

Thoughts on Islamic Shari'ah Law in Indonesian Law

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Abstract- Indonesian Law consists of the Law of Islam, the West Law and Customary Law and other national legal developments. National Legal Policy which is often interpreted as a political law is legal policy that will be or have been implemented by the Government. This paper aims to discuss legal policy of Islamic law in the Indonesian law. The significant of this discussion as Indonesia is not a religious state. In this country there are several religions that were recognized in the national constitution. For this reason, the nation should treat the people neutral. The treatment should not be dominated by one denomination or group. In other words, the people should be treated equal before the law / equality before the law. Note that, the focus of this paper is on the Sharia economic law. The implementation of sharia economic laws certainly required the political support of government, state institutions either in the form of regulation as well as capital as ruled in the Law No. 21 of 2008 and its amendments, Law No. 23 of 1999 concerning Bank Indonesia, and Ministerial Rule (Permen) No. 2 Year 2008 concerning KHES, and the Fatwa of MUI. The study found that the law that regulates the implementation of Sharia economic activities has not be as expected by the Islamic community in particular and the nation in general.

Index Terms- Islamic law, Indonesian law, economic sharia law, equal before law, and neutral treatment.

I. INTRODUCTION

Indonesia is not a religious state. However, Islam is a religion that has majority followers. This indeed affects the life of the nation of Indonesia. In the view of the people of Indonesia, Islamic law is an important part of religious teachings. Apart from Islamic law, the Indonesia law also adopts the Western law, and Customary Law. The Government of Indonesia always reviews its national law in accordance with changes that happened in the society. The Islamic law has also made necessary changes in accordance with the dynamics of life. Thus, Islam keeps its changes to the life of society including in the politics, law, education and economic.

Of many aspects that received a great attention by the Muslims in Indonesia is the practice of shari'ah economic in their activities. This is because the conventional economic system was not able to meet expectations. The conventional system or a system of capitalism and socialism are considered by the Muslims are less valid and unable to cope with the problems of life. In addition, public awareness for Muslims to practice shari'ah economic wholeheartedly (*kaffah*) in various aspects of life show an increasing trends. This increasing phenomenon is expected to be one of the alternatives of the economic system that will be able to increase the society's welfare.

By definition, the scope of shari'ah economic includes as follows, namely, *Ba'i*, purchase contract, *syirkah*, *mudaraba*, *murabaha*, *muzara'ah* and *musaqah*, *khiyar*, *istisna*, *ijara*, *kafalah*, *hawalah*, *Rahn*, *wadi'ah*, *gashb* and *itlaf*, *wakalah*, *shulhu*, *ta'min*, capital markets, mutual funds, certification of Indonesian sharia bank, multi financing services, *qardh*, shari'ah overdraft financing, pension fund, *zakat* and grants, and shari'ah accounting.

Current trends in the global world indicate that the principles that are used in economic activity, including financing activities that leading and moving toward the Islamic principles that rests on Islamic law are universal. Various countries in the world have implemented Shari'ah principles in economic activities such as, China, India, Britain and others including financing activities, such as Islamic banking, Islamic Capital Market, Takaful, Islamic Assurance, Islamic Bonds, Shari'ah Mutual Funds, to a name a few.

The establishment of the Law of the Republic of Indonesia No. 21 Year 2008 on Islamic Banking has given a gateway for the implementation of shari'ah economic in Indonesia. This law has been awaited by the Muslims of Indonesia. The implementation of shari'ah economic law politically has been associated with the legal policy. As Satjipto Rahardjo stated that the law is an instrument of the decision or political will, so that lawmakers have many particular interests, and become the field for law makers to compete one and another. The agencies that made laws represent a configuration of the power and interests that exist in society. Configuration of power and interests in the agencies become important as the lawmakers do not only formulate law materials, but also make political decisions in advance.

Besides the configuration of the power and interests in the law-making body, interventions from the outside parties cannot be ignored in the formation of legislation. This intervention was mainly carried out by groups who have power and strength, socially, politically as well as economically. According to Mahfud MD (1998), political law also includes an understanding of how politics affects the law by looking at the configuration of the force behind the creation and enforcement. Also, it takes into account the legal ethics, good or bad, fair or not, or whether or not legal provisions are suitable for the people concerned. All of these have to do with whether or not the law is obeyed by the society (Abubakar, 1993).

The institutionalization of Islamic law is basically based on the *fikrah* (human reason) values of the Muslims in the legal field. The institutionalization of Islamic law in the form of legislation governing the activities in the field of sharia'ah economic has been demanding by the Muslims particularly those who have business activities.

Development of national law objectively recognize the plurality of law within certain limits. The enforcement of

customary law and religious law to certain circumstances and subject to certain law are reasonable because it is not possible to impose unification law unification for some areas of life. It is, therefore, unnecessary if the subject matter of Islamic law that have *muamalah* activities is treated shari'ah economic law, and it seems natural to treat family relationships more dominant in terms of local customary law. Thus, the principle of unification of the law should be as guidelines, but if the law unification is impossible, then the plurality law must be received.

II. LEGAL BASIS OF SHARI'AH ECONOMIC

There are some basic laws that underlie the thinking and the determination of economic concepts in Islam. These include the following:

1) Al-Quran

Al Qur'an is the main legal basis of economic concepts in Islam. This is *interalia* because the Quran comes directly from Allah the mighty. Some verses in the Quran referring to human commands to develop an economic system which is based on Islamic law, include the *Fushilat* (41: 42), *Al-Kahf* (18, 54 - 55), *Az-Zumar* (39: 27) and *Al-Hashr* (59: 22).

2) Hadith and Sunnah

In the context of Islamic law, the Sunnah, which literally means "the way, the customs, habits of life" refers to the behavior of the Prophet Mohammed SAW. Hadith and Sunnah reflects the behavior of the prophet Muhammad SAW and if the Muslims do what has been done by the Prophet, the Muslims will get reward (pahala) from Allah SWT. However, if the Muslims do not do it, they will not have any pahala. Through Al Qur'an, Allah asks the Prophet Muhammad SAW to detail the Islamic teaching for the Muslims. See, for instance, Al Ma'idah (5: 47-48), An Nisa (4: 16, 44).

3) Ijma'

Ijma' is the third source of Islamic law which is a good consensus of the community and the religious scholars. Ijma' is a new principle of legal content which arise as a result of doing scientific interpretation logically facing a rapidly expanding community, as well as the early Islamic community, which began with the friends and extended to generation and the next generation. In the Qur'an, this is mentioned in Al-Baqarah (2: 143).

Aghnides states "the importance of ijma' or consensus" in Islamic law. In fact, the values of ijma' can hardly be doubted. Although the influence of ijma' is to unite, but the fact remains that there are still differences in a particular opinion about a small problem that is not agreed upon, but it is by legal experts of religion is interpreted as a sign of God's mercy towards his people. Such differences cannot be underestimated, because it is a sign of God's grace. Ijma' is based on the Hadith. As the Prophet said: "Opinion differences in Muslims is a sign of grace that comes from Allah SWT.

4) Ijtihad or Qiyas

Ijtihad means "a continuation to make every effort based on *syariah*. In terms of law, this may be right or wrong. According to Al Mawardi, the scope of Ijtihad after the death of the Prophet includes eight separate meaning. Seven out of the eight meanings consist of the interpretation of the verses in the Al Quran using analogical method. Only one meaning using

logical interpretations derives from the verses of Al Quran. Thus, Ijtihad means the decision made based on the interpretations or reinterpretation on one hand, and partly on logical thinking based on Al Quran.

Bank of Indonesia issued several regulations concerning the operation of business activities with Islamic principles. Some regulations that associated with the business operation based on Shari'ah economic principles are:

1. Bank Indonesia Regulation (PBI) no. 7/46 / PBI / 2005 dated 14 November 2005 concerning the Agreement of Collection and Disbursement for Conducting Business Based on Shari'ah Principles.

2. Decree of Directors of Bank Indonesia Number 32/34 / Kep / Dir of Commercial Banks Based on Shari'ah Principles.

3. Decree of Directors of Bank Indonesia Number 32/36 / Kep / Dir of Rural Bank based on Sharia principles.

The issuance of Islamic Banking Act is expected to be followed by the issuance of other laws that regulate explicitly the implementation of sharia 'ah economic business activities. As we know that the implementation of sharia economic activities previously only based on fatwa (religious decision) made by Indonesia's Muslim leaders (Majelis Ulama Indonesia-MUI) where the decision made were not legally binding and forcing. This is because the fatwa in the context of Indonesian law is a rule that is free to be obeyed or not. But, how did the national legal policy form the Shari'ah economic law in Indonesia?

III. THEORITICAL BACKGROUND SUPPORTING SHARI'AH ECONOMIC LAW

Before discussing the above question, let first examining the theoretical background advance in the literature. The theoretical background useful to discuss the above question has been outlined by many authors as follows.

1. Theory Authority of Islamic law, which was developed by the Gibb. This theory is based on the social reality of the Muslim community who are submissive and obedient to the teachings of the religion. For Muslims the law is one of the core teachings of Islam. As summarized by Sayuti Talib that for Muslims, the law that should be used is Islamic law. Whilst the use of common law is only acceptable if it does not conflict with the teachings of Islam and Islamic law.

2. The theory introduced by Friedman (1975) in his book "The Legal System": A Social Science perspective. According to Friedman that the law consists of three components, namely, the legal substance that associated with rules or norms, the legal structure which refers to the agency or law enforcement authorities such as police, judges and prosecutors and lawyers), and the legal culture that related with religion and belief ideas, attitudes and opinions about the law.

3. The theory outlined by Mahfud MD (2009) who argued that political law is "legal policy" or the official policy line about law that will be enforced either by the new legal acts and the replacement of the old law, in order to achieve the purpose of the State. Thus, the political law is about the choices of the laws that are going to be implemented. These choices are intended to achieve the purpose of the State as stated in the Preamble of the 1945 Constitution. In other words, the politics of law is the policy of State administrators about what the criteria used to

judge something good establishment, enforcement and implementation.

4. Other theory was introduced by Sunaryati Hartono (1991). The theory emphasized that the legal politics is as the means and steps that can be used by the government to create national legal system expected. By this national legal system, the nation goals can be realized.

IV. IMPLEMENTATION OF SHARI'AH ECONOMIC LAW IN INDONESIA

Based on etymology, the word law known in Indonesia is derived from the Arabic words which means judgment or provision. In the encyclopedia of Islamic law, the law means set something on something or deletion. From the viewpoint of Islam, the term shari'ah is syariat which further associated with *fiqh*. Thus, the meaning of shari'ah economic is the principal arguments about economic based on the Qur'an and *Hadits*. Thus, *shari'ah* economic in the short term is an Islamic Economics system and Islamic Economics law.

Manan (2002), however, interpreted sharia economics as a social science that studies the economic problems of the people inspired by the values of Islam. According to Muhammad Abdullah al-'Arabi, shari'ah economics or the economics of Islam is a set of common economic fundamentals that are based on the Al Quran and Sunnah. According to Zainuddin Ali, shari'ah economics or Islamic Economics is a collection of legal norms derived from the Qur'an and the hadiths that control the economy of mankind. Similarly, Mardani defined shari'ah economics or Islamic economics is the effort or activity carried out by individuals or groups of individuals or business entities legally or illegally to meet the needs of people commercially and non-commercially according to Islamic principles. Therefore, shari'ah economic or Islamic economics is the economic system that comes from the transcendental revelation from the al Quran and Hadith and the sources of interpretation called *Ijtihad*.

The emergence of the Reform Order is a part of the historical process of the nation and the state of Indonesia. This reform is expected to reach the Indonesian civil society who have a better life, democratic, transparent and self-reliance in the economy.

The implementation of Shari'ah economic activities were based on the fatwa issued by the National Sharia Council (DSN)-MUI. This business activities include as Islamic banking, insurance, Islamic mutual funds, bonds, and shari'ah financing programs. DSN-MUI is an institution established by the Indonesian Muslims leaders (Majelis Ulama Indonesia-MUI) that is authorized to issue fatwa in the business activities of banks based on the principle shari'ah. To date, the DSN-MUI body has issued a fatwa on Shari'ah economic activity including as follows.

- a. National Sharia Board fatwa No.01 / DSN-MUI / IV / 2006 On Portfolio,
- b. National Sharia Board fatwa No.02 / DSN-MUI / IV / 2006 on Savings,
- c. National Sharia Board fatwa No.03 / DSN-MUI / IV / 2006 on deposits,

d. National Sharia Board fatwa No.04 / DSN-MUI / IV / 2006 on Murabaha,

e. National Sharia Board fatwa No.05 / DSN-MUI / IV / 2006 on Sale and Purchase of Shares,

f. National Sharia Board fatwa No.06 / DSN-MUI / IV / 2006 On Sale Buy Istishna ', and

g. National Sharia Board fatwa No.07 / DSN-MUI / IV / 2006 on *Mudharabah (Qiradh)*.

Therefore, the Shari'ah economic system plays important role in the Indonesian economy. However, the laws that are expected to organize these business activities still need to be issued in order to make this business activities growing in a better shape as in the case in Malaysia or other countries.

V. CONCLUDING NOTES

The Islamic law plays important role in Indonesian national law system. The transformation of Islamic law into the national legal system has only been through political infrastructure channels, but also national legislation process. However, the process of this transformation does not only create opportunities, but it also creates challenges both positive and negative. Due to these problems, there should be support from the people of Indonesia and the government as well.

Political support that was needed from the government include the availability of legislation that is not only able to accommodate any matters related to the Shari'ah economic law, but it should also be practical in the implementation and in accordance with the conditions of the State. The existence of sharia economic should not only be limited to the Muslims, but also to the Non-Muslims as this economic system can be one of the business alternatives.

In contemporary developments, the concept of Islamic economics is still dominated by the application of Islamic principles in the financial sector, especially in banking. Therefore, the post-reform of Islamic laws that are based on developed legal politics has undergone many changes including changes in the perception towards Islamic law in Indonesia. For this reason, the Islamic law can be used as a source in the formation of national law. However, as there have been many changes in the global condition, much remain to be done in improving the present Shari'ah economic law.

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