

Formalization of Islamic Law Into National Law in Indonesia: Between Dogma, Democracy and Human Rights

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Introduction

Indonesia is a predominantly muslim country with 240 million inhabitants (86% or around 207 millions are muslim in 2009¹). With its enormous muslim population, Indonesia was considered as the largest muslim country in the world in 2012, surpassing Pakistan (178 millions muslim), India (177 millions muslim), Bangladesh (145 millions muslim), Egypt (80 millions muslim), Nigeria (76 millions muslim), Iran (75 millions muslim) and Turkey (74 millions muslim). There are almost as many Muslims living in Indonesia as in the entire Arab-speaking world combined. Sunni Islam is the predominant branch of Islam in Indonesia.²

Out of Indonesia's 33 provinces, 27 are Muslim-dominated. The provinces of Aceh, Riau, West Sumatra, Kepulauan Riau, South Sumatra, Lampung, Banten, West Java, Central Java, Yogyakarta, East Java, South Kalimantan, Gorontalo, and West Nusa Tenggara have Muslim populations consisting of over 90%.³ A survey conducted by Pew Global Attitudes shown that Indonesia is country where its inhabitants are considered as the most religious people in the world.⁴

However, Indonesia is neither a Muslim country nor a secular one, but a country which tries to accommodate its diverse population in a harmony and coexistence.⁵ Besides of Muslim inhabitants, there are significant minority groups, including Protestant Christians, Catholics, Hindus and Buddhists. In terms of ethnic diversities, besides the Javanese and Sundanese ethnics groups (the two largest ethnicities in Indonesia), there are also significant numbers of people of Chinese and Arabic descent.

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¹ According to National Geographic Indonesia, Vol. 5, No. 10 (2009), pp. 82 – 88.

² Michael Buehler, "Islam and Democracy in Indonesia", in *Insight Turkey*, Vol. 11, No. 4 (2009).

³ See *National Geographic Indonesia*, Vol. 5, No. 10 (2009), pp. 86 – 87.

⁴ See *Ibid.*

⁵ In relation to Islamic apprehension by Indonesian Muslim, Abdullahi Ahmed An-Naim argued that Indonesia considered as the most populous country in the world since the Indonesian Muslim have different apprehensions and practices compared with those in other countries. Even though, at the same time, Indonesian Muslims also consider themselves as 'Muslim' at their own way: traditional, pluralistic and open to the differences, though there is also some development of Wahabism in Indonesia. See Abdullahi Ahmed An-Naim, *Islam adan Negara Sekular. Menegosiasikan Masa Depan Syariah*, Bandung: Penerbit Mizan (2007), p. 394.

Indonesia is also the world's third largest democracy after India and the United States of America. Since the authoritarian regime of President Suharto collapsed in 1998, the most immediately visible change in Indonesian politics has been the implementation of an extensive regulatory framework that directs both executive and legislative elections. In April 2009, Indonesia conducted its third legislative election of the post-Suharto era. As in 1999 and 2004, the recent election featured a nationwide legislative election for the national parliament, the senate-like Regional Representative Assembly, and for the parliaments at the provincial, district and municipal level. Furthermore, direct elections for regents and mayors were held in 486 out of 510 regencies and municipalities and gubernatorial elections were held in 15 out of 33 provinces throughout the last few years. By the end of 2008, all the leaders of sub-national executive governments had been directly elected by the Indonesian people.⁶

In addition to the introduction of elections, which were all regarded as reasonably free and fair, the independence of the media was restored while various reform initiatives strengthened human rights and increased opportunities for the political participation of civil society. In short, overall development throughout the last decade points towards ever expanding democratic freedom for Indonesian citizens.⁷ These developments are reflected in the position Indonesia currently holds in democracy ratings where it was given the highest ranking of all Southeast Asian countries in the latest report of Freedom House (categorized as 'free').

The Indonesian Constitution of 1945 (Undang-Undang Dasar 45) clearly mentions that Indonesia is a country based on law and established the idea of *unity in diversity* (Bhinneka Tunggal Ika). Though it believes in *One Supreme God* (Ketuhanan Yang Maha Esa), it acknowledges all religions and beliefs equally. Nevertheless, the idea of an Islamic State and Islamic Shariah as an integral part of national law has existed in some quarters since before the Independence of the Republic of Indonesia on August 17th, 1945.

Article 1 of the Indonesian Constitution 1945 clearly states that the State of Indonesia shall be a unitary state, with the form of a Republic. Sovereignty is vested in the people and implemented pursuant to the Constitution and the State of Indonesia is based on the rule of law.

This article would like to explore about how Indonesia manages its diversities and heterogeneities amid the fact that the country is the largest Muslim country in the world and, at the same time, the third largest democracy in the world after the US and India. There is a notion that Islam and democracy could not work together.⁸ Both are in a relationship fraught with problems as the former, allegedly, does not allow secular law to be put above divine law or accept the legitimacy of worldly authorities.⁹

⁶ See Buehler, "Islam and Democracy in Indonesia", p. 2.

⁷ See *ibid*.

⁸ Abu Bakar Ba'asyir, Indonesian prominent Muslim preacher who is currently in prison, asserts that parliament and courts are part of insult to the God (Allah). He believes that Al Qur'an, Muslim holy book, is all that Muslim need and that Islam and democracy could not live coexistent. See National Geographic Indonesia, Vol. 5. No. 10 (2009), p. 88.

⁹ See Buehler, "Islam and Democracy in Indonesia", p. 1.

Jakarta Charter and the Development of Islamic Law

Islamic laws have been partially implemented in Indonesia since the country's independence along with secular laws (originating from Western Europe) and customary laws. Islamic laws in Indonesia have had a long path of development, appearing previous to independence in 1945, during Dutch Colonialism and before. However, real development and formal recognition of Islamic laws in the national legal system, occurred after independence, and is still in development today. Sharia is believed to have been introduced to the Indonesian archipelago (long before the nation of Indonesia existed) as long ago as the 10th-11th centuries, at the same time as Islam began to make inroads in the region. The first institution which introduced Sharia law to what is today Indonesia was the Islamic Sultanate of Perlak and Pasai (currently situated in Aceh province) and subsequently Islamic sultanate of Aceh.¹⁰

The first significant national law heavily influenced by Islamic law is Indonesian marriage law No. 1 year 1974. The law is actually a national law but many of its provisions are clearly derived from Islamic Law. The provisions of polygyny, religious marriage, divorce settlements and children status are influences of Islamic Law on national marriage law.

In Indonesia, where Sharia covers Islamic rituals and mostly social issues, a network of 330 religious courts across the country adjudicate on marriage, inheritance and other domestic disputes. Under the 1974 Marriage Law, Muslim couples are obliged to settle their differences in the Religious Court, which decides on child custody (usually awarded to the mother) and the division of property. Appeals can go all the way to a handful of religious judges who sit on the Supreme Court.¹¹

Following the Marriage Law of 1974, the country enacted Indonesian Law on Islamic Court No. 7 in 1989, the Islamic Family Law Compilation in 1991, the Law on Zakat (alms) No. 38 in 1999 (later amended by Law No. 23 in 2011), the Law on Wakaf (endowment) No. 41 in 2004, the Law on Islamic Banking System No. 21 in 2008 and Law No. 19 in 2008 on State Sharia Obligation (Sukuk), the Law No. 3 in 2006 (amended by Law No. 50 in 2009) on extensification of jurisdiction of Islamic court from family laws affairs to Sharia economic disputes.

Islamic law is considered as the material legal source of Indonesian national law. The role of Islamic law in private and economic matters has been formally accepted for quite a long time. Its role in criminal law, however, is still debatable and has endured many criticisms.¹²

While the aforementioned laws deal mostly with family and economic affairs, the Islamic laws in Aceh Province has gone further by introducing local ordinances/ by-laws in Islamic Criminal Laws ruling in specific jurisdictions namely: adultery (zina), gambling (maisir), alcohol (khamr), and *khalwat* (unmarried men and women mixing in social

¹⁰ A. Saifullah, *Khilafah dan Jejak Islam Kesultanan Islam Nusantara*, Bogor: Pustaka Thariqul Izzah 2011, p. 1.

¹¹ See John McBeth, "The Case for Islamic Law", in *Far Eastern Economic Review*, Vol. 165, No. 33 (2002), pp. 12-15.

¹² See Topo Santoso, "Implementation of Islamic Criminal Law in Indonesia: Ta'zir Punishment as a Solution?", in *IIUM Law Journal*, Vol. 19, No. 1 (2011).

settings), and (in 2009) introducing stoning as a form of capital punishment (rajam) for adultery offenders and the amputation of hands as punishment for theft. However, these provisions have not been officially implemented yet due to heavy criticism from public.

The notion of Islamic Law as a part of national law can be traced back to the constitutional debates of 1945, shortly before the proclamation of independence. At that time, some Muslim scholars and Indonesian 'founding fathers' proposed a constitution draft titled *Piagam Jakarta* or the Jakarta Charter.

The charter was an important part of the founding of the Republic of Indonesia. It was initially written in the Charter that "the state is based upon (Belief in) the One God Almighty, with the obligation for Muslim to exercise Islamic Sharia" (on themselves). During the announcement of the Indonesian Constitution on August 18, 1945, this latter phrase was removed, and the altered text read: "The State is based upon (Belief in) the One God Almighty. This deletion has resulted in a lengthy constitutional debate - one which has lasted until present.¹³

The phrase 'with the obligation for Muslims to exercise Islamic Sharia' (on themselves) refers to obligations which are imposed by the state, by means of laws and regulations, upon Muslim citizens. This is because Sharia (Islamic Law), in its implementation, can be divided into two parts. The first part is Sharia which does not require state power for its implementation, and which is left to the individual obedience of individual Muslims. Actually, all of Islamic law relies heavily upon individual Muslim obedience, but there is another particular part of it which it is the duty of the state to execute. This second part consists of obligations which are imposed by the state upon individuals as a part of enforcing the laws of a sovereign nation.

In the Decree of the President of the Republic of Indonesia (RI), regarding the return to the Indonesian Constitution of the Year 1945 (UUD 1945), former President Soekarno stated, among other things: "That we are of the belief that the Jakarta Charter, dated 22 June 1945, is the inspiration behind the UUD 1945, and is an integral part of this constitution."¹⁴

From this paragraph it can be understood that the legal stipulations regarding the obligation to observe Sharia on the part of citizens who are Muslims is still in effect, even though due to political consideration the text of that phrase (seven words in the original Indonesian) was removed. As this legal stipulation is still in effect, this is precisely what has led to the sporadic appearance of a number of laws, regulations and institutions which exhibit nuances of Sharia.¹⁵

If we take a look at the laws connected with Islam which have been produced during the existence of the Indonesian Republic, it turns out that the terms "Islamic Law" and "Islamic Sharia" (or just "Sharia" or "Shariah") have been used interchangeably. After the Jakarta Charter, the precedent for the use of the term *Sharia* within Indonesian Law appeared in Law No. 10 of 1998 which replaced Law No. 7 of 1982 on banking, where it states in Article (1) clause (12) that: "Financing as based on the Principles of Islamic

¹³ See Rifyal Ka'bah, *The Jakarta Charter and the Dynamic of Islamic Shariah in the History of Indonesian Law*, Jakarta: University of Indonesia 2006, p. 6.

¹⁴ Ibid., p 7.

¹⁵ See *ibid.*

Shari'ah is the provision of money or equivalent redeemable notes which are based on an agreement or authorization between banks and other parties which obligate the party which is provided the financing to pay back the monies or redeemable notes within a predetermined period of time accompanied by compensation or a share of the profits."

Article 1 clause (10) of this law states that:¹⁶

Shariah principles are contractual regulations which are based on Islamic Law, between banks and other parties, for the depositing of funds and/ or the financing of business activities, or other activities which are stated to be in accordance with the Shariah, among them, financing based on the principles of profit-sharing (mudarabah), participating capital (musharakah), sale of goods of profit (murabahah), or the financing of capital goods based on the principles of renting (ijarah), or by existence of an option of transfer of ownership of the property rented from the bank by another (third) party (ijarah wa iqtima).

The article mentioned above clearly explains that what is meant by "Shariah Principles" are contractual regulations which are based on Islamic Law. So the term Shariah here is equated with Islamic Law.

Long before this, on June 10th 1991, the Compilation of Islamic Law in Indonesia (Kompilasi Hukum Islam) was enacted, pursuant to Presidential Instruction No. 1 year 1991. This law consists of three books on *Marriage Regulation*, *Inheritance Regulation* and *Endowment (waqf) Regulation*. In particular, the Book III has been revised and developed into the Law No. 41 year 2004 regarding Endowments (or wakaf).

The term Sharia also appears in Article 25 clauses (1), (2), and (3) of Law No. 18 year 2001 regarding *Special Autonomy of the Special Province of Aceh*, which was enacted on August 9th, 2001. In this article, it is stated that:

The Islamic Shariah Judiciary in the province of Nanggroe Aceh Darussalam (NAD)¹⁷ is a part of the national court system, as conducted by the Shariah Court, which is free from any and all outside influences. The authority of Shariah Court, as meant in clause (1) is based on Islamic Shariah in the national legal system, which is further regulated by the qanun (laws) of the Province of NAD.

The Sharia court or the Islamic Judiciary in the Province of NAD consists of Religious Courts (PA) which have more authority than PAs in other provinces, based on the Qanun of NAD as regional regulations authorized under special autonomy status.

¹⁶ Ibid.

¹⁷ Nanggroe Aceh Darussalam is a northernmost province in Indonesian Sumatra Island. The province was granted special autonomy to apply Sharia Laws due to its unique history and part of the settlement of political conflict.

Local Ordinances with Sharia Nuances

Legislation based on Islamic Shariah in the first-tier regions and the second-tier regions (districts) was not only enacted under the Qanun of the Province of NAD but also through various Regional Regulations (or Regional Ordinance/Bylaws), Government Circulars and other laws made in a number of regions, both in the provinces and regencies/ cities.

Investigation made by Tempo magazine in Indonesia describes that currently there are around 96 local ordinances in Indonesia, either in the form of provincial or city/regency ordinances which contain Sharia nuances. Provinces with significant number of local ordinances with Sharia influences are West Sumatra, West Java, East Java, Banten, Aceh, South Sulawesi, West Nusa Tenggara, South Kalimantan and Lampung, respectively.¹⁸

For instance, in Bulukumba Regency (South Sulawesi), the local government enacted Regional Ordinance No. 03/ 2002 regarding the ban on the issuance and sale of strong alcoholic drink, regional ordinance No 02/ 2003 regarding the zakat management, alms and charity, regional ordinance No. 05/2003 regarding the Dress Code of Muslim Men and Women and Regional Ordinance No. 06/2005 concerning Proficiency in the reading and writing of the Qur'an for students and marrying couple.

In Maros regency (also in South Sulawesi) the local government enacted Regional Ordinance No. 15, 16, 17 of December 2005 respectively concerning Qur'anic Alphabet Literacy, Muslim Dress Code and the Zakat, Alms and Charity Management.

In East Lombok (Nusa Tenggara Barat Province) there is Regional Ordinance No. 09/2005 regarding payment of zakat by profession. In Pamekasan Regency (East Java Province) the government enacted Regional Ordinance No. 18/ 2001 regarding the Banning on the Distribution of Alcoholic Drinks. In Cianjur Regency (West Java) the government issued a circular No. 061/2896 concerning the Recommended Work Dress Code (for Muslim Men and Women) on Work Days. In Riau Province, The Governor Issue a letter No. 003.1/UM/08.1 regarding the Making of Arab-Malay signs.

Rifyal Ka'bah marks that the enactment of many Regional Ordinance closely linked to Islamic tradition is an indication that there is support for Islamic Shariah from public representatives in certain regions. Considering this present state of development, it is quite possible that the number of Regional Ordinance based on Islamic Shariah will increase in the future. This is, of course, in addition to laws at the central government level which will come into being in the near or distant future in order to support legal reforms in Indonesia.¹⁹

Article 49 of Law No. 3 year 2006 concerning the amendment of Law No. 7 year 1989 concerning Religious Courts states that the Religious Courts among other things have the authority to settle the dispute in the field of the Shariah-based economy. The law indicated here mentioned eleven types of Shariah-based economic institutions/ products, namely:

¹⁸ See "Perda Syariah untuk Apa", Special Report of *Tempo Magazine*, Jakarta, 29 August – 4 September 2011 Edition.

¹⁹ See Ka'bah, The Jakarta Charter and the Dynamic of Islamic Shariah , p. 13.

- a. Shariah-based banks;
- b. Shariah-based macro-finance institutions;
- c. Shariah-based insurance;
- d. Shariah-based reinsurance;
- e. Shariah-based mutual funds;
- f. Shariah-based bonds and mid-term notes;
- g. Shariah-based securities;
- h. Shariah-based financing;
- i. Shariah-based pawnshops;
- j. Pension funds run by Shariah-based financial institutions; and
- k. Shariah-based businesses.

The entry of these eleven types of law for the Shariah-based economy means that almost all types of business transactions under Islamic Shariah have become positive law in Indonesia (the prevailing laws).

Rifyal Ka'bah²⁰ indicates that the introduction of various laws based on Islamic Sharia, whether from the central or regional governments since June 22th 1945 are indications that Islamic Sharia is a living part of Indonesian society. Such indications can also be seen from the recent use of Dewan Syariah Nasional (National Shariah Board) fatwas to fill the void of laws and regulations in the field of the Sharia-based economy. This trend has also been supported by the increase in the authority of Religious Court (Pengadilan Agama), including the Shariah Court in the Province of Aceh, which previously held limited authority, and had to have its decisions upheld by the Court of General Judicature, but now is one of four types of courts under the Indonesian Supreme Court.

Ka'bah further believes that the enforcement of Sharia which takes the form of state law is a very supportive development regarding positive legal reforms. Islamic Sharia, as law which originate from divine injunctions, will provide substance to a national legal system which can be well-respected, especially by those citizens who consider it to be religiously valid.²¹

Discussions

In regard to the formalization of Islamic law into national law, there at least three issues which can be raised in the Indonesian context: firstly, whether the application of Islamic law is in line with the Indonesian legal system; secondly, whether Islamic criminal law contradicts the international human rights standards; and thirdly, whether the Indonesian Islamic Laws, particularly local ordinances with Sharia nuances are really 'Islamic Law' according to Al Qur'an (the Koran), or the Sunnah (the Prophet Muhammad's words and behaviors).

Some liberal Muslims in Indonesia assert that the discussion of the formalization of Sharia recently has raised controversy. One may say that the formalization of Sharia is incompatible to the pluralism of Indonesia, and that the interpretations of Sharia are varied. There is no common apprehension about Islamic Sharia in Indonesia. Further, some people

²⁰ See *ibid.*, p. 20.

²¹ See *ibid.*, p. 21.

believe that the state must not interfere in the religious life of the people, and that religious should remain a private and individual matter. Another reason against the implementation of Sharia is that some laws within Sharia incompatible with international law, human rights and democracy.²²

Formalization of Islamic Laws has so far been done in a few specific ways: (1) through interpretation of some provisions in Indonesian constitution of 1945; (2) through National Law or Act in special sections of law which apply nationwide and (3) through local ordinances/bylaws at the provincial and city/ regency level.

Robin Bush mentions that Indonesia is commonly perceived as the best example of a developing democratic country in the Southeast Asian region. Indonesia is also the one and only country in Southeast Asia which was ranked 'free' by Freedom House in 2007, instead of 'partly free' or 'not free' as shown by many other Muslim countries. However she perceives that the development of Local Ordinances with Sharia nuances will likely decrease the democratic freedom of the citizens as an antithesis to the ongoing reform movement.²³ Despite this, Robin Bush did admit that the role of Islam in Indonesia is still significant, with Islam being practiced piously by millions of Muslims.²⁴

The relationship between Islam and democracy, according to Michael Buehler²⁵ is less problematic and seems to go well together due to syncretic forms of Islam practiced in the archipelago state that are less dogmatic, and hence more conducive to democratic principles. There are also broader dynamics within civil society, political parties and state institutions as it has to do with the syncretism, hence moderate forms of Islam practiced in the archipelago.²⁶ Despite the fact that Indonesia is the largest Muslim country in the world, formalizing Islamic Laws into National Laws in Indonesia is not as easy as in Arabic countries. Indonesian Muslim and Indonesian Islam are somewhat different in character from those in Middle Eastern countries.

Mohammad Mahfud MD, the Chief Justice of Indonesian Constitutional Court, responded to this issue by stating that the Indonesian constitution of 1945 has an Islamic character. The founding fathers' choice on Unitarian State of Indonesia along with Pancasila as state ideology and 1945 Constitution as the constitution is not incompatible with Islamic teaching and Islamic Sharia, and the 1945 constitution itself, has a Sharia spirit.²⁷

Abdullahi Ahmed An-Naim confirms that even though Indonesia is not a religious state, religion is an important factor in building up the country. Pancasila (five pillars), state basic foundation, contains the principles of *One Supreme God, humanity, the unity of Indonesia, consultative democracy and social justice*. Article 29 of Indonesian Constitution of 1945 explicitly mentions that "the state is based on One Supreme God."²⁸

²² See Adiah Husaini and Nuim Hidayat, *Islam Liberal: Sejarah, Konsepsi, Penyimpangan dan Jawabannya*, Jakarta: Gema Insani Press 2002, pp. 155 – 167, cited in Frans Sayogie, *The Rights of Religious Freedom in Islam*, thesis submitted at Postgraduate Program of Law, University of Indonesia, Jakarta '2012.

²³ See Robin Bush, "Peraturan Daerah Syariah di Indonesia: Kegajilan atau Gejala", in Greg Fealy & Sally White (eds.), *Ustadz Seleb Bisnis Moral & Fatwa Online*, Jakarta: Komunitas Bambu 2012, p. 175.

²⁴ See *ibid.*

²⁵ See Buehler, "Islam and Democracy in Indonesia", p. 1.

²⁶ See *ibid.*, p. 7.

²⁷ See Masdar Farid Mas'udi, *Syarah Konstitusi UUD 1945 dalam Perspektif Islam*, Jakarta: Pustaka Alvabet 2011, pp. i-xii.

²⁸ See Abdullahi Ahmed, *Islam adan Negara Sekular*, p. 401.

Other problems and challenges are adjusting Indonesian Islamic Law with International Human Rights standards. Indonesia amended its constitution in 2000 which inserted ten new articles (article 28) on human rights affairs. Indonesia is also a country which has ratified major human rights conventions, including International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR). Both ratifications were made in 2005 through law No. 11 and 12 in 2005. The country has also enacted some laws related to human rights such as Human Rights Act No. 39 in 1999, Human Rights Court Act No. 26 in 2000, ratification of Convention against Torture in 1998, Children Rights Convention in 1990, and CEDAW in 1984, and so on.

However, when discussing whether the application of Islamic Criminal Law is compatible with international human rights standard, Alfitri argues that an approach which is able to reconcile the requirement of Sharia Law regarding criminal punishment and those of international human rights norms is necessary.²⁹

Can the requirement of Sharia Law regarding criminal punishments be interpreted in a way that is compatible with ICCPR (International Covenant on Civil and Political Rights) and CAT (Convention Against Torture)? Alfitri pointed out that the requirement of both of Islamic criminal law and the ICCPR and CAT can therefore be mediated, *inter alia*, by strictly adhering to the procedural and evidential requirements prescribed by the Al Qur'an (holy book) which were then theorized by classical Islamic jurists. This method is expected to effectively pacify the criticism coming from both human rights advocates and proponents of the Sharia Law regarding the implementation of Islamic criminal punishments in Muslim countries that are parties to the ICCPR and CAT.³⁰

Nadisyah Hosen perceives that Sharia is neither above nor outside the human rights provision in the 1945 constitution. The principles of Sharia can be seen as an inspiration for human rights protection: they can walk together side by side. There are at least three possible explanations. Firstly, all Islamic political parties in Indonesia refer to the situation in the Suharto³¹ era, particularly when many Muslims activist were sent to the jai without human rights protection. Therefore, it is for the interests of Islamic political parties to ensure that such abuse does not occur in the post-Soeharto era. This explains why they have given their full support to the inclusion of human rights provisions in the amendment to the 1945 constitution.³²

Secondly, all Islamic political parties take the position that human rights are compatible with the substantive Sharia approach. To put it differently, they operate on the premise that Islam is in substance compatible with Western human rights legal norms, if interpreted accordingly. To support this contention they refer, on a general level, to the elasticity of Islam and to its capability to accommodate various interpretations equally favorable or hostile to human rights.³³

²⁹ See Alfitri in Topo Santoso, "Implementation of Islamic Criminal Law in Indonesia", p. 2.

³⁰ See *ibid.*

³¹ The Second president of Indonesia, who is in power from 1967 – 1998

³² See Nadirsyah Hosen, "Human Rights Provisions in the Second Amendment to the Indonesian Constitution from Shari'ah Perspective", in *The Muslim World Journal*, Vol. 97, No. 2 (2007), p. 219.

³³ See *ibid.*

The acceptance of human rights provisions without any restriction to the formal understanding of Sharia suggests that all Indonesian Islamic political parties that have been involved in the process of constitutional reform during 1999-2002 differ in their position from other Muslim groups who openly reject the concept human rights as based on alien Western notions or as a conspiracy against Islam, and those who take pains to establish a specifically Islamic human rights scheme within an ideological framework devoid of a legal reform in Islam.³⁴

Thirdly, although the second amendment to the 1945 constitution accepts human rights in their full substance, this does not mean that religions do not have roles in Indonesia. Religious values along with justice, morality, security, public order and democracy should be taken into account in implementing the human rights provisions of the 1945 Constitution. It is worth noting that the phrase “religious values” refers not only to Islam but to other religions as well. Moreover, the word “values” connotes spiritual or ethical norms rather than focusing on law or regulation. In the context of Islam, religious values can be interpreted as Sharia in its original meaning as a ‘path’ or guide, rather than a detailed legal code.³⁵

Mashhood A. Baderin shares a similar observation: “The scope of international human rights can be positively enhanced in the Muslim world through moderate, dynamic and constructive interpretation of the Sharia rather than through hardline and static interpretation of it.” This leads to the conclusion that the full acceptance of the human rights provision has shown that Indonesia has provided a model for other Islamic countries to acknowledge the compatibility of human rights and Islamic law.³⁶

Indonesian Sharia

Sharia, in its widest application, offers guidelines on the Islamic rituals of daily life, such as praying five times a day and the wearing of head scarves for women. It also offers means to resolve social and economic conflicts, and through *hudud*, or Islamic criminal code, deals with criminal offences including theft, sex outside of wedlock, murder and rebellion.³⁷

In a recent study by the Jakarta-based Centre for Islamic and Community Studies, more than 61% of the respondents approved of the implementation of Sharia, though that number declined significantly on the issue of draconian punishments such as the stoning to death of adulterers and amputation for thieves. In another survey conducted last year by the United States-based Asia Foundation, religious leaders and religious courts scored significantly higher than the police and civil courts in job performance and trustworthiness.³⁸

Azyumardi Azra, former Rector of the Syarif Hidayatullah State Islamic University and a leading Islamic intellectual, finds it understandable that citizens turn to religion when

³⁴ See *ibid.*, p. 220.

³⁵ See *ibid.*

³⁶ See *ibid.*

³⁷ See McBeth, “The Case for Islamic Law”, pp. 12-15.

³⁸ See *ibid.*

the state is perceived to be making a mess of things. "Sociologically speaking," he points out, "people tend to treat Sharia like an elixir that can cure all of the diseases of society."³⁹

John Brownlee, who heads the Islam in Civil Society program at the Asia Foundation, believes Indonesia's Islamic revival is natural after years of authoritarianism. But, as he notes: "Sharia is a political commodity that has distracted people from the real issues. The debate shouldn't be about implementing Sharia, but about how to address real concerns. It should be about justice."⁴⁰

Indonesia is a unique melting pot of Islam where liberalism, moderate and radicalism can go together. Robin Bush mentioned that Indonesia is a big tent which accommodates all voices of Muslims, both the loud and soft ones, and they may talk to each other.⁴¹

Generally speaking, Islam has come to Indonesia gradually and peacefully.⁴² Islam in Indonesia has played significant role in uniting the people who were previously divided and coming from various ethnic groups into a single regional culture. Syafii Anwar believe that Islam could easily spread all over Indonesia due to its accommodation to the existing cultures and beliefs in Indonesia, while Robert W. Hefner, an American Indonesianist, holds that the extreme Islam has missed most of its momentum in the archipelago.⁴³

Conclusion

As the largest Muslim country in the world and the third largest democracy, Indonesia has provided a model for other Islamic countries to acknowledge the compatibility of Islamic laws and democracy. Indonesia has shown that Islam and democracy can work together. However, efforts to combine those two ideas have not been that easy and to some extent, have contributed to an already complicated situation.

Formalization of Islamic Laws (Sharia) into national laws is part of these efforts. The discussion above has shown that the formalization has rendered a number of problems: whether the application of Islamic law is in line with Indonesian legal system; whether Islamic laws contradicts the international human rights standards; and whether the Indonesian Islamic Laws, particularly local ordinances with Sharia nuances are really 'Islamic Law' according to the original Islam originated from the Holy Book Al Qur'an and practiced by the Prophet Muhammad.

In case of private affairs, Islamic laws can easily be formalized into national laws. They have few objections from the Muslim community. Yet, if the laws apply to all citizens, not just Muslim citizens, it will raise controversy. Indonesian marriage law of 1974 which has Islamic law nuances is one good example.

³⁹ Cited in ibid.

⁴⁰ Ibid.

⁴¹ As voiced by Robin Bush, "Moderat dan Radikal dalam Rumah Bernama Indonesia", in *National Geographic Indonesia*, Vol. 5, No. 10 (2009).

⁴² Abdullahi Ahmed An-Naim seconds this argument by stating that all Muslim scholars believed that Islamization of present-day Indonesia had been running peacefully, though there were few Muslim rulers forced their people to convert to Islam. See Abdullahi Ahmed, *Islam dan Negara Sekular*, p. 393.

⁴³ See ibid., pp. 97 – 98.

In the case of criminal law, Islamic criminal laws which partly apply in Nanggroe Aceh Darussalam province have raised controversy due to their incompatibility to human rights laws. As we have seen, Indonesia has ratified almost all of major human rights laws and conventions. The country has enacted the human rights act in 1999 and amended the constitution in 2000 which added ten new articles on human rights. Therefore, Indonesia does have obligation to comply with international human rights standards when enacting and implementing the laws.

Another challenge is the local ordinances which have Sharia nuances. Actually not all of them are really Islamic Laws, but the laws which have religious nuances. Therefore, people simply refer to them as "Sharia Local Ordinances". Some local ordinances which have Sharia nuances are driven by social and legal needs of the people; however, some of them are politically motivated.

Finally, we must take into account that Islamic Laws in Indonesia are designated for the Indonesian situation. They might be different in character from those applied in Middle Eastern countries, or they might not be Islamic Laws as apprehended by Muslim in other countries. However, to some extent, they are still considered as Islamic Laws for Indonesian Muslims.

Despite the controversies raised, we can see that Islam and democracy and human rights can live and work together, but more effort is needed to ensure harmonious coexistence. Formalization of Islamic Laws in Indonesia, as part of these efforts, can be done by taking into account the heterogeneity of Indonesia, as well as democratic values and human rights.