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"Prophetic Role of Sharia Knowledge in Developing Social Justice"

BiCoShS
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SCIENTIFIC COMMITTEE

KATA PENGANTAR

1st Biennial Conference on Sharia and Social Studies; Konferensi Internasional Keilmuan Syari'ah dan Ilmu Sosial merupakan festival akademik dua tahunan Fakultas Syari'ah Universitas Islam Negeri Imam Bonjol Padang. Kegiatan ini ditujukan untuk menggali dan memahami kekayaan dan kearifan nusantara serta menenunkannya kembali menjadi mozaik keilmuan.

Tema Perdana Konferensi ini adalah Peran Profetik Keilmuan Syari'ah dalam Membangun Keadilan Sosial. Tema ini terinspirasi oleh kenyataan bahwa keilmuan syari'ah sepertinya masih belum kunjung keluar dari kungkungan paradigma teologis-normatif yang cenderung abai terhadap fakta-fakta sosial. Oleh karenanya, Keilmuan Syari'ah Teologis sejatinya membuka ruang dan menerima gejala sosial sebagai sebuah fakta kesyari'ahan yang hidup dalam masyarakat. Interaksi dan dialog keilmuan syari'ah dengan ilmu sosial secara intensif dan berkelanjutan menjadi agenda akademik terpenting dan mendesak dilakukan. Dalam kerangka akademik inilah kehadiran Keilmuan Syari'ah Profetik menjadi keniscayaan untuk membingkai tenunan tatanan sosial yang berkeadilan, berkemanusiaan, dan memiliki etos transendental.

Buku [Prosiding] ini merupakan kumpulan paper yang dipresentasikan oleh para akademisi dan peneliti dari berbagai latar belakangan keilmuan dan institusi pada Konferensi Internasional Keilmuan Syari'ah dan Ilmu Sosial yang diselenggarakan Fakultas Syari'ah Universitas Islam Negeri Imam Bonjol Padang, 23 s/d 25 Agustus 2017. Mudah-mudahan pengetahuan yang termaktub dalam prosiding ini dapat memperdalam dan memperluas wawasan keilmuan, sekaligus menjadi etos dalam membangun budaya akademik.

Akhirnya, izinkan kami menghaturkan ucapan terima kasih untuk segala ide, gagasan, konsep, perspektif, partisipasi dan kerja keras akademik semua pihak atas terselenggaranya konferensi pertama tentang Keilmuan Syariah dan Ilmu Sosial di Indonesia; sehingga Keilmuan Syari'ah Profetik dapat dikembangkan, dan misi profetik yang dicita-citakan dapat tersampaikan. Amin.

Padang, 18 Agustus 2017
Penanggung Jawab

nurus shalihin

DAFTAR ISI

SOCIAL JUSTICE

SHARIA KNOWLEDGE EPISTEMOLOGY

Maqashid Sharia and Social Theories

Nazhariyyat Al-Tanzhīmi Al-Qadhāī and Its Transformation In Indonesian Regulation

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Abstract – Changes in regulation have a significant impact on the substance, structure and legal culture of Religious Courts, especially after the enactment of Law Number 50 Year 2009. The changes were influenced by some factors and had an impact on the reformulation of *nazhariyyat al-tanzhīmi al-qadhāī* in the Indonesian legal system. In the context of the legal system, the law is required to harmonize both parallel and higher regulation.

Key Words*: Nazhariyyat Al-Tanzhīmi Al-Qadhāī, Transformation, Religious Court, National Legal System*

1. Introduction

Religious Court is a historical proof of Islamic law development in Indonesia. This institution originated from an institution known as *tahkim* formed when Muslim immigrants entered Indonesia. Furthermore, this judicial institution changed *to Ahl Hally wa al-'Aqd*, when Muslim communities appeared. Finally, in line with the development of Muslim politics, this institution became *tawliyah*, as seen in Surambi Court during the Islamic Mataram empire. This was followed by other kingdoms, such as Mataram, Banten, Cirebon, and Aceh.

The scope and period of Islamic judicial institution development can be seen as part of adaptation to previous norms, guided by Hinduism, Buddhism and "indigenous religion". The subsequent development was confronted with "colonial law" institution brought by colonial government which tended to support customs rather than *fikh*. The existence of Islamic judiciary was recognized by the Dutch government. In the beginning, they were not directly involved with the legal affairs of Muslim community. However, due to political consideration, the Dutch government began to interfere by the inauguration of *Priestraad* based on the Decree of the Dutch King (KB) Number 24 on January 19, 1882. This Religious Court was established in Java and Madura, and it was formed in Kalimantan in 1937. Its coverage includes cases among Muslims based on Islamic law. In Kalimantan, it is limited to *munakahah*, whereas in Java and Madura it covered *munakahah* and *warastash.*

Different from the previous colonies, Japan did not make much intervention to the competence of Religious Court. This situation enables Muslims to restore the Religious Court. In the Dutch colonial period, the effort could not be made due to "independent *ulama*", who mastered Islamic jurisprudence, engaging in rebellion. Recovery is only done by "dependent *ulama*", who have close ties to the colonial Government. During Japanese occupation, the same effort was confronted with nationalist resistance. This is proven from the debate about 7 words in the Jakarta Charter which ended in stating "Ketuhanan Yang Maha Esa" in the preambule of 1945 Constitution of The Republic of Indonesia.

During the New Order period, through the policy of adaptationist modernization, there was recognized the importance of religious and moral values within Pancasila framework. The Religious Court is recognized as a judiciary in Indonesian courts, so Religious Judges have the opportunity to explore the rules of Islamic law developing in society. Law Number 1 year 1974 on Marriage is considered to be an early milestone for the strong legal juridical foundation of Islam, and a sign of the "death" of receptie theory.

Reform movement in 1998 aimed to form a new democratic government of Indonesia, including the field of law. The first step improving system through

regulation change and improvement to the that underlie law enforcement. This completion is made in the form of amendment of 1945 Constitution, which was previously considered sacred (taboo), as *revolutiegrondwet.* In addition, according to the literal meaning, legal reform is defined as the process of legal order change (constitutional reform). The logical consequence of constitutional improvement is the refinement of various laws and regulations under it, including legislation related to religious court in Indonesia.

Based on the above background, Religious Court that is naturally identical with the implementation of Islamic law in Indonesia has changed and will continue to change. Since three decades ago, there have been several changes in the Law of Religious Court, starting from Law Number 7 Year 1989, that becomes Law Number 3 Year 2006, and finally Law Number 50 Year 2009. The changes affect the substance, structure and legal culture of Religious Courts. Therefore, this research is entitled *Nazhariyyat al-Tanzhīmi al-Qadhāī* (Theory and System of the Establishment of Religious Judicature Law) and its Transformation in Regulation in Indonesian.

In line with the problem identification, this study aims to analyze: (1) the background of legislation changes on Religious Court from 1989 until 2009; (2) the relationship of Law Number 50 Year 2009 on Religious Court with laws applied in Indonesia, either vertically or horizontally; (3) the amendment of laws on Religious Court that occurred in 2009; and (4) the formulation of *Nazhariyyat al-Tanzhīmi al-Qadhā* in Indonesian law;

With the above analysis, this research is expected to provide practical, theoretical, and academic benefits. Practically, this research can provide an understanding of change process and enforcement of law in the form of legislation, especially for general legal practitioners, and for legal practitioners within Religious Court in particular. Theoretically, there can be conducted the development of Islamic Sciences, regarding the theory of Islamic law enforcement and the theory of legal change in Indonesia; and academically, there will be strengthening effort of *Nazhariyyat al-Tanzhīmi al-Qadhāī* in the rule of law in Indonesia through various structured studies and research in the body of *shari'ah* science (Body of knowledge) in Indonesia;

2. Literature Review

According to some literature that Religious Court is a legal system, and at the same time is a subsystem of the national legal system. Therefore, the implementation of the legal system in Religious Courts is a complex symptom that requires sophisticated theoretical explanation. On the basis of this consideration, a research on *Nazhariyyat al-tanzhimi al-Qadhāī* (Theory and System of the Establishment of Religious Judicature Law) and its transformation in regulation in Indonesia is still relevant.

Conceptually, the placementb of *Nazhariyyat al-tanzhimi al-Qadhāī* (Theory and System of the Establishment of Religious Judicature Law) and its transformation in regulation in Indonesia as an analytical unit requires a theoretical explanation, which is mapped based on theoretical framework sequences of Grand theory, middle range theory, operational theory.

In grand theory, there was used legal system theory from Lawrence M. Friedman. The consideration is that changes in legislation on Religious Courts are conducted within the context of legal reforms, so that law has a tool function for social engineering. As a result, in the broader context law is a subsystem of a wider system. As a system, law covers various elements related to each other in achieving the objectives of legal system. According to Friedman the legal system elements are the legal structure, substance, and culture.

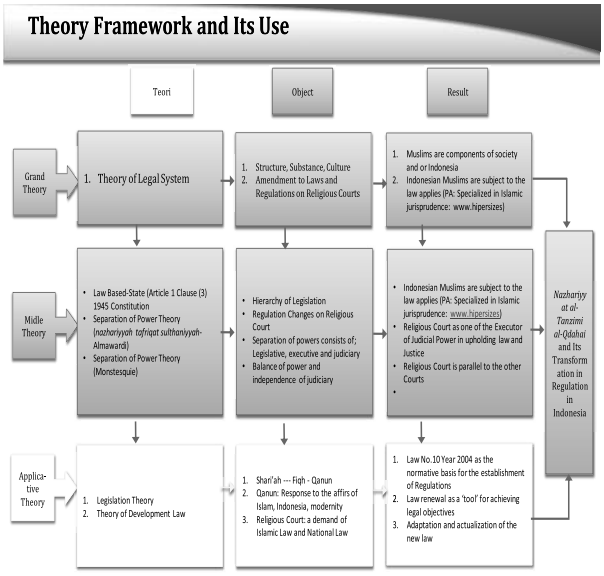
In middle-range theory, there was used the theory of constitutional state and distribution of power. This theory is used considering that Indonesia is not an Islamic state, but a Muslim country. Therefore, the establishment of Islamic legal system can not be separated from the context of the wider national legal system. Another consideration is that 1945 Constitution states that Indonesia is a constitutional state *(staatrechts)*, not a power state *(maachtstaats).* The concept of staatrechts (Dutch) is corresponding to the concept of the rule of law (English) as proposed by Albert Venn Dicey (1885). This concept includes three important ideas, namely: (1) the supremacy of law, which is different from authoritarian power; (2) everyone is equal before the law; and (3) everyone has the right and independence protected by law and enforced through judiciary. The early version of this concept has developed through the thought of Joseph

Raz, such as independent judiciary, and judicial review of any legislation is essential to ensure legal security. Regarding the last characteristic, the distribution of power based on *Trias Politica* doctrine can not be neglected in the formation of Islamic law in Indonesia which adheres constitutional state principles.

In operational theory, there were used legislation theory and legal development theory in Indonesia. The legislation theory is based on Peter Noll's idea that the development of constitutional state concept will be followed by the development of legislation, so that the latter phenomenon affects the legal theory which previously focused on adjudication as a science of the application of rules that includes yudicial process and legislative process. In this regard, the development does not merely involve judiciary.

This is also related to the function of law, which is limited to the placement of law not only as a tool of social control, but also as a tool of social engineering. In this relation, legal politics in Indonesia shows the same tendency, as seen in the emergence of "law and development" theory by Muchtar Kusumaatmadja (1976) or "Progressive Law" by Satjipto Rahardjo (1981).

Based on the theoretical framework revealed, here is a conceptual scheme to be framework of thinking in this research.



3. Approach

This research used philosophical, juridical and sociological approachin addition to the approach of regulation applies in Indonesia, especially after the enactment of Law No.10 year 2004 on the Establishment of Regulation in Indonesia. Thus, the position of this research lies in the study of doctrinal law with normative juridical method.

4. Findings

Based on the description and analysis in the previous chapters, there are some research findings, as follows:

First, the change of regulation on Religious Courts from 1989 until 2009 was motivated by several factors, they are: (1) philosophical factor, meaning that Unitary State of the Republic of Indonesia is a constitutional state based on Pancasila and the Indonesian Constitution Year 1945, which aims to bring about orderly, clean, prosperous and equitable life of state, nation and society. Under that framework, based on the mandate of Article 24 clause (10) and clause (2) of 1945 Constitution of the Republic of Indonesia that the establishment of an independent judiciary is conducting justice to enforce law and justice. The judicial authority is implemented by a Supreme Court and a subordinate judicial body within general court, religious court, Court Martial, Civil Court of Justice and Constitutional Court. (2). juridical factor, meaning that religious court as regulated in Law Number 7 Year 1989 on Religious Court amended by Law Number 3 Year 2006, is no longer compatible with the development of law and the legal needs of society and the constitutional life according to 1945 Constitution of the Republic of Indonesia.

Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 Year 1989 on Religious Court is approved by the President and enacted by the Minister of Law and Human Right on October 29, 2009, with the State Gazette of the Republic of Indonesia Year 2009 Number 159 and Additional State Gazette of the Republic of Indonesia Number 5078. In Law Number 50 Year 2009 regarding the Second Amendment of Law Number 7 Year 1989 on Religious Court, there are 24 item changes. (3) sociological factor, meaning that Realizing a clean and authoritative judiciary requires direct involvement of society (Muslims) as the seeker of justice and Transparent and accountable supervision of the judiciary in performing judicial, administrative, financial and judicial duties. In addition, social changes

in the macro society may also affect legal product in the form of regulation. (4) Political factor, meaning that the presence of regulation with its instrumental change that include substance, institution and culture is a 'political product' by the authorities, both executive and legislative institutions.

In addition, the change in regulation on Religious Courts in 2009 was caused by changes in the national political climate through reformation that has taken place since 1998. One of the reform agenda is law reform through the amendment of law and regulation on Judicial power which has direct implications for all judicial bodies, including Religious Court through a 'one roof system' under the Supreme Court.

Second, Law Number 50 Year 2009 regarding the Second Amendment to Law Number 7 Year 1989 has significant relationship with the prevailing regulation in Indonesia, vertically or horizontally. It vertically corresponds to: (1) Article 1 Clause (3) of 1945 Constitution of the Republic of Indonesia that Indonesia is a law based-State. (2). The first principle of Pancasila "Belief in the one supreme God ". (3). Law Number 48 Year 2009 About Judicial Power. (4). Law Number 3 Year 2009 on the Supreme Court. (5). Law Number 22 Year 2004 on the Judicial Commission. Moreover, it is horizontally related to: (1) Law Number 1 Year 1974 on Marriage. (2). Law Number 38 Year 1999, and Law Number 23 Year 2011 on Management of Zakat. (3) Law Number 41 Year 2008 on Endowment. (4). Law Number 21 Year 2008 on Sharia Banking.

Third, the implementation of *nazhariyyat al-tanzhīmi al-qadlhāī* in the rule of law in Indonesia, related to regulation on Religious Court, is directed to the following three aspects: (1). Substantial aspects. It deals with the power of court, both absolute power (absolute competentie), and relative power (relative competentie). (2). Institutional aspect. It is constantly related to the composition of Religious Court, both within Religious Court internally, and within Judicial Power externally. (3). Legal culture aspect in Religious Court. It deals with the legal consciousness of society (Muslims) in utilizing the services of Religious Court to solve cases.

The research findings show that the changes in the regulation of Religious Court have increased its status, competence extension (absolute), and the addition of legal institutions within Religious Court.

First, the changes of regulation on Religious Court have implications to the change of status and position of Religious Court, especially in that is related to the addition of absolute competence in handling shari'ah economic cases. Therefore, in terms of absolute competence, it is no longer a 'Family Court', but is transformed into a 'General Court'. In addition, although the execution of shari'ah economic cases is still below 3%, in handling other legal cases, such as appeal and cassation, it does not have institutional tools such as Civil Court of Shari'ah Commerce.

Second, the cases handled by Religious Court are the most 'sensitive' cases in the world. In solving legal cases, it deals not only with positive law, but also with the psychological law. Therefore, the law enforcers within Religious Courts, especially judges, must have competence in legal psychology (cases related to family conflicts).

Third, the changes of regulation on Religious Court in 2009 may provide an open opportunity for Religious Court to be able to resolve 'criminal cases', especially domestic violance in the family context. Therefore, domestic violence may one day become part of the absolute competence of Religious Court.

Fourth, substantially and institutionally, the changes of regulation on Religious Court lead to the modernization of judiciary. Religious court seems to be modern because it is corresponding to the easy, fast, simple, and low cost current judicial principles. However, culturally (socio-cultural) it is still traditional. This can be proved by the number of cases entered and solved in Religious Court, and little understanding of regulation changes on Religious Courts.

In legal system perspective, the changes in legal instruments have implications to the change in other legal components, namely legal institution and culture in Religious Court.

5. Conclusion

Based on the above framework of thinking, it can be concluded that:

1. The change of *nazhariyyat al-tanzhīmi al-qadhāī* is triggered by philosophical, juridical, sociological and political factors; the law amendment on Religious Court in 2009 was driven by the change

of national political climate through the running reform since 1998.

2. The implementation of *nazhāriyyat al-tanzhīmi al-qadhāī* in Law Number 50 Year 2009 on Religious Court is directed to the substance, structure and culture of Religious Judicature law;
3. Law Number 50 Year 2009 on Religious Courts is harmonious and compatible with vertical law and horizontal law.

6. Recommendation

Based on the research findings,implications and conclusions of this study, here are some suggestions related to the development of theory for further research on this topic, as well as practical knowledge on the change of regulation on Religious Court, namely:

First, the changes of regulation on Religious Court need attention from government, private institution, and society (Muslims). It becomes an integral part of the national legal system and an implementation of legal thought development in family law of Islam (*al-ahwal al-syakhshiyyah*) and its transformation in Indonesian regulation. Therefore, one of the strategic steps is law socialization (counseling). Socialization is very important because it deals with knowledge, understanding, legal awareness of community.

Second, the steakholders involved in the process of decision-making on the drafting and ratification of regulation regarding Religious Court needs to make a follow-up of re-drafting of regulation in accordance with the applicable legal norms, such as the provision of domestic violence law and Islamic legal norms such as Islamic civil procedural law that can apply in Religious Courts.

Third, al-Ahwal al-Syakhshiyyah (AS) Study Program in Syari'ah and Law Faculty, Islamic Law Study Program at Postgraduate School, research centers, and the experts of Islamic civil administration should develop scientific and in-depth studies on contemporary family law issues and objects related to Religious Court in Indonesia in particular, and family law in international level.

Fourth, the theory of religious court legal system in Indonesia will change following the substance of law followed by structure and culture and vice versa.

Fifth, *Nazhariyyat al-Tanzhīmi al-Qadhāī* should be involved in a sub-discipline of syari'ah to be the main study of Religious Courts in.Syari'ah and Law faculty.

Sixth, Strengthening *Nazhariyyat al-Tanzhīmi al-Qadhāī* in Indonesia is carried out through the establishment of Civil Courts of Shari'ah Commerce.

These are some contributions that the authors presented in this research. They are expected to be beneficial for the development of Islamic jurisprudence in university, and legal practitioners within the Religious Courts and Muslims in Indonesia as whole.

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Al-Quran and Humanity: A Study on Humanism behind the Stipulation of Verses about Crimes Based on the Perspective of Thematic Analytic Interpretation

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Abstract – Stigmatization on the imposition of maximum criminal penalties described in al-Qurân such as qishash for the accused of homicide, amputation of the hand for the robbery crime and the punishment of whip and rajm for the adultery case, are practically criticized and considered as crimes, evil, sadistic, inhuman, as well as against human rights. The judgments on "the Islamic laws" are likely negative due to the verdict of the maximum punishment. As a consequence, this results in apathetic leading to antipathy against Islam as a belief. Al-Qurân certifies that administering the maximum punishment like qishash is not purposed as taking revenge, releasing painful feeling or expressing hateful. The actions of the maximum punishment for crimes in Islam truthfully have principal aims and are not without paying attention on the sides of humanity, but keep focusing on the preventive actions for the guarantee of balance and sustainability of the social life among mankind. Humanism or the side of humanity is surely existed in every criminal action mentioned in al-Qurân.

Key Words: *al-qurân, crime, humanism, interpretation*

1. Introduction

The verses explaining about status, implementation and sanctions for actions involved in crimes and the messages about humanism behind the enforcement and the imposition are indeed found in many places contained in the verses of al-Qurân al-Karîm. Types of crimes in Islam mentioned in al-Qurân are murder, insult, adultery, allegation of adultery, theft, desertion, apostate, drunk and gambling. This research describes the actions categorized as crimes in al-Qurân and the illustration of nuances, indications, and guidance on the elements of humanism and humanity behind the imposition of penalty for crimes systematically and consecutively. The limitation of spaces and time restrains the writer to focus on the study on only two types of crimes consisting of murder and insult.

2. Murder Crimes in Al-Qurân

The crime of murder in al-Qurân has been indicated in nine verses in different guides and contents. The guide of description is clear since it discusses the imposition of sanctions, both on the world and the hereafter. The meant guide include: *first:* the prohibition of committing homicide without legality of law mentioned in Q.S. al-An'âm: 151 dan Q.S. al-Isrâ: 33. *Second:* the obligation to carry out *qishash* to murderers by deliberating on principles of justice and stability as stated in Q.S. al-Baqarah: 178. *Third,* the penalty for unintentional murder crimes is called *diyat,* as stated in Q.S. an-Nisâ: 92. *Fourth:* the sanction on the hereafter for the murderer, as mentioned in Q.S. al-Mâidah: 32, Q.S. al-Furqân: 68 dan Q.S. an-Nisâ: 93. *Fifth,* the direct message of humanism in verses concerning behind the stipulation of *qishash*, as stated in Q.S. al-Baqarah: 179.

The first guide in relation to prohibition of committing murder without the legality of law, is stated in the Allah SWT words in al-An'âm: 151. The verse illustrates the virtuous obligation for every muslim and also the prohibition considered bad and evil (al-razy: 1412 H: 178). The demand of the obligation and the prohibition imposed to every muslim is actually emphasized on the utterance of wise and delicate words to make the muslims' heart and pulse voluntarily

accept it, using the word of "testament" (al-razy: 1412 H: 179). The testament has a function as guidelines for the people to do their religious activities, and as individual guidelines to well-behave (*aqidah*), live in a family and next generation, and socialize by protecting and ridding each other particularly on terms of economic interaction as well as a guarantee of a muslim demanding their rights. The guidelines are started from the faith and the belief in Allah SWT (quthub: 1412 H: 1229).

The demands in the form of orders which should be implemented in the testament form is (Al-Khathib: 1418: 83), *first:* well-behaving to parents. *Second:* Upholding justice and fairness in *mu'amalah* (social) transactions which utilize dosages and scales for the transactional tools. *Third,* being righteous to speak, and *fourth:* fulfilling the promise of Allah.

Meanwhile, the demand in the form of prohibition which should be stayed away includes, *first:* not associating a partner with Allah (*shirk*) as the god and this is the highest prohibition for every individual. *Second:* not forcedly getting rid of children life (murder) due to economic factors. *Third:* not committing evil-classified-actions in accordance with the perspective of *sharia* (Islamic law), both apparent and hidden. *Fourth,* not forcedly getting rid the people life (murder) without the legality. *Fifth,* not devouring the wealth of orphans yet organizing it using legal ways according to *sharia*.

The demand of commands and prohibition in this verse is not a type of an arisen new law yet the type of the existed law and imposed to the previous coreligionists. The demand of the command and prohibition is a grand design of Islamic sharia and also an ideological identity considered as a determiner with other ideologies present in the *musyrik* community in that period. Murder actions are categorized into the highest level of crimes after doing *shirk* to Allah as the only god (al-hijazy : 1413 H: 680). Homicides are a type of prohibition which has a characteristic of an action as compilation for spiritual life. Al-Qurân in the abovementioned verse states a word "*ta'al*" as profound comprehension to solely accept thing with no condition (as-sya'rawi: tt: 3983).

The second verse is Q.S. al-Isrâ: 33, stating the words of Allah SWT which still asserts the prohibition of murder without the legality principal and provision and also explains the consequences of law accepted by the victim guardian using the existed legal consideration. The legality principle and provision is described in details by the verse stating more about that the parties in right to sue for execution are "guardians" in genetic relationship and descendants of the murder victim. The sue action is then charged to the judicative institution if the murder victim does not have "guardians". The "guardian" cannot do arbitrary actions to sue by a means of claiming for death penalty for two or more people if the murder victim is only one person (adz-dzumukhsyari: 1407 H: 664). This Islamic sharia subsequently became the determiner of local wisdom present in the pre- Islamic community (*jahiliyyah*) in the past because their habit to sue for execution exceeds from what it should be.

The second guide is the obligation of administering *qishash* to the murder perpetrator by deliberating on the principle of justice and stability stated in Q.S. al-Baqarah: 178. There were several types of punishment for the murderer before the presence of Islam. The Jewish was by *qishahs* while the Christian was by *diyat* and the pre-Islam Arabian was by suing the murder to the non-offender, avenged for putting to death of one or even more than ten lives from the offender's family, and or suing for revenge on a man or a free slave for the murder of a woman (adz-dzuhaili: 1418 H: 105). The acts of pre-Islam Arabian was subsequently amended by the Prophet's command in his hadith: "*al-muslimûna tatakafa' dimâuhum*" (Abu Daud: tt: 80). Islamic sharia is socialized in accordance with the principle of justice and equality on the middle of various sanctions for murders which were still existed in the period. The penalty of qishahs in Islam is classified as a middle class sharia compared with both samawi and non-samawi sharia beforehand.

The description asserted in this verse is also about the Islamic status and the faith of a murder offender. The Islamic capacity and the "faith" quality of the perpetrator are not out of tract considering the murder action committed intentionally. Ibn 'Abbas R.A has provided three statement points of law in accordance with this verse (al-razy: 1420 H: 272), *first:* the *qishash* penalty is imposed to the intentional murder action and the offender is still classified as a person with "faith". *Second:* the relationship action mentioned in this verse is the relationship in Islam. *Third:* the

intentional murder action is categorized as "remission and grace from Allah to confirm more the faith status of the offender. Equality and justice implemented by al-Qurân to do qishahs is analogized as a free man for a free man, a slave for a slave and a woman for a woman. This verse then becomes the legal argumentation for the murder perpetrator in groups with only one victim, which was administered by Umar bin Khaththab R.A to execute seven men in Yaman due to killing a man. Ali also implemented the same penalty to *khawarij* people who committed murder in groups to Abdillah bin Khabbab (adz-dzuhaili: 1418 H: 105).

The third guide is the legal sanction for unintentional murder crimes called terminologically as *diyat* and this is explained in Q.S. an-Nisâ: 92 concerning the detailed description of penalties for unintended homicide to a muslim citizen and is a solution for unintentional murder cases in the Prophet Muhammad era.

The third pattern is the penalty for unintentional homicide act which is known as *diyat* and it is explained in the Koran surah An-Nisa: 92; that verses describes the detail explanation to the penalty for unintentional homicide act to Muslim and it contained solution to the unintentional homicide problem in the period of Prophet Mohammed. Sentence "*mâ kâna li mu'min an yaqtula mu'minan*" in the beginning of the verse is the expression of prohibition, illegality, inappropriateness to homicide act which is committed by a Muslim to his Muslim's brother, yet the condition out of the human's power is an exception (al-qasimy: 1418 H: 256). The meaning of the unintentional in this verse is "act without purpose and goal" (yahya: 1979: 301).

This verses also describes the detail of the penalty for unintentional homicide act to a Muslim citizen in the period of Prophet Mohammed Saw. Due to a past action 'Ayyash bin Abi Rabi'ah had killed a prophet shohabah and his name was al-Harits bin Zaid, he was convicted to be animism (jahiliyah era) at that time. 'Ayyash later asked this problem to Prophet Mohammed SAW to seek a law solution and later the God sent His revelation to be the background of law in the determination of *diyat* in the case of homicide crime act (as-Samarqandy: tt: 326). The meaning of unintentional in this chapter is "act without purpose and goal" (yahya: 1979 M: 301). The penalty and consequence of unintentional homicide convict is the payment of diyat which is given to the victim's heir and later can be used to fulfill their needs (awajy: 2006: 1298).

That verses has become the basic of homicide status decree into three categories (al-razy: 1420: 176), first: *al-'Amd* (intentional), second: *al-Khatha'* (wrong or unintentional) and third: *Syibh al-'Amd* (close to intentional). The first category is homicide act which has a purpose to make death due to injury or else. The second has two kinds which the purpose of the act is directed to the polytheist yet concerning to Muslim citizen and suspected to polytheist citizen due to their attribute. The last category is *Syibh al-'Amd* (close to intentional) is like hitting using a bat which the intention of the hit is light which not fatal but in reality it causes death.

The fourth pattern is afterlife penalty to the homicide convict which is signed in the Koran surah Al Maidah: 32, Al Furqon 68, and An Nisaa: 93. The first is surah Al Maidah: 32, concerning to the sentence *min ajli dzâlik* (so that) in this verse has shown the detail of *considerant* in the row of verses before this which conclude to a certain decision. *Considerant* of this verse is betrayal among the son of Adam in term of homicide of other human being, as well as dignity, holiness and glory due to the right of life for every human being (al-khathib: tt: 1082). The permanent damage which show up due to intentional homicide and hostility as well as long vengeance (al-razy: 1420 H: 343). The case of betrayal is later patented by Allah in the book of Torah in terms of revelation that must be done by them (as-samarqandy: tt: 385). Among those revelation is homicide crime act matter. Homicide crime act as well as damage that influence to social order of the society is pictured by Koran in term of *kaanamâ* (as if) by "conduct homicide act to all humankind." It means someone who commit homicide crime act intentionally and not based on formal jurisdiction reason such as *qishash* and not as a preventive act to systemic damage upon the earth, the status of the crime is the same as commit murder to all humankind (quthub: 1412 H 877). That analogy is believed to be clear, to the point, and severe penalty for the afterlife (at-thabary: 2000: 241).

The second verse which explains the fourth pattern is afterlife penalty to convict of homicide is surah Al Furqon: 68. This verses belongs ot *Makkiyah* verse to answer the condition of polytheist who will

convert to Islam in Prophet Mohammed period. This polytheist felt that he/she was full of sin and he/she is worried of no mercy and forgiven from Allah SWT, and he/she asked this matter to Prophet Mohammed SAW. Allah SWT later sent the Koran Surah Al Furqon: 68 to answer the polytheist question and also as a good news that Allah SWT accept the repent of the repentant (at-thabary: 2000: 241). Post the revelation, the polytheist of Mecca stated that Mohammed suspected the polytheist, commit homicide and fornication will be sent to hell, and they had no good deed in Allah's side, then the next revelation mentioned *Illâ man tâba* (except for those who repent from Mecca people at-thabary: 2000: 241).

There are three important points revealed in this verse and can be used as believers variable, first there is no worship except to Allah, second: no commitment to homicide except for those who are allowed by jurisdiction reason, third, fornication is prohibited. Logical arguments to these three variables is, tauhid is *ushûl* (basic) of faith as well as distinctive factor between clear line, has strong stance and firm compared to the mystery, slipped and complex which is not strong upon the system and later on has no good effect of life. Homicide which is not based on jurisdiction condition and legal formal of sharia is a distinctive pattern between peaceful and prosperous social life with principle of human's respect compare to human who live in cave and jungle which is full of insecure and instill to do their activity and build something inside. Repent from fornication is a distinguisher between pure life which is wanted by all mankind and get rid of animal side compare to the mingle of sex organ which aim is contradictory to give birth and self respect as well as standard of life which promote masculinity and feminists.

The third verse in the explanation of afterlife penalty is the revelation in Koran surah an-Nisâ: 93 which states the quality of sin and severe penalty for those who commit intentional homicide. Homicide crime act is categorized as the highest criminal act in Islam therefore the penalty takes place in the present and after life. Penalty at the present is already mentioned in the interpretation and explanation in the previous verses, meanwhile; the penalty of the afterlife is also described in this verse. The effect which is shown of this homicide crime is classified as highest criminal act and for the convict is suffered by the great penalty.

Intentional crime act or losing one's life with no legal jurisdiction procedure, the penalty is Jahannam (hell) and they are eternal inside and only Allah who knows the limit of the penalty. They also receive the wrath of Allah because of their sin and will be condemned of Allah's blessing, and they will be rewarded by severe punishment and penalty (thanthawi: tt: 261). There are four classifications for the sinner mentioned in this verse, namely *Jahannam*, wrath of Allah SWT, condemned of Allah SWT, and punishment and penalty. If we notice further the law material, we can be sure that these four classification is afterlife penalty promised by Allah, except the second and third classification which are likely obtained in this present life.

This verse carries four categories of stern warning and promise for those who commit a murder; Hell, Allah's anger, curse, and punishment. When we take consideration on this, these four categories are included into hereafter tribulation as what has promised by Allah, except for the second and the third categories.

The fifth guide is a message of humanism based on a verse of *qishash* determination, as stated in Q.S. Al-Baqarah: 179, "And there is for you in legal retribution (saving of) life, O you (people) of understanding, that you may become righteous". In this verse, Allah commanded the law of equality and life among human beings. Arab tribes during the time of *jahiliyah* forbade referral of the suspect into the victim relatives due to the fear of decreasing amount of their clan. Therefore, Allah stated, *fî al-qishâshi hayât* which means "the member of the clan will grow if they reject it" (al-ashfahani: 1999: 381) because of the absence of murder and victim. Qishash is preventive action toward the same deed to other people (Ibn 'Ashur: 1984: 145) but this is the fairest mechanism (asy-syinqithy: 1995: 32). Focus of the explanation and application of this verse based on nash; *yâ ulil albâb* as the guide to understand, reflect, and implement *qishash* law by those who believe, do goods, smart, and be honest (thanthawi: tt 373).

3. Humanist Messages behind the Verses Determination of Penal Murder

Maximum punishment cited in al-Qurân is related to hostility, through system or through wealth and ownership, under various punishment like *hudûd,*

qishash and *ta'dzîr* with the strong and thorough implementation toward Moslem community in Islam countries. In Q.S. al-An'âm: 151 there is a humanist message for each people to affirm people's humanity which is highlighted in al-Qurân in imposing claim and prohibition. This verse uses the word "instructed" or in Bahasa Indonesia *wasiat*, it is form of a very polite diction, humanist side from The Creator to His people in order to force them to be faithful in ordering all that is right and prohibit all that is wrong.

The second verse figures out how Islam concern on nurturing life as a main part in keeping the viability of the generation. Allah does appreciate, honor, respect, and glorify all His creatures. It only happens in one condition, without intentionally murder one's life. Likewise, in the case of depriving soul, it could only take not more than his/her life in turn. The justice principle must be prioritized as a preventive action of the similar cases which gives deterrent effect.

In the third verse, Q.S. al-Baqarah: 178, it is more instructive for the command media that actually leads to the Moslem, however the implementation will be different where the judiciary rights (judge) as *syiar* and control for any negligence judiciary. Murder for murder is a simple conclusion from the above analogy. This is a form of humanity and humanism that is highlighted and proposed by al-Qurân in different guides from the previous congregation. Therefore the justification claim for Islam has additional argument with *syari'ah* cited in al-Qurân as the perfecting *syari'ah* than ever before. The alternative solution is bringing the murder together with his/her murdered relative as one way to avoid social problem or revenge that could affect social order.

The third verse, Q.S. an-Nisâ: 92, focus on the explanation of the amount of *diyat* (blood money) that must be paid to the murdered family under unintentionally categorization. The amount of *diyat* paid to the murdered family under intentionally or unintentionally categorization is an obvious and valid cue that since the Prophet era shows how precious a life is. It will affect murder's economy and social life, as he/she will not be able to pay that *diyat*. *Kifarat* or ransom is an obligation after his/her crime. Free a slave is a reward of like for taking out the slavery status of a man. However, in this modern era, we could not find any slave then it encourages people to use second alternative that is fasting for two months. The murder could take him out of lust and pleasure then focus on doing positive things.

Life is right of everyone. Intentional murder is categorized as the removal of everyone's rights. The punishment given could not amend their threats in the judgment day. *Qishash* is actually an equal retaliation. Therefore this verse would not state that *qishash* is all about life because the implementation of *qishash* is taking one's life. However, *qishash* prosecution is a warranty for the murder and the murdered. A person who is going to murder hopefully thwarts his crime because of the real consequence that is *qishash*.

4. Conclusion

The implementation of *qishash* is a preventive action that aims at maintaining sustainability of life and social life of both murder and murdered. It is not about taking advantage of compensation (*diyat)*. Thus, it is clear that life and death of human are honored and respected. Murder is an action that could not be tolerated and it deserve to get countermeasure in the world and hereafter.

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Method of *Al-Qawa'id Al-Fiqhiyyat* Development

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Abstrak – *Al-Qawa'id al-Fiqhiyyat* constitutes one of the 'tools' to understand, find and apply Islamic law in micro and macro life, especially in which related to worship, mu'amalah and so forth. Therefore, its existence is strongly necessary in the development of Islamic law in responding the various challenges of eras. Accordingly, Al-Suyuthi (1996) stated in *muqaddimah* his monumental book of '*al-al-asybah wa al-nazhair*' that Al-*Qawa'id al-Fiqhiyyat* is a great science that can provide an understanding of the nature of fiqh, the original source of quotation, and its secrets. Through the knowledge, one is expected to have more detailed understanding about fiqh and able to bridge and create law (*al-takhri al-ahkam*) and legal istinbath, both written and unwritten law (Syafe'i, 1997).

Key Words:

1. Introduction

Due to the importance of *Al-Qawa'id al-Fiqhiyyat* science, there are many scholars of the schools of thought (madzhab) attempted to make in-dept analysis through compiling various books related to *Al-Qawa'id al-Fiqhiyyat.* Nevertheless, the books compiled by the scholars of madzhab only cover descriptive rules, the basis for making rules, branches, and kinds of both *muttafaq* and *mukhtalaf* rules. On the other hand, there are not so many books on the methodology of *Al-Qawa'id al-Fiqhiyyat* development. The absence of the historical context of *Al-Qawa'id al-Fiqhiyyat*, of course, will be an obstacle in 'countering' Josept Schacht analysis which stated that the legal rules composed by the scholars of madzhab are actually influenced by the legal rules of Roman. The statement is certainly very ironic and contrary to the 'assumptions' of Muslims that the legal rules are the original product of the scholars of madzhab.

Sementara itu, upaya penelusuran dan penggalian metodologi *Al-Qawa'id al-Fiqhiyyat* belum dilakukan secara 'serius'. Padahal, begitu *urgent* nya karena berhubungan secara signifikan guna memahami paradigma yang komprehensif dan pengembangan model lebih lanjut tentang *Al-Qawa'id al-Fiqhiyyat.* Jika dihubungkan dengan konteks kekinian yang relalif lebih modern, maka pengembangan *Al-Qawa'id al-Fiqhiyyat* tidak saja dijadikan sebagai 'wacana' pergumulan dikalangan para ulama madzhab, melainkan juga dapat dijadikan sebagai landasan hukum bagi upaya melakukan perubahan social *(social engginering).*

In addition, searching and exploring the methodology of *Al-Qawa'id al-Fiqhiyyat* has not been seriously done. In fact, *Al-Qawa'id al-Fiqhiyyat* is very urgent due to its significance to understand the comprehensive paradigm and the development of a further model of *Al-Qawa'id al-Fiqhiyyat*. If related to modern relative contexts, the development of *Al-Qawa'id al-Fiqhiyyat* is not only used as a struggle of 'discourse' among the scholars of madzhab, but also used as the legal basis for the effort of social engineering.

This paper attempts to elaborate the response to Josept Schacht's thesis by using the Islamic Social History approach developed at the time of the rules of Islamic law formulation by Islamic scholars. This paper departs from a theory of thought stated by Anton Baker, that a person's idea is always influenced by the surrounding living situation. Therefore, an idea is usually the result of a growing and developing historical process with together with its challenges. Moreover, in understanding one's thinking, it is necessary to trace his background of the socio-political situation and the developing intellectual discourse in the society in which he was born and grew up (Baker, 1990).

2. Method of *Al-Qawa'id Al-Fiqhiyyat* Development

In historical methodological perspective, the emergence of jurisprudence is an authentic evidence of how Islamic legal scholars succeeded in realizing the dynamism of Islamic law in different times, places, social situations. The Islamic law has increased significantly from generation to generation. Husaini (1983) stated that one of the 'effective tools' used is the path of ijtihad. The scholars used deductive and inductive methods in interpreting law and making decisions, to ensure that the culturally-produced cultures turn 'Islamic', the absorbing and creative Islamic rationality become the principles of legal methodology.

The deductive method is a form of reasoning that uses the rules of *nash*, both Qur'an and Sunnah. Meanwhile the inductive method is a form of reasoning based on physical facts or scientific facts and sociological data (Faruqi, 1962). The inductive method is defined as a way of finding general conclusion, or universal preposition through observation of particular events (Praja, 1995).

Regarding *al-Qawa'id al-Fiqhiyyat* science in exploring the rules, the scholars seem not to escape from the use of inductive and deductive methods. However, the scholars have tendency to use deductive method in compiling these rules. Ahmad al-Zarqa (1986) in the *muqaddimah* of Ali Ahmad al-Nadawi's book *al-Qawa'id al-Fiqhiyyat* stated that *al-Qawa'id al-Fiqhiyyat* was quoted from the *nash* of Qur'anic and Sunnah. For example, al-Suyuthi in his book *al-Asybah wa al-Nadzair*, after revealing the rules, he always mentions the *nash* that raises the emergence of the rules. It appears in the following rule: "*al-Umuuru bimaqaashidiha"* "everything (deeds) depends on its purpose". Furthermore, he mentions that the rule is derived from the hadith texts of Umar Ibn Khattab, *"Innamal a'maalu bi al-niyyat"* (indeed all acts (deeds) depend on their intentions ...).

Another example of using deductive method is the rule of *"al-masyaqqatu tablibu al-taysiir"* (The difficulty will bring convenience). "According to al-Suyuthi, the rule is deduced from Qur'an surah al-Hajj verse 78, *"wamaa ja'ala 'alaikum fii al-diin min haraj"* (he has not placed upon you in the religion any difficulty).

However, not all *al-Qawa'id al-Fiqhiyyat* is derived from a deductive method. Some scholars use inductive method, but they have difficulty in searching it due to the following points. *First,* the absence of a special book on the history of the emergence of *al-Qawa'id al-Fiqhiyyat*. *Second*, scholars have more tendency to use deductive method. Therefore, Paja (1995) drows a conclusion that *al-Qawa'id al-Fiqhiyyat* was compiled based on inductive reasoning by observing the definition of *al-Qawa'id al-Fiqhiyyat*, as follows: "*law is majority in nature, so when applied appropriately to most of its units the legal position of the units will be known*."

Moreover, this does not mean that there is no example based on inductive method. According to the author's understanding on the book of *al-Ash-wa-Nadzair*, there are two mentioned rules derived from traditions and empirical facts, such as the rule: *"al-Ijtihaadu laa Yunqhadu bi al-Ijtihadi"* (An ijtihad can not be cancelled by another ijtihad). The scholars formulated that the rule was triggered by the historical event of the Caliph Abu Bakr who made legal decisions on some later issues which were disputed by the Caliph Umar. However, Umar did not cancel Abu Bakr's decision, and he still admitted it.

Another example that uses the method is the rule: *"Tasharruf al-imam 'alal raa'iyyah manuuthun bi al-maslahah."* (The act of a priest toward his people is based on benefit.) The rule is derived from the *fatwa* of Imam Syafi'i that means "The position of a priest toward his people is like the position of the guardian to an orphan". However, al-Suyuthi (1976) states that the rule is derived from the *fatwa* of Umar Ibn Khattab narrated by al-Barra Ibn 'Azib, meaning "*Indeed, I place myself to the treasure of God as a guardian of orphan. If I need, I will take it. And if there is something left I will return it. And if I do not need it, I stay away from it (I refrain from it)*."

Based on the description of the rules formulation above, it can be drawn that there are two development methods of *fiqh* rules, namely deductive method and inductive method. There is no significant difference especially between the development of particular event (inductive) and the development of *hadith* or *atsar shahabat*. The latter development is usually a particular transmitted phenomenon. In fact, if it is agreed that Qur'an is a response to any human social cultural event, it will obscure the limits of deductive-inductive methods.

3. Relationship between *Al-Qawa'id Al-Fiqhiyyat* and Latin Rules

As stated in the beginning of this paper, Josep Schatcht made a 'surprising' statement that the rules of Islamic law were truly influenced by the Byzantine rules of Roman Law, Canon Law of the Eastern Churches, Talmud Law, Rabbanic Law, and Sasanian Law. Those rules of law allegedly had influence to the new Islamic law during incubation period. These doctrines appeared in the second century of Hijrah. In his book entitled "An Introduction to Islamic Law", Schacht (1964) said:" *The intermediaries were the culture non-Arab converts who (or whose fathers) had enjoys a liberal education, that is to say, an education in Hellenistic rhetoric which was the normal one in the countries of the fertile Crescent of the near which the Arab conquered. This education invariably led to some acquaintance with the rudiments of law, which was considered necessary for the orators who were also advocates, and useful for all educated persons. These educated converts brought their familiar ideas, including legal concept and maxims, with them into their new religion.."*

Based on the above statement, it is known that the rules of Latin law have influenced and penetrated 'islamic law' through the followers of Islam from non-arabian culture who enjoyed a liberal education, such as education in Hellinistic Rethorik. They bring ideas and concepts of law and legal rules. In addition, there is a 'similarity' between Islamic law and Roman law regarding the doctrines acquired in classical Roman law.

Furthermore, Joseph Scahcht (1964) stated that the rule of *al-Walad li al-Firasy* (the child belongs to his bed) was in accordance with the Roman law rule *"peter est quem nuptiae demonstrant."* Although this rule does not play a true role in Islamic law, it is often related to the accountability of thieves who can not be punished as determined by Qur'an, to double the value of the stolen goods. It is an old doctrine left by Islamic law.

The thesis of Joseph Shacht seems rather difficult to deny, considering that in the second century of Hijra (Abbasid Daula period), Muslims experienced the golden age in cosmopolitan civilization. At that time, Islamic civilization was very open, even 'wellcoming' with other civilizations to enable external influences (Roman) into the treasury of Muslim intellectuals. In his book, Social History of Muslims, Ira M. Lapidus (1999) describes the social situation and scientific discourse occurring at the time, as follows: "beginning with actual practice in family law, commerce, criminal law, administrative rules, Sasanian proverbs, Byzantine and Hellenistic popular, orthodox religious law, Talmudic, Rabbanic, and Ancient Babylonian law, scholars tried to bring something according to God's will. Their discussion did not establish a cold rule of law, but a discursive building containing rules interrelated with theological, moral and ethical perceptions."

Through the theory of Anton Baker, the thesis of Joseph Schacht stating that the rule of Islamic law is influenced by the rule of Roman law seems not deniable because the rules of Islamic law were being formulated at that time. The intellectual discourse of Roman law was growing and developing; meanwhile at the time, Islamic civilization was very inclusive and open with other civilizations. As a matter of fact, it is necessary to realize that there is a relationship between *qawa'id fiqhiyyah* and *Roman norms*, as revealed by M. Mahmasani in his book *Falsafat Tasyri' Islam*.

Nevertheless, the truth of the thesis is not 'final'. It is necessary to make in-dept study and research by exploring historical data that shows the infiltration of Roman rules into *qaidah fiqhiyyah*. Moreover, the research needs to be directed into the history of the emergence of *qaidah fiqhiyyah*, and the figures who formulated the rules to find out the clarity regarding the possibility of the influence of Roman rules on the rules of *fiqh*.

4. Solution of *Al-Qawa'id Al-Fiqhiyyat* Development

It is well-known that *al-qawa'id al-fiqhiyyah* is a 'compilation' of rules concentrated in 'classical books'. It becomes an intellectual treasure with very high civilizational values. However, it is very difficult to develop *al-qawa'id al-fiqhiyyah*, when connected with the context of human modern life. Even if there is a study, it is merely theoretical study, and not practical study.

Nonetheless, the effort to develop *al-qawa'id al-fiqhiyyah* has been done, as initiated by S. Waqar Ahmad Husayni who tried to develop it with his intelligence. He tried to elaborate the rules within the *Majallah al-ahlam al-adhliyah* to be the 'basis' of the Ottoman Empire in 1293 H (1876). In one of his ideas,

he revealed that if the ideological rules were stipulated by a competent Legislative Council, it was allegedly that the rules were involved into Shariah code for the planning of environmental engineering systems(..... Ibid 19). In other words, it is more possible to make the development through 'supra politics'.

The shari'ah arguments in the *Majallah* are the sources of *fiqh*. Its principles can provide substantive contribution to the formulation of Shari'ah-based regulations, especially those relating to the conception of environmental change. In addition, it also serves as a facilitator of the Legislative Council and a more comprehensive legal interpretation (Ibid 20.....). The rule of "Avoiding evil is better than pursuing profit" (stated in Majallah, article 30) is a hierarchical formula of values that destroys pure utilitarianism to be ethical considerations. The background of this rule is that personal and community benefits must be abandoned and national interest is performed in order to implement *fardhu* and avoid *haram*.

Based on the above principles, there appears among Muslim legal experts a theory on rights abuse that rules neighboring relationships. This theory reveals that a person can be forbidden to do something of his right if harmful to others. Thus, an enterprise or industry that can pollute the environment or cause other losses in the community may be stopped or restricted, even if such prevention can harm the entrepreneur. The Islamic State should leave such action, as it relates to the Shariah environmental ethic code, short-term profit to realize higher values and protection of environmental resources.

5. Conclusion

As a conclusion, there are some underlined important points, as follows:

First, the development of *al-qawa'id al-fiqhiyyah* can be done through force and political power as it was developed during the Ottoman period. This turns important in the study of modern political science because all the great interests of human life (Muslims) are not apart of government authority.

Second, *the development of al-qawa'id al-fiqhiyyah* can be done through academic studies by involving in-dept and comprehensive research resources; So that the *al-qawa'id al-fiqhiyyah* remains up-to-date.

Third, the development of *al-qawa'id al-fiqhiyyah* can be done through deductive and inductive methods. Both methods are commonly used and tested empirically and methodologically in the fields of scientific activities, especially in exploring, understanding and practicing the law in a wider life.

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The Adjudication of Divorce Between Fiqh Doctrine and The Authority of Pengadilan Agama: Based on Maqashid Syaria Perspective

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Abstract - There is a difference of divorce settlement between the jurisprudence and the authority of the religious court. According to the concept of Jurisprudence, divorce can fall anytime and anywhere, although no one witnesses. However article 115 of the Compilation of Islamic Law (KHI) states that the marriage break can only be done in front of the court, after the judge tried and failed to reconcile both parties. The same thing is also described section 39 of the Marriage Law (UUP). KHI and UUP are the material laws applicable in the Religious Courts. The marriage law has been in effect effectively for 42 years, and KHI is 26 years old. But until now has not done well. This is due to the strong law of fiqh that is embedded in the psyche of Muslims. Another cause is that the Marriage Act is not properly disseminated. Marriage Law is socialized among educated people living in urban areas and in communities that already know the marriage law or the law is still socialized and absorbed by advanced societies.

Key Words: *divorce, Jurisprudence, authority, religious court*

1. Introduction

In general, the field of marriage is classified by fiqh scholars into the category of mu'amalah, not 'worship. That is, without ignoring the text of the Qur'an and Sunnah that nuzul / wurud (down) and dalalah (show pronunciation) its qath'iy (absolute) in some verses, in the field of munakahat, open the opportunity to conduct ijtihad widely, By looking at socio-cultural changes, which must be in line with maqashid al-syari'ah (the purpose of legal pensyariatan by Allah SWT).

Therefore, although the whole of the classical Jurisprudence books has been thoroughly discussed on the subject of marriage, it must be remembered that the formulation is purposely made only to answer the problems that arise in their day, not to apply to Muslims thoroughly until the end of time. The legal formulation contained in the classical Jurisprudence book is certainly in line with the maqashid al-shari'ah, but certainly, only for the community community at that time. It could be that the same formulation, in part, is irrelevant for now because it is not aligned with maqashid al-syari'ah. (Al-Raisuni 1992, 14-15)

Parallel or inconsistent with *maqashid al-syari'ah* is measured by the extent to which the formulation of the law can apply kemashlahatan and rejects conscience. It can be understood from the definition of maqashid al-shariah itself, namely:

لا ينكر تغير الأحكام بتغير الأزمان

The purpose of the stipulation of syara 'law is for the benefit of the servant. Moving from the above review looks urgency to understand well the difference between shari'ah and fiqh. That is the philosophy, why in most of the sacred texts Allah SWT puts it in a multi-tafsir form (ulama ushul classifies it to *mujmal*, *muthlaq*, and *aam*), that the multi-interpretive texts can accommodate socio-cultural changes that are always moving dynamic. Because, especially the Qur'an, became huda (guidance) for Muslims until the Day of Resurrection. If showing the meaning of the Qur'an is technical guidance, it will be a lot of clues contained in it that has sterile because obsolete. So, simply, judging by its position, in the life of a country in Indonesia, the Qur'an is relatively the same as Pancasila, whose norm in it is general. How many times does TAP change

MPR, Presidential Decree, or even the amendment of the 1945 Constitution-because it adapts to changing

conditions, and will not conflict with Pancasila. Etymologically, al-syari'ah means مورد الماء (place of water). (Ibn Mazhur t.th, 213) While in terminology, Dr. Farouk Abu Zeid, as quoted by Amir Syarifuddin, defines the Shari'a with what Allah decreed through the oral word of His Prophet. (Syarifuddin 1997, 2) While al-Fiqh is etymologically al-fahm (understanding) and al-fiqh Terminology is a science by which practical laws of practice can be derived, derived from (digging) detailed syarak's arguments (Khalaf 1978, 11)

Based on the above definition can be understood that between shari'ah and al-fiqh very different. The Shari'ah is all that Allah decrees, whereas al-fiqh is a ready-made legal formulation unearthed from its source, namely the Qur'an and Sunnah, and has the possibility of change if the circumstances surrounding it change, as long as it is in line with maqashid al-syari ' Ah. A law is said to be in line with maqashid al-shari'ah if it is in accordance with the wishes of the legislator and the purpose of revelation and to give the benefit of beings and the standard is jalb al-mashalih wa dar` al-mafasid (which can bring benefits and can reject harm). (Al-Khadimiy 1998, 32)

In line with that context, a new Jurisprudence emerged in Indonesia, passed through Presidential Instruction No. 1 of 1991, called KHI. This KHI is called the Islamic law of Indonesia. That is, after going through a very comprehensive assessment by looking at the kemashlahatan aspect which became the objective of legal arrangement by the experts, by dissecting dozens of books of classical Jurisprudence and conducting comparative studies to some Middle East countries, the legal formulation contained in the KHI is viewed as law That are relevant to apply, at a minimum, in Indonesia. As long as the rules are regulated in the KHI, the same rules in classical Jurisprudence, temporarily, are not enforced until the conditions surrounding them are the same as those surrounding the formulation of the classical fiqh (stored as a treasure of Islamic legal scholarship). This is in line with the method:

الغاية التي وضعت الشريعة لأجل تحقيقها لمصلحة العباد

The legal formulation changes with the changing of time. (Al-Barkati 1986, 113)

Law No. 1 of 1974 on Marriage enacted on 2 January 1974 and became effective on October 1, 1975, including the old law (42 years), without any amendment except for several judicial review by the Constitutional Court Decision. One can speculate on why the Marriage Law lasts a long time. (Mudzhar 2015, 1) This is because: First, perhaps the public feels it is still sufficient to answer the current development. Secondly, it may also be that the status quo between those who want to keep the law and those who want to change it. For those who want to defend it especially from conservative religious figures of Islam see that the contents of the law is relatively close to Islamic law. Some also assume that the UUP is the embodiment of Islam in the field of marriage law. For them, re-opening the UUP and revising it would remove the material from Islamic law and fall into the hands of liberals and secularists. As for those who want to change it, his ideas have already appeared to be like the circulation of draft counters of the UUP and the petition for judicial review by various parties on various articles of the law. This paper focuses on the discussion: what is the perspective of maqashid shari'a towards the settlement of divorce between the jurisprudence and the authority of the religious court?

2. Divorce According to the Concept of Jurisprudence

Talak is taken from the word *talaka-yathliqu thalaaqan*. Talak language means unbinding and releasing. (Asy-Syarbaini t.tt, 279) The scholars gave the definition of divorce according to the term with different editors, among them put forward by Wahbah az-Zuhailiy, divorce is to abort the marriage relationship by using the pronunciation of talak and the like. Meanwhile, according to Abu Zahrah, divorce is lifting the marriage contract at that time or in the future with pronunciation of talak or with a word that is with it. (Zahrah 1998, 326) As for the legal basis of divorce, among which are contained in the word of Allah SWT in the Qur'an Surat al-Baqarah: 229 and at-Talak: 1.

Divorce or divorce is the last solution the husband and wife will take in ending the household problem. There are several requirements that must be fulfilled for the occurrence of divorce, which is as follows:

1) The husband who will divorce his wife, is required to have grown up, healthy mind, and not pronounce talak in a state of necessity. 2) The wife to be divorced, under the control of a

man who will divorce her or still be married to her. 3) Shighat talak, the occurrence of divorce when the husband who will divorce his wife was uttered a certain speech that states his wife out of power. According to Amir Syarifuddin, there are some things that need to be considered but not discussed specifically by the scholars in the terms of divorce, among which is the approval of the wife who will dialak, the reasons for dropping divorce and the necessity of a witness. (Syarifuddin, Hukum Perkawinan Islam di Indonesia: Antara Fikih Munakahat dan Undang-undang Perkawinan 2006, 214)

The fiqh scholars divide the divorce into two kinds, namely in terms of how to drop it and in terms of husband may refer to his wife. First, in terms of overthrowing it, divorce is divided into sunni talents and bid'i talak. Talak sunni is the divorce of husbands according to the instructions taught by Islam, namely:

1. Mentalak wife gradually, starting with talak one, two and three and interspersed with the iddah period.
2. Wives to be divorced in a holy state and not yet digauli
3. The wife has been obviously in a state of pregnancy.

While the talkative bid'i is the talak that is passed by the husband through the ways that are not recognized by the Islamic Shari'ah, namely: 1. Mentalak wife with three divorces at once. 2. Mentalak wife in the state of menstruation and childbirth. 3. Destroyed divorce to wife in holy state but already digauli. In terms of whether or not the husband reconciled with his wife, then divorce divides into talak *raj'i* and talak *bain*. Talak *raj'i* is the one and two talak which is suamai to his wife, who has been pursued without compensation. During the iddah period the husband is entitled to reconcile without a new marriage agreement and without paying the dowry. Talak bain is the husband who was sentenced to his wife, where the husband is entitled to return to his wife but with a new marriage contract and dowry.

3. Divorce Based on the Authority of the Religious Courts

One of the jurisdictions of the Religious court is to settle divorce cases. The rules on divorce are explained UUP and rules are detailed in KHI. In line with the principle or principle of Marriage Law to complicate the occurrence of divorce, where divorce can only be done before the court, after the court concerned and unsuccessful to reconcile the two sides (Marriage Law article 39, article 65 jo article 115 KHI). Furthermore section 39 of the Marriage Law explains:

1) A divorce can only be conducted before a court hearing after the court has tried and failed to reconcile the parties;
2) To divorce there must be enough reason that the husband and wife will not be able to live in harmony as husband and wife;
3) The divorce proceedings before the court are governed by their own rules of procedure.

The marriage settlement as described above is regulated by KHI in Chapter XVI on Marriage Breakup. Article 114, for example, divides the divorce into two parts, divorce caused by divorce and divorce caused by divorce suits. Divorce is the pledge of the husband in the presence of the religious court which is one of the reasons for the breaking of marriage (KHI article 117). Whereas a divorce suit is filed by his wife or legal counsel to a religious court which in his jurisdiction occupies the plaintiff's residence unless the wife leaves the joint residence without the husband's consent.

Furthermore, KHI also explains the reasons for divorce described in article 116 below:

a) One party commits adultery or becomes a drunkard, compactor, etc. that is difficult to cure.
b) One party leaves the other for 2 (two) consecutive years without the other party's permission without a valid reason or for anything other
c) Than his or her ability.
d) One party is sentenced to 5 (five) years imprisonment or a heavier sentence after marriage takes place.
e) Either party has committed serious atrocities or torture which endangers the other party.
f) One party gets a disability or illness with the consequences of not being able to perform obligations as husband and wife.
g) Between husband and wife continuous disputes and quarrels and no hope of living in harmony again in the household.

h) The husband violated taklik talak

i) Religious transfers or apostates that cause unfairness in the household.

From the above rules it is understood that divorce can only be done before a religious court, after the court fails to reconcile the two parties. Divorce to wife outside religious court is not considered divorced by KHI. Consequently in the case of a divorced husband two (2) times outside the religious court hearing, then filing divorce divorce to the religious court, the judge will decide to fall one divorce. The aborted one is based on the rules of KHI in article 115, that a divorce can only be made before a court hearing. Based on the above description was until now still many Muslims who do not want to choose the path of divorce settlement in court or have no reason enough to conduct a divorce in court. They take a shortcut that is a divorce outside a religious court or termed a wild divorce. This is because such divorce is legitimate according to religion or jurisprudence. Such cases are found everywhere, leaving a lot of legal issues.

Problems arise when a person who has been divorced outside the court requires evidence of authentic divorce issued by a religious court. An authentic divorce certificate can be obtained after applying for divorce to a religious court and must recite divorce or divorce. The word of divorce (divorce) uttered in court and the amount of talak that had been uttered outside the court, the question arises, how many amounts of talak already spoken by the husband. Another issue that arises is when the divorced woman's marriage ends, the deadline for divorce in a religious court or a divorce outside the religious court, can occur outside the court of court has expired, but in the religious court has not been exhausted. In this condition comes the problem again, whether the divorced husband can refer to his ex-wife or not.

Law no. 1 of 1974 on Marriage and Compilation of Islamic Law which is taqnin of Islamic law in Indonesia, which is a material law in the Religious Courts. The birth of Law no. 1 Year 1974 on Marriage that applies to all Indonesian people on January 2, 1974, it turns out through a long process. Demands on this matter have been started since the First Women's Congress of 1928. The issues that became the center of attention of the women's movement at that time were: 1. Forced Marriage, 2. Polygamy. 3. Divorce is arbitrary. The coveted improvements are primarily for indigenous Indonesian Muslims, whose rights and obligations in marriage are not provided for in the written law. The marriage law of indigenous Indonesians who are Muslim listed in the jurisprudence books, according to the Indonesian legal system can not be categorized in the category of written law.

The desire to compile the Islamic jurisprudence in compilation was felt increasingly urgent. The compilation of this compilation is not only based on the need for uniform reference of legal decisions in the Religious Courts (PA) in Indonesia, but also based on the necessity of the fulfillment of the instruments of a court of Islamic jurisprudence used in the courts.

KHI was born with several considerations, among others that:

1. Before the birth of the Marriage Law, marriage of Muslims has been regulated by religious law, either before independence or after. The religious law referred to here is the jurisprudence of munakahat. When viewed in terms of material derived from the school of Shafi'i, because most Muslims in Indonesia are actually practicing the Shafi'i school in the whole religious amaliah.
2. With the issuance of the Marriage Law, then the Marriage Law is declared valid for all Indonesian citizens who are mostly Muslim. Under article 66 of the Marriage Law, munakahat jurisprudence material so far as has been regulated in the Marriage Law is declared no longer valid. But article 66 also means that munakahat jurisprudence material which has not been regulated by the Marriage Law is still valid. There is still a lot of munakahat jurisprudence material that has been practiced in arranging the marriage of Indonesian Muslims not regulated in the Marriage Law.
3. From the other side of the jurisprudence of munakahat even though using munakahat fiqh one particular school of Syafi'iyah, have found different opinions among the scholars of Shafi'iyah itself. Especially if it extends outside the Shafi'i school, almost in all the material there are different scholars' views. Issue a different opinion in the fatwa is still possible. But deciding cases with different opinions is very troublesome and causes legal uncertainty.

4. The purpose of the formulation of the Compilation of Islamic Law (KHI) in Indonesia is to prepare uniform guidelines (unikatif) for Religious Court judges and become a positive law that must be obeyed by all Indonesian citizens who are Muslims. This indicates that there is no more confusion about religious court decisions.

4. Completion of Divorce Perspective Maqashid Syari'ah

As mentioned in article 1 of Law no. 1 Year 1974 that the purpose of marriage is to form a happy, eternal family based on the One Godhead. While in the language of Compilation of Islamic Law (KHI) is called *mitsaqan ghalizan* (strong bond). But in reality it is often a marriage that runs aground in the middle of the road causing the breakup of marriage, either because of death, divorce or court decision. Article 38 of the Marriage Law states: marriage may be terminated due to: a. Death, b. Divorce and c. Upon a court decision. Related to the divorce cause, the Marriage Law provides standard, detailed and very clear rules.

There is a difference of divorce settlement between fikh doctrine and the authority of the religious court. When further analyzed the matter of the Marriage Law and compared with munakahat jurisprudence material, there are three forms:

1. Matter of marriage law is fully absorb and take from book of fiqh. For example the provisions on marriage barriers, both nasab obstacles, mushaharah and obstacles sepususuan.
2. Matter of marriage law is not contained or arranged in jurisprudence but is acceptable because it is not contradictory with jurisprudence. For example about having to register for marriage officially.
3. Matter of marriage law is different and contradictory with jurisprudence material. For example, the provisions on the minimum marriage limit. The Marriage Law sets the age limit for men to marry to 19 and women 16 years. (Syarifuddin, Islamic Marriage Law in Indonesia: between Fikih Munakahat and Marriage Law 2006, 48)

The existence of these differences, Muslims in dealing with the marriage law, is divided into three groups. First, do not recognize the Marriage Law as a rule of fiqh. They continue to run and adhere to the jurisprudence law. Although there is a KHI that governs the settlement of divorce, they are running jurisprudence, this is due to the strong understanding of jurisprudence embedded in his soul. Second, recognize the Marriage Law as a law that must be adapted in its position as a citizen, and at the same time as a Muslim person still recognizes and implements jurisprudence. There is a dualism of the understanding of community groups in this form. According to them, the case is legitimate according to religion, but it is deviant or illegitimate according to state regulations. For example, a person who makes a marriage in front of the penghulu by fulfilling the terms and conditions as set forth in the book of fiqh, but not registered to the Marriage Officer set by the state. According to them, marriage in the form is legitimately religious, but has no legal force. Law no. 1 of 1974 also explains in article 2 verse 1 that marriage is lawful if done according to the law of their respective religion and belief. This community group does not comply with the sound of paragraph 2 of the Marriage Law that each marriage is recorded according to the applicable legislation. For this group it appears that the Marriage Law as far as the material is not contrary to the law of fiqh is obligatory to be followed and adjusted.

Thirdly, groups that behave and regard the Marriage Law as a legitimate state law regulate the marriage of Muslims in Indonesia. For this group the Marriage Law to the extent that regulates the marriage matters of Muslims is the jurisprudence of munakahat in its new and prevailing form in Indonesia while the jurisprudence remains in effect as far as it is not regulated in the Marriage Law. For this group the law can develop according to the culture and needs of the people who run it and the Marriage Law is the law of fiqh in the form of its latest development.

In the concept of ushul al-fqh, the presence or absence of (open or not) field of ijtihad on an issue, not seen from the side; Whether the scholars have agreed or not? But seen from side; Whether to show the text either in terms of *nuzul* / *wurud* (the certainty of arrival to us) or in terms of dalalah (show its meaning) -nya *qath'iy* (absolute) or *zhanniy* (relative). If the text *qath'iy* then means there is no opportunity to do ijtihad on the issue, but if the text is zhanniy then it means there is a chance to do ijtihad. As far as the

author's view, there is no qath'iy text ijtihad by the KHI formulator. It is only in the texts of the zhanniy that the reinterpretation (reinterpretation) of the KHI formulations is made.

A very complicated issue arises when one and two divorces are done at home or outside the religious court, then to obtain the divorce legality divorced by the wife in the religious court. If this question is asked to the court or a judge they will answer one, only the divorce is spoken in court without regard to what happens outside the court. However, if the use of the concept of jurisprudence munakahat or asked to ulama, they will answer that happened outside the court is legitimate, and coupled with the divorce word spoken in the religious court.

Extra-divorce occurs in Minangkabau society, the case seems to be endless and phenomenal. The following is an overview of cases of non-court divorce occurring in West Sumatera society, snowboll sampling. (Sulfinadia 2016, 246). This can be seen from the following table:

Table 1. Divorce Outside the Religious

No	District Name	Number of Cases
1	Luhak Agam	17
2	Luhak Tanah Datar	15
3	Luhak Lima Puluh Kota	18
4	Pariaman	11
5	Padang	13
6	Pesisir Selatan	17
7	Solok	20
8	Dharmasraya	12
	Number	123

Based on the above table shows that the case of divorce outside the religious court almost evenly occurred in each area that made the location of this study which reached 123 cases. This case occurs due to various reasons, among which the material legislation on marriage is different from the jurisprudence material. According to the concept of jurisprudence that divorce can be done anytime and anywhere and can even be done without any cause. When understood the concept of Jurisprudence is apparently while whistling divorce can fall. Meanwhile, according to the rules of the applicable legislation, the divorce just fell when done before the religious court after the judge tried and failed to reconcile the parties. The divorce provisions stipulate that a new divorce may be brought to a religious court if there are causes that allow it. That is, the divorce can not be done in any place and for no reason to allow it.

The phenomenon that occurs in society, divorce can happen anytime and anywhere, and without having to watch the person. For example, there is a husband who left a piece of paper that essentially divorced. Understanding like this they understand from the concept of divorce according to jurisprudence munakahat, reinforced by the talak is the absolute right of the husband, and the husband may use his rights anytime and anywhere, without having to be witnessed. Coupled with Munakahat Jurisprudence does not regulate the cause of divorce. Different munakahat jurisprudence material with legislation about marriage related to divorce and divorce causes the dualism of the understanding of society. It seems that the reluctance of some people to consider the KHI as Islamic law of Indonesia, because 1) The discovery in the KHI are some formulations of law that have never been formulated in classical jurisprudence because the conditions have not wanted it, 2) Unlike the opinion of scholars that he knows, 3) In contrast to the opinion of the majority of scholars but due to the limitations of reference then he considers it a scholar deal, or 4) Unlike the classical scholar's opinion. In terms of the ushul al-fqh concept, whether or not there is an open field of ijtihad on an issue, not from the side; Whether the scholars have agreed or not? But seen from side; Whether to show the text either in terms of nuzul / wurud (the certainty of arrival to us) or in terms of dalalah (show its meaning) -nya qath'iy (absolute) or zhanniy (relative). If the text qath'iy then means there is no opportunity to do ijtihad on the issue, but if the text is zhanniy then it means there is a chance to do ijtihad. As far as the author's view, there is no qath'iy text ijtihad by the KHI formulator. It is only in the texts of the zhanniy that the reinterpretation (reinterpretation) of the KHI formulations is made.

The overall reluctance, especially rooted in the mistake in understanding the difference between shari'ah and fiqh, so the determination of the law is not based on the view of maqashid al-syari'ah. As a result, the formulation of Jurisprudence in the classic book was regarded as standard, as did the Shari'ah (*al-*

nushush al-muqaddasah / sacred texts). It is as if the door of ijtihad, they say, has been closed. In addition, it is also rooted in the erroneous understanding of KHI's position in the Islamic legal system. If the position of the KHI in the Islamic legal system is not yet proportional in the understanding of the people, the muballigh, the law enforcement officers, then the law of Islam that is validly legal in the country of Indonesia, will not run effectively. Let's not look at his position, which from the point of view of his serial number in the hierarchy of legislation in Indonesia somewhere, has been passed into law anyway, if the position of KHI in the Islamic legal system is not right in our understanding, it will continue to run and Is half-hearted and we will always hear the phrase that divides between Islamic law and mere state / administrative law. In line with the above reviews it is seen that the Law and Compilations of Islamic Law have a number of spaces that can still be refined both in terms of content and in terms of substance. The Marriage Law as a state law should meet the criteria of law or regulation, law enforcement, facilities that support, there is a regulated society and there are sanctions. The Marriage Law has no legal sanction, the consequence is that when there are people who violate the marriage rules as regulated by the law, no legal sanction is granted.

5. Conclusions

The settlement of divorce between the juristic doctrine and the authority of the religious court from the perspective of the maqashid shari'ah shows that:

1) The settlement of divorce as stipulated in the Compilation of Islamic Law is a reinterpretation done by the drafters of the KHI of the zhanniy texts, drawn up in accordance with the changes and developments of the zamanyang in line with the above mentioned fiqh sqf.
2) There should be an equalizing effort between fiqh and the Compilation of Islamic Law, in order to avoid the dualism between the two rules. Efforts to resemble the understanding between the jurisprudence of munakahat and the legislation on marriage, backed by the material of both laws are the same as myatat fiqh, there are different and not even listed in the book of fiqh. The familiarity of understanding is mainly related to divorce outside the court.

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Undang-undang No. 1 Tahun 1974 tentang Perkawinan

Pendekatan Profetik Sebagai Solusi Menjadikan Keilmuan Syari'ah yang Lebih Bertenaga

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Abstrak – Berbagai usaha dan aktivitas keilmuan di Fakultas Syari'ah berupa pemecahan problematika Hukum Islam (normatif dan empiris) akan menjadikan nilai-nilai profetik (kemanusiaan, pembebasan dan ketuhanan) sebagai dasar pertimbangan. Apabila rumusan konsep ini dapat dipahami dan disepakati, maka semua insan akademis di Fakultas Syari'ah UIN Imam Bonjol Padang dapat menjalani kegiatan keilmuannya (pembelajaran, riset dan pengabdian) dengan cara pandang yang sama, meskipun berbeda dari tipe ilmu Syari'ah keahliannya. Bila hal ini terlaksana baik maka akan terwujud sinkronisasi dalam mewujudkan caita-cita Fakultas, baik dari aspek keilmuan maupun kelembagaan.

Key Words: *syari'ah, profetik, UIN Imam Bonjol.*

1. Pendahuluan

Hukum Islam yang sudah lahir sejak zaman klasik namun hingga kini masih senantiasa menjadi isu panas di pentas global. Di masa kejayaan kekhalifahan Islam eksistensi Hukum, yang kala itu populer dengan sebutan Fikih, begitu dominan dan menjadi bagian tak trepisahkan dalam kehidupan bermasyarakat dan bernegara. Sistem dan rumusan Fikih bisa dikatakan yang terbaik pada masa-masa tersebut. Kala itu, tidak terdengar isu perihal ketakutan akan penerapan syari'at Islam atau syari'at fobia. Pengaruh Hukum Islam begitu luas penyebaranya meliputi perbatasan Tiongkok di ujung Timur hingga perbatasan Spanyol-Prancis di bagian Barat. Fikih atau Hukum Islam tampak begitu dinamis, mapan dan menjanjikan. Puncaknya adalah dengan terbitnya *qanun* (perundang-undangan) berbasis fikih di masa Kahlifah Usmaniyah abad ke 16 M yaitu Sulaiman 1. Dari peristiwa inilah ia digelari "al-Qanuni".

Namun, selang dua abad kemudian semuanya tiba-tiba saja berubah drastis. Pasca pendudukan Mesir oleh Prancisnya Napoleon Bonaprte pada 1798, Dunia Islam segera merasakan bahwa apa yang mereka miliki berupa tradisi Hukum Fikih yang diyakini akan seperti itu selamanya ternyata oleh sebagian kalangan sudah terlihat sebagai sebuah sistem yang usang. Isu yang berkembang kemudian lahirnya superioritas Bangsa-bangsa Barat pada semua sektor termasuk aspek Hukum. Walhasil tampillah era kolonialisme di mana dunia Muslim salah satu korban terbesarnya. Wabah kolonialisme yang mengganas sepanjang abad ke-19 diiringi dengan dominasi tradisi dan norma dari penjajah ikut menggerogoti tradisi dan sistem kehidupan Umat Muslim yang selama ini berjalan termasuk aspek Hukum. Hukum Islam menjadi terpinggirkan dalam waktu yang panjang hingga pertengahan abad ke-20.

Kehancuran Eropa pasca Perang Dunia II sempat meredupkan pamor BAngsa-bangsa Barat dan awal lenyapnya cengkraman kolonialisme dalam skala global termasuk di kebanyakan negeri-negeri muslim. Situasi demikian terutama pada era 1950-an, menaikkan antusiasme Dunia Muslim untuk membangun kembali kejayaan masa lalu yang hilang, di mana instrumen kejayaan itu tampil dalam bentuk khilafah (Negara Islam), Pendidikan Islam dan Syari'at Islam(baca; Hukum Islam). Khusus pada aspek Hukum Islam, marak lahirnya aspirasi yang menggebu untuk tegaknya Hukum Islam dalam kehidupan bermasyarakat bahkan bernegara. Sehingga muncul gerakan penuh semangat (tidak jarang yang militan) seperti Ikhwanul

Muslimin (Mesir-Syria), Jami i Islami(india) dan DI/TII(Indonesia).

Namun kali ini dunia sudah berubah, termasuk Umat Islam juga sudah berubah. Tidak semua kalangan Umat Muslim yang antusias dengan "pemulihan kembali" Hukum Islam, bahkan ada yang memusuhinya. Ikhwanul Muslimin dibungkam penguasa Mesir, DI/TII dihancurkan di negeri berpenduduk Muslim terbesar di dunia dan terdapat sejumlah pergerakan dengan aspirasi Syari'at Islam di beberapa negeri muslim selalu diberangus oleh pengausa setapat. Asumsi yang mengira akan adanya sabutan menyeluruh Umat Muslim akan tegaknya syari'at Islam ternyata meleset. Apa yang telah terjadi.

Kini, di era milenium, nasib eksistensi Hukum Islam tidak jauh berubah. Hukum yang juga sering disebut Syari'at Islam, selalu diselimuti dengan kontroversi, isu sensitif dan serangan yang dikaitkan dengan HAM atau gender. Tidak jarang, aspirasi pseseorang pada Hukum Islam dijadikan indikator perilaku radikalisme. Situasi diperburuk dengan adanya cerita seram tentang sejumlah kelompok militan bernama Taliban, Boko Haram, al-Qaida bahkan ISIS, yang terkenal dengan cara keras mereka untuk menegakkan syar'at Islam. Media dunia membumbuinya dengan berbagai kisah praktek Hukum Islam dengan nuansa "horor" khususnya yang terkait dengan aturan Qisas dan Hudud.

Namun, apakah semua yang berasal dari Syari'at Islam ditolak oleh banyak pihak. Ternyata tidak juga. Sebab ada sistem aturan yang nyata-nyata membawa nama Syari'at (Istilah yang begitu dimusuhi oleh kaum islamofobis), yaitu Perbankan Syari'ah atau Ekonomi Syari'ah. Kenyataan pada "kasus" ini tentu dapat menjadi harapan dan refleksi bahwa Hukum Islam akan bisa diterima oleh banyak pihak apabila diperkenalkan dengan strategi yang tepat.

Dinamika dunia akhir-akhir ini yang diwarnai dengan isu radikalisme, fundamentalisme atau terorisme selalu diakaitkan dengan Syari'at Islam. Situasi demikian menjadikan perdebatan seputar Hukum Islam menjadi penting dan pusat perhatian. Atau dalam bahas satirnya, maslah Hukum Islam merupakan isu yang sangat laku. Fenomena ini merupakan tantangan tersendiri bagi mereka yang menggeluti atau lingkungan akademis di bidang Hukum Islam. Salah satu tempat di mana Hukum Islam atau Syari'at Islam menjadi kajian sentral adalah Fakultas Syari'ah.

2. Fakultas Syari'ah dan Paradigma Profetik

Kalau ada pertanyaan "apakah lembaga resmi yang akademisinya dapat menjadi pejuang berjalannya Hukum Islam di Indonesia? Atau "pihak manakah yang berkompeten dalam menjawab persoalan/isu-isu tentang Hukum Islam? Atau siapakah yang dianggap ahli dalam merumuskan model penerapan Hukum Islam. Semua pertanyaan tersebut jawabannya adalah insan akademis di Fakultas Syari'ah. Meskipun terdapat lembaga lain seperti MUI, namun Fakultas Syari'ah merupakan lembaga resmi Hukum Islam bersifat akademis yang nyaris satu-satunya di Indonesia.

Ada banyak Fakultas Syari'ah di hampir semua perguruan Tinggi Islam di dunia. Meski demikian, sorotan tentu difokuskan terhadap Fakultas Syari'ah yang berada di negeri dengan penduduk Muslim terbesar di dunia, tetapi justru menjadikan Hukum Islam sebagai "Hukum kelas 2", yaitu Indonesia

Sayangnya, Fakultas Syari'ah merupakan lembaga dengan "studi panasnya", termasuk jarang tampil di hadapan publik (media) dalam rangka menawarkan solusi sustu isu hukum atau pengenalan ide-ide pencerahan/inspiratif. Artinya sebagai lembaga yang mengkaji urusan keseharian umat (di antaarnya hukum) seharusnya senantiasa tampil terdepan

Pada masa kini orang yang memilih dunia Hukum Islam sebagai jalan hidupnya sedari awal harus tahu dan sadar bahwa dia telah memilih jenis kajian yang dimsuhi banyak pihak.... Individu yang tergabung dalam Fakultas Syari'ah juga harus sadar bahwa studi yang mereka dalami umumnya "tidak terpakai" di negeri ini....Maka sudah saatnya para akademisi di Fakultas Syari'ah harus bekerja lebih keras lagi dan selalu putar otak bagaimana caranya menjdikan jenos hukum ini lakku.....bagaimanapun individu yang ada di Fakultas ini hakikatnya diamanahkan mejadi pejuang/pembela dan kalangan yang bertugas menegakkan Syari'at Islam Bedanya dengan pihak lain adalah Fakultas Syari'ah melakukannya dengan cara-cara legal dan resmi.

Pembentukan Fakultas Syari'ah Padang tentu tidak lepas dari visi yang ditetapkan oleh institusi, di mana fakultas ini bernaung, yaitu Institut Agama Islam Negeri (IAIN) Imam Bonjol Padang. Semuanya dimulai tatkala lembaga pendidikan Islam negeri ini mulai didirikan pada tahun 1966. Pada tahun-tahun pertama berjalannya IAIN Imam Bonjol Padang, visi yang

menjadi pegangan adalah bahwa "IAIN merupakan suatu lembaga institusi yang memberikan pendidikan dan pengajaran Agama Islam tingkat universitas serta menjadi pusat untuk memperkembangkan dan memperdalam ilmu pengetahuan Agama Islam" (A. Rivai Yunus: 1976, 68).

Di dalam salah satu dokumen pada masa awal berjalannya IAIN Imam Bonjol Padang dengan jelas dinyatakan bahwa maksud dan tujuan pendidikan dan pengajaran IAIN adalah membentuk sarjana-sarjana muslim berakhlak mulia, berilmu dan cakap serta mempunyai kesadaran tanggung jawab atas kesejahteraan umat dan masa depan Bangsa dan Negara Republik Indonesia yang berdasarkan Pancasila. Selain itu, IAIN juga bertujuan mencetak sarjana-sarjana muslim/pejabat-pejabat Agama Islam yang ahli untuk kepentingan Departemen Agama maupun instansi lain yang memerlukan keahliannya (A. Rivai Yunus; 1976, 68). Kalimat-kalimat yang menjelaskan kemana arah pendidikan studi Islam, yang ditargetkan oleh IAIN, memberi kesan bahwa keberadaan Perguruan Tinggi ini seolah untuk memenuhi kebutuhan pemerintah akan tenaga terdidik dalam rangka mengisi posisi-posisi jabatan atau karir tertentu yang masih kekurangan.

Dengan demikian Fakultas Syari'ah di IAIN Imam Bonjol Padang tidak luput dari situasi awal tersebut. Para mahasiswa yang belajar di Fakultas Syari'ah IAIN Padang diarahkan untuk mempelajari ilmu-ilmu yang kelak menunjang karir mereka terutama di Pengadilan Agama. Selain itu salah satu nama dari dua jurusan yang ada saat itu adalah jurusan al-Qadha atau Peradilan Islam. Sementara yang kedua jurusan Tafsir Hadis(A. Rivai Yunus:1976: 104). Dari segi penamaan saja "*Qadha*" (peradilan) sudah tampak bahwa tamatan fakultas ini sudah diarahkan kemana karirnya sejak awal.

Sepertinya tidak ada redaksi pemerintah, selaku "pemilik IAIN" saat itu, yang dengan tegas membentuk lembaga pendidikan dalam rangka melahirkan ulama, yaitu (yang dalam konteks keindonesiaan identik dengan) figur yang secara nonformal berkiprah di tengah masyarakat, serta terlibat dalam mengeluarkan fatwa keagamaan. Namun dengan keberadaan sejumlah jurusan tertentu serta dengan melihat dari mata kuliah yang disediakan, dapat dipahami bahwa pemerintah pada dasarnya menginginkan terlahirnya sosok ulama namun dengan kategori (meminjam istilah Sanusi Latif, Rektor IAIN Padang pada 1976) "ulama-intelek". Biasanya dipahami cendikiawan agama yang juga menguasai dan menerima ide-ide modern (A. Rivai Yunus:1976: 9).

Seiring dengan berjalannya waktu, tatkala memasuki dekade ke 2 dan 3 (tahun80-an hingga 90-an) terjadilah perkembangan pesat pada aspek sosial dan politik Bangsa Indonesia pada umumnya (dan Sumatera Barat pada khususnya). Pada masa-masa ini ditandai dengan terjadinya berbagai kebijakan dan peristiwa yang berdampak terhadap kehidupan bermasyarakat dan bernegara. Di antaranya adalah terbitnya Undang-undang(UU) no 7 tahun 1989 tentang Peradilan Agama. Kemudian di tahun 1991 muncullah Kompilasi Hukum Islam(KHI). Pada tahun 1992 diresmikanlah perbankan berbasis Syari'ah pertama bernama Bank Muamalat. Kemudian pada tahun 1998 pecah krisis moneter yang berujung tragedi politik. Setahun kemudian terbitlah UU Zakat (Muhammad Atho Muzhar: 1994: 3/798).

Semua perkembangan di atas punya kaitan langsung dan tidak langsung terhadap studi yang dikembangkan di Fakultas Syari'ah. Dinamika-dinamika seperti di atas direspon dan dimanfaatkan pihak Fakultas Syari'ah. Kemajuan regulasi di bidang Peradilan Islam ditandai dengan perubahan nama jurusan yang sebelumnya bernama jurusan *Qadha* menjadi Peradilan Agama. Krisis ekonomi sejak tahun 1998 memicu antusiasme publik terhadap Bank Syari'ah yang direspon oleh Fakultas Syari'ah dengan mendirikan jurusan Perbankan Syari'ah. Beberapa tahun kemudian lahir pula jurusan baru Ekonomi Islam. Kedua jurusan tersebut punya rumpun yang berbeda dengan karakter Fakultas Syari'ah (Nur Syam: 2011, 2). (Sementara gejolak politik yang mengirngi prahara 1998, berujung kepada kelahiran berbagai Parpol-parpol Islam. Hal ini menjadi daya tarik tersendiri bagi jurusan Jinayah Siyasah)

Namun ada masalah krusial yang kurang dirasakan oleh insan akademis Fakultas Syari'ah (khususnya di lingkungan IAIN Imam Bonjol Padang) yaitu identitas keilmuan. Artinya kajian keilmuan yang diajarkan di fakultas ini belum berbasis kepada model pengembangan keilmuan syari'ah yang jelas. Di satu sisi Fakultas Syari'ah mendalami dan mengembangkan studi-studi Hukum Islam yang berbasis kaidah fikih klasik. Studi tampil dalam wujud ilmu fikih dan Ushul

Fikh serta turunannya. Namun di sisi lain fakultas ini juga tidak bisa mengabaikan kajian ilmu hukum konvensional yang menjadi identitas bagi Fakultas-fakultas Hukum "Perguruan Tinggi Umum" yang ada di nusantara. Ini terlihat adanya studi seperti Hukum Perdata, Hukum Pidana atau Hukum Acara Perdata. Situasi ini sudah lama menjadi beban pemikiran di kalangan akademisi IAIN di Indonesia (JM Muslimin: 2008, 3).

Pada pertengahan tahun 90-an Fakultas Syari'ah mengembangkan sebuah jurusan baru bernama *Jinayah Siyasah* atau *Pidana dan Politik*. Keberadaan jurusan ini terkadang menimbulkan kebingungan, karena di samping jurusan tersebut mengkombinasikan dua jenis studi yang berbeda, tatapi yang lebih masalah lagi adalah adanya kesimpangsiuran mengenai rumpun ilmu salah satu dari penamaan jurusan tersebut dalam hal ini Siyasah(Tim Penyusun; 1998; 78). Istilah Jinayah disepakati sebagai nama yang diasosiasikan dengan studi Fikih Jinayah (Hukum pidana Islam) yang berbasis kefikihan. Sementara istilah Siyasah bisa dipahami sebagai studi yang berbasis fikih atau Fikih Siyasah, tetapi tidak jarang istilah tersebut juga diasosiasikan dengan kajian Politik Islam, di mana rumpunnya tidak berbasis fikih namun mengarah ke Pemikiran Politik. Kenyataannya dalam kurikulum Jinayah Siyasah ada studi ilmu politik. Kemudian sejumlah besar penelitian (skripsi) yang disusun para mahasiswanya merupakan riset berbasis teori-teori politik, bukan Hukum Islam atau fikih (Tim Penyusun; 200 105-106).

Belakangan Fakultas Syari'ah juga mengembangkan studi-studi ilmu ekonomi dan kelembagaannya seperti perbankan, asuransi dan koperasi. Fenomena ini diawali dengan terbentuknya jurusan Muamalat di pertengahan 1990-an. Jurusan yang pada prinsipnya mendalami problematika ekonomi berbasis Hukum atau fikih Islam, ternyata juga memasukkan beberapa studi tentang Ilmu ekonomi konvensional dan perbankan(Tim Redaksi: 1998; 62). Namun perlu pula dicatat bahwa perilaku responsif pragmatis yang dilakukan oleh Fakultas Syari'ah IAIN Imam Bonjol Padang ini bukanlah fenomena mereka sendirian, tetapi hal tersebut menrupakan fenomena yang dialami Perguruan Tinggi Islam di nusantara.

Rupanya sebagian besar sikap responsif tersebut disebabkan oleh kecenderungan umum PTAI-PTAI di daerah yang selalu berkiblat dan mencontoh IAIN/UIN di Ibu kota dalam hal ini UIN Syarif Hidayatullah yng memang dekat dengan pusat pemerintahan. UIN ini dikenal tanggap dan kreatif dalam menyikapi aneka kebijakan pemerintah atau dinamika sosial di tengah masyarakat Ibu kota. Apa yang diperbuat oleh UIN Ibukota ini selalu menjadi barometer dan ditiru oleh PTAI lainnya di daerah(Khairul Atma; Tt, 1),tidak terkecuali Fakultas Syari'ah di IAIN Imam Bonjol Padang.

Adanya sikap responsif yang terkadang pragmatis ini sebenarnya tidak salah, bahkan sudah menjadi keharusan sebuah perguruan Tinggi modern memiliki kepekaan dan memahami perkembangan di tengah masyarakat (lokal/nasional) sekaligus meresponnya sesuai tutuntuan akademis. Namun di satu sisi ada segi negatifnya bagi perkembangan fakultas itu sendiri apabila tidak segera disadari dan disikapi dengan tepat. Adanya perkembangan yang begitu pesat di Fakultas Syari'ah Imam Bonjol Padang yang melahirkan berbagai prodi dan pengembangan keilmuan syari'ah (sebagaimana telah diceritakan di atas) berakibat kepada terjadinya kekaburan atau ketidakjelasan orientasi ilmu yang menjadi identitas Fakultas(Amzulian Rifai; 2010, 3). Hal demikian tanpa disadari akan ikut berperan dalam memperlemah atau mengaburkan arah pengembangan keilmuan syari'ah itu sendiri. Situasi inilah yang tengah berkangsung di Fakultas Syari'ah dan menjadi perdebatan tak berujung di kalangan akademisinya(Tim Redaksi: 2017: 5).

Menyikapi fenomena ini, J.M. Muslimin, (seorang akademisi UIN Syarif Hidayatullah, Jakarta) memandang bahwa, karena dualisme tradisi pendidikan (pendidikan umum dan keagamaan) di negara-negara Muslim, tradisi keilmuan yang bersifat saling memperkaya dan meminjam antara ilmu-ilmu syariah dan ilmu hukum tidak dapat berkembang. Lebih jauh, secara perlahan-lahan seiring dengan memudarnya tradisi ijtihad, maka proses saling meminjam dan memperkaya itu berubah menjadi tradisi keilmuan dan sikap ilmuwan yang defensif, menolak dan tertutup. Arah dan penajaman spesialisasi keilmuan kemudian lebih menunjang keberlangsungan dualisme tersebut. Tidak mudah untuk mengembangkan keilmuan syariah secara dialektis, saling meminjam dan mengisi di antara keilmuan syariah dan hukum(J.M Muslimin: 2008, 3)

Masalah lain yang juga perlu dikemukakan lagi di sini adalah terjadinya pola Keilmuan Syari'ah yang

"kurang membumi". Kalangan akademisi Fakultas Syari'ah sering kesulitan bila berhadapan dengan permasalahan yang bersifat nilai-nilai lokal. Mereka barangkali mahir dalam menjelaskan kaidah-kaidah dan teori-teori kefikihan yang banyak dan rumit, akan tetapi terkadang mendapat jalan buntu ketika mengimplementasikannya dalam kasus-kasus hukum yang muncul pada masyarakat lokal di sekeliling mereka. Hal demikian sebenarnya cerita klasik, tetapi masih saja terjadi hingga kini. Maka belakangan ada usaha untuk melakukan *indigeneousasi* atau pribumisassi Fikih/Hukum Islam. Artinya usaha untuk mentransformasikan Hukum Islam bisa terimplementasikan di tengah masyarakat berdasarkan kearifan lokal (*indegeneousasi values).*

Akhir-akhir ini IAIN Imam Bonjol Padang beralih status dari Institut menjadi Universitas, di mana perubahan ini memaksa semua fakultas yang ada dalam lingkungan Perguruan Tinggi Islam ini untuk menyesuaikan diri dengan status yang baru tersebut. Termasuk dalam urusan pengembangan keilmuan yang menjadi basis fakultas, termasuk Fakultas Syari'ahnya(Tim Redaksi: 2017, 3). Berdasarkan perkembangan itu pula, muncul kebutuhan mendesak untuk melakukan pengembangan keilmuan yang menjadi identitas suatu fakultas (dalam hal ini Fakultas Syari'ah UIN Imam Bonjol Padang). Karena pengembangan keilmuan suatu lembaga pendidikan tinggi melalui data empiris hasil penelitian merupakan faktor yang sangat penting untuk membangun teori-teori baru terkait dengan disiplin ilmu lembaga bersangkutan.

Masalahnya kini adalah bagaimana pola atau model yang akan diterapkan dalam prosesnya nanti. Selama ini Fakultas Syari'ah UIN Imam Bonjol Padang sudah melakukan beberapa bentuk pengembangan keilmuan. Bahkan sejak awal berdirinya Fakultas ini sudah langsung menampilkan studi Hukum Islam yang menyajikan variasi model Ilmu yang memadukan studi Hukum Islam (fikih) dengan studi-studi keislaman non Fikih seperti Tafsir, Hadis, Teologi dan bahasa. Dalam sebuah Naskah pedoman Kampus di tahun 1976, Fakultas Syari'ah diketahui sudah memasukkan studi Ilmu-ilmu Hukum umum, seperti Hukum Perdata, Pidana, Dagang dan Tata Negara, yang merupakan kajian akademis khas Fakultas Hukum "umum" (A. Rivai Yunus:1976: 104). Fakta ini mencerminkan adanya usaha pengembangan keilmuan dari Fakultas Syari'ah dalam bentuk sinergi Kajian Hukum Islam (fikih) dengan Ilmu Hukum Nasional. Pola ini seolah menjadi trend di tahun 90-an dengan bergabungnya studi-studi ilmu umum lain di bdang ekonomi dan politik seperti Ekonomi Makro/mikro, Perbankan, asuransi, manajemen dan iIlmu Politik (Tim Perumus: 1998, 58).

Apa yang menjadi faktor terjadinya pengembangan ini sudah diuraikan di atas. Namun yang jelas, motivasi utama adanya pengembangan tersebut lebih didorong oleh pertimbangan target karir bagi tamatannya. Pola pengenbangan inilah yang menjadikan Fakultas Syari'ah sama seperti lembaga pendidikan lainnya(baca: umum) yang berorientasi lapangan kerja dan agak menomorduakan peran-peran kemsyarakatan. Padahal yang terakhir inilah menjadi nilai lebih Fakultas Syari'ah.

Maka merujuk kepada situasi Fakultas Syari'ah, kecenderungan dunia keilmuan modern dan situasi sosial masyarakat akhir-akhir ini, Perhatianpun tertuju kepada suatu pengembangan keilmuan yang diperkenalkan oleh Ilmuwan Yogyakarta, Kuntowijoyo, yang mencetuskan model pengembangan keilmuan profetik (yang besifat multidimensi) dan punya basis kearifan lokal (*indigeneousasi).* Penyebutan model ini tidak lepas dari visi dari Fakultas Syari'ah UIN Imam Bonjol Padang sendiri yang dengan tegas ingin menjadi sebagai pusat pengembangan keilmuan syari'ah. Kemudian salah satu misinya menyatakan akan mengembangkan peran sosial-profetik keilmuan syari'ah dalam mendorong partisipasi dan kesadaran publik untuk membangun tatanan sosial yang berkeadilan dan berkemanusiaan**(**Muchlis Bahar; 2016, 13-14).

Usaha menentukan Model Pengembangan Ilmu Syari'ah Profetik di Fakultas Syari'ah UIN Imam Bonjol Padang" perlu dilakukan dalam rangka mencari formula yang terstruktur dan tersistematis guna memperoleh umpan balik serta penyempurnaan cetak biru kurikulum Ilmu-ilmu Syari'ah. Kelak dampak dari pengembangan tersebut akan melahirkan generasi akademis yang memiliki semangat untuk mengembangkan keilmuan syari'ah multidimensi dan "pribumisasi" Ilmu Syari'ah atau yang diistilahkan dengan *indigeneousasi.* Maka dengan sendirinya, haruslah pula didudukkan model pengembangan keilmuan dimaksud.

3. Nilai-Nilai Profetik Keilmuan Syari'ah

Studi ini tidaklah bermaksud melakukan klaim kebenaran namaun memberikan tawaran yang diaharapkan menjadi alternatif yang inspiratif bagi insan akademis Fakultas Syari'ah dalam rangka memajukan dan menggeliatkan antusiame terhadap Hukum Islam dalam menghadapi tantangan dunia yang terus dinamis. Publik Keilmuan Syari'ah juga diharapkan akan menyadari bahwa ternyata masih begitu banyak pola-pola yang dapat diterapkan dalam mengembangkan variasi keilmuan dalam lingkup keilmuan tersebut.

Maka untuk mengetahui seperti apa konsep keilmuan Syari'ah berparadigma profetik ini, penulis merumuskannya dengan menyematkan karakter profetisme ke dalam makna inti dari keilmuan Syari'ah. Maka dari sini penulis berpendapat bahwa keilmuan Syari'ah profetik adalah suatu studi yang berusaha menyelesaikan problematika dan atau identitas hukum suatu objek/kasus yang menggunakan seperangkat metode dan kaidah yang bersumber/ berdasarkan al-Qur'an-Hadis dan menjadikan nilai-nilai profetisme sebagai panduan filosofisnya.

Berdasarkan rumusan konsep di atas maka dapar dinyatakan di sini bahwa berbagai usaha dan aktivitas keilmuan di Fakultas Syari'ah yaitu berupa pemecahan problematika Hukum Islam (normatif dan empiris) akan menjadikan nilai-nilai profetik (kemanusiaan, pembebasan dan ketuhanan) sebagai dasar pertimbangan. Apabila rumusan konsep ini dapat dipahami dan disepakati, maka semua insan akademis di Fakultas Syari'ah UIN Imam Bonjol Padang dapat menjalani kegiatan keilmuannya (pembelajaran, riset dan pengabdian) dengan cara pandang yang sama, meskipun berbeda dari tipe ilmu Syari'ah keahliannya. Bila hal ini terlaksana baik maka akan terwujud sinkronisasi dalam mewujudkan cita-cita Fakultas, baik dari aspek keilmuan maupun kelembagaan.

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FIQH AND SOCIAL ORDER
Gender, Multiculturalism, and Environtment

Explosion of Conflict In a Heterogeneous Society (In Kampung Pondok, Padang City, West Sumatera)

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Abstract **-** Ethnic diversity in Indonesia can be understood by some social scientists such as; Hildred Geertz who says that there are more than 300 ethnic groups in Indonesia. Skinner revealed there are more than 35 ethnic groups in Indonesia and in terms of religious diversity, Indonesia recognizes 6 religions. This can be illustrated as in Poso, Sambas, Kupang and others. Kampung Pondok, Padang City, West Sumatra is an area that has a diverse population of ethnicity and religion. This highly heterogeneous area of opinion by Klinken and other ascertained in the Society As a result of ethnic and religious diversity. This research has found that in this village there are potential confrontation. Potential conflicts are found in the presence of crematorium places owned by certain ethnic and religious groups.

Key Words: *Conflicts, Ethnic, Religion*

1. Introduction

Indonesia is a diverse country in terms of ethnicity, religion and others. Ethnic diversity in Indonesia by Hildred Geertz is over 300 ethnic and Skinner says there are more than 35 ethnic groups in Indonesia (Nasikun, 2010: 40, 44). Meanwhile, according to Abubakar and Bamualim (2006: 86), Indonesia has approximately 500 ethnic groups. All these experts say that the ethnic people live each with different customs and languages because each ethnic group retains its ethnic and cultural identity in this homeland of Indonesia. These diverse ethnicities not only live in their respective areas but there is a process of social mobility that occurs. This condition causes some areas to be a gathering place and interacting with some ethnic and religious. In relation to inter-ethnic and religious social interaction, Jamuin (2004: 145) says that there will be meaningful interpretations in the process of social interaction, whether given to certain ethnic or members of a certain group by ethnic and other group religions. The meaning is related to words, deeds, clothes, lifestyle, professional choice, religious choice, and social choice.

In urban areas, the meaning of the inherent identity of the individual, whether by inheritance or cultural (cultural) influences is often the issue in social relations. The inherent identity of tribalism and religion becomes something that seems to be blamed when people lose their mind when there is a conflict with social interests. Errors committed by individuals are then reduced as representations of community behavior, This is what makes inter-ethnic hatred and hatred and encourages the emergence of aggressive behavior or open conflict between ethnic and religious. So inter-ethnic and religious conflict is a product of social interaction that occurs in society (Jamuin, 2004: 146, 200 and Habib, 2004: 23).

In some areas that have high societal heterogeneity in Indonesia and there are often ethnic and religious conflicts, as well as many of those conflicts are endangered by violence, such as the case of the conflict in Sambas-West Kalimantan that has been going on since the 1950s to April 1999, between ethnic Madura and indigenous peoples (ethnic Dayak, ethnic Melays and ethnic Thionghoa) (Irewati, et.al, 2001: 155, 168, 212). The large inter-ethnic conflict in Sambas-West Kalimantan between ethnic Malays and Madurese from January to April 1999 as well as other inter-ethnic conflicts that occurred in Indonesia such as the inter-

ethnic conflict in Ambon-Maluku that occurred on 19 January 1999 Until 15 September 2003, between ethnic immigrants (Bugis, Buton and Makasar) with local ethnic Ambon or conflict between Islam and Christianity that occurred in Poso with the death toll of thousands of people (Hadi, et.al. 2007: 150, 165, 179 -180).

History also notes that the eruption of violent conflict at the beginning of the fall of the Soeharto regime spread almost throughout the territory of Indonesia. Violence often occur in several big cities in Indonesia, such as Jakarta. Incidents of prolonged communal violence with ethnic and religious nuances also appear in Kalimantan, Sulawesi and Maluku. In addition, the acts of violence on behalf of pro-independence in Aceh and Papua have increased sharply, especially when the state responds with massive military operations. The political security turmoil in the Timor Timur Province also wriggled and the pro-independence group progressively demanded secession from Indonesia. This series of violence based on SNPK (National Violence Monitoring System) data in seven regions (Aceh, West Kalimantan, Central Kalimantan, Central Sulawesi, Maluku, North Maluku and Papua) has resulted in 16,113 people lost their lives and thousands of families displaced. The period (1998-2004) was a dark experience in the Indonesian historical record (Peranto, 2015: 1).

In the city of Padang, which is the capital of West Sumatera Province, also became one of the places where there are various ethnic groups that have existed from the Dutch occupation and in diversity there is also a tangent in social interaction, especially as in Kampung Pondok, West Padang. There are several ethnic groups living in this area such as Chinese, Minangkabau, Batak, Mentawai, Nias and Javanese. Likewise with the diversity of religion, Kampung Pondok community embraces five religions, namely: Islam, Catholicism, Protestantism, Hinduism and Buddhism (Colombijn, 2006: 93 and Profile Documents Kampung Pondok 2010: 3).

To identify potential conflicts within the community and to analyze what the community is doing as a sub-system in conflict management in order to create social harmony. The results of this study will add to the repertoire and study materials for the sociology of conflict and the study of social systems and structures.

The term conflict comes from a Latin verb that is configere meaning to hit each other. Once adopted into English then he became a conflict and then adopted into the Indonesian language (Wirawan, 2010: 5). Webster in Pruitt and Rubin says the term conflict in the original language means a fight, a war or a struggle, which is a physical confrontation between several parties. But the meaning of the word evolved with the intention of "sharp disagreement or opposition to interests, other ideas" (Pruitt and Rubin, 2004: 9).

Lewis A. Coser also provides a definition of conflict that is a hostile behavior. Coser pays attention to the origins of the conflict, this is the same as that of Simmel, that there is an aggressiveness or hostile feeling. But Coser criticizes Simmel's view that aggressiveness or hostility in people does not necessarily lead to overt conflict, so Coser adds a hostile behavior element, where this hostile behavior will cause people to experience conflict situations (Susan, 2010: 60).

Coser distinguishes two basic types of conflict, ie realistic and non-realistic conflicts. Realistic conflict has a concrete or material source, such as the seizure of economic resources or territory. Non-realistic conflicts are driven by irrational desires and tend to be idiological, such as inter-religious, inter-ethnic and other conflicts of conflicts. Non-realistic conflict is a way of reducing tension or reinforcing the identity of a group, and it manifests actual abominations that descend from other sources. According to him conflict can bear both types at once so as to produce more complex conflicts (Susan, 2010: 60-61).

For Coser, conflict is not only negative-faced, because conflict has a positive function to society through the social changes that result. Coser sees conflict as a mechanism of social change and adjustment, can give positive roles or positive functions, in society. So in a certain social relationship, concealed conflicts will not have a positive effect (Susan, 2010: 60).

Coser offers good conflict management to keep the group from possible social conflicts. Specific mechanisms for managing conflict or prevention are the savety valve. Rescue valves let the animosity out without destroying the entire structure, as well as helping to clean up the atmosphere in the chaotic group. Coser sees rescue valve serves as a way out that feels hostility, where without the rescue valve

the relationship between the opposing parties will get sharper (Poloma, 2010: 108-109).

While the Consequences of Conflict is meant by Coser namely: first, the conflict can be an instrumental process in the formation, unification, and maintenance of social structure. Second, conflicts can establish and maintain a boundary line between two or more groups. Third, conflicts with other groups can reinforce group identity and protect it from melting into the social world of its environment (Poloma 2007: 107).

2. Research Methods

The method used in this research is qualitative research method that is analyzing data in the form of words and deeds of human by interpretation. The data consists of people's conversations or oral data, writings (media writing, correspondence, government policy, minutes of meetings, etc., activities undertaken by people, signals conveyed by people and Physical expression like facial expression when excited and angry. Thus qualitative research methods can be defined as social science research methods that analyze data in the form of words, meanings, reasons of events and actions done by individuals and social groups by interpretation (Afrizal, 2008: 20-23).

Qualitative research methods used in this study, with consideration of the types of data to be collected and theoretical considerations. In this study, the researcher wanted to collect information about the efforts made by the local community in preventing the emergence of inter ethnic and religious violence in Kampung Pondok, Padang Barat Subdistrict, Padang City. Such data will be more fully revealed by using qualitative research methods because researchers here are not to see the relationship between two or more variables but see holistically (intact).

This research uses descriptive research type, where this research only develop concept and collect facts, but do not do hypothesis testing. As we know that descriptive research tries to find the widest possible data in order to seek the social conditions of a group of humans.

This research was conducted in Kampung Pondok, Padang Barat Subdistrict, Padang City, West Sumatera Province. The reason this place used as research location is:

1. Due to the high level of ethnic and religious diversity.
2. The existence of a latent conflict between multiethnic communities that occurred in the Village adjacent to Village Kampung Pondok (based on previous research).

In this study, in order to get informants in accordance with the study of the study, the authors use a deliberate mechanism (purposive) with criteria of research informants as follows:

A. Community leaders from ethnic and religious social groups who live in Kampung Pondok Village, Padang Barat Subdistrict, Padang City.
B. Organizations of social groups that play a role in the management of conflict or as a savety valve / Karangtaruna in the Kampung Pondok.

This research method is qualitative method, with data data technique through observation not involved, in-depth interview and document study. That is data reduction, presentation data (display), and withdrawal results / verification. (Miles and Huberman, 1992: 15-17).

The first data analysis performed data codification. At this coding stage the researcher rewrote field notes made when in-depth interviews were conducted. When the interview is recorded, the first step is to transcribe the recording. Here the researcher reads the entire field notes or transcripts to select important and unimportant information by signaling.

The second important flow of analysis activity is the presentation of data. Presentation of data as a set of arranged information that gives the possibility of drawing conclusions and taking action. In the research implementation plan, the presentation includes different types of matrices, graphs, networks and charts. Everything is designed to combine information composed in a coherent and easily accessible form (Miles and Huberman, 1992: 17-18).

The next important activity is to draw conclusions / verification that is to find relationships between categories of data and illustrated with matrices or diagrams. These three steps are performed or repeated every time after collecting data by any method. All three steps are carried out until the study ends. So the data analysis in this research is the process of categorizing the data, finding patterns / themes and

looking for relationships with the categories that have been found.

3. Result and Discussion

Kampung Pondok Villages is one of the villages located in Padang Barat District, Padang City. Kampung Pondok Villages has 11 RW and 33 RT. This village has an area of 65 Ha and with a height of 1.5 meters of sea level. The area of settlement is 21.3 Ha / m2, and 17.7 Ha / m2 of land is used for other purposes, including; Yards, offices, parks, tombs, and so forth.

According to the report of the Village Government, Kampung Pondok Village in 2016 has a population of 5.981 people. Consists of 2,818 men and 3,163 women with a total of 1,112 households. Kampung Pondok has five kinds of religions that are adopted by the people of Islam, Christian, Catholic, Hindu, Buddhist. The number of adherents of each of these religions can be seen in the following table;

Table.1. Jumlah Penduduk Menurut Agama

No.	Nama Agama	Jumlah Penganut
1.	Islam	2.514
2.	Kristen	1.241
3.	Katolik	1.812
4.	Hindu	25
5.	Budha	625

Sumber: Laporan Program Kerja Kelurahan Kampung Pondok, Kecamatan Padang Barat Tahun 2016

From the table above can be seen that the community in Kampung Pondok village most adheres to Islam is the number of 2514 people while the least religious religion adopted by the community here as many as 25 people. The diversity of religion adopted by the community is also supported by the existence of the place of worship, although not all religions have places of worship in the region. Place of worship that is in the village hamlet village are three mosques, three musholla and 1 pagoda. For the religion where the worship is not in the village hamlet village then to worship they go to the nearest area that has the infrastructure of religious penance.

Ethnic Diversity in Kampung Pondok Village

In addition to the community living beside with religious diversity, the people in Kampung Pondok Urban Village also vary in ethnic terms. According to the Profile of Kampung Pondok 2010, there are five ethnic groups: Chinese, Minangkabau, Nias, Mentawai, and Batak. The total population based on ethnicity is 5093 people. The highest ethnic population is from ethnic Chinese with 2902 people, while the lowest is Batak ethnic. More detailed data on ethnic population in Kampung Pondok Village, presented in the table below;

Table .2. Jumlah Penduduk Menurut Etnis

No.	Etnis	Jumlah
1.	Tionghoa	2.902
2.	Minangkabau	2.033
3.	Nias	78
4.	Mentawai	63
5.	Batak	17
	Jumlah	**5.093**

Sumber: Profil Kelurahan Kampung Pondok, 2016

Potential Conflict in Kampung Pondok Society

Kampung Pondok is one of the heterogeneous areas in terms of ethnicity and religion. In terms of ethnicity, Kampung Pondok has five ethnic and five religions. The most widely held religion in the Kampung Pondok is Islam and the least is Hindu, while the most ethnic in Kampung Pondok is ethnic Chinese and the least are Batak ethnic. Given these diversity conditions sometimes there are some things that can trigger contradictions in society, such contradictions have sometimes been followed by acts of violence. This has happened in the meeting of Manunggal Sakato project development plan in 1997. This happened due to misunderstanding between two meeting participants from different ethnic background, this conflict has the potential to cause conflict issues that are SARA (Suku, Agama, Ras, dan Antar Golongan).

In the meeting this development plan appears poor communication and followed by violence committed by one of the members of the meeting to members of other meetings. This violence resulted in the physical injury of participants from one ethnic group due to a glass toss to a meeting participant. News of this incident, when it has come to one of the ethnic Chinese organization that is HBT (Himpunan Tjinta Teman / Heng Beng Tong). Where Mr. Doni is the victim of joining the social organization HBT. Within this organization there is a

strong ethnic identity within each member, and they have an emotional bond between each other, because according to them if any of the members get unfavorable treatment from other ethnic groups then resulted in the group. At the time of the incident, the organization gathered its mass to invite Syahrial (glass-throwing) and ethnic groups, and the news had also reached the local police force (Wahyuni, 2013: 69-70).

Based on cases of violence and rejection between ethnic and religious, there are also negative assumptions or views of an ethnic group to other ethnic groups that sometimes also cause ethnic and religious tensions. Negative views are like the call "Kaliang puta babeliang" aimed at ethnic Indian descent (in Kampung Pondok Village called ethnic kaliang / rivet), and this ethnic is considered dishonest person.

Recently there has been explosion of conflict from other ethnic to ethnic Chinese descent. This incident resulted from the existence of a crematorium made by ethnic Chinese in the area of disclosure. The existence of this crematorium is considered to disturb the surrounding community because there is a procession of cremation of the body that its aroma is considered disturbing the surrounding community. In the case of the conflict of existence of this corpse crematorium the community rejected collectively around this cremation area.

In a local newspaper Posmetro Padang (Monday, 9 November 2015), it was reported that although the presence of a crematorium site in Kampung Pondok was rejected by residents because the location of the HBT crematorium would disturb the convenience, the city government still insisted that the crematorium was suitable And conduct a mature assessment. The operation of the crematorium has the full support of Mayor Mahyeldi Dt Marajo. Mahyeldi mentions that the crematorium HBT Pondok already fit the rules apply. If there is still rejection from a handful of people, Mahyeldi hopes that the police immediately act to secure the parties that cause conflict. This is reinforced by Head of Park Cleanliness Sanitation Department (DKP) Padang Afrizal Khaidir on Sunday. According Afrizal, the existence of crematorium is according to the rules. There are three things that are not violated by HBT Pondok, first in terms of Spatial and Regional Plans (RTRW). According to Local Regulation No. 4 of 2012, HBT Pondok is a cultural heritage area, but not a special area for settlement. Second, the building permit HBT is a funeral home. In terms of environmental aspect, HBT Pondok has prepared Environmental Management Statement Letter (SPPL). This means that crematorium does not have any impact on the environment. So the existence of this crematorium is in accordance with the laws and regulations. HBT Pondok has also used modern technology in burning corpses, so it does not cause odors, smoke, and does not pollute the environment.

Member of the Commission 1 of the people's parliament of the city of Padang, Azirwan said, in the granting of permits made by Pemko against crematorium, it is considered there is a violation of the law. And, Local Governmant should conduct a review again. He said, crematorium problems that have been issued permission by Local Governmant , violating the Government Regulation No. 9 of 1987 pasal 2 ayat 3 a. Where in the appointment and stipulation referred to in ayat (1) and (2) must be based on the Regional Development Plan, and / or the Urban Plan, with the following provisions: (a) is not in a densely populated area, (b) Avoiding the use of fertile soil, (c) Pay attention to harmony and harmony of environment, (d) Prevent soil and environmental destruction, (e) Prevent excessive use of land. "Clearly in Pasal 2 ayat (3) a, the establishment of the crematorium is in violation of being established in the midst of citizens' settlements.

This sense of unhappiness or dissatisfaction was not left alone by the village community leaders of Pondok Village, but at that time they immediately intervened trying to solve it by way of deliberation and kinship. This effort is made to avoid the conflict that does not develop into a larger conflict that can trigger violent conflict between ethnic groups and religion.

4. Conclusion

The conclusion that can be drawn from this research is the village village of cottage is in a heterogeneous condition in terms of ethnicity and religion that has occurred hundreds of years ago and this village was awarded a national level because it can manage the conflict between ethnic and religious. Although in a heterogeneous condition, it has been awarded, but in fact the village of Pondok village is

also not protected from potential conflicts between ethnic and religious. This is because there have been two outbreaks of conflict even though they did not develop into major ethnic and religious conflicts such as conflicts in development plans and conflicts in the presence of HBT crematorium sites.

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Protection of Girls from the Dangers of Sexual Violence in Indonesia To Design Sustainable Child Protection

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Abstrak – Children are the next generation of the nation Indonesia. Indonesia as a state of law is obliged to protection children, because it is the key to success of the state of Indonesia in the future. Today many girls are sexually exploited, this exploitation is done by irresponsible people. This prompted the President to issue a Government Replacement Act (PERPPU) about Kebiri. This study discusses: 1) how is the protection of girls after the amendment of child protection law? 2) Does this rule give a deterrent effect to potential perpetrators, to realize a sustainable child? This research is normative law research. From the research results obtained: 1) The substance of the regulation already protects the rights of the child well, and punish the perpetrators. 2) this rule does not give a deterrent effect for potential perpetrators of child exploitation, because there are still many exploitation of children in Indonesia. This is due to the still not running law enforcement in Indonesia. It is expected that in the future, law enforcers and the community will be active to protect children.

Key Words: *Protection, Sexual Violence, Indonesia, Sustainable.*

1. Introduction

The child is a gift that God gives to the family, the community, even the country. The birth of a child becomes a requirement of the survival of nation and state life. They are the generation that will replace us someday. That's why the child always gets more portions than any point of view. Protecting children against threats is a common task. It is the responsibility of all parties. Constitutionally may be the duty of the state, but it is morally obligatory to anyone. In fact there are still many Homework to be done in this country in order to protect children. Children are still vulnerable in our system that is still very necessary to continue to be addressed.

The recent case of sexual crimes against children is becoming more and more. Child predators roam around us. Cases of sexual crimes against children continues to increase. In fact, not infrequently children not only become victims of sexual violence, but at the same time killed. The phenomenon that is now the iceberg and ready to melt is a phenomenon of exploitation of girls by some irresponsible, girls being subjected to adulterous sexual satisfaction, or becoming commercial sex workers (Laurensius, 2016). This indicates that child protection has failed in Indonesia.

The worst case is the case of a 14-year-old girl in Bengkulu. The child who was still in junior high school was raped 14 people, he was then killed. The incident also attracted public attention. Even to the ears of President Joko Widodo. President Joko Widodo then held a limited meeting, specifically discussing about the handling of sexual crimes. Until finally, there arose the idea of imposing additional punishment of curiosity for perpetrators of sexual crimes against children.

The President then issued a Government Regulation in Lieu of Law (Perppu) on Kebiri. Perppu Kebiri or the so-called Perppu number 1 of 2016 on the second amendment to Law No. 23 of 2002 on Child Protection was approved by President Joko Widodo in May 2016. After that, the Perppu sent to the House of Representatives. Had a tough debate, the Perppu was finally passed into law. With the form of Law No. 17 of 2016 on the second amendment to Law No. 23 of 2002 on Child Protection.

The law regulates penalties to death penalties for child sex offenders, as well as life sentences, and

imprisonment of at least 10 years and a maximum of 20 years. Additional punishments include announcement of the identity of the perpetrator, and the act of chemical castration and the installation of chips to the perpetrator.

This study discusses: 1) how is the protection of girls after the amendment of child protection law? 2) Does this rule give a deterrent effect to potential perpetrators, to realize a sustainable child? It aims to look at the protection of girls after amendments to child protection legislation and the prevention effect on potential perpetrators to achieve sustainable childhood.

The legal research conducted is a normative legal research with normative legal approach method that emphasizes the use of materials or secondary data research with supported by library data. In addition, the study also uses a statutory approach to historical approaches and comparative approaches. Judging from the specifications, this study includes descriptive analytical research that describes and analyzes issues related to the protection of girls. The process of data acquisition to support the results of the research is done through the stages of library study using secondary data, which is trying to find books, concepts, theories and opinions of experts and findings that are closely related to the subject matter to be studied (Jhony Ibrahim, 2006).

2. Discussion

2.1. Protection Of Girls After The Amendment Of Child Protection Law

After President Joko Widodo signed the Perppu Kebiri and passed into law, this regulation also regulates the punishment of candor for the perpetrators of sexual crimes against children. This regulation to address the crunch caused by sexual violence against children is increasing significantly. Child sexual abuse is an extraordinary crime because it threatens and endangers the soul and the child's growth. The crime also disturbs the sense of comfort, security, and public order.

Sanctions are regulated in the form of chemistry and the installation of electronic detection equipment so that the perpetrators can be detected after moving out of prison. Punishment is also condemned to death sentences, life sentences, a maximum of 20 years and a minimum of 10 years in prison. The addition of the article in this Perppu to give the judges room gives the most severe punishment. We hope the presence of this Perppu gives deterrent effect to the perpetrators and suppress sexual crimes against children.

Vice Chairman of the Indonesian Child Protection Commission (KPAI) Putu Elvina said the number of cases of sexual violence against children declined. The decline occurs after the release of a new child rule. In the Year 2014 total cases 5,000, decreased to 4,309 cases in 2015 after the discourse about the punishment of the left is exhaled. In 2016 to April 3,134 incoming cases (Detik.com, 2017). This new rule does provide little warning and deterrent effect on the perpetrators of sexual violence against children.

The fact that happened, Yuyun case has not been completed, then reappear a similar case. No punishment of any kind will ever solve and stop cases of crime and violence, including against children. By castrating or executing rapists, millions of Indonesian children are still at risk of experiencing similar things. Proven in some countries that apply a similar penalty does not reduce the number of perpetrators of crime.

Ironic see a castrated chemical. When the symbol of manhood can no longer be used. In view of the constitutional point of view, formal juridical punishment violates constitutional and human rights, perpetrators of sexual violence, as provided for in Article 28B paragraph (1) of the 1945 Constitution, which states that every person has the right to form a family and to continue the offspring through legal marriage. Based on that understanding and in line with the principle of hierarchy of legislation, it can be drawn hypothesis that the enactment of criminal prosecution criminal juridical law is contradictory to the 1945 Constitution.

Although it has become a law, in accordance with the code of ethics and professional oath of a doctor, the Indonesian Doctors Association declared unable to perform the duties as executor. In accordance with the universal virtues of ethics and profession, the doctor during reciting the doctor's oath and following the medical ethics, can not be the executor of the noble (N. Nazar, 2016). But that opinion is contrary to legal certainty, as long as a law is legitimate and binding in our country, then all citizens including doctors are

obliged to carry it out. So, if there is a law order for a doctor to perform the act of carrying out duties under the law, then the doctor must comply. Of course, in the execution of the punishment of "chemical kebiri" it has been enforced and fixed by law (Jamesallan Rarung, 2016). If implemented, then that is not a denial of the code of ethics and doctor's oath. Unlike the case if this action is done by the doctor against innocent people legally.

2.2. Deterrent Effect To Potential Perpetrators, To Realize A Sustainable Child

The concept of "sustainable" is a concept often used in environmental studies and environmental law, which is associated with sustainable development. The establishment of legislation is directed to social life and requires certainty, consistency and trust (Yuliandri, 2009). In harmony with the concept, it is necessary to maintain the pattern of child protection by the government, because by using this concept, the protection in each region will take place continuously.

The principles of the right to life, survival and development are the most basic human rights of children protected by the state, government, society, family, and parents. This principle illustrates that the right to life, survival and development are the most important child rights to protect (Darwan Prinst, 2003). Rika Saraswati states that the last principle is the principle of appreciation for the opinion of the child is respect for the rights of children to participate, and expressed his opinion in decision-making especially when it concerns things that affect his life. This principle aims to encourage the participation of the child in the fulfillment of his / her right to carry out all actions taken in the life of the child by including: 1) the right to argue, and to reason with his opinion; 2) the right to obtain, and to know information and to express; 3) the right to organize relationships to join; And 4) the right to obtain appropriate information, and be protected from unhealthy information (Mochammad Fahruz Rizqy, 2015).

It is better for the government from now on, to create a pattern of child protection, so that the ongoing form of child protection can be run in accordance with the wishes of humans in general. The pattern can be initiated in several forms of patterns, namely: (1) Patterns of family and family friendly family, Patterns Patterns of family care becomes one of the factors preventing violence against children. The main foundation of the family to create a superior child is very minimal. It is time for families to take a role or responsibility for the protection and development of children in the future; (2) Pattern of Education; (3) Training For Bride Candidates To Fix Patterns of Care; (4) Youth Pioneer Prevention of Child Predators and Child Protection Advocacy; (5) Child-unkind impressions and games must be closely monitored; (6) Overseeing early marriage and child selling (Laurensius, 2016).

3. Conclusion

The government, whether it be the leadership of Jokowi or before, often applies antidotes to various problems in the country but does not solve the underlying problem. Similarly, in determining and selecting a criminal law policy formulation regarding child sexual abuse. In addition to encouraging the option of aggravating punishment for the perpetrators, the government has also taken preventive measures. So the approach in tackling child sexual violence can be approached with a repressive or preventive approach (prevention) as well. However, until now only a repressive approach has been echoed and never before the government launched a systematic blueprint for the overcoming of sexual violence against children. This rule kebiri does not give a deterrent effect for potential perpetrators of child exploitation, because there are still many exploitation of children in Indonesia. This is due to the still not running law enforcement in Indonesia. It is expected that in the future, law enforcers and the community will be active to protect children. Ensuring the fulfillment of children's rights in order to live, grow, develop, and participate optimally in accordance with the dignity and dignity of humanity is a manifestation of quality Indonesian children, morality and prosperity is the dream of the Indonesian nation. Establishing the pattern and concept of sustainable child protection from as early as possible means equal to protecting the Indonesian people in the future, because by producing intelligent children it will affirm that Indonesia is in the hands of children who are ready to defend the unity and progress of the future Unitary State of the Republic of Indonesia.

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STATE, RELIGION, AND CULTURE

Social Change, Globalization, Nationalism, and Locality

Religion in Stateless:
Compromising the Exclusivist Doctrine of Religion in a Pluralistic State

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Abstrak – A series of exclusive doctrines in Islam covers the virtue of doing good and avoiding evil (*amar ma'ruf nahyi munkar*), choosing a Moslem leader, formatting shari'a of Islam as the positive law of the state, noticing democracy as *thaghut* and *kafir*, altering Pancasila as the states of ideology and dichotomized between tax and *zakat*. It is considered as a noble and holy task to apply them in daily life. However, when those doctrines injected to national life as an adjunct to, it will create friction between the adherents of other religions, and lead to the disintegration of the nation. This paper discusses how to 'compromise' the exclusive teachings of religion in the context of the pluralistic Indonesian nation of life. As a good Moslem, we have to realize that we need the state to strengthen the structure and pattern of religiosity activities starting from prayer, fasting, *zakat*, *haji*, and other religious duties. Therefore, it is not enough to be good Moslems in this state but also to be good citizens.

Key Words: *doctrine, exlusive, pluralistic, da'wah, shari'a.*

1. Introduction

The Indonesian pluralistic is a blessing and a gift from God Almighty. Therefore, maintaining and caring for the unity is essential. A prosperous and dignified Indonesia can be achieved due to a harmonious life and peace people have hoped for. This is especially true and a must when it comes to people living in the different religion and ethnic.

In a pluralistic society, it is necessary to have rules that contain ethical values and moral messages serve as a common guideline both personally and in groups, in order to avoid crashes in the community. This diversity inspired the Indonesia nationalist leaders to formulate *Pancasila* (the five principles) as the official foundational philosophical theory and national symbol where national motto of Indonesia *Bhinneka Tunggal Ika* is inscribed.

Today, many phenomena show where there are group of people that seem to live in their own dreams and deny other citizens who have the same legal and equal rightsbecause of different views and beliefs. This can be seen, for example through *amar ma'ruf nahyi munkar* pattern shown by the Islamic Defenders Front (FPI). They take over the duty of the state apparatus; reject non-Moslem leaders in a demonstrative manner, notice democratic as the system of *thaghut* and *kafir*, formalize the Shari'a of Islam as a national law, and create anti-Pancasila movement. There is also a dichotomization of *zakat* and taxes, where a person is only willing to pay *zakat*, but not taxes and others.

These phenomena are motivated by the exclusive doctrine of religion. Sometimes they occur as a result of textual, narrow, and rigid understanding of religious teachings. Regardless, if this exclusive teaching is applied in the context of pluralistic national life, it will lead to frictions between adherents of other religions, and disintegration of the nation.

Diversity is a reality that must be accepted by Indonesian. This country was built by hundreds of ethnic from Sabang to Merauke who agreed together struggled from the shackles of colonialism, aspire to realize an independent country, and build a peaceful life together, just and prosperous. The same fate and goals are strong attributive to size the various ethnic groups to build this country; Indonesia.

This paper discusses how to 'compromise' the teachings of an exclusive religion in the context of a

pluralistic life in Indonesia. In other hand, it deliberates how we remain obedient to the teachings of religion without creating friction. It also discusses some relevance current issues such as the pattern of *amar ma'ruf nahyi munkar*, democracy as a national system, Pancasila as the philosophical ideology, and *zakat* and taxes.

2. Discussion

2.1. Method of *Amar Ma'ruf Nahyi Munkar*

The virtue of doing good and avoiding evil (*amar ma'ruf nahyi munkar*) is a sacred duty in Islam. It is as mentioned in the QS. Ali Imran [3] verses 104 and 110. The Prophet also commands the same through his saying: "*Whoever amongst you see munkar, then let him change it with his hand* (*power*)*, if he is unable, then with his tongue* (*advised*)*, and if he is not able to as well, then with his heart* (*was not happy and do not agree*)*, and thus it is the least of weekof faith*." (Narrated by Muslim). The question arised, how to proclaim this Islamic *da'wah* in Indonesia where the pluralistic exists? Can this task be carried out individually, or should official institutions take part? Good (*ma'ruf*) and bad (*munkar*) have different concept and different meaning from each other based on their embraces values with religious and cultural views, do not they? In the national pluralistic context like Indonesia, the practice of *amar ma'ruf* and *nahyi munkar* can not be done by individuals or organizations (groups) irregularly. The official institutions should contribute positively. We can imagine when every person and organization (group) did *amar ma'ruf* and *nahyi munkar* based on their understanding and their values, they are accused heresy. *Amar ma'ruf nahyi munkar* can not be done perfectly without government.

There are three methods mentioned by the Prophet in ordering right and and prohibiting wrong as explained in the previous hadith. First is changing it by hand. It means that whoever among people sees wrongdoing; they have to recify it with his power. Those with power and authority such as official institution must be able to create regulations, conduct raids, arrest offender to seizure *amar ma'ruf nahyi munkar*. This kind of action can not be completed without the duty of rulers as subjects is to draw up those programs. If a particular person or group enforces the law, it will lead to a greater harm, chaos, disputes, and can not solve *munkar*. There is no legitimation for individual or group to take over the duties of the state apparatus. Eradication of munkar should not be done in an unjust way, because it will lead to another *munkar*. There is no obligation for certain individuals or groups who do not have the power to perform *amar ma'ruf nahyi munkar* by hand, because it is the responsibilities of the government do it.

The second method is by tongue. *Amar ma'ruf nahyi munkar* can be done through argumentation and explanation. It is a task for educated people those who are able to convey arguments and explanations. There is no obligation for those who have no knowledge to perform *amar ma'ruf nahi munkar* orally. If it is imposed, it will cause new *munkar* because of giving wrong explanation. Ones who enforce *amar ma'ruf nahyi munkar* must know which *ma'ruf* and what is *munkar* completely. If not, then this will be misleading.

The last method for enjoing what is good and forbidding what is evil is due to heart. It is obligatory upon all Moslem to change evil action by feeling that it is wrong. This denial is for anyone who does not have the ability to perform *amar ma'ruf nahyi munkar* by power or by verbal. The Prophet said: "*Woe unto whose hearts neither know good nor evil*." (Narrated by Thabrani).

In a state context, it needs cooperation among government, ulama, and the people to perform *amar ma'ruf nahyi munkar*. Ordinary people are obliged to dismiss with their hearts against *munkar* and report it to the authority's affairs, for *hujjah* enforcement (argumentation) by scholars (educated), and law enforcement by the government apparatus. If there is no cooperation, or one of them ignores the task, or handled by unauthorized parties, there will be turmoil within the state. If *munkar* is abandoned and there is no *amar ma'ruf nahyi munkar*, then there will be damage in the country that will be felt throughout the population of the country. Thus, we remain of being good Moslems, for inviting others to do good and to hate *munkar*, and we remain good citizens, for surrendering the act of *munkar* to the authorities, not by any individual or group.

2.2. Democracy as a System

It is a common some questions raised whether democracy is compatible with Islamic features. Others might ask; does Islam ever set a system model in

electing council of leaders? Is democracy not an Islamic political system? To answer the questions above, let us review the process of selecting and designating the caliph after the death of Rasulullah Saw. The process of appointment of Abu Bakr as-Shiddiq to the caliph was carried out in a deliberation at Saqifah Bani Saidah (a hall in Medinah). The meeting was held because the Moslems, either Anshar or Muhajirin believe that the Muhammad, a messenger of Allah never appointed someone as his successor. The Prophet also never gave an example of a procession of a leadership transition. In short, Abu Bakar was chosen by majority vote of deliberation participants at that time. Abu Bakar was elected democratically through a fairly tough debate process.

After Abu Bakar's death, it was Umar bin Khattab who became the next Moslem leader. Umar bin Khatthab was appointed as caliph through the appointment of the caliph Abu Bakar after obtaining the consent of the great companions. It was done Abu Bakar to avoid political conflict between Moslems themselves. He worried that the appointment was made through the election process as in his time, then the situation would be chaotic, because there may be many interests that exist among those who make the country become unstable, so the implementation of development and development of Islam will be hampered.

Furthermore, the process of choosing Usman bin Affan as a caliph is desribed. When Umar was ill, he summoned six tribal elders. The six tribal leaders, Ali bin Abi Talib, Usman bin Affan, Thalha, Zubair bin Awwam, Sa'ad bin Abi Waqqas, and Abdurrahman bin Auf. Umar invited them to deliberate internally to seek his successor after his death. In the deliberation process, Usman is decided as caliph to substitute Umar. In the modern era, this system is known as the formation system.

Further, the process of election Ali bin Abi Talib replaces Usman as caliph. People know that Usman bin Affan was killed in Friday night Dzulhijjah, 18th 35 H. Before Usman was buried, the Moslems then appointed Ali bin Abi Thalib as the successor of Usman bin Affan. Thus we can understand that the process of leadership transition from Usman to Ali is through a coup process.

From the chronology, it can be concluded that Islam has never set the leadership election model in a definitive way, but it is left entirely to consensus in a country governed through its own constitution. Thus, it is not correct to assume that this democratic or electoral system is contrary to the teachings of Islam, even if the democratic system is triggered by the West. Indonesia has agreed to adopt a democratic system in the leadership election system. In democratic system, all societies either in terms of race, color, sex, or religion are in the same position. They both have the right to vote and to be elected. The quantity and quality of the vote value are also equal; one man one vote. As a consequence of democracy, all have the same right to compete in every succession of leadership change, including from different religious backgrond, even though in Islamic religious doctrine ones should not choose non-Moslem leaders (the argument can be disputed).

At this juncture, a Moslem is challanged with hard choice. He must obey his belief of the religious teachings. In other hand, he must follow democracy, the agreed method of leadership elections system. He should to be a good Moslem as well as a good citizen. It is clear that Islam states that choosing a non-Moslem leader is *haram*. According to authors, the most appropriate attitude is enough for him to vote on Moslem candidate in the polling station without acting demonstratively and offensively in public. If this exclusive religious doctrine is demonstrated in the public, such as on campaign platforms, it will create friction within society. It will also lead to dissension and disintegration of the nation.

2.3. Pancasila as the State of Ideology

The discussion between the nationalist and the Islamist groups on the basis of Indonesian from the beginning to the present day seems to be continuining. The nationalists expected that a country could embrace all Indonesians without making a particular religious teaching as the basis of the state. However, Islamists seize the teachings of Islam as a foundation of constitution.

When we look at the five principles carefully, they are very in line with the teachings of Islam. There is no precept contrary to the spirit of Islam either other religions. From a vertical problem to a horizontal problem all are accommodated in Pancasila. Vertical problems are contained in the first principle

of Pancasila, "Belief in the one and only God." The second until the fifth principles involves horizontal issues regard to human relationships in society. They are also very much in line with the principles of Islamic teachings in regulating human life, such as the value of justice, civilization, unity, and deliberation. These values are highly respected in Islam.

It is found that pancasila actually implies the teachings of Islam if ones examined the values of Pancasila. Integrating religion symbols as the foundation of the Republic of Indonesia will cause new problems. Even though Indonesian is dominated by Moslem, others have different beliefs and religions. They must be resistant to it. If Indonesia uses the Islam symbols as the basis of the state, then it is not relevant to the condition of the plural society in terms of religion.

Pancasila accommodates not only the aspirations of Islam, but also other religions in Indonesia. Pancasila does not use religious symbolsindeed its essence is universal values of various religions. When we interpret the values of Pancasila, it does not mean that we do not practice the doctrine of Islam. It contains guidance of living in a nation and the core of religions that exist in Indonesia. By looking at Indonesian society, Pancasila is the best choice as the philosopical foundation.

Indonesia has been successfully established as a country, but not as a nation. Anation is formed on the basis of equality, both because of the similarity of tribe, religion, and others. For example, let us examine the people of Aceh and Papua. It is hard to find their similarity whether in terms of religion, culture, language, and skin color. Another example is when ones observe the people of Bali and Riau. They differ in terms of religion, culture, and language. None of these features shares similarities. Pancasila is the instrument that can unite all these differences. Toaccommodate all the diversity, Indonesian Founding Fathers compromise them in Pancasila.

Pancasila as a source of Indonesia value are excavated, grown, and developed from the culture of the nation. Then, it becomes an ideology that is inherent with the nation. The values of Pancasila serve as a way of life, attitude and behave references.

2.4. Dichotomized Zakat and Taxes

The existance of *zakat* is associated with the wealth and income of Moslems. There is an obligation to purify wealth for those Moslem who have wealths over a certain ratio. As an Indonesian, Moslems also have to pay tax obligations for those who have qualified. Indonesia law sets it. Tax is enforceable contribution exposed on all Indonesian citizens; the usage is support financial and national development.

Thereare pros and cons among Moslems responding to this tax obligation. As mentioned before, when a Moslem meet the criteria, he obliges to pay *zakat* and at the same time he has to pay tax due to Indonesia regulation. Some scholars consider that *zakat* and tax are two different entities and cannot be united. According to them, *zakat* is the spiritual obligation of a Moslem against his God, while tax is his duty to the state.

These tax related counter pros should be seated in the proper proportion in order for mutual understanding to bring prosperity particularly to the Moslems welfare and Indonesian people in general. Thus, a critical study is needed to integrate the two obligations so that a Moslem's obligation to religion and country can be accomplished simultaneously.

For those who forbid reasoned that in the Qur'an or hadith there is no command to held the collection of *zakat*, even that there is a prohibition for tax collection, such as the hadith of the Prophet: "*It is not lawful for a Moslem's property except with the willingness of the owner.*" (Narrated by Ahmad). The argument specifically explains tax hazards and threats to its pullers, among them are: "*Verily the tax collector* (*al-maks*) *is tortured in hell*." (Narrated by Ahmad and Abu Dawud). It is this tradition which is often used to forbid taxation, and also as an excuse to not pay taxes. In addition to the hadith, they also hold to the opinion of ulama who forbid *al-maks* (charges), such as the opinion of Imam al-Nawawi and Ibn Hazm.[1]

1. Actually, Ibn Hazm had forbidden was *al-maks*. The meaning of *al-maks* is a kind of charges in the streets, at the gates of the city, in the markets in the form of taxes on goods carried by people who are passing by it as well as the goods brought by the merchants. This includes wrong doing and the law is banned (*haram*). The most appropriate word for tax in the present context is *al-dharibah* (الضريبة), which means language "load." Why is it called *dharibah* (burden)? Because tax is an additional obligation (*tathawwu'*) for Moslems after *zakat*, so in its application it will be perceived as a heavy burden or pound. (See Yusuf al-Qaradhawi, in *Fiqh al-Zakah*, page. 211). Thus, the *al-maks* is not the same as the tax officer (*dharibah*). The *Shahib al-maks* is the tyrannical tax officer, who levies taxes on markets where there is no command and example of the Prophet, just like a thug who asks for money to the market traders. Tax officers who collect money are not constituted by law.

While the opinion that justifies the tax argues that the arguments used by the counter they with tax payments are not appropriate to apply to current taxes. The argument is as follows: first, tax is not extortion. The charges referred to in the foregoing argument are forbidden, because they are extortion of those who are strong to the weak. The above arguments are more contexts of the age of *jahiliyah* in the period before the prophethood. But after the arrival of islamic treatises, taxes still exist despite certain conditions. When compared with the present, the illegitimate tax is the tax applied in the colonial period, when the Dutch East Indies government in power and collect taxes that extort the sweat and blood of the people. Therefore, the people of Indonesia to fight physically to expel the invaders, which in essence they are nothing but tax collectors. Today, though taxes are levied on the people, but are implemented by the state on the basis of need and also with the consent of the people's representatives. So the tax in the present is tailored to the ability. For example, luxury taxes, of course, only imposed on the people who have luxury goods. The poor commoners are certainly not charged. If we eat at street stalls, the price is very cheap, because it is not taxed. Conversely, the price of food in a five star restaurant becomes multiplied, one factor being taxed.

Second, tax returns for the peoples. In contrast to the levies of the forbidden past, the tax on this day is in principle more a consensus among the people to equally finance the administration of the state. So the principle is that the tax money from the people will be returned to the people, and in the interest of the people. Like the dues of security and hygiene in the neighborhood where we live, every month each house collected dues used to pay security guards and janitors. Of course all this for the safety and the environmental cleanliness. So we can not say that the dues of security and hygiene are illegal payments. On the contrary, the payment is even obligatory.

Third, they that forbids the tax often postulates that the Prophet said: "*There is no obligation in the affairs of property except zakat*." (Narrated by Ibnu Majah). But the notion of this hadith is not appropriate if we apply it haphazardly. If so, then the debtors will not pay their debts, on the grounds that religion only obliges us to pay *zakat* instead of paying the debt. So also the person who vowed, will also cancel the intention, just for the reason that the property must be only *zakat*. The meaning of the above hadith just wants to establish that basically the basic obligation in Islam is *zakat*. As for the case where someone owes, of course he must pay the debt. Similarly, if we agree to become citizens of a country and it has been established that among our obligations as citizens is to pay taxes, of course we easily understand that the obligation we have to admit.

And addition to the above argumentation, the reason for allowing taxes is for the benefit of the people, since government funds are insufficient to finance expenses, where if the expenses are not financed, then there will be harm. While preventing harm is also an obligation. As the *kaidah* of Ushul Fiqh: "*Ma layatimmu al-wajib illa bihi fahuwa wajib* (If an obligation is not perfect except with something, then something is also obligatory)." (Jalaluddin as-Suyuthi, 1408 H/ 1988 M: 203). The scholars who allow the Islamic government to take taxes from the Moslems include al-Juwaini in the book of *Ghiyats al-Umam* page. 267, al-Ghazali in *al-Mustashfa*, I/ 426, asy-Syathibi in *al-I'tishom*, II/ 358, Ibn Abidin in *Hashiyah Ibn Abidin*, II/ 336-337, and others.

Ali Abdurrasul in his book, *Mabadi' al-Iqtishad fi al-Islam* mentions that during the reign of Prophet Muhammad as head of state in Madinah (622-632 M/1-10 H). The most important source of state income and the greatest is *ghanimah* (spoils of war) obtained from non-Moslems through warfare, which then the treasure is divided according to Allah's orders on QS. Al-Anfal [8] verse 1 and verse 41, 4/5 are troop rights, and 1/5 are divided for Allah, the prophet Muhammad, Prophet's family, orphans, poor, and *ibn sabil*. From this treasure *ghanimah* paid army salaries, war costs, living expenses of the Prophet and his family, as well as various general purposes.

The second source of income is *fa'i*, the spoils that Moslems get from enemies without war (QS. Al-Hashr [59]: 6), are distributed to Allah, prophet Muhammad, Prophet's family, orphans, the poor, and *ibnu Sabil*. Gained without war, there is no army rights in it.

The third state revenue comes from *kharaj*. The rent of land collected from non-Moslems when Khaibar was conquered, this is of seventh year of Hijrah. Initially the entire land conquered by the Islamic government,

was robbed and made state property. But then, Umar bin Khattab gave his *ijtihad*, he doesn't give it to the Moslems, but still gave ownership to non-Moslems, with obliged them to pay rent on the treated land (for *kharaj*).

The fourth source of national income is *'ushr*, from import duties imposed on all traders who cross the border of the country, which must be paid only once a year, and applies only to goods with a value greater than 200 Dirham. The rate of duty granted to non-Moslems is 5% and to Moslems by 2.5%. *'Ushr* paid by Moslems still belong to *zakat*.

The fifth source of income is the *jizyah*, which is tax paid by non-Moslems, especially scribes for the protection of life, property, worship and non conscription. They remain obliged to pay *jizyah*, while they have not yet converted to Islam. This is in accordance with Allah's command in QS. Al-Taubah [9] verse 29.

The sixth source of income is *zakat*, that is the obligation of the Moslems on certain property which reaches a certain *nishab* and is paid at a certain time, according to the command of Allah in QS. Al-Taubah [9] verse 103.

From the description of the sources state revenues above that shows the income of the state in the early Islamic period in Madinah originated from non-Muslims (*ghanimah*, *fai'*, *kharaj*, *jizyah*, and *'ushr*), and also from the Muslims that is *zakat*. But along with the expansion of Islamic territory which resulted in many infidels entering Islam. So that from them (non-Muslims) can no longer be obtained *ghanimah*, *fai'*, *kharaj*, *jizyah*, and *'ushr*. But from these sources it is financed by various state expenditures such as paying soldiers and officials, building facilities and infrastructure and other routine expenses. Because there are no sources of state income such as *ghanimah*, *fai'*, *kharaj*, *jizyah*, and *'ushr* in the present time. Emerging new thinking (*ijtihad*) from the ulama which was then ratified by the leader (*Ulil Amri*) as a new source of income. One of the results of ijtihad is tax (*dharibah*).

Other reason, appears tax (*dharibah*) because to the limited purpose of the use of *zakat*. Although the acceptance of *zakat* increases as the number of Muslims increases, but *zakat* should not be used for public purposes such as hospitals, highways, lighting, irrigation, bridges, schools, offices, hiring employees, etc, as Allah says to QS. Al-Taubah [9] verse 60. And Rasulullah who is also the head of state other than the Prophet, forbid himself and his descendants to eat *zakat* money. (Sayyid Sabiq, 1409 H/ 1989 M: 4/212). Zakat also has a time limit (*haul*), it is a year and minimum level (*nishab*). So it can not be collected at any time before maturity. The purpose of the use of *zakat* has been established directly by Allah Swt and is exemplified by his prophet Muhammad Saw. Moslems should not be permitted in making the aims of *zakat*, as can not be *ijtihad* in the ordinance of prayer, fasting, pilgrimage, and other *mahdhah* worship. The opportunity of *ijtihad* for pure worship is already closed.

There is another tax (*dharibah*) because the leader is obliged to meet the needs of his people. If there is a state of cash condition is less or empty because there is no *ghanimah*, *fai'*, and *zakat*, then a leader is still required to meet the three basic needs of the people such as: security, health, and education. If the needs of the people are not held, and it is feared there will be a danger or greater danger, then the leader is allowed to collect tax (*dharibah*).

Therefore, the opinion that the tax is unlawful is inappropriate. Tax (*dharibah*) is found in Islam which is one of the state revenue based on ijtihad leader (*Ulil Amri*) approved by the House of Representatives (*ahl al-halli wa al-'aqdi*) and the approval of the scholars. *Zakat* and taxes, are both obligations in the field of property, although have the different philosophies, traits, principles, sources, targets, sections, and levels. Moslems can see that *zakat* still holds the highest rank compared with the results of financial thinking in the form of taxes in modern times, both in terms of principles and laws. But as a citizen does not mean may be free of tax obligations, for any reason, including theological reasons. The arguments that serve as tax breaks can not be understood textually. But must be understood by contextually.

3. Conclusion

As a good Moslem, we have to realize that we need the state to strengthen the structure and pattern of religiosity activities starting from prayer, fasting, *zakat*, *haji*, and other religious duties. Therefore, it is not enough to be good Moslems in this state but also to be good citizens.

The Unitary State of the Republic of Indonesia (NKRI) is a plural society. As a very diverse nation, There may be friction between one element and the other. Very regrettable, there are still parties who like to warm up the Ethnicity, religion, race, and group (SARA) issue and politicize religious issues, where religious issues are very sensitive in Indonesia. How this nation will progress and can build, if energy runs out for a fight. It is impossible to live without contact with others, who may be different religions, ethnicities, understandings and classes.

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Islamic Law in Indonesia: Deconstruction and Reactualization

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Abstract - The idea of Islamic law deconstruction in Indonesia is in accordance with the subject matter that is in tune with the dynamics of social change, becoming a mainstream, with an obsession "establish a puritanical Islamic style and modern". The idea of this epistemological deconstruction, hypothesised in the form of Islamic social thinking reformers. Rational thought was instrumental in reviewing the rationality of the Qur'an to gain knowledge, as a basic framework for the truth of a belief. Legislation in the Qur'an contained general principles and specific legal. The general principle is the meaning and reasoning behind the specific legal provisions, sometimes stated explicitly accompany specific legal expressions. In Islamic law thinking updates notion of Islam in Indonesia, substantively, there is a fundamental distinction between the teachings of Islam that is *qath'i* (absolute) and *zhanni* (relatively). Distinction between *qath'i* with *zhanni* so stressed, because in this case it is an open space for ijtihad. Flexibility in the development of Islamic legal thought in Indonesia is very relevant to introduce the ethos of progressivism in the dynamics and crystallization of Islamic law. The implications of this pattern of progressive thought is the liberation of man from the things that are mythological, passive-aggressive or conservative. On the basis of this progressive ethos, recognized the human capacity that has all the freedom *(free will, free act).* Deconstruction of Islamic law try to find deep-rooted knowledge of the moderate Islamic knowledge and adaptative with social change, to produce a puritanical beliefs or faith, which subsequently been implemented in behavior that can be accounted for by reference to the epistemological basis of Islamic law that is elastic or active charity -progressive. Islamic law became the most substantive and most entities to determine the truth of a proposition of Islam.

Key Words: *Islamic law, sharia, deconstruction, reactulization, social change.*

1. Prolog

The idea of Islamic law deconstruction in Indonesia looks more and more significant. The idea of deconstruction of Islamic law in tune with the dynamics of social change, with an obsession "establish a puritanical Islamic style and modern". This idea evolved into the space, which tends to be cultural, juridical and even philosophical.

Deconstruction of the idea of Islamic law in Indonesia, epistemological, hypothesised in the form of social thought Islamic reformers of Islamic legal thought. Confidence and strong opinions about Islam, as well as eliminating doubt, to arrive at this goal, the logic was instrumental in reviewing the rationality of the Qur'an to gain knowledge, as a basic framework for the truth of a belief. This will be opened with the veil that wraps the birth of epistemes by re-reading *(i'adah al-qiraah)* of the epistemology texts that gave birth to the formulation of Islamic law. In this way the Muslims are expected to distinguish between normative Islam and historical, sociological or between truth and ultimate truth, so that the phenomenon of thinking sacralization *(taqdis al-Afkar)* and even more so *taqlidism* and *madzhab* phenomenon that characterizes the lives of Muslims will be minimized. Islamic law progressively became the most substantive and most entities to determine the truth of a proposition of Islam.

This progressive Islamic legal thought seeks to find a deep-rooted knowledge of the moderate Islamic knowledge and adaptative with social change, to produce a puritanical beliefs or faith, which subsequently been implemented in behavior that can

be accounted for by reference to the epistemological basis of Islamic law that is elastic or charity active-progressive. Progressive Islam is becoming really progress with pioneering spirit, since the inclusive progressivism included critical properties, the criticism is seen in the strong pressure in making distinctions, categories, analysis, and so on-with great appreciation on the role of ratio. Progressivism grounding is very important in showing that applicative style Islamic law in the reality of everyday life, responsive to the dynamics of change and progress, without the need for elaborate packaging of Islamic mystical or symbolic embodiment. Typically, this is the idea that Islam is the moving atmosphere "passive" or "aggressive-radical" to the progressive actualization of Islamic law and dynamic.

2. The Methodology Primary Sources of Islamic Jurisprudence

In the context of a way of life for Muslims, the Qur'an and Sunnah are the main source of knowledge, the principal source of legal jurisprudence *(mashadir al-ahkam)* in Islam. Al-Quran and Hadith have perfect derived has ended with the death of the Prophet Muhammad published. Various activities in Islam refers to the rules contained in the source.

In praxis, expressions message of the Qur'an should be generalized to the moral principles in a variety of activities by linking specific expressions of the Qur'an and their socio-cultural background and political dynamics by considering the ratio-legislators *('illat* of law) is expressed in phrases of the Qur'an. [1] The nature of the Qur'an as the "word of God"rests on the belief aspect and hence the basis of one's faith and a source of reference in doing various activities. [2]

Legislation Qur'an is basically statements of the Qur'an which charged the law, but it is also the books of principles and moral appeals in a variety of activities and is not intended merely legislation alone. [3] As a moral policies of the Qur'an raised position "second class citizens": women, orphans, destitute, poor, and slaves towards the realization of social justice and equality conditions essential human dignity. [4]

In the Qur'an legislation contained general principles and specific legal. The general principle is the meaning and reasoning behind the specific legal provisions, sometimes stated explicitly accompany specific legal expressions. Legislation in this charity aims to create social justice economics. These general principles are translated into practical terms the specific legal rules. Specific legal formula is intended as an alternative solution that is loaded with term *Ilahiyyah* transcendental values to the actual problems are increasingly complex. Thus, the *Ilahiyyah* ordinance contains specific legal rules and resource values and principled moral content.

Verses of the Qur'an are principle-there are definitive *(qath'i)* and general content *(zhanni). Qath'i* verses implies that clear and specific enough, no need for another interpretation of the meaning of *Zahir.* While the verses are *zhanni* require interpretation in order to understand the content of its meaning. Portion ratio is crucial in making the interpretation in this context. Formulation rational juristic interpretation contained in the "fiqh" became mainstream in conducting practiced through the use of certain instruments.

Meaning of the content of the Qur'an that are *qath'i* and *zhanni* it gave instructions not to overload the set of shari'ah law enforcement *(mukallaf),* but to give the benefit to humans. The goal is to preserve religion, life, intellect, lineage and prosperous life for mankind universally. General nature of the verses of the Qur'an implies that the Qur'an allowed *mu'amalah problems, siyasah* (politics), and *making up those* (judicial) evolve according to future needs, circumstances and places. This is an indicator of the dynamism and flexibility of the values of the Qur'an. [5]

Problems of adult humans is much included in the categorization mu'amalah. Mu'amalah spectrum is dominated by the verses that are zhanni than qath'i. Therefore, *ijtihadiyah* paradigm that is based on Islamic epistemology is very flexible in accordance with the socio-cultural dynamics and mobility changes. Development studies in an effort to reform and reinterpretation of Islam already should refer to the factual analysis of the implementation of the concepts in the dynamics of social change.

An interpretation of the Qur'an that factual should be done. The great danger in an effort like this, of course, is the emergence of the projection of subjective ideas into the Qur'an and make it as a treatment object arbitrator, but the consequences can be minimized,

then a thorough methodology to understand and interpret the Qur'an should be used.

In interpreting the Qur'an first time to look for an explanation in the Qur'an itself. Therefore, there are verses often mentioned briefly in one place, while sticking to the explanation of other verses. If not found to be an explanatory paragraph that for something to be interpreted, then sought explanation on the tradition. Therefore, the Apostle better know the true meaning of a command or message is delivered to him. If the hadith there is no explanation, see the companion interpretation. This interpretation is closer to the truth, because the companions themselves heard directly from the Apostles and watched the causes down *(asbab al-nuzul)* paragraph. Moreover, the true friends know about the Arabic language, more specifically, the Arabic language is used when the verses were revealed.

Understanding of the meaning or significance of a statement (paragraph) is very important, including by examining historical situations or problems where the statement of the Qur'an is the answer. Of course, before reviewing the specific passages in specific situations, an assessment of the macroeconomic situation in the limits of society, religion, customs, institutions, and even the whole life of the community, especially people in Arabia at the time Islam came and especially Mecca and surroundings, as well as the context keindonesiaan, must be done first.

After that, generalize the specific responses and express it as expressions that have common social-moral purpose, which can be "filtered out" of specific phrases verse in light of the socio-historical background and in light of rationes legislators *(illat)* law which is often expressed. The Qur'an is a unity, so that any sense of a particular verse is understood, any law which declared, and each goal will be formulated with other coherence. The Qur'an itself lay claim definitively that "teaching is not a contradiction, but rather a coherent whole".

The underlying idea is contained in the way of thinking of the specific passages leading to the principle, or in other words, think of specific legal rules leads to social moral content of a general nature contained therein. There are three devices to be able to deduce the principles of social morality. *Firstly,* the *'illat al-hukm* (ratio legislators) are expressed in the Qur'an explicitly. *Secondly, al-hukmillat* stated implicitly that can be determined by generalize some related specific expression. *Thirdly,* the socio-historical devices that could serve to strengthen *al-hukmillat* implicitly to define the direction of its purpose, it can also serve to help reveal *illat al-hukm* and its goals are not expressed at all. [6]

The second source of Islamic jurisprudence after the Qur'an was Sunnah. Lexically, Sunnah means *shawwara* (create) and *al-sirah* (life behavior). In addition, the Sunnah can also mean a way of life or habits *(custom or habitual actions).* Accordingly, the Sunnah is intended as "an exemplary behavior *(exemplary counduct)* either *fi'liyah (doing:* act), *qauliyah (saying:*speech *),* and *sukutiyah (unconducting:* silent).

On that basis, if less precise term is defined in the context *fi'liyah* Sunnah only. According to Fazlur Rahman (an Moslem intellectual from Pakistan), adherence to the Sunnah (the normative nature) in the historical thesis is not an integral part of the Sunnah, but from outside the authority of the Sunnah, even to improve it, the Sunnah should be followed [7] . In this context, the Sunnah is not defined as "the practice of normative," because the Sunnah is growing at the beginning of the Muslim community is not the Sunnah of the Prophet, but the habit of pre-Islamic Arabs who modified the Qur'an. Thus the Sunnah Hadith has a "differentiation" is typical. Hadith is originally derived from the Prophet, not from *the Sunnah* (practice) who lived at that time and is normative. [8]

Although, according to experts of hadith, Sunnah together with tradition, but in fact there is a difference. Hadith is that all events are leaning to the Prophet, even if only once occurred throughout his life, whereas the Sunnah of the Prophet is amaliahmutawatir, more specifically in terms of its meaning.

Sunnah historically evolved into living *sunnah* and hadith further legislated. In the perspective of the majority of ushul fiqh experts, Sunnah or Hadith concept evolved quite varied: *mutawatir tradition, famous, mawdhu ',* etc., with various argumentative ratings: *shahih, hasan, dha'if,* and others. Sunnah though in terms of pronunciation, *mutawatir* writings, not the cause *sanad* becomes not *mutawatir*, but due to the implementation *mutawatir,* then still called the Sunnah.

Authority of Sunnah besides as *parrots* the Qur'an as well as the *constitution,* (Islamic legislation) [9] in

various matters. Authority of Sunnah *parrots,* among others in the form of *commentary al-mubham, tafshil al-mujmal, taqyid al-muthlaq, takhshishal'am.*[10] All forms of this *parrot* is Sunnah as *tasyri authority, 'which* is a legal resident who is independent, in the cases that the Qur'an does not establish legal, [11] is an authority that is extra Qur'aniy Prophet. [12]

Space or the nature of the authority of the Sunnah of the Prophet is more likely as the concept of behavior, which when viewed from the side of the Qur'an, the Sunnah is an operational effort, because it is more reflective of situational charge of his day, except in regard to religiosity and moral aspects of Islam. [13]

The nature of the authority of the Sunnah of the Prophet, along with specific legal expressions of the Qur'an, which ought to be thinking about this situation and further developed so that new conditions can be included into it. In the context of specific legal provisions of the Qur'an, the Sunnah of the Prophet is the position of the model or pattern application. Being specific legal provisions of the Qur'an is a translation of the general principles of the Qur'an. There needs to be a fresh new look in the reinterpretation of the Qur'an and Sunnah, as *the ultimate goal* of progressive Islam, so more adaptatif with changing dynamics.

3. The Progressive Paradigm of Islamic Law Deconstruction

Flexibility in the development of Islamic legal thought in Indonesia is very relevant to the ethos of progressivism in introducing dynamics and crystallization of Islamic law. The implications of this pattern of progressive thought is the liberation of man from the things that are mythological, passive-aggressive or conservative. On the basis of this progressive ethos, recognized the human capacity that has all the freedom *(free will, free act).*

In efforts to reform Islamic thought in Indonesian law, substantively, there is a fundamental distinction between the teachings of Islam that is *qath'i* (absolute) and *zhanni* (relatively). Distinction between *qath'i* with *zhanni* so stressed, because in this case it is an open space for ijtihad.

Reviewed the contents of the content of the Qur'an, the Qur'an does not actually contain everything. In Surah Al-Maidah (5): 3 is said to have perfected the religion of Allah, the Qur'an is not meant complete with all the science, technology and systems of community life in all its aspects. Special connotation of the verse in the refinement of the basic religious and lawful and unlawful restrictions. In the Qur'an there are verses 6236, there were only 650 verses containing about faith, worship; 500 verses on the life of the community; 150 verses about science. Of the approximately 650 verses, not all are clear, without the need for interpretation.

Although the overall nature of the Qur'an *al-wurud qath'i* (absolute of God), but there is a classification of the revelations clear, absolute and one meaning *(qath'i al-dlalalah)* and verses that can contain various terms *(zhanni al-dlalalah).* Classification of the last verses, which give rise to various sects and streams in Islam.

This distinction, demanding tolerance in receiving the plurality of streams of religious thought. This portion is *lots* of space at the same interpretation of ijtihad, the ratio of the functioning optimally.

Step and deconstructive strategies can be done in two ways. *Firstly,* the pattern of Islamic thought which has given rise to the formulation of scientific tradition of Islam should be reviewed *(re-reading)* correctly as an attempt to disassemble *(deconstruction)* system of thought *(episteme)* that is dominant in a particular historical stage. This is called the *regressive* procedure. *Secondly,* because the text is derived by tradition is still active as a system of knowledge, then the effort to transform charges and initially function to something new. This is called the *progressive procedures.*

Structuralism and post-structuralism as a later approach is used to unpack the relationship between *"language-thought-history"* in any scientific conception of Islam. This is done to awaken the Muslims who have distorted the reality of *the ontological-metaphysical-religious substantial* itself. Consequently, mixing occurs between Islam as a religion and Islam as a historical framework. On this basis, then distinguished two dimensions of Islam, which are substances that are universal religious and additional elements of social reality that included the name of Islam.

In relation to the epistemology of Islamic law will cause some of the implications of deconstruction. *Firstly,* the deconstruction of epistemology Islamic law will generate a pattern of discourse on epistemology formulation of Islamic law during the period of the

classical-scholastic even to this overlooked, such as epistemology of Islamic law among Shiites and Kharijites. Thus, this deconstruction will give birth to a new understanding of the epistemology of Islamic law in accordance with the historical-sociological development of the Muslim community. Proven epistemology-scholastic classical Islamic law itself is always associated with social, cultural, economic, and political or *episteme* formative period that did not escape the ideological battles that time.

Second, epistemological deconstruction of Islamic law will give birth to change the structure of hierarchical formulation of the classical sources of Islamic law. This hierarchical structure changes due to a change analysis tool that is used with the inclusion of analysis tools of the social sciences and humanities that develops in the early 20th century, such as sociology, history, and linguistics. This analysis tools are sufficient to understand Islam while now live in the midst of the challenges of the modern world.

Third, by shifting The hierarchical structure of epistemological formulation of Islamic law and the introduction of social sciences and humanities, it would appear possible logic of pluralism in the Muslim mindset, so that various pemkiran *dichotomy* in classical Islamic law on the basis of seeing things in black and white, halal-haram, valid-invalid, and so will be replaced with the diversity of Islamic legal thought more openly. This is because deconstruction itself trying to put a variety of discourse and interpretation is in a position of historical, sociological, and epistemological system should remember axiological *(value system)* is strongly associated with a particular historical circumstances.

Fourth, with the logic of pluralism is then possible to reduce or even eliminate the phenomenon of dogmatism and ortodoksisme in Islamic legal thought, both among Sunni, Shi'ite, and Kharijites.

In this relationship with a progressive Islamic discourse, epistemology fiqh is an important theme that is interesting to study more specifically considering *the fiqh-oriented* mindset has "historical" and almost dominant in all Muslim countries. There are two reasons why it is so dominant fiqh. *Firstly,* Islam has teachings that demand practical action with respect to the norms and rules of behavior that outwardly worship should be measurable. *Secondly,* the needs of scholars and umara in controlling or guiding Muslims in social and political behavior. The dominance of *the fiqh-oriented* mindset then becomes one element in understanding the weakness of the Muslims migration issues "true religion" to "ideological orthodoxy". On this basis, it is very regrettable birth of standardization and accounting standards that are considered religious teachings that led to the birth of Islam stagnation or reification.

Islamic law reform today is more significant that it is more accommodating to the dynamics of social change. Within the context of this study to explore the use of Islamic law system of eclectic thinking. An argument of priority, referring to the argument of which one is better and closer to the truth and is supported by strong arguments aligned with the development of society.

This deduction analogy method includes freedom of ijtihad is very important in analyzing the problems that are not governed nor prohibited *(permissible)* that there is no law provisions. In addition, the comparative method is also presented primarily on issues of law provisions that already exist, which is a product of ijtihad jurists' earlier, whether Sunni or Shiite or Kharijites. Comparative method which is a method by comparing *(muqaranah)* between one opinion with another opinion from various schools of law, and choose the best and closer to the truth and supported by strong arguments *(tarjih).*

Comparative method was then developed further in the discourse of pluralism. Comparative studies between fiqh with customary law and positive law in Indonesia, as well as with the Shari'ah-shari'ah other religions, such as the Jews, Christians can, Roman law (west). Extensive knowledge in the science of fiqh is necessary to perform comparative analysis. Comparative study between the various schools, to track the material better legal and beneficial to society at large. On that basis, the school of fanaticism is a matter that is not logical anymore.

In the perspective of the science of jurisprudence, comparative method is called *fiqh al-muqaran.'s* Defined as a science that studies the laws of Personality 'by describing the opinions are varied on an issue and the arguments are used, the rules, comparing the one with the another, then take the best and closer to the truth, and compare them with existing regulations in a country. [14]

With integrated comparative method, the problems relating to the law can be stated theory and basic framework to highlight what has been said jurists' earlier. With this method, the elasticity of Islamic law (fiqh) can grow and thrive without a break away from what has been formulated jurists'. Fiqh will be aligned with the development of modern society. Fiqh is adaptatif dean accommodating the dynamics of the development of society. *Takhrij, tahqiq,* and *Legal Affairs Committee* is the result of a comparative study, which is a product of ijtihad. Ijtihad is the dynamic factor for *fiqh* existence. [15]

The use of the comparative method will facilitate the formulation of a compilation or later codification of Islamic law. By reviewing the comparative fiqh will allow selecting legal provisions according to the situation and condition of Indonesia. [16] With this clearly visible in studying fiqh approach laden with socio-cultural and socio-historical with reference to the arguments of the texts.

Determination of the law by the jurists' earlier, in the analysis of the history of the growth and development of the constitution, not in spite of the influence of socio-cultural development. With a history approach *(Dirasah tarikhiyah)* method is known jurists 'law in the dig, the circumstances affecting, and the underlying purpose of the determination of the law *(istinbath).* In reviewing the legacy of fiqh jurists', used also *tarikhiyah* this approach, especially in general, experts fiqh law set by *'illat.*

Moreover, in the face of future developments in fiqh, *dirasah waqi'ah* approach (socio-cultural approach) is also very important. *Dirasah waqi'ah* is meant is the science of social law. [17]

In the context of the reform of Islamic law, two models of this approach is very important. *Dirasah tarikhiyah* and *Dirasah waqi'ah* need to be combined as a methodological reference in restructuring more adaptatif Islamic law and the dynamics of social change. Thus, fiqh can be changed according to the circumstances of the case, with due regard to the benefit of society in general.

Reform the Islamic legal thought must always be grounded in the texts. The essential meaning of the update itself does not mean leaving the texts. In this case, the update was to update the old stuff that has been worn with such restore the original state. Legal reforms carried out by restoring the charge on the principles and the principles of law, not to remodel or destroy the joints of the law.

Updates done in the field into arable ijtihad. The field is the issues or events that require a legal determination of general principles *(mabadi 'amma)* has existed in the shari'ah, and general principles and detailed laws regarding the issue or case *or permissible.* [18]

Renewal of Islamic law can not be done even if *old-fashioned* skepticism and still hit the scholars and Muslims. In contrast, progressive and dynamic attitude is important, but remains cautious attitude is a must, in addition to having the authority of jurisprudence, so it is the probability of air and *istidlal istinbath* represent substantive meaning in Personality.

4. Ijtihad Significance in the Dynamics of Islamic Law Progressive

Ijtihad is a method in extracting meaning and benefit as a matter of law with the goal. In the present context, ijtihad can mean a progressive work to update the rules contained in the text of the Qur'an or the Sunnah so that they were able to cover the new circumstances by providing a solution (rule of law) a new one anyway. [19]

It is the necessity to explore the law against legal events in various fields, particularly with respect to the portion of the arguments *dzanni* is maximalist, that there has been no legal determination based on *the texts.* Jurists' conception of contemporary jurisprudence should reformulate *up to date* with developments accommodative circumstances in the life of modern society.

The problems of life are increasingly diverse society. To problems related to the determination of the law that there is no law, there is no other way except to ijtihad. Ijtihad is a noble task as an effort to provide an alternative solution of a variety of increasingly complex legal problems.

Flexibility fundamental structure of Islamic law in praxis sometimes not matched by productivity substantive understanding through ijtihad method. The implication, traditional Islamic sciences, especially Islamic law, especially after the 10th century AD tends *legal-formalistic* and *stagnate.* The assumption that the

existing fiqh has load points divine law *(shari'ah),* has hampered the interpretation of substantive ijtihad and *taqlid* became tradition thrives. [20] This situation gets even worse when the interpretive texts of Islamic law used as an authoritative text. Though not uncommon, the text is merely a commentary *(Sharh)* or maybe even comment on the comments *(hasyiyah)* so that the first text became lost. In turn, the formulation of Islamic law lost its relevance to the practical realities of life.

Updates limitations and scope of ijtihad also need to be reconstructed. In the dynamics of the historicity of Islam, ijtihad as a dynamic medium of Islamic law is very progressive, free without any formal rules that follow. However, the scholars of usulfiqh development makes the rules of which are in the form of restriction *(limitation)* the scope and terms of ijtihad. Cleric next Usul make sorting between laws that are sources of ijtihad and not be *lots* of ijtihad. Broadly speaking, this includes the area of ijtihad two things: *first,* laws nashnya no clue at all, and *second,* the laws are appointed by nash Zhanny. While the laws that have been designated by *qath'i dalalah* no slightest opportunity for ijtihad.

Recognized or not the ijtihad limitation of making turns in the dynamics of the historicity of Islam had an impact on the development of Islamic legal thought. Limitation of ijtihad with the texts should not touch *qath'i dalalah* have caused *partial* renewal of Islamic law *ad hoc.* Due to realize the universal update is necessary to the provision of space for the widest ijtihad, including the *qath'I dalalah* though. By implication, the formulation of the terms of ijtihad should be flexible, elastic, dynamic, according to the needs of the mujtahid.

Renewal of Islamic thought can not be done, if *old-fashioned* skepticism and still hit the scholars and Muslims. In contrast, progressive and dynamic attitude is important, but remains cautious attitude is a must, in addition to having the authority of jurisprudence, so the probability of air and istidlal istinbath represent substantive meaning in Personality '.

In ijtihad, the text of the Qur'an and precedent (Sunnah) can be understood to be generalized as the principles and that these principles can then be formulated into the new rules. In understanding the working mechanism of ijtihad includes text and precedent in the integrity of its context in the past, understanding the new situation that is happening now, and changing the rules of law contained in the text or precedent. Reformulation of ijtihad functioned as a conception of the reform of Islamic law, as well as efforts to meet the challenges of the new situation in the context of Indonesian-ness.

Ijtihad is the only way to anticipate the changes that Islamic values can be accommodating with the development of society. Nonetheless, *ijma ', qiyas, istihsan,' urf,* and *istis'hab* remains were placed in two different positions. On the one hand, the argument of this law with the Qur'an and hadith as a source of ijtihad, which is therefore also a *mashadir al-Ahkam*. But on the other hand, the legal reasoning as well as a method of ijtihad*(thuruq al-istinbath al-masalik)* . With the method of *the double* is then reformulated *al-fiqh al-indunisyy*.

In the methodological aspect, the method proposed comparison schools (*muqaranah al-madzahib).* The comparative method, within the framework of fiqh thinking contextualization in Indonesia, is used if the problems facing society is already a solution in the schools of both schools of Sunni and non-Sunni, as far as their use is still relevant to the development and social change in society.

If the problems increasingly complex, while the solution is not formulated by the jurists' History, seen in *ijtihad bi al-ra'yi*, which determines the law based on the beneficiaries, college rules, and ' *illat* of law. At the level implementable, methods used include: *qiyas, istihsan, istishlah, 'urf,* and *istis'hab.* These methods are applied in line with the rules of the relevant jurisprudence. Legal decision-making *material* and *formal* taken through *ijtihad jama'I* (collective ijtihad) or *ijma '* (consensus). Legislative context, with reference to the Qur'an, the Sunnah, or *ra'yu*, reached through consultation by order of the head state, instead of *ijtihadfardi.* Crystallization results of ijtihad becomes *ijma '* and then the policy *taqnin* (establishment of Islamic law into law) is a result of socialization effort of ijtihad.

Patterns of ijtihad is taken collectively, or better known as *ijtihad jama'i,* because in this ijtihad will offer more options or alternatives that are qualitative. Meanwhile, if solely relied upon ijtihad of *fardi* will give birth to a lot of disagreement. Rationally, the collective

view will certainly be better than the views that are personal.

To unearth collective ijtihad, the significance of the establishment of the institution *of the ahl al-hall wal-aqd* institute is supported by two sub-agencies. *Firstly, hai'ah siyasah* (political institutions). Members of this institution consists of people who are elected by the people, of the people, and for the people. Categories capability in this context, they do not necessarily meet the requirements of *the mujtahid*, but quite mastered the field represents. *Secondly, hai'ah tasyri'iyah* (the legislature). These institutions include components *ahl al-ijtihad* and *ahl al-ikhtishas* significantly .

5. Politics Configuration for Revitalization of Islamic Law in Indonesia

The diversity of schools of fiqh, also in theology and Islamic philosophy suggests that Islamic teachings multiinterpretative. [21] The nature of this multiinterpretative has served as the basis of spasticity in the history of Islam. The rest, it was also suggested that such a requirement pluralism in the Islamic tradition. Therefore, as stated by many, Islam can not and should not be viewed as monolithic.

Political Islam can not be separated from the history of Islam that multiinterpretative this kind. On the other hand, almost all Muslims believe in the importance of the principles of Islam in political life. At the same time, because of the nature of the multiinterpretative Islam, there has never been a single view of how Islam and politics should be attributed fit. In fact, as far as perception can be captured from a trip intellectual discourse and historicity of Islamic political thought and practice, there are many different opinions about the relationship between Islam and politics. [22]

Broadly speaking, today there are several spectra of different Islamic political thought. While both acknowledge the importance of the principles of Islam in every aspect of life, both have very different interpretations of the teachings of Islam and kesesuainnya with modern life and its application in real life.

At one end of the spectrum, some Islamists believe that Islam should be the basis of the state, that shari'a should be accepted as the constitution of the country, that political sovereignty is in the hands of the Lord, that the idea of the nation state (nation-state) is contrary to the concept of the ummah is not recognize political boundaries or regionalism, and that while recognizing the principle of shura (consultation), application of the principle is different from the idea of democracy known in modern political discourse today. In other words, in the context of this view, the modern political system-in which many newly independent Muslim countries have based their political building-put in a position opposite to the teachings of Islam.

At the other end of the spectrum, some other Islamists argue that Islam does not put a standard pattern on the theory of the state or a political system should be run by the people. According to this school of thought, even the term state *(dawla*) was not found in the Qur'an. Although "there are various expressions in the Qur'an that refer or as if referring to the political power and authority, but these expressions merely incidental and have no bearing on political theory". For them, it is clear that "the Qur'an is not a book about politics."

However, this opinion also recognizes that the Qur'an contains the values and teachings that are ethical about social and political activities of mankind. These teachings include the principles of "fairness, equality, fraternity, and liberty." To that end, for those who think so, all the countries adhering to such principles, the implementation mechanism is in accordance with the teachings of Islam.

In addition to the above general categories, there are some circles is considered that in Indonesia there are some *mainstream* Islamic political thought. The mainstream is intended as an analytic category, because it does not really show the absolute difference between the ideas and orientations in the skeleton.

The first flow may be called formalistic/ scripturalistic. This term is meant to refer to the shape of their thinking which maintains strict implementation of Islamic forms of formal. Formalistic political orientation on the one hand shows that kulturalisasi Islam must be transformed into the politicization, which then led to the Islamic symbolism. Formalist maintenance on the authenticity of the language of revelation not only demonstrate strong ties to scripturalism-traditionalist, in addition to maintaining the tendency to emphasize the concept of scriptural fundamentalist Islam,

although not accompanied conformity with the forms and institutions of modern ideas.

Formalism literal interpretation of Islam appears to combine the above scripture. Equally emphasizing traditional scripturalism on the one hand, and the other stressing the tendency which emphasizes the concept of scriptural fundamentalist Islam, though not in the sense of the concepts can be understood in the traditional Shari'ah. However, it is not in accordance with the forms of ideas and modern institutions.

Some elements of formalism moderate Islam is seen for example in the universalist intellectuals ideas. This grouping Rais enter into universalist group. In addition to Amien, Jalaluddin Rahmat and AM Saefuddin belong to it.

Islamic Universalism supports the view that the essence of Islam is universal and thorough. Universal thinkers tend to emphasize the principle of monotheism Divine sovereignty which they helped liberate humanity from the powers of non-divine. To make Islam the strength liberator, universalist saw the need for institutionalized Islam. Emphasizing the necessity of the existence of institutions as a formal entity to implement the principles of Islam is the nature of the formalism of Islam.

In addition, there are also currents which tend to emphasize the importance of certain substantial significance level while rejecting formalistic forms of thought. Therefore, these flows can be called substantivistik. This term is to indicate their political orientation that emphasizes the demands substantial manifestation of Islamic values in political activity, not just formal manifestations, both in ideas and institutions. For supporters of this orientation, the more important is the existence of intrinsic teachings of Islam in the Indonesian political arena, and to encourage the necessary Islamizationkulturalisasi, namely cultural foundation preparation, towards the realization of modern Indonesian society.

Ideas for cultural Islamization emphasis has been championed by those who are known as the thinkers who emphasize the importance of considering the elements of indigenous or local in understanding Islam, which has sought to observe the Islamic ideals for national culture of Indonesia, which distinguishes clearly between Islam and the state. One of the indigenous originators is Abdurrahman Wahid, leader of NU, which when in the early 80s famous for his idea of "indigenization of Islam" in the face of Indonesian culture. The idea is based on the postulate of pluralism of Indonesian society, where Islam only serves as a complementary factor for Indonesia as a whole. In this connection it is important for Muslims to develop national consciousness. Because according to him, on the basis of the Indonesian state of consciousness is established.

Other mainstream Islam today is Liberal. The term Liberal Islam was first put forward by Asaf Ali Asghar Fyzee (India, 1899-1981). The main core of the Liberal Islamic thought, according to research results Leonard Binder, should the language of the Qur'an's revelation however, the meaning and essence of revelation is not verbal. So to get the meaning of revelation is not limited to the words revealed in the Qur'an and to understand through those which are the words, but the interpretation can go beyond it so as to find true meaning.

The rise of the idea of Liberal Islam in Indonesia-which according Fauzan al-Ansari is a continuation of the adventures of thought NurcholishMadjid[23] -as an alternative Islamic discourse, is a consequence of the rejection of the politicization of religion, along with the development of the Islamic movement "militant" and the politicization of religion. Enforcement of Islamic law, for example, the case of the application of stoning on Laskar Jihad carried out by the group itself is an indication of the strength of the militant Islamic movement (Slot, 24, April 2001), and the desire to incorporate Islamic law into Constitution in the 1945 amendment. Liberal Muslim presence is also a protest and resistance against the dominance of orthodox Islam.

In the relations between Islam and the state, the state of affairs is Liberal Islam purely worldly human affairs. There is no provision or obligation of Islamic teachings specifically on the human form of government. [24] Another argument is the Prophet was never stated explicitly that a system of government must have certain political patterns. The relationship between Islam and the state according to this view is that Islam does not clearly reveal the concept of state issues and affairs of state are worldly affairs and not governed by religion.

Contrary to this, the Islamic group Literal obvious objection to this view. Liberal Islam group emphasized not see the reality of history. In view of Literal Islam, since the establishment of the state of Medina who had

first written constitution in the world (charter Medina), the Prophet Muhammad has been acting as head of state, which in addition to lift state officials also enforce the law (shari'ah) Islam against all citizens. Reality in Indonesia is also so much of Islamic law that is set by the state, such as the Marriage Law, the Law on Religious Courts, Banking Basic Law, the Law of Zakat, Hajj Act, and so on. Similarly, the emergence of militant Islamic movements in Indonesia, such as Laskar Jihad, FPI and HTI, could be interpreted as their participation to engage seize public sympathy.

The view of Progressivism Islam does not put a standard pattern on the theory of the state or a political system should be run by the people. Even the term state *(dawla*) was not found in the Qur'an. Although "there are various expressions in the Qur'an that refer or as if referring to the political power and authority, but these expressions merely incidental and have no bearing on political theory".

However, it must be admitted that the Qur'an contains the values and teachings that are ethical about social and political activities of mankind. *Mabadi al-Siyasy*forth in substantial values of Islam. These teachings include the principles of "fairness, equality, fraternity, and liberty." Islamic law is the source and the basic framework of the political dynamics. The culturalization of Islamic law should be transformed into politicization, coupled conformity with the forms and institutions of modern ideas.

Political orientation in view of progressive Islam emphasizes the demands substantial manifestation of Islamic law values in political activity, not just formal manifestations, both in ideas and institutions. Even more important is the existence of intrinsic Islamic law in Indonesia's political arena, and to encourage the necessary Islamizationkulturalisasi, namely cultural foundation preparation, towards the realization of a modern Indonesian Islamic society.

6. Epilog

Flexibility in the development of Islamic legal thought in Indonesia is very relevant to introduce the ethos of progressivism (deconstruction of Islamic law) in the dynamics and crystallization of Islamic law. The implications of deconstructive style of thinking is progressive and liberating people from the things that are mythological, passive-aggressive or conservative, with reference to Islamic law is elastic. On the basis of this ethos of progressivism, recognized the human capacity that has all the freedom *(free will, free act)*. *Progressive* became the most substantive entity and determine the truth of a proposition of Islam.

This progressive Islamic legal thought seeks to find a deep-rooted knowledge of the moderate Islamic knowledge and adaptative with social change, to produce a puritanical beliefs or faith, which subsequently been implemented in behavior that can be accounted for by reference to the epistemological Islamic law deconstructive-elastic or active-progressive charity. In this progressive paradigm of Islamic law be truly *progress* with pioneering spirit, since the inclusive progressivism included critical properties, the criticism is seen in the strong pressure in making distinctions-distinctions, categories, analysis, and so on-with great appreciation on the role of the ratio. Thus will be displayed Islamic law applied in the reality of everyday life, responsive to the dynamics of change and progress, without the need for elaborate packaging of Islamic mystical or symbolic embodiment too, but substantively manifest.

Wallahu a'lam bi al-shawab.

End Notes

[1] FazlurRahman, *Islam and Modernity: Transformation of an Intellectual Tradition*, (Chicago: Chicago University Press, 1980), p.6

[2] Efrinaldi, *Reaktualisasi Hukum Islam, Suatu Kajian Metodologis dalam Pemikiran Fazlur Rahman,* dalam *Mimbar Hukum,* No. 50 Thn. XII 2001 (Jakarta: Al-Hikmah & DITBINBAPERA Islam Depag RI), h. 98

[3] The achievement of the purpose of the legislation of the Qur'an will become more apparent when viewed from the context and from the sociological background of the Arab community when times down the revelation, in which human life when it is colored patterns of inequality and exploitation of group relations "class society "the two-class society.See: *ibid.,*p.99

[4] FazlurRahman, *Major Themes of the Qur'an,* (Minneapolis-Chicago: BibliotecaIslamica, 1980), p.68.

[5] Hasbi Ash-Shiddieqy, *Syari'at Islam Menjawab Tantangan Zaman,* (Jakarta: Bulan Bintang, 1966), h.7-10, dan *Dinamika dan Elastisitas Hukum Islam,* (Jakarta: Tinta-mas, 1976), h. 24-26.

[6] FazlurRahman, *Toward reformulating the Methodology of Islamic Law,* in " *International Law and Politics ",* (vol. 12, 1972), 221-222.

[7] FazlurRahman, *Islamic Methodology in History,* (Karachi: Institute of Islamic Research, 1965), p.12.

[8]*Ibid., Islam and Modernity,* p.46

[9] The concept of the authority of the Sunnah in the study of ushul fiqh was formulated in the context of *istinbath al-Ahkam*.

[10] Muhammad al-KhathibAjjaj, *Al-Sunnah Qabla al-Tadwin,* (Egypt: Maktabah Wahbah, 1963), p. 23-26.

[11] 'Ajjaj al-Khathib exposing the sample to the Sunnah of the Prophet forbade the sale of fruits are still young and have not looked. See: *ibid.,*p.26.

[12] Efrinaldi, *Op.Cit.*, p.101

[13] As an illustration of this theory, for example, determination of the object property Sunnah compulsory Zakat, or the Sunnah of the Prophet when a decision must summarize *qahshar* and *jama'* prayers in a distance of *safar* (journey), is closely related to *setting* Arab civil society at that time. Study in: FazlurRahman, *Islamic Methodology History, Op.Cit.,*p.51.

[14] M. Hasbi Ash-Shiddieqy, *Pengantar Ilmu Fiqh,* (Jakarta: Bulan Bintang, 1967), h. 91.

[15] Idem, *Pengantar Il mu Perbandingan Mazhab,* (Jakarta: Bulan Bintang, 1975), h. 37-40.

[16] *Fiqh Islam, Mempunai Daya Elastis, Lengkap, Bulat, dan Tuntas,* (Jakarta: Bulan Bintang, 1975), h. 39.

[17] *Ibid,* p. 158-159.

[18] Idem *, Islamic Fiqh,* H.38.

[19] Idem, *Islam and Modernity, Transformation of Intellectual Traditions,* (Chicago: Chicago University Press, 1982), p.8

[20] John L. Esposito, *The Islamic Threat: Myth or Reality?,*trans. Alwiyah Abdurrahman, (Bandung: Mizan, 1994), h.46.

[21] Assessing the historical-sociological length on this subject can be found. Among other things, the Marshall GS Hodgson, *The Venture of Islam: Conscience and History in a World of Civilization,* Volume I-III, Chicago: U niversity of Chicago Press, 1974.

[22] See: Erwin IJ Rosenthal, *Islam in the Modren National State,* (Cambridge: Cambridge University Press, 1965), W. Montgomery Watt, *Islamic Political Thought* (Edinburgh: Edinburgh University Press, 1960), Qamaruddin Khan, *Political Concepts in the Qur'an,* (Lahore: Islamic Book Foundation, 1982), Muhammad Asad, *The Principles of State and Government in Islam,* (Berkeley and Los Angeles: University of California Press, 1961).

[23] Fauzan al-Anshary, *Koreksi atas Tafsir Liberal Syari'at Islam,* Republika, 31 Agustus 2001.

[24] Luthfi As-Syaukani, pengantar *Wajah Islam Liberal di Indonesia,* (Jakarta: JIL, 2002).

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Interpretation of The Khalifah Verses in Al-Qur'an on Perspective of Tafsir Maudhu'i

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Abstract **-** The government officially dissolved the Hizbut Tahrir Indonesia (HTI) political organization, in line with the emergence of no. 2 Year 2017 which regulates the existence of mass organizations in Indonesia. This simple research aims to know how the meaning contained in the word khilafah. This research uses thematic method, because understanding and interpreting the verses of the Qur'an can not be done only by using some verses but leaving another verse. The results of this study indicate that the word khalifah is used twice in the Qur'an with a single form that has the meaning of a prior substitute in terms of enforcing the law, as well as carrying out certain affairs that are more of a power. The word khulafa 'in the Qur'an recurs 3 times, all in al-Qur'an according to al-Thabary used for the same meaning of substitute. While the use of the word khalaif in the Qur'an four times. The mufassir mentioned that the use of the word khalaif is more focused on the meaning of the substitute of the previous people.

Key Words: *Khalifah, Thematic Interpretation*

1. Introduction

The Government in July 2017 officially dissolved Hizbut Tahrir Indonesia (HTI) because it has a ideology that is contrary to the ideology and Law of the State of Indonesia based on Pancasila and the 1945 Constitution. The activities carried out by HTI are considered to have violated the goals, principles and characteristics of the ideology of Indonesia.

The Khilafah is the ideology of the Country that HTI fights for. The democratic system that has been applied in Indonesia is considered to have deviated from the rules set by God in the Qur'an. The ideological foundations in Indonesia have been judged to be inconsistent with the content of the Qur'an and hadith, then it is considered by them as a mistake and deviates from the guidance of the Qur'an.

The Qur'an as a guidebook containing 14 letters and 6236 verses is an inseparable part. Understanding the verses of the Qur'an should incorporate and involve other verses in finding a complete understanding of meaning. Understanding the verses of the Qur'an can partially produce a radical interpretation and contradict another verse. Understanding religious values partially can also lead to a radical attitude. (Al-Qardhawi: 2001: 59-67). CAn example of partial understanding of the verse that can plunge into radical and extreme insight is when understanding the fifth verse of the surat at-Taubah (QS: 9:5) which states "kill the polytheists wherever you find them". The verse will surely contradict another verse which enjoins to provide security protection for the polytheists who plead with the Muslims (QS: 9:5).

Thus, understanding the meaning of the Qur'an by using thematic method is one effort to get the full meaning, In this context is the khalifah and Imamat in al-Qur'an. Ibnu Taymiyah says that the best interpretation is the al-Qur'an bil-Qur'an interpretation, since sometimes a topic is dealt with briefly on a particular surat and specified in a particular surat or verse. (Ibnu Taymiyah: Musaid: 2007, 271). Selection of khalifah keywords to get the full meaning of the meaning of the word in the al-Qur'an. In addition, there is no word of khilafah in the Qur'an, HTI groups repeatedly rely on the concept of khilafah in verse 30 of Surat al-Baqarah (QS: 2:30) Which in the verse is the word khalifah.

This simple study has the purpose to prove scientifically through thematic approaches to the

meaning of the word khalifah in the al-Qur'an. Does the meaning of the khalifah used in the al-Qur'an really state leaders as understood by radical and anti-Pancasila groups? Combining one verse with another verse about the two words will result in a correct understanding of the use and intent of both. Thus it can reduce or eliminate all forms of understanding that are radical and not appropriate in understanding the sentence in the al-Qur'an.

2. Thematic Interpretation

Thematic interpretation is a contemporary method of interpretation which is in great demand by the scholars of Tafsir. This is because this method has several advantages such as being able to dismiss the allegations of conflict between one verse with another verse, this method is capable of generating general guidance in the Qur'an, this thematic method is able to present the messages of the Qur'an Practicallly and systematically (Farmawi: 1997, 53-55). This thematic method also has other features besides those already mentioned, which are able to find the beauty of the style in every arrangement of a sentence used in various surat on the same topic or interrelated one (Azzahrani: 1992, 13).

This thematic interpretation method in term has the meaning of science or method that covers various problems of the ummah viewed from the perspective of the Qur'an through the study of one surat or more. The definition of thematic tafseer in term according to some scholars, namely collecting separate verses in the Qur'an which relates to the same theme both in the resonate or ruling in accordance with the purpose or intent of the content of the Qur'an (Muslim: 2005, 16). The thematic interpretation is also defined by the term as a science that examines the problems contained in the al-Qur'an through the collection of scattered verses, both in the same surat or in different surat, all of those verses have one thing in common and purpose. The taking of the law from the collection of verses is done through special mechanisms, specified conditions and specific steps (Said: t.h, 20). From both definitions can be concluded that thematic interpretation is a method of interpreting the al-Qur'an through the collection of separate verses either by the same surat or separated one by a verse that is not related to the topic to be studied, all of the collected verses have similar meaning or purpose.

Steps that must be passed by a mufassir in practicing thematic interpretive framework according to Farmawi there are seven steps. first; Set the issues to be discussed. second; Collect all the Qur'anic verses that pertain to the matter. third; Arrange the sequence of selected verses according to the period of descent. fourth; Understand the correlation between the verses in each letter. fifth; Compile the topic in a unified discussion. sixth; Complete the discussion with the Prophetic traditions related to the topic. seventh; Studying all selected verses as a whole and compromising between the general and the special, the absolute and the relative, etc. so that they all meet in the estuary without distinction or coercion in interpretation (Farmawi: 1997, 37)

In this study, the operational steps to be followed in the application of thematic methods in accordance with what was written by Azzahrany, that are: *First,* Selecting the topic to be studied; *Second,* Finding and collecting the verses related to the topic; *Third*, Preparing the verse in the order of descent*; Fourth,* Interpreting the verses well*; Fifth,* Supporting Arguments from the Prophet's Hadith (Azzahrani: 1992, 17). This step is considered more concise and practical writers without reducing the substance of this study.

3. Khalifah In The Al-Qur'an

The Khalifah comes from Arabic derived from khalafa syllables consisting of three letters خ, ل, ف. Sentences derived from the word kha la fa in various forms and its meaning repeated as much as 127 times in the al-Qur'an (Abd al-Baqi, tt: 303-306). From 127 repetitions, the word has 12 *shighat* listed in the Qur'an (Rahim: 2012, 22). This study is focusing on word خليفة as singular and خلائف خلفاء both of which are the plural of the word khalifah, which means literally as leader. The word khalifah and its plural form in the Qur'an repeat nine times. Here is a list of the khalifah verses in both singular and plural forms;

The word khalifah repeats twice

وَإِذْ قَالَ رَبُّكَ لِلْمَلَائِكَةِ إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً قَالُوا أَتَجْعَلُ فِيهَا مَنْ يُفْسِدُ فِيهَا وَيَسْفِكُ الدِّمَاءَ وَنَحْنُ نُسَبِّحُ بِحَمْدِكَ وَنُقَدِّسُ لَكَ قَالَ إِنِّي أَعْلَمُ مَا لَا تَعْلَمُونَ (QS: 2, 30)

يَادَاوُودُ إِنَّا جَعَلْنَاكَ خَلِيفَةً فِي الْأَرْضِ فَاحْكُمْ بَيْنَ النَّاسِ بِالْحَقِّ وَلَا تَتَّبِعِ الْهَوَى فَيُضِلَّكَ عَنْ سَبِيلِ اللهِ إِنَّ الَّذِينَ يَضِلُّونَ عَنْ سَبِيلِ اللهِ لَهُمْ عَذَابٌ شَدِيدٌ بِمَا نَسُوا يَوْمَ الْحِسَابِ (QS: 38, 26)

The word Khulafa repeats three times

أَوَعَجِبْتُمْ أَنْ جَاءَكُمْ ذِكْرٌ مِنْ رَبِّكُمْ عَلَى رَجُلٍ مِنْكُمْ لِيُنْذِرَكُمْ وَاذْكُرُوا إِذْ جَعَلَكُمْ خُلَفَاءَ مِنْ بَعْدِ قَوْمِ نُوحٍ وَزَادَكُمْ فِي الْخَلْقِ بَسْطَةً فَاذْكُرُوا آلَاءَ اللهِ لَعَلَّكُمْ تُفْلِحُونَ (QS: 7, 69)

وَاذْكُرُوا إِذْ جَعَلَكُمْ خُلَفَاءَ مِنْ بَعْدِ عَادٍ وَبَوَّأَكُمْ فِي الْأَرْضِ تَتَّخِذُونَ مِنْ سُهُولِهَا قُصُورًا وَتَنْحِتُونَ الْجِبَالَ بُيُوتًا فَاذْكُرُوا آلَاءَ اللهِ وَلَا تَعْثَوْا فِي الْأَرْضِ مُفْسِدِينَ (QS: 7, 74)

أَمَّنْ يُجِيبُ الْمُضْطَرَّ إِذَا دَعَاهُ وَيَكْشِفُ السُّوءَ وَيَجْعَلُكُمْ خُلَفَاءَ الْأَرْضِ أَإِلَهٌ مَعَ اللهِ قَلِيلًا مَا تَذَكَّرُونَ (QS: 27, 62)

The word khalaif repeats four times

وَهُوَ الَّذِي جَعَلَكُمْ خَلَائِفَ الْأَرْضِ وَرَفَعَ بَعْضَكُمْ فَوْقَ بَعْضٍ دَرَجَاتٍ لِيَبْلُوَكُمْ فِي مَا آتَاكُمْ إِنَّ رَبَّكَ سَرِيعُ الْعِقَابِ وَإِنَّهُ لَغَفُورٌ رَحِيمٌ (QS: 6 , 165)

ثُمَّ جَعَلْنَاكُمْ خَلَائِفَ فِي الْأَرْضِ مِنْ بَعْدِهِمْ لِنَنْظُرَ كَيْفَ تَعْمَلُونَ (QS: 10, 14)

فَكَذَّبُوهُ فَنَجَّيْنَاهُ وَمَنْ مَعَهُ فِي الْفُلْكِ وَجَعَلْنَاهُمْ خَلَائِفَ وَأَغْرَقْنَا الَّذِينَ كَذَّبُوا بِآيَاتِنَا فَانْظُرْ كَيْفَ كَانَ عَاقِبَةُ الْمُنْذَرِينَ (QS: 10, 73)

هُوَ الَّذِي جَعَلَكُمْ خَلَائِفَ فِي الْأَرْضِ فَمَنْ كَفَرَ فَعَلَيْهِ كُفْرُهُ وَلَا يَزِيدُ الْكَافِرِينَ كُفْرُهُمْ عِنْدَ رَبِّهِمْ إِلَّا مَقْتًا وَلَا يَزِيدُ الْكَافِرِينَ كُفْرُهُمْ إِلَّا خَسَارًا (QS: 35, 39)

3.1. The Meaning of Khalifah

Ibnu Mandzur gives the meaning of the khalifah as the person who replaces the previous person, plural of the khalifah is khalaif or khulafa' (Ibnu Mandzur: vol. 9, 1414H, 84). Al- Maraghi in his commentary mentions that the purpose of the khalifah is the person who replaces God in carrying out his commandments and his affairs among men (al-Maraghi. vol. 1, 1946, 77). Both interpretations of the meaning of the khalifah are similar to the interpretation of al-Zuhayli in his tafsir in defining the meaning of the khalifah, that is, the person who succeeded the previous person in terms of enforcing the law. al- Zuhayli asserted that the khalifah in the verse (QS: 2, 30) as the Prophet Adam (Al-Zuhayli: vol, 1, 1418 H, 124). The interpretation of al-Zuhayli is similar to his predecessor al-Zamakhsyary in his commentary al-Kasyaf which says that the caliph in the verse is Prophet Adam, the khalifah itself in the language means a substitute from other (Al-Zamakhsyary. vol 1, 1407, 124). Al- Thabary in his commentary mentions that the king or supreme ruler can be called as khalifah, because he replaced the previous king and occupied his position (Al-Thabary. vol 1, 2000, 449). From some of those interpretations of the meaning of khalifah, it can be concluded that the khalifah referred to in the verse is the Prophet Adam, while the meaning of the khalifah literally is the person who replaces the previous person or in any certain affairs.

The interpretation of the khalifah meaning as a substitute is corroborated by the 28th verse of surat Shad as written by al-Wahidy in his tafsir (al-Wahidy: 415, 922). Al-Qurtuby also does not differ with the previous mufassir who gave the khalifah meaning as a substitute of the previous, namely angels or other (al-Qurtuby, vol 1, 1964, 263). All the above-mentioned by mufassir in giving the meaning of the khalifah in the surat of al-Baqarah verse 2, consistent with the meaning of the khalifah in the surat of Shad verse 28. From some interpretations of the meaning of the word khalifah of the mufassir have no significant difference in giving the meaning of khalifah which interpret as the substitute of Allah or Malikat or previous other people in upholding certain laws or affairs on Earth.

The word khalifah contained in the two surats seemed to be a complementary whole. It can be seen in the interpretation given by al-Qurtubi about the Caliphate of Prophet Dawood. In his commentary, he mentioned that Prophet Dawood was commanded by Allah to be a khalifah with the aim of enjoining the good and forbidding the evil, in lieu of the Prophets, or the good men before him (al-Qurtuby: vol 15, 1964, 188).

The word khalifah is used twice in the Qur'an with a single form having the meaning of a prior substitute

in enforcing the law, exercising certain matters which are more of a power. In this case, the Power has a broad scope, covering the World, as God mentioned with the word Earth in the surat al-Baqarah. The scope of the khalifah may also be interpreted by a narrow scope and reach out to a particular community, this is as directed by the surat of Shad verse 28.

3.2. The Meaning of Khulafa'

The word khulafa' in al-Qur'an repeats 3 times, everything in al-Qur'an according to al-Thabary is used for the same meaning that is a substitute (Al-Thabary. vol 12, 19, 2000, 505, 540, 485). Ibnu Kathir interpreted word khulafa' in (QS: 7, 69) as a descendant, in the context of that verse is the descendant of Prophet Nuh (Ibnu Kathir: vol. 3, 1999, 434). Al-Zuhayli Interpreting the khulafa with a leader who replaces the previous leader, this interpretation is supported by the subsequent word which Allah Almighty bestow to his successor leaders with physical strength (Al-Zuhayli: vol, 8, 1418 H, 259). Al-Qurtuby interpreted Khulafa in verse 69th of surat al-A'raf by residents or occupants (al-Qurtuby: vol 7, 13, 1964, 236, 224).

After making a search of the meaning of khulafa' in al-Qur'an, it is found that the khulafa as already asserted is the plural of the word khalifah. The word khulafa on some verses in the Qur'an by the mufassir interpreted as a substitute or successor of the previous people, only al-Qurtuby interpreted khulafa as a resident or resident on Earth. Interpretation of al-Qurtuby is not substantially in contradiction with other mufassir, because the man whose status as a substitute for the previous people also at once become the population and control of the Earth.

Looking at the editorial composition of the word khulafa' and its surrounding verses, as well as considering the interpretation of the commentary scholar, it can be concluded that the emphasis on the use of the word khulafa' in al-Qur'an is not intended to directly mean the leader or king or ruler in particular. Thus, in accordance with the use of its editorial as a plural word intended for groups or a large community. Therefore, khulafa' which is derived from the singular of the khalifah is emphasized understanding of its meaning in general. In other words, khulafa' is used by the al-Qur'an as a common scripture and common area. The khalifah is emphasized specifically as a powerful man capable of establishing universal stability both on Earth and in certain communities and classes. Although the khulafa is the plural form of khalifah, but the emphasis point is different, it is proved by the interpretation of al-Qurtuby who interpreted the word khulafa' with the residents or the occupants -in this context is the Earth-, whereas the khalifah is interpreted as a substitute for someone in power to govern good and prohibit evil.

3.3. The Meaning of Khalaif

The use of the word khalaif in the Qur'an four times. The mufassir mentioned that khalaif is the plural of the khalifah. The use of the word khalaif according to the mufassir is more focused on the meaning of the substitute of the previous people. The emphasis of the use of the word khalaif is different from khalifah that means to master.

Regarding all the usage of the word khalaif, Al-Zuhayli gives the interpretation that all human beings are khulafa in the sense of mutual exchange between one another, each generation is a substitute of the previous generation (Al-Zuhayli: vol, 8, 1418 H, 132). Actually the turn of power (istikhlaf) in earth is strongly influenced by good deeds. Allah Almighty will destroys those who do dhalim and replace them with good people. The wisdom of successive generations is that Allah will know how they are doing. (Al-Zuhayli: vol, 11, 1418 H, 126). Indeed, Allah Almighty replaces one generation with another generation aims to be grateful for the favors and utilize the goodness of the earth's content, but whenever the generation is disobedient, then their disobedience will be bad for them (Al-Zuhayli: vol, 22, 1418 H, 274).

3.3. General Interpretation of Khalifah

Habib Umar stated that the discussion of the Khilafah is important to examine two very important things. First, the narrowing of the meaning of the khilafah, which is only on the implementation of Islamic law through power. Secondly, the supposed view of upholding the khilafah when there is government in the midst of the people.

Regarding to the first problem, it should be emphasized that the word "khilafah" when associated with religion and shari'a, its meaning is not only limited to the context of power with all the application of public laws, because

the meaning of the khilafah is etymologically much wider. Al-Qur'an uses this word, even for those who do bad, people who deviate from the right path, also the generation that comes after the prophets and apostles, as in verse,

فَخَلَفَ مِن بَعْدِهِمْ خَلْفٌ أَضَاعُوا الصَّلَاةَ وَاتَّبَعُوا الشَّهَوَاتِ فَسَوْفَ يَلْقَوْنَ غَيًّا

But there came after them successors who neglected prayer and pursued desires; so they are going to meet evil." (QS.19 : 59).

So, they are a substitute generation that lives in the place of previous people, but they do not follow the principles and behaviors of previous generations. Thus, the meaning of khilafah is a person's turn towards others in any context.

Regarding the relation of the khilafah to the affairs of religion, it is also necessary to understand that the Khilafah is glorified and declared by God as a special privilege of Prophet Adam and his grandchildren, in his word,

إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً

"Indeed, I will make upon the earth a khalifah (successive authority)" (QS.2 : 30), Is a spiritual, religious, and divine khalifah, not limited to the political authority that governs the external affairs.

The Khilafah is closely related to the duty of carrying the mandate in accordance with one's capacity and capability, in the context of upholding the truth, the shari'ah that Allah has established in His creatures. This is the khilafah mentioned in al-Qur'an, when Allah layed our ancestors, the Prophet Adam to the earth.

Practicing God's demands, executing orders, and avoiding his prohibitions, that is the meaning of the khilafah that God has assigned to Prophet Adam. Prophet Adam descended when on earth there has not been any nation that can be the object of power. He was only accompanied by Mother Eve. Then came the sons of Adam's family. He underwent his position as the first person to hold the khilafah before the form of government and public power. History continues in that family region, Adam and his sons. They are the inhabitants of the earth.

Then more and more offspring. The prophet Syits, the son of Adam, succeeded him in the reign of the Caliphate. He accepts prophethood and a mandate to execute a human pledge to God. Khilafah is the task of each of us. There is no reason for anyone to underestimate this, to neglect and abandon it because of the absence of the physical symbols of the khilafah (power).

If it is associated with one of the great khilafah of the Prophet Muhammad, the Khilafah is the realization of the law in general, because power is held by honest, righteous, and guided people. He reported, this khilafah lasted only 30 years from the time he died. This is one of the miracles that shows his truth as Prophet. Prophet called the deadline. When his 30-year old leadership has been completed and this kind of khilafah has been lost, he does not give orders, **"Rebel against the rulers, fix the problems, strive to replace them with people who resemble those 30 years!"** The Messenger of Allah did not command it. In fact, although in his hadith he has signaled that the royal grip will last a long time. In some narrations, he called it as adhudh (the power that like to bite).

In the book of Imam Ahmad's Musnad, also in Al-Mustadrak 'al-Ashihai Al-Hakim's work, it is mentioned, Rasulullah PBUH said,

عَنْ سَفِينَةَ، قَالَ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: "الْخِلَافَةُ بَعْدِي ثَلَاثُونَ سَنَةً

"Khilafah after me lasted ٣٠ years, then became a kingdom." (Ibnu Hibban: vol 15, 1988, 392)

Let us examine his words that clearly mention the period of this khilafah. Apparently, Ali ra killed in the month of Ramadan, while Rasulullah died in Rabi'ul Awwal. For up to 30 years, there is still a six month pause. This six-month period is the period of the leadership of Al-Hasan bin 'Ali RA, his grandson of the Prophet, until he withdrew from the caliphate in Rabi'ul Awwal, just at the end of the 30 years as mentioned by Rasulullah PBUH. Again, this is one of the signs of prophecy, the great miracle of the Prophet Muhammad PBUH, as well as his notice of the secret things (supernatural) that he can from Allah Almighty. In the hadith it was revealed that the Prophet preached, *"After that, power is in the hands of the rulers who do the things you (the friends) deny. You see they are not firm in following the teachings of Islam."* They (the Companions) asked, "What do you (O Messenger of

Allah) command us? Should we create a new khilafah, another government, and fight to get rid of them? "The Prophet (s) said," You must be obedient (to your leader).*"* (HR.Bukhari dan Ahmad)

This is not the idea of certain groups in Islam. This is the direction of prophetic and apostolic holders, one who receives revelation from Allah Almighty. In a hadith, Rasulullah PBUH prayed, *"O Allah, give mercy to my khalifah / successors. When he was asked who the caliphs were, he did not use the meaning of khilafah as he said "Khilafah after me lasts 30 years", but he uses another notion of khilafah, the religious khilafah. He said, "The people who live after me, they narrated my hadiths and taught them to humans."*

He said, people who have high attention to the sunnah and teach it to others are the khalifah of his successors.

It is reinforced by the hadith about scholars who are the heirs of the prophets. Also, as mentioned in the books of interpretation that the contents of the pronunciation of Ulul Amri mentioned in some verses are the scholars, those who were awarded Shari'ah science and became the bearer of the Shari'ah's knowledge. For example, this verse,

وَلَوْ رَدُّوهُ إِلَى الرَّسُولِ وَإِلَى أُوْلِي الأَمْرِ مِنْهُمْ لَعَلِمَهُ الَّذِينَ يَسْتَنبِطُونَهُ مِنْهُمْ

"... But if they had referred it back to the messenger (rasul) and to those of authority (ulil amri) among them, then the ones who (can) draw correct conclusions from it (rasul dan ulil amri)." (QS. 4 : 83). According to the opinion of the mufassir, ulil-amri referred to here is the ulama. As in the word of God as follow

أَطِيعُواْ اللّهَ وَأَطِيعُواْ الرَّسُولَ وَأُوْلِي الأَمْرِ مِنكُمْ

"...obey Allah and obey the messenger and those in authority among you." (QS.4 : 59). Regarding the physical power, the law of its existence in the Shari'ah is, "If they rule well, be good for them and for you. If they rule badly, it is good for you and so bad for them." (HR.Thabrani).

Thus, from the sunnah of the Prophet PBUH, we can sort the two attitudes. First, leave the khilafah to preserve the welfare of the Muslims because of their real condition. Secondly, refuse to give the title of khalifah only because of the demands of the ignorant or submit it to an unworthy person, provided that it does not cause confusion. The second is what Rasulullah PBUH said to Sayyidina Uthman. Notice, the Prophet PBUH praised his grandson, Al-Hasan, for willingly releasing the khalifah for the good of the Muslims. On the other hand, he said to Sayyidina Uthman RA, "They are about to take off the clothes that God has put on you. Do not follow them until you catch up with me.*"* (HR.Thabrani).

There were some who came to Uthman, asking him to withdraw from the khalifah. Apparently, they are not worthy to replace him. Meanwhile, chaos is not caused by Utsman RA's attitude to defend the khalifah. Chaos occurs when people like them receive a khalifah. They will play it (khilafah).

Nor can we simply carry out the function of the khalifah only in relation to ourselves. Each of us has the mandate of being the successor or khalifah, in the eyes, ears, tongue, sex, stomach, hands, feet, and heart. So, carry out the obligations of the khalifah of the Prophet. All these are things you have to keep. You are the leader of all this, all his affairs are handed over to you. So, be a good successor of the Prophet in keeping your limbs to always obey the shari'ah and apply the law of Allah Almighty.

In other areas, you have power in matters related to family affairs, friends, and neighbors. Also, in matters relating to the person listening to your advice, accept your advice and referral, whether you are close or not. Perform khilafah duty in all of that.

Upholding the Shari'a, in any form, is a khilafah of Allah and His Messenger, in a general sense. While the khilafah in a special sense is a khilafah in the hadith of the Prophet who was declared lasted for 30 years after his death. After that, the "biting kingdom". After that, dictatorial power. This is what happened to the majority of the rulers of the time. Then in the end the khilafah returns like the teachings of the Prophet Muhammad. This is something that will happen, and has been reported by the Messenger of Allah.

4. Conclusion

The results of this study indicate that the word khalifah is used twice in al-Qur'an with a singular form that means a substitute in the case of enforcing the law, carrying out certain matters which are more related to the power. The word khulafa' in al-Qur'an repeats 3 times, all in al-Qur'an according to al-Thabary

used for the same meaning of substitute. The use of the word khalaif in the Qur'an repeats four times. The mufassir mentioned that the use of the word khalaif is more focused on the meaning of the substitute of the previous people.

The khalifah is a mandate for all to maintain individual or social stability. Upholding the teachings of religion and running all the Shari'ah of Allah is a duty for every individual as a khalifah. This is the general meaning of the word khalifah. As for the special meaning of the word khalifah is the one who has power with the royal system (khilafah) and this only lasts for 30 years as the hadith which has been described.

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State and Religion in the Perspective of Pancasila: Study Based on Shari'a Law

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Abstrak–Shari'a-based regimes if linked to the state and religion in Pancasila's perspective can be seen from the return of the Indonesian nation to the 1945 Constitution through the Presidential Decree if associated with the Jakarta Charter Manuscript. Indeed, the formal juridical can not be used as the basis for the validity of Shari'ah Islam in Indonesia. However, it has given place for the position of Shari'ah Islam in Indonesia, or at least provides a basis for the formation of national legislation based on Islamic Shari'ah. In other words there is an opportunity given by the constitution to be used by Muslims in the formation of national legislation based on Shari'ah Islam as long as it is not contrary to the rules of the above-mentioned shrimp.

Pancasila is the source of all sources of state law (fundamental norm of state/staatfundamental norm) or basic norm (graundnorm, basicnorm) which ranks highest at the top of the pyramid of the highest legal norms, followed by the 1945 Constitution, as well as unwritten basic law or constitutional convention as (Stelegraundgesetez), by law (formele gezetz), as well as autonomous and autonome satzung rules of conduct and regulations starting from the Government Regulation, the Presidential Regulation and the Regional Regulation.

Key Words: *State, religion, Pancasila and Sharia-based law.*

1. Introduction

Sharia-based regulation, various reasons have been conveyed by counter parties to reject sharia-based regulation, among others that Sharia-based regulation is not entitled to regulate the privacy of Muslims in worship, Sharia-based regulation contrary to the law Higher, Indonesia is a plural country not an Islamic state, contrary to Local Government Law, the law should be general and should not be partial and various other reasons.

Similarly, the pro-sharia-based parliaments, which argued that as the discourse of democratization, sharia-based regulation is part of the aspirations of local communities, so that each region is entitled to make the rules of the region's distinctive legislation. In addition, the existing legal regulation is considered not able to guarantee the enforcement of justice in society, so there is no harm in trying the enforcement of Islamic law is clearly more assertive and basically a part of the source of national law to apply to the community.

In addition to those who agree with the formal implementation of Shari'ah Islam in Indonesia has at least 3 (three) problems that are quite serious; (Kuriawan Zein, Sarifuddin, et Munthoha : 2010 ; 7) First, it deals with historical issues. Historically, the idea of formalizing Islamic Shari'a in state politics is not a new idea. The Islamic circles used to struggle seriously, as seen in the Jakarta Charter, which then became a milestone for the prosecutor of the idea of formalization of Islamic Shari'ah in Indonesia.

Historically, the abolition of seven words in the Jakarta Charter means the sacrifice of Muslims in the context of pluralism. This is not a defeat but a moral victory, which shows that Muslims have a great contribution and a good cause for the formation of a nation that is essentially very plural, even though the majority of the population is Muslim. But for the disillusioned of the journey of history it is assumed that the founders of the nation of the Muslim group have betrayed the aspirations of Muslims, accepting

the abolition of seven words in the Jakarta Charter, marked by the 'Kartosuwiryo Rebellion' (DI / TII) taking place in Java, In Aceh with the main character Daud Beueureuh, in South Sulawesi through the Kahar Muzakkir movement and in South Kalimantan with the character of Letda Ibnu Hajar.

Secondly, ideological issues, ideological discourse offered by Islamic groups who want formalization of Islamic Shari'ah in politics is not easy to make many people believe and express their support even by (mostly) among scholars. Islam (as ideology) is usually confronted with Pancasila as the state ideology. Islam versus Pancasila is a counter-productive discourse for the progress of the Islamic movement itself. The confrontation of Islam and Pancasila (in the context of ideology) has absorbed much of the energy from the Islamic movements in Indonesia that are mutually "muddled" themselves. The imposition of a single principle by the New Order regime on political parties and mass organizations (1985) should be a lesson for all. Shari'ah Islam ideologically, still leads to pro-contra that prolonged, both internally Muslims, as well as with outsiders (non-Muslims). In the internal context there is still a substantive questioning; Should it be proper that a universal Islam is derived from (into the) ideology? With outsiders, the offer of Islamic ideology is not easy to understand by (them).

Thirdly, the technical-practical problem is how is the technical implementation of Islamic Shari'a, if the state intervenes? Sharia police superintendent should be formed? The shadow of inconvenience inspired many, when the idea of formalization of the Islamic Shari'a.

Another area of political issues, the emergence of shari'ah-based regulation can be seen from efforts to implement or formalize Islamic Shari'a through a new strategy through the Regional Government as a result of the constant struggle of the implementation of Islamic Shari'ah through the constitution. But is that really the main reason, or is it just a political interest of the Regional Government to get support from the community.

2. Discussion Sharia-Based Regulation If connected with the State and Religion in Perspective of Pancasila

Religion, as expressed by many, can be viewed as a Divine instrument to understand the world of Islam, (Bachtiar Effendi; 1998 hlm; 6) as opposed to other religions, is actually the easiest religion to accept such a premise. The main reason lies in the most prominent feature of Islam, namely its omnipresence. It is a view that recognizes that "everywhere" the presence of Islam always provides "the right moral guidelines for human action" (Fazrul Rahman; 1966 hlm; 4)

The holistic view of Islam has some implications. One of them is that it has encouraged the birth of a tendency to understand Islam in its "literal" sense that it only emphasizes the "outer" dimension (exterior) and ignores the "contextual" and "interior" dimensions. In terms of this holistic nature of Islam, Qamaruddin Khan writes as quoted by Bachtiar Effendi (Bachtiar Effendi;1998 hlm; 9) : There is a false view in the minds of some Muslims today that the Qur'an contains a thorough explanation of everything. This misunderstanding is due to a false view of the Qur'anic verse that reads: "And We have sent down to you the Scripture to explain all things, and guidance, and mercy and glad tidings for those who surrender" (QS An Nahl ayat ; 89). This verse is meant to say that the Qur'an contains an explanation of all aspects of moral guidance and not an explanation of all the objects of life. The Qur'an does not contain anything related to general knowledge.

In fact, recognizing Shari'ah as a comprehensive life system is something, while understanding it correctly is another thing. In fact, in the context of "how the shari'ah should be understood" this is, as Fazrul Rahman sees, lies the real issue. There are a number of factors that influence and shape the outcome of the Muslim understanding of shari'ah. The ideological, cultural, and intellectual situations, or so-called Arkoun as "aestheticsofreception," are very influential in determining the form and content of understanding. Therefore, even though every Muslim accepts the general principles set forth in the Shari'ah, their understanding of the teachings of Islam is colored by differences.

On the relationship between religion and state in Islam, according to Munawir Sjadzali (Munawir Sadzali; 1985 hlm; 235-236) , there are three schools that respond. First, the flow that assumes that Islam is a plenary religion, which includes everything, including the problems of the state. Therefore religion can not

be separated from state and state affairs is a religious affair and vice versa.[1]

The second flow, saying that Islam has nothing to do with the state because Islam does not regulate the life of a state or government. According to this flow, the Prophet Muhammad had no mission to establish a state.[2]

Third, argues that Islam does not cover everything, but includes a set of ethical principles and values of social life including statehood. Therefore, in a state, Muslims must develop and implement outline by Islam

Model of religious and state relations. Hussein Muhammad (Hussein Muhammad; 2000 hlm; 92-94) mentions two models, namely integralistic and mutualistic symbiotic relationships. First, it is an integralistic relationship. This relationship model can be interpreted as a relation of totality, where religion and state is an inseparable unity. Both are two integral institutions. It also provides the understanding that the state is a political institution and a religious institution.

M. Amien Rais said in his paper, that Islam is din and daulah (religion and state) (M. amien Rais; 1987 hlm; 7). The statement is also the opinion of almost all modern writers. Muhammad Yusuf Musa in his book Nizham al-Hukmifii al-Islam, has repeatedly asserted that Islam is din and daulah (Muhammad Yusuf Musa; 1964 hlm; 7).

The second relationship model is a symbiotic-mutualistic relationship. The model of this relationship, affirms that between religion and country there is a relationship of mutual need. According to this view, religion must be well executed. This can only be done if there is an institution called a country. Meanwhile the state can not be left alone without religion. For without religion there will be chaos and immorality in the state.

According to Nurcholis (Muhammad Yusuf Musa; 1964 hlm; 256) the value of state and government in Islam is instrumental and not the purpose itself. The purpose of living Muslims is not to set up a nation, but to the Lord and return to Him. The government or the state is created to create space and time as a place for every human being to develop piety to his God. Thus, religious and state relations are ethical non-spiritual issues. The state does not regulate and interfere with the spirituality of citizens with God. Through the state it is hoped that an ethical society created by religious values will be created.

Shari'a-based regimes associated with the state and religion in the Pancasila perspective can be seen from the return of the Indonesian nation to the 1945 Constitution through the Presidential Decree by linking the Jakarta Charter Manuscript, it is not yet formal juridical basis for the validity of Shari'ah Islam in Indonesia Intact. However, it has given place for the position of Shari'ah Islam in Indonesia, or at least provides a basis for the formation of national legislation based on Islamic Shari'ah. In other words there is an opportunity given by the Constitution to be used by Muslims in the formation of national legislation based on the Shari'ah of Islam (Syamsul Wahidin and Abdurrahman; 1984 hlm; 108).

According to Soepomo in his speech with the most basic issue of Indonesian Problem as quoted by Syafi'i Ma'arif, Pancasila is the foundation of a state still debated in the Constituent Assembly.[3] The Islamic group considers that historically Pancasila animates the Jakarta Charter. For Muslims the ideals of Pancasila law is none other than how to implement the values of Islamic teachings that have some universal principles that can be accepted by all groups. According to M. Tahir Azhari (Taher Azhari; 1992 hlm; 69) , the concept of Pancasila state law has the following key characteristics;

a. There is a close relationship between religion and the State;
b. Relying on the One God;
c. Religious freedom in a positive sense;
d. Atheism is not justified and communism is prohibited;
e. The principle of kinship and harmony;
f. The constitutional system;
g. Equality in law;
h. Free courts;

1. Among those included in this category of supportive thinking are Rasyid Ridha, Sayyid Quthb, and Abul al-A'la al-Maududi.
2. This controversial thinker is Ali Abdul al-Raziq.
3. There was an interesting drag on the discussion of the State Basis between the Nationalist, Religious and Indonesian Nationalist Groups. Each propose ideas according to the ideology adopted. So according to Soepomo Pancasila is a political agreement, see Syafi'i Ma'arif, Islam and State Problems

Historically it is a necessity that Pancasila reflects the spirit of the Jakarta Charter. This is a gift of Muslims for the unity and unity of the Indonesian nation from national disintegration. The great-minded Muslims eliminate seven words; Belief with the Obligation to execute Islamic Shari'ah for its adherents become Belief in God Almighty. Pancasila can not only be seen in terms of legal ideals that contain the philosophy, ideas of ideas, and cultural values of a nation. But furthermore it is a reflection of the values of Islamic teachings in all aspects of human life as a whole.

In addition to this, the response of several regions in Indonesia to the autonomy and decentralization policies that have been rolling since the enactment of Law no. 22 of 1999 on Regional Government which was later replaced by Law no. 32 of 2004 on Regional Government has made some areas especially based on a very strong religious sociological culture, especially the Islamic religion demanded the enactment of Islamic Shari'ah (Muntoha; 2010 hlm; 109).

3. The Role of Regional Autonomy in the Emergence of Sharia-Based Regulation

The fall of power of the New Order after a long time to curb the freedom of society gave a new passion for democratic life in Indonesia and the beginning of the reform era in all aspects of life from economic, political, social, and cultural. However, the transition, characterized by the shifting powers of the New Order regime to the reform era, did not quickly bring the Indonesian people into a democratic order.

Indonesia is a country that embraces a unitary State system (unitary) in the form of Republic. The Unitary State of the Republic of Indonesia is divided into provincial and regional areas of the province divided into districts and municipalities, each of which regencies and municipalities have a Regional Government regulated by law.

Regional Autonomy is the policy of the Government of the Republic of Indonesia to distribute power between the Central Government and the Regional Government. Through Regional Autonomy, local governments are authorized to regulate and manage their respective regions in various ways, except: foreign, defense, security, yustisi, monetary, fiscal and religious.[4]

After the implementation of Regional Autonomy which is marked by the enactment of Law no. 22 of 1999 on Regional Government from 1 January 2001, which was subsequently replaced by Law no. 32 of 2004 on Regional Government, each region (province, district / city) is given a very large authority to regulate and govern their respective regions

The opportunities given by the regional autonomy policy were translated vary by region. One of the "translations" used is to make various Regional Regulations (Perda). In some areas, including in South Kalimantan, there is an interesting phenomenon of law making to be studied academically, especially from a legal and political perspective. The phenomenon is the emergence of many local regulations that regulate issues related to the religiousness of a person and / or group in a society commonly called Islamic Sharia Ordinance or Perda Berbasis Syari'ah, such as the law on Khatam Koran duty for children of elementary school age / MI, Perda on Ramadan, Perda on Jum'at Khusu 'and various other Perda with the intention of protecting, defending and / or maintaining various characteristics typical of the region.

Sharia-based regulations are currently implemented at least in 6 (six) provinces, 38 (thirty eight) districts and 12 (twelve) cities. The pattern of enforcement of sharia-based regulation also varies as in Nanggroe Aceh Darussalam Province (NAD) which affirms the implementation of Islamic Law, sharia-based regulation is made by the Provincial Government which refers to a parent regulation, namely Regulation no. 5 of 2000 on Enforcement of Islamic Shari'a where this regulation is made valid for all districts / cities

In the provinces of Riau, South Sumatra and Gorontalo, sharia-based regulations are made at the provincial level, but are not followed by the District / City Government. The rules governed are generally related to the prohibition of prostitution and circulation of liquor. Another form of enactment of Shariah-based regulation is Perda made by the Regency / City Government, without any parent rules at the provincial level. Cianjur regency (West Java), Tangerang (Banten), Banjarmasin (South Kalimantan) and Pamekasan (Madura, East Java) are some district and / or municipal

4. This is regulated in Article 18 paragraph (2) of the 1945 Constitution and also in Article 10 of Law No. 32 of 2004 on Regional Government. State Gazette of the Republic of Indonesia Year 2004 No. 125 and Supplement to State Gazette of the Republic of Indonesia No 4437.

governments implementing syariah-based regula- tions even though the host province does not regulate it.

In addition to the result of Regional Autonomy which gives wide authority to the region, the emergence of Sharia-based regulation is also due to the granting of special authority for the Province of Nanggroe Aceh Darussalam through Law no. 18 of 2001 on the Province of Nanggroe Aceh Darussalam which inevitably raises jealousy for other regions. Abdul Aziz Kahar Muzakkar, chairman of the preparatory committee for the implementation of the South Sulawesi based shariah law, said that the provision of Special Autonomy in Nanggroe Aceh Darussalam Province has paved the way for other provinces to get the same status. Therefore, South Sulawesi should also be given special status as Nanggroe Aceh Darussalam

The emergence of Sharia-based regulation in the regions and the application of Islamic Shari'ah in Nanggroe Aceh Darussalam has been analyzed by political analyst Denny Indrayana as a strategy that in Mao Tse-tung's terms, this strategy is made 'village besieging the city'. So it is expected that the Shari'ah of Islam will gradually be applied directly in the State of Indonesia. Thus, if Shariah-based regulation already exist in various regions, in the end Shari'ah Islam becomes part that can not be eliminated again from the middle of society

4. Closing

The need for a deep understanding of the drafting of Shariah-based regulation includes the drafting of local regulations in general, so that it is not misunderstood and considered to be out of the Unitary State of the Republic of Indonesia.

The birth of special regulations in the regions, including from local regulations based on the values of religious teachings (in this case Islam), should be understood as the diversity of regions in Indonesia as a plural country with due regard to the hierarchy of laws and regulations In the Unitary State of the Republic of Indonesia.

The formation of Sharia-based regulation should really pay attention to the aspirations of the people, not just for the sake of the moment for the executive and legislative governments of the region.

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Foreign Walinagari:
The Unfinished (Political) Contemplation of Minangkabau's Democracy

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Abstrak – Nagari as lowest government institutions in Indonesia was recognized since the principles of regional autonomy applied. Nagari wasn't a recent-known on Minangkabau society in West Sumatra. Nagari has been through a variety of regime and was adapted in accordance with government regulations established before. In the modern era, Nagari was undermined by government efforts in the framework of the universalization of bureaucratic administration. The existence of Undang-Undang Desa with some chapters that were canceled by Mahkamah Konstitusi showed that the state ignores the values of indigenous Minangkabau locality by provides equal opportunities to all Indonesian citizens to run for walinagari in Minangkabau.

Key Words: *pluralism, locality, democracy, nagari, Minangkabau*

1. Introduction

The regional of movement expansion should be seen as a manifestation of a political movement that identity because of the issues of justice and regional development is urgently (Maarif 2012, 1). One of the important issues on the reform era governance is the application of administrative autonomy at the local level. The autonomous government held in conjunction with the decentralization of power. It shows that every region in the diverse structure of the administration has the right to formulate by it self-policy in their respective regions in certain aspects. Changes authority in this case likely will affect property relations and inheritance, and changes in property relations will certainly have implications for the political authority and administrative (Benda-Beckmann and Benda-Beckmann, Political and Legal Transformations of an Indonesian Policy: The Nagari from Colonisation to Decentralization 2013, 26). In a paternalistic culture of Indonesian society, decentralization and regional autonomy policies will not succeed unless there is a conscious effort to build its own regional's independence (Asshiddiqie 2005, 278). Therefore, to encourage the development of society era of reform, the existence of regional autonomy regulation was unable to accommodate the need of fostering the independence of governance at the local level.

West Sumatra Province who first responded to the regional autonomy and decentralization of power in Indonesia by restructuring public administration (Benda-Beckmann and Benda-Beckmann, Recentralization And Decentralization in West Sumatera, 2009, 293). This policy opens opportunities for indigenous Minangkabau to return to their form of government in the past, although basically, the idea of returning to the form of government system villages had been there in 1998 when Muchlis Ibrahim served as governor of West Sumatra (Vel and Bedner 2015, 495). The regional autonomy policy is not seen as a transfer of authority from the central agenda for the region only, but rather than related to the transfer of authority from the government to the public.

The decentralization policy has stimulated debates on the relationship between indigenous patterns, Islam, and the state. This condition not only affects the village administration but also on the identity of indigenous Minangkabau society and their position in the Republic of Indonesia (Grace, 2013, 123). The existence of regional autonomy to provide fresh air to the Minangkabau in West Sumatra to reimplement its form of local wisdom. Nagari as governance structures

gets formalistic legality of the state's back is turned as the lowest form of government (Abidin 2016, xiii).

2. Discussions

2.1. Nagari Minangkabau: Genealogical vs Geographical Administrative

West Sumatra as one of the provincial-level administrative regions in Indonesia that territorial synonymous with a culture that is Minangkabau region (Asnan 2007, 1). Most of the public identifies as the Minangkabau region of West Sumatra. However, when examined further, basically the Minangkabau region is not identical with the province of West Sumatra alone (Graves 2007, 16, Nur 2015), but also partly the mainland Riau, north of Bengkulu, the western part of Jambi, the southern part of North Sumatra, parts of southwest Aceh and parts of Negeri Sembilan in Malaysia. The Mentawai Islands are administrative including West Sumatra, but it wasn't a part of Minangkabau (Loeb 1972, 97-127).

The term of Minangkabau implies culture in addition to the geographical significance. In the life of the nation, Minangkabau is perceived as an ethnic and cultural forms. Meanwhile, the people of this region are not familiar with the term tribe or culture of West Sumatra. Therefore, it is not unusual when most people used to call him with the Minangkabau ethnic and not ethnic Minangkabau of West Sumatra. Customary law community Minangkabau in West Sumatra is a unique ethnic group and well known for salesmanship and their intellectual achievements. They are characterized by three major characteristics, namely: a strong adherence to Islam, obedience to the matrilineal kinship system and the tendency to wander or migrate strong (Azra, 2003, 31). Islam was another important aspect in the Minangkabau world. Customary and Islamic relations in the Minangkabau world depicted in the symbol of the completeness of the village.

Villages in West Sumatra became quite interesting to study to be discussed in relation to the empowerment of people to the process of democratization in the grass root level. Nagari in Minangkabau tradition is a cultural identity which became a microcosm symbol of the macrocosmic of a broader arrangement (Shalihin 2014, 4). Nagari in Minangkabau is compliant embryonal in a state system. Nagari is a country in terms of miniatures, and a small republic is self-contained, autonomous, and fix yourself (Naim 1990).

As an institution, the village is not only understood as a mere territorial quality but also summarizes the quality of genealogy. Nagari is a government agency at the same time is also a major dominant social institution. As an autonomous public entity is a republic mini villages with a clear territorial boundaries for its members. Nagari has self-government and has their own customs that govern the lives of its members (Manan 1995). Nagari is a confederation of regions within the Minangkabau government and is entitled to take care of himself (Kato 1982).

The latest regulation that is shaped and determined to be related affairs of local autonomy is Law No. 6 of 2014 on the village and Law No. 23 of 2014 on Regional Government. Not much different from the existing regulation, the regulation focused only related to the order of arrangement of public administration at the local level as a form of assistance.

This regulation states that the lowest form of government to be recognized is the Village and the Village People. Basically, between the village with an adat village are two vastly different things. Although the arrangement is still equated. General Explanation of Law No. 6 of 2014 on the village claimed that by combining construction self-governing local community with self-government is expected to customary law community unit that becomes part of the village, so arranged into the Village and the Village People. Village and Village People basically perform similar tasks. While the difference is only in the exercise of origin, especially concerning the social preservation of the Village People, regulation, and management of indigenous territories, indigenous peace hearing, maintenance and order for indigenous and tribal peoples, as well as the implementation of government regulation based on the original order.

The village as a unit of the community recognized the right of the origin and/or recognition of traditional rights are firmly of the country (Diamantina 2016). However, the village as specified in this regulation is the redefinition of the village that was formed in the regime of the old order. Recognition of the village's existence and indigenous villages as unification effort form of government resulted in the differentiation form of government at the lowest level in West Sumatra, as follows:

Table 1. Lowest Government Models in West Sumatera

No	Kabupaten / Kota	Kec.	Lowest Government		
			Desa	Nagari	Kel.
1	Padang	11			104
2	Padang Pariaman	17		60	
3	Pariaman	4			16
4	Pesisir Selatan	15		182	
5	Solok	14		74	
6	Sijunjung	8	1	60	
7	Tanah Datar	14		75	
8	Agam	16		82	
9	Lima Puluh Kota	13		79	
10	Padang Panjang	2			16
11	Bukittinggi	3			24
12	Kota Solok	2			13
13	Payakumbuh	5			76
14	Sawahlunto	4	27		10
15	Dharmasraya	11		52	
16	Pasaman Barat	11		19	
17	Pasaman	12		32	
18	Solok Selatan	7		39	
19	Kepulauan Mentawai	10	43		
	Jumlah	179	126	754	259

Source: Reproduced from LKAAM Report, 2016.

2.2. Nagari: Between Global Democracy and Multiculturalism

Nagari as a local wisdom lives among Minangkabau communities in West Sumatra. The provisions of article 1 point 1 Regulation of the Minister of Internal Affairs Number 52 The year 2014 on Guidelines for the Recognition and Protection of Indigenous Peoples states that indigenous people are characterized as follows:

a. Indonesian citizens who have distinctive characteristics;
b. live harmoniously in groups according to their customary law;
c. has ties to the ancestral origin and/or similarity of residence;
d. there is a strong relationship with the land and the environment;
e. the system determines the value of the economic system, political, social, cultural, and legal;
f. utilizing one specific area for generations.

The relationship between the state and indigenous and tribal peoples under the provisions of Article 18B paragraph (2) are declarative and anticipatory. According to the concept of a unitary state, not known for their state within a state. Indonesian state was established as a state "*Een-Heid Staat*" (a unitary state) so that a likelihood of countries (*staat*) within the State (*Staat*). Customary law community can not stand alone outside the territory of the Republic of Indonesia. Customary law community is an integral part of the territory of the Republic of Indonesia, so it can not be ignored by the state (Sulastriyono 2014, 100).

In the early of independence, the recognition of the existence of indigenous peoples juridical constitutional stated in the provisions of Article 18 of the Constitution of 1945. Although the reform era there were four amendments, the recognition of the existence of indigenous people continued to receive special attention. Before you change this setting, the recognition of the existence of the state that the Indonesian government admits approximately 250 units and community organizers themselves as villages in Java and Bali, Nagari in Minangkabau, village, and clan in Palembang and so on. The regions have a natural order and therefore can be considered as a special area. The Republic of Indonesia to respect their position and state regulations about the region they will pursue their historical rights (Antlov 2003, 194). Once amended, the provisions of Article 18B (2) states that the state shall recognize and respect indigenous and tribal peoples and their traditional rights long in fact still exist, according to the development of society and the principles of the Unitary Republic of Indonesia and regulated in the Act. Recognition and respect for the state of the rights of indigenous people do not happen constantly, but by the struggle of systematic, planned and sustainable (Bahar and Suryasaputra 2013).

Customary conception in the Minangkabau society customary law can not be separated from social identity. Minangkabau society interprets the customary law in a different way (Simon 2007, 73). Customary conception focused on the development of social institutions, while the characteristics of the people associated with a trend adopted ways of empowering social institutions themselves. In Minangkabau society, emphasis towards social integration as well as the emphasis towards autonomy realized in individual

experience and a strong cultural representation (Simon 2007, 612-613).

According to Simon, the balance of the ideal dimensions of Minangkabau society is on the application of indigenous Minangkabau system of government, and so the genealogical aspect of figure walinagari also an impact on social stability in the indigenous Minangkabau. Social identity as it should be the starting point in the development of related regulations and in direct contact with indigenous peoples. The trend of globalization that is both centrifugal and centripetal (Irianto 2009, 33) basically will greatly affect the construction of the whole society, as well as with indigenous peoples. Similarly, the democratic currents of multiculturalism (Dallmayr 1996) who later also influenced. The State as the most authoritative, ideally capable of providing protection against Cultural Rights who live in it. Construction regulations set should not only recognize the existence of indigenous peoples' rights normative but also with a set of other things that are bound by these rights.

2.3. Walinagari as Headman of Village

The contemplation village government system is strongly influenced by the ruling regime. A series of specific regulations to give effect to the present system of village government. Lastly, Act No. 6 of 2014 on Village Government. Recognition of the existence of the village as the lowest form of government accommodated by this regulation. This recognition is explicitly seen in the provisions of Article 1 paragraph 1 which states that the reference to the village is the village or the traditional village or called by any other name is a legal community unit which has a limit which is authorized to regulate and administer governmental affairs and interests of the local community based initiatives society, the right origin, and/or customary rights recognized and respected within the government system unitary Republic of Indonesia.

Existence is also reinforced by the provisions of article 4 letter a, b, c, and g stating that the village setting aims to:

a. Provide recognition and respect for the diversity of existing village before and after the formation of the unitary state of Indonesia;
b. Providing clarity and legal certainty on the status of the village in the state system of the republic of Indonesia for justice for all the people of Indonesia;
c. Preserve and promote the customs, traditions, and culture of rural communities;
d. Increasing the resilience of rural people's social culture in order to realize the rural communities that are able to maintain social cohesion as part of national security.

Nagari has experienced accommodation and adaptation into a more modern form of the change of regime. The existence of Act Rural still only focusing on village settings as government bureaucracy (Grace, Nagari: Decentralization Era Minangkabau in 2017) and put aside the values genealogically as the main element to form villages. It can be seen from some of the aspects set out in this regulation. One example is the starting point of the formation of the village. Recognition of a new village apart from a series of preparatory processes that must be gone through is based on the number of people in a region. The provisions of article 8, paragraph (3) letter b number 3 of Act Rural states that the minimum requirements for the recognition of a number of residents of the new village on Sumatra are 4.000 peoples or 800 heads of households. In contrast to the basic concepts of villages in Minangkabau, a village in Minangkabau formed with some of the requirements that characterize aspects of genealogical descent, the availability of facilities and infrastructure support for each of the villagers in their activities. The basic concept of the establishment of a village that is based on the concept of domicile administration indirectly a significant effect on the number of residents in the village remember temporal migration culture in the form of wandering for the majority of Minangkabau society. It will also be a significant effect on the municipal elections villages where indigenous populations who migrate lose voting rights to choose and determine their area trustee for the administration is no longer listed as natives in the village. Similarly, the existence of article 9 of this regulation, that a village can be removed by natural disasters and/or strategic interests of national programs. Deletion of a village of regulatory and administrative aspects of the national strategic development goals looks very possible. However, this removal would be a dilemma when interpreted as an effort to eliminate aspects of

local knowledge that became the starting point village government itself, because basically the State to protect the local wisdom.

The existence of villages and devices in almost all areas of West Sumatra has not been able to be a sociological escalator to bring Minangkabau completely. One interesting aspect to be discussed is the existence walinagari. Supposedly, the selection of cultural political contestation walinagari be getting the enthusiasm of the community (Abidin 2016, xiii). Walinagari was not something new in village government. Walinagari recognized the existence of villages as a *raad* (local resort) during the colonial era. Walinagari expressed in Staatsblaad 1903 Number 219, Staatsblaad 1903 No. 329, No. 137 Staatsblaad 1905 and 1905 Staatsblaad No. 181. Basically the presence of some of the regulation weakens the village as a system of self-government with the appointment of the Head of the prince by decree of the Dutch government at that time, Head of Penghulu and Kelarasan existence as a medium of communication between indigenous communities and the Government of the Netherlands at that time on one side of a modified form and acceptances village towards modernization. But on the other hand, the right of ratification and appointment of the Head of Penghulu held by the Dutch government showed that the sovereignty of independent community of indigenous people in villages is in the hands of the Netherlands. The same thing happened to the guided democracy. Enforcement of West Sumatra Governor Regulation No. 32/DESA/GSB/1959 which introduced a leadership figure in the village by giving authority to the role of legislation walinagari and *tigo tungku sajarangan*.

The existence of some of the provisions in the Act Village gives a new direction in contemplation villages continues. Walinagari relating to the elections, there are several requirements that must be met. Among them are provisions in article 33 paragraph (g) stated that the requirement of the village head candidate/walinagari must be registered as a resident or residing in the village (Nagari) local at least one year before the registration of candidates for village chief (walinagari). This provision indicates that the domicile aspect plays an important role as a candidate walinagari requirements. It indicates that a candidate must be registered as a walinagari local population of at least one year prior to the registration of candidates walinagari. Figured walinagari candidates in this provision is a native of the genealogical aspect waiver. This provision was later canceled and does not have binding legal force by the Mahkamah Konstitusi's Decision No. 128/PUU-XIII/2015 dated August 23th, 2016. The cancellation of the provision of Article 33 letter (g) it provides equal opportunity for all Indonesian citizens to propose to be candidates walinagari in West Sumatra. The Constitutional Court decision is also confirmed by the presence of the regent of Solok Regional Regulation No. 1 Year 2017 on Procedures for the Election, and Dismissal walinagari in Solok. The provisions of article 3, paragraph (4) and Article 32 paragraph (1) in substance states that the chances of candidates walinagari broad opened for all Indonesian citizens who are willing to live in the Nagari if elected later. Provisions requiring candidates derived from locals walinagari eliminated after the Constitutional Court decision mentioned above.

The basic requirements change raises a dilemma for the integrity of the village itself. On the one hand, changes to these terms provide equal opportunities for all Native village, both located in the village or for immigrants to become candidates walinagari. On the other hand, other residents who are not descendants of the original Minangkabau also has an equal chance to bid to candidates walinagari. This condition is of course potentially shake-up in the social integrity of the village. Abandonment genealogical aspect in terms walinagari candidate has injured the protection of local wisdom in the Republic of Indonesia.

Consideration of the Constitutional Court related to the cancellation of the article is that the status of the village in Act No. 6 of 2014 is an elaboration of the provisions of Article 18 paragraph (7) and Article 18B (2) of the Constitution of 1945, which gives tribute and recognition to the Countryside framework of the Unitary Republic of Indonesia, providing clarity and certainty of legal status for the village in the state system in order to realize social justice, and to preserve and promote the customs, traditions and culture of the village. The village is an integral part of the organization structure of which run the functions of state government officially so for the election of village heads (walinagari) need not be limited to the provisions to be registered as a resident and reside in the village (village) local at least one year before registration. Constitutional Court to

equate the principle of village elections (walinagari) with the regional head and deputy regional head who does not provide restrictions and requirements related to the domicile of candidates.

Another argument put forward is that to push and move towards the development of the village become advanced and modern civilized society, organizing villagers require institutionalization process better. Institution-village institutions should function effectively to promote development in the direction of progress. Village life requires a space of freedom to move and to compete in a healthy manner as well cooperate in an orderly and peaceful atmosphere. The Constitutional Court considered that it is in line with the provisions of Article 28C paragraph (2) of the Act of 1945 which states that everyone has the right to advance himself in the fight for their rights collectively to build a society, nation, and country. Some of the considerations in the decision of the Mahkamah Konstitusi indicates that the village is a village structured society in the context of the legal regime of the regional administration.

The existence of the Act village with all its provisions and also a Constitutional Court decision gives a new face in democracy at the lowest level. The provision of equal opportunities for all citizens to become candidates volunteered walinagari should be limited. The principle of social justice mandated by the Act of 1945 should be elaborated in a more dynamic and accommodating. Fairness in this context is not only meant the provision of opportunities at large but also must be limited with respect to some abstract values locality that lives in the community. The local wisdom that lives in the community is part of the Cultural Rights recognized and recognized by the state. The influence of the trend of globalization and localization in trans-nationalization law should be accommodated by the state to provide certainty and systemic protection against local wisdom itself. Because if this is not addressed, it will potentially interfere with the stability of the local also become an integral part of national stability.

3. Conclusion

Nagari as the lowest in the constitutional form of government has been around a long time. Nagari with the complexity it faces on various government regimes have been modernized and modified so that it integrates as acting government in the lowest order. A series of regulations on the recognition of the village and/ or indigenous villages or the name specified lumped still focused on the structuring of the government bureaucracy alone. Is an ambiguity when the Mahkamah Konstitusi equates walinagari elective principle to the concept of the regional head and deputy regional head. Nagari in Minangkabau built from genealogical values can not be separated. Thus, the settings related to the village itself also should pay attention to aspects of support in order to regulations become effective in order to provide social justice without having to harm the values of local wisdom that to this day is still held by the Minangkabau people in West Sumatra.

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Nasionalisme: Sebuah Realitas dan Tantangan Bangsa Indonesia

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Abstrak – This article is going to discuss about the conflict between nationalism and globalization in Indonesia. The focus of this article is to describe the facts related to the impact of globalization on nationalism. Multidimensional crisis that occurred in Indonesia can not be separated from the history of Indonesian nationality. Various inter-ethnic, inter-religious, and disintegrating disputes between nations are the fact that nationalism in Indonesia is on the verge of crisis. Pancasila as the ideology and basic norm of the state become the guidance of life, nationality and state. While the 1945 Constitution was used as the highest formal legal source in Indonesia which became the guide in the settlement of every issue in accordance with the law that upholds the value of justice based on equality before the law. This article also describes the spirit of the Indonesian youth who declared the motto of "The Oath of Youth", thus placing the nusa, the nation, and the language into a unity and become the symbol and identity of the Indonesian nation. Diversity born in various aspects of the life of Indonesian society has become the identity, strength, and basic capital in the development of society towards a great and dignified nation.

Key Words: *Nationalism, Globalization, National Identity, Multidimensional Crisis.*

1. Pendahuluan

Indonesia merupakan negara kepulauan yang memiliki keanekaragaman budaya, ras dan agama. Ciri khas yang demikian menjadikan Indonesia sebagai negara multikultural yang memiliki kelebihan dan keunikan bila dibandingkan dengan negara lain. Indonesia juga menjadikan semboyan Bhinneka Tunggal Ika sebagai asas penyelenggaraan pemerintahan negara. Pancasila sebagai idiologi bangsa dan norma dasar menjadi pedoman bagi semua aspek kehidupan bangsa Indonesia, tanpa melihat perbedaan keyakinan dan ras. UUD 1945 dijadikan sebagai sumber hukum formil tertinggi di Indonesia memberikan panduan dalam penyelesaian setiap persoalan sesuai dengan hukum yang menjunjung tinggi nilai keadilan dengan berprinsip pada persamaan hak di depan hukum.

Perkembangan ilmu pengetahuan dan teknologi telah memberikan kontribusi besar terhadap perubahan tatanan sosial kemasyarakatan, ekonomi, dan politik suatu negara. Bahkan di beberapa negara, perkembangan ilmu pengetahuan dan teknologi telah menggeser ideologi suatu negara. Tidak terkecuali dengan Indonesia, keadaan ini telah mengganggu stabilitas negara utamanya dalam mempertahankan sikap moral, heroisme, dan nasionalisme masyarakat Indonesa yang belakangan ini sudah mulai menurun.

Krisis multidimensi yang berkepanjangan dan puncaknya terjadi di penghujung abad 20, yakni sekitar tahun 1997-2000 juga memberikan catatan penting bagi perjalanan sejarah kebangsaan Indonesia. Nasionalisme Indonesia saat ini sedang mengalami degradasi dengan meningkatnya berbagai konflik antar-etnik, antar-agama, dan fenomena disintegrasi bangsa lainnya yang terjadi di berbagai daerah.

Globalisasi merupakan proses tatanan masyarakat yang tidak mengenal batas wilayah. Globalisasi juga mempengaruhi kehidupan berbangsa dan bernegara baik secara langsung maupun tidak langsung, hal ini harus disikapi tidak hanya sebagai tantangan akan tetapi sebagai peluang menjadikan suatu negara semakin kuat. Globalisasi tentunya membawa dampak bagi kehidupan suatu negara termasuk Indonesia. Dampak globalisasi tersebut meliputi dampak positif dan negatif diberbagai bidang kehidupan sosial, politik, ekonomi, dan budaya yang akan berpengaruh pada

semangat mewujudkan nilai-nilai nasionalisme bangsa. Semangat nasionalisme merupakan salah satu modal utama yang harus dimiliki bangsa Indonesia dalam menghadapi berbagai ancaman ketahanan nasional baik dari luar maupun dari dalam negeri sendiri.

Globalisasi sebenarnya bukanlah hal yang baru dalam interaksi umat manusia, karena secara alamiah pada dasarnya manusia ingin berhubungan dengan manusia lainnya tanpa dibatasi sekat-sekat geografis, politis, budaya. Bahwa pada dasarnya manusia akan menghadapi situasi alamiah yang sama, yaitu persoalan scarcity of collective goods. Masalah kelangkaan sumber-sumber kehidupan mendorong manusia untuk berkelana keseluruh penjuru dunia untuk mencari jaminan keberlangsungan hidup mereka.

Pancasila dan UUD 1945 sebagai pedoman penyelenggaraan negara sedang diuji oleh munculnya berbagai konflik di berbagai daerah, dengan demikian perlu segera direformulasikan kebijakan-kebijakan yang mendukung tercapainya kehidupan masyarakat Indonesia yang aman, tertib, dengan tetap menjunjung tinggi nilai-nilai patriotisme. Negara yang besar akan terwujud apabila segenap komponen bangsa mampu membangun dan menjaga semangat nasionalisme sebagai modal dasar dalam kehidupan global.

2. Nasionalisme: Sejarah Lahirnya Bangsa Indonesia

Kata nasionalisme berasal dari kata "nation" yang berarti bangsa. Dalam bahasa Latin, kata nation berarti kelahiran kembali suku kemudian bangsa. Bangsa adalah sekelompok manusia yang mendiami wilayah tertentu dan memilik hasrat untuk bersatu karena adanya persamaan nasib, cita-cita, dan kepentingan bersama. Secara konseptual, nasionalisme menempatkan rasa cinta, kesetiaan, dan penghormatan kepada bangsa diatas golongan dan individu-individu. Menurut Rourke[i], untuk disebut sebagai suatu bangsa harus dipenuhi tiga (3) unsur, yakni: similarities, feeling of community, dan a desire to separate (secara politik independen dan otonom).

Sementara menurut Han Kohn[ii] nasionalisme adalah suatu paham yang menempatkan kesetiaan tertinggi individu harus diserahkan kepada negara dan bangsa. Secara historis bangkitnya nasionalisme Indonesia didorong oleh faktor internal dan eksternal yang kemuculannya sejak abad 19-20. Sehingga dapat dikatakan bahwa nasionalisme Indonesia adalah sebagi suatu gerakan kebangsaan yang timbul pada bangsa Indonesia untuk menjadi sebuah bangsa yang merdeka dan berdaulat.

Sebagaimana Hans Kohn melihat nasionalisme sebagai perasaan yang mencerminkan kesadaran nasional dan kesetiaan kepada suatu bangsa dan individu-individu menyerahkan kesetiaannya dan mengidentifikasikan kesejahteraannya dengan suatu bangsa tertentu, oleh karena itu nasionalisme mengandung unsur-unsur psikologis dan politis, dalam arti yang lebih konkret, kekuasaan politik tercermin dalam Negara, namun keberlangsungan hidup Negara tergantung pada sejauhmana bangsa tersebut secara psikologis dipersatukan.

Faktor yang mendorong rasa nasionalisme bangsa Indonesia sebenarnya bukan akibat penjajahan yang dilakukan oleh koloni Belanda maupun Jepang, melainkan rasa persatuan yang sudah dimiliki sejak zaman dahulu oleh bangsa Indonesia. Masyarakat Indonesia sudah dikenal sebagai masyarakat yang memiliki semangat bergotong royong serta saling menghargai dan menghormati terhadap sesama. Bahkan kedatangan para penjajah justru menempatkan rasa persatuan menjadi simbul lahirnya sebuah negara yang merdeka.

Indonesia sebuah negara kepulauan dengan asset yang terdiri dari beribu-ribu suku bangsa sehingga disebut sebagai negara bangsa (nation-state). Sebagai negara yang sedang berkembang sehingga semangat nasionalisme yang tumbuh masih kuat. Dengan berkembangnya globalisasi yang berprinsip untuk mewujudkan negara tanpa batas (borderless state), sehingga akan menjadi tantangan tersendiri bagi nasionalisme Indonesia.

3. Globalisasi dan Tantangan Nasionalisme Indonesia

Globalisasi telah menghilangkan batas dan waktu dari setiap individu di dunia. Globalisasi juga merupakan keniscayaan dari kemajuan ilmu pengetahuan dan teknologi yang berdampak pada perwujudan pasar bebas. Identitas bangsa dan nasionalisme adalah entitas penting dalam kajian tentang globalisasi.

Kekayaan Indonesia akan sumber daya alam baik perairan maupun darat sudah menjadi isu utama diberbagai kegiatan baik nasional maupun internasional. Melimpahnya sumber daya alam di satu sisi juga akan menjadi tantangan besar bagi stabilitas bangsa dalam memasuki era globalisasi. Tantangan terbesar pada saat sumber daya manusia tidak siap dengan perkembangan jaman.

Bangsa Indonesia telah menempatkan Pancasila sebagai dasar negara dan UUD 1945 sebagai hukum dasar bagi penyelenggaraan dalam berkehidupan serta bernegara Indonesia. Ketentuan ini menjadi pedoman bagi bangsa Indonesia dalam menyelesaikan berbagai konflik yang terjadi secara internal maupun eksternal. Selama ini Pancasila telah berhasil menghadapi berbagai tantangan yang mengganggu stabilitas bangsa. Pancasila menjadi landasan nasionalisme bangsa Indonesia dan menjadi pemandu bagi Indonesia dalam memasuki era globalisasi.

Dampak dari gloalisasi adalah terjadinya pergeseran perilaku dan nilai yang lebih universal dari masyarakat Indonesia. Kondisi ini yang akan menjadi tantangan besar terhadap nasionalisme bangsa Indonesia. Identitas bangsa Indonesia juga mulai terancam dengan derasnya arus informasi dan teknologi yang masuk ke Indonesia. Hal ini juga akan mengancam semangat nasionalisme masyarakat Indonesia, terutama para generasi mudanya.

Seperti pendapat Krsna[iii] bahwa globalisasi berlangsung melalui dua dimensi dalam interaksi antar bangsa, yaitu dimensi ruang dan waktu. Ruang makin dipersempeit dan waktu makin dipersingkat dalam interaksi dan komunikasi skala internasional. Globalisasi telah memasuki semua ranah kehidupan manusia, hal ini dipicu oleh berkembang pesatnya bidang teknologi dan informasi. Kondisi ini semakin memudahkan kapitalis asing untuk menguasai kekayaan alam Indonesia. Penguasaan kapitalis asing atas sumber daya alam Indonesia secara tidak langsung memberikan ruang yang sempit peran negara dalam pengelolaan sumber daya alam.

Sementara itu, UUD 1945 Pasal 33 Ayat (3) merumuskan bahwa negara memegang penguasaan atas sumber daya alam. Akan tetapi fungsi negara menjadi sebatas penjaga ketertiban dan keamanan, sehingga memudarkan nasionalisme dan perlahan berganti dengan faham globalisme[iv]. Pancasila sebagai ideologi bangsa menjadi identitas politik yang memberikan ruh dan semangat lahirnya nasionalisme bagi bangsa Indonesia, hal ini yang harus diamankan dari berbagai pengaruh ideologi asing.

4. Kesimpulan

Sebagai bangsa yang sedang berkembang, Indonesia menghadapi tantangan besar dalam mempertahankan dan meningkatkan sikap nasionalisme. Hal ini karena arus globalisasi secara langsung maupun tidak langsung akan berhadapan dengan tatanan masyarakat yang sedang mengalami perubahan dan perkembangan dari masyarakat yang memiliki identitas atau keunikan sebagai bangsa Indonesia menuju masyarakat dunia, karena negara sudah tidak lagi berbatas. Globalisasi yang mengembangkan konsep negara tanpa batas (borderless state) secara langsung maupun tidak langsung akan mengikis nilai-nilai keindonesiaan yang sudah terbangun sejak ratusan tahun silam. Masyarakat Indonesia dihadapkan pada kenyataan bahwa globalisasi akan membuka pintu-pintu Keindonesiaan dan menjadi bagian dari globalisasi. Sebuah tantangan besar manakala masyarakat Indonesia tidak siap dengan perkembangan jaman yang begitu cepat ini. Untuk itu perlu ada agenda dan strategi kebjakan untuk tetap mengobarkan rasa kebanggaan dan identitas berbangsa dan bernegara Indonesia.

Kehadiran globalisasi membawa pengaruh, baik positif maupun negatif , langsung maupun tidak langsung bagi kehidupan suatu negara, termasuk Indonesia. Nasionalisme yang dimaksud adalah rasa cinta terhadap tanah air, melalui kesadaran yang mendorong seseorang untuk membentuk kedaulatan dan kesepakatan membentuk negara berdasar kebangsaan. Sikap ini sehingga dijadikan sebagai pijakan pertama dan tujuan dalam menjalani kegiatan kehidupan berbangsa dan bernegara.

Bagaimanapun besarnya tantangan globalisasi, semangat nasionalisme berbangsa dan bernegara tetap harus dipertahankan. Untuk itu itu perlu adanya agenda penguatan nilai-nilai Pancasila dan mengoptimalkan penyelenggaraan pemerintahan dan kenegaraan dengan mengacu pada hukum dasar tertinggi negara Indonesia, yakni UUD 1945.

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The Exsistence of Ulayat Land in Minangkabau

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Abstrak – The right of ulayat land is the highest right in Minangkabau which is held in the hands of the penghulu, nagari (village), tribes or federation of several villages. Ulayat land should not be sold or just disappeared. There are rules about customary land in Minangkabau, both in terms of mastery and in terms of utilization. The right to ulayat in Minangkabau already existed when Indonesia was colonized by the Dutch. After Indonesia became independent, the government designed and legalized the UUPA as the basis of national land law. The problem is whether this UUPA still recognizes the existence of customary land, one of them is the existence of ulayat land in Minangkabau, and how the regulation of customary land law in Agrarian Law / UUPA.

Key Words*: ulayat And, Minangkabau, land, customary law.*

1. Pendahuluan

The ulayat right in Minangkabau is a common right belonging to a tribe or nagari that holds customary right. The nature of togetherness can be seen from that the land has not been entered and processed, so that anyone among tribe members who own ulayat rights can cultivate it into agricultural land or housing. Each member of the tribes may not possess it by private right, but with a right of use is governed by penghulu in each tribe. (Amir Syarifuddin, 1984, 219).

The penghulu is an andiko of his area or king of his nephew, who serves as head of government and becomes a leader, becomes a judge and a peacemaker within his people, he also becomes a prosecutor and defends his people to face outsiders. (AA.Navis, 1984, 139)

Penghulu who has been chosen by communities of his tribe (anak kemenakan) is the leader of them. The task of a Penghulu that likened: paneh tampek balinduang (Shelter when it's hot), hari hujan bakeh bataduah (Shelter when it's rain), Ka Pai tampek batanyo (place to ask), ka pulang bakeh barito (place to deliver the news), koq kusuik ka manyalasaikan (resolve the puzzler), kok Karuah nan kamanjanihi (clear up the murky), hilang nan ka mancari (Looking for the missing), tabanam nan kamanyilami, tarapuang nan ka mangaik, hanyuik nan ka maminteh, panjang nan ka mangarek, singkek nan ka mauleh, senteng nan ka mambila, in all respects, It is necessary for a penghulu to carry out his duties with full responsibility. (Idrus Hakimy, 1988, 12)

In addition, a penghulu is also obliged to keep the treasures of his people and his nephews, not to sell or transfer to others. The treasures left by the ancestors of the treasure inventor for the common good of his grandchildren in the future. There are two levels of interest: that is the usual interest in everyday life is quite filled from the results obtained from heritage. Both urgent interests, which had not been covered by the inheritance, could be covered with the treasury itself.

Ulayat land is a treasure in Minangkabau's law. Inheritance is only possible to be pawned not for sale. To pawn the treasure is not arbitrary, only in a very urgent circumstances. The use of inheritance in relation to urgent interests is stated in the customary proverb as follows: (Amir Syarifuddin, 1984, 223).

a. Rumah Gadang Katirisan
b. Rando gadang tak balaki
c. Maik tabujua di tangah rumah
d. Mambangkik batang tarandam

Based on the above description it can be concluded that according to the Minangkabau customary law the release of inheritance is complicated and almost

impossible, except in the case of very urgent nature. The customary law of Minangkabau is more likely to leave the ulayat land untouched if it has not been able to do so, rather than the transfer of rights beyond the customary law community.

Outsiders, not villagers who have customs, are allowed to work on ulayat lands, as long as the ulayat can not be processed by the villagers themselves, but the conditions are very heavy, besides the money to be paid, There are other conditions to be met (AA.Navis, 1984 , 152):

a. For every person who has obtained a permit, it is obligatory to complete the work to open the customary land within the agreed timeframe, if not within the timeframe, the agreement is no longer valid.
b. The permit holder may not transfer his / her rights to others without permission. first-priority to transfer of the rights was given to the tribal owners, the second level to the villagers of ulayat lands, the next level to anyone who was able to receive the transfer of those rights.
c. The permit holder is obliged to return his or her permission to the penghulu who gave it. If the holder does not wish to continue his business and is not met by the person who is willing to accept the transfer of the right, the holder of the license shall be entitled to receive the compensation from the head of tribes who grants the consent in the amount agreed upon.
d. If the permit holder died without heirs, the arable land into *harato gantuang* (treasure hanging) for a certain period of time, then the permissions that can be forwarded.

Ulayat or *Pusako* in Minangkabau will be hereditary inherited by a blood-streaked heir according to the mother's line, as long as it's still there, and she will move to another hand if the inheritance of this mother's line is exhausted / extinct. (Idrus Hakimy, 1988, 32).

2. Understanding of Ulayat Land

Article 1 Paragraph 2 in the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 5 of 1999 on the Guidelines for the Resolution of the Indigenous Peoples' Land Rights Problems states that ulayat land is a plot of land over which there is customary rights of a particular customary law community. Where as the ulayat land rights of customary law communities are the authority which according to certain customary laws over certain areas which constitute the environment of its citizens to benefit from natural resources, including land, within the territory, for survival and life, arising from the relationship Outwardly and inwardly and uninterruptedly between the tribe and area concerned.

Customary rights for tribal peoples in Indonesia function as containers, and economic means for the prosperity of members of collective law communities. In West Sumatra (Minangkabau) the ulayat land is a common property which should not be harnessed and is forbidden to be transferred forever. Hak ulayat function social, devoted prosperous members of the community supporters (Social Justice). M. Koesno was quoted by Sjahmunir as saying:

> That the legal community and its members are obliged to keep, protect and maintain. Protecting the land of his ulayat rights and all of its contents from interrupt, disturbances, threats brought by outsiders who are not entitled to the environment of ulayat land. relationships beetwen tribal peoples and customary law , bringing the consequences that no ulayat means the destruction of the legal community. The basic principle of customary law community is that there is no customary law community without ulayat right.

Boedi Harsono stated, ulayat right is a set of authority and obligations of a customary law community related to land located within its territory. The ulayat right has the power to applied in and out. aply Into for their citizens, while force applies outward in relation to non-members of the customary law community called "foreigners" or outsiders. (Boedi Harsono, 1995, 162) Ter Haar's ulayat power right beyond includes:

a. Other members of the tribe (as well as their neighbors) should not take benefit from customary land, except by permission to the tribal / legal community, and by giving such a small gift (Earning Money Aceh, Java Mesi) first. In principle other members of the tribe can't have ownership rights to the land.
b. Customary law communities who have customary rights over their territory are responsible for matters occurring within the territory, for example

when other members of a tribe are found dead or killed in the area responsible for seeking murderers or paying fines.

While the inward force of customary rights includes:

a. The legal community / members may take benefit from the land and vegetation, as well as the wild animals living on it.
b. Members of the tribe / legal community for their own purposes are entitled to hunt for forest products (which are then owned by property rights) and even have the right to possess several trees that grow wild if they are maintained by them.
c. They have the right to open the land with the knowledge of the head of the tribe / legal / rural community is a legal protection that gets protection in the legal community. The relation of rights between the person who clears the land and the open land, the longer the stronger, if the land is continuously maintained / cultivated and ultimately becomes the property of the opener. Nevertheless community land rights on the ground is still there though weakened. If the cleared land was then not taken care of / abandoned, then the land will again become customary lands of communities.
d. By the legal community itself can be determined parts of the area that will be used for residential areas, places for tombs, public grazing place, rice fields and others for common purposes.

3. Setting of Ulayat Land in Minangkabau

The total area of Minangkabau is broadly divided into two parts, namely luhak and rantau. Understanding of Luhak is the area of origin Minangkabau located in the vicinity of Mount Merapi, namely: Luhak Agam, Luhak Tanah Datar and Luhak Lima Puluh Kota. Luhak is a loose federation of area. Each area has it's own government, has the people as members of society and their own wealth in the form of ulayat land of the area and have the leadership of the area. In every area there are at least four different tribes. Each tribe is led by a penghulu with the rank of andiko and the call of Datuk.

In three Luhak there are two laras, that is Laras Koto Piliang and Laras Bodi Caniago. In relation to ulayat land it differs between these two customs. According to Koto Piliang custom, ulayat land is held by the topest of penghulu, while in Bodi Caniago, ulayat land is divided among all pengulu of tribes . The Overseas Region is an area of extension of the three luhak in an attempt to accommodate the development of members residing in the luhak. Customary are prevailing in the rantau area is the custom that prevails in luhak, but different in the leader, the leader in the region luhak is penghulu while the leader in the rantau is the king. (Amir Syarifuddin, 1984, 151)

Regarding the Ownership, Control and Utilization of Treasure in Minangkabau is described by Amir Syarifudin in his book as follows:

a. Treasure of the Heritage was first discovered by the ancestors who originally inhabited the land menaruko, mencancang and melateh.The land that has or has not been processed is the property of the ancestors who obtained it. Because the ancestors provided the treasure for relatives who later developed into a single entity called tribes, then the ancestral treasures of the ancestors were under the control of the tribe.
b. The tribe as a matrilineal genealogical entity, consisting of members whose relation to the ancestor can be traced through the female line. The tribe as a unitary law community controls the treasures collectively. The inheritance belongs not to the individual from the tribe, but the individual is entitled to use the inheritance, for as a member he also participates in the possession of the property. The land that is controlled by the tribe is called ulayat of tribes.
c. In subsequent developments tribe members have multiplied and the tribe has been enlarged. In such cases, occurs division tribe called gadang manyimpang, which produce units that are smaller in scope. As a result of the division of the tribe, the possessions treasured , both processed and unprocessed, are shared. the result from the ulayat tribe called ulayat kaum.
d. The treasures theoretically owned by the ancestors and controlled by the people, are practically in the hands of members of the kaum to be used for the

benefit of their daily lives. The treasure holder at that time was neither the owner nor the possessor of the treasure. As proof he has neither possession nor dominion is he personally unable to act to transfer the property to the other without the consent of the people. He only borrowed the treasure from the people by right of use. He is only entitled to the results and not on its origin, namely the land. proverbial saying, airnya boleh diminum, hasilnya boleh dimakan, tanahnya tetap tinggal. . Rights of the members in reaping wealth has earned it called *ganggam bauntuak*. The treasure will return to the people when it is no longer used.

Mastery of ulayat nagari rights in the hands of penghulu nan ampek suku as leader of the four basic tribes(induk suku) in Minangkabau . The four tribes are Bodi, Caniago, Koto and Piliang. While the Ulayat Tribal land is in the its tribe only, and the control of ulayat kaum land belongs to the mamak kepala waris as leader of the tribe. (Zefrizal Nurdin, 40)

Regarding the status of ulayat land in Minangkabau, the Regional Office of the National Land Agency of West Sumatra said as follows:

a. Tanah Ulayat Nagari, namely forest land around the nagari either untapped or utilized, such as fish pond, market, sports area, medan bapaneh and others, which are dominated by custom and in the supervision of nagari used for public interest.
b. The Ulayat Land of the Tribe, land which is controlled by a tribe in a nagari, where only members of this tribe can acquire and use the land, with the knowledge and permission of penghulu.
c. The Ulayat Kaum Land, the land is owned by a *kaum*, which is the common property of all members of the *kaum* , were hereditary and authority of the chief beneficiaries on the hand of ninik mamak kepala waris.
d. Tanah Pusako Rendah, land obtained by a person based on grant, purchases that belong to a family, his livelihood, purchase and so forth.

Land is considered very important For agricultural society . In terms of philosophy, the land is a symbol for the dignity of their lives.Landless people or people are seen as less. Who does not own the land viewed as malakok (menempel) . Land is the place of birth, place of life and also the place of death. The analogy as a place of birth, then every relative must have a home where his grandchildren are born, as a place to live, each relative must have a rice field or field that is a mainstay to ensure eating . As a place to die, every people must have a pandam pusara, so that the body of the relatives is not neglected. (AA.Navis, 1984, 150).

4. Arrangement of Ulayat Land in UUPA

As previously stated that in West Sumatra (Minangkabau) the ulayat land is a joint property which should not be harnessed and prohibited for transfer of forever. Monitoring and utilization of customary property rights is entirely in the hands of ninik mamak / customary stakeholders. Provisions of customary law about this land already existed before Indonesia was colonized by the Dutch. When Indonesia was colonized by the Dutch, the Dutch government recognized the existence of customary law and against customary land of custom law. (Dualistic and pluralistic national land law).

After Indonesia gained independence for 12 years, the Indonesian government drafted the Indonesian land regulation and only in 1960 the UUPA was legalized. With the enactment of Agrarian Law Number 5 of 1960, that ended the previous applicable of dualism of agrarian law in Indonesia. The principal objectives of the UUPA are:

a. Laying the groundwork for the preparation of the national agrarian law, which is a tool to bring prosperity, happiness and justice for the state and the people, especially the farmer, in the framework of a just and prosperous society.
b. Laying the groundwork for unity and simplicity in land law.
c. Laying the groundwork to provide legal certainty, on the rights to land for the people as a whole.

There are three basic concepts in UUPA (Andik Hardiyanto, 1998,149), namely:

a. The prevailing Agrarian Law on earth, water and space is customary law.
b. The existence and authority of the State as the highest organization of the nation is stated in the right of control of state (HMN) over the earth, water and space as the elaboration of Article 33

paragraph (3) of the 1945 Constitution which is used to achieve the greatest prosperity of the people.

c. The implementation of the *land reform program.*

In the UUPA also recognize customary law as a law applicable to this land is set forth in Article 5 UUPA which reads: Agrarian law applicable to the earth, water and space is customary law, as long as it does not conflict with national and state interests, The unity of the nation, with Indonesian socialism as well as with the rules contained in this Act and with other laws and regulations, all things with due regard to the elements of the standards of religious law.

The purpose of Article 5 of this UUPA is that the interests of tribal peoples should be subject to the wider national and state interests and ulayat rights must be in accordance with the broader interests. If the state's recognition of customary rights is clear enough, the issue of communal land rights has become obscure. State recognition as stated in Article 5 of the UUPA is ambivalent , at a party where customary rights are recognized, but on the other hand such recognition is limited to some provisions, such as not to be contrary to the national interests and the state, national unity and regulations listed In this Act. (Sjahmunir, 2000, 3)

Restrictions on land rights are also seen in Article 6 of the UUPA which states that "All rights to land function socially". Furthermore, Article 18 of the UUPA states:

> For the common good, including the interests of the nation and the State and the common interest of the people, land rights may be repealed, by compensating suitably and disobeying the manner prescribed by law.

5. Land Procurement For Public Interest

Even in the UUPA it states that "The agrarian law applicable to the earth, water and space is customary law, and the recognition of customary rights in Article 3 of the UUPA, but the enforcement of customary law is as long as it does not conflict with national and state interests. This means that if the government considers the interests of the state wants, customary rights with ulayat rights can be defeated. Here it appears that tribal peoples are being led to changes by the law (Soejono Soekanto, 1988, 87). This is confirmed in Article 18 of the UUPA states:

> For the public interest, including the interests of the nation and the State and the common interest of the people, land rights may be repealed, by compensating suitably and in accordance with the manner prescribed by the Act.

In order to enforce the rules on the right of control of the State, the Government issues some rules as the legal basis for the process of releasing or transferring land rights to the State for the public interest, as for the rules are:

a. Law number 20 of 1961 concerning the Revocation of Land and Property Right there on. Article 1 of this Law stipulates "For the public interest, including the interests of the Nation and the State and the common interests of the people, as well as the interests of development, the president is in a state of coercion after hearing the Minister of Agrarian Affairs, the Minister of Justice and the Minister concerned may deprive the land rights And objects that are on it. The determination of direct compensation is stipulated in the revocation letter of the land rights. If the landlord does not agree with the amount of compensation then he can apply to the Court of Appeal. Events on the determination of compensation by the High Court are regulated in Government Regulation No. 39 of 197Presidential Instruction No. 9 of 1973 with annex, on Guidelines for the Implementation of the Revocation of Land Rights and Objects above it.

b. Presidential Instruction No. 9 of 1973 with annex, on Guidelines for the Implementation of the Revocation of Land and Property Right thereon.

c. Presidential Decree number 55 of 1993 on Land Procurement for Development Implementation for Public Interest. This decree is a follow-up arrangement in the framework of the implementation of Law no 20 of 1961 in order to expedite the National Development as well as the first step to provide guarantee to the holder of the right of land whose rights are revoked. Based on Keppres no 55/1993, the term revocation of land rights is replaced by the term of disposal or transfer of land rights. Article 1 paragraph 2, formulates that the disposal or transfer of land rights is an activity to relinquish legal relationships between the holder of the land right and the land under his control by

giving compensation based on the deliberation. Subsequently, Article 1 point 5 of it formulates that the deliberation is a process or activity of mutual listening with mutual acceptance of opinions and desires based on voluntary relationships between the land holder and the landowner, in order to gain agreement on the form and size of the compensation. So the legal basis for disposal or transfer of land rights is the law of engagement.

d. Law No. 2 of 2012 on Land Procurement for Development for Public Interest. With the issuance of this Law, all existing laws and regulations are declared to remain valid as long as they are not contradictory or have not been replaced by new ones under this law.

Regarding what is meant by the Public Interest is regulated in Article 12 of Law No. 2 of 2012 on Land Procurement for Development for Public Interest. Based on the right of control of the state, the government succeeded in obtaining customary rights in Pasaman District which later developed into oil palm plantation area, not even a small amount of which was given to foreign investors for the use of similar business rights. Among them are owned by PT.Agam Masang Perkasa (PT AMP) with Singaporean investors with a plantation area of tens of thousands of hectares.

Based on the results of research by Zefrizal Nurdin in 1998 in West Pasaman, in Kinali and Lingkuang Aur more than 80% of all land declarations granted permission to a number of foreign palm oil plantation companies derived from ulayat land, especially from tribal and nagari ulayat lands, the rest originated From the conversion of land rights erfpacht to HGU for entrepreneurs. The legal basis is Government Regulation No. 40 of 1996 on HGU, HGB and Right to Use for Foreign Investors. Based on 2000 data in Pasaman Regency there are + 78,387,473 ha of oil palm plantation area, 16,215,00 ha of rubber plantation area.

Ulayat land that was originally rich enough with various results, then ogled by investors, then there was the delivery of land in the form of a siliah jariah. Based on the deed is considered to have occurred buying and selling land. Consequently, people lose their rights to land.

Based on the results from the study of the authors in making Thesis of 2002 in Pasaman District: there are 7 PT in Kinali District that delivery of ulayat rights carried out from 1999, namely: PT. PMJ. The extent is 1,680 Ha. Delivery in 1996, PT. PANP. The extent is 2,000. Ha. Submission in 1988, PT. TR, area 100 Ha. Submission of 1991, PT Induk Agritama, area of 12,000 Ha, delivery of 1991, PT TSG, total area of 14,000 Ha submitted, delivery of 1989, PT PN VI. Land area 12,000. Ha, taking the case, PT AMP. There were 3 PT AMP submissions in 1993.

The existence of the process of handover of ulayat land to the State to serve as a vast plantation turned out to cause many problems. To help solve the problem, the government issued Permeneg Agraria / Head of National Land Agency number 5 of 1999 on the Guideline of Completion of Rights Issues. In this regulation, it is mentioned that the customary land that has been given / released for agricultural purposes and other purposes that require the Right to Use or Use Right can be done by the customary law community with the delivery of the land for a certain period of time, so that after the period is over , Or after the land has been reused or abandoned so that the said Use Right or Use Right shall be subsequently removed, subsequent use shall be made on the basis of the new agreement of the customary law community as long as the customary community's customary land rights still exist in accordance with the above provisions.

6. Conclussion

Based on the above provisions, the author can conclude that the customary land of customary law community in Minangkabau is recognized by the existence of the national land law and the customary land, is applicable rules on Minangkabau customary law. However, if the state needs land, including customary community land for public interest, based on Law No. 2 of 2012 on Land Procurement For the Public Interest, the government may execute land rights by providing reasonable compensation.

While the customary community land that has been handed over to the interests of the plantation with the basis of the Right to Use or the Right to Use, then after the expiration of the HGU or HP can be made a new agreement with the customary law community. In the existing rules it is not mentioned which agreement is done by whom, whether between the investor with the customary law community, or between the government and the local customary law community

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SOCIAL JUSTICE
Social History, Ethics, Politics of Law,
and Sharia Economics

The Renewal Movement of Islamic Family Law in Indonesia (Politics of Islamic Law from Old Order until Reformation)

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Abstract – Historically, the regulation of Islamic Family Law had been a long time presented since Islam came in Nusantara with a classic pattern that is implementation of *madzhab fiqh asy-syafi'iyyah* massively. However, based on institutional politics especially after forming NKRI the renewal phase in Islamic Family Law started move from Old Order to Reformation with the various considerations. The movement of that renewal movement more unique to re-read after CLD-KHI be used as the new law of marriage, but the response was negative from the Islamic community so that appear social and politic "uproar" and at the end that planning was canceled by government. The impact of liberal consideration and fundamentalism conservative was continued until now in order to reach their positions in political and social seats, so that this problem should be "re-read better" in order to plan innovation of Islamic Family Law in Indonesia.

Key Words: *Renewal Movement, Islamic Family Law, Indonesia*

1. Background

Indonesia is a complex country with the amount of Muslim as the majority community[1]. The implication is Indonesia needs law regulations in order to manage their life; marriage, hajj, zakah distribution, wakaf, Islamic economy and so many. Politicly, that needs in society bring a religion existence (Islamic law) in politics and law in Indonesia outside Dutch law and the tradition.

That law creation in family law is the presence of UU 1/74 about Marriage and the president' instruction number 1/91 about KHI based on research of the experts in Indonesia they are; academics, ulama, and Muslim bureaucrat. One of te law product that contradictory with *fiqh* is the permission of a wife to propose divorce in Religious Court. Ulama stated that a wife that request a divorce from her husband without any clear reason it categorized as a proof of transgression and included in great sin (Ibn Hibban, 1993).[2]

The change of *fiqhiyyah* paradigm is about the Islamic marriage law in Indonesia, it supported by the theorem:

إن النصوص تتناهى ولكن الحوادث لا تتناهى

Meaning: Truly the religion reasons will be exhausted, while law events never be exhausted (Abu Zahrah, 1989)

So that, the stagnation in thinking will be produced weak law product. Therefore, the seriousness to re-formulate about *fiqh* thought in Islamic family law should be continued. There are many not responsive law products; the bias gender of marriage guardian, unregistered marriage, the child recognition of unregistered marriage and so on. The products awaken the experts in next era to criticize the UU of marriages and KHI through the spirit of evaluation and revision.

The renewal of Islamic family law in Indonesia should be progress and not stop in one time, because

1. Central Bureau of Statistics August 2010, total population Indonesia based on 237.556.363 people; 119.507.580 male and 118.048.783 female with the growth rate , 1,4% per year, While based on religion in 2010, 85,1% Muslim 9,2% Protestant, 3,5% Catholic, 1,8% Hindu, and 0,4% Buddha. See web-in *www.bps.go.id*

2. Hadits Muhammad SAW riwayat Ibnu Hibban dan di *shahih*-kan oleh Syu'aib :

أخبرنا أحمد بن علي بن المثنى قال : حدثنا عبد الأعلى بن حماد قال : حدثنا وهيب عن أيوب عن أبي قلابة عن أبي أسماء عن ثوبان عن النبي صلى الله عليه و سلم قال : أيما امرأة سألت زوجها طلاقها من غير بأس فحرام عليها رائحة الجنة. قال شعيب الأرنؤوط : إسناده صحيح على شرط مسلم

For every wife that want to divorce to her husband without any clearly reasons so haram to fragrant surge "

the real law is always move in presence the *mashlahat* of the people in the wolrd and hereafter. So that, to revise law products in line with the time, place and the situation. Even though, the renewal of law not scriptualist and negate the complex contexts, especially in human right (HAM) and gender equality.[3] Hence, in this paper would explain the dialectics of Islamic family law renewal in Indonesia, specifically renewal movement aspect so will find the solution of responsive renewal for Muslim in Indonesia.

2. The Renewal Movement History

2.1. Old Order Era

Old order era held since 1945 after independent day until 1967. In this era, there is no science discussion and the legislation about the renewal of Islamic family law in form of regulation (UU) because of the politic busyness between Islam politics and national politics, especially about the idea of Islamic country that summaries in 2 choices; Islamic concept (Piagam Jakarta) or Pancasila. The result is Pancasila was the main chosen in rational dialectics and social evidence from participants to accommodate the plural Indonesia society and after pancasila accepted by Indonesian, so that to present the goddesses for Muslim and to accommodate the great inoperative ideas so it is formed Ministery of Religious Affairs as the big house of Muslim in Indonesia.[4]

Although, Muslim had Ministery Religious Affairs the terms of family law in that era still follow Dutch Colonial, where (1) for original Indonesian apply tradition. (2) for original Islamic Indonesian apply Islamic marriage law (3) for original Christian (Java, Minahasa and Ambon) apply Huwelijks Ordonnantie Christen Indonesiaers (HOCI) (4) for Europe and Chinese generation Indonesian apply Burgerlijk Wetboek (BW) dan (5) for combination marriage apply mixture marriage (Staatsblad 1898 No. 158) atau *Regeling op de Gemengde Huwelijken*. (Wirjono Prodjodikoro, 1984)

The Dutch determination was adopted above, described that there is law renewal for Christian Indonesian that is HOCI and for Indonesian Europe and Chinese generation Indonesian apply (BW), that legalized determination give the easy and concrete solution form country to solve the problems in family law. It is contradictory with Muslim as majority religious where Islamic law very not codificated and the problem solution in family was done with *tahkim* by ulama. It means that Islamic law family was equated with tradition law that applied not writtenly in the society and ulama as the highest authority in order to solve the problems of family law.

At the end, that condition got the attention for government in 1946 by applying UU 22/1946 about marriage registration, divorce and reconciliation that applied in Java and Madura, then Emergency Goverement Republic Indonesia in Sumatera the regulation (UU) was also applied for all over Sumatera (Nani Soewondo, 1968). In order to implementation that UU, so that the country launched the Minister of Religion's instruction 4/1947 about pointing the employee of Marriage Registration (PPN), with the duty was to avoid children underage married, to explain the duty of a polygamy husband, to manage the reconciliation for a couple that have a problem in family, to explain ex-husband and ex-wife and their children if they are divorce, explain about *"iddah* and manage the divorce couple to reconciliation again. The determination applied until 1954 because in that era government was launched UU 32/1954 for all over Indonesia.

In fact, the journey of the renewal of family law in Indonesia not stop in that place, because in August 1950, the woman in the parliaments request urgently about re-consideration the regulation of marriage permanently. At the end, in 1950 by the Minister of Religion's instruction No. B/2/4299 dated 1/10/50 was formed the committee of investigation of regulation marriage registration, divorce and reconciliation (Asro Soisroatmodjo, 1978).

In 1952, the committed able to settle their job, produce the concept of UU that applied for all classes and religious and also the specific regulations to manage the religious itself. In 1/12/52 the committee

3. In 2013 Indonesian workers abroad (TKI) 6,5 people that administered in 142 countries. See Wiji Nurhayat, , 14/03/2013, see *http://www.finance.detik.com*
4. Politically, the establishment of Ministery Religion seen as compensation tolerance manner of vices Islam, crossed out seven words in piagam Jakarta; the deity in a duty to execute the syari'at for every religion and Moh Slamet Anwar stated that the mission of ministery of religion is "hold a nation" in order to religion nation. See: http://e-dokumen.kemenag.go.id

delivered the RUU of marriage to all central and local organizations with the in order to give the opinion about RUU until 1/2/53.

In 1954, the committee was successes to design RUU about marriage delivered by Ministery of Religious at the end September 1957 with the next renewal. But, at the first in 1958 there was no movement from the government to continue, so that the lawmakers from the woman that led by Soemari was proposed RUU marriage in 1958, one of the suggestions is monogamy asas as Indonesia marriage, this suggestion got the the reaction from the government and society.

That product got the controversy from Muslim especially traditionalist group that assumed the *syariat* regulation clearly encounter all the regulation, so that regulation of Islamic family law is not needed again. They think, the regulation from the God (*syariat)* is for all era and country. As the result, all the new materials that produced in 1953 until 1958 was not discussed again by the government and lawmaker (J. Prins, 1982). While, the suggestion from Soemari et al in October 1959 was not apply because got the reaction from Indonesian Legislative Assembly (DPR) and Islamic Party especially the idea of monogamy in a marriage.

Beside the internal factor above, the *discontinuance* spirit of Islamic family law renewal also occurred by external, that is the changing of institution system in Indonesia as the effect of Presiden *Decrit* 5/6/59 as the solutive step between Islam and Nasionalis group. So that, in the old order era all of that is end (1967), There was no Islamic law in family law codificated or legislated so it can be as the main reference for Muslim in Indonesia.

2.2. New Order Era

Politic law in this era going to establishment of UU 1/1974 run into long and hard journey that occurred in the Old Order Era, it started by the parlemen meeting DPR GR 1967-1971 got the proposal of RUU marriage from two department; RUU Muslim Marriage that proposed by Ministery of Religious in Mei 1967 and RUU about the main determination of marriage that proposed by Ministery of Justice in September 1968. But, because of there was a specific proposal from Ministery of Religious so come up the rejection from Katolik fraction with the total number 8:500 with the rationalizations;

> *" the marriage regulation way was determined by RUU is not appropriate with Indonesia that is Pancasila, it means that there was changing of national principle. National was not based on Pancasila again but based on religion where it is suitable with the principle of Piagam Jakarta* ". (H.M. Rasjadi, 1974)[5]

In fact, argumentation between Muslim and Cristian continue until alteration of parlement after legislative election in 1971 and in July 1973, the government re-entering RUU about marriage to DPR, the result of election in 1971 get it back RUU that proposed in Ministery of Religious in 167 and Ministery of Justice in 1968. However, the rejection about RUU occurred in internal Islam itself because of the pasal in RUU considered contradict with Islam, Pancasila and UUD 1945. The determinations or pasals in RUU that contradictory were;

a. Legitimation of marriage (pasal 2 ayat 1), where they assumed that legalilty of marriage fulfilled by principle *(rukun)* in a marriage; solemnization of marriage done by brides and witnessed by two bystander, and marriage registeration.
b. Marriage prohibition because of adopted children (pasal 8 c) and marriage prohibition for three times for divorce couple two times (pasal 10). This two determinations was not instruction by Allah in QS QS. an-Nisa' ayat 22 until 24.
c. Diferrence Religion is not obstacle of marriage (pasal 11). In Islam, different religion as the main obstacle in marriage based on QS. Al-baqarah ayat 221 and QS. Al mumtahanah ayat 10.
d. Waiting period for a widow to married again is 306 days (pasal 12). It is contradict with the regulation of *iddah* that explained in Islam, where the waiting period of a widow is there *quru'*, after give birth and 4 months 10 days for widow that left by husband (Taufiqurrohman Syahuri, 2013).

The polemic more complex with the assumption that RUU marriage is for *receptive theory* Snouck Hurgronje with the aim to ban Islamic law in Indonesia by leaning Islamic law into tradition law (Sajuti Thalib, 1985) and West law (Neng Djubaedah, 2009) through material sub " marriage registration" and at the

5. President's instruction No. R.02/P.U/VII/1973, 31th July 1973 about RUU marriage.

end by bargaining the politics between Islam group respresnted by Partai Persatuan Pembangunan (PPP) and government represented by militer group gain the deal to ban some pasal about the regulations and considered contradictory with the Islamic principles, in 22/12/73 DPRl legalized RUU as UU and signed by President No. 1 Year 1974 date January 2th 1974.

In order to get the best place in society, there was design of regulation PP 9/75, PMA3/75 changed with PMA 2/90 about how to register marriage and divorce. Regulation Ministery of Home Affairs No. 221a year 1975 about registration and divorce a Marriage. In order to give the understanding deeply for society about how to apply the regulations above, so that designed the regulations more clearly for government employees (PNS) as the main example in a society PP 10/83 about marriage and divorce and it changed in PP 45/90.

To solve the problem in family, applied UU No. 7 Year 1989 about Religion Justice. But, in the implementation there are many judges that felt difficult in taking decision because of there are many science about *fiqh* Islam. So, President's instruction 1/91 about KHI was implemented. This is the main debating about sciences in Indonesia especially family law by unification law approach that contradictory with the history of fiqh Indonesia *asy-Syafi'iyyah madzhab*.

Abdul Gani Abdullah (1994) noted there were three notes from president' instruction about KHI, namely; (1) instruction to share KHI and also the duty of Islamic society in order to functionalized normative doctrine (2) the formulation of problem in KHI attempted to terminate double perception from Islamic law in Pasal 2 ayat 1 and 2 UU 1/74 and also UU 7/89 as the perfectly law implementation. (3) show the firm of the implementation are in government instiution and society.

2.3. Reformation Era

This period occurred since President Soeharto stepped down in 19998 and replaced by President BJ. Habibie for 1 year 5 months (1998-1999), then Abdurrahman Wahid for 1 year 8 months (20th October 1999 s.d 23th July 2001), Megawati Soekarno Putri for 3 years 3 months (23th July 2001 until 20th October 2004) and Susilo Bambang Yudhoyono for two periods or 10 years (20th October 2004 until 19th October 2014) and the last President Joko Widodo where the writings still completed, because it might be there was decision of MK about *judical review* for Indonesia University student about prohibition marriage in different religion.

In this era, there were two spirits of the renewal Islamic family law; *first* the issue of deletion or revision marriage law, especially PP 10/83 year 1999-2000 second, the appearance of movement in order to revise the regulation.

The government was amending UU 7/89 by applying UU 3/2006 that ave the authority and higher status to Ministery of Religious. By applying that UU so that, Ministery of Religius added in three parts; *zakah, infaq and ekonomi syari'ah*.

Beside that, government also preparing other action that is Team Gender (PUG) as UU family law that revised UU UU 1/74 in Megawati Soekarnoputri era. This team works under supervision from Minister of Regulation, with the mean object is the content of KHI. Therefore, because of the formulation was contradictory with KHI so that the draft called as *Counter Legal Draft*-Islamic Compilation Law (CLD-KHI), the content were 116 pasal in one book about marriage, 8 bab and 42 pasal in two book about inheritance, and 5 ba 20 pasal in three books about wakaf.

But in fact, CLD-KHI was resistance as the explained in the chapter before including in ulama and academics, so Ministery of Religious made a decree to dissolve that team work[6] as considered liberal and contradictory with syariat Islam. After the failure of CLD-KHI as the UU, the renewal run through advocacy by proposing law material in UU No. 1 Year 1974 in Constitutional Court.

3. The Means of Different Argument

It is better if difference argument be created as the renewal model (*liyatafqqahu fi ad-din*), enrich sciences of Islam in Indonesia so that it can be give the optimal functions for the universal. The main concept "Bhineka Tunggal Ika" unity in diversity and also agree in disagreement. The difference should be created as *rahmat* for all who are think, because of able to give understanding for them so that Muslim are able to unite

6. Decree Ministery of Religious No. MA/274/2004 about Counter Legal Draft KHI, date 14th October 2004 and Decree of Ministery Religious No. MA/271/2004 12th October 2004.

in diversity with concept Islamic law; *jalb al-mashalih wa dar'u al-mafasid*, presenting the goodness and encounter the damage.

Religion text that assumed as sacral and absolute in packaging and containing by conservative-fundamentalist Islam, but it is contradict with Islam liberalism where the text not to limit the freedom of thinking, so that assumed that mind is same as sacred as God's revelation and the mind has a big right in huge interpreting on the will of God, so it is as the reconciliation way was through understanding about politic law as the mediator.

The point of explanation above is between Islam and country that have relationship should always together from the first until the end, as explained by Yudian K. Wahyudi (2007) there were five couple characteristics of Islamic law; first, Islamic law tend to *Ilahi* at once *wadh'iy* (human; positive and secular); second, Islamic law tend to absolute at once relative; third, Islamic law tend to universal but locally. Fourth, Islamic law tend to eternal temporal. Fifth, Islamic law *harfiyyah ma'nawiyyah*. Therefore, because of Islamic law coupled above, the model of relationship should be interwoven in order to create the development of law between Islam and country (national) with the symbiotic paradigm; reciprocal relationship where religion need a country and country need a religion in order to guide moral (Abd. Salam Arief, 2004).

Perspective moderation unite between ideality and reality, as explained above able to convince every group about the certainly of the renewal of Islamic law in Indonesia especially family law.

The way to renewal can be seen as stated by Fathurrahman Djamil (1996) namely; first, the effort of the eclectic expedient; Second, effort of (the procedural exepedient. Third, effort of the expedient of administrative orders and the last effort of the exepedient of reform by judicial decision).

The process built orderly above, put it first in methodology framework (*manhajiyyah*) that is re-reading text, context and substantive. It means that, when someone try to talk about text, so universally and visionary as the reference while, about context the point of view used human thinking for example culture, religion, and ras that summarized as plurality. From this process it is better to do the "maturation academic or thinking", so that it can be create substantive from the text that used in the world for all human.

The argumentation that synergized between text movement and context in order to face the law pluralism and culture through politics law way so that it can be presence substantive, that can lean through behavior and policy from Muhammad SAW when he is in the Madina that face the heterogen and plural society. Until now, that product still as interesting discussion for many researchers in the world in order to describe country, democracy, and Human Right (HAM) Islamic model was Piagam Madina. Heterogenity and plurality in the Madina involved religion, ethnic, culture and ras. All unite in one in friendliness of Islam that basedon constitution Piagam Madinah as the reference.

In the context of religion plurality, Al-Burey (1986) noted that Islam recognize the freedom in religion not only in normative but also in practical. Katimin explained that Piagam Madinah give the autonomy warranty for every group of religion, tradition, culture and also equality of human right that consists of democracy (Katimin 2004). So, as the national constitution in Piagam Madinah consist of the meaning and strategic function because of the freedom that warranty constitutionally (Rahmad Asril Pohan, 2014).

The analogy that can build through the historic reference was between Muslim and country was never be separated, it can be symbiotic paradigm because of guarding by constitution, Indonesia is the country sociologically as same as Madinah that heterogen and plural, even more plural than Madinah. So that, in connecting the communication that impeded by other concern group it can be done through the policy of country through the politics.

This is the solution in order to provide the difference of principal between liberalism and fundamentalism Islam in Indonesia so that it can be give benefit each other in order to develop law in Indonesia.

4. Conclusion

The renewal movement of Islamic family law in Old Order was done by ulama in the parliament by launched UU 22/46 about regulation marriage registration, divorce and reconciliation that apply in Java, Madura and

Sumatera until present as the reference in applying UU 22/46 all over Indonesia. This renewal got the positive response from the woman in parliament in August 1950 that importunate the government to re-consider the regulation of marriage permanently, and based on Minister of Religion's instruction No. B/2/4299 date 1st October 1950 formed supervision of the regulation marriage registration, divorce and reconciliation

Debatable of law materials continuing until Presiden's instruction date 5th Juli 1959 and all the process was stop automatically.

The renewal movement of Islamic family law in New Order Era was done by executive started by parliament meeting DPR-GR 1967-1971 that got proposal RUU about Muslim Marriage that proposed in Minister of Religion in Mei 1967 and RUU about the main terms of marriage that proposed by Ministery of Justice in September 1968. In the context of RUU proposal from Ministery of Religion got the rejection from Katholic and debat argumentation between Islam and Christian in the parlement until the alteration of the parlemen member after legislative election in 1971 and in July 1973 The government re-entered again RUU about Marriage to DPR as the result election in 1971 withdraw RUU before that proposed by Ministery of Religion in 1967 and Ministery of Justice in 1968.

The renewal movement in family law assumed will be well organize, in fact there was rejection from Muslim itself in the parliament because of not appropriate with *fiqh.* As the result, by bargaining the politics of Islam that represented byPPP and government that represented by Military the result was there were pasal that banned about the regulation as the triggers of debating and it can be seen as contradictory with the principles of Islam, and in 22th December 1973 DPR approved RUU as UU

The first marriage in Indonesia signed by President in No. 1 year 1974 date 2th Januari 1974. In the Era-90 the spirit revision of family law came in government. So that, come up KHI as the law materials that used in Religious Court in order to solve the problem in Islamic family law in Indonesia.

In the reformation era, the renewal movement in family law runs into two paths, first MK *judical review* and Team Gender (PUG) as UU family law that revised UU 1/74 Ministery of Religion was created Counter Legal Draft - Islamic Compelation Law (CLD-KHI), the content were 116 pasal in one book about marriage, 8 bab and 42 pasal in two book about inheritance, and 5 ba 20 pasal in three books about wakaf.

But, the PUG movement got the rejection because assumed as liberal, so that Minister of Religion made a decree to dissolve the team work.

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Kedudukan Perbankan Syariah dalam Sistem Ekonomi dan Hukum Indonesia

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Abstrak – Perbankan syariah tumbuh dan dikembangkan sebagai sebuah alternatif bagi Praktik perbankan konvesional. Kritik terhadap konsep bank konvensional oleh konsep perbankan syariah, bukanlah menolak bank dalam fungsinya sebagai lembaga intermediasi keuangan, melainkan dalam karakteristiknya yang lain, misalnya masih terdapat unsur riba, judi *(maysir)*, ketidakpastian *(gharar)*, *bathil*. Dalam prakteknya perlu sinergitas antara Pemerintah, MUI dan Lembaga Peradilan, sinergitas dalam hal implementasi prinsip syariah dalam kegiatan usaha perbankan syariah, menyangkut lahirnya aturan hukum dalam praktik yang diikuti pihak perbakan sehingga dapat terciptanya keadilan, kebersamaan, dan pemerataan dalam kegiatan ekonomi nasional

Kata Kunci*: Perbankan Syariah, Ekonomi, Peradilan Agama*

1. Pendahuluan

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (Selanjutnya disebut Undang-Undang Dasar 1945) Pasal 1 ayat (3) menyatakan bahwa negara Indonesia adalah negara hukum. Apabila dikaitkan dengan Pasal 29 ayat (1) Undang-Undang Dasar 1945, yang menyatakan bahwa "negara berdasarkan atas Ketuhanan Yang Maha Esa maka negara hukum yang dimaksud oleh Undang-Undang Dasar 1945 adalah negara yang tidak terpisah dari agama". "Indonesia sebagai negara yang memiliki dasar negara Pancasila merupakan jalan tengah bagi hubungan antara agama dan negara sekaligus menegaskan bahwa hukum agama merupakan salah satu sumber hukum nasional."

Sejalan dengan ketentuan tersebut maka salah satu prinsip penting negara hukum adalah adanya jaminan penyelenggaraan kekuasaan lembaga peradilan yang bebas dari campur tangan pihak kekuasaan extrayudisial untuk menyelenggarakan peradilan guna menegakkan ketertiban, keadilan, kebenaran dan kepastian hukum yang mampu memberikan pengayoman kepada masyarakat. Perubahan Undang-Undang Dasar 1945 telah membawa perubahan dalam ketatanegaraan, khususnya dalam pelaksanaan kekuasaan lembaga peradilan. Kekuasaan kehakiman yang merdeka adalah pilar dari negara merdeka. Kekuasaan yang merdeka adalah kekuasaan yang tidak memihak dan bebas dari pengaruh eksekutif dan bebas gangguan dalam melaksanakan tugasnya

Perkembangan Peradilan Agama juga seiring dengan tumbuhnya Bank Syariah sebagai bagian dari sistem ekonomi Islam. Di Indonesia, perbankan Syariah dapat dikatakan terlambat dibandingkan negara-negara lain yang mayoritas penduduknya muslim. dengan potensi jumlah penduduk muslim Indonesia yang mencapai ±85 % dari 237 juta penduduk Indonesia, memberikan kesempatan bagi perkembangannya secara pesat sektor perbankan syariah di Indonesia. "Dengan menyajikan alternatif instrumen keuangan dan perbankan kepada nasabah muslim Indonesia, Sejak saat itu, Pemerintah semakin serius dalam memberikan perhatian terhadap pertumbuhan bank syariah di Indonesia".[1]

Setelah munculnya bank-bank syari'ah di negara-negara lain, pada awal tahun 1980 diskusi mengenai bank syari'ah sebagai pilar ekonomi Islam mulai dilakukan. "Konkritnya pada tahun 1991 dibentuk suatu akte pendirian PT Bank Muamalat Indonesia sebagai hasil musyawarah nasional Majelis Ulama Indonesia pada tahun 1990 yang menginginkan adanya

1. Bank Indonesia, *Panduan Investasi Perbankan Syariah Indonesia*, Jakarta: Bank Indonesia, 2007, hal. 9.

pendirian bank Islam di Indonesia".[2] Bank Syari'ah di Indonesia secara resmi *yuridis* diperkenalkan pada tahun 1992 sejalan dengan diberlakukannya Undang-undang Nomor 7 Tahun 1992 tentang Perbankan (Selanjutnya disebut UU Perbankan). Lahirnya undang-undang ini menandakan adanya kesepakatan rakyat dan bangsa Indonesia untuk menerapkan *dual banking sistem* atau sistem perbankan ganda di Indonesia. Tahapan ini merupakan tahap perkenalan *introduction* terhadap perbankan.[3]

UU Perbankan tidak secara eksplisit menyebutkan adanya apa yang disebut *bank syari'ah*. Hanya ada dua pasal yang dapat dijadikan dasar yaitu Pasal 6 huruf m yang berkenaan dengan lingkup perbankan umum dan Pasal 13 huruf c berkenaan dengan salah satu lingkup kegiatan Bank Perkreditan Rakyat dengan isi yang sama menyebutkan bahwa "menyediakan pembiayaan bagi nasabah berdasarkan prinsip bagi hasil sesuai ketentuan yang ditetapkan dalam Peraturan Pemerintah".[4]

Kegiatan perbankan syariah adalah bank yang melaksanakan kegiatan usaha secara konvensional maupun berdasarkan prinsip syariah yang dalam kegiatannya memberikan jasa dalam lalu lintas pembayaran. "Hal ini mengingat dalam undang-undang tersebut perbankan syari'ah diberikan peluang yang luas menjalankan kegiatan usaha, termasuk membuka kesempatan kepada bank umum konvensional untuk membuka kantor cabang yang khusus melakukan kegiatan usaha berdasarkan prinsip syari'ah".[5] Prinsip syari'ah adalah aturan perjanjian berdasarkan hukum Islam antara bank dan pihak lain untuk penyimpanan dana dan atau pembiayaan kegiatan usaha, atau kegiatan lainnya yang dinyatakan sesuai dengan syariah. Di sini terlihat, bahwa di Indonesia berlaku dua sistem perbankan, yaitu sistem konvensional yang menggunakan sistem bunga dan sistem syari'ah yang berlandaskan pada ketentuan Islam.

Kepastian hukum semakin dirasakan bagi pemerhati dan masyarakat pengguna jasa perbankan syariah setelah diundangkan Undang-Undang Nomor 21 Tahun 2008 tentang perbankan syariah (selanjutnya disebut UU Perbankan Syariah). Perbankan syariah merupakan salah satu solusi perekonomian bangsa mengingat perekonomian merupakan tulang-punggung pengerak stabilitas nasional. Perbaikan segala permasalahan bangsa yang dihadapi saat ini harus dari kegiatan perekonomian nasional yang menuju perekonomian berbasis syariah.

Kegiatan perbankan syariah secara tegas diatur dalam UU Perbankan jo UU Perbankan Syariah Penyebutan mengenai perbankan syari'ah dapat terlihat dari pengertian bank, Bank Umum adalah bank yang melaksanakan kegiatan usaha secara konvensional maupun berdasarkan prinsip syariah yang dalam kegiatannya memberikan jasa dalam lalu lintas pembayaran. Hal ini mengingat dalam Undang-Undang tersebut perbankan syari'ah diberikan peluang yang luas menjalankan kegiatan usaha, termasuk membuka kesempatan kepada bank umum konvensional untuk membuka kantor cabang yang khusus melakukan kegiatan usaha berdasarkan prinsip syari'ah. Berdasarkan data dari OJK Sampai tahun 2015 ada 2.881 kantor cabang bank syariah.[6]

Perbankan syariah tumbuh dan dikembangkan sebagai sebuah alternatif bagi Praktik perbankan konvesional. Kritik terhadap konsep bank konvensional oleh konsep perbankan syariah, bukanlah menolak bank dalam fungsinya sebagai lembaga intermediasi keuangan, melainkan dalam karakteristiknya yang lain, misalnya masih terdapat unsur riba, judi *(maysir)*, ketidakpastian *(gharar)*, *bathil*. Dengan dilarangnya riba, *maysir, gharar,* dan *bathil* dalam perbankan, maka sebagai gantinya dapat menerapkan akad-akad tradisional Islam pada praktik perbankan dimaksud. Secara filosofis, bank syariah adalah bank yang aktifitasnya meninggalkan masalah riba.[7] hal ini

2. Muhammad Syafi'i Antonio, *Bank Syari'ah Wacana Ulama dan Cendikiawan*, Tazkia Institut, 1999, hal. 278.
3. Karnaen Perwataatmadja, *Bank dan Asuransi Islam di Indonesia*, Kencana, 2005, Jakarta, hal.1-3
4. Abdurrahman, *Eksistensi Perbankan Syari'ah dalam Pembinaan Ekonomi Umat dalam Prospek Bank Syariah di Indonesia*, PPHIM, Bandung, 2005, hal.26
5. Atas dasar UU Perbankan tersebut kemudian berdiri Bank Syari'ah Mandiri dan beberapa bank yang membuka cabang syari'ah antara lain bank BNI, Bank BRI, Bank IF, Bank Bukopin, Bank Danamon, BPD Jabar, bahkan saat ini telah ada bank asing yang membuka cabang syari'ah yaitu Bank HSBC. Lihat Hasanuddin, "Penyelesaian Sengketa dalam Perbankan Syar'ah", *Makalah* disampaikan pada Seminar Perbankan Syariah Sebagai Sarana Pemberdayaan Ekonomi Kerakyatan diselenggarakan oleh BPHN Departemen Kehakiman dan HAM bekerjasama dengan FH Universitas Andalas Padang dan Kanwil Departemen Kehakiman dan HAM Provinsi Sumaatra Barat tanggal 29-30 Juni 2004, hal. 21
6. www.ojk.go.id diakses 10 April 2016
7. Amir Machmud, *Bank Syariah: Teori, Kebijakan dan Studi Empiris di Indonesia*, et. Al. t.t.: Erlangga, 2010, hal. 4.

sejalan dengan firman Allah dalam surat Al-Baqarah ayat 275:

. . .وَأَحَلَّ اللهُ الْبَيْعَ وَحَرَّمَ الرِّبَا. . . ٢٧٥

"…Allah telah menghalalkan jual beli dan mengharamkan riba . . ." (QS. Al-Baqarah [2] : 275). [8]

Adapun akad-akad tradisional Islam atau yang lazimnya dikenal dengan akad berdasarkan prinsip syariah menurut Muhammad Syafii Antonio : "terdiri dari prinsip titipan atau simpanan *(depository)*, bagi hasil *(profit sharing)*, sewa-menyewa *(operating lease and financial lease)*, dan jasa *(fee-based service)* yaitu *al-wakalah, al-kafalah, al-hiwalah, ar-rahn, al-qardh"*.[9]

Antusias masyarakat muslim selaras dengan perkembangan di bidang hukum ekonomi syariah dengan lahirnya peraturan perundang-undangan seperti Undang-Undang Nomor 3 tahun 2004 tentang Bank Indonesia dan Undang-Undang Nomor 10 tahun 1998 tentang perubahan atas Undang-Undang Nomor 7 tahun 1992 tentang perbankan, UU No. 19 Tahun 2008 tentang surat berharga syari'ah negara dan UU No. 21 Tahun 2008 tentang perbankan syari'ah semakin memperkokoh kegiatan ekonomi syari'ah modern dewasa ini.[10]

2. Pembahasan

2.1 Kedudukan Bank Syariah dalam Sistem Perbankan di Indonesia

Bank syariah adalah sebuah badan usaha yang masuk dalam lingkup Lembaga Keuangan Syariah (LKS). Definisi LKS menurut Dewan Syariah Nasional adalah lembaga keuangan yang mengeluarkan produk keuangan syariah dan yang mendapat izin operasional sebagai lembaga keuangan syariah (DSN-MUI, 2003).[11] Definisi ini menegaskan bahwa ada dua unsur yang harus dipenuhi oleh suatu LKS, yaitu unsur kesesuaian dengan syariah Islam dan unsur legalitas operasi sebagai lembaga keuangan.

Adapun definisi perbankan syariah secara spesifik telah banyak diungkapkan oleh para tokoh dalam buku-buku literatur seputar perbankan dan lembaga keuangan syariah yang esensinya sama antara pandapat tokoh yang satu dengan yang lainnya. Salah satunya seperti yang diungkapkan oleh Muhammad, bank syariah adalah bank yang beroperasi dengan tidak megandalkan pada bunga. Bank Islam atau biasa disebut dengan bank tanpa bunga, adalah lembaga keuangan/perbankan yang operasional dan produknya dikembangkan berlandaskan pada Al-Qur'an dan Hadis Nabi SAW. Dengan kata lain, Bank Islam adalah lembaga keuangan yang usaha pokoknya memberikan pembiayaan dan jasa-jasa lainnya dalam lalu lintas pembayaran serta peredaran uang yang pengoperasiannya disesuaikan dengan prinsip syariat Islam.[12]

Dari penjelasan di atas, bank syariah dapat diartikan sebagai lembaga keuangan yang beroperasi berdasarkan pada prinsip syariah Islam, yakni dengan berpedoman pada Al-qur'an dan hadits. Kedua hal tersebut menjadi pijakan bagi perbankan syariah dalam menjalankan kegiatan operasionalnya, mengembangkan kegiatan usahanya lewat produk dan layanan yang ditawarkan kepada para nasabah serta sebagai pijakan juga untuk aspek-aspek lainnya berkenaan dengan bank syariah itu sendiri.

Dengan demikian, penghindaran bunga yang dianggap riba merupakan salah satu tantangan yang dihadapi dunia Islam dewasa ini. Belakangan ini para ekonom Muslim telah mencurahkan perhatian besar guna menemukan cara untuk menggantikan sistem bunga dalam transaksi perbankan dan keuangan yang lebih sesuai dengan etika Islam.

Aktivitas keuangan dan perbankan dapat dipandang sebagai wahana bagi masyarakat modern untuk membawa mereka kepada, paling tidak, pelaksanaan dua ajaran Al-Qur'an, yaitu:[13]

a) Prinsip *At-Ta'awun*, yaitu saling membantu dan saling bekerja sama di antara anggota masyarakat untuk kebaikan, sebagimana dinyatakan dalam Al-Qur'an:

8. Departemen Agama RI, *Al-Qur'an dan Terjemahnya* , t.t.: J-ART, 2005, hal. 48.
9. Muhammad Syafi'i Antonio, 2007, *Bank Syariah dari Teori ke Praktik*, Cetakan ke-10, Gema Insasani Press dan Tazkia Cendikia, Jakarta, hlm 83. Lihat juga M. Natsir Asnawi, *Menyoal Kompetensi Peradilan Agama dalam Menyelesaikan Perkara Ekonomi Syari'ah,* Media Badilag tahun 2011, hal 4
10. Afdol, *Legislasi Hukum Islam di Indonesia*, hlm 115 lihat juga Muhammad, 2005, *Sistem dan Prosedur Operasional Bank syariah*, Yogyakarta, UII Press, hal 18, lihat juga Muhammad Djakfar, Hukum Bisnis, UIN-Malang Press 2009
11. Rizal Yaya, *Akuntansi Perbankan Syariah: Teori dan Praktik Kontemporer*, et. Al. Jakarta: Salemba Empat, 2009, hal. 38.
12. Muhammad, *Manajemen Dana Bank Syariah* , Yogyakarta: Ekonisia, 2004, hal. 1.
13. Zainul Arifin, *Dasar-Dasar Manajemen Bank Syariah* , Jakarta: Pustaka Alvabet, 2005, hal. 11.

. . .وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى وَلا تَعَاوَنُوا عَلَى الإِثْمِ وَالْعُدْوَانِ وَاتَّقُوا اللهَ إِنَّ اللهَ شَدِيدُ الْعِقَابِ ٢

" . . . Dan tolong-menolonglah kamu dalam (mengerjakan) kebajikan dan takwa, dan jangan tolong-menolong dalam berbuat dosa dan pelanggaran. Dan bertakwalah kamu kepada Allah, sesungguhnya Allah amat berat siksa-Nya." (QS. Al-Ma'idah [5] : 2)[14]

b) Prinsip menghindari *Al Iktinaz,* yaitu menahan uang (dana) dan membiarkannya menganggur (*idle*) dan tidak berputar dalam transaksi yang bermanfaat bagi masyarakat umum, sebagaimana dinyatakan di dalam Al Qur'an:

يَا أَيُّهَا الَّذِينَ آمَنُوا لا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ وَلا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللهَ كَانَ بِكُمْ رَحِيمًا

"Hai orang-orang yang beriman, janganlah kamu saling memakan harta sesamamu dengan jalan yang batil, kecuali dengan jalan perniagaan yang berlaku dengan suka sama-suka di antara kamu. Dan janganlah kamu membunuh dirimu; sesungguhnya Allah adalah Maha Penyayang kepadamu" (QS. An-Nisa' [4] : 29).[15]

Perbankan merupakan elemen penting dalam pembangunan suatu negara. "Hal ini tercermin dalam pengertian perbankan secara yuridis, yaitu badan usaha yang menghimpun dana dari masyarakat dalam bentuk simpanan dan bentuk-bentuk lainnya dalam rangka meningkatkan taraf hidup rakyat banyak."[16] Fungsi bank sebagai lembaga intermediasi keuangan *(financial intermediary institution)* tersebut sangat menentukan bagi sukses tidaknya pembangunan ekonomi masyarakat pada suatu negara.

Kebijakan perbankan di Indonesia sejak tahun 1992 berdasarkan ketentuan UU Nomor 7 Tahun 1992 tentang Perbankan, yang kemudian diperkuat dengan UU Nomor 10 Tahun 1998 Tentang Perubahan atas UU Nomor 7 Tahun 1992 tentang perbankan menganut sistem perbankan ganda (*dual banking system*). "*Dual banking system* maksudnya adalah terselenggarannya dua sistem perbankan (konvensional dan syariah secara berdampingan) yang pelaksanaannya diatur dalam berbagai peraturan perundang-undangan yang berlaku".[17] Pasal 2 Undang-Undang Nomor 21 Tahun 2008 Tentang Perbankan Syariah (selanjutnya disebut UU Perbankan Syariah), ditegaskan asas perbankan syariah. Perbankan Syariah dalam melakukan kegiatan usahanya berasaskan Prinsip syariah, demokrasi ekonomi, dan prinsip kehati-hatian.

Ketentuan dalam Pasal 2 Undang-Undang Perbankan syariah dapat diketahui secara jelas, bahwa perbankan syariah dalam melakukan kegiatan usaha diwajibkan berasaskan dan mengimplementasikan prinsip syariah. Perbankan syariah adalah perbankan yang berdasarkan kepada prinsip syariah. Mengenai pengertian prinsip syariah dikemukakan dalam ketentuan Pasal 1 angka (13) Undang-Undang Perbankan Syariah, yang mengartikan sebagai berikut:

Prinsip Syariah adalah aturan perjanjian berdasarkan hukum Islam antara Bank dan pihak lain untuk penyimpanan dana dan atau pembiayaan kegiatan usaha,atau kegiatan lainnya yang dinyatakan sesuai dengan syariah, antara lain pembiayaan berdasarkan prinsip bagi hasil (*mudharabah*), pembiayaan berdasarkan prinsip penyertaan modal (*musharakah*), prinsip jualbeli barang dengan memperoleh keuntungan (*murabahah*), atau pembiayaan barang modal berdasarkan prinsip sewa murni tanpa pilihan (*ijarah*), atau dengan adanya pilihan pemindahan kepemilikan atas barang yang disewa dari pihak bank oleh pihak lain (*ijarah wa iqtina*).

Berkenaan dengan pengertian prinsip syariah dalam perbankan syariah, dalam penjelasan umum atas UU Perbankan Syariah antara lain dikemukakan sebagai berikut: Sementara itu, untuk memberikan keyakinan pada masyarakat yang masih meragukan kesyariahan operasional Perbankan Syariah selama ini, diatur pula kegiatan usaha yang tidak bertentangan dengan prinsip syariah meliputi kegiatan usaha yang tidak mengandung unsur-unsur riba, maisir, gharar, haram, dan zalim.

14. Departemen Agama RI, *Al-Qur'an dan Terjemahnya,* hal, 107.
15. *Ibid,* hal, 84.
16. Lihat pasal 1 ayat (2) Undang-Undang Nomor 10 Tahun 1998 tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1992 tentang Perbankan (Lembaran Negara Republik Indonesia Tahun 1998 Nomor 182, Tambahan Lembaran Negera Republik Indonesia Nomor 3790)
17. Abdul Ghofur, *Perbankan Syariah di Indonesia,* Yogyakarta, Gadjah Mada University Press, 2007, hal. 33

Berdasarkan hal ini, maka mengandung arti, bahwa kegiatan usaha dan produk perbankan yang berasaskan prinsip syariah tersebut, antara lain adalah kegiatan usaha yang tidak mengandung unsur-unsur seperti yang tersebut dalam Penjelasan atas Pasal 2 Undang-Undang Perbankan syariah, yaitu:

1. *riba*, yaitu penambahan pendapatan secara tidak sah *(batil)* antara lain dalam transaksi pertukaran barang sejenis yang tidak sama litas, kuantitas, dan waktu penyerahan (*fardhl*), atau dalam transaksi pinjam-meminjam yang mempersyaratkan Nasabah Penerima fasilitas mengembalikan dana yang diterima melebihi pokok pinjam karena berjalannya waktu *(nasi'ah);*
2. *maisir*, yaitu transaksi yang digantungkan kepada suatu keada yang tidak pasti dan bersifat untung-untungan;
3. *gharar*, yaitu transaksi yang objeknya tidak jelas, tidak dimiliki, tidak diketahui keberadaannya, atau tidak dapat diserahkan pada saat transaksi dilakukan kecuali diatur lain dalam syariah;
4. *haram*, yaitu transaksi yang objeknya dilarang dalam syariah;
5. *zalim*, yaitu transaksi yang menimbulkan ketidakadilan bagi pihak lainnya.

Sebelumnya, dalam ketentuan Pasal 2 Peraturan Bank Indonesia No.9/19/PBI/2007 sebagaimana diubah dengan Peraturan Bank Indonesia No. 10/16/PBI/2008 menegaskan hal yang sama, bahwa dalam melaksanakan perbankan melalui kegiatan penghimpunan dana, penyaluran dana pelayanan jasa bank, Bank Syariah wajib memenuhi prinsip syariah. hal ini tentunya prinsip syariah yang wajib dipenuhi oleh Bank dimaksud bersumber pada Fatwa yang dikeluarkan oleh Dewan Syariah Nasional (DSN). Dalam Undang-Undang Perbankan Syariah Pasal 1 angka (12) juga memberikan rumusan pengertian prinsip syariah, yaitu: Prinsip Syariah adalah prinsip hukum Islam dalam kegiatan perbankan berdasarkan fatwa yang dikeluarkan oleh lembaga yang memiliki kewenangan penetapan fatwa di bidang syariah.

Prinsip syariah itu prinsip hukum Islam yang didasarkan kepada fatwa yang dikeluarkan oleh lembaga yang memiliki kewenangan dalam penetapan di bidang syariah. Lembaga yang berwenang menetapkan fatwa dibidang syariah itu adalah Majelis Ulama Indonesia (MUI), sedangkan pelaksanaan selama ini dilakukan oleh DSN-MUI.[18]

Berbeda dengan UU Perbankan pengaturan yang menyangkut asas ini, lebih menekankan pada frasa "berasaskan prinsip syariah". Hal tersebut sesuai dengan karakteristik dari perbankan syariah.[19] Karakteristik Bank Syariah yang utama adalah adanya pelarangan riba dalam bentuk kegiatan apa pun. Dalam Bank Syariah tidak mengenal *time value of money*, perlakuan uang dalam bentuk bank Syariah hanya diperlakukan hanya sebagai alat pembayaran dan tidak diperkenankan sebagai alat komoditi atau untuk diperdagangkan. Oleh karena itu, Bank Syariah tidak pernah menghitung nilai dengan adanya perubahan waktu yang akan datang. Transaksi-transaksi yang dijalankan oleh Bank Syariah, juga tidak diperkenankan untuk mengandung unsur spekulatif, karena hal tersebut dikategorikan unsur judi.[20]

Perbankan konvesional bergerak disektor moneter, karena fungsi bank sebagai penghubung pihak yang kelebihan dana dari pihak yang kekurangan dana serta bank mengambil keuntuntungan dari seluruh beban yang dibayar kepada para deposan dengan pendapatan yang diterima dari debitur berkaitan dengan perdagangan uang. Hal ini berbeda dengan Bank Syariah, karena Bank Syariah tidak diperkenankan memperdagangkan uang, uang semata-mata hanya sebagai alat pembayaran saja. Bilamana ditelaah lebih mendalam tentang dan pola kerjanya, Bank Syariah banyak bergerak pada sektor riil, dibandingkan dengan sektor moneter, sebagian besar penyaluran dana dilakukan oleh Bank Syariah menggerakkan atau sangat terkait dengan sektor riil.[21]

Berdasarkan ketentuan dalam Pasal 2 Undang-Undang Perbankan Syariah dalam melaksanakan kegiatan usahanya tidak hanya berasaskan kepada prinsip syariah, tetapi juga berasaskan kepada demokrasi ekonomi dan prinsip kehati-hatian. Dengan berasaskan kepada asas demokrasi ekonomi, maka

18. Abdurrahman, op.cit., hal. 7.
19. Arief R. Permana dan Anton Purba, *Sekilas Ulasan UU Perbankan Syariah*, Buletin Hukum Perbankan dan Kebansentralan Vol. 6 Nomor 2 Jakarta, 2008., hal 4
20. Wiroso, *Konsep Dasar Perbankan Syariah*, Jakarta: Badan Hukum Pembinaan Hukum Nasional Departemen Kehakiman dan HAM, Jakarta, hal., 151-152
21. *Ibid*., hal 152

kegiatan usaha perbankan syariah harus mengandung nilai-nilai keadilan, kebersamaan, pemerataan dan kemanfaatan. Nilai-nilai ini harus diterapkan dalam pengaturan perbankan yang didasarkan pada prinsip syariah yang disebut perbankan syariah. Hal ini merupakan salah satu upaya pengembangan sistem ekonomi berdasarkan nilai syariah dengan mengangkat prinsip-prinsipnya ke dalam sistem hukum nasional. Demikian pula dalam melakukan kegiatan usahanya, perbankan syariah harus berpedoman kepada pengelolaan perbankan yang sehat, kuat, dan efisien, sehingga dapat terwujudnya perbankan syariah yang sehat, tangguh, dan kompetitif.

Berbeda dengan tujuan perbankan pada umumnya yang menekankan pada meningkatkan pemerataan, pertumbuhan ekonomi, dan stablitas nasional, ke arah peningkatan kesejahteraan rakyat banyak, maka tujuan perbankan syariah diarahkan dalam rangka meningkatkan keadilan, kebersamaan, dan pemerataan kesejahteraan rakyat. Ketentuan dalam Pasal 3 Undang-Undang Perbankan Syariah bertujuan menunjang pelaksanaan pembangunan nasional dalam rangka meningkatkan keadilan, kebersamaan, dan pemerataan kesejahteraan rakyat.

Sementara itu, Penjelasan atas Pasal 3 Undang-Undang Perbankan Syariah menyatakan sebagai berikut: Dalam mencapai tujuan menunjang pelaksanaan pembangunan nasional, Perbankan Syariah tetap berpegang pada Prinsip Syariah secara menyeluruh (*kaffah*) dan konsisten (*istiqamah*). Dengan demikian jelas, bahwa tujuan dari perbankan syariah adalah menunjang pelaksanaan pembangunan (nasional dan daerah) yang diarahkan kepada terwujudnya peningkatan keadilan, kebersamaan, dan pemerataan kesejahteraan rakyat dalam kegiatan ekonomi. Oleh karena itu, implementasi prinsip syariah dalam kegiatan usaha perbankan syariah harus dilaksanakan secara *kaffah* dan *istiqamah*, sehingga dapat terciptanya keadilan, kebersamaan, dan pemerataan dalam kegiatan ekonomi.

Tujuan perbankan syariah yang demikian ini sesuai dengan prinsip ekonomi syariah yang menekankan pada aspek kesatuan (*unity*), keseimbangan (*equilibrium*), kebebasan (*free will*), dan tanggung jawab (*respo*nsibility). Tidak berbeda dengan fungsi perbankan konvensional umum, perbankan syariah melakukan fungsi penghimpunan dan penyaluran masyarakat dalam rangka menjalankan fungsi bisnis (*tijarah*) sebagai lembaga intermediasi keuangan syariah. Ketentuan fungsi bisnis dari Bank Syariah dan UUS ini diatur dalam ketentuan Pasal 4 ayat (1) UU Perbankan Syariah, yang menetapkan bahwa: Bank Syariah dan UUS wajib menjalankan fungsi menghimpun dan menyalurkan dana masyarakat.

Berbeda dengan fungsi bank konvensional umum selaku pelaku bisnis yang mengejar keuntungan dan tidak mempunyai fungsi sosial, maka Bank syariah dan UUS memiliki dwifungsi di masyarakat. Walaupun berkewajiban menjalankan fungsi menghimpun dana dan menyalurkan dana kepada masyarakat, namun Bank Syariah dan UUS masih mempunyai fungsi lain yaitu fungsi sosial.[22] Fungsi sosial keagamaan dari Bank Syariah dan UUS diatur dalam ketentuan Pasal 4 ayat (2), ayat (3), dan ayat (4) Undang-Undang Perbankan Syariah yang menetapkan sebagai berikut:

1. Bank Syariah dan UUS dapat menjalankan fungsi sosial dalam bentuk lembaga baitul mal, yaitu menerima dana yang berasal dari zakat, infak, sedekah, hibah, atau dana sosial lainnya yang menyalurkannya kepada organisasi pengelola zakat.
2. Bank Syariah dan UUS dapat menghimpun dana sosial yang berasal dari wakaf uang dan menyalurkannya kepada pengelola wakaf (*nazhir*) sesuai dengan kehendak pemberi wakaf (*wakif*).
3. Pelaksanaan fungsi sosial sebagaimana dimaksud pada ayat (2) dan ayat (3) sesuai dengan ketentuan peraturan perundang-undangan.

Berdasarkan ketentuan di atas, selain menjalankan fungsi bisnis, perbankan syariah secara khusus juga menjalankan fungsi sosial (*tabarru'*) dalam bentuk lembaga *baitul mal*, yaitu menerima dana yang berasal dari zakat, infak, sedekah, hibah, atau dana sosial lainnya yang menyalurkannya kepada organisasi pengelola zakat. Bank Syariah dan UUS juga dapat menghimpun dana sosial yang berasal dari wakaf uang dan menyalurkannya kepada pengelola wakaf (*nazhi*r) sesuai dengan kehendak pemberi wakaf (*wakif*). Sesuai dengan Penjelasan atas Pasal 4 ayat (2) Undang-Undang Perbankan Syariah, Perbankan Syariah juga dapat menghimpun dana sosial lainnya, yaitu antara

22. Arief R. Permana dan Anton Purba, Loc.cit. hal 4

lain penerimaan bank yang berasal dari pengenaan sanksi terhadap nasabah (t*a'zir*). Dengan demikian, status Bank Syariah maupun Unit Usaha Syariah (UUS), selain sebagai perusahaan yang mencari keuntungan dan sekaligus sebagai badan sosial di masyarakat.[23]

Konsep perbankan syariah mengharuskan bank-bank syariah memberikan pelayanan sosial apakah melalui dana *qard* (pinjaman kebajikan) atau zakat dan dana sumbangan sesuai dengan prinsip-prinsip Islam. Di samping itu, konsep perbankan syariah juga mengharuskan bank-bank syariah untuk memainkan peran penting di dalam pengembangan sumber daya manusianya dan memberikan kontribusi bagi perlindungan dan pengembangan lingkungan. Fungsi ini juga yang membedakan fungsi bank syariah dengan bank konvensional. Walaupun hal ini ada dalam bank konvensional biasanya dilakukan oleh individu-individu yang mempunyai perhatian dengan hal sosial tersebut, tetapi dalam bank syariah fungsi sosial merupakan salah satu fungsi yang tidak dapat dipisahkan dengan fungsi-fungsi yang lain. Bank syariah harus memegang amanah dalam menerima zakat, infak dan sadaqah atau *qardhul hasan* dan menyalurkan kepada pihak-pihak yang berhak untuk menerimanya. Dalam melaksanakan fungsi sosial keagamaan tersebut, Bank Syariah dan UUS selain tunduk kepada Undang-Undang Perbankan Syariah, juga harus mengindahkan ketentuan peraturan perundang-undangan lain yang terkait dengan pelaksanaan fungsi sosial Bank Syariah dan UUS.

2.2 Kebijakan Pengembangan Perbankan Syari'ah di Indonesia

Perkembangan bank syariah di Indonesia dewasa ini berjalan dengan sangat pesat. Walaupun jumlah bank, jumlah kantor bank dan jumlah total aset bank syariah masih sangat kecil apabila dibandingkan dengan bank konvensional. Kita telah membuktikan bahwa perkembangan perbankan syariah yang pesat baru terjadi setelah diberlakukannya Undang-Undang Perbankan.

Dengan berlakunya Undang-Undang Perbankan tersebut telah memberikan dasar hukum yang lebih kokoh dan peluang yang lebih besar dalam pengembangan bank syariah di Indonesia. Undang-Undang Perbankan diharapkan dapat mendorong pengembangan jaringan kantor bank syariah yang dapat lebih menjangkau masyarakat yang membutuhkan di seluruh Indonesia. Dengan di berlakukannya Undang-Undang Perbankan, maka legalitas hukum bank baik dari aspek kelembagaan dan kegiatan usaha bank syariah telah diakomodir dengan jelas dan menjadi landasan yuridis yang kuat bagi perbankan dan para pihak yang berkepentingan. Undang-undang tersebut telah memberikan peluang yang semakin besar bagi berkembangnya bank-bank syariah.[24]

Berdasarkan kepada Undang-Undang Perbankan, telah diberlakukan beberapa pengaturan yang berkenaan dengan perbankan syariah. Bank Indonesia selaku otoritas perbankan mengeluarkan berbagai ketentuan yang mengatur perbankan syariah, baik aspek kelembagaan maupun aspek kegiatan usaha perbankan syariah serta hal lainnya yang berkenaan dengan praktik perbankan syariah. Sejak saat itu pengembangan perbankan syariah semakin meningkat pesat.

Adanya potensi jumlah penduduk muslim Indonesia yang mencapai ±85 % dari 227 juta penduduk Indonesia, memberikan kesempatan bagi perkembangannya secara pesat sektor perbankan syariah di Indonesia, dengan menyajikan alternatif instrumen keuangan dan perbankan kepada nasabah muslim Indonesia. Sejak saat itu, Pemerintah semakin serius dalam memberikan perhatian terhadap pertumbuhan bank Islam di Indonesia. Bank Islam tidak lagi dikesankan sebagai institusi yang dianaktirikan oleh pemerintah. Hal ini tercermin dari berbagai macam peraturan bank Islam, menyusul perubahan yang substansial terhadap peraturan hukum perbankan Indonesia.[25]

Sebagaimana diketahui, perbankan syariah sebagai salah satu sistem perbankan nasional memerlukan berbagai sarana pendukung agar dapat memberikan kontribusi yang maksimum bagi pengembangan ekonomi nasional. Salah satu sarana pendukung vital adalah adanya pengaturan yang memadai dan sesuai dengan karakteristiknya. Pengaturan tersebut di antaranya dituangkan dalam Undang-Undang Perbankan Syariah. Pembentukan Undang-Undang Perbankan Syariah menjadi kebutuhan dan keniscayaan bagi berkembangnya

23. Arief R. Permana dan Anton Purba, Loc.cit. hal 137

24. Arief dan Anton Pubo, *Sekilas Ulasan UU Perbankan Syariah*, Jakarta: Bulettin Hukum dann Perbankan Kebanksentralan Volume 3 Nomor 1, 2005

25. Bank Indonesia, *Panduan Investasi Perbankan Syariah Indonesia*, Jakarta: Bank Indonesia,2007, hlm. 9.

lembaga tersebut. Pengaturan Perbankan Syariah dalam Undang-Undang Nomor 7 Tahun 1992 sebagaimana telah diubah dengan Undang-Undang Nomor 10 Tahun 1998 belum spesifik dan kurang mengakomodasi karakteristik operasional Perbankan Syariah, di mana, di sisi lain pertumbuhan dan volume usaha bank syariah berkembang cukup pesat.

Melihat begitu besarnya dorongan dan dukungan dari masyarakat agar disusun Undang-Undang Perbankan Syariah yang terpisah oleh Undang-Undang Perbankan konvensional, Dewan Perwakilan Rakyat (DPR) mengajukan inisiatif penyusunan Rancangan Undang-Undang Perbankan Syariah, dan selanjutnya mendapat tanggapan positif dari Pemerintah, sehingga terbuka jalan untuk segera menyelesaikan RUU Perbankan Syariah, dan akhirnya setelah melalui pembahasan intensif Undang-Undang Perbankan Syariah berhasil diselesaikan. Dukungan yang begitu besar dari berbagai kalangan dapat dilihat dari proses penyusunan dan pembahasan daftar inventarisasi masalah RUU Perbankan Syariah yang dapat diselesaikan dalam waktu yang relatif singkat.

Pada hari Selasa tanggal 17 Juni 2008 dalam rapat paripurna DPR, akhirnya DPR menyetujui Rancangan Undang-Undang tentang Perbankan syariah untuk disahkan menjadi Undang-Undang Perbankan Syariah setelah diadakan perubahan dan penyempurnaan sebagaimana mestinya. Seperti diketahui berbeda dengan perbankan konvensional, perbankan syariah memiliki kekhususan, karenanya diperlukan aturan spesifik yang diatur secara khusus dalam suatu undang-undang tersendiri. Apalagi selama ini pengaturan perbankan syariah masih merujuk pada Undang-undang Perbankan umum dan aturan yang dibuat Bank Indonesia. Selain itu pengaturan tersendiri bagi Perbankan Syariah merupakan hal yang amat mendesak dilakukan, untuk menjamin terpenuhinya prinsip-prinsip syariah, prinsip kesehatan bank bagi bank syariah, dan yang tidak kalah penting diharapkan dapat memobilisasi dana dari negara lain yang mensyaratkan pengaturan mengenai perbankan syariah dalam suatu tong-undang tersendiri.

Pengesahan Undang-Undang Perbankan Syariah dilakukan oleh Presiden pada hari Rabu tanggal 16 Juli 2008 sebagaimana termuat dalam Undang-Undang Nomor 21 Tahun 2008 tentang Perbankan Syariah, kemudian diundangkan dalam Lembaran Negara Republik Indonesia Tahun 2008 Nomor 94 dan Tambahan Lembaran Negara Republik Indonesia Nomor 4867. Dengan lahirnya Undang-Undang Nomor 21 Tahun 2008 ini diharapkan akan lebih menjamin kepastian dan perlindungan hukum bagi *stakeholders* dan sekaligus memberikan keyakinan kepada masyarakat dalam menggunakan produk dan jasa perbankan syariah.

Adanya dukungan seperangkat aturan yang memadai di bidang perbankan syariah, serta semakin bertambahnya instrumen keuangan syariah diharapkan akan semakin menarik investor/pelaku bisnis pada khususnya dan masyarakat pada umumnya, sehingga perkembangan ekonomi syariah di Indonesia dapat berkembang lebih baik lagi. Terlebih di Indonesia yang penduduknya mayoritas muslim, memiliki potensi yang sangat besar untuk mendukung berkembangnya kegiatan ekonomi berdasarkan prinsip syariah, termasuk perbankan syariah. Hal ini mengingat negara-negara yang mayoritas nonmuslim saja, seperti di Inggris, Jerman, Amerika Serikat, dan Singapura, kegiatan perbankan syariah pada khususnya dan ekonomi syariah pada umumnya banyak diterapkan dan berkembang cukup baik. Oleh karena itu, persepsi yang keliru yang menganggap bahwa syariah hanya diperuntukkan bagi penduduk muslim. Dalam praktiknya pilihan bagi masyarakat dalam memilih layanan perbankan dan tidak adanya peraturan perundang-undangan yang membatasi pelayanan bank syariah hanya untuk penduduk yang beragama muslim saja. Pada kenyataannya memang terdapat banyak kalangan nonmuslim yang menjadi nasabah bank syariah.

3. Kesimpulan

Adanya dukungan seperangkat aturan yang memadai di bidang perbankan syariah, serta semakin bertambahnya instrumen keuangan syariah diharapkan akan semakin menarik investor/pelaku bisnis pada khususnya dan masyarakat pada umumnya, sehingga perkembangan ekonomi syariah di Indonesia dapat berkembang lebih baik lagi. Dalam prakteknya perlu sinergitas anatara Pemerintah, MUI dan Lembaga Peradilan, sinergitas dalam hal implementasi prinsip syariah dalam kegiatan usaha perbankan syariah, menyangkut lahirnya aturan hukum dalam praktik yang

diikuti Pihak perbakan syariah yang bersumber Fatwa MUI/DSN yang berubah menjadi aturan BI/OJK dan Peran pengadilan diharapkan dapat mengawal secara *kaffah* dan *istiqamah* melalui putusan pengadilan, sehingga dapat terciptanya keadilan, kebersamaan, dan pemerataan dalam kegiatan ekonomi nasional

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Political Hadith: Contextualization to Understanding Hadith of Leadership Qurays as Social Justice

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Abstract - Understanding hadith in a textual way sometimes leads to a misconception, such as the hadith "al-Aimmatu Min Qūraisyin". If it is understood textually, this hadith seems to oblige the Muslims to choose the leader of the Quraysh tribe. The problem that arises is whether the hadith is appropriate for the present day, or the hadith is valid only in the time of the Prophet? This paper will discuss the extent to which the hadith is so that there is no mistake in understanding the hadith of the Prophet. The writer uses a socio-historical approach to the cause of this hadith and how to apply the hadith to the contemporary context. With the socio-historical approach, it is expected that the reader of hadith can obtain a more accurate, appreciative and accommodative understanding of the hadith in accordance with space and time. With this approach is obtained indications that the tribe of Quraish is the first tribe to embrace Islam. Since he first embraced Islam, he deserved to be a leader because of his close relationship with the Prophet at that time.

Key Words: *Political Hadith, Contextualization, Quraysh Tribe, Socio-Historical*

1. Introduction

Basically, everyone is a leader. And every leader will be held accountable for what he leads. Leadership is open, meaning anyone and from any group may hold certain positions as long as they are able and committed to the teachings of Islam. As a holy book of Muslims, the Qur'an does not provide a clear texts about the procedure of appointment and succession of leaders. The Qur'an only gives a cue about the principle of deliberation in every affair, including in the state.

Then in the matter of choosing leaders in Islam, there are differences of opinion among the previous scholars about the terms of the leader that is, derived from the tribe of Quraysh. Some scholars insist on choosing leaders of the Quraish tribe. Some denied the obligation for several reasons. And some are too fanatical with the class and the view that the right to lead is from the tribe Qurasy, descendants of the Prophet.

After research and investigation there is no found *asbabul wurud* of this hadith. If there is, it will make it easier for the clergy to understand and difficult to find any differences of opinion, because it is known because the Prophet Said so.

The problem researched is the hadith about the leadership of Qurash tribe through the socio-historical approach, related to the absence of *asbabul wurud* from the hadith. The objective is to clearly understand the meaning of the hadith when the Prophet conceived it from both the social and historical aspects, then adapted it to the present context.

To complete this article, the writer collect data with literature/library research in the form of books of Hadith and other literature books related to the theme of discussion.

2. Discussion

2.1. Overview of the Socio-Historical Approach in Hadith

To understanding the hadith correctly is not easy, because sometimes there are seemingly contradictory hadiths, some are difficult to understand, if only look at the text. It is not enough that a person only sees the text of his hadith, especially when it has a special cause or background. For that, required a set of science, among others, is the science of *asbabul wurud* from ontological, epistemological and axiological review (Mustaqim,

2016: 38-39). Dialectic of hadith and contextual texts is a necessity, because it is impossible for the Prophet to say in the cultural vacuum. That is why *asbabul wurud* is important to be considered in understanding the hadith of the Prophet (Mustaqim, 2016: 58).

The socio-historical approach is a form of development in the study of hadith. Whatever the variety and model of approach in understanding hadith, it is their appreciation and interaction with the hadith as the second source of Islamic teachings after the Qur'an. The basic assumption of the socio-historical approach is that the Prophet's hadith will be placed as a very historical social fact, not as a theological-normative doctrine (Mustaqim, 2016: 60).

The scholars had already introduced the theory *asbabul wurud*, as a tool in understanding the hadith. The hadith has a special *wurud asbabul*, some have no special cause. For hadiths that have special causes, we can use special wuds *asbabul wurud*. This is where the writer's offer of the necessity of understanding the hadith using the approach of sosiso-historically, and perhaps also with other disciplinary approaches.

It departs from one basic assumption that when the Prophet Said that he certainly can not be separated from the circumstances surrounding the community at that time. In other words, it is impossible for the Prophet to speak in a vacuous space of history. Every idea or idea, including in this case is the hadith of the Prophet. Always based on socio-historical and cultural problems, that is related to the socio-historical and cultural problems of the time, regardless of the socio-historical context (Mustaqim, 2016: 64)

With the socio-historical approach, it is expected that the reader of the hadith is able to gain a more accurate, appreciative and accommodative understanding of hadith against the changes and the development of the times. He did not get caught up in the confines of the text of the hadith, but paid attention to the socio-cultural context of the time.

Furthermore, that the hadith of the Prophet Is a partner of the Qur'an, which is theologically expected to inspire to help solve the religious social problems emerging in contemporary society. Because after all we agree that the renewal of Islamic thought or reaktualisasi Islamic teachings themselves, namely the Qur'an and Hadith. It means that we should not be uprooted from its theological roots, but should not ignore the sociological conditions of an ever-changing and growing society.

The socio-historical approach is an approach in the study of hadith that seeks to combine the text of hadith as historical fact and simultaneously as a social fact. As a historical fact it must be validated through the study of *jarh wa at-ta'dil*, whether the information is true or not. At the same time, the hadith is also a social fact that the message of the editor is very closely related to how the situation and relationships between individuals and society and how the culture and traditions that surround it.

In short, the basic assumption of the socio-historical approach is that the Prophet's hadith is seated as a historical social fact, not as a normative-theological doctrine. The socio-historical approach in this case is an attempt to understand the hadith by considering the socio-historical conditions and contexts when the hadith is conveyed by the Prophet. Such an approach has actually been pioneered by the scholars of hadith since the first, with the emergence of science *asbabul wurud,* the science that explains the causes why the Prophet. Telling hadith and the time to tell it. Only, the focus of the study of *asbabul wurud* is more than a discussion of the events or questions that occurred when the hadith was conveyed by the Prophet. Usually *asbabul wurud* serve as one of the scalpels to determine the specific and general provisions, limiting the absolute and global, the cancellation of law and others.

Meanwhile, the socio-historical approach is the development of the theory of *asbabul wurud* of hadith. This approach will emphasize the question, why the Prophet, said so, how the socio-historical, even cultural condition of Arab society of the 7th century AD at that time, how also the patterns of social interaction of society at that time. (Mustaqim, 2016: 64-66)

The socio-historical approach examines how and why social behavior is related to the hadith as we see it. The basic sociological stance is 'suspicion' whether the terms of hadith are as written, or actually there is another purpose behind the written. The mastery of sociological concepts can provide the abilities to conduct an analysis of the effectiveness of the hadith in society, as a means of transforming society into achieving certain better social conditions. (Mustaqim, 2016: 67)

With this approach, it is hoped that a reader of hadith will gain a progressive contextual understanding, and

appreciation of social change which is the implication of a creative *ijtihad* that needs to be appreciated. In short, "explaining with a new dimension or new perspective, though perhaps 'wrong', it is still better and more important, than trying to explain something that is all.

2.2. Critism of Sanad

In the criticism of sanad, the writer is based on one hadith that is "al-aimmatu min Qūraisyin". The Hadith can be found in Musnad Ahmad bin Hanbal, No. 18941, 18.946, and 18.947.

Actually, many more hadiths that are consistent with the above hadith. Not only in Musnad Ahmad bin Hanbal, but also in Sahih Imam Bukhari, Sahih Imam Muslim, Abu Daud, an-Nasa'i and ad-Darimi. The writer has done *takhrij* hadith from Musnad Ahmad bin Hanbal No. 18.941, but the author does not describe the overall result of the thesis.

On the path of hadith, found 4 rawi, namely Sulaiman bin Daud, Sikkin bin Abdul Aziz, Siyar bin Salamah, and Nadhlah bin 'Ubaid. Of the four *rawi*, only one *rawi* course indicated defect that is Sikkin bin Abdul Aziz (al-Mizzi: 210). However, his disablement is disputed by the Hadith scholars, as there are others who say he is a *tsiqah*, that is Imam an-Nasa'i. So far, the hadith is accepted and is not questioned too seriously in the critique of sanad (Bukhari, 199).

2.3. Critism of Matan

It seems to me the writer to expose a little about the Arabs geographically, the area is completely barren and has some fertile parts, with a generally warm climate, most of the inhabitants are nomadic although it is acknowledged that in the future there are residents who live in a place certain. Most of them have traders. Those who settle tend to be more advanced than the moving tribes because they can trade (Muhibbin, 1996: 13).

Because geographical conditions are hard deserts, Arabs live in groups. Thus there are various tribes, where one another often feuds. And not infrequently, in the face of such a danger, a tribe coalesces with other tribes so that it becomes great. And so, if the coalition tribe faces danger from other coalitions, then over time there will be a coalition of various tribes. Among these tribes there are tribes Quraisy from descendants of Bani Nadar Ibnu Kinanah. This tribe is the most famous tribe among the other tribes. This is because of its strategic place, which is around Makkah city. And as is known Makkah is a city located in the middle of the trade street. In addition, this Makkah is the source of Zam-Zam which is a factor which is greatly needed by the passing caravan to fetch water.

In addition, the influence of tribal trade in which they make contact with other societies, especially with Persia and Rome which at that time has been known to be very advanced. Not just trade issues, but also cultural and literary contacts and more. This encouraged the Arabs in general and the Qurays in particular to be advanced and interested to visit for a more advanced civilization (Muhibbin, 1996: 14).

The Arabian peninsula was flanked by two great kingdoms at the time, namely Persia in the East and Rome in the West. Both of these kingdoms wanted to conquer the Arabs, but it was difficult because the Arabs themselves of various tribes had their own power and power. This is not easy to do for both jobs. Therefore, they then look for the best and most profitable way out that is by establishing relationships with these tribes and then establishing a representative area under their supervision (Muhibbin, 2016: 15).

In addition to the question of power, there is also a process of religious mission by Jews and Christians. Jewish religion stands in Medina (Yathrib) with the famous tribe of Nazir, Qainuqa 'and Quraizah. In addition to teaching religion, they (Jews) are also good at planting, making iron tools, jewelry and weapons. This Jewish religion has become acquainted with the Greek / Roman culture as well as the Islandariyah. This is where the mixing of religion and philosophy which then becomes a new aqidah.

In addition to the Jewish religious mission, Christianity also spreads in the Arabian Peninsula, especially those that are inclined to the clergy's life, and establish monasteries. And it should be noted, the Christian religion that goes into this Arabian Peninsula has brought with it the Greek culture, like the Jewish religion.

The pre-Islamic Arab society, at that time was a bellicose society. Small problems that occur between someone with another can lead to a big war. It is here that most of them have low morals. That is why the Prophet was sent (Muhibbin, 1996: 15-17).

Since the Prophet was sent, enmity has begun to diminish and can be united under the banner of Islam. Until no more enmity was seen in Medina at that time. All tied into one people who follow and obey the teachings of the Prophet.

In practice, the Prophet not only mustered the internal friendship of Muslims, but also made a peace treaty with non-Muslims to live peacefully side by side and keep each other order and together face the dangers that threaten the safety of the country. This is the essence of the teachings of Islam that never impose the will, but at the same time also appreciate others to continue to embrace his belief.

After the Prophet's death, Muslims (Ansar and Muhajirin) gathered to hold a deliberation at *Saqifah Bani Sa'idah* regarding the successor to the Prophet. Completion and final result with the election of Abu Bakr also through deliberation (Muhibbin, 1996: 19).

In practice the Prophet was recognized as the leader of society, especially after he emigrated to Medina. In fact almost all observers recognize it as the state. His capacity was seen when he wrote the law in writing in unifying the heterogeneous Medina society to prevent conflicts between them in order to secure internal order. Likewise, when leading the war, guaranteeing freedom, execution of laws and treaties, receiving delegation delegates from the Arabian Peninsula, sending letters to the Arabian Peninsula rulers, administering *zakat* and taxes and bans of usury, leading deliberations and appointing his deputy in Madinah if he are out of town.

Thus in addition to performing the duties of the Prophet's message on the basis of revelation, he is also the leader of a society who desires peace and tranquility. For this reason often in his capacity as a community leader, he uses his own opinions even the opinions of his companions. Thus, his greatness and exemplary praise Muslims and non-Muslims.

In the history of Islamic politics, the beginning of leadership was fully held by the Prophet. After the Messenger of Allah died, a unique situation arose in the history of Islamic politics, where he was a spiritual and temporal authority who derived from divine revelation. The most significant thing is that he did not appoint his successor as leader of the people.

Raising leaders is a must in Islam. In fact, if thought rationally rational no one denies the obligation to appoint a leader. Leadership exists because of the benefit of the people as Ibn Khaldun says; Khilafah is a position that serves to lead the people in accordance with the demands of the Shari'ah for the benefit of the world and their afterlife, because according to the creator of the Shari'ah that the matter of the whole world is seen as a path to the benefit of the afterlife (Rodhi, 2012: 23-24).

In the Qur'an and Hadith there is no clue about how to determine the leader of the people or head of state. There is only general guidance, that is, for Muslims to seek a solution in matters related to common interests through deliberation. Glancing at the history of Abu Bakr's appointment as the first caliph, it is an example of a deliberation between Muhajirin and Ansar to determine the successor of the Messenger of Allah. The Ansar argued that the successor of the Prophet should be of the Ansar. In these circumstances, Abu Bakar reminded by mentioning the hadith that the writer discussed in this paper (Zuhaily, 2011: 311).

Ahlussunnah said that the caliph must be from Quraysh, based on the words of the Prophet as the hadith the writer put forward. While the Mu'tazilah and Khawarij argue others say the right caliph of every Muslim who meets the other requirements.

However, the Fuqaha gave the view that the Qurays in the past did indeed have the leading position in the Arab society, were very experienced, and understood very well the civilization and social affairs and were followed by most people, his words heard and obeyed by the tribes that existed since The age of Jahillah. If so the position of Qurays, including the form of benefit if this general and political affairs is the person who holds and cares for the cases of the Muslims must be a person who is followed by the majority to be obeyed and supported, have the power gained from political will and desire. Thus, there is unity and unity and the loss of dispute and division factors (Zuhaily: 2011, 311-312).

3. Conclusions

After the criticism of sanad and matan, and through the socio-historical approach it is concluded that it is not necessarily the leader of the Qurays. Ancient conditions require leaders to come from the tribe of the Qurays because the tribe is considered

able to fulfill the benefit of the ummah. As the times progressed, the Qurasy leadership was no longer significant with the conditions of the times. Leadership can be held by people who are not from the Qurays tribe with a record of being able to lead as the Qurays of the ancient tribes had done. With this understanding, one does not assume the Qurays are a noble tribe, for the glorious in the sight of Allah is the righteous.

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The Leadership Style of Muhammad (p) as a Role Model for the CEO

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Abstract – The purpose of this paper is to mengekspirasi the leadership style of the Prophet Muhammad as the central character as a useful alternative on a self-centered models and approach to value-neutral transformational that currently many Adopted in the world of business management. The authors extinguishing the perspective of an approach centered on the character of moral leadership, such as that of the Koran and Practiced - by Prophet Muhammad and suggests that this approach can be useful or applied for the CEO. This paper was written with discussing Muhammad's leadership style based on the major sources of Islamic history proved shown that the practical implications for the process of having leadership in management. This article claims that the approach and style of leadership that focuses on self-centered and value-neutral model of transformational approach is a new style in resolving the problems of leadership.

Key Words: *Islam leadership behavior, ethics, transformasionalis, character, virtues, Muhammad, servant leadership*

1. Introduction

The problem of leadership is still an evolving assessment and interesting to discuss. The reason is not because until recently, the issue of leadership is still a puzzle difficult theta parsed and increasingly complex. The biggest problem facing the world today is leadership began the loss of values. Leadership running as if no binding rules, and, based on the will of the self.

Leadership style which is currently growing tends to be done in a "transformative" or transformational ", but this style is not without drawbacks and problems. A study of Howell and Avolio and Bass and Steidlmeier has revealed that there is a potential ethical problem with transformational leadership. (1) Leaders with this style may be able to increase their strength and downplay their weaknesses, and adopt the values they believe in accordance with the theories of implicit follower of their leadership. However, corrupt the values in achieving each goal. (2), there is no check and balances, and there may be a concentration of power that is not healthy. (3) follower can be manipulated to follow the interests of their leaders rather than pay attention to their own personal needs.

Transformational leadership that is currently widely implemented, often ignore this aspect of the human psyche. If the mental aspect is ignored in the management of a company then certainly there will be no harmonization because employees were forced to act or doing work that does not fit even contrary to their conscience. This led to the loss of confidence. This is the most vital issue in an organization when the confidence level of customers, employees at the company declined even disappear altogether. Covey put this issue on the most important chronic problems. Although the company has a mind (vision), the body (structure, systems, processes), and heart (passion) is good, but without the presence of the soul company will move like a zombie. He lost confidence in the competitive market. Another problem would arise as deadly mutual competition, strife and unrest (Dsouli, et al, 2012). People often get stuck on a word sage is actually misleading, but made the creed of "a dream of what they want, and work hardest, you will achieve that dream." This is the creed of those who neglect the soul. As the CEO they will justify all means to achieve the targets of the company.

The question of leadership style also comes from the phenomenon of the economic crisis. It could be said that the leadership issue also includes the company's human resource issues. This fact led to the development of human resources should also be considered whether they wanted to develop a pattern of short-term as the paradigm of business as usual or a pattern of sustainable future (McLean, 2000). Philip Kotler anxiety about the values that are endangered or Covey that highlights the leadership behavior of the CEO, Muslim scholars such as Hassi, (2012). Khan and Sheikh (2012) and Beekun (2012), view and analyze this issue from the perspective of the religion (Islam).

Muhammad is referred to as a leader who has a leadership style that centered on him. This study will test the leadership style does have an influence on the quality of employee performance. Companies that will be sampled or case study is the Bank Syariah Mandiri. As a business organization that is claimed to run the values of Islam as a driver of corporate culture, it is appropriate if Centered Leadership Character models tested did become one of the determinant factors that participate to make this bank a success and became a top Islamic bank in Indonesia.

2. Literature Review

The study of leadership style or leadership model claimed effective and efficient way to run an organization at various levels have been carried out. If divided, debate or discussion of these studies ranged on two fronts, namely, there are claims that the model of democratic leadership as style transformative is a good model, and the other side are those who argue that the style of leadership that is centered on the character of the leader or inter -Personal passphrase is the most effective model to increase or boost the performance of employees. These studies are considered very relevant for determining the position of the study. The following is presented several studies that were considered relevant in the period of three years.

Mauri (2017) revealed that the leadership is undergoing a seismic shift and old. In many companies, there is a chronic leadership gap. To move forward, the leadership style needs to be updated. Chin (2015) revealed Sixty per cent of the research study, explores a group of workers who work team is expected to be permanent, which received strong guidance of a designated leader; Almost as much as it was (58.75 percent) explores a group that works with formal leadership by superiors. Nearly 50 percent of the paper explores the leadership that combines two or more styles of leadership simultaneously. Johansson and Hamrin (2014) states is a communicative leader as someone who showed to employees in a dialogue, actively share and seek feedback, practicing participatory decision making, and are considered open. Kiersch (2014) through the study stated organizational identification mediates the relationship between perceived interpersonal leadership and involvement, which mediates the relationship between perceived interpersonal leadership and commitment. Involvement mediates the relationship between identification and work stress. Interpersonal leadership characteristics can be developed, and positively associated with the identification, commitment and employee involvement, which is negatively related to work stress. Leaders interpersonal positively related to employee involvement; High involvement has been linked to health and well-being of employees are positive. A healthy workforce translates into a healthy society. Labovitz, et al which examines the attributes of transformational leadership find in addition to the positive effects of job involvement on the size of the result, it showed how political skills are essential capabilities that contribute to transformational leadership and job satisfaction leader. These findings also demonstrate the interaction of emotional skills, political skills, and job involvement contributes to job satisfaction among managers.

3. Result and Discussion

3.1. Characteristics of the leadership of Muhammad SAW.

From the search results traditions and history about the activities of the leadership of Muhammad, was found several distinctive character in the style of Muhammad SAW, namely:

1. Raising awareness of the people. Muhammad SAW raise awareness of what is right, fair and lawful (halal) during the period jahiliyyah or ignorance. Outlining the state of pre-Islamic, Ja'far ibn Abi Thalib said to the ruler of Abyssinia: "O king! We used to drink blood, eat carrion, commit adultery,

steal, kill each other and loot. The strong used to oppress the weak. We used to do a lot more shameful and despicable "(Bukhari, Wasa'ya '). With this background, Muhammad (p) spent their lives to teaching and mentoring followers in Islamic values.

2. Help his people to see that the common interests are much better. Muhammad SAW emphasized the universal brotherhood of mankind, enjoining the good, goodness and justice and against selfishness that permeated his time. He argued that such practices infanticide should not be accepted simply because they are derived from one's ancestors. It is not only morally unacceptable, but also morally bad and unjust: "None of you truly believes until he wants for his brother what he wants for himself (Hadith An-Nawawi)". In addition to this, the clan-centric parochialism rejection of them, Muhammad (p) urged his followers - Emigrants and Ansar - to see the "big picture" for the sake of the people.
3. Intellectual stimulation. Intellectual stimulation necessary to challenge the divinely ordained jahiliyyah in the word of the first revelation: "Iqra" which means "Read!" These orders, which came to an unlettered Prophet implies that the trust should use their spiritual and intellectual ability to reflect on the signs of the presence of God in all of His creation. "He was issuing forth to seek knowledge is busy in the affairs of the Lord until he comes back from his quest (as narrated by Anas Ibn Malik in al-Tirmidhi, Hadith # 420). They seek and acquire knowledge not to "refresh himself", but rather to approach, and to serve their Creator. By believing and practicing these suggestions, the Muslims developed the first university and lead in many scientific fields for centuries
4. Charismatic. According to Stone et al. (2004), leaders who demonstrate integrity in ethical behavior becomes a model admired by followers, honor and pattern themselves is a charismatic leader. Charisma, however, can have a positive side or the dark. Charismatic leaders are working to develop their followers into leaders, learn from criticism and relies on internal moral standards. Unethical charismatic leaders are motivated by personal interests, denounced the critical views or oppose and do not have an internal moral compilation. As indicated earlier in the QS. 68: 4), Muhammad SAW was a charismatic leader who ethically, and this is justified by pious life she lived.
5. Consideration and individual attention. Muhammad SAW attention to personal differences between followers (Humphreys, 2005). He understands that each follower has different requirements and needs that change over time. He reached out to all people with kindness and benevolence, including the worst critics. One need only compare the pre-Islamic Ummah (which will kill him) to Umar Muslim to understand the effect that Muhammad had as a role model and coach at several toughest opponent. He treats them fairly, but differ depending on the assessment of the level of maturity and readiness - such as when he refused to appoint Abu Dhar to an administrative post by "inability to manage the affairs of society" (Muslim, Imara, 16- 17).
6. Inspirational motivation. The dimensions of transformational leadership (Avolio and Bass, 1991) is characterized by high expectations of communication, the use of symbols to focus efforts and important objectives in a simple pronunciation. Such behavior increases the confidence of the followers. Inspirational leader who often gave impetus to the hard times and set standards as far as work ethic groups - such as people being abused and some Muslims were tortured and put to death in the most cruel way. Muhammad SAW refused to react with rancor and make his companions to stay focused on their goals higher.

3.2. Contributions leadership centered on the character of management development.

Based on the discussion and description of the characteristics of leadership centered on the characters that Muhammad SAW, then there are some things that can be done by the CEO on the plains practical as the contribution of leadership centered on the characters, namely:

1. Dare to address the most difficult issues and critical encountered. Often leaders are faced with flooding problems, but must distinguish between what

is more difficult and more critical to be handled and the proper way to handle it. Some leaders avoid facing difficult problems and / or critical for political expediency or economic interests alone. Muhammad SAW is not concerned with motivation; He overcame major problems such as idolatry, infanticide, slavery and alcoholism. His approach to the different issues is wise and timely: in connection with idolatry, he dealt with that, but in connection with alcoholism, he does it in a way that is more gradual - inspired by God.

2. Seek advice from a competent person and / or experienced. In figuring out the correct way to do the right thing in certain situations, leaders need to be aware that they are not omniscient and sometimes they are less experienced in certain situations. Except in the case of divine revelation, Muhammad asked for advice (shura) in such situations where there is a battle strategy more experienced veterans around him. Sources of advice is never mean to her during her incompetent or have more experience. Leading in an area where people who do not have the competence showed a lack of humility and carelessness.
3. Welcome feedback and criticism with grace, and act on them. The leader, because the size of their psychological, sometimes offended by the feedback and criticism they received from followers and other stakeholders. Alternately, they may receive the comments of others without intending to follow through. Muhammad SAW when dealing with lenders who could not accept criticism of their hard against him, and with a generous return them more than they give to him once again, after the Muslims refuse to obey in Hudaybiya, he graciously accepted the advice of Umm Salama (ra) that he set an example and do what he suggested.
4. Create a shared experience to build a new paradigm. To convey the message of Islam in words and deeds, and to maintain a set of common good at his friends earlier, Muhammad as transformational leaders are authentic choose "house of Al Arqam" for guidance and intensive assistance in virtue, brotherhood, awareness And the world will increase in spiritual affairs. He also uses this process to train a replacement, that they will continue to spread the message after he was celibate.
5. Knowing when to "bend" the rules. In Islam, lies are forbidden and a major sin. However, in some cases select only the Prophet (saw) said that it was allowed, There is a condition when a leader may have to bend the rules to reconcile the two parties or make things right.
6. Always grateful Muhammad SAW never store of value, but instead handed over nearly everything he or she can get, very frugal life so sometimes there was no food cooked at home for three days in a row. As usual prayers he say Oh God, make me thank you, remembering you, in awe of You, devoted to obedience, humility, regret, and always turn to You in repentance.

3.3 Muhammad SAW as leaders Serving

Servant leader is one who focus on the needs of others rather than their own needs. Servant leaders can also be regarded as a leader who empowers his followers, and provide the vision, gain credibility and trust of followers. Based on these definitions, there are some indicators show that Muhammad SAW is the servant leader, as follows:

1. Serve before yourself

A servant leader is not interested in getting power, status or wealth. He wants to do what is morally right even if it may hurt him personally. Muhammad SAW stated that "the nation's leader is servant" (sayyid al qawn khadimuhum). With all my heart, Muhammad (p) continue to seek the welfare of his friends and tried to guide them towards what is good. Status was not important to him. During the writing of Hudaybiya treaty, the Prophet (pbuh) dictated these words: "This is from Muhammad, the Messenger of Allah." When the Quraysh delegation objected, the Prophet immediately asked the scribe to write "Muhammad, son of Abdullah" instead. Direct attempt to humiliate not reduce humility and patience. Wealth and status do not attract the attention of the Prophet (saw). Changes in the social status of a trader to the head of state in Medina did not lead to any change in his life simple. Anas (ra) said that the Prophet would accept the

invitation though. He served with barley bread and soup that tastes have changed. Anas also narrated that the Prophet (peace be upon him) said: "I am the servant of God, I eat like a waiter and sat like a waiter."

2. Listening as a means of affirmation of

Muhammad SAW did not try to impose itself on others unless it is a divine revelation. He will remain silent when you first listen to questions from followers, and then respond appropriately.

3. Create trust

Servant leaders have an honest attitude, focusing on their needs and gain their trust. As indicated previously, Muhammad SAW was known as "al-amin," which can be trusted. He was always a man of words, never cheat or steal from anyone and always speak the truth - something that even his enemies grudgingly admitted.

4. Focus on what is feasible to achieve.

Servant leaders are not trying to achieve anything, and neither do the most difficult to do so. Aisha (ra) narrated that whenever Muhammad SAW given the choice of one of two things, he would choose the easier of the two (Bukhari, 4: 760). Muhammad SAW, also using gradualism: he knows that he can not deliver his message to the entire Arab immediately; But first he must continue to covertly until God allows for blatant.

5. Light hand

Servant leaders are people Benevolent - he is looking for opportunities to do good. Muhammad's kindness and benevolence is not limited. He always helped the poor and needy. 'Abdullah ibn Abi Awfa said that the Prophet (pbuh) never ordain go with the widow to finish the job. Jabir claimed that the Prophet used to slow down for the sake of the poor and also pray for them.

4. Conclussion

Leadership centered on Muhammad imitate the virtues he preached, and unique because he combines the authentic elements of transformational leadership (ethical) with servant leadership. This paper has compared both the dominant leadership perspective with character-centered leadership. This leadership model is moderated by five important principles of Islam - faith, piety, gratitude, shura and accountability.

Zakat and Empowerment Micro, Small and Medium Business: Case on National Amil Zakat Agency in Palopo

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Abstract – This paper aims to: (1) analyze the role of zakat in the empowerment of Micro, Small and Medium Business ((UMKM)) in Palopo, (2) to analyze the management of utilization of zakat by BAZNAS Palopo City in the empowerment of UMKM, (3) To formulate zakat potential and productivity by BAZNAS Palopo City as venture capital investments of UMKM. This study used a qualitative approach. Primary data taken from research informant. Author choose the informant who could give expected qualitative data. This Paper Argue that (1) The role of ZIS funds collected by BAZ Palopo city in empowering UMKM in Palopo is fundamental. This is demonstrated by the many businesses types of UMKM obtaining qardul hasan financing from BAZ Palopo city. (2) Utilization management of ZIS fund conducted by BAZ of Palopo city in recent years aimed at financing on productive and the potential sectors to be developed. (3) The huge potential of ZIS funds owned by Palopo city based on the calculations in this study is Rp.8.539.124.00. With the huge potential amount, it can help the business capital as many as 570 units, 170 units of small businesses, and 85 units for medium-sized business.

Key Words*: Zakat, BAZNAZ, UMKM, Pemberdayaan Ekonomi*

1. Pendahuluan

Development of zakat and wakaf empowerment programs, BAZNAS, tends to implement more programs on the trial side, while structured, thorough and sustainable designs are still avoided. There are three assumptions that can provide an explanation of the condition. Firstly, the available fund is limited (because it is done by one institution), therefore the allocation of funds is still trial and error. Secondly, the program is still designed in such a way as to create an attraction for the community to participate, in the form of funds and energy. Thirdly, BAZNAS still emphasizes the NGO mission which is conformism and reformation. Plans and activities of such programs have not touched the root of the real problem. Because in addition to the inter-agency zalcat is not synergized, the perspective that had been developed is incidental and trial and error.Contoh dua LAZ berikut akan menjadi gambaran konkret bagaimana program-program LAZ bersifat kondisional, lokal dan temporer. (Muhtada, 2005).

Generally, Zakat institutions have a view to turning mustahik into muzakki built on two sides, religious and social. From the religious side, the beneficiary will seek to become a payer till a good actor, not a beneficiary of the good of others. While the social aspect, the beneficiary will turn into a beneficiary who will remain a partner zakat institute client. Means, the scope of program orientation is still temporary and regional, strengthening the inter-agency network with beneficiaries.

The condition of LAZ in the empirical example is not much different from what happened in Palopo City. LAZ and BAZNAS institutions actually become institutions that are able to collect, channel, and optimize the existing ZIS in its region. Zakat is a special concept in the Islamic economic system. Zakat is the name of a right of Allah issued to those who are entitled to receive zakat (mustahik). Therefore, zakat has an important position because it has a dual function, namely as worship mahdah fardiyah (individual) to God to harmonize vertical relationship to God, and

as worship mu'amalah ijtimaiyah (social) in order to establish a horizontal relationship among human .

2. Literature Review

There have been several studies conducted and considered relevant to the discussion in this paper. Hikam (2004) reveals that one of the obstacles faced in poverty alleviation, due to the dysfunctional supervision and supervision system undertaken by Bazis. Palmawa (2004) found that the quality of service of National Amil Zakat Agency is very influential on the establishment of muzakki trust; The level of trust muzakki very influential on the distribution of zakat on the National Amil Zakat Agency. Khasanah (2004) has concluded that there are four varieties: bureaucratic model, business organization, mass organization and traditional amil model.

In addition, the author also refers to the theory of Muslim scholars in the field of contemporary Islamic economics who also addressed relevant issues. Qardâwi (1984) in his book Fiqh al-Zakât, in which discloses various ideas and discussions related to the aspects of zalcat management both in terms of collection, utilization, the impact of zakat and the laws of zakat. It also describes the relationship of the Caliphate function with the fulfillment of economic needs. According to him, how can humans perform the functions of the Caliphate, if not fulfilled his needs. Another description, regarding the views of various schools on how many times the poor are given zakat; Guarantee of life for the poor; The wisdom of zakat in the Muslim economy. In general his description embraces the Islamic legal approach which sometimes displays fikh comparisons. Chapra (2001) in his book The Future of Economics, one of the discussions is about the position of zakat in public life. According to him zakat reaches the maximum value in the discussion expressed by realizing maqâśidjika country provides socio-economic environment. Sudewo (2004) in his book entitled Zakat Management discusses the management of zalcat management in Indonesia both for the benefit of amil zakat agencies and amil zakat institutions. The approach that he uses more focused on the author's experience in managing Dompet Dhuafa a zakat management agency. According to him, zakat managers in Indonesia, should apply the principle of management. Arguments that understood from them is the manager of zakat is related to the interests of the people.

Several studies discussed and proved the existence of zakat influence on economic cultivation, Subekan (2014. Study showed several things, namely: 1) Zakat has no significant effect directly to the economic independence mustahik. Even the direct influence of zakat on economic independence is potentially negative. Zakat also has no significant effect on consumption by mustahik. Although admitted zakat has a positive effect, but the effect is very small and insignificant. Meanwhile, zakat has a positive and significant effect on the production function, but the effect is relatively small. It means that zakat has the potential to develop production activities performed by mustahik although the influence is relatively small; 2) Infak does not directly affect the economic independence mustahik. The direct influence of infak on economic independence mustahik is nil. Infak also has no significant effect on the consumption of mustahik. It is understandable considering the main purpose of infak is the empowerment mustahik, not the fulfillment of consumption needs. Muthmainnah (2015). The results of the research indicate that: 1) Optimizing the role of BAZNAS of Central Sulawesi Province in the utilization of zakat in Palu City has been implemented well based on the guidance of Law Number 23 Year 2011 on Zakat Management, in terms of institution, And human resources. However, there are several laws and regulations that have not been applied well by BAZNAS of Central Sulawesi Province, namely, in Article 22 regarding the payment of zakat deducted with taxable income, there is no internal regulation of BAZNAS of Central Sulawesi Province regarding NPWZ Zakat Mandatory Number) so that it can not coordinate with the Directorate General of Tax on this matter. Second, concerning the supervision that is still weak due to inadequate amil in this supervision; 2) There are several models of utilization of zakat in BAZNAS Central Sulawesi Province, by distributing consumptive zakat for the mustahik in some form of assistance in accordance with needs mustahik.It can be in the form of food or groceries or in the form of funds (cash). As well as distributing productive zakat in the form of business capital either soft loans, revolving funds or granting of free business capital for small business actors in various business fields according to the type that mustahik be involved; and 3) Strategies that can be undertaken by BAZNAS Central Sulawesi Province in the utilization of zakat in Palu City, including: a)

Completing the rules of law for muzakki that has not pay Zakat, b) Recruit amil professionally according to the expertise and amounts that should be required by the Zakat institution, c) Give awards to amil who excel in his field as a motivation for the work of all amil, d) Provide special training for amil to add expertise in the field of Zakat, e) Promoting zakat awareness movement for the community through formal media of da'wah and education, f) Coordinate with community leaders in involving the community in the activities of BAZNAS of Central Sulawesi Province to foster public trust to zakat institution.

3. Research Method

This study used a qualitative approach to investigate in-depth management and management of ZIS funds conducted by Badan Amil Zakat (BAZ) In Palopo City. The management and management covers the aspects of recording, collection, distribution, and utilization of ZIS by BAZ Kota Palopo. In this study, the author tries to reveal about the questions what and how the system of governance and management of ZIS fund management is done, mainly related to the empowerment of SMEs run by society. These themes include a complex mix of facts and values that can be investigated from the informant's perspective to obtain detailed information in a natural setting.

Data sources in qualitative research are grouped into two, primary and secondary data. Data sources directly related to the studied are grouped into primary data sources. While data are not directly related or only as supporting data with the cases studied are grouped into secondary data sources. In accordance with the purpose of research, the method of data analysis used is qualitative descriptive. Through this technique, it will illustrate all the facts obtained from the field by applying the following procedure: qualitative descriptive analysis by developing the categories relevant to the research objectives.

4. Result

The policy directions of empowering Cooperatives, Small and Medium Enterprises are: (1) developing small and medium enterprises in order to contribute significantly to economic growth, employment creation and business competitiveness; (2) developing micro enterprises in order to increase income in low-income groups; (3) strengthening institutions with the application of good governance and gender-minded principles by improving the business environment and simplifying licensing procedures, broadening access to capital sources, especially banking, extending and enhancing the quality of supporting institutions running inter- Mediation as provider of business development, technology, management, marketing and information(4) expanding the base and business opportunities and cultivating new entrepreneurs with excellence, including encouraging increased exports; (5) increasing the role of MSMEs as providers of goods and services in the domestic market, in particular to meet the needs of the community; (6) to improve the quality of cooperative institutions in accordance with the identity of the cooperative.

The second activity is productive. This is even asserted in the Palopo City Sheet Number 6 of 2006 which states that the utilization of ZIS collection results is based on the priority scale of necessity mustahik and as much as possible utilized for productive efforts for the benefit of the ummah. In the social context of the community, productive enterprises include business units of MSMEs.

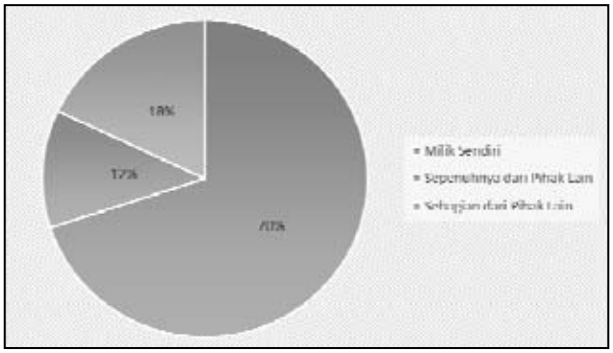


Figure 1 Composition of Capital Source of SMEs of Palopo City

Table. 1 Map of Potential of Utilization of ZIS Fund as Business Capital in Micro Enterprise

No	Districts	Micro business	Average stock	Assisted business units
1	Wara	1.588	37.730.328	226
2	Wara Timur	413	8.894.000	960
3	Wara Utara	407	19.361.000	441
4	Wara Barat	159	6.375.000	1.339
5	Wara Selatan	159	6.780.000	1.259
6	Telluwanua	65	1.383.000	6.174

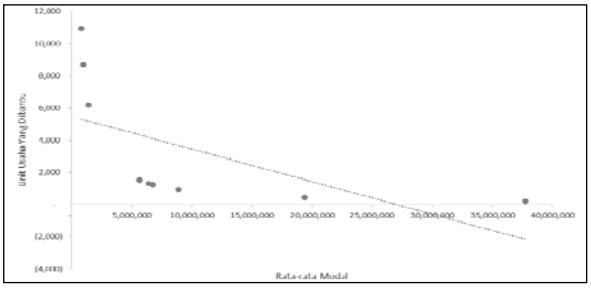
7	Bara	139	5.612.300	1.522
8	Sendana	58	781.000	10.934
9	Mungkajang	56	980.000	8.713
	Total	3.044	87.896.628	31.568

From the table it can be seen that the distribution of existing micro enterprises in Palopo City mostly located in District Wara or in percentage is equal to 52.17 percent. With the number of micro-enterprises, the average stock owned by them approximately Rp37.730.328, meaning that there are partially a few units of micro businesses that are able to switch to small businesses. The distric that has the smallest number of small businesses is Mungkajang sub-district with 56 units of small business units, where the average stock owned by them is Rp. 980,000.

More detail, the portion of micro business unit assisted by BAZNAS Palopo City is in accordance with the principle of justice. The concept of justice by definition is defined by dividing according to its portion. The number of business units assisted stock by BAZNAS according to the average capital with the number of business units assisted them. From the table it can be seen that the micro business units that have an average stock that is large enough only a few who get business capital assistance from BAZNAS. In contrast, micro business units with an average amount of capital get more business stock assistance from BAZNAS.

This condition is in accordance with the economic logic that has been understood theoretically, the more established a business unit in terms of the greater the capital, the smaller the grant of business capital provided. Conversely, the more vulnerable a business unit, in terms of small business capital then the business unit requires greater capital for business to develop. Thus, it can be concluded that venture capital owned by a business unit is inversely proportional to the many venture capital assistance that needs to be provided to them. If this condition is depicted in an illustrative scatter plot, then the result is as shown in Figure 2. Figure 2 shows the relationship between the number of business units financed by the average stock owned by the business unit. The scatter plot line moving from the top left to the lower right indicates that the correlation between the two variables is negative. It means the more capital owned by the micro business unit, the smaller the business capital assistance provided by BAZNAS Kota Palopo. It indicates that in the implementation of business capital assistance, BAZNAS Kota Palopo has done the right thing (on the right track).

Figure 2 Relationship Between Micro Business Unit Assisted by Number of Owned Stock



From the results of the potential spread of the map, it is also seen that Wara District is a concentration basis of existing SMEs Palopo City. The business unit of MSME in this sub-district has been well established, both from micro business to medium business. The implication is that what is needed by this ditrict is not the capital assistance, but rather the guidance so that their business can grow. The concentration of areas that need to get attention in the form of capital assistance from BAZNAS should be directed to Sub-District Sendana and Mungkajang which has a small number of business units and small business stock.

The information encountered in the field indicates that BAZ has provided assistance to 776 MSMEs. It means that BAZ has helped 26.59% of Muslim SMEs from the total of all existing MSMEs. According to information provided by informants in the process of data retrieval, as many as 545 or 70.23% of the debtor is a debtor that gets a ranking above average.

Table 2. Potential ZIS in Palopo City

No	Uraian	Muzakki	Rerata		Pertahun (Zakat*12 Bln*Mzk)
			Gaji	Zakat (2.5% dari Gaji)	
1	Zakat Fitrah	125.073	-	18.000	2.251.314.000
2	Zakat Profesi PNS				
	1. Gol IV	962	520.000	130.000	1.500.720.000
	2. Gol III	1.000	400.000	100.000	1.200.000.000
	3. Dokter Ahli	10	16.000.000	4.000.000	480.000.000
	4. Dokter Umum	30	6.000.000	1.500.000	540.000.000
	5. BUMN/TNI-Polri	800	328.000	82.000	787.200.000
3	Infaq Profesi				
	1. Gol III	1.213	-	15.000	218.340.000
	2. Gol I dan II	1.431	-	10.000	171.720.000
4	Zakat Mal				
	1. Usaha Mikro	2.807	-	140.000	392.980.000
	2. Usaha Kecil	192	-	700.000	134.400.000
	2. Usaha Menengah	136	-	5.000.000	680.000.000
5	Infaq RTM	18.245	-	10.000	182.450.000
Total Potensi ZIS					**8.539.124.000**

Thus, the accumulative magnitude of the potential of zakat and infaq funds owned by Palopo City is the sum of zakat fitrah, zakat profession and infaq civil servants, zakat mal, and other infaq is Rp. 8,539,124.00,. The need for funds for MSMEs to increase their production scale is as follows:

a. Micro Business requires at least Rp. 25.000.000, -, then the number of micro business that can be assisted is approximately 570 units.
b. Small Businesses need at least Rp. 50.000.000, - then the number of small businesses that can be assisted is approximately 170 units.
c. Medium Enterprises requires at least Rp. 100.000.000, - then the number of small business that can be assisted is approximately 85 units.

Based on the illustration of ZIS potential calculation of MSME empowerment can be drawn a conclusion that the potential of ZIS in Palopo City is basically very prospective in providing funding alternative for the development of UMKM. Moreover, if traced that ZIS funds are distributed by BAZ Palopo City is channeled in the form of revolving fund funds by replacing the philosophy of qardul hasan. Therefor, there is no interest in the process of borrowing. It condition of course facilitate the perpetrators of SMEs to make loans.

5. Conclussion

The role of ZIS funds collected by BAZ Palopo City in empowering SMEs in Palopo City is very important. It is indicated by the many types of SMEs that get qardul hasan financing from BAZ Kota Palopo. ZIS fund is an alternative fund and financing for MSMEs in expanding the market and enlarge their production capacity. The condition occurs because the results of the study indicate that the characteristics of MSME funding in Palopo City basically derived from the personal funds of MSME business owners. The results also found that they are not willing to lend to the bank for several reasons, where the main reason is the absence of collateral when they want to borrow. Difficulties are resolved by the role of BAZ Intermediation Palopo through the provision of loan funds to the perpetrators of SMEs in Palopo City. Thus, it can be concluded that the role of ZIS funds managed by BAZ Palopo City in empowering SMEs is to become an alternative source of financing for the perpetrators of SMEs .

The amount of potential ZIS funds owned by the City of Palopo based on calculations in this study amounted to Rp 8.539.124.00, -. With the potential amount of it, it can help the business capital as much as 570 units, small businesses as many as 170 units, and medium businesses as many as 85 units.

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Rethinking Zakat Distribution for Sustainable Poverty Eradication

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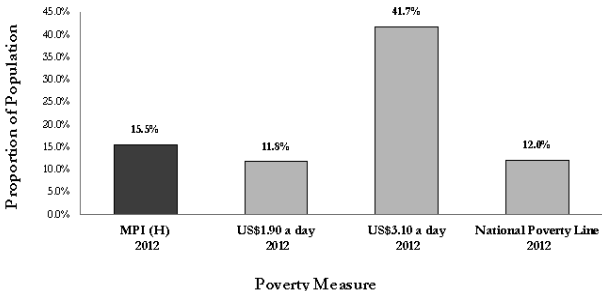
Abstract **-** This article aims to porpose zakat distribution for sustainable poverty eradication. The main idea is that poverty is created by the systemic problems of the natural, psychological, social, and manmade environment of maqasid. The consumptive approach of zakat distribution is not effective yet to alleviate poverty. Meanwhile, productive zakat tends to the aspect of the economy. In the light of maqasid-based of system philosophy, the zakat fund should be distributed to preventing (*sadd al-zara'i)* or cutting all of the causes or the root of poverty that appear in the fourth of the environments of maqasid.

Key Words*: zakat, povery, maqasid system, sustainability*

1. Introduction

Poverty is a systemic and multidimensional problem of society over the worldwide. Many studies, researchers, models of empowering has developed and implemented to create the appropriate solutions of poverty eradication (Shaikh 2017; Béné 2003; Daw et al. 2011). The common approach in poverty analyzing was consumption and income line that limited dimension. Alkire tries to promote multidimensional approach as an alternative to measuring poverty (Alkire and Santos 2013; Bennett and Mitra 2013; Alkire and Santos 2014). Health, education, and living standard are variables which used to analyzing and indexing poverty. In 2016, Global Multidimensional Poverty Index notes that there are 1.6 billion people are living in multidimensional poverty. More than 50% of Global MPI poor people in the countries are using the $1.9/day poverty line where almost live in Sub-Saharan Africa (32%), South Asia (53%) and East Asia (9%) (Global MPI, 2016). Based on this approach, Indonesia had 15.5% poor people that highest than national poverty line and extreme poverty line (Initiative 2016).

Chart 1. Comparative Poverty Measures



Source: Oxford Poverty and Human Development Initiative (2016). "Indonesia Country Briefing", Multidimensional Poverty Index Data Bank. OPHI, University of Oxford., p. 2. Available at: www.ophi.org.uk/multidimensional-poverty-index/mpi-country-briefings/.

For Indonesia, as the highest of the Muslim majority population in the world, it was extremely ironic because the five pillars of Islam obligating Muslim to share their wealth to *asnaf* which is called as zakat. Muslim scholar agreed that zakat has the socio-economic function as also as religious worship (Nurlaelawati 2010). The empirical evidence was proving that zakat intensively alleviates poverty (Mohamad Sholeh Nurzaman 2010; Beik and Arsyianti 2013; Mohsin and Ismail 2013; Abdelmawla 2014; Johari, Ab Aziz, and Ali 2014; Studies 2017d). It would be a challenge to government, academicians, practitioners, and others stakeholders to improve upon the strategies of zakat-based poverty eradication. What is the root of the problems of poverty and how is the framework of zakat distribution for sustainable poverty eradication In the light of the system philosophy of maqasid?

2. Missing dimension of current zakat-based poverty alleviation

The discussion of poverty alleviation *via* zakat and others instruments of Islamic charities has intensively been held by many universities, governments, and private organizations around the world. Historically,

Indonesia had continually been changing experiments in order to manage even controlling the zakat in which influenced by the government policies. Following the Dutch system, until reformation era, zakat was used as the tool of political hegemony to control of Muslim activities (Salim 2006). Based on post-colonial perspective, this historical problem on zakat collecting and distributing had been creating a society mistrust to the government (Addiarrahman 2013). After reformation era, the tension between semi-governmental zakat management and private zakat management arose as a continued effect of the Dutch policy (Saidurrahman 2013).

The Indonesian government has seriously been attempting to enrich the zakat function to reducing penury. This endeavor essentially was connected with the middle-term national strategic to poverty eradication for instance: 1) transformation of social security programs, 2) improving basic service; and 3) sustainable livelihood for poor people (Iryanti 2016). Integrated with this strategic, Financial Service Authority (OJK) Indonesia set down the so-called roadmap for sustainable finance. The issue of financial inclusion is so important in order to achieve the target of all of that plans. The Indonesian Zakat Outlook 2017 was introducing the role of zakat to financial inclusion. There are four roles of zakat such as (1) moderating social gap, (2) provoke of people economy, (3) driving a breakthrough model of poverty eradication, (4) enriching financial development resources to fulfill human-welfare out of APBN or APBD (Devisi Publikasi dan Jaringan Pusat Kajian Strategis (Puskas) BAZNAS 2016). These need a serious striving to fulfill it.

BAZNAS previously has had the progressive programs to grow up the zakat collection and distribution. The programs could be classified as five agendas namely (1) zakat education and socialization (2) reinforcing zakat institution (3) optimization of zakat utilization, (4) strengthening of the regulation of zakat management, (5) synergize with all of the social component (Didin Hafidhuddin 2016). From these agendas, Zakat Community Development (ZCD) is one of the main models to break up the deadlock of zakat utilization. The basic idea of ZCD is a social security and service in generally. It is not only to serve a limited part of technocrat but also to all of the society in which they could be able to access and control every step of development programs (Tim Penyusun 2013). So, the means of 'community development' is as UNESCO defined that *a process of planning technical assistance programs and of inter-agency coordination is complicated by a lack of precision in the terms used to describe the process or combination of the process by which an underdeveloped area develops or is developed* (UNESCO 1956). The empirical research has proved that ZCD was contributed to social mobility and take a role in the process of socio-economic development as seen in the growth of zakat collecting and distributing, especially in utilizing of zakat fund for social empowerment. (Baidhawy 2015; Hamdi, Nurjanah, and Handayani 2014; Mochlasin 2015; Studies 2017a, 2017b, 2017c).

Basically, the programs of zakat management in Indonesia has on the right path. The achievements of BAZNAS in last decade are promoting and implementing zakat as an instrument of social mobility in facing Indonesian multidimensional obstacles in order to implemented sustainable development (Abdoellah 2016). There are some increasing in zakat collecting as seen with the growth of *muzakki* as the influence of that's strategies (Devisi Publikasi dan Jaringan Pusat Kajian Strategis (Puskas) BAZNAS 2016; Studies 2017a, 2017b, 2017c). However, Huda notes three main problems of zakat that are (1) zakat regulation and organization; (2) the synergy of zakat organizations; (3) the standards of zakat officer (Huda 2014).

In the other perspective, the main problems that Huda said are just at the level of surface or technical. The framework to implemented community development, especially, must take into account the community's nature as a complex living system (Spruill, Kenney, and Kaplan 2001). So that, my opinion is that the essential problems in implementing zakat-based property eradication are the paradigm and model that are from the epistemological perspective still biases or particular. Choudhury has strongly recommended the need of Islamic episteme of the unity of knowledge as a learning system in order to participatory development (Choudhury and Harahap 2009).

3. Environments of zakat distribution for sustainable poverty eradication

Environment from maqasid perspective was referred to the macro ontological concept of *al-bi'at*

which strongly connected with the quranic conception of human creation. *Al-bi'ah* (singular: *al-bi'at*) refers to *ba-wa-a* which indicate two interconnected meaning. The first from the word *bawwa'* that means to prepare or equip a place to the inhabitant. The second meaning comes from word *ba'* which means return or incur. The creating of man in Quran is described that man naturally from clay (Q.S. 55:14, 32:7, etc) and then "He fashioned him and breathed into him of His Spirit; and appointed for you hearing and sight and hearts" (Q.S. 32:9). By his potencies, man has interacted each-others in the social environment. They are creating anything to grow up the civilization. Those process of human life is describing the kind of environment in which human should be able to interact. They should aware in all of the environment that they from the Almighty God and return to Him again. Thus, if the human deed is harmed for their environments, they would incur the consequences of those harms. In that environment, as *al-Muta'allim,* human have been learning and collecting all of the 'signs' of the Almighty God to create the pure knowledge.

The development of human being, therefore, in the context of maqasid's environments could not be seen separately. Maqasid's environments are Islamic living system. There is an integrated-interconnected nexus between all of *al-bi'ah* or environments. The partial approach tends to produce pieces of concept that operate on the single way. This way was opposite with the nature of maqasid-based of signs system that had to unite all of cognition, holism, openness, multidimensionality, purposefulness (Auda 2008). Therefore, the zakat model of sustainable poverty eradication must be included all of the maqasid environment that analyzed by certain approach as I described previously. That's model contains four integrated environment that the sustainable poverty eradication depends on the integrated nexus between that environment. My analysis about the integrated of the macro ontology of maqasid environment is contextualized by the current situations of the cause of the poverty problems.

3.1. Natural environment (*al-bi'ah al-thabi'iyyah*)

There is a nexus between poverty and environment. It was the nature of integrated signs of system maqasid. A number of empirical studies reveal the connection and nexus between poverty and environment (Camp 1990; Kumar et al. 2011; Sr 2009). Water crisis, for example, has an important role towards poverty line (Ahmad 2003). Therefore, the phenomenon has surely been driven an attempt to take the agenda of poverty alleviation in the context of environmental sustainability (E. R. Carr, Kettle, and Hoskins 2009). Sustaining environment, of course, should be one of the most important to evaluate and measure the levels of poverty (Bass et al. 2006). The environmental education has also been significance role to the notion of poverty eradication (Tilbury 1995; Umoh 2010).

In the perspective of the system philosophy of maqasid, the earth is not an object that human could do exploit it or use it in the wrong or danger way. It is contradicted with positivism paradigm that mostly influences the Western philosophy in order to profit maximization in all of the economic activity. That is a true number of Western scholars or philosopher are raping all of the environment crises caused by that paradigm. They then introduce an alternative paradigm such as eco-phenomenology and eco-philosophy (Dewi 2015). That's philosophy tends to build the relation between man and earth are not as subject and object. Unfortunately, there is some mislinkage in that's paradigm, especially, related to 'signs' of Almighty God that in Islamic perspective all of 'signs' are regarding the existence of Allah SWT. An attempt to strengthen the role of zakat, consequently, would be aimed at sustaining and creating a green environment that is the ultimate objective of the natural environment (*maqasid al-bi'ah al-thabi'iyyah*). In this goals, the purpose of human creation is husbanding (*al-imarah*) in facing natural environment.

3.2. Psychological environment (*al-bi'ah al-nafsiyyah*)

In Quran, the term *al-nafs* root from the word *nafasa* that means breath. It is referred to heart (*qalb*), species, desire, soul or spirit (*ruh*), human being, and the Almighty God (Shihab 2007). Quran confirms two characters of *nafs* that both positively and negatively. In substance, the positive side is most preponderant then negative but negative attractiveness is most strength then positive. Therefore, the man should be purifying of their soul (Q.S. 91:9-10). Refer to the feature of *muzakkah* or purify knowledge, the psychological

environment takes attention to applying of *tazkiyah al-nafs* that means to purify development. It is also connected with an attempt to negate *al-hawa* (toppling desires), *al-zann* (guess), and *al-itiba' li itiba'* (imitation for the purposes of imitation) that would bring a man to the psychological disorder. To this condition, "Allah changes not the condition of a folk until they (first) change that which is in their hearts" (Q.S. 13:11). Hence, the healthy 'heart' or psychology will influence the quality of life.

The psychological process has been involved in order to analyze and maintenance of poverty (Harper 1991). It could be applied to poverty analyzing: (1) as a lens for scrutinizing its psychological features; and (2) as a means of contributing to poverty reduction (S. C. Carr and Bandawe 2011). Hence, poverty has not only been about the structural problems of social, economic and politic but also psychological obstacle (Moghaddam et al. 1999; Zaman and Zaman 1994). Psychological theories can generally be divided into two categories, namely theories of on the causes of poverty and on the impact of poverty. At the first one, there are a number of theories such as pathologies theory, nativist perspective, intelligence-based psychological theory, attribution theory, moralizing and medicalizing perspectives, and so on. Others, the impact theories of poverty can classify as structural forces, psychiatric disorder, psychopathologist, and medicalization of poverty theory (Turner and Lehning 2007).

Health psychology, for example, has been explaining the connection between poverty and health (Murray and Marks 2010). Mental health is influencing the perception of well-being in rural and urban society (Nepomuceno et al. 2016). The empirical studies describe that adolescent mental health is vulnerable to the effect of poverty such as mood states, depression, suicide, and so on (Dashiff et al. 2009). Customer behaviors can be seen as the part of psychological issues. The people with healthier psychology are influencing their consumption behavior to be more rational and that could be used to analyze of overconsumption phenomenon (Hutton 2015). Therefore, the problems of poverty are strongly connected with the quality of life and social adjustment in which psychology should not be separated from poverty analyzing.

3.3. Social environment (*al-bi'ah al-ijtima'iyyah*)

Our social environment today is colorized by the complexity of problems. The globalization brings human life beyond geographical, racial, religion, and ethnicity boundaries. The impacts development of science and technology can be seen both as improving human civilization and enriching human risks. The Global Risk Report 2016 notes the risks are faced by today life most systemic and complex (World Economic Forum 2016). These conditions create our understanding to the long-term future remains fundamentally and irreducibly unpredictable or so-called *deep uncertainty* (Lempert et al. 2017). Thus, social security or protection is the ultimate objective, end, purpose, and principle of the social environment. The term *adl* (justice) is a key to achieving that's goal.

The poverty predicament, for example, is not only understood as an economic issue but also as psychological, sociological, anthropological, and political problems (Vu 2010). The poverty in an anthropological perspective is seen as the impact of global process on local environments and persons (Frerer and Vu 2007; Green 2006). Postmodernism perspective saw poverty as the impact of the nexus of production relations namely technical, social, ecological, cultural, political and academic. That's production relations are conducted within a network of discursive and non-discursive relations. It also is seen as a dynamic system of mutually constituted elements (Yapa 1996). The substantive action at multiple sites spread throughout the nexus of production relations at various levels is a solution to poverty eradication.

There are many perspectives on themes of poverty in which most dominated by the economic narration that is competitiveness. This is both normatively and empirically missed connected with what the Quran said that the social environment must be led by the spirit of friendship or brotherhood (*silatu al-rahim*), mutual assistance (*ta'awun*), and unity (*ittihad*) under the principle of justice (*'adl*). These values of spirit would bring the achievement of human life in the today's social environment and also hereafter. Therefore, the Quran said that human timely and spatially is co-succession (*al-khilafah*) on the earth to fulfill in the facing of the social environment.

3.4. Man-made environment (*al-bi'ah al-sana'iyyah*)

The manmade environment is related to the product of economic, politic, social and culture activity. The people needs continuously are determined by those constructions (Yapa 1996). The man is not as rational as in economic theory said. Overconsumption was causing unsustainable of economic growth and resulting economic crisis in 2008 (Jaworski and Weber 2011). The greedy make the wealthiest 1 percent was dominating the world while the middle class was sliding into poverty (Smith 2010). In Indonesia, the wealth of fourth richest man is equal to 100 million of poorest citizen wealth (The Guardian 2017). Then, what is the reason behind the greedy and overconsumption?

In socioanalysis viewpoint, greed is a psychotic dynamic that inhabits thinking that limits reality in what is bearable and desired. It has often been causing the competition fueled by excessive greed and the source of corruption and/or fraud (Sievers 2012). The greed contains three major aspects, namely moral, cognitive, and emotional. There is a set of the internal battle of the greed motivation: e.g. the self versus others; cognitions versus emotions; and hot versus warm emotions (Wang and Murnighan 2011). Emotions, according to Svasek and Skrbis, is a shaped and shaping aspect of global mobility. Following this idea, Kenway and Fahey propose the concept of *emoscapes* that regarding the nexus of emotions to the social, political, spatial, and cultural aspect that entangled with the global capitalist economy, especially the manifestation of 'financialisation' (Kenway and Fahey 2010).

A lot of perspective of the greed is true because of its contradiction to the signs-based knowledge (*alamatiyah*) that is *al-hawa* (toppling desires), *al-zann* (guess), and *al-itiba' li itiba'* (imitation for the purposes of imitation without supporting signs such as arrogant, ancestors, or imitation of the majority. Connected with the social, psychological, and natural environment, the human activity in the manmade environment is the most influenced by that environments. It is caused by the emptiness of maqasid utilization or *al-istikhdam al-maqasidi.* The productions and consumptions are not based on the ultimate goals of shariah that is the multidimensional protection of religion (*din*), life (*nafs*), intellectual (*'aql*), prosperity (*maal*), offspring (*nasl*).

From the notions in this sections, I am going, to sum up, that an agenda of maximization of zakat utilization for sustainable poverty eradication should pay the attention to the substance problems that facing the current maqasid environment. There are many problems occur on the natural, psychological, social, and manmade environment. The crisis in one environment, such as manmade, influence to others. The integrated ontology of maqasid take a duty to the human being that would be husbanding (*imarah*), purify (*tazkiyah*), co-succession (*khilafah*), and maqasid utilization (*al-istikhdam al-maqasidi*) in facing all of the maqasid environments obstacles. Those duties aim to create green ecology or environment, purified development, social security or protection based on justice, and maqasid-based production and consumption. The following figure illustrates it more clearly.

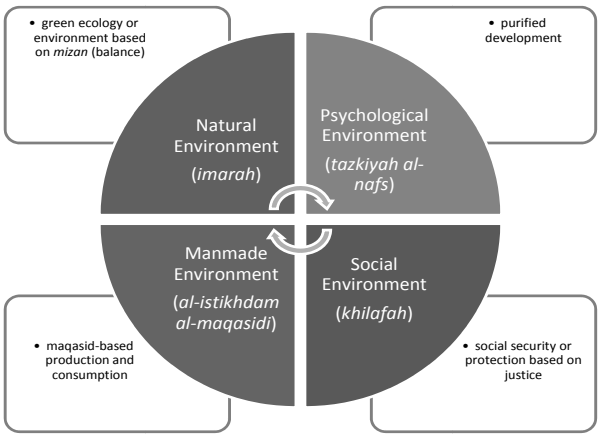


Figure 2. Integrated maqasid environments

4. Discussions and Implications

This paper reviews the philosophical problems of zakat in order to create the framework of sustainable poverty eradication. Regarding this goals, the discussion of zakat's problems is still on the level of technical management (Harun, Nordin, and Hussain 2008) and dominated with the economic approach (Ali et al. 2014). An attempt to reconstruct it in framework and methodology of national zakat index is also in that's domain (Mohamad Soleh Nurzaman et al. 2017). NZI has divided two domains of the variable, namely macro and micro. The macro domain is related to regulation, governance budget allocation, and database of zakat while the micro domain contains institutional and zakat impact variable. All of the indicators of the variables are associated with technical management and socio-economic sector. In another word, is not taking a care

to the domain of integrated maqasid environment, as explained before.

In this section, I try to analyze the framework of zakat distribution for sustainable poverty eradication with integrating quranic-based of maqasid system philosophy into the unity of maqasid environment. I propose the domains of zakat distribution for poverty eradication, at least, consist of the fourth domain, namely the natural, psychological, social, and manmade domains. All of this domains are refer to maqasid environment whereas the research on these domains should be using the epistemology of quranic-based maqasid system.

1. **Natural domain**: In this domain, the purpose of zakat utilization must be oriented to ecological conservation that supported by eco-community in which able to face the shock (resilience to shocks), such as water and food crisis, earthquake, others ecological disasters. In this domain, as an individual, member of community or government, man has a role as an *imarah* or husbanding. In another word, the zakat education and socialization should be able to create awareness of *muzakki* or *mustahiq* that purposes and the ends of zakat.
2. **Psychological domain:** There are many factors that influence the psychology of men such as family, education, information, and health. Zakat utilization is addressed to these goals that intense to promote the pure development. In this domain, the function of zakat is to purify (*tazkiyah*) to all of the psychological diseases.
3. **Social domain:** As many scholar states, zakat has had a social function. Nevertheless, in this domain, the function of zakat is depended on the role of man, in this context is government (a function of *khilafa*), in order to give protection to the social environment. Regulation and good governance are the keys to achieving this goal.
4. **Manmade domain:** The goals of this domain are to create the community development that having the entrepreneurial skill, literate to information and technology (IT). By these competencies, both *muzakki* and *mustahiq* could be able to create the maqasid-based products that supporting and protecting the social, psychological, and natural environment.

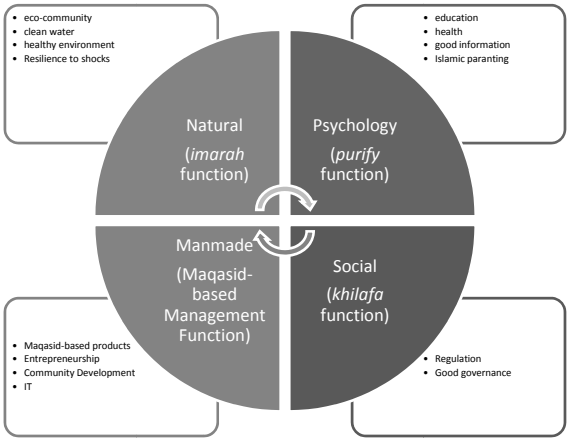


Figure 3. Integrated Framework of Maqasid-based of zakat for sustainable poverty eradication

The figure is describing the integrated framework of maqasid-based of zakat for sustainable poverty eradication. Based on this framework, this article reveals some implications as follow:

a. The function of zakat is not only limited to religious, social, and economic but also ecological and psychological functions in order to protect the social and psychological environment;
b. The main function of zakat for poverty eradication is purifying development in a maqasid-based of an integrated framework;
c. The integrated framework of maqasid-based of zakat for sustainable poverty eradication must be taken in the quranic-based of maqasid system philosophy. Therefore, it needs a deep understanding and serious study in order to reveal the root of all of the human problems in all of the maqasid environments;

5. Conclusion

Poverty is created by the condition of environmental chaos. From the perspective of maqasid, there are the fourth domains of environment, namely: natural, psychological, social, and manmade. The problem in one of the domain is influencing of the others. Water crisis, for example, is influencing of the human psychology, social, and manmade. Therefore, the integrated framework of maqasid-based of zakat distribution for sustainable poverty eradication is integrating all of the maqasid environment and connecting to the maqasid ontological function, namely *imarah, tazkiyah, khalifah,*

and maqasid-based management. Thus, zakat fund should be distributed to prevent any crises of chaos in every domin of enviroment of maqasid.

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Discrimination Against Women In Case of Inheritance: Analysis of the Settlement of the Case of al-Gharawain

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Abstract - The Qur'an and Sunnah have explained in detail the degree or what part will be received by an heir, especially the QS. Al-Nisa 'verses 11, 12 and 176. However, in the settlement of Gharawain's problem, Jumhur Ulama chose a solution that came out of the general provisions in the verse, to fulfill the will of that time tradition, that the father (men) Of female mothers). The clergy asserted that the meaning of "tsulutsu (one-third)" in the verse is understood by the meaning of "tsulutsu al-baqiy (one-third of the remaining property after the division of the husband's or wife's share)." In this way, there has been discrimination against the mother, Receive twice as much portion of the mother's portion, so the mother of a woman is considered unworthy of receiving more inheritance rights from father, a man, so the mother's right here, should be reduced, even if it violates the verse zahir.

Key Words*: Discrimination, women, inheritance, gharawain*

1. Introduction

Basically the Qur'an and Sunnah have explained in detail about the level or what part will be received by an heir, especially the QS. Al-Nisa' verses 11, 12 and 176. These verses are understood by scholars with a common understanding, meaning that verse is a verse that is easily understood and impossible to be understood in other meanings. For example the verse explains that a daughter gets ½, if she is alone, or the mother's part is 1/3 if the heir does not have children.

However, in solving certain problems, such as the Gharawaini problem, the grandfather's inheritance with you, the musharaka problems and the aul and rad issues, Jumhur Ulama opted for a solution that came out of general terms in verse or Hadith. According to them, if the question of inheritance was resolved in the normal way, something strange and inappropriate happened during that period, for example in Gharawaini's case, if divided in the usual way, it turns out that the mother gets a share (2/6) Father (1/6) as' asabah. Jumhur Ulama, unable to accept a "Mother" who is a woman, gets more from a "father" who is a man, this is considered odd. On that basis, ultimately the Jumhur Ulama tries to think of ways to make the father more out of the mother's part, and the solution is to change the meaning of "tsulutsu (one-third)" in the verse understood by the meaning of "tsulutsu al-baqiy (one third of the rest of the property after Divided by husband or wife). "In this way, father finally gets twice as much share of the mother's part.

The way in which the Jumhur ulama in solving the Gharawaini problem is seen, is very gender biased, in which the mother, as a woman is on the severely disadvantaged side, even though Allah has determined her right. This is probably, because the socio-cultural influence of Arabic heritage of ignorance is still very thick, where women are seen to have a lower position than men. However, ironically, Jumhur Ulama's thinking in the classical era, then continued to be a reference and followed by the scholars today. Even in Indonesia, the opinion of the cleric was chosen and confirmed in the Compilation Book of Islamic Law in Indonesia, precisely in Chapter III, article 178 paragraph 2.

2. General Provisions In Islamic Inheritance System

2.1. Definition of Islamic Inheritance Law

In discussing the definition of Islamic inheritance law, there are two terms that match the sense of *al-*

faraidh and *al-mawaris*. Therefore, before explaining the definition of Islamic inheritance law, it will first explain the meaning of *al-faraidh* and *al-mawaris*.

In terms of etymology, in Arabic, *al-faraidh* (الفرائض) is the plural of *fariidhah* (فريضة), meaning parts that have been confirmed in levels. (Al-Mahalli t.th.134) الفرائض is the plural of which is derived from the word فريضة, فرض Which means taqdir (provisions). (Sabiq 1987,427)

The definition of *faraidh* according to syara' is a predetermined part for the heirs. (Al-Mahalli t.th.134) While understanding the science of jurisprudence arrives faraidh are interlocking with the division of the inheritance, knowledge of how the calculations ı can pass on to the division of property and knowledge about the parts that are required of inheritance to each owner the right to inheritance. (Rahman 1981,32)

Al-Mawaris is the plural of ميراث that treasures those who had died were inherited by their heirs. Lafaz *miras* (ميراث) is *mashdar* of said *Warisa* (ورث), *yarisu* (يرث) *irsan* (ارثا), has an idea: The migration of something from one person to another or from one people to another people. Something that is more common than the treasure that is the science, greatness and glory. (Al-Shabuni1988, 40) On the other hand people who left the property was called *Mawaris*(موارث)), while those eligible for inheritance is called inheritance (وارث). (Al -Shiddieqy 1973, 17)

While understanding al-Mawaris according to the terms, the fukahak dissent, such as al-miras notion propounded by Muhammad Ali Al-Shabuni following: Definition of al-mawaris according to terms are: The migration of the property of the deceased to the heirs who are still alive, whether he left it in the form of movable and immovable property rights according to Islamic Shari'ah. (Al-Shabuni 1988, 40)

DR. Badran Abu al-Ainaini Badran, in his book, suggests *al-mirats* as follows:

الميراث شرعا :حق قابل للتجزئة يثبت لمستحقه بعد موت من كان له ذالك لقرابة او زوجية او ولاء. .

"Miras according to syara 'is the right received are certain parts that remain for the person entitled to receive it, after the death of the heir. And that right is due to kinship, marriage or wala '. (Abu al-Ainaini Badran t.th.,11)

While Prof. DR. H. Amir Syarifuddin expressed the notion of Islamic inheritance law is as follows:"The law of inheritance of Islam is a set of provisions governing the manner of transition of the right of a deceased person to a living person, whose provisions are based on the divine revelation contained in the Qur'an and the explanations given by the Prophet Muhammad SAW." (Syarifuddin 1984,43)

Mean while Wirjono Prodjodikoro, as quoted by Abdullah Siddik, put forward the definition of inheritance as follows: "The inheritance is a matter of whether and how various rights and duties concerning one's wealth at the time of his death will turn to others who are still alive". (Siddik 1984, 41) Based on the above understanding, either the meaning of *al-faraidh* or *al-mawaris* is about the estate of a deceased person. Thus the definition of Islamic inheritance law is a set of rules governing how to transfer the property of a deceased person to a living person as an heir, in which the provisions are based on Islamic shari'ah.

2.2. The Basic Law of Islamic Inheritance

Islamic inheritance law is sourced to the Qur'an, hadith, ijma 'and ijtihad.

2.2.1. Al-Qur'an

The first source of Islamic inheritance law is the Qur'an which is basically contained in several verses from the Word of Allah SWT. Among the verses of the Qur'an are surah al-Nisa 'verses 7, 8, 10, 11, 12, 13, 14, 33, 176 and surah al-Anfal verse 75.

2.2.2. Hadith

Hadith is the second legal source of Islamic inheritance law that explains the things that have not been explained in the Qur'an. Like the following hadith:

عن ابن عباس رضى الله عنهما قا ل: قال رسول الله صلى الله عليه و سلم ا لحقوا الفرائض باهلها فما بقي فهو لاؤلى رجل ذكر. متفق عليه

Meaning: Hadith from Ibnu Abbas r.a. Rasulullah SAW. Said: "Give faraid (the part that has been determined in the Qur'an) to the erhak receive it and the rest give to the nearest male family." (al-Kahlani t.th. ,98)

عن اسامة بن زيد ان النبي صلى الله عليه وسلم فقال : لايرث المسلم

الكا فر ولا يرث الكا فر المسلم . متفق عليه

Meaning: Hadith from Usama bin Zaid, Prophet SAW. Said: a Muslim does not accept the inheritance of the heathen (not Muslim) and the infidels also do not accept the inheritance of a Muslim. (HR Muttafaqun 'Alaih). (Ismail al-Kahlani t.th., 98)

عن ابن عمران بن حصين ان رجلا اتى النبى صلى الله عليه وسلم فقال : ان ابن ابنى ما ت فمالى من ميراثه فقال : لك السدس. رواه احمد و ابو داود والترميذى.

Meaning: Hadith from 'Amran bin Hushain, a man came to the Prophet SAW. And said: my grandson has died, what am I getting from his treasure? So the Prophet replied: for you 1/6. (Ahmad, Abu Daud and Tirmidhi) (David 1952, 110)

The first Hadith above contains about the command to hand over the inheritance to the rightful person who is his heir. Then after being distributed to all the heirs it turns out his property left, then the rest of the property is given to the family of the nearest man. While the second hadith explained that because of religious differences that is a Muslim with a non-Muslim or otherwise, should not be mutually inherited. The third hadith explains the division of the inheritance that grandpa acquired, if grandchildren died while his father was absent, the grandfather got 1/6

2.2.3. Ijma' and Ijtihad

Basically the source of inheritance is the Qur'an and the Hadith of the Prophet (s), but in practice there are problems that are not explained in detail in the Qur'an or Hadith, thus opening the opportunity for the scholars to berijtihad in completing The problems of inheritance that arose in their day.

Ijma 'and ijtihad are the further sources of the law after the Qur'an and Hadith which serve to explain what has not been explained in the authentic texts. In this case the Companions, the Imam of the School and other Mujtahids have a very important role to solve the inheritance problems that have not been explained by the Qur'an and Hadith. As Fatchur Rahman explains the following:

a. Regarding the status of the brother who inherited along with the grandfather, there is no explanation in the Qur'an. The Qur'an only explains the status of the brothers together with the father or together with the boys who in both of these circumstances they get nothing, because they are veiled, except in the case of the fact they have a share. According to most opinions of friends and priests of the school quoting Zayd ibn Thabit, the brethren received the legacy part of muqasamah with grandfather.
b. The status of the grandchild whose father had earlier died than the grandfather who inherited the stock together with his father's brother. According to the provisions, they get nothing because of being shaken by his father's brother. But according to the Egyptian Testament Law which rested from the ijtihad of the mutaqaddimin ulama, they were given a part based on the wills of the mandate (Rahman 1981, 33)

Based on the above explanation, it is clear that God provides a vast opportunity for the human mind to dig up the law in order to solve the problems that arise by keeping guidance to the lines that have been described by Allah and the Apostle.

2.3. The Legal Principle of Islamic In heritance

In Islamic inheritance law there is a principle of inheritance concerning the procedure of transition of property of the deceased person to the living person, namely: the principle of ijbari, bilateral principle, individual principle, fairness principle of balance and inheritance principle solely due to death.

2.3.1. Pillars and Terms of Inheritance

In Islamic law there are three main elements that become harmonious of inheritance, namely: **a.** The heir (*muwarris*) is the one who dies and leaves the property or right that the heirs can possess, whether the death is inherently or in a hukmi manner, that is to die on the basis of the judge's verdict. **b**. The inheritance *(maurus*) is anything left by the heirs who can legally turn to his heirs. **c**. Heirs or heirs are the ones who are entitled to the inheritance left by the deceased either by kinship with the nasab (hereditary), marriage and wala' (liberating slave) paths.

2.3. Problem *Gharawain* and Settlement According Jumhur Ulama

2.3.1. Understanding *Gharawain*

Gharawain is the name given to two inheritance problems that the composition of his heir consists of; Husband, father and mother and wife, mother and father.

The problem of *gharawaini* is also known by the name of Umaryataini problem, because this problem is a matter once decided by Umar (Al-Mahalli, t.th., 143) which was then accepted by the majority of friends and followed by Jumhur Ulama. Some literature gives the name *gharawaini* problem with the name *gharibaini* which also means two miraculous or strange problems.

Gharawaini comes from the word *gharwu* or *gharan* which means strange, surprising (Al-Munawwir 1984, 1004). So *gharawaini* problem means two strange problems. This *gharawain* problem first appeared in the time of Umar bin Khatab.

2.3.2. Finishing *Gharawain* Problem According to Jumhur Ulama.

2.3.2.1. If the heirs consist of husband, mother and father (*Umariyah I*).

If a person dies and leaves an heir; Husband, mother and father, then part of each heir is according to the provisions of the Qur'an and Hadith is;

a. Husband receives 1/2 = 3/6 (because the testator does not leave the child).
b. Mother = received 1/3 = 2/6 (because the heir does not leave the child).
c. Father = as' asabah.

Thus, the number of parts husbands and mothers is 1/2 + 1/3 = 3/6 + 2/6 = 5/6. Means the rest of the treasure is 1/6. In accordance with the provisions, then 'asabah get the rest of the property after given the mother and husband, which is 1/6.

2.3.2.2. If the heir consists of wife, mother and father (Umariyah II).

If a person dies and leaves an heir; Wife, mother and father, then part of each of the heirs according to the provisions of the Qur'an and Hadith are;

a. Wife receives 1/4 = 3/12 (because heir does not leave child).
b. Mother receives 1/3 = 4/12 (because heir does not leave child).
c. Father = 'asabah = 5/12

Thus, the number of parts of the wife and mother is 1/4 + 1/3 = 3/12 + 4/12 = 7/12. Means the rest of the treasure is 5/12. In accordance with the provisions, then the 'asabah get the rest of the property after given the mother and wife, ie 5/12.

Actually the completion of the division of inheritance for the two above case forms has been completed, since it has been divided in accordance with the provisions of the Qur'an and Hadith. However, after paying attention and comparing the amount of inheritance received by mom and dad, it appears that the mother's part is larger than the father's part. It made Umar and some friends feel a bit strange and odd, because how can a mother, whose daughter receives more part of the father, who is a man. Instead, the father should get more from the mother, or the male should get twice the female part. This is where the problems arise which then lead to differences of opinion scholars.

To solve the problem of Gharawaini, both first and second, in order for the father to have a greater share of the mother's part, Umar wished by turning the understanding فلأمه الثلث (then the mother got a third), the meaning (الثلث) one third here is not one-third of all (Tsulutsu al-baqiy) after being distributed to dzu al-furud, that is husbands, so that the parts change, that is;

a. Husband gets 1/2 = 3/6
b. Mother gets 1/3 of the rest of the property;1/3 x 1/2 = 1/6
c. Father as 'asabah gets the rest of the property, ie 1/3 = 2/6

Thus, the father as an asabah gets 2/6, twice the mother's part is 1/6.

Then, the result of ijtihad Umar in deciding the matter of *Gharawain* I, followed by the Companions, such as: Zaid bin Thabit, Usman ibn Affan, Ibn Sirrin, Ibn Mas'ud and Ali, onwards became the opinion chosen by Jumhur Ulama, such as; Hasan, Sufyan al-Tsaury, Malik, Abu Hanifa and Shafi'i. The friend who disagrees with Umar's method is Ibn Abbas, he argues that in the settlement of this *gharawain* case does not require takwil, because the guidance of the Qur'an and Hadith has been clear, and no matter if it turns out the mother's part more than the father.

Meanwhile, Ibn Sirrin argues for the settlement of the second *gharawain* case disagrees with Umar, but agrees with Ibn Abbas (Hazm t.th., 260) Because in the second case the father has got more from the mother, though not twice the share mother.

However, in other narrations it is explained that Ali disagrees with Umar. It is as narrated by Ibrahim al-Nakha'i that according to Ali bin Abi Talib, in this case gharawain mother gets 1/3 of all amount of property, not 1/3 of the rest of the property.

As for the basis of Umar's ijtihad here, as Amir Syarifuddin explains in his book, it is merely to avoid the greater part of the mother from the father's part. (Syarifuddin 2008.97) Even Ibn Qudamah in al-Mughni states that the right of the mother should not be greater than the right of the father. (Qudamah 1970, 279) This is also reinforced by Ibn Mas'ud in his statement narrated by al-Musayyab bin Rafi 'from Sofyan al-Tsauri and from his Father and from Waki' that: "God does not show me the excess of the mother from father". (Hazm t.th., 260) The result of ijtihad Umar is felt to meet the rules that have been in effect that the male portion is twice the female portion.

In addition, Ibn Rushd in his book Bidayah al-Mujtahhid explains that the reason of Jumhur Fukaha in the matter is that when the heirs are only fathers and mothers, the mother as dzu al-furud gets a third of the treasures and the father asabah spends the rest of the estate, Ie 2/3. So it should be so in this Gharawaini case, where father gets twice the mother's part. So, as if they think that more maternal acquisition from the father's part is a departure from the basic rules. (Rusyd 2007, 392)

Nevertheless, there are scholars who disagree with Umar's settlement method above, namely Ibn Abbas. According to him, in the matter of this Gharawain, the mother still receives 1/3 of the total property, in accordance with zahir al-Nisa' verse: 11;

لم يكن له ولد وورثه أبواه فلأمه الثلث فإن

(if the deceased had no children and he was inherited by his mother (alone), his mother got a third). Meanwhile, the father as asabah is based on the Prophet's instructions in the hadith which reads:

عن ابن عباس رضى الله عنهما قا ل : قال رسول الله صلى الله عليه و سلم ا لحقوا الفرائض باهلها فما بقي فهو لاؤلى رجل ذكر. متفق عليه

Meaning: Hadith from Ibnu Abbas r.a. Rasulullah SAW. Said: "Give faraid (the part that has been determined in the Qur'an) to the erhak receive it and the rest give to the nearest male family". (HR. Muttafaq 'Alaih).

Thus as 'asabah' father here only receives the excess of treasure after being distributed to dzu al-furud how much it is, ie 1/6. Then Ibn Abbas's opinion is further supported by Shuraih al-Qadhi, Daud Zahiri and other scholars of the Zahiriyah school, such as Ibn Hazm. (Hazm t.th., 260-261)

As for the reasons expressed in reaching the opinion of Jumhur Ulama is, as Ibn Hazm explained the following:

a. Resolving the issue of inheritance outside the provisions is a violation of the guidance of Allah and the Prophet Muhammad.
b. With regard to Ibn Mas'ud's statement of the mother above, Ibn Mas'ud does not know about the virtue of the mother of the father, as is the Prophet's Hadith about the question of a person who is most worthy to receive the goodness of his shuhbah's salutation? The Apostle answered 3 times "your mother". For the fourth time, the Prophet replied "your father". Thus, this Hadith rejects what Ibn Mas'ud expressed.
c. Based on the explanation narrated by Ikrimah, that Ibn Abbas has sent him to meet Zaid bin Thabit to inquire about the inheritance of husband, mother and father. Zaid replied; Husband gets 1/2, mother gets 1/3 of the rest of the treasure. Then Ibn Abbas asked; Is Zaid's answer based on his own opinion or on the basis of the book of God? Zaid replied: It is my own opinion, that mother should not be more than father. Responding to that, Ali said: "if there is a verse related to Zaid on that opinion, of course he will reply that" I say so is based on God's Book. So, instead of saying it based on my opinion.
d. The inconsistency of Umar and Ibn Mas'ud, because in the case of inheritance if the heir consists of; 1 boy, mother and father. The solution is mother and father both got 1/6. Why do not they make a fuss about it? (Hazm t.th., 261-262)

Observing the solution of the *Gharawaini* problem by Umar bin Khatab above which was followed by Jumhur Ulama, seems understandable and considered logical, because 'urf at that time did so. At that time, cultural influences before Islam were still very strong. Before Islam came, women were treated very badly, considered disgrace, contempt and not dignified. Women have no rights and they are treated like goods.

As Allah described in the Qur'an about the reaction of the Arab community of Jahiliyah when hearing the news of the birth of his daughter, their faces are red, because they are very shy and angry. They are wavering between allowing the daughter to live, risking to bear the family's disgrace, or burying the girl alive, in order to cover the family's disgrace. (Surat al-Nahl: 58-59) In this case Umar is one Never did such a nasty thing, before Islam.

Then Islam came to lift the dignity of women. Islam sees men and women have the same degree, which distinguish only their faith only. But on the other hand, Islam regulates that men are female leaders. So also in the household, the man is the head of the family who has the obligation to give a living and protect his family. Culture at the time, women have not had a role like women today. In the past, women played more role in the house only and not many who do economic activities, let alone as the backbone of the family in the problem of living.

Then, if the other reason is taken as the basis of Umar's decision which is then followed by Jumhur Ulama, when it says the meaning of 1/3) فلأمه الثلث of the total property) to 1/3 of the rest of the property is as follows:

a. Because of this gharawain problem, if not ditakwilkan, then the mother exceeds the father. This is considered strange, awkward and inappropriate at the time.
b. With the ditakwilkannya meaning 1/3 (*tsulusu*) from the treasure to 1/3 of the rest of the property, then the father will get more parts, even two parts of the mother.
c. This takwil is done because the composition of the heirs is not as mentioned in sura al-Nisa 'verse 11.
d. Ibn Mas'ud's statement narrated by sofyan al-tauri, that: "God does not show me the excess of the mother of the father", although in this case, it is as if Ibn Mas'ud forgot about the hadith which explains the virtue of the mother of the father.

Thus it can be concluded that Umar's decision in this gharawaini problem, seems very discriminatory. However, this opinion is chosen by Jumhur Ulama of classical age and Jumhur Ulama next. In fact, in Indonesia who tend to have a cultural culture or 'urf different from the Arabs, choose Jumhur Ulama's opinion in the settlement of this *gharawain* case, as in the Compilation of Islamic Law in Indonesia, precisely in Chapter III, article 178 verse 2.

Therefore, for today if the opinion of Jumhur Ulama is applied in solving the *gharawain* problem, there will be parties who are not happy, feel aggrieved because their rights are reduced. Therefore, it is necessary to reformulate Islamic jurisprudence, especially in this matter of inheritance settlement. According to the author, for the present time, simply by re-apply the will of the verse zahir. Therefore Ibn Abbas's opinion seems more in line with the 'urf that applies to Muslims today, if it is' the urf used as an excuse in the adjective verse.

According to the authors are not the instructions of Allah and His Messenger in the Qur'an and Hadith in the matter of the provisions of the right of each heir (*furud al-muqaddarah*) is very clear and Muslims are obliged to follow these provisions. However, due to the influence of the social and cultural conditions prevailing in the Arabian Peninsula at that time-of a very strong patrilineal and male domination, when confronted with the "gharawaini" issue, Jumhur Ulama who adopted the thought of Umar bin Khatab There is an awkwardness, because father, a man, gets less inheritance than a mother, even though it is a provision of nash, then they try to find a way by turning the meaning of the mother's part 1/3 treasure with the meaning of 1/3 the rest of the property (*tsulusu al- Baqi*).

3. Conclusions

From the above discussion it can be concluded that:

3.1. The method used by Umar in his ijtihad about this gharawain problem is the takwil method, in which he turns the meaning of zahir nash 1/3 (tsulusu) from the treasure to 1/3 of the rest of the property.

3.2. Umar's decision followed by Jumhur Fukaha in this gharawaini issue tends to discriminate against women, especially mothers. This can be seen from the reasons underlying his thinking as follows:

3.2.1. When the heirs are only fathers and mothers, then the mother as dzu al-furud gets a 1/3 share of property and father as asabah spends the rest of the property, ie 2/3. So it

should be so in this Gharawaini case, where father gets twice the mother's part.

3.2.2. It is a deviation from the basic rule if the mother more than the father.

3.2.3. This takwil is done because the composition of the heirs is not as mentioned in sura al-Nisa 'verse 11.

3.3. Umar's decision followed by Jumhur Fukaha in this gharawaini matter was strongly influenced by the 'urf or social and cultural conditions prevailing in the Arabian Peninsula at that time which was patrilinial and the dominance of a very strong male.

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The Development of Waqf Regulations In Indonesia

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Abstrak – This paper discusses about the development of waqf regulations in Indonesia during the Dutch colonialism until independent of Indonesia. The finding of this study that the existence of waqf, especially land waqf, in this Archipelago has been done since the establish of muslim communities. Waqf institutions come together with the birth of muslim society because a community generally requires facilities of worship and education to ensure its sustainability. During the Dutch administration, the condition of waqf also stagnated. Some legislation products that have relationship with waqf are Bijblaad 1905 No. 6196, Bijblaad 1931 No. 125/3, and Bijblaad 1935 No. 13480. After Indonesian independence, some legislation products are Government Regulation No. 28 year 1977 about waqf of the owned land, Presidential Instruction No. 1 year 1991 on Compilation of Islamic Law (KHI), Law no. 41 of 2004 on Waqf, PP No. 42/2006, and some Regulation of the Minister of Religious Affairs.

Key Words*: waqf, regulation, Indonesia.*

1. Introduction

Waqf is one of the Islamic financial institutions in addition to *zakat*, *infak* and *shadaqah* that entrenched in Indonesia. Islam as a religious message strongly emphasizes the solidarity of fellow human beings, brotherhood, equality of destiny as creatures of Allah SWT, and common purpose in worshiping Him. One manifestation is through the financial and economic institutions with the aim of helping fellow human beings and fellow faithful (Ali, http://ekisonline.com).

As well known, *waqf* is restraining the origin and flowing the results, (al-Kabisi, 2004: 61). In this way, *waqf* property can be used for public interest and public benefit without losing the original property.

The laws concerning the management of *waqf*, in addition to worship and individual laws, are carried out consistently among muslims. The spirit of *waqf* in classical periode proved able to create a conducive atmosphere for the rise of muslim intellectualism so that Islam reaches the peak of glory.

Abdul Hayy Farooqi stressed that the principles of the Islamic economy are two; *Firstly*, in individual life, Islam aims to create just conditions so that every person is capable of pursuing a clean and decent life. *Secondly*, in social life, all efforts must be mobilized to achieve a balance between individuals and society to achieve a middle ground between the sharp distinction in the economy (Farooqi, 82: 87). *Waqf* institutions, as one pillar of the Islamic economy, also can not be separated from the principles of Islamic economics as Farooqi stated above.

The issuance of the Law of the Republic of Indonesia No. 41 of 2004 AD on *Waqf* directed to empower *waqf* which is one of the instruments in building the socio-economic life of muslims. The presence of *Waqf's* Law is a momentum of *waqf* empowerment productively, because it contains a comprehensive understanding and management pattern of potential empowerment of *waqf* in a modern way.

If in the previous legislation, PP No.28 of 1977 AD on the *waqf* of land owned, the concept of *waqf* is identical with the land owned, then in this new *Waqf* Law the concept of *waqf* contains a very wide dimension. *Waqf* in this new law covers both immovable and movable property, and its use is not limited to the establishment of places of worship. Such this understanding is a very revolutionary change and if it can be realized it will have multiplied effects, especially in relation to the economic empowerment of muslims.

But the effort in that direction is definitely not an easy task. Indonesian Muslims for hundreds of years have already identified *waqf* with (in the form of) land, and are generally more comfortable if reserved for mosques or mushala. Thus, the Law no. 41 of 2004 AD is projected as a means of social engineering, make changes in thinking, attitude and behavior of muslims in order to be close to the spirit of the Law.

For that purpose, the role of government is very important in empowering the function of *waqf* as one of the instruments to improve the economy of the society. The government, through its policies can break-in of rigid public understanding of *waqf*, socializing productive *waqf* and money *waqf*, and participating in maintaining the continuity of *waqf* property. This paper would like to explore further matters relating to the development of waqf regulations in Indonesia after the explanation about the progress of *waqf* in Indonesia and the regulation of *waqf* in Indonesia during the Dutch colonialism and after independent of Indonesia.

2. History of Waqf Developments in Indonesia

Waqf is an Islamic teaching that commonly practiced by Indonesian society for centuries. Tholhah Hasan, as quoted by ANTARA News, saying that the activities of *waqf* are known along with the development of Islamic da'wa in this Archipelago. In addition to the Islamic da'wa, the scholars also introduced the teachings of *waqf*. This is evident from the many historic mosques built on *waqf* land (http://www.antara.co.id/arc/2015/4/22).

Waqf practice is assumed to have existed since Islam became a socio-political force with the establishment of several Islamic kingdoms in the Archipelago since the end of the 12th century AD. At that time there was penetration of the Sufi masters to the archipelago. The role of this Sufi master influenced the local population and contributed to the spread of Islam. Until the 14th century AD, the influence of Sufi propagators in developing Islamic teachings grew wider, and began to enter through the gates of the royal palace in the Archipelago. The strongest evidence is the role of Walisongo when spreading Islam at both area, the palace and the society. Walisongo established mosques and *pesantren* (Islamic boarding schools) which were also known as the first *waqf* institutions that became the seeds for the development of Islamic philanthropy in the next period. In East Java, traditions like *waqf* have existed since the 15th century AD and are actually called *waqf* with the discovery of new historical evidence existed in the early 16th century AD, while in Sumatra, Aceh, *waqf* mentioned began to appear at 14th century AD (Najib, 2006: 72-73).

This *waqf* teaching continues to grow in the Indonesian Archipelago, even in pre-colonial times, colonial times, or post-colonial in the era of Indonesian independent. Some people considered that the period of colonial rule was the momentum of *waqf* activity. Because at that time, the development of religious organizations, schools, *madrasah*, *pesantren*, and mosques are self-supporting and stand on the land of endowments. Unfortunately, the development of *waqf* later did not change significantly. *Waqf* activities are limited to religious activities, such as the construction of mosques, *mushalla*, *langgar*, *madrasah*, and public burial. So that *waqf* activities in Indonesia are less useful economically for the people.

Such above situation continue even when Islam has spread in society and even Islam for some muslims become the main identity compared with the identity of the nation. *Waqf* institution was still not moved from its original designation even the aspect of the welfare of the ummah and the burden of some muslims in the poverty and backwardness chain is very urgent to look for the solution. This condition then spay *waqf* function as an impetus for the welfare of society because most of people tend *waqf unsich* for mosques and religious activities, although this still does not forget the aspects of belief and improving the quality of community's faith. For this reason, some of Indonesian muslims leaders hit upon the idea to develop the wealth of *waqf* in a balanced manner by still paying attention to improve the religious aspects on the one hand and social welfare aspects on the other.

The existence of *waqf*, especially land *waqf*, in this Archipelago has been done since the establish of muslim communities. *Waqf* institutions come together with the birth of muslim society because a community generally requires facilities of worship and education to ensure its sustainability. Such that facilities can be fulfilled by *waqf*, either in the form of land, building materials, or human power endowment.

GF Pijper (1992: 68) describes his vision of *waqf* practices in Indonesia as follows:

> Mosque according to Islamic law is a *waqf*, that is an "institution of obedience". The *waqf* shall not be traded, pledged, inherited and awarded. Because the mosque has the nature of *waqf*, it means that the mosque should always be used for worship by muslims. A mosque should not be dismantled except for the purpose of dismantling and should not be removed.

Pijper's testimony above not only shows the existence of institutional *waqf*, but also the attitude of the Indonesian muslims towards the wealth of *waqf*. They are generally very careful in treating *waqf* properties. To see this attitude closely lets see to Pijper's exposure below (1992: 68):

> "The rules of demolition of mosques according to Islamic law are known here. On the island of Java we often see on the side of the mosque, under a roof, there is a stack of dismantled materials coming from the old mosque. In Sendangduwur, near Pacitan, East Java, for example, there are still parts of the old mosque building made of wood that was dismantled and still remain on the side of the new mosque. Some people also keep that in the replacement of old mosque with the new mosque the materials from the old mosque can still be inserted in to the new mosque building".

The proof of above explanation can be seen from the restoration of Demak Mosque. In the restoration carried out in 1926 AD and later, pieces of wood of mosque buffer known as *soko guru* remained kept and placed in a building next to the mosque. Although unfortunate, there are people who take pieces of wood that can not be used then cut it into small pieces and made amulets. This is a superstitious practice that's not based on the jurisprudence of fiqh.

The different treatment in the management of *waqf* can be understood, because the religious leaders have reference books or books of jurisprudence that are not the same. This is one of the disadvantages of the absence of legislation specifically regulating *waqf*. Another disadvantage is *waqf* property becomes not protected, because the implementation of *waqf* is still very simple. The implementation of the *waqf*. is quite vowed to the *nazir* witnessed by some witnesses. There is no authentic evidence as the administrative proof, so that once the related parties die, the next generation is being confused, and in some cases leads to a dispute.

3. Regulation of Waqf in Nusantara

3.1. Regulation of *waqf* in the kingdom and the Netherlands colonial era:

One of the important factors contributing to the development of *waqf* in modern Indonesia is when the state participates in regulating *waqf* policy through a positive laws. In the process of policy formulation, the vision and direction of *waqf* policy is largely determined by how the government see the potentials and organization of *waqf*s within the framework of their interests and muslims society. In general, *waqf* policy is based on ideological assumptions about the relationship between Islam and the state, as well as the question of how far Islam "may" play a role in the public sphere. These assumptions do not apply permanently because they change over time in line with political changes at the national level as well as the dynamics of political communication between muslims and the state (Najib, 2006: 81).

During the Dutch administration, the condition of *waqf* also stagnated. Although there are many *pesantren* that stand on *waqf* land, or some Islamic organizations that also manage *waqf*, but the role of *waqf* still weak. The regulations issued by the Dutch government are perceived to be very inadequate in sheltering the practice of *waqf* in the Indonesian colony. Some legislation products that have relationship with *waqf* are below:

a. Letter of the Secretary Govermen dated January 31, 1905 no. 435 which is contained in Bijblaad 1905 No. 6196 about Teezicht op den bouw van muhammadaansche bedehuizen. This letter explained that the Dutch government does not intend to obstruct the Indonesian muslims practise their religious needs; restrictions on places of worship is only done if required by the public interest (Djunaidi, et al, 2006, 15-16).
b. Letter addressed to the heads (leaders) in Java and Madura so that the regents make a list of muslim houses of worship in their respective districts. The list must note about the origin of the house of worship, its use, mainly used for prayer jum 'at or not, support facilities, it's has yard or not, *waqf* status or not, etc.
c. Letter (Bijblaad 1931 No. 125/3) on the order for the regents - all not yet exist-made list of

houses of worship used for prayer jum 'at, use and legal status. It is also mentioned that *waqf* (the establishment of houses of worship) require permission from the regent.

d. Letter (Bijblaad 1934 No. 13390) is an affirmation of the letter before. Then the letter (Bijblaad 1935 No. 13480) which is also as affirmation of the letter before. But this last letter contains a few changes that who donate the land should inform the regents, so the regents may write it to the list provided to examined (Mubarak, 2008, 5).

By following Abdurrahman explanation, as quoted by Jaih, it is known the provisions about *waqf* issued by the Dutch government: *first,* the Dutch government calls for the orderly administration of *waqf* to know all the things related to *waqf* land that has been existing before. Practically, this duty is imposed on the regents; *second*, the *waqf* must get permission from the regent; *third*, the regent must be willing to be a mediator if there is a dispute between the muslim about jum'at prayers; *fourth*, because the *waqf* needs permission from the regent, the Dutch government is considered to have intervened too far in the implementation of *waqf*. Against this last point, the rule does not last long, because in the next letter there is no need for permission from the regent, but just notifying the regent of the endowment practice (Mubarak, 2008: 51).

3.2. *Waqf* regulation after the independence of Indonesia

After Indonesian independence, the practice of *waqf* did not experience significant development, and did not get the attention of the government. This can be seen from the absence of regulations that regulate *waqf* for more than 30 years. The rules are impressed just to continue the rules that have been there before. For example, the Ministry of Religious Affairs has issued guidance on *waqf* at December 22, 1953, in which *waqf* becomes one of the authority of the office of religious affairs. After that, there was also a circular letter No. 5 / D / 1956 on October 8, 1956 on the procedure of land *waqf*. This letter meant to follow up the existing rules (Djunaidi, 2006: 16). Although *waqf* has become a very old religious institution, but it is so long not regulated in the legislation of the state. Until then born National Agrarian Law as stipulated in Law No.5 of 1960 on the basic regulations of agrarian principles, and other regulations as a follow-up. After the issuance of this law, land *waqf* has a strong legal foundation.

In relation to land *waqf*, Law No.5 of 1960 Chapter XI on Land Rights for holy and social purposes, article 49 explains:

(1) Proprietary land rights of religious and social institutions insofar as they are used for religious and social enterprises are recognized and protected. Such institutions are also guaranteed to obtain sufficient land for their buildings and businesses in the religious and social aspecs.

(2) For the purposes of worship and other sacred purposes referred to the article no. 14 may be directly granted land that controlled by the State with use rights.

(3) *Waqf* of owned lands is protected and regulated by Government Regulation.

It was not until 1977 that the government issued Government Regulation No: 28 of 1977 on the *waqf* of the owned land. With the issuance of this government regulation, *waqf* activities began to wriggle in Indonesia, although this regulation only legitimize the practice of *waqf* that has been running for a long time that is land *waqf*.

The Government Regulation that protects and regulates the *waqf* of the owned land newly born 17 years later, that is with the issuance of Government Regulation No. 28 year 1977 about *waqf* of the owned land. Later also appeared Presidential Instruction No. 1 year 1991 on Compilation of Islamic Law (KHI) in Indonesia which consists of three books, the third book is a matter of *waqf* law. The issuance of KHI is very strategic as a guidance of religious courts in deciding the problems of *waqf* that arise in the society. But this KHI is not sufficient to accommodate the development of Islamic contemporary thought and practice on *waqf* in Indonesia.

Tholhah Hasan as quoted by Antara News explained that PP No. 28 year 1977, not much different from the *waqf* model in the early period, identical with the land *waqf*, and its use was also limited to religious social activities, such as mosques, cemeteries, madrasahs, and others. The land *waqf* seen to be still consumptive and less to accommodate the economic interests of Muslims (Hasan, http://www.antara.co.id/arc/2009).

The stagnation of the development of *waqf* in Indonesia according to Tholhah Hasan (2009), began develop significantly in 2001 when some Islamic economic practitioners began to introduce new paradigm into the community about the new concept of cash *waqf* management to improve the welfare of the ummah. The concept is interesting and able to provide energy to break the stagnation of the development of *waqf*.

Then in 2002, the Indonesian Ulama Council (MUI) welcomed the concept by issuing a fatwa allowing cash *waqf (waqf al-nuqud).* The MUI fatwa was then strengthened by the presence of Law no. 41/2004 on the *waqf* which states that *waqf* is not only non-scattered objects, but can also be moving objects, such as money.

In addition, also regulated the policy of *waqf* in Indonesia such as the formation of nazhir and the management of *waqf* property. In order to carry out its function, this Law still needs other tools, namely Government Regulation and Minister of Religious affairs Regulation (PMA) on Money *Waqf* which will be the implementation guidance, and the Indonesian *Waqf* Board (BWI) which will serve as the central nazhir *waqf*.

Ironically, the Government Regulation of 1977 lasted long enough and no other rules were set up until 2004. Due to the lack of regulation governing on *waqf*, it is not surprising if the development of *waqf* in Indonesia stagnated. Law no. 41 of 2004 on *Waqf* is a milestone of the realization of productive *waqf* as a basis for economic empowerment of the ummah. One consideration of the enactment of the law is that the *waqf* institution as a religious institution with potential and economic benefits needs to be managed effectively and efficiently for the benefit of worship and to promote the welfare of the people.

Although quite a number of *waqf* institutions are standing, but only few *nazhir* is able to manage the *waqf* properties optimally. So it can be said that the development of *waqf* in Indonesia has not been able to contribute to improve the welfare of the people.

After going through a long process, at the end of 2006, PP No. 42/2006 on the implementation of *Waqf* Law issued.. Then, in July 2007, the President signed the Presidential Decree of the Republic of Indonesia No. 75 year 2007 which decided and raised the membership of BWI period 2007-2010.

Furthermore, for Law no. 41 year 2004 can run well, then some regulations appear as below:

a. Minister of Religious Affairs Regulation no. 4 year 2009 on the administration of *waqf* money registration. Article 5 paragraph 2 of this rule is mentioned that in order to register the money *waqf*, then the *waqif* candidate must submit some evidence that is 1). Identity of LKS-PWU, *waqif, nazhir*, and witnesses; 2). The nominal amount of money *waqf*; 3). The origin of money; 4). Allocation of *waqf*; 5). Term of money *waqf*; 6). Money *waqf* certificate number; and 7). Registration number.
b. Regulation of the Minister of Religious Affairs on Determination Shari'a Bank as a financial institution that receive endowments money. Some of these rules include:
    1) Regulation of the Minister of Religious Affairs Number 93 Year 2008 regarding Stipulation of Bank Muamalat Indonesia as LKS-PWU
    2) Regulation of the Minister of Religious Affair Number 95 Year 2008 concerning Stipulation of Bank Syari'ah Mandiri as LKS-PWU
    3) Regulation of the Minister of Religious Affairs Number 96 Year 2008 regarding Stipulation of Bank Mega Syari'ah as LKS-PWU
    4) Regulation of the Minister of Religious Affairs Number 94 of 2008 concerning the Establishment of Bank DKI Jakarta as LKS-PWU
    5) Regulation of the Minister of Religious Affairs Number 80 Year 2010 concerning Stipulation of State Savings Bank Syari'ah Division as LKS-PWU
    6) Regulation of the Minister of Religious Affairs Number 81 Year 2010 concerning the Stipulation of Bank BPD of Sharia Business Unit of Yogyakarta as LKS-PWU
    7) Regulation of the Minister of Religious Affairs Number 82 Year 2010 regarding the Establishment of Bank Syari'ah Bukopin as LKS-PWU
    8) Regulation of the Minister of Religious Affairs Number 177 Year 2010 concerning the Establishment of Bank BPD Jateng as LKS-PWU

9) Regulation of the Minister of Religious Affairs No. 178/2010 concerning the Establishment of Bank BPD Kalbar as LKS-PWU

10) Regulation of the Minister of Religious Affairs No. 179/2010 concerning the Establishment of Bank BPD Riau as LKS-PWU

Based on the above history of political law, it can be said that there has been a change of *waqf* arrangement, from the beginning only exist in the 2 articles of Agrarian Law, then became PP *waqf*, and KHI, and last became the Law in 2004. The last regulation is more comprehensive and better than previous legislation. More over, the graduality and different management arrangements between the new Law and the previous also seem to indicate that the new type of *waqf* get the serious concern since the reform period. Clearly, the government's lack of attention to the development of *waqf* since the beginning of independence until the 80's era. It was not until the early of 90's that KHI appeared, one of his books is on *waqf* (book III). And it takes more than 20 years for *waqf* to be regulated in legislation (MoRA, 2005: 118).

4. Conclusion

The conclusion of this paper that the existence of *waqf*, especially land *waqf*, in this Archipelago has been done since the establish of muslim communities. *Waqf* institutions come together with the birth of muslim society because a community generally requires facilities of worship and education to ensure its sustainability. During the Dutch administration, the condition of *waqf* also stagnated. Some legislation products that have relationship with *waqf* are Bijblaad 1905 No. 6196 about Teezicht op den bouw van muhammadaansche bedehuizen, Bijblaad 1931 No. 125/3, Bijblaad 1934 No. 13390, and Bijblaad 1935 No. 13480. After Indonesian independence, some legislation products the practice of *waqf* are Government Regulation No. 28 year 1977 about *waqf* of the owned land, Presidential Instruction No. 1 year 1991 on Compilation of Islamic Law (KHI), Law no. 41 of 2004 on *Waqf,* and PP No. 42/2006, and some Regulation of the Minister of Religious Affairs.

In our opinion, the above conditions are likely related to the *secular state* policy initiated by the Dutch colonial government and maintained literally until the middle period of the new order. This political policy seeks to marginalize the teachings and practices of Islam as a public power, especially political and economic.

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Religious Law as a Tool of Exploitation and Politicization

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Abstract–When humans interpret passages in the texts of religion with passions without the use of reason and conscience, it is for the sake of symbols, power, pride, and personal piety aside from social piety. Religious law is made only by human persons as a means to exploit and politicize others. Many philosophers who have criticized religions claim that God is an illusion and also believe that religion is a tool of power that is always present and used in social relationships. Religion became an escape in human disability. There are two things that can be concluded. *Firstly*, the existence of religion is not wrong, but what is wrong is the understanding of_scriptures and the religious attitude that needs to be improved. *Secondly*, there needs to be a review of the understanding and religious attitude born from the sacred texts of religion in order to be internalized in accordance with it's context so as to manifest the spirit of religion that is the *maslahah.*

Key Words: *relegion; exploit; politicize.*

1. Introduction

The more frequent hand-catch operation (OTT) by the KPK against bureaucrats and party politicians fulfills Indonesian politics and entertainment. Many of them had previously been the loudest people to lead anti-corruption movements, but when they entered the circle of power, they became the most sadistic people, stepping on people's trust and greedily robbing the wealth and assets of the country. Ironically, the majority of them identify as Muslims on their ID cards, or even in the reality of their lives they are religious and devout.

Allah Almighty indeed descends the scriptures through his messengers to be used as a guide, but in order for these instructions to be practiced in the way that Allah taught, man is obliged to use reason and heart. If scripture alone can automatically "Islamize" a person, then one can annotate that when the holy book is given to an animal, it becomes a devout Muslim. But the reality is not so. It is, therefore, increasingly clear that reason and qalbu are the media or the ultimate stewardship of a person towards the Islamic caliphate's qualities. Scripture only provides its way and its signs, but if it is not captured and processed by reason and lived with the heart, then the book is only a dead object. Therefore, God always challenges his people with the words: "if you all want to think".

In empirical reality, not all human beings are able to integrate the mind and heart in reading and living and then internalize the values of scripture in his life properly and correctly. Other than reason and heart in man, there is lust, whose tendency leads and invites us onto negative things that contradict the noble values in scripture. The real demand is that man must use his mind and heart to reconstruct his consciousness, and to rely on the objective world in an ideal direction according to the teachings of scripture. If humans interpret the verses in scripture only because of their desire, and not by reason and heart, then the interpretation is only for the benefit of symbol, power, pride, and personal piety, putting aside social piety. In other words, religion is only made by the human person as a tool to exploit and politicize others.

Given the unilateral use of religious law by elite classes, physical coercion should not be used to create subordinate subjects of obedience. Religious law does not eliminate domination, but what happens is that the dominated party is not aware of their own condition and infliction on society. This is the implication of the effective use of religion by the ruling class. The role of such religious laws do not escape the socialization of

beliefs and values through the institution of the family, the educational system, and to the mass media that are entirely within the control of the elite capitalists.

2. Criticism of Religion and Religious Attitudes

Karl Marx relates alienation to the infrastructure or social foundation (which Marx says is economic - and with supra structures standing on the infrastructure), which according to Marx is religion. As a belief system built on an economic basis that gave rise to alienation, religion played a major role in the process of alienation of the people (the proletarian majority) as a result of the domination of the bourgeoisie (the owners of capital). They only get a perfunctory wage and have to work hard in a long time without secured welfare and health. They become poor and no longer free to choose a job. Religion, in this case, has served the interests of the elite community of capitalists and on the other hand has turned the majority of society (the working class) from the issues encompassing it with the doctrine of a happier life expectancy in the Hereafter.

The belief in a religion as an ideology is vulnerable to the interests of domination and exploitation in every dimension of life, especially in the political sphere. Supported by the blind adherence of the leader, religion becomes a tool for the group's interests to legitimize power. Therefore, the approach to religious figures before an election becomes a habit that we often see as one of political behavior.

While the people of the exploited class can be retained by their various physical compulsions, they will be more subdued when their own thoughts. Their own ideas and beliefs-have trapped them in a false consciousness. Marx saw this in a case in Germany, where religion intervening with the bourgeoisie became a means to legitimize a class-based production system and obscure the reality of the consequences of human consciousness. This is the beginning of Marx's idea that religion is an opiate, which can lull man into a false consciousness that hinders the creation of social liberation and class struggle. Religion as a representation of ideology has a role to preserve existing structures. Without such support, the structures under which the capitalists are empowered will be destroyed by themselves. Marx's view that the defendant or the guilty is a religion in this matter is certainly not entirely acceptable because in fact, that in the level of his ideality and existence (religion) is something that must be believed in holiness and nobleness, while the wrong is precisely the understanding and the religious attitude of the human okamun itself in actualizing its religion. Therefore, religion is not in the wrong.

3. Politicization of Religion

In a historical and sociological perspective, the politicization of religion develops when a particular religious community undergoes a process of marginalization in an ever-changing life. The inability to respond to life makes them affirm their identity through religious symbols and attributes. Through that affirmation, they differentiate themselves from other groups. At the same time, they will feel that they have some new energy to fight against groups or people who have been accused of causing their helplessness. In addition, such conditions can also occur when the ruling regime wants to perpetuate its power so as to seek its legitimacy on religion. With the legitimacy of religion, the power it holds is manifested as a divine decree that can not be inviolable, and must be obeyed absolutely. For example, in some areas, rules are applied to every candidate for Governor, Regent, and Mayor to be able to read the Qur'an. Islam as the religion of majority is usually used as a *hujjah* (argument) to justify the practice. Because of this rule, the majority is no longer a '*rahmatan lil alamin'*. It is simply a language that translates political libido, power of passion, or worldly lust. The effect of the projection is the split. Such rules continue to widen the gap between majority and minority, political rights as citizens become increasingly difficult to obtain, and in the end, the majority will gather to the central circle while minorities remain on the periphery.

On the contrary, religion was used as an instrument of political power. For example, the objective violent fatwa issued by MUI (Indonesian Council of Ulama) is nothing but the form ofreligion conspiracy with power. When politics has a deficit of trust, religion patches it. New Order era did the same thing. All Islamic groups are united in a party vessel to keep the regime safe and secure. Ethnic conflicts are then wrapped up with religious issues, so that human rights violations become biased and even invisible.

Religious politicization makes the substance of religion will be lost from its universal value. Religious are subjugated into temporal, local, or sectarian interests. Religion is a tool of interest for a particular group of people, whether it be a handful of ruling elites, opposition groups, or clerics themselves. Each of them makes religion merely a reactive doctrine to affirm ambition, interest, and to suppress differences against everything that is considered contrary to or different from their views or interests (Maliki, 2010:64-65).

The issue of religious politicization is nothing new. In the realm of Islamic law or the jurisprudence of fiqh, religious politicization has been going on since the rule of the Umayyads to present day. This is due to the social-political conditions that surround it. Claims are put in place by the political and religious authorities who claim to be the holder of the power of religious law. As Syahrur quoted by Fanani,"Islamic law or fiqh relics of the past is the result of the interference of great political authority and religious authority by putting aside the aspirations and contexts of society at large," (Fanani, 2011: 290-291).

4. Religion and Hegemony Patriarchy

Most people in this world claim to use more patriarchal culture. Patriarchal culture is a culture that gives men more power than women. In this patriarchal form of kinship, men are placed in positions of power while women are suppressed into a subordinate position. There are many instruments that reinforce male domination against women with all forms as a type of oppression, thus delivering bitter experiences to many women. The superior male power is applied in various ways, such as the ideology of patriarchal culture to the masculinization of religious meanings, which has formed a lame awareness of the existence of women. Awareness built so firmly and almost without resistance from women. The existence of religion as a means of legitimizing the "male empire" is very effective in strengthening the subordinate position of women. Through religion and in the name of God, men have "sold" their religion to maintain power. This can be seen more clearly in the reference of Islamic legal law in pesantren, which is a yellow book that is generally followed by pesantren, describing women as half-priced beingsin comparison to men.

Some of the laws or rules contained in the Islamic religion and tradition that can be classified as gender discrimination include placing men in higher positions than women, especially in a family of husbands are family leaders. Therefore, boys are considered to have a higher value than girls in many cases. Boys are consideredprospective leaders, so it is fair to get more or different treatment than girls. The distinction between men and women actually will not cause problems if they do not involve dissolution in terms of obligations and rights. However, socio-cultural problems that occur in most Indonesian people who embrace Islam must adhere to the teachings of Islam in social interaction between men and women. As mentioned, men are leaders for women.

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِلْغَيْبِ بِمَا حَفِظَ اللهُ وَاللاتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ فَإِنْ أَطَعْنَكُمْ فَلا تَبْغُوا عَلَيْهِنَّ سَبِيلا إِنَّ اللهَ كَانَ عَلِيًّا كَبِيرًا

Men are the maintainers of women because Allah has made some of them to excel others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as Allah has guarded; and (as to) those on whose part you fear desertion, admonish them, and leave them alone in the sleeping-places and beat them; then if they obey you, do not seek a way against them; surely Allah is High, Great.

Based on this verse, the position of a man is higher than a woman, so the obligations and rights are different too. This distinction of duty and right is not regarded as an injustice or an imbalance for those who accept what it is, because it is a rule to be obeyed. Of course, it will be different when there is someone or a group of women who feel that the rule is considered unjust and harming him to achieve a goal. For example, the wishes of women to become chief executive is hindered by these provisions.

Furthermore, in relation to marriage there is a verse which suggests that: marry women (other women) you love two, three or four. Then if you are afraid that you will not be fair, then marry only one.

وَإِنْ خِفْتُمْ أَلا تُقْسِطُوا فِي الْيَتَامَى فَانْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَى وَثُلاثَ وَرُبَاعَ فَإِنْ خِفْتُمْ أَلا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ

أَيْمَانُكُمْ ذَلِكَ أَدْنَى أَلا تَعُولُوا

And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four; but if you fear that you will not do justice (between them), then (marry) only one or what your right hands possess; this is more proper, that you may not deviate from the right course

This verse can mean that a man as a fair man may marry more than one woman at the same time (polygyny). This pattern of polygynous marriage justified by the Islamic religion can thus be motivated by various motivations, such as the object of covert greed or other exploitation. Being for a woman who can be fair, there is no verse that justifies being married to more than one man at the same time (polyandry). Based on that verse then, the parent who is Muslim is directly or impossible? will interpret and practice the teaching by educating his / her son so that someday, they can be a fair and good leader for his wife and children, responsible for adequacy of clothing, food, shelter, security, happiness, and the formation and welfare of family members,'sakinah mawadah warohmah'. To be responsible, parents are obliged to teach children, to earn a living, lead a strong, fair family and so on. While the position of women as a family member must accept the position of husband as a leader who at the same time accept her position as devoted.

Therefore, Muslim parents should teach their girls to obey and serve their husbands, and be good mothers for their children. The teachings of religion other than Islam are basically not much different where the position of men is higher than women, therefore obligations and rights should be distinguished. This is not intended to cultivate injustice, but must be interpreted as a proportional division of labor in order to realize the harmony of family and society.

Associated with the division of inheritance there is a clear provision in the holy book of al-Qur'an sura al-Nisa' verse 11

يُوصِيكُمُ اللهُ فِي أَوْلادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الأُنْثَيَيْنِ فَإِنْ كُنَّ نِسَاءً فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ وَإِنْ كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ وَلأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ فَإِنْ لَمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَهُ أَبَوَاهُ فَلأُمِّهِ الثُّلُثُ فَإِنْ كَانَ لَهُ إِخْوَةٌ فَلأُمِّهِ السُّدُسُ مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ آبَاؤُكُمْ وَأَبْنَاؤُكُمْ لا تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفْعًا فَرِيضَةً مِنَ اللهِ إِنَّ اللهَ كَانَ عَلِيمًا حَكِيمًا

Allah enjoins you concerning your children: The male shall have the equal of the portion of two females; then if they are more than two females, they shall have two-thirds of what the deceased has left, and if there is one, she shall have the half; and as for his parents, each of them shall have the sixth of what he has left if he has a child, but if he has no child and (only) his two parents inherit him, then his mother shall have the third; but if he has brothers, then his mother shall have the sixth after (the payment of) a bequest he may have bequeathed or a debt; your parents and your children, you know not which of them is the nearer to you in usefulness; this is an ordinance from Allah: Surely Allah is Knowing, Wise.

If it is understood textually, then the division of inheritance mentioned above clearly demonstrates that boys are more benefited than girls, through the wording that boys get a 2-fold share of the share given to girls. In order to avoid any gaps in understanding the above verse, it is necessary to use textual and contextual approaches in a comprehensive and profound manner. For example, using the approach used by Syahrur, the theory of limits / hudud (Fanani, 2011:278-284).

Furthermore, with respect to the rules of congregational prayer (shalat jamaah), a man's prayer is illegitimate if the priest (imam) is female. Priest women may only be followed (ma'mum) by women only. Whereas if the priest is a male, then his followers may be male and. In the congregation prayers which accommodate to males and females, the first sof is occupied by the adult male until the last sof of the boy. Behind the sof of new boys may be occupied by adult women until the last sof is for girls (Rasjid, 2006 : 113). In the above mentioned congregational solicitation, it is clear that there is gender discrimination, where adult women, who are fluent in the teachings of the religion, do not even have the right to become a male priest. In addition, even sof or row of solatpun positioning of adult women behind the boys sof boy demonstrates gender discrimination. Thus, it seems clear that even though women are very eloquent andhave mastered the pillars of prayer, they still have no right to be a leader or a prayer priest in congregation with men.

5. Patron-Client in Pesantren

Indonesia, as an agricultural and maritime country, has a great cultural diversity. This cultural awareness is also reflected in religious relations, one of which is Islam. In Indonesia, Islam is the religion that has the most supporters. Even Indonesia is the largest Muslim country in the world.

With so many people in Indonesia who embraced Islam, there was an adaptation with local culture. This adaptation allowed the emergence of a 'compound' between the teachings in Islam and the noble Indonesian local culture (without prejudice to the meaning of the sacred teachings within Islam itself).

The process of adaptation between Indonesian local culture and the sacred teachings of Islam is then called the Cultural Islam. One of the patterns of adaptation of Islamic Culture in Indonesia can be seen in the boarding school (*pesantren*) environment, which is a non-formal education institution. The system of education in boarding schools is to integrate between the Islamic sciences and general science.

The boarding school (*pesantren*) is a traditional educational environment in which students live together and learn under the guidance of teachers who are better known as *kiyai* and have a dormitory for housing, *santri*. The *santri* are in locationsthat also have access to mosques for worship, a study space, and other religious activities. This location is usually surrounded by a wall to be able to monitor the entry of the *santri* in accordance with applicable regulations (Dhofier, 2011:38-41).

Generally, a boarding school starting from the existence of a *kiyai* somewhere, then come *santri* who want to learn religion to him. At that time, the *kiyai* did not plan how to build his cottage, but how to teach religion to be understood and understood by *santri*.

Over time, the patron-client relationship between *kiyai* and his *santri* fosters social interaction with each other. If at first kiyai-*santri* relationships are limited to teacher and student relationships in the field of religion or in the development of patron-client relationships between *kiyai-santri*, there exists a shift.

The pattern of interaction / relationship between *santri* and *kiyai* / uztad can be called patron-client. The characteristics of the relationship are in the absolute respect for patron and patron domination to his clients. Emotional relationships between *kiyai* and his *santri* are very thick, and the *Santri* will be very offended) if there are people / other parties who treat the *kiyai* out of his place. In any model relationship, the exploitative factor, the higher 'exploit' of the lower party in the social structure, must exist (Ida, 2004: 5). The emergence of an emotional connection and exploitation in the patron-client context, indicates the interaction of (social) *kiyai*-his *santri*.

The existence of *kiyai* in the midst of *santri* and the surrounding community can almost be equated with the position of the king in Java, where the king has an important role to direct and guide the community (Ida, 2004: 2). *Kiyai* in the eyes of *santri* and the community have a role and share in directing and determining their steps and attitude of life forward(for example, from the problem of dating to work and others).

6. Conclusion

Many philosophers have criticized religions: Karl Marx stated that religion is opium; Ludwig Feuerbach, who claimed God is not creating human, but human creates God; Or Sigmund Freud in the theory of our father rejection. In addition to wishing to state that God is an illusion, they also want to emphasize that religion is a tool of power that is always present and used in social relationships. The concept of patience, *zuhud*, *wara*' and the things of the hereafterare considered by Feuerbach as a concept that keeps people alive in their ability to change the world. Religion became an escape in human disability. God has been placed as a *dalang* (director), by which man is in a passive state.

From these opinions, there are two things that can be concluded. In fact, religious integrity is not wrong; it is the understanding and attitude of the religious people who need to be straightened out. And thus there needs to be a review of the understanding of religion and religious attitudes derived from the sacred texts of religion to be internalized in accordance with the context so that the realization of the spirit of religion that is to realize the *mashlahah* in the life of the world and the hereafter.

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