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SHARIA ECONOMY IN INDONESIA FROM CONSTITUTIONAL PERSPECTIVE

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ABSTRACT

Law is the accumulation of rational ideas in response to community development that was born based on the idea of universality and morality. The idea of universality provides a justification for the enactment of basic human freedoms and recognition of basic human rights in the life of the country. Similarly, the idea of morality is that moral principles are general and can be analyzed by human reasoning. The second idea is the essence of it is used as a basic idea about the nature of the formulation of law and justice as a legal foundation. The functional purpose is looking at the law more focused on the facts of a field, social, cultural, political, and religion as factors that need to be considered in seeking legal solutions. The law in the functional flow is in line with the social dynamics, economics, culture and politics so that the value inherent in the law that developed in the community concerned. Both streams are still evolving and are applied in various countries around the world. With regard to the transformation of Islamic law in national legal systems, it cannot be separated from these two streams of law that is through a systems approach and the approach to legislation.
Keyword: Sharia Economy, Legal Politics, System of national law

1. BACKGROUND

Sharia banking is a legal anticipated norm on the social dynamics that has become part of the social needs and in line with the legal principles.[1] Sharia banking is one of the forms of potential manifestation and contribution of the society on the national economy and is part of the economic development based on the Islamic values and principles (sharia) in which, the state incorporate the sharia principles into the national legal system (banking law). The sharia principles are based on the fairness, usefulness, equality, certainty and universality principles into the banking principles. It is a dynamic legal process that interacts with the social dynamic, hence, automatically, the sharia principles and the sharia banking become integral part national banking system and is part of the social legitimacy of the law.[2] In other words, this norm integration principles is hand in hand with the general principles of law, such as fairness, usefulness, and certainty principles. In addition to that, it is also in line with the human rights principles, to respect, to protect, to fulfill human rights. Those three principles in nature are the freedom protected in Article 27, Article 28, Article 28 D Clause (1), and Article 28E Clause (1) and (2), Article 28H Clause (2), and Article 29 Clause (1) and (2) of the 1945 Constitution.

In a plural society, it is possible for certain sectors to be managed differently so long there is no discrimination, and that the final objective is to ensure the protection and fulfillment of human rights and fairness.[3] Considering the content of Article 29 Clause (1) of the 1945 Constitution which stated that, "*Negara berdasar atas keTuhanan Yang Maha Esa/the state is based on one supreme god"* the implementation of god's values are within the system of religious teaching, hence, all the Indonesian citizens are protected to implement the values

[1] Hazairin, *Tujuh Serangkai Tentang Hukum*, (Jakarta: Bina Aksara, 1985), hal. 30

[2] M. Dawam Rahardjo, *Arsitektur Ekonomi Islam*, (Bandung: Mizan, 2015), hal. 189 – 192. See also M. Dawam Rahardjo dalam, *Ekonomi Politik Pembangunan*, (Jakarta: LSAF, 2012), hal. 9 -12

[3] *Ibid*, hal 31. In-depth study was also conducted as the successor Hazarin, Prof. Daud Ali in his opinion, *Perundang-undangan dan Perkembangan Hukum di Indo*nesia, Majalah Mimbar Hukum, No. 21 Tahun VI (Juli – Agustus 1985), hal. 18

of the religion that they believe at.[4] This is also insisted within Article 29 Clause (2) of 1945 constitution, which stated that, "*Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agamanya masing-masing dan untuk beribadat menurut agamanya dan kepercayaannya itu/the state assure the freedom of each of its citizens to believe in their religion and to pray based on their beliefs and religions"*. In Article 29 Clause (1) and (2) of 1945 Constitution, the state ensure and protect the implementation of religious teaching including the incorporation of religious norms into legal norms, hence, all the values held by the state mentioned in the religious values need to be ensured its legalities by the state, in order for the legal objectives –fairness, certainty, and usefulness can be achieved by the people who believe in those religions. Therefore, legal pluralism in certain areas shall be a constitutional foundation and to ensure that it does not prioritize the major religion, instead, it should be based on the legal values and certainty and legal usefulness as stipulated by the 1945 Constitution and Pancasila as the foundation of the state. In human rights context, the to respect, to protect and to fulfill human rights principles is freedom manifested in Article 27, Article 28, Article 28D Clause (1), Article 28E Clause (1) and Clause (2), Article 28H Clause (2), Article 29 Clause (1) and Clause (2) of 1945 Constitution is part of the state's obligation to respect, to protect, and to fulfill them.

2. LEGAL PLURALISM

Sociological Review

The plurality of Indonesian citizens is evident in its geographical layout, ethnicity, cultures, and religion. Regardless, we are politically united to complement each other as symbolized by our state emblem, "Bhineka Tunggal Ika/Unity in Diversity." The ethnical, culture, and religious diversity can be interpreted as a socio-cultural phenomenon. These diversities influence the legal matters, especially those related to codification and unification of law. Ethnicity, cultures and religions also contain diversities of values and norms believed and obeyed by the related societies. The ongoing debate on the legal diversity in Indonesia has been happening since the Dutch occupation time. The core debated matter is the choice that has to be made by the colonial government, the Dutch, on the integrated or segregated colonial community. In legal framework, **one law for all groups of society**, or **diverse law for diverse society**. The first view tends to create colonized state, and the second view tends to only create administration system within the colonized state.[5]

Those two options have legal consequences. The first view shows that the law is learning to legal unification approach because state power needs legal certainty. Meanwhile, the second view does not need legal unification approach, rather it only needs management of the colonized region (administration system). The East Indie region is not a state, but an administrative area under the sovereign state (Holland). The consequence of this second view is a diverse legal choice and the Dutch opted for this choice. Due to East Indie (Indonesia) only an administrative area under the ministration of the Dutch government, the

[4] Hartono Mardjono, *Menegakkan Syari'at Islam dalam Konteks Ke Indonesiaan*, (Jakarta: Mizan, 1997), hal.28., which explains that Article 29 paragraph (1) of the 1945 Constitution contains three (3) charge meanings: 1) Countries should not create legislation or conduct policies that are contrary to the basic belief in God Almighty; 2). The state is obliged to make to make perutan legislation or conduct policies for the implementation of the manifestation of faith in God Almighty; and 3) the State is obliged to create legislation that prohibits anyone abusing religious teachings ..

[5] Daniel S Lev, ***Hukum dan Politik di Indonesia -Kesinambungan dan Perubahan (legal and Politics in Indonesia- Sustainability and Changes)*** (Jakarta: LP3ES, 1990), p. 440

ruling government appointed by the Dutch in Indonesia does not have authority to create laws and regulation. It's legal consequence, legal plurality implemented by dividing the population of East Indie to abide the law based on their classes (IS Article 131 and 163). This legal diversity can be understood, because it is hard to create legal unification in a diverse community. If this is not done, it would bring social upheaval among the society, in which the society held into their normative values. Based on this second choice, the colonial government established the Reglement op het beleid der Regeering van Nederlands Indie, or Regeering Reglement (RR) enacted through Staatsblad 1882/152.[6] Article 75 Clause (3) RR emphasized that for the inlanders (the Indonesian people) the religious law applied. The political decision (legal politics) taken was influenced by a theory proposed by Lodewijk Willem Chritian van den Berg that is, *receptio in complexu*. This theory believes that legal norms are based on religious norms.[7] In the development of legal politics, the reception in complex theory by Snouchk Hurgrounye and van Vollehhoven is considered inappropriate because it does not benefit the colonial government. As the result, the reversed theory called receptive theory was developed. This theory explains that the law applied to the indigenous people is the customary law and not religious law. Only when the religious law has been incorporated into the customary law then it can be implemented. Snouchk and Van Vollenvohen's opinion become the basis for the formulation of the legal politics of the colonial government as written in the Wet op de Staatsinrechting van Nederlandsch Indie or Indische Staatsregeling (IS) Stbl. 1929:212. Legal diversity problem has placed religion as the basis of the legal formulation in Indonesia during the BPUPKI court. The output of the BPUPKI court is well known as the Jakarta Charter that placed religion as the basis in managing the society's life especially those who are Moslem. In the theoretical framework, legal diversity can be viewed from the natural law perspective. Natural law as one of the streams in legal philosophy was based on the **universality** and **morality ideas**. The universality idea is the basis for the establishment of human freedom and acknowledgment of human rights in the state life. in this sense, the morality idea becomes common moral principles and is acceptable to human reasoning. Both ideas is the essential thing that has become the rudimentary in the formulation of legal and fairness as the objective of the law.

Considering these two ideas means that moral values and ethics is one of the rudimentary of legal development to make fairness as the eternal ideas. The legal concept is not constructed,

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6 R. Soepomo, ***Sejarah Politik Hukum Adat (Political History of Customary Law), Jilid I*** (Chapter I) (Jakarta: Pradnya Paramita, 1982), p. 30.
See Soepomo in Moh. Yamin, ***Naskah Persiapan Undang-Undang Dasar*** 1945 (Preparatory Text of the 1945 Constitution) ,(Jakarta: Yayasan Prapanca, 1959), p. 109 in BPUPKI Court held on 15th of July 1945 stated that Indische Staatsregeling replaced RR as Dutch Constitution Article 75 Clause (3) RR describes that ***by the Indonesian judges, they should treated the religious law (godsdienstige wetten) and the customs of the indonesian people.*** Article 78 Clause (2) of the RR stated that " in civil cases between Indonesian, or with those similar to them, then they should bow to the decision of the religious judge or head of the society based on the religious law or their old habits and practices."
Compared with Sayuti Thalib who stated that either legal plurality or legal institutionalization is elected by the colonial government is not the plurality in the sense of the law, rather, in political meaning, rather it is in political sense of the law which is related to the legal substance that differ someone's position before the law. This social stratification placed the European law (Dutch) higher than the local law. This shows arrogance of the Dutch government who placed the Dutch community in a higher strata than the Indonesian people. Sayuti Thalib, ***Politik Hukum Baru - Mengenai Kedudukan dan Peranan Hukum Adat dan Hukum Islam dalam Pembinaan Hukum Nasional(New legal politics- The role and place of customary law and Islamic law in the state law),*** Cet.Pertama (Bandung : Binacipta, 1987),p. 63

7 Sayuti Thalib, ***Receptio A Contrario-Hubungan Hukum Adat dengan Hukum Islam (correlation of customary law and Islamic law_,*** (Jakarta: Bina Aksara, 1985), p. 7.

rather, it is the result of natural works that becomes the apex of the law. However, how fairness can be or cannot be achieved relies on how the law is formulated and applied. Hence, the content of natural law is fairness and morality.[8] Historically, the natural law origin has been developed since the 6th century and is a legacy from the Roman as the disciple of the Justinianus book of the law, which was the first book of the law written in the Roman age. The content of this book can be traced back to the Greek law based on Cicero's thoughts. Cicero said that human being is the universe community. Law, naturally, is an expression of the universal human nature. In the development of this thought by Immanuel Kant, natural law is partly developed based on the imperative category. The Kant's idea is that law motivation of human actions. The motive of human action divided into internal human motive such as morals, and extreme actions called the law. Extreme actions are categorized as law due to the nature of those actions that can influence or be followed by others. In relation to religion, the religious principles are loaded with morals and justice values, hence, it can be understood as principles that in line with the principles and the content of natural law. Therefore, legal pluralism is possible to be implemented in a heterogeneous community like in Indonesia, and religion can have a place as a source or basic norms for the reference in formulating the law. Politically and normatively, it had done in Indonesia during the Dutch colonization and in the establishment of the Republic of Indonesia in Jakarta Charter and in Article 29 of 1945 Constitution.

3. RELIGIOUS AS SOURCE OF LEGAL ESTABLISHMENT

In normative and political constellation, religion has been placed as one of the foundations for making the law. This is evident in Article 29 Clause (1) of 1945 Constitution, which insisted that The state is based on one supreme God. Meanwhile, in Clause (2) of the same Article, it is emphasized that The state ensures freedom of each of its citizens to believe in each of their religion and to pray based on their religion and beliefs. In understanding the 1945 Constitution especially this Article 29 has to start by the debate in the beginning of the drafting process of the Jakarta Charter. The Jakarta Charter is a national consensus, which was born as anticipation of the climax of the Indonesian struggling. It is a national consensus in a way that the Jakarta Charter was produced by an institution, which was established during Japan colonization era (by the Dai Nippon), the *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia*/the Investigation agency for the preparation of Indonesian independence (or *Dokoritsu Zyunbi Tyoosokai* in Japanese). During their meeting which was started from 29 of May 1945 on Constitution, there was a question on the foundation of the state (*weltanschauung).* The 62 members of the BPUPKI can be

[8] A.P. d'Entreves, ***Natural Law - An Introduction to Legal Philosophy,*** (London:Hutchinson &Co, 1970), p. 13. In page 14 A.P. d'Entreves stated that the origin of the idea of natural law may be ascribed to an old and indefeasible movement of the human mind (we may trace it already in the Antigone of sophocles) which impels it towards the nation of an eternal and immutable; a justice which human authority expresses, or ought to express - but does not make; a justice which human authority may fail to express - and must pay the penalty for failing to express by the diminution, or even the forfeiture, of its power to command. This justice is conceived as being the higher or ultimate law, proceeding from the nature of the universe - from the being of God and the reason of man. It follows that law - in the sense of the law of the last resort - is somehow above law-making. It follows that lawmakers, after all, are somehow under and subject to law. Pengertian yang sama juga dapat ditelaah dalam W. Friedman, ***Legal Theory,*** Fifth Edition (London: Stevens & Sons Limited, 1967) p. 114 - 116. Hal senada juga dapat ditelaah tentang pemahaman hukum alam oleh Heinrich A. Rommen dalam, ***The Natural Law - A Study in Legal and Social History and Philosophy,*** (Indianapolis: Liberty Fund, 1998), p.4- 6.

categorized into two groups, the secular nationalists, and Islamic nationalists.[9] These two groups have clear differences on what should be the foundation of this state, one group would like Islam as the foundation of the state, and the other group wanted the state as the foundation of this country. In their court meeting on the 1st of June 1945, Soekarno presented his ideas on the foundation of the state that today is well-known as Pancasila. Other members of the agency such as Soepomo, Muhammad Yamin had also presented their ideas on the foundation of the state.

To accommodate the evolving ideas, a formulator team consists of 9 people (9 Committee) was established to formulate the Jakarta Charter that had become the gentlemen's agreement.[10] The Jakarta Charter contained politic aspect, human rights, *staatidee* and *rechsidee*. There were five bases principles as the foundation of the Jakarta Charter that was mentioned in the fourth paragraph of the charter:

" ... yang terbentuk dalam suatu susunan Negara Republik Indonesia yang berkedaulatan mwhrakyat dengan berdasarkan kepada : Ketuhanan, dengan kewajiban menjalankan Syari'at Islam bagi pemeluk-pemeluknya, menurut dasar kemanusiaan yang adil dan beradab, persatuan Indonesia dan kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan perwakilan, serta dengan mewujudkan suatu keadilan sosial bagi seluruh rakyat Indonesia."

"... Later on, to establish a government of the republic of Indonesia that protects the whole nation of Indonesia and all the land of Indonesia and to bring common prosperity, to educate the nation and to participate in creating a well arranged world, which was based on freedom, eternal peace, and social justice, hence, Indonesian independence is composed into a foundation of law formulated in a composition of the United Republic of Indonesia which is a people sovereign state, which was formulated in a composition of the state of the Republic of Indonesia, a people sovereign state that based on: God, with the duty to implement the Islamic Sharia for its believers, based on fair and civilized humanity, unity of Indonesia, and citizenship that is led by wisdom in representation and permusyawaratan, and by providing a social justice for all the citizens of Indonesia." The formulation of the Panitia 9 got a strong reaction from the members of the BPUPKI, especially on the formulation of the God concept, with the duty to implement the Islamic sharia for the believers. This reaction came from the heated debate between the secular-nationalists members and the Islamic-nationalists members. This concept brought political implication and there was a concern that this can bring frictions in the state. After a long discussion and explanations from some islam-nationalists members that sit as the members of Panitia 9, then, on July 14, 1945, the Jakarta charter was wholly agreed as the opening (Preamble) of the 1945 Constitution.[11]

In the context of the constitution, how was the implication of formulation of the Jakarta Charter? To answer this question, it can be seen from the political implication and the legal viewpoint. ***First,*** political implication means that the formulation did not necessarily mean

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9 Endang Saifuddin Anshari, ***Piagam Jakarta 22 Juni 1945,*** (Bandung : Pustaka - Perpustakaan Salman ITB, 1981), p. 26. Compared with William G. Andrew, ***Constitutions and Constitutionalism,*** Van Nostrand, New Jersey, 3rd edition, 1968, which stated that consensus is based on three basic elements; (1) The general goals of society or general acceptance of the same philosophy of government; (2) The basis of government; and (3), The form of institutions and procedures

10 ***Ibid.*** , p. 27

11 ***Ibid,*** p 31

that the state is based on Islamic law or this state is not an Islamic state. Therefore, those seven words have to be interpreted as anemphasize that the Islamic people need to be protected their freedom in implementing the sharia/regulation of their regulation. Islamic law does not necessarily need to be incorporated into the customary law, however, the Islamic law is on its own and its regulation is only applicable for the Moslems. The concept of God with the responsibility to implement the Islamic sharia for its believers has an implication toward the state in a material sense. If it was incorporated as part of the constitution, then automatically, the established state should have been an Islamic state. This is a ***wrong*** view, because according to Sunny,[12] that formulation was preceded by the formulation of the *stateside* or a constitution established by the people sovereign state of the Republic of Indonesia. The state that would be established based on the Jakarta charter was a people sovereign state and not an Islamic state. The people sovereign state should be based on 5 principles in the Jakarta charter as cited above. Further, Sunny considered that the formulation of the Jakarta charter should not be debated at length, thus, it raised misunderstanding and it was not necessary to erase 7 words behind the word God, it was necessary to change those words into 7 new words, hence, it would appear: "*with the responsibility to implement the* ***religious*** *deeds of its believers."*[13]

With this new composition it means that the Moslems are responsible to implementing Islamic Law, The Christians are obliged to implement the Christians law, and soon. ***Second,*** the implication on understanding the legal concept, then the Jakarta charter can be seen from two perspectives, as ***persuasive source,*** and as an ***authoritative source***. *Persuasive source* means as a legal source that people needs to be convinced to achieve it and *authoritative source* means that it is an authoritative source of law.[14] Since the signing of the Jakarta Charter in the BPUPKI up to the Presidential Decree on July 5, 1959, it was considered as ***a persuasive source*** of law, including the 7 words that were deleted. Because the Jakarta charter has been incorporated as part of the 1945 Constitution, then the Jakarta charter has shifted to become the *authoritative source.* This means, that the seven words that were erased have the binding power for its believers or they become an authoritative source of Indonesian constitution. Hence, the position of the Islamic law does not need to be incorporated into the customary law as stipulated in Indische Staatsregeling (IS), however, it stands alone and can be implemented by the state into its believers.

3. CONSTITUTION SUPREMACY PRINCIPLE

Constitution and National Legal System

Rechtsstaat or *The Rule of Law* is a concept of state idealized by the founding fathers who discussed and formulated the 1945 Constitution, as mentioned in the explanation of the 1945 Constitution before the amendment. The affirmation of our state as the rule of law or as a law state is strengthened in 1945 Constitution after its amendment in Article 1 Clause (3) in which it states that "Indonesia is a Law State".[15] As a law state, then the law has to be

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12 Ismail Sunny, ***Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia (Islamic Law in Indonesian Constitution's System),*** in National Committee of Association of Religious Court Judges, ***Prospek Hukum Islam dalam rangka Pembangunan Hukum di Indonesia - Sebuah kenangan 65 tahun Prof. Dr. H. Busthanul Arifin, SH (The Prospect of Islamic Law in Shaping Indonesian Law- a 65 Years Memory of Prof. Dr. H Busthanul Arifin, SH)***, (Jakarta : PP - IKAHA, 1994), p.195

13 ***Ibid,*** p. 195

14 ***Ibid,*** p. 197

15 Article 1 Clause (3) is the fourth amendment of 1945 Constitution.

understood and developed as an integral part of a system. As a system, law consists of the elements of (1) institutional, (2) instrumental, (3) subjective and cultural elements. Those three elements of law encompass (a) law making activity, (b) law administrating, and (c) law adjudicating or sometimes used interchangeably with its narrow term, the law enforcement. In addition to those activities, there are other activities that often forgotten such as, (d) law socialization and law education, and (e) law information management. These two activities are supporting activities, which contribution is becoming more and more important in the national legal system. Those five parts of the legal system are usually divided into three areas of the state power, (i) legislation and regulation function, (ii) executive and administration function, and (iii) judicial function.[16]

The legislative body is a parliamentary institution, the executive body is the government bureaucracy, and the judicial organ is the law adjudication bodies that consist of police, attorney, and court. All these organs have to be interconnected from its higher ranks to their lower ranks, from the central apparatus to provincial apparatus, and the districts/cities apparatus. The whole elements, components, hierarchy, are systemic aspects and are interrelated with each other. Hence, it covers the legal system definition that has to be developed within the law state of the republic of Indonesia based on the 1945 Constitution. All dynamics of those aspects, elements, hierarchies, and components need to work in harmony, otherwise, it won't be as expected. Currently, there is an intention to understand law and law development partially. One of the elements in the national legal system is the law administration. Those administrations of law are the regulations that can be said as instruments within a national legal system, in which their validity can be traced back, directly and indirectly, to the constitution.[17] Legal administration, as the personification of the state, is a hierarchy of the regulations, which has different levels. The unanimity of the regulations is based on the fact that creation of the lower level regulation must be based on the higher level regulations.[18] National regulations in Indonesia as a legal administration is also hierarchically composed. This composition is called the constitutional supremacy, as constitution at the apex of the hierarchy.

Implication of the amendment of the 1945 Constitution on the Development of National Legal System

As a consequence of constitutional supremacy and regulation's hierarchy within a legal system, the constitutional amendment requires amendment of the related regulations by the stakeholders.[19] The same case applies for the fundamental amendment of 1945 Constitution,

[16] Montesquieu, *The Spirit of the laws*, Translated by Thomas Nugent, (London: G. Bell & Sons, Ltd, 1914), Part XI, Chapter 67.

[17] Hans Kelsen, *General Theory of Law and State*, translated by: Anders Wedberg, (New York; Russell & Russell, 1961), p. 115 pp 123-124.

[18] *Ibid*., p 124. Several authors stated that this hierarchy theory is influenced by Adolf Merkl theory, or at least, Mark has proposed his theory prior to Hans Kelsen, his theory is called *"stairwell structure of legal order"*. Merkl's theory is on the order of the law *(die Lehre vom Stufenbau der Rechtsordnung)* in which, a law is a system of hierarchical order, a norm system that conditioned and be conditioned and legal actions. The conditioning law contains condition for creation of other norms or action. The creation of this hierarchy is manifested in regression from a higher legal order system to the lower legal order system. This process is always a concretization and individualization of the process.

[19] Law can be categorized into four law definitions based on the area it is made and legal formation, *The State's Law*, Customary Law (*The People's Law*), Doctrine (*The Professor's Law*), and practical law (*The*

it has to be followed by the amendments to the regulations under this amended constitutions. Soon after the constitutional reform is made, it has to be immediately followed by legal reform. In a comprehensive view, the regulations in the 1945 Constitution have been amended 4 times, and there are 22 statements that stated, "stipulated by the law" or "will be further stipulated in the law", 11 statements on "stipulated in the law" or "will be further stipulated in the law", and 6 statements on " stated with the law." These statements are obviously mandating the amendment of legal regulations as part of the implementation of the 1945 Constitution. The legal clusters that need to be amended are politics and governance cluster, social welfare and culture, and legal system and apparatus arrangement cluster.

As an integral part of the legal system, the efforts to amend the regulations have to be adjusted with the 1945 Constitution's amendment and is an integral part of the national development of law. Therefore, the amendments to many regulations should be conducted in well-planned and participatory manners in national legislation program as well as a legislative review forum. The national legislation program should be done to implement the stipulation within the 1945 Constitution. The 1945 Constitution can be elaborated into laws and regulations that have to be made in national legislation program, either in a politic sector, economy, or social sector. In addition to that, the society can also apply for constitutional review to the Constitutional Court on the regulations that they considered violates their constitutional rights that stipulated within the amended 1945 Constitution.[20] People can also apply for Judicial review to the Supreme court on any regulations below the law that they consider contradictory with the Law.

4. CONSTITUTIONALITY AND THE LEGAL POLITICS OF THE SHARIA ECONOMY

Constitutionalization of the Sharia Economy

In the lives of every state that proclaimed their state as the democratic state based on law, there will always be a fundamental conflict of interest, that is the interest to create the law to ensure the legality certainty and to ensure the legal obedience of the society, as well as protecting the common interest and the interest to protect the individual liberty/freedom. The consequence of the democratic law country and democratic state based on law as stated in Article 1 Clause (2) and (3) of the 1945 Constitution is not only that the process of the developing the law and its content should be based on the democratic principles, but also that the democratic practices has to bow to the principles of the rule of law that places the 1945 Constitution as the supremacy of law. Therefore, the laws, either the development process or the content can be reviewed against the Constitution as the supreme law.

Sharia economy and the sharia banking in the perspective of the 1945 Constitution, in principles all the regulation from an institutional arrangement, business activities, and means and banking business processing are based on the principles of the 1945 Constitution that

Professional's Law). See Jimly Asshiddiqie, *Hukum Tata Negara dan Pilar-Pilar Demokrasi (State Constitution and Pillars of Democracy)*, (Jakarta; Konstitusi Press, 2005), p. 4.

[20] Based on Article 50 Law No 24 of 2003 on the Authority of the Constitutional Court (MK), the constitutional court authority to conduct constitutional review is limited to Laws enacted after the first amendment of 1945 Constitution. However, in the MK decree No. 04/PUU-I/2003 Article 50 of the Law No. 24 of 2003 was put aside by the MK due to it reduces the authority of MK based on the 1945 Constitution.

upheld the human rights. Within this perspective, sharia banking is an integrated part of the national banking system, which the legal norms are based on the Islamic law, hence the sharia banking has its own uniqueness. In a plural community like in Indonesia, this is possible to become part of the economic activities, considering that some of the community conducts their economic activities based on their beliefs. Banking world is part of the private law, hence, the basis to regulate the relationships between the parties are given to those parties as long as it is not against the constitution and other regulations. In the private law, there is a concept of equality that is the principle that gives an equal position to all the subjects or the stakeholders, hence the term is stakeholders. The equality and stakeholders principles give a consequence that those stakeholders have an equal position, authority, and independence and freedom to do anything. In addition to that, it gives influence on the freedom to determine the object, process, and legal norms that become the basis for conducting cooperation and agreement to do something based on that agreement, as long as it is not against the constitution and laws.

Constitutionally, those principles become the basis to regulate the sharia banking system based on the sharia principles (Islamic principles) as the legal norms in conducting the banking business. As one of the banking system, sharia banking as a whole is based on the sharia, which either the institution, the business, the way or the process in implementing its business. In the national banking principle, the sharia economy, including the sharia banking is a special arrangement because some of the subjects in banking business wanted special treatment (sharia law norms) be implemented on the basis of their activities. This specialty or exception can be made to abide the human rights principles (to respect, to protect, and to fulfill) which are basically are the freedoms ensured within the 1945 Constitution as stipulated within the Article, 27, 28, 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, and Article 28I. In this sense, the sharia banking is the manifestation of respecting, protecting, and fulfilling of the human rights as mentioned in Article 28 D Clause (1), and Article 28 E clause (1) and (2), and Article 28H Clause (2) of the 1945 Constitution as follows:

- Article 28D Clause (1) states that, "everyone is entitled to acknowledgement, and insurance, protection, and fair legal certainty and acknowledgement of equality before the law";
- Article 28E Clause (1) states that, "everyone is free to believe in their religion and to worship based on that religion, to have education and training, to choose a job, to choose citizenship, and to choose residency within the area of the state, and to leave it, and are entitled to come back";
- Further in Article 28E Clause (2) states that, "everyone is entitled to freedom in believing their beliefs, state their thoughts and attitudes according to their freewill."
- Further, in Article 28H Clause (2) mentioned, "everyone is entitled to get easiness and special treatment to gain equal opportunity and benefit in order to gain equity and equality."

Within the perspective of human rights, those regulations basically are manifestations of the democratic law state principles, that is the Article 1 Clause (2) of the 1945 Constitution, in which mentioned that "*sovereignty lays on the people and implemented based on the Constitution".* This points out that the sovereignty is in the people's hand, hence, all the activities should be based on equality and equity principles. In the same token, the people's sovereignty principles is a fundamental constitutional principle which not only gives color and the spirit of the constitution that determines the format of the government, but also the

morality of the constitution that gives the essence and attitude toward all the laws and regulations. Nevertheless, it has to have a clear boundary of not against the people's sovereignty. Because this is more than basic norms, it is also the morals of the constitution for the implementation of the state either in politic, social, economy, and law. Those principles have to go hand in hand, they are upholding the human rights that shape the dignity of the man. Therefore, based on the discussion above, it is concluded that the sharia economy including the sharia banking is not against the human rights principles and the 1945 Constitution.

Regulations' Umbrella for the Sharia Economy Law

Among regulations that need to be understood by the judicial apparatus or other institution in relation to sharia economy conflicts and the Bank of Indonesia are:

a. Laws

1) Law No. 7 of 1992 on Banking
2) Law No. 10 of 1998 on amendment of Law No. 7 of 1992 on Banking
3) BI Regulation No. 6/24/PBI/2004 on General Bank that Implements the Business based on Sharia Principles
4) BI Regulation No 6/9/PBI/DPM/2004 on Allowance for Possible Losses on Earning Assets for Sharia Credits Bank
5) BI Regulation No 3/9/PBI/2003 on Allowance for Possible Losses on Earning Assets for Sharia Bank
6) BI Letter No 6/9/DPM/2004 on mechanism to provide short term finance for the Sharia Bank
7) Decree of the Board of Directors of BI No. 32/34/Kep/Dir on General Banks based on Sharia Principles
8) Decree of the Board of Directors of BI No. 32/36/Kep/Dir on Community Loan Bank based on Sharia Principles

Meanwhile, other regulations related to Law No. 3 of 2006 on Religious Court especially Article 49 on the authority of the court to settle the sharia economy disputes are also related to some of the laws below:

a. Law No. 5 of 1960 on Agrarian.
b. Law No 6 of 1969 on State Owned Business Enterprise.
c. Law No 3 of 1982 on Companies Duty to Enlist.
d. Law No 2 of 1992 on Insurance Business.
e. Law No 25 of 1992 on Koperasi.
f. Law No 8 of 1987 on Company's Documents.
g. Law No 1 of 1995 on Limited Company.
h. Law No 1 of 1989 on Bankruptcy.
i. Law No 8 of 1999 on Customer's Protection.
j. Law No 30 of 1999 on Arbitrate and Alternative Settlement of Disputes.
k. Law No 41 of 2004 on Benefaction.
l. Law No 38 of 1999 on Zakat.
m. Law No 42 of 1999 on Fiduciary.
n. Law No 16 of 2001 on Foundation.
o. Government Regulation No 28 of 1977 on Benefaction of Owned Land
p. Co-decision of Minister of Religious Affair and Head of National Agrarian Agency No. 422 of 2004; Nor 3/SKB/BPN/2004 on Certificate of the Beneficed Land.

q. Regulation of the Minister of Religious Affair No. 2 of 2008 on Compilation of Law on Sharia Economy.

b. Fatwas of the National Council of Sharia/ Dewan Syariah Nasional (DSN)
DSN is an agency under the Indonesian Council of Ulamaa (MUI) established in 1999. This agency has authority to give fatwa on product and services of the banks that based on the sharia principles. Up to this date, there are about 80 fatwas given on the activity of sharia economy by this council, some of them are listed below:[21]

1) Fatwa of the National Sharia Council No 01/DSN-MUI/IV/2000 on Check.
2) Fatwa of the National Sharia Council No 02/DSN-MUI/IV/2000 on Savings
3) Fatwa of the National Sharia Council No 03/DSN-MUI/IV/2000 on Deposits.
4) Fatwa of the National Sharia Council No Nomor 04/DSN-MUI/IV/2000 on Murabahah/ cost-plus financing.
5) Fatwa of the National Sharia Council No 05/DSN-MUI/IV/2000 on Stocks Transaction.
6) Fatwa of the National Sharia Council No 06/DSN-MUI/IV/2000 on Istishna'/project financing/bridging Transaction.
7) Fatwa of the National Sharia Council No 07/DSN-MUI/IV/2000 on Mudharabah (Qiradh)Financing.
8) Fatwa of the National Sharia Council No 08/DSN-MUI/IV/2000 on Musyarakah Financing.
9) Fatwa of the National Sharia Council No 09/DSN-MUI/IV/2000 on Ijaarah Financing.
10) Fatwa of the National Sharia Council No 10/DSN-MUI/IV/2000 on Wakalah.
11) Fatwa of the National Sharia Council No 11/DSN-MUI/IV/2000 on Kafalah.
12) Fatwa of the National Sharia Council No 12/DSN-MUI/IV/2000 on Hawalah.
13) Fatwa of the National Sharia Council No 13/DSN-MUI/IV/2000 on Down Payment and cost-plus financing.
14) Fatwa of the National Sharia Council No 14/DSN-MUI/IV/2001 on Distribution of Benefits from the Sharia Financing Institution.
15) Fatwa of the National Sharia Council No 15/DSN-MUI/IV/2001 on Principles of distribution of benefits from the sharia financing institution.
16) Fatwa of the National Sharia Council No 16/DSN-MUI/IV/2001 on Discount in Murabahah.
17) Fatwa of the National Sharia Council No 17/DSN-MUI/IV/2001 on Penalty for the Customers who are able to pay but postponing payments.
18) Fatwa of the National Sharia Council No 18/DSN-MUI/IV/2001 on Allowance for Possible Losses on Earning Assets in Sharia Financing Institutions.
19) Fatwa of the National Sharia Council No 19/DSN-MUI/IV/2001 on al-Qardh.
20) Fatwa of the National Sharia Council No 20/DSN-MUI/IV/2001 on Guidline for Sharia Investment Fund.
21) Fatwa of the National Sharia Council No 21/DSN-MUI/IV/2002 on General Guidelines on Sharia Insurance.
22) Fatwa of the National Sharia Council No 22/DSN-MUI/IV/2002 on Paralel Istishna's Transaction.
23) Fatwa of the National Sharia Council No 23/DSN-MUI/IV/2002 on Discount of Final Payment in Murabahah.
24) Fatwa of the National Sharia Council No 24/DSN-MUI/IV/2002 on Save Deposit Box.

[21] www. Dewansyariahnasional.com.

25) Fatwa of the National Sharia Council No 25/DSN-MUI/IV/2002 on Rahn.
26) Fatwa of the National Sharia Council No 26/DSN-MUI/IV/2002 on Gold Rahn.
27) Fatwa of the National Sharia Council No 27/DSN-MUI/IV/2002 on Ijarah al Muntahiyah bi al Tamlik.
28) Fatwa of the National Sharia Council No 28/DSN-MUI/IV/2002 on Currency Transaction (al Sharf).
29) Fatwa of the National Sharia Council No 29/DSN-MUI/IV/2002 on Hajj Financing by the Sharia Financing Institution.
30) Fatwa of the National Sharia Council No 30/DSN-MUI/IV/2002 on Sharia Checking Account Financing.
31) Fatwa of the National Sharia Council No 31/DSN-MUI/IV/2002 on Debt Swaps.
32) Fatwa of the National Sharia Council No 32/DSN-MUI/IV/2002 on Sharia Bond.
33) Fatwa of the National Sharia Council No 33/DSN-MUI/IV/2002 on Sharia Mudharabah Bond.
34) Fatwa of the National Sharia Council No 34/DSN-MUI/IV/2003 on Letter of Credit (L/C) Sharia Import.
35) Fatwa of the National Sharia Council No 35/DSN-MUI/IV/2003 on Letter of Credit (L/C) Sharia Export.
36) Fatwa of the National Sharia Council No 36/DSN-MUI/IV/2003 on Wadi'ah Certificate of the Bank of Indonesia.
37) Fatwa of the National Sharia Council No 37/DSN-MUI/IV/2003 on Currency Market between Sharia Banks.
38) Fatwa of the National Sharia Council No 38/DSN-MUI/IV/2003 on Between Banks Mudharabah Investment Certificate (IMA Certificate).
39) Fatwa of the National Sharia Council No 39/DSN-MUI/IV/2003 on Hajj Insurance.
40) Fatwa of the National Sharia Council No 40/DSN-MUI/IV/2003 on Stock Market and General Guidelines on Implementation of Sharia Principles in Stock Market.
41) Fatwa of the National Sharia Council No 41/DSN-MUI/IV/2004 on Sharia Ijrah Bond
42) Fatwa of the National Sharia Council No 42/DSN-MUI/IV/2004 on Sharia Charge Card
43) Fatwa of the National Sharia Council No 43/DSN-MUI/IV/2004 on Compensation (Ta'widh).
44) Fatwa of the National Sharia Council No 44/DSN-MUI/IV/2005 on Multiservice Financing.
45) Fatwa of the National Sharia Council No 45/DSN-MUI/IV/2005 on Line Facility (at-Tashilat).
46) Fatwa of the National Sharia Council No 46/DSN-MUI/IV/2005 on Bill Cut on Murabaha (al-Khas Fi al Murabahah).
47) Fatwa of the National Sharia Council No 47/DSN-MUI/IV/2005 on Murabaha Account Settlement for the Customers that Cannot Afford to Pay
48) Fatwa of the National Sharia Council No 48/DSN-MUI/IV/2005 on Rescheduling the Murabahah bill.
49) Fatwa of the National Sharia Council No 49/DSN-MUI/IV/2005 on conversion of the murabah contract.
50) Fatwa of the National Sharia Council No 50/DSN-MUI/IV/2006 on Murabahah Musyarakah Contract.
51) Fatwa of the National Sharia Council No 51/DSN-MUI/IV/2006 on Mudharabah Musyarakah Contract on Sharia Insurance.

52) Fatwa of the National Sharia Council No 52/DSN-MUI/IV/2006 on Wakalah Bil Ujrah Contract in Sharia Insurance and Reinsurance.
53) Fatwa of the National Sharia Council No 53/DSN-MUI/IV/2006 on Adab Tabarru' in Sharia Insurance and Reinsurance.
54) Fatwa of the National Sharia Council No 54/DSN-MUI/IV/2006 on Card.
55) Fatwa of the National Sharia Council No 55/DSN-MUI/IV/2006 on Sharia Musyarakah Checking Account Financing.
56) Fatwa of the National Sharia Council No 56/DSN-MUI/IV/2007 on Ujrah Review Guideline in Sharia Financing Institution.
57) Fatwa of the National Sharia Council No 57/DSN-MUI/IV/2007 on Letter of Credit (L/C) in Kafalah Bil Ujrah Contract.
58) Fatwa of the National Sharia Council No 58/DSN-MUI/IV/2007 on Hiwalah Bil Ujrah.
59) Fatwa of the National Sharia Council No 59/DSN-MUI/IV/2007 on Sharia Mudharabah Obligation Convention.
60) Fatwa of the National Sharia Council No 60/DSN-MUI/IV/2007 on Finalization of Receivable in Export.
61) Fatwa of the National Sharia Council No 61/DSN-MUI/IV/2007 on Finalization of Receivable in Import.
62) Fatwa of the National Sharia Council No 65/DSN-MUI/III/2008 on Rights to Request Effect in Advance on Sharia (HMETD Sharia).
63) Fatwa of the National Sharia Council No 66/DSN-MUI/III/2008 on Sharia Warrant.
64) Fatwa of the National Sharia Council No 69/DSN-MUI/VI/2008 on State's Valuables Sharia Certificats.
65) Fatwa of the National Sharia Council No 70/DSN-MUI/VI/2008 on Method of Issuing the State's Valuables Sharia Certificates.
66) Fatwa of the National Sharia Council No 71/DSN-MUI/VI/2008 on Sale and Lease Back.
67) Fatwa of the National Sharia Council No 72/DSN-MUI/VI/2009 on Ijarah the State's Valuables Sharia Certificates Sale and Lease Back.
68) Fatwa of the National Sharia Council No 76/DSN-MUI/VI/2010 Ijarah the State's Valuables Sharia Certificates Asset To Be Leased.
69) Fatwa of the National Sharia Council No 80/DSN-MUI/III/2011 on Implementation of Sharia Principles in Equity Stock Exchange Mechanism in Regular Stock Exchange.

Direction of the Legal Politic of the Sharia Economy

The conceptual debate among Islamic leaders and the nationalist's leaders had been started in 1905 and the climax of this debate was in 1945 are both academic and ideological debate to produce a consensus on "the Jakarta Charter" which was signed on June 22, 1945. Within the Jakarta Charter, Islam was about to be placed within the system of Indonesian constitution. Hence, Islamic values directly become one of the sources of Indonesian constitution and become one of the nuances in determining the direction of the state's policy. This is not exaggerated, because as a politic reality, Islamic people is the majority within the state that was about to be established. Regardless, on August 18, 1945, when the constitution is about to be enacted, the 7 words in the Jakarta Charter, "God Concept by implementing the Islamic Rules for its believers" were erased and replaced with " Believe in One Supreme God". Regardless, to this erasing of seven words, made the position of Islam within the Constitution System becomes unclear, the Islamic leaders believed that the principle of***" Believing in One Supreme God- Ketuhanan Yang Maha Esa"*** means the

"***oneness of god/tauhid"*** that becomes our first requirement in religion, hence, this change was accepted even with a bit worry.

The debate and the demand of the Islamic people to implement the Islamic rules did not stop there, and their approach switches from political approach to economic approach since the 1980s by the Islamic economists which were supported by the Council of Islamic Scholars/MUI, hence, at the end of the 1980s and in early 1990s, a Muamalat Bank, the first sharia bank was established. The birth of this Muamalah bank was politically supported by the government, and even, Soeharto, the president at that time, personally also bought the stock of Muamalah Bank. The support from the intellectuals, academics, and the politicians in their efforts to manage the economy based on the sharia principles. These efforts have finally seen some encouraging result and even in the amendment of the Law No. 7 of 1987 on Religious Court, which was later amended by Law No. 3 of 2006 on Amendment of Law No. 7 of 1987 on Religious Court, and law in banking system since the enactment of Law No 7 of 1992 on Banking which was later revised with Law No. 10 of 1998 on the Amendment of Law No. 21 of 2008 on Sharia Banking and Law No. 19 of 2008 on State's Valuable Sharia Letter. This is the revolution of legal politics in Sharia Economy that cannot be stopped.

Terminologically, the definition of the sharia economy is formulated in various terms by Islamic scholars and economists. Some define the sharia economy by accentuating the source and principles of sharia economy and some other emphasizes on objectives and target of the economic activities in a system of sharia economy, and the other defines the sharia economy within the scope of economic science. In relation to this, Dawam Raharjo[22] notes three possible interpretation on the term of sharia economy. ***First,*** the sharia economy is "the economic science" which was based on Islamic values or teaching as well as accentuating that the Islamic teaching has its own definition of what economy is; ***Second,*** sharia economy is "the Islamic economic system"; and ***third,*** sharia economy is " Islamic economy", or "economy of the Islamic word". In a similar tone, Muhammad Abdul Manan[23] proposed that *" Islamic economics is social science which studies the economics problems of people imbued with the values of Islam."* In his explanation, Mannan described that Islamic economics science is not only studying the social individuals but also human with their religious talents themselves. Hence, the economics problems arise, either in the traditional or a modern economics of Islam. The difference is only in the choice that they made, in Islamic economy, the choice is based on the Islamic values, meanwhile, in modern economy, the choice is based on individual interests. On the other hand, the definition of "sharia economy" as mentioned in Law No. 3 of 2006 on Amendment of Law No. 7 of 1989 on Religious Court is, " the actions or business activities based on the sharia principles,"[24] such as: a. Sharia Bank; b. Sharia Insurance, Sharia Reinsurance; d. Sharia Stock Investment; e. Sharia Micro Financing Institution; f. Sharia Bond and Valuable misterm certificates; g. sharia security; h. sharia financing; i. sharia pawn shop; j. Retirement Fund of the Sharia Finance Institution; and k. Sharia Business.

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22 M. Dawam Rahardjo***, Islam dan Transformasi Sosial Ekonomi***, (Jakarta: LSAF, 1999), hal. .3-4. See Muhammad Syafi'I Antonio, *Bank Syari'ah Dari Teori ke Praktik*, (Jakarta: Gema Insani, 2001), hal. 18-21

23 Muhammad Abdul Manan, ***Islamic Economic, Theory and Practice***, Cambridge:Houder and Stoughton Ltd, 1986, hlm.18.

24 Penjelasan Undang-Undang Nomor 3 Tahun 2006 tentang Perubahan atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama, pasal 49 huruf i.

The development of sharia economy Indonesia is very positive, looking for the establishments of many sharia banks, either independence new sharia banks or units from conventional banks. In Indonesia, where most of its population are Moslems and with the government political will support the development of sharia banks in Indonesia. Institutionalization of sharia economic institutions in Moslems countries, including Indonesia is a state's responds on aspiration and demand of Moslems people related to the implementation of Islamic values in the economy. Institutionalization of the sharia economic institution coincides with formulation of sharia economic law into regulations has been started since the New Order Era since the enactment of Law No. 7 of 1992 on banking which was later revised with Law No. 10 19988 on Amendment of Law No. 7 of 1992 on Banking. In reformation era, formalization of sharia economy has gained a more solid ground through the enactment of Law No. 3 of 2006 on Amendment of Law No. 7 of 1989 on Religious Court, Law No. 21 of 2008 of Sharia Banking and Law No. 19 of 2008 on Valuables Sharia Certificate of the State. In Law No. 3 of 2006, Article 49[25] was mentioned that " Religious Court is assigned and authorized to investigate, determine, and settle disputes in the first level among Moslems people in *a. Marriage; b. Inheritance; c) Wills; d. Grant; e. Benefaction; f. Zakat; g. Infaq; h. Sodaqoh; and i.* ***sharia economy.***

5. CONCLUSION

Transformation of Islamic law into the state law has been started and manifested through an enactment of several laws and regulations on zakat, hajj, benefaction or waqaf, and sharia banking. From the political perspective, the formulation of the BPUPKI on the state constitution preamble is known as the Jakarta Charter that places religion as the foundation of managing the society's life, especially for its citizens who are Moslems. Hence, all the formulated public policy are based on laws and regulations and the value of Pancasila-based on the devotion to God. Transformation of Islamic law is creative efforts to make the content of the law stated within regulations are inherent with the belief and values of the people themselves. Thus, the transformation of Islamic law to state's law is an obvious thing that should make anyone suspicious about it, rather, it has to be supported. This process will happen from generation to generation, hence, the law can be said as a constantly evolving phenomenon along with the development of society itself.

Sharia economy in Indonesia is well developing, it is evident in establishments of many sharia banking, either independent new sharia banking or units of the conventional banks. The development of sharia banking in Indonesia is supported by both Moslem people that are the majority of the Indonesian citizens and government's political will. Hence, an institutionalization of the sharia economic institutions in Moslems countries including Indonesia is a manifestation of the state respond to the aspiration and demand of the Moslem community on implementation of Islamic values in the economic sector.

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[25] See Article 49 of Law No 3 of 2006.

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