

# Legal Justice for All and Anti Discrimination: Models for Practicing Sharia in Democratic Secular State of Indonesia

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Abstract: As a source of ethics, moral and spiritual, sharia is an ideal concept that is used as guide for Muslims in everyday life because it contains the principles of justice, benefit for all. However when these principles are extracted and formulated by a number of Islamic legal experts the results are not singular. Sharia often criticized for unable to give justice for all. Therefore, when there is a high demand in Indonesia to make sharia the material resource for national law, a more suitable model is needed. By assuming that there are many models that can be used in practicing sharia, this study aims to explore models of implementation of Islamic law, the problem and impacts of each model and the solution that can be take by Muslims in practicing sharia in Indonesia. This objective can be achieved by examining the meaning of sharia, its purpose, the models of sharia implementation in a number of countries, as well as model of sharia implementation which suitable for the condition of Indonesia. This paper argues that in social and political life, Muslims can use any model for practicing sharia as long as it is directed to achieve the purpose of sharia: to protect basic human rights for all member of the community, to establish justice between Muslims and the rest of humanity, and to provide benefits for human beings and removing hardships from them.

## 1 INTRODUCTION

Indonesia is a multi-ethnic and multi-religious state. The major religious groups in this country of more than 250 million inhabitants are Islam. As the state founded on divine values, religion in Indonesia can not be separated from the life of nation and state. Therefore, efforts to separate religious values from the life of the nation and state will always be in vain. On the contrary, efforts to integrate religious values into the life of a state always have wide support. According to research in 2013, there are 72% of Indonesian Muslims who support Islamic law as an official law for the state (www.pewforum.org - article 1, 2013). There is also the fact that 61 % of Indonesian Muslims approve of Indonesia as a democratic country (Bev, 2018). It means that a substantial majority of Indonesians support both Islamic law and democratic state. While democracy accepted plurality, 45% of Indonesian Muslims hold that Islamic sharia has only one interpretation (www.pewforum.org - article 2, 2013). It means that there is the tendency of some

Indonesian Muslims who practiced sharia rigidly. Such a rigid model of practicing sharia is vulnerable to being exploited by radical Islamic groups or Islamists that make religion a political ideology and Islamic sharia as political agenda. Therefore, efforts to search model for practicing sharia in democratic state that able to be tool for achieving justice for all is needed to counter radical groups who believe that in democratic secular state like Indonesia Islamic law cannot be fully implemented. In other words, sharia cannot be fully implemented because Indonesia is not Islamic state.

The assumption that in secular state the aspirations of sharia are always confined, supported by the thesis of Arskal Salim. In his book *Challenging the Secular State; The Islamization of Law in Modern Indonesia* Arskal Salim argues that attempts to formally implement sharia in Indonesia have always been marked by a tension between political aspirations of the proponents and the opponents of sharia and by resistance from the secular state. The result has been that sharia rules remains tightly confined in Indonesia (Salim, 2008).

By assuming that sharia is a law that is always suitable for all places and times for it can change according to the changing times, places, intentions and circumstances, the objective of this study was to formulate: 1) the meaning and the purpose of sharia 2) the model for practicing sharia in the Muslim worlds 3) the model for practicing sharia in secular democratic state of Indonesia , so it can brought justice for all.

## 2 THEORY

There are some theories that was used to explain the models for practicing sharia in Indonesia. Among others are the theory of *maqashid al-sharia*, presented by Jasser Auda, the theory for exploring the values and norms in sharia, the theory of the role of religion in politics presented by Mayskuri Abdillah, the theory for practicing sharia in general presented by Nurrohman, the theory of the relationship between sharia and local customs presented by Van Den Berg, Snouck Hurgronye and A Qadri Azizi. The theory of eclectic choices introduced by Tahir Mahmood and Mahfud MD, as well as Fazlur Rahman's theory of *ijtihad* in the modern era are used to reform Islamic law. The theory of justice used in this study is the justice proposed by John Rawls well known as the shared justice.

## 3 MATERIALS AND METHODS

This research is a kind of non doctrinal qualitative legal research which covered some problems, policy and law reform based research (5) This is a kind of library research supported by field data collected through interview. The purpose of research is to find the model for practicing sharia in Indonesia that will brought justice for all. The subject of this study is the meaning and purpose of sharia, the model for practicing sharia in the Muslim world and the model for practicing sharia in Indonesia. Data was collected from the book or documents that have been published particularly the book that discussed the meaning and purpose of sharia, the model for practicing sharia in the Muslim world and the model for practicing sharia in Indonesia. Field data obtained from Muslim leaders in West Java as well as in Aceh who were picked purposively. Data was analyzed and compared to find the problems and impact of each model as well as to find the possible model for practicing sharia in

Indonesia, so it able to brought justice for all, Muslim as well as non –Muslim.

## 4 SHARIA; ITS MEANING AND PURPOSES

The term sharia in Arabic literally means a path or a way (Qur'an chapter :45 verse:18). From this reading, sharia generally means the way or path that Muslims take to lead their lives — be it as individuals, as a society or as a religious community. The term sharia is often used in present discourse as if it were synonymous with Islam itself, as the totality of Muslim obligations in both the private, personal religious sense and vis-à-vis social, political, and legal norms and institutions (An-Na'im, 2014).

From the perspective of Islamic jurisprudence, sharia refers to “Islamic law” which many assume as consisting of mainly criminal laws and penalties. As the sacred law of Islam, Islamic law is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspect (Schacht, 1964). Although Islamic law is a ‘sacred law’, it is by no means essentially irrational; it was created not by an irrational process of continuous revelation but by a rational method of interpretation, and the religious standards and moral rules which were introduced into the legal subject-matter provided the framework for its structural order (Schacht, 1964).

As God's plan for mankind consisting of His prescriptions for human behavior, sharia is a rather abstract concept which leaves ample room for various concrete interpretations by human beings. The classical sharia is the body of Islamic rules, principles and cases compiled by religious scholars in search of God's will during the first two centuries after Muhammad. In this sense, sharia can be found in the classical works of the religious scholars of the dominant legal schools (*madhab*), and is therefore more concrete. The historical sharia includes the entire body of all principles, rules, cases and interpretations developed and transmitted throughout a history of more than one thousand years across the entire Muslim world. In this context sharia is plural. Historically, sharia has been influenced by time and place. The contemporary sharia contains the full spectrum of principles, rules, cases and interpretations that are developed and applied at present, throughout the Muslim world. New technologies of information and communication

have decreased the dominance of the legal schools of classical sharia. The variety of meanings of sharia has given rise to a flexible, multi-interpretable discourse about sharia and law which moves smoothly from one meaning of sharia to another. Therefore, the theological assumption that sharia is a fixed set of norms that apply exclusively to all Muslims must be dismissed on the basis of both legal and empirical evidence.”(Otto, 2008). Although there is a flexible, multi-interpretable discourse about sharia, it has an objective.

The first objective of sharia is protecting basic human rights for all members of the community irrespective of race, religion and culture. There are seven basic human rights that must be protected by the State or society, ie: 1) the right to life and its enjoyment 2) the right to believe 3) the right to gain knowledge 4) the right to disagree, 5) the right to consultation, 6) the right of equality and justice 7) the rights of the oppressed (Al-Jabri, 2009).

The second objective of sharia is establishing justice between Muslims and the rest of humanity. Equality is among the key messages of Prophet Muhammad in his Last Sermon. Qur'anic legislation in the field of private and public life has social justice and the building of an egalitarian community as its end. (Rahman, 1984)

The third objective of sharia is providing benefits (*maslahah*) for human beings and removing hardships (*al-usr*) from them. Bringing about benefits and removing harm is essential in establishing a harmonious society. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the sharia, even if it is claimed to be so according to some interpretation (Auda, 2007).

## 5 THE MODEL FOR PRACTICING SHARIA IN THE MUSLIM WORLD

In practicing sharia, Muslims in the world were influenced by many factors. Beside influenced by past complex relation between religion and state in history, they are also influenced by how they explore the meaning of sharia, they apply sharia in daily life, they put sharia in state or political life, their state puts sharia in the constitution. In exploring the meaning and the content of sharia, at least there are three theories , *bayani*, *irfani* and *burhani*, Table.1. In *bayani* method, the truth was obtained through linguistic approach that produced correspondence truth. The source of truth is religious text and the method is juristic reasoning. In Islamic history , this method was often used by jurists and theologians. In *irfani* method, the truth was obtained through psychognostic approach that produced inter subjective truth. The source of truth is intuition and the method is illumination. Gnosis refers to knowledge based on personal experience or perception. In religious context, gnosis is mystical or esoteric knowledge based on direct participation with the divine. In Islamic history , this method is used by mysticians. In *burhani* method, the truth was obtained through logical approach that produced coherence or consistence truth. The source of truth is ratio and the method is analytical discourse. While these three methods actually had been used in the Muslim world, *burhani* method which put forward the way of demonstrative-philosophical thinking not developed optimally by Muslim thinkers and scientists.(Widodo, 2007)

Table 1: Theories for exploring the meaning and the content of sharia

The name of theory	The Theories for exploring the meaning and the content of sharia			
	Source	Method	Approach	The validity of truth
<i>Bayani</i>	Religious text	<i>Istidlal/</i> juristic reasoning	Linguistic	Correspondence
<i>Irfani</i>	Intuition	<i>Kasyf/</i> illumination	Psychognostic	Inter-subjective
<i>Burhani</i>	Ratio	Analytical discourse	Logic	Coherence/ consistence

Source : modification from <http://habibisir.blogspot.co.id/2013/04/epistemologi-bayani-burhani-dan-irfani.html>

In applying sharia in their life in general, there are three model; exclusive textual, inclusive substantial and combination (Nurrohman, 2002), Table 2.

Table 2: The models for practicing sharia

Type of Model	The Models for Practicing Sharia		
	Description	Assumptions	Example
Exclusive textual	trying to implement sharia as mentioned in the text of the Qur'an, the prophet tradition or in the text of standard works of expert recognized by its authority in explaining Islamic law <sup>a</sup>	Sharia has perfectly regulated all aspects of life. Sharia after the prophet Muhammad no longer experiences the process of evolution	Cutting the hand of the thief is under-stood physically
Inclusive substantial	Trying to practice sharia by looking at the concepts or ideas that exist behind the text. If the main idea has been captured, then its application can be carried out flexibly.	Every legal provision in Islamic law has its reasoning and purpose. Therefore, Islamic law undergoes evolution. There is no monopoly in the interpretation of sharia.	Cutting the hand of the thief is not under-stood physically. It just metaphor
Combination	In practicing the sharia, they divided it into purely religion ( <i>ta'abbudi</i> ) and <i>ta'aqquli</i> (be understood by reason). They sort the sharia into two, private and public.	Some sharia has a reason and experiences evolution, and the other ones are should accepted without reason and not experience evolution	In private matter or pure religion tend to textual, for instance daily prayer should be in Arabic, but in public matter accept substantial meaning.

From Nurrohman, end note 15

There are three types of the role of religion in political life; as a political ideology, as an ethical, moral and spiritual base and, as a sub-ideology (Abdillah, 2000), Table 3.

Table 3: The Role of religion in politics

Type of Role	The Role of Religion in Politics		
	Description	Explanation	Example
As an ethical, moral and spiritual base	as an ethical, moral, and spiritual source the imprtance one of religion is to build consciousness of religious people themselves through cultural approaches and reject structural approaches in terms of socialization and institutionalization of religious teachings. <sup>a</sup>	the implementation of religious teachings should not be institutionalized through legislation and state support.	Secular state such as Turkey
as a political ideology	as an ideology religious teaching should be formally endorsed to be	The implementation of religious teaching is	State that places sharia as the

Type of Role	The Role of Religion in Politics		
	Description	Explanation	Example
	positive law by taking structural approach to socialization and institutionalization of religious teachings	become state obligation	primary source of legislation, such as Egypt and Pakistan
as sub-ideology	as sub-ideology religion tend to support a cultural as well as structural approach by involving religious teachings in public policy making in a constitutional, democratic and non-discriminatory manner	When the norms of religion will be used to made public policy it should be adjusted so, the content is really bring justice for all	State that has it's own ideology such as Indonesia

Modified from the end note 16

In the way, Muslim countries puts sharia in their constitution, at least there are four model; formally mention Islam and sharia as primary source of legislation such as Iran and Egypt , formally mention Islam as official religion but not mention sharia as primary source of legislation such as Malaysia, not mention Islam as state religion and also not mention sharia as primary source of legislation but acknowledged sharia as living law in the country ,such as Indonesia, and state declared himself as secular state like Turkey(Syarif, 2016).

The choice of models taken by individuals and society was influenced by legal policy of the state. For instance, although Bassam Tibi (Tibi, 2005) refused to use Islam as political ideology, and distinguished between Islam and Islamism (Tibi, 2012), in reality there are some Muslims in the world who used it. Prohibiting Islam as an ideology contrary to the principle of democracy, in democratic state any ideologies should be allowed to be contested. Although from the world perspective , Indonesia was grouped by Ahmed T Kuru in secular state (Kuru,2009), it is by no means that it lest Islamic than other countries which formally declared themselves as an Islamic

state in their constitution. Based on research conducted by Rehman and Askari, the Islamic index of Indonesia is better than the index of country which formally declares itself as an Islamic state or makes Islam a state religion like Egypt, Pakistan and Iran. Based on this index, Indonesia ranked 140, Pakistan ranked 147, Egypt ranked 153 and Iran ranked 163. (Rehman,2010).

## 6 THE MODEL FOR PRACTICING SHARIA IN INDONESIA

The model for practicing sharia in Indonesia is a combination. Some provisions of sharia are practiced exclusively, but the others are practiced substantively and inclusively. In the private aspect, sharia tends to be practiced exclusively textually. But in the public domain, sharia tends to be transformed substantially inclusively. In Indonesia, some experts explained how the sharia is applied in the context of history through religious or sharia court, Table 4.

Tabel 4: Theories for practicing sharia in Indonesia

The name of theory	The Theories for Practicing Sharia in Indonesia		
	Description	Implication	Notes or reference
<i>Receptio in complexu</i>	Muslims should adhere sharia norm as consequence of their religion. <sup>a</sup>	Sharia norms directly applied to Muslims without waiting whether its accepted by custom or not.	Applied in religious court since 1855
<i>Receptie</i>	"In the case of civil cases among fellow Muslims, will be resolved by the judges of Islam if their customary law	The application of sharia norms depend on the acceptance of customary	the reference of colonial policy since 1929

The name of theory	The Theories for Practicing Sharia in Indonesia		
	Description	Implication	Notes or reference
	wants it."	law	
Possitivisati on	Islamic law has basically become a positive law for Indonesian Muslims	the application of Islamic law is no longer determined on the basis of acceptance by customary law	The main reference of this theory is: UU No.1 / 1974 about marriage

From the end note 23

According to *receptio in complexu* theory supported by Van Den Berg (1845-1927), Muslims should adhere sharia norm as consequence of their belief or religion. This theory became a reference in the colonial policy since 1855 (Praja,2009). According to the *receptie* theory,supported by Snouck Hurgronye (1857-1936) Islamic law in Indonesia only applies if customary law requires it. This theory became the reference of colonial policy since 1929 through the *Indische Staatsregeling* (IS) of 1929. Article 134 paragraph 2 of IS said: "In the case of civil cases among fellow Muslims, will be resolved by the judges of Islam if their customary law wants it." The theory of the *positivization* of Islamic law said that in civil law, the application of Islamic law is no longer determined on acceptance of customary law. Because Islamic law has basically become a positive law for Indonesian Muslims. The main reference of this theory is: UU No.1 year 1974 about marriage. The supporter of the theory is A Qadri Azizy.(Syarif,2016).

So, If Whitehead in his book call religion in the making, (Whitehead,1927) sharia as a religious norm base on faith also still in the process of development. It is what Hallaq said the evolution of Islamic law (Hallaq, 2005). There is no exact model, including what is practiced in Aceh. Professor Alyasa Abubakar, an Islamic law expert who was involved in the reconstruction of Islamic law in Aceh from the beginning acknowledges it (Interview in Banda Aceh, 2005).

## 7 THE PROBLEM TO BRING JUSTICE FOR ALL IN SECULAR DEMOCRATIC STATE

It is not easy to brought legal justice for all in practicing sharia in Indonesia. The first obvious problem or challenge to realize sharia as legal justice

for all is the emergence of authoritarianism in understanding sharia. Authoritarianism is the act of “locking” or captivating the Will of the Divine, or the will of the text, into a specific determination, and then presenting this determination as inevitable, final, and conclusive. (El-Fadl, 2001)

The second problem is ambivalence attitude or inconsistency of some Muslims in accepting the constitution and the law that has accommodated the values of Islamic law. If Muslims acknowledged that there is no contradiction between the principles of sharia and the principles of constitution then each law that not contradict to constitution should be accepted by Muslims. This means that, in the context of state life, the constitution must be made the highest law, but in reality, it is not always the case. While legal system consists of three elements; structure, substance and culture (Friedman, Hayden, 2017), sometime the culture of society not supported the substance or the structure. For example, although marriage legislation in Indonesia has made provisions that the marriage age is 16 years for women and 19 years for men but in the community, there is still a frequent occurrence of underage marriages.

The third problem is the conflicting provision among the laws in Indonesia, for instance the age of children. According to Law No. 35 of 2014 on Child Protection, article 26 (1), parents are obliged and responsible for preventing marriages from occurring at the age of the Child. According to this law the child is someone who is not 18 (eighteen) years old. However, according to Law No. 1 of 1974 on marriage, a woman who is 16 years old and a 19-year-old man can get married. As a result, child marriages still occur in Indonesia. Child marriage is a nation's problem, which can violate children's rights to get education, health, growth and others.

In order to overcome rigid, authoritarian interpretation, Muslims need to be introduced to various interpretation of sharia. The norms of sharia was created not by an irrational process of

continuous revelation but by a rational method of interpretation. (Schach, 1964) The Islamic legal maxim said: "It may not be denied that laws will change with the change of circumstances" (*la yunkar taghayyur al- ahkam bi taghayyur al-zaman wa al-ahwal*). (El-Fadl h, 2014)

In order to overcome the ambivalent attitude, some parts of the family law need to be revised or reformed. For example, if the marriage principle according to marriage law is monogamous, polygamy is only possible in an emergency after someone who will to conduct it obtaining permission from the court. If this provision violated the marriage should be declared invalid and the perpetrator should be punished. In personal or family law, Muslim countries take different model of reformation. Some countries take progressive reform such as Tunisia and Turkey. For instance, based on the Turkish Civil Code 1926, polygamy is strictly prohibited and if it happens then the marriage is declared invalid. (Huda, 2017)

The conflicting provision among the laws is morally unacceptable because it is violated the principles of morality of law. There are some standards of morality of law such as the clarity of law and not containing contradictions in laws. Rules that its formula is not clear, or contained contradictions between one and another are immoral rules. (Fuller, 1969).

In order to reform sharia law in Indonesia, eclectic choice need to be used. Eclectic choice not only proposed by Tahir Mahmood but also by Mahfud MD. According to Mahfud, the formation of national law should be processed through an eclectic process in legislative institutions by preserving the objectives of sharia which include public benefit and justice (MD, 2018) The eclectic process is in line with the concept of *ijtihad* according to Fazlur Rahman. For Rahman, *ijtihad* must be multiple effort of thinking minds – some naturally better than other, and some better than other in various areas – that confront each other in open arena of debate, resulting eventually in an overall consensus. (Rahman, 1979)

The ideal concept of justice is justice for all proposed by John Rawls which well known as shared justice. (Latif, 2007) This concept should be used by citizens to "regulate their political affairs and interpret the constitution" (Rawle, 2005). Rawls believes that, in modern conditions, a conception of justice can achieve stability only if it can be the object of an overlapping consensus, that is, only if it can be morally endorsed by citizens who are also committed to diverse and partially conflicting moral, religious, and philosophical worldviews (Poge,

Kosch, 2007). The best way to functionalize Islamic values, according to Hefner is through democratic constitutionalism (Hefnerh, 2011). Hefner's view is in line with the opinion of Rachmat Syafe'i, the chairman of West Java Council of Ulama (MUI). For Syafe'i, a concrete manifestation of the absorption of the aspirations of Muslims to include the values and norms of sharia through political policies is carried out every five years, when Muslims through their representatives who sit in the legislative body formulate laws that will be applied in Indonesia. (Interview, 2018)

## 8 CONCLUSIONS

This study concluded that sharia for Muslims is paradigm. As paradigm it is rather abstract concept which leaves ample room for various concrete interpretations. This study also concluded that while there is no single model of Muslims in understanding and practicing sharia in the world, there is also no single model in understanding and practicing sharia in Indonesia. Theological assumption that sharia is a fixed set of norms that apply exclusively to all Muslims not supported by legal and empirical evidence. From three models of practicing sharia, inclusive, exclusive and combination, Indonesia tends to use combination model by dividing sharia into private and public. The great design of the implementation of sharia in Indonesia is the national legal system in the form of a democratic constitutional state. The assumption that in a secular state, sharia cannot be fully implemented is only true for those who take Islam as ideology and take an exclusive textual model in implementing sharia. Since the model of practicing sharia in Indonesia is still in the making, the following studies of sharia must be directed to realize the objectives of sharia by using more objective indicators and measurements in order to achieve justice for all without any discrimination among citizens.

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