LEGAL POSITIVISM, POSITIVE LAW, AND THE POSITIVISATION OF ISLAMIC LAW IN INDONESIA

Muslihun

State Islamic University (UIN) of Mataram
Email: muslih2009@yahoo.com

Abstract: This study elucidates the legal positivism and critically compares it with other schools of philosophy of law. Debates on the legislation of Islamic law in Indonesian can be traced back to the discursive practice of legal philosophy such as legal positivism. Indonesia as a law-based state (rechtsaat) adopts to a considerable degree legal positivism. However, it cannot be said that pure legal positivism, as it is promoted by its thinkers such as John Austin and Hans Kelsen, is applied because the Indonesian legal system accept morality such as religious and customary norms as the ground of legislation. By examining the postivisation of Islamic law, that is the legislation of Islamic law into the state legal system, this study argues that morale, ethics or norms derived from religion and customs are accepted to the state law. They can be used as the source of justice while justice in the positivists' view refers to the code and statute endorsed by those who are in authority or power to do that. It thus denies the view of legal positivists who reject ethics or norms beyond the state law as non-law.

Keywords: legal positivism, philosophy of law, justice, positivisation, Islamic law.

DOI: http://dx.doi.org/10.20414/ujis.v22i1.305

Introduction

THIS PAPER AIMS to examine legal positivism and its claim over justice that is based on statute or state law. There have been heated debates on the nature and philosophy of law. Sumanto explained that the new philosophy underlies the development of positivism

constructed by A. Comte (1789-1857).[1] According to Comte, the history of human culture can be divided into three stages: (1) The theological stage, i.e. the search for truth in religion; (2) the stage of metaphysical, i.e. the search for truth through philosophy; and (3) positive phase, i.e. the search for truth through sciences.[2] In law, positivism has two forms, namely juridical positivism and sociological positivism. In the juridical positivism, law is regarded as a symptom of its own which should be treated scientifically. The goal is to establish rational structures applicable for juridical system. Law is seen as the result of scientific inquiry. Hence, the establishment of law becomes increasingly professional. Modern law is the creation of experts in the field of law. It must be recognized that positivism is a term that connotes a more philosophical meaning and is included in one of the schools that concentrates on the positive law. An empirical approach in viewing law has refined the understanding of law and eliminated the factors or other values that are separable from law.

The legal positivism forms a chain in the philosophy of law. Philosophy of law itself emerged from a simple question of what law is. Pound suggested twelve concepts of law. His concept in many ways hinges on legal positivism. It is asserted that the essence of the law is to preserve the interests of the law maker.[3] The law is closely associated with a collection of authority command. In other words, law originates from those who hold the authority.[4] The school of natural law, for example, emphasizes the

---

[1] Soemanto, *Hukum dan Sosiologi Hukum: Lintasan Pemikiran, Teori, dan Masalah* (Surakarta: Universitas Sebelas Maret Press, 2006), 65.

[2] Three stages of Comte's cultural history is called "three-stage development of the law" Theo Huijbers, *Filsafat Hukum dalam Lintasan Sejarah* (Yogyakarta: Kanisius, 1982), 124 or "Teori Tiga Tahap" according to Djamil. Fathurrahman Djamil, *Filsafat Hukum Islam* (Jakarta: Logos Wacana Ilmu, 1997), 53.

[3] Sound Fifth, the law is understood as a collection of declarations regarding moral code eternal and unchanging. Sixth, the law is understood as a collection of agreements or decisions of people from organizations / political parties in the community. And eighth, the law is understood as a set of commands ruler has sovereignty and political authority that how people act. Djamil, *Filsafat Hukum Islam*, 92.

[4] Azizy adds that discussion about "what is law?" is the main target of philosophy. All the books on the philosophy of law and jurisprudence always ask

value of justice in the law. In addition to the natural law, in the 19th century the school of historical law pioneered by Von Savigny (1779-1861), argues that the law is a manifestation of the legal consciousness of society or psyche (*volksgeist*) derived from customs and beliefs, instead of legislation. These different opinions amongst scholars regarding law are reasonable and unavoidable, because their foundation and basis of analysis are different.

This paper is an attempt of continuation of such debates.[5] It examines the purpose of law, that is justice. Rahardjo explained that the law serves as the institution of justice. Furthermore, he said "talking about the law is talking about human relationships. Talking about relationships between people is talking about justice. Thus, each talk about the law, clear or vague, has always been a discussion about justice anyway. We cannot talk about the law itself to a formal form as buildings. We also need to see it as an expression of the ideals of justice society."[6] Focusing in the Indonesian context, this article argues that searching such explanation of legal purpose of justice has to go beyond the law which is strictly understood in the legal positivism as official, state-endorsed law.

The Nature of Legal Positivism

The term positivism comes from the word *ponere*, *which* means "lay"; then, it becomes a passive form *positus-a-um*, which means "laid". Thus, positivism shows an attitude or thinking laying view and approach to things. Generally, legal positivism is empirical approach to law. Legal positivism sees that the law as the fact created and enforced by certain people in the community who

---

this question. However, almost all the answers affirm that it will be difficult to make a precise definition. It is based on the recognition of legal experts such as statement of Immanuel Kant (1724-1804), "Noch eine Definition juristen suchen die Begriffe zu ihrem von recht" (none of the lawyers are able to make a definition of law). LJ van Aveldoorn also states that definition of law, he considers, is a greater loss. Qadri Azizy, *Hukum Nasional: Eklektisisme Hukum Islam dan Hukum Umum* (Jakarta: Teraju, 2004), 90–91.

[5] On the debates on purposes of philosophy of law, see Danny Priel, "The Boundaries of Law and Purpose of Legal Philosophy," *Law and Philosophy* 27, no. 6 (2008): 643–695.

[6] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2007), 159.

have the authority to make law. The source and validity of legal norms rooted in the authority. For this school, the law is a social phenomenon specifically compared to other social phenomena that can only be set up, organized, and implemented within a certain scope.

In principle, legal positivism is legal thought that affirms the legal form (Act), legal content (authorities' command), characteristic of the law (sanctions, orders, obligations, and the sovereignty), and systematization of legal norms (legal hierarchy). This stream is getting a strong influence from legal thought, i.e. legal certainty, which then transform into legal positivism. It grew in medieval times. Its core teaching is equalizing law with statute (Act) as the principal mind. This school which glorifies the written law is essentially an excessive appreciation towards the power that creates the law. So, power is regarded as a source of law and is law itself. This stream is appropriately called positivism since its basic inspiration is the same as the principle of social positivism. As in social positivism, what established as a fact is to be accepted as truth, as well as in the juridical positivism. Moreover, according to the positivist, performing scientific investigations is seen as the right way to get the truth. The conclusion that can be drawn from such an approach is that the only law that is accepted as the law is the rule of law, because this law can only be ascertained as fact.[7]

According to the juridical positivism, theoretical considerations and metaphysical approach are not allowed to perceive law because the positivism is scientific teaching on law. Positivists begin a statement regarding themselves as different side from the experts of legal nature in terms of viewing law as a social phenomenon and humanitarian empirical phenomenon, and it is not from the phenomenon of divinity, metaphysical, as well as the nature. The intended social facts refer to, by the positivist, the activity of legislative institutions in determining the law. This explicitly distinguishes the school of natural law that emphasizes

---

[7] Mohamad Abdun Nasir, *Positivisasi Hukum Islam di Indonesia* (Mataram: IAIN Mataram Press, 2004), 68. See also Mohamad Abdun Nasir, "Positivisasi Hukum Islam di Indonesia: 1970-2000" (Thesis Post-Graduate, IAIN Walisongo, 2002).

aspects of morality, i.e. the modern principle in every society, the legal positivism that understands the law formally as system commands, rules, and structure supported by power.[8]

In its development, juridical positivism is divided into two, i.e. (1) Analytic positive law (Analytical Jurisprudence) pioneered by John Austin; and (2) Pure law (*Reine Rechtslehre*) pioneered by Hans Kalsen. Although Austin and Kelsen have similarities, the philosophical origins of both are different. Kelsen bases his thinking on Neo-Kantianism, while Austin is on Utilitarianism.[9]

John Austin (1790-1859) was the founding father of legal positivism. In his famous book "The Province of Jurisprudence Determined and Lectures on Jurisprudence", Austin defines law as "A rule laid down for the guidance of an intelligent being by an intelligent having power over him". This may indicate an emphasis on the rule of law. That is, the law is the power of the ruler (law is a command of the sovereign).[10]

According to Austin, the task of jurisprudence is simply to analyze the elements that obviously exist in the legal system. Rahardjo explained that there are three main legal positivisms according to Austin, i.e. (a) the sole source of law is the highest authority in a country; (b) the law is a system of logic which is fixed and closed (or closed logical system); (c) the law must meet the elements of the command, penalties, liabilities, and sovereignty. Fulfillment of four elements makes it as the law or otherwise as a moral person.[11]

It is admitted that historical elements exist but those are intentionally ignored. The law is the command of the sovereign political power in a country. Legal science is only concerned with the positive law of the state, regardless of the merits or ugliness of law. Explicitly Austin stated that "The existence of law is one thing, its merit or demerit is another". Thus, John Austin's legal positivism (Analytical Jurisprudence) does not regard assessment

---

[8] Nasir, *Positivisasi Hukum Islam*, 69.

[9] Darji Darmodiharjo and Shidarta, *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia* (Jakarta: Gramedia Pustaka Utama, 2006), 114–115.

[10] Nasir, *Positivisasi Hukum Islam*, 70.

[11] Rahardjo, *Ilmu Hukum*, 163.

as good and bad because that is a matter of ethics or morals. Law and morality are strictly separated, and the idea of justice is replaced by the rule. Law is the command of the sovereign. Sovereignty is a thing that exists outside the law. That is in the realm of politics or sociology.

Hans Kalsen advocates analytical positivism. It is acknowledged that Kelsen develops his own theories. While Austin is closer to utilitarianism, Kelsen's philosophy is based on the ideas of Immanuel Kant which differs sharply between form and matter in science.[12] Pure legal theory is a theory of positive law.[13] He tried to question and answer the question "What is law? And not "How the law should be?" This theory is a rebellion against the ideological jurisprudence. The study of law must also be cleaned from moral considerations because moral is something abstract and has no clear standard. Even Kelsen also insists that justice is an ideological concept, something ideal but "irrational". There is a notion that justice exists, but that opinion could not provide clear boundaries so it gives a rise to a contradictory situation. After all, justice cannot be separated from the will and human action. However, it could not be the subject of knowledge. In the view of rational knowledge, there are only interests and therefore only a conflict of interest exists.

According to Kelsen, the meaning of the law lies in the form of law while justice has to do with the content or legal material. Justice is outside and rooted in the basic norms which have effective validity. Darji Darmodiharjo[14] also confirmed that, to Kelsen, the law deals with the form (*forma*), not the content (*materia*). Thus, justice as legal content is outside the law. A law therefore can be unjust, but it remains the law because it is issued by the authorities. Furthermore, according to Kelsen, the law includes *sollen* category (law as a necessity), and it is not *sein* category (law as a reality). People obey the law because it must be obeyed as a state command. Kelsen also introduced *stufen* theories,

---

[12] Nasir, *Positivisasi Hukum Islam*, 72.

[13] Rahardjo, *Ilmu Hukum*, 272–273.

[14] Darmodiharjo and Shidarta, *Pokok-Pokok Filsafat Hukum*, 115.

stating that the law is essentially a hierarchical system composed of the lowest rank to the highest rank.

Rahardjo explained that the basic fundamental of Kelsen's theory is as follows: (1) the purpose of the theory of law, as well as any science, is to reduce confusion and increase unity; (2) The legal theory is science, not the will or desire. It was knowledgeable about the law that exist, not about the law that should exist; (3) the science of law is normative, not the natural sciences; (4) as a theory of norms, legal theory does not deal with the question of the effectiveness of legal norms; (5) a theory of law is formal, a theory of how the setting and content vary according to road or a specific pattern; and (6) the relationship between legal theory with a certain positive legal system is like among the possible legal and law.[15]

Austin, Kelsen and all followers of positivism would assume that the legal norm and moral norm are different. Law cannot be confused with moral norm. Adhering to the strict positivism will also cause some problems in the practice of law which give birth the realism.[16] Qodry Azizy argues that the legal positivism cannot stand alone in today's modern world. Therefore, an effective law, in my view, is the law that is responsive to social conditions and moral attention. In other words, an effective legal product is always supported by three pillars, i.e. philosophical, juridical, and sociological bases.[17] Philosophical pillar means that law has the force to be applied if it is in accordance with the highest legal ideal as the highest positive value (*uberpositiven*). In the context of the Indonesian people, especially Muslims, ideal supreme law is based on the Qur'an (including the *hadīth*, consensus (*ijmā'*), and analogy (*qiyās*)) and Pancasila. Its concrete form is the benefit of the people in the form of a just and prosperous society. Juridical pillar maintains that law has the power to be applied if its formal requirements of formation have been met. Sociological pillar supposes that law is acceptable in the society where it exists whether or not it is imposed by state or by social acceptance. These

---

[15] Rahardjo, *Ilmu Hukum*, 273.

[16] Azizy, *Hukum Nasional*, 205.

[17] See at Rahardjo, *Ilmu Hukum*, 175, 178.

all suggests that law cannot stand alone. It needs a ground upon which it works properly.

Criticism to Legal Positivism

Rahardjo explained that the rejection of legal positivism was firstly performed by Friedrich Carl von Savigny, German jurist and an adherent of the legal history.[18] The critics from the legal history proponents against legal positivism is not only a law issued by public authorities in the form of laws, but the law is the soul of the nation (*volgeist*) which contains the rules on community living habits. The law is also in the form of customs and legal doctrine. Power to form law lies on the people in which they consist of the complexity of the individual elements and community groups.[19]

The contradiction between the views of the legal positivism and the school of legal history is mediated by the school of sociological jurisprudence, with its main proponent Eugen Erlich and Roscoe Pound. This school of thought states that good law is law which lives in line with society's needs. Such formulation was introduced in order to discover the relationship between law and society, between the written law with unwritten laws that aim to bring the legal certainty and living law as appreciation on the important role of the community in the establishment of law and legal orientation.[20] If the legal positivism states that the law is created and can be used as a tool/instrument of social engineering (law is a tool of social engineering) to encourage and create change in the community, the school of legal history argues that the law is not created, but it is found in the society.

Objection on the principles of legal positivism was also expressed by the school of legal realism.[21] In transition of the 10th and 20th century, legal thinking was influenced by a philosophical school, namely pragmatism. Pragmatism is a school of philosophy

---

[18] On the view that defends the method of legal positivism, see, for example, Giorgio Pino, "The Place of Legal Positivism in Contemporary Constitutional States," *Law and Philosophy* 18, no. 5 (1999): 513–536.

[19] Rahardjo, *Ilmu Hukum*, 164.

[20] Ibid., 164–165.

[21] Ibid., 167.

that emphasizes the orientation to reality. In the field of philosophy of law, this has resulted in the movement of the attention of the world theory, as the previous philosophy dominates the thinking, towards the practical world. Legal thinkers behind this school are called legal pragmatic realism that emphasizes attention to the application of law in society. Law is not what is written beautifully in the legislation, but what is done by law enforcement officers, police, prosecutors, judges or anyone who performs the functions of law enforcement.

Legal realism is inspired by the jurist Oliver Wendell Holmes (1841-1935) and Jerome Frank (1889-1957), as well as the social scientist Karl Llewellyn (1893-1962).[22] On the basis of the statement that "the life of the law is not (based on) the logic" Holmes laughed at the notion that the cases in law are understood in reverse as the implementation of the rules.

For this case, if the law is just the rules, there will be no process to the court. They can easily be applied to such rules as the rules in the game of chess. This is according to Holmes can happen because law is not a system of rules waiting in a strong box to be taken by the judges and mechanically applied to cases that arise. The judge, according to Holmes, has freedom and decisive role to choose or define the application of the law rather than simply taking in the box. In fact, the judges have the right to play a relatively free role, so they can decide a case in a number of ways. In practice, the factors in judges such as psychological temperament, social class, and the existing values, function more in law decision making rather than 'written rules'.

With this reality, Holmes call on behaving and acting realistically. "Realism" is understood as scientific examination of why the decisions are in fact taken". Attitudes like this are more evident than "academic exercise about how the decisions can be constructed as a logical consequence rather than rules". In accordance with his understanding and description of the legal, Holmes has issued popular words "Think of law as a prediction of what courts will decide". Or in short, it can be said that "the law is the court's decision". While the popular words from Frank are

---

[22] Azizy, *Hukum Nasional*, 207.

"Base your predictions of what the courts will decide on a good psychoanalytic understanding of judicial temperament and not on some notion of the rules". These two views express the idea that law is not what is written on statute, codes or regulations, but it is largely determined by the judge in court that is generally based on the reality on the ground.

Here, the judge has the authority to determine the law when deciding on the court. Although in some cases, the decision is not always the same as what is written in the law or other regulations. To that end, the morality of judges will determine the quality of law as the result of the court decision. At the same time, with this school, there is no reason to say that a case cannot be decided because a written law has not been set. Similarly, severe sanctions can be given to the hard cases that are very harmful to people's lives. This is where the concept of *ijtihad* from the judges can be practiced more closely. However, once again, the judge's moral quality plays an important role. Consequently, if the judge's moral is bad, legal products will also be bad.[23]

Another critic to legal positivism stems from Critical Legal Studies (CLS). It opposed the basic view of legal positivism which declares the neutrality, purity, and legal autonomy to develop left-wing theories as an inspiration and methods of eclectic thinking. CLS denounced neutrality, purity and autonomy of law by stating that it is a myth because in reality law does not work in a vacuum space but it is very tightly influenced by subjective political interests. CLS offers a solution to the legal assessment that can be done without being trapped by the thought of legal positivism, namely by eliminating the separation between legal doctrine with empirical social theory.[24]

Critics also come from Marx.[25] He said that the process of law-making is essentially a full of dialectical conflicts. The conflict

---

[23] Rahardjo also assertes that the realism developed in Germain produced the teaching of free law (Freirechtslehre) which states that the role of jurist is not merely to find law but also to form law. For this reason, the jurist must be given right to invent law freely. Rahardjo, *Ilmu Hukum*, 168.

[24] Ibid., 169.

[25] R. Herlambang Perdana Wiratraman, "Kritik terhadap Doktrin Positivisme Hukum," in *Pengantar Pendidikan Hukum Kritis* (presented at the

between one interest and the other interests which act as it is antithetic. Law is suspected as a positivised norm (by whom?) for the protection of a specific interest (from whom?), or for the sake of winning a particular conflict (by whom?). Explaining the "who" is surely those in the socio-political constellation playing as part of a strong class which have domination and hegemonic. Hence, from the beginning, it is suspected that law will be more likely clutched in the hands of the elite from this powerful class, and they will be capable of utilizing the formal law to win a conflict of interest.

Criticism for the legal positivism above shows the dynamics of the development of law. Rahardjo explained that the study of law continues to grow because it is supported by the dynamics of the development of science in general and the crisis experienced by previous legal schools (legal positivism) that unwittingly lead to the advancement of the discipline of law, with the emergence of theories, philosophy, or new schools. A wave of legal reforms is increasingly reinforced by empirical studies offered by the disciplines of sociology of law, legal anthropology, legal history, law and psychology.[26]

The development of law in the contemporary era is highly influenced by the school of legal thought that takes into account other disciplines. With this assumption, the necessity of positive law is not solely to meet the desires of the ruler who has kept the law away from morals, ethics, and justice but also respect to morals, ethics, and justice, and puts the process of positivisation on one side and substantial of morals, ethics, and justice. Law and justice must be fused on the legal form of legal content or material itself.

Legal Positivism, Positive Law, and the Positivisation of Islamic Law

Legal positivism, as described above, is part of philosophy of law. It thus forms one school of legal philosophy. If we go back to

---

HuMa-Aliansi Masyarakat Adat Nusantara, Makassar: Fakultas Hukum Universitas Airlangga, 2008), 8.

[26] Rahardjo, *Ilmu Hukum*, 161.

the two sources of law namely the formal legal sources (law rooted in the strength and validity) and material law sources (law rooted in the content), the philosophy of law is the source of its material and jurisprudence as a formal source.[27]

Meanwhile, positive law is a product or outcome of legal philosophy and jurisprudence after going through a process called positivisation of law. There is a very noticeable difference between legal positivism and the positivisation of law. The term "positivisation" is basically a derivation of the notion of positive law. When the term was changed to positivisation, it refers to a process to make "something" into a positive law.[28]

There are several definitions addressed when defining positive law. One definition states that "positive law is the applicable law in a state". Some added the above definition with the word "today". Both of these definitions are considered wrong because in essence all of the law would be positive law as they can be accountable. Here are some definitions of positive law.[29]*First*, the law is absolute rule that governs the life of the people to social supervision, interpreted and enforced by the government. *Second*, the law that includes values and norms received by the chosen ones imposed on society in the form of legislation (Socrates), which binds the behavior and role of the people and government officers (Aristotle); made by officials who govern community life (Th. Aquinas), and often tend to be oriented to maintain power (Gumplowichs). *Third*, the law that aims to make people obey the command and authority based on the rule of law, in particular to protect the people who face problems (Pericles). *Fourth*, the law technically evolved and formalized through utilitarian

---

[27] Hendro Prasetyo, "Pesantren, FU, dan FISIP UIN Jakarta Belajar Isam dari tiga Kecamatan," in *Dari Pesantren Untuk Dunia: Kisah-Kisah Inspiratif Kaum Santri*, ed. Komaruddin Hidayat (Jakarta: Prenada Media Group in collaboration with PPIM UIN Jakarta, 2016), 14.

[28] See Nasir, *Positivisasi Hukum Islam*; Ahmad Rafiq also explained that the main purpose of the formulation of the Compilation of Islamic Law in Indonesia is setting up uniform guidelines (unification) for Religious Courts judges and become positive law that must be obeyed by all Indonesian Moslems. Ahmad Rafiq, *Nuansa danTipologi Pembaharuan Hukum Islam di Indonesia* (Jakarta: Raja Grafindo Persada, 2002), 84.

[29] Soemanto, *Hukum dan Sosiologi Hukum*, 3.

rationalization (advantages) supported by government and modern law.

Although legal positivism always separates legal aspects of law from moral elements, in the case of Indonesia, moral has important stance, such religious ethics. Therefore, the positivisation of law in Indonesia can be seen through the effort to positivise or formalize Islamic law. Uniquely, this positivisation is different from the theory of legal positivism that had been understood in the West in which it strictly distinguishes between legal and moral. The positivisation of Islamic law in Indonesia is actually an attempt to accommodate the moral values (Islam) on one side and accommodate legal positivism on the other side. This practice seems to be separated from the characteristics of Islamic law. Islamic law recognizes the concept of ethical-legal system, namely that the law does not distinguish between legal and moral issues.[30] Samsul Anwar introduces the term ethical-legal system by qouting Ziaul Haque's work of "Early Landlord and Reason in Islam: A Study of the Legal Doctrine of Muzara'a or Sharecropping". Syamsul Anwar further provides the following illustration:

> "In terms of its nature, the norms and provisions of Shari'a/fiqh are not entirely coercive and enforceable by an authority. Most of the norms and legal provisions of shari'a are implemented on the basis of individual consciousness and one's faith. Thus, Islamic law (fiqh/shari'a) is not entirely identical with the law in the modern western sense. Islamic law (fiqh/shari'a) has a wider scope than the law in the Western sense. When Shari'a/fiqh will be translated into the legal terminology of the West, the two words should be used at the same time, the law and ethics. The law of apparel, beverage and singing for example cannot be said to be legal in the Western sense, but it is in the scope of ethics. However, in the conception of Islam it is all about the law. On this basis, the Muslim jurists refer to Islamic law as the ethico-legal system."[31]

This positivisation of Islamic law has applied in the field of civil Islamic law (*al-ahwāl al-shakhsiyyah*) and collected in the form

---

[30] See Wael B. Hallaq, "Groundwork of the Moral Law: A New Look at the Qur'an and the Genesis of the Shari'a," *Islamic Law and Society* 16, no. 3 (2009): 239–279.

[31] Syamsul Anwar, "Operasionalisasi Fiqh Muamalah Maliyah" (presented at the Pengembangan Materi dan Metode Pengajaran Fiqh di Indonesia, Yogyakarta: Fakultas Syari'ah IAIN Sunan Kalijaga Yogyakarta, 1996), 6.

of Islamic Law Compilation (*Kompilasi Hukum Islam*/KHI). Meanwhile, in the field of civil contract (*mu'āmalah māliyyah/madaniyyah*), it is still new through the accommodation of Islamic banking and similar financial institutions. The positivization of Islamic economic law is enacted through the Compilation of Economic Shari'a (Kompilasi Hukum Ekonomi Islam/KHES).

There are various terms used by experts regarding the effort of accommodation of Islamic law into national law, including legislation, positivisation, formalization, the transformation of Islamic law, institutionalization of Islamic law, codification or compilation of Islamic law, Islamization of law, *taqnīn*, and *siyāsa*. Whatever the term used, above all, it tries to put Islamic law as one of the main pillars in state law directly and binds all citizens, especially Muslims. Meanwhile, popular branding to denote reform in Islamic law in Indonesia includes "renewal of Islamic law", "indigenization of Islamic law", and "contextualization of Islamic law".[32]

Fathurrahman Djamil and Wahiduddin Adam use the term legislation in revealing the meaning of accommodation of Islamic law by the state. The concept of positivisation is used by M. Yahya Harahap and A. Qodry Azizy. Meanwhile, Abdul Ghani Abdullah offers the concept of the transformation of Islamic law. The term "Institutionalization of Islamic law" is introduced by Bustanul Arifin. Rifyal Ka'bah, Abu Bakar bin Hashim and S. Ali RazaNaqvi refers this to codification or compilation of Islamic law. Muhammad Abu Zahrah uses the term *taqnīn*. N.J. Coulson uses the term *siyāsah* powers.[33] Meanwhile, the term formalization is currently widely used by other scholars, such as Abdurrahman Wahid and others.[34]

---

[32]The term re-actualization of Islamic law popularized by the former Minister of Religious Affairs in Soeharto era, Munawir Syazali. Meanwhile, the term "grounding" of Islamic law popularized by M. Quraish Shihab -which was also the minister of religion in the Suharto era.

[33] A description of this, see Nasir, *Positivisasi Hukum Islam*, 20–27.

[34] See Maulidin, "Mendiskusikan Tulisan H. Abdurrahman Wahid: Utopia Formalisasi Syari'ah", Jawa Post, Tanggal 7 November 1998," *Jawa Post*, November 7, 1998; Mutawalli, "Menjual Murah Ayat-ayat Tuhan: Hasrat Kuasa

All these thoughts underline the same idea about the imposition of Islamic law in the state system formally and substantially. They endorsed Islamic law as a part of the state law and the law that lives and thrives in the community (the living law) should provide a real contribution in a state.

Azizy termed it in the view of substantial and cultural. It actually has the same meaning, i.e. inserting Islamic law by not promoting the label but the values only. The second model can also be considered a form of the positivisation of Islamic law.[35] In fact, according to Azizy,[36] in the reform era, the direction and policy of national law which is also a national political law must be based on the state development guide or national long-term plan. It stated that managing national law must recognize and respect religious law and customary law. Thus, in this reform era, Islamic law or *fiqh* has a major role as a source of national law. According to Abdul Ghani Abdullah, there are three basic reasons for the juridical position of Islamic law in Indonesia. *First*, it is a philosophical base. Substantial injection of normative aspects of Islamic teachings in Indonesia emerges epistemological attitude that has contributed massively to the growth of life perception, moral ideals, and ideals of law in socio-cultural life. *Second*, it is a sociological base. It refers to the tradition of searching law and justice. Those who have knowledge and authority in law will become reference to whose who seek justice. *Third*, it is a legal base. Indonesian legal history shows that the validity of the juridical phenomenon to reveal the long journey in the legal system, so that in the end Islamic law was given a place in the legal order.[37]

The development of Islamic law in the context of state legal system is very rapid. Thus, KHI development is needed not only in the realm of status personal and family law (*al-aḥwāl al-shakhsiyyah*) but also in the realm of contracts (*mu'āmalah)* in the

---

di Balik Ide Formalisasi Syariat," *Ulumuna* 7, no. 1 (June 2003); Ahmad Amir Aziz, "Geliat Formalisasi Syari'at di Pulau Seribu Masjid: Sebuah Pemetaan Awal," *Ulumuna* 7, no. 1 (June 2003).

[35] Azizy, *Hukum Nasional*, 194.

[36] Ibid., 174.

[37] Nasir, *Positivisasi Hukum Islam*, 131–132.

special sense (*mu'āmalah māliyyah*) and eventually developed in the other realms of Islamic law.[38] Thus, the teaching of Islam is related to two of the last things, to be more grounded and not just studied as *an sich* knowledge.

Usman[39] records ten aspects of Islamic law within the Indonesia law. *First*, Presidential Decree on July 5, 1959, on the returning to the Constitution of 1945. Through this decree, the President said that the Jakarta Charter (known as *Piagam Jakarta*, whose first principle commands the application of Islamic law for Muslim citizens) animates and is a continuum of the 1945 Constitution. *Second*, Government Regulation No. 28/1977 on Endowment Land (*waqf*). *Third*, the Presidential Instruction No.13/1980 on Guidelines for the Implementation on Revenue Sharing Agreement Statute No. 2/1960. *Fourth*, Marriage Law No. 1/1974. *Fifth*, the Supreme Court decision no. 93/K/ Kr/1977 issued on 19 November 1977, affirms the verdict of the District Court on Adultery Punishment in accordance with Islamic law. *Sixth*, Religious Court Act No. 7/1989. *Seventh*, Compilation of Islamic Law issued by Presidential Decree No. 1/1991. *Eighth*, Islamic Banking Act included in Government Regulation No. 7/1992 and Act No. 10/1998, which accommodates Islamic banks. *Ninth*, Zakat Management Act No. 38/1999 and tenth Pilgrimage Act No. 17/1999. Some other regulations can be said to have adopted Islamic law. These include Endowment Act No. 41/2004 and Amendment of Religious Act No. 7/1989 under the Act of Religious Court Amendment No. 3/2006.

The compilation of Islamic Law only regulates three issues, i.e. marriage, inheritance, and endowments. Indeed, all three are about *mu'āmalah* (civil contract), but they are still limited to the issue of family law (*al-ahwāl al-shakhsiyyah*). In other words, three issues do not touch *mu'āmalah* in a certain sense yet. That is the relationship of people on worldly problems (economic

---

[38] About the positivisation of Islamic law in al-Ahwalas-Syakhsiyyah discussed thoroughly by Nasir, *Positivisasi Hukum Islam*; Meanwhile, the positivisation of Islamic law in Mu'amalah Maliyyah, see Muslihun Muslim, *Fiqih Ekonomi dan Positivisasinya di Indonesia* (Mataram: IAIN Mataram Press, 2006).

[39] Suparman Usman, *Hukum Islam: Asas-Asas dan Pengantar Studi Hukum Islam dalam Tata Hukum Indonesia* (Jakarta: Gaya Media Pratama, 2001), 132–133.

transactions), or with other terms *muʿāmalah madaniyyah* or a private civil contract (*muʿāmalah* in the narrow sense), and commercial law.

Conclusion

The legal conceptions of the positivists emphasize on the roles of human institutions for legal determination. They see the law as a social-humanity phenomenon and no longer view it as a metaphysical and natural phenomenon like the school of natural law. The considered social facts are the activities of legislation council which become the source of law and their output seen as legal. Then the positivists put decision-making institutions as a resource for legal content.

Positivist ideas are very different from the ideas of the proponents of natural law and sociology of law. The proponents of natural law emphasize the importance of moral in law, and legal positivism split them away. The sociologists believe that the origin of the law is not from the legislature or the authorities, but it comes from the community as a whole. On the one side, the legal positivism has similarities to the natural law because they are top-down (one way) to rely on sources of law that comes from top. Legal positivism is from the ruler while the natural law comes from God. On the other hand, legal positivism has similarities with the school of legal history because they both put something empirically as a legal basis.

Thus, the legal type of the positivists is top down, from the rulers to the people. Meanwhile, the type of sociology of law is bottom up, from the people then ratified by the authorities. The historical law itself is top down and bottom up (simultaneously). The law in this school is institutionalized pattern of behavior. The positivists view law as their existence (Law as it is) and not the law as it should be. Positivists do not put religious values and morals in its legal system.

The positivisation of law in Indonesia can be seen from the efforts to positivise Islamic law. This effort is actually an attempt to accommodate the moral values (Islam) on one side and accommodates the legal positivism on the other side. Although the legal positivism always splits legal and moral but for Indonesia,

moral would be at the first place namely the religious moral. Moreover, Islamic law recognizes the concept of ethico-legal system. It does not distinguish legal and moral issues. The positivisation has been implemented in the field of civil Islamic law (*al-ahwāl al-shakhsiyyah*), collected in the form of Islamic Law Compilation (KHI), and in the field of special civil (*mu'āmalah māliyyah/madaniyyah*) which has the Compilation of Islamic Economics Law.

References

Anwar, Syamsul. "Operasionalisasi Fiqh Muamalah Maliyah." Yogyakarta: Fakultas Syari'ah IAIN Sunan Kalijaga Yogyakarta, 1996.

Aziz, Ahmad Amir. "Geliat Formalisasi Syari'at di Pulau Seribu Masjid: Sebuah Pemetaan Awal." *Ulumuna* 7, no. 1 (June 2003).

Azizy, Qadri. *Hukum Nasional: Eklektisisme Hukum Islam dan Hukum Umum*. Jakarta: Teraju, 2004.

Darmodiharjo, Darji, and Shidarta. *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia*. Jakarta: Gramedia Pustaka Utama, 2006.

Djamil, Fathurrahman. *Filsafat Hukum Islam*. Jakarta: Logos Wacana Ilmu, 1997.

Hallaq, Wael B. "Groundwork of the Moral Law: A New Look at the Qur'an and the Genesis of the Shari'a." *Islamic Law and Society* 16, no. 3 (2009): 239–279.

Huijbers, Theo. *Filsafat Hukum dalam Lintasan Sejarah*. Yogyakarta: Kanisius, 1982.

Maulidin. "Mendiskusikan Tulisan H. Abdurrahman Wahid: Utopia Formalisasi Syari'ah", Jawa Post, Tanggal 7 November 1998." *Jawa Post*, November 7, 1998.

Muslim, Muslihun. *Fiqih Ekonomi dan Positivisasinya di Indonesia*. Mataram: IAIN Mataram Press, 2006.

Mutawalli. "Menjual Murah Ayat-ayat Tuhan: Hasrat Kuasa di Balik Ide Formalisasi Syariat." *Ulumuna* 7, no. 1 (June 2003).

Nasir, Mohamad Abdun. *Positivisasi Hukum Islam di Indonesia*. Mataram: IAIN Mataram Press, 2004.

———. "Positivisasi Hukum Islam di Indonesia: 1970-2000." Thesis Post-Graduate, IAIN Walisongo, 2002.

Pino, Giorgio. "The Place of Legal Positivism in Contemporary Constitutional States." *Law and Philosophy* 18, no. 5 (1999): 513–536.

Prasetyo, Hendro. "Pesantren, FU, dan FISIP UIN Jakarta Belajar Isam dari tiga Kecamatan." In *Dari Pesantren Untuk Dunia: Kisah-Kisah Inspiratif Kaum Santri*, edited by Komaruddin Hidayat. Jakarta: Prenada Media Group in collaboration with PPIM UIN Jakarta, 2016.

Priel, Danny. "The Boundaries of Law and Purpose of Legal Philosophy." *Law and Philosophy* 27, no. 6 (2008): 643–695.

Rafiq, Ahmad. *Nuansa danTipologi Pembaharuan Hukum Islam di Indonesia*. Jakarta: Raja Grafindo Persada, 2002.

Rahardjo, Satjipto. *Ilmu Hukum*. Bandung: Citra Aditya Bakti, 2007.

Soemanto. *Hukum dan Sosiologi Hukum: Lintasan Pemikiran, Teori, dan Masalah*. Surakarta: Universitas Sebelas Maret Press, 2006.

Usman, Suparman. *Hukum Islam: Asas-Asas dan Pengantar Studi Hukum Islam dalam Tata Hukum Indonesia*. Jakarta: Gaya Media Pratama, 2001.

Wiratraman, R. Herlambang Perdana. "Kritik terhadap Doktrin Positivisme Hukum." In *Pengantar Pendidikan Hukum Kritis*. Makassar: Fakultas Hukum Universitas Airlangga, 2008.