The Implementation of State Law And Religious Law In Indonesian Muslim Society

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Abstract

In the Indonesian constitution, rule of law is an acknowledged instrument to realize justice and social welfare. Common in many post-colonial countries, this instrument often manifests as legal pluralism, that is the co-existence of at least three legal systems: state (or 'national' in Indonesian parlance); religious, and customary (*adat* in Indonesian language). This paper examined the first two systems, state and religious laws, especially in their implementation as practiced by the Indonesian society. Using empirical legal methods, the factors which influenced the preference of Muslims to use state or religious laws in Indonesia were examined. Key terminologies, such as 'state law', 'religious law', and 'Muslim society', were elaborated. It was found that several factors were influential, namely legal culture, economic condition, social values, *fiqh* conservatism, and judge insight.

Keywords: State Law, Religious Law, Muslim Society

A. Introduction

It has been established several times in modern Indonesian history that *Pancasila* (Five Principles), with the first principle being *'Ketuhanan yang Maha Esa'* (Belief in the One God), is the foundational principles of the Indonesian nation-state. The population of Indonesia, of which 88-90% are Muslims, have showed time and again their support towards *Pancasila*, balancing the consequent civic implication of their obedience adhering towards the state law with their religious obedience towards Islamic law. In many cases, the Indonesian people have astutely showed their preference towards state or religious (Islamic) laws on a case-by case basis. This paper examined the factors which influenced the preference of Indonesian Muslims in terms of the laws they use to settle their legal needs, focusing on state and religious laws, both of which are applicable in Indonesia generally due to the phenomenon known as legal pluralism.

Legal pluralism is 'generally defined as a situation in which two or more legal systems coexist in the same social field'.[1] Its popularity is often attributed to the rise of anthropology as an established scientific discipline in the 1970s. Anthropologists then had observed the phenomenon of legal diversity among various societies in the world, which in

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[1] Sally Engle Merry, "Legal Pluralism", in *Law and Society Review,* Vol. 22/1988.

the context of post-colonial countries usually comprise of the following legal systems: state (national), religious, and customary (*adat*). In this theory, a country's law is conceived to have originated from two different sources: the state and the society. Societal laws have their sources in religions, customs, traditions, or conventions which are adhered to by the society. The encroachment of globalization into the sphere of the modern-nation state has also caused the emergence of another source of law, 'international law', which may take the form of conventions agreed at the level of the United Nations. The last-mentioned law's influence can frequently be seen in the arena of trade, economy, and human rights.[2]

In addition, there exist the term or ideology of 'centralization of law', which means that the state law, and only the state's law, without consideration to the presence of other types or sources of laws, can apply uniformly to all residents under the state's jurisdiction. Under this ideology, only specific state institutions are allowed to formulate laws, and other types or sources of law, such as religious and customary laws, as well as societal norms and conventions, are not part of these institutions' considerations. These other laws are deemed to possess lesser binding power than state's law. Fortunately, in Indonesia, this ideology has never been taken hold, as the Indonesian government, from the time of independence till now, realize the importance or religion and custom among Indonesians.

B. Key Terminologies

1. State Law

Law is a set of rules or norms formed by formal institutions to regulate society, which violation can result in sanctions.[3] Generally, the function of law is to order and regulate society and to solve problems which may have been caused by social interaction. Law can be categorized philosophically as *ius constitutum,* applicable at certain time and place, in other words 'positive law'. From the perspective of positivism, positive law must take the form of written regulations. The other category is *ius constituendum,* law which is desired or hoped for.

The state is a political community which resides in a certain region, organized by a certain government, and has internal and external sovereignty. The word "state" in the European middle ages refers to the throne which are sat upon by kings or queens in official

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[2] HUMA team (ed.), *Pluralisme Hukum: Sebuah Pendekatan Interdisiplin* (Jakarta: HuMa, 2005), p. 58.

[3] Anthon F. Susanto, *Hukum dari Consilience Menuju Paradigma Hukum Konstruktif-Transgresif* (Bandung: Refika Aditama, 2007), p. 9.

events.[4] The state can also be defined domestically, such as conceptualized by Max Weber, "*a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.*"[5]

In general parlance, the terms country, nation and state are regularly understood interchangeable synonyms. However, in a more rigorous academic setting, these terms are not necessarily treated as synonyms. The concept of country refers to a geographical location, nation refers to a people, while state refers to a government, an entity of international law. It must be noted that even though the term nation refers to a people, the term 'national' and 'international' also refers to things related to the state. Hence, what is meant by state law is a set of rules or regulations made by certain state institutions in Indonesia. For example, in the Indonesian context, a law is made by the House of People's Representatives (*Dewan Perwakilan Rakyat* - DPR), with the agreement of the President of the Republic of Indonesia.

2. Religious Law

Religion is called *din* in Arabic. In anthropological studies, religion is commonly defined as 'any set of attitudes, beliefs, and practices pertaining to supernatural power, whether that power be gods, spirits, ghosts, or demons.[6] Emile Durkheim has stated that religion has three essential characteristics: 1) belief in the sacred and the profane; 2) worship rituals; 3) adherents, in short, religion is 'a system of shared beliefs and rituals about the sacred that bind together a community of worshippers.'[7] If the above definitions are held, then religion in general falls under the category of human culture, or 'natural religions'. However, certain adherents believe that their religion originate supernaturally and divinely, what is often called as 'revealed religions'. In Indonesia, religion is usually meant as certain universal religions which have historically been accepted and developed here. There are six religions acknowledged by the state: Islam, Protestant-Christians, Catholic Christians, Hinduism, Buddhism and Confucianism.

So, what is meant by religious law is a legal system based on religious stipulations found in each religion's holy book.[8] Religious law as discussed in this paper only covers

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[4] http://en.wikipedia.org/wiki/State.

[5] http://www.mdx.ac.uk/www/study/xweb.htm.

[6] Carol R. Ember, Melvin Ember, and Peter N. Peregrino, *Anthropology: Tenth Edition* (Upper Saddle River, New Jersey: Prentice Hall, 2002), p. 439.

[7] Joan Ferrante, *Sociology: A Global Perspective* (Belmont: Wadsworth, 2003), p. 481.

[8] abdulhakim9511.blogspot.co.id.

Islamic law.[9] Most Indonesians adhere to Islam, hence Islamic law is quite dominant in Indonesia, especially in the fields of marriage, family, and inheritance. This paper focuses especially on matters related to marriage law.

3. Muslim Society

In the *Dictionary of Sociology*, society is defined as '*a group of people who share a common culture, occupy a particular territorial area, and feel themselves to constitute a unified and distinct entity*'.[10] The most basic characteristic of society is the relationship between humans. This relationship can be based on different foundations. In social science, society is sometimes distinguished between primary and secondary groups based on the level of intimacy among its members. This level is closely related to the concept of identity, be it religious, ethnic, or class identity, among others.

The word "muslim" originates from Arabic "*aslama, yuslimu, islaman",* which means "to receive, surrender, submit" to God. The word "muslim" appears in the Qur'an as many as 90 times, which means a person who submits and vows to God. Hence, this term can generally covers anyone who believes in God.[11] A Muslim is thus specifically defined in this paper as the adherents of Islam who submits to God.

Based on the above elaboration, what is meant by Muslim society is a group of humans who are in relationship for a long time in a place where the social system adheres to the truth of God's revelation. The truth here covers justice, unity based on faith, commanding good and forbidding evil (*amar ma'ruf nahy munkar*) and morality. The characteristic of a Muslim society is one that has positive attributes and upholds the virtues espoused by Islam.[12] A Muslim society is also universal, non-racial, non-national, and non-geographical (not limited to geographical limitations). It is an open society, for all mankind, without heed to sex, color, or language, and even conviction or creed.[13]

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[9] 'Islamic law' is a combination of the word "law" and root word "Islam". These words are used in the Arabic and Indonesian language, as well as can be found in the Qur'an. Islamic law is the efforts of *fiqh* experts (*fuqaha*) to implement the Islamic shari'a according to societal needs. *Fiqh* is the understanding of *shari'a* related to law. 'Islamic law' has been defined as a set of rules based on God's revelation and Prophet's *sunna* to regulate and binding upon adult Muslims. See Amir Syarifuddin, *Ushul Fiqh* (Jakarta: Logos Wacana Ilmu, 1997), Volume I, p. 4. See also, Mahmud Manan (ed.), *Studi Hukum Islam* (Surabaya: IAIN SA Press, 2012), p. 43. Satria Effendi, *Ushul Fiqh* (Jakarta: Kencana, 2005), p. 3-4.

[10] Gordon Marshall, *Oxford Dictionary of Sociology* (Oxford: Oxford University Press, 1998), p. 625.

[11] https://id.m.wikipedia.org/wiki/islam.

[12] Pengertian-pengertian-info.blogspot.com.

[13] Sayid Qutb, *Masyarakat Islam* (Bandung: Al-Ma'arif, 1978), p. 70.

C. Factors which Influence the Preference of Indonesian Muslims towards State or Islamic Law

The implementation of laws in Indonesia is very complex as the Indonesian Muslim society is very diverse and dynamic, as befitting a country which if measured in terms of length, spans the entire continent of Europe, America, or Australia. Theologically, Indonesian Muslims are of one identity. However, legally in terms of Islamic law or *fiqh*, there is a variety of interpretation and implementation. An example, which is the focus of this paper, is in terms of marriage law. As would be evident later, the following are the most important factors in influencing the preference of Indonesian Muslims towards state or Islamic law.

1. Legal Culture

The first factor is legal culture. Not as simple as public opinion suggested by anthropologists, legal culture does not only mean the compilation of theories and practices related to the behavior of a particular society, but also the entire social values of the society in relation to laws applicable in the society.[14] Legal culture determines the place of law in the cultural framework of the society, identifies members of society according to their conviction, behavior, knowledge, and action. In short, everything human-learnt is culture.

Even though the cultures of different societies in the world may appear different, the characteristics and manifestations of these cultures are similar. *First*, culture manifests in terms of societal behavior. *Second*, except for the first humans, culture is present before society; it may persistently occurs, not necessarily disappearing after the passing a particular generation. *Third,* human needs culture and vice-versa. *Fourth,* culture comprise of rules of obligations as well as acceptable or unacceptable conduct.[15] Every laws issued must help in creating peace and order in the society. No law will be effective unless it is in agreement with the societal culture.

Among the Indonesian Muslim-majority, the Islamic culture can be found to be dominant. The state laws are regularly examined by most Muslims based on their compatibility with Islamic law. Some of them consider that man-made laws are composed of rules and regulations which may be implemented or ignored based on the actions of the elites.[16] Due to the lack of examples shown by the Indonesian elites, a significant

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[14]Soerjono Soekanto, *Hukum dan Masyarakat* (Surabaya: Universitas Airlangga, 1977), p. 2.

[15] fh.uisu.ac.id*, Peranan Budaya Hukum dalam Perspektif Pembangunan Hukum.*

[16] Romli Atmasasmita, *Teori Hukum Integratif: Rekonstruksi terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif* (Yogyakarta: Genta, 2012), p. 14.

population of Indonesian Muslims choose to follow Islamic law rather than state law due to the perceived divine legitimacy and supremacy.

2. Economic Condition

Empirically, both law and economics has an influence on each other. Weber has stated "*…human activities as they actually take place… are conditioned by their necessary orientation toward "economic situation of facts…*".[17] This is evident in cases of marriage and divorce among Indonesian Muslims. In Law No. 1 Year 1974 on Marriage, Article 39 Clause 1 has stated that "a divorce can only be conducted before the Court after the failure of mediation of both parties by the Court".[18] However, many economically disadvantaged Muslims do not possess the necessary financial means to go to court. Thus, they only follow what they perceive as Islamically correct, that is to have the husband proclaim divorce (*talaq*) before the wife. Economically, the cost of this proclamation is negligible, compared to divorce by court which necessitates frequent trips which consumes time and money.

3. Social Values

Social interaction is the mutual interaction between humans, be it among individuals, groups or among individuals and groups. These interactions give rise to value systems which condition individual or collective patterns of thought. The patterns in turn modify the behaviors of humans, which collectively produce means of social conventions, among which legal norms are an important part. These norms then become guidelines for future legal behavior.[19] In many societies, these behaviors can sometimes be problematic due to the deviation between the actual and ideal, the practical and the theoretical, the common or uncommon. To solve these problems, the agreed upon value system by the society become the means of judgment. If a religion is dominant in a society, then religious values become a useful tool in this regard.

An example is the case of adultery or sex outside of marriage. Non-marital sex is viewed as a major problem in a Muslim family, especially when it results in pregnancy. In Law No. No. 1 Year 1974 on Marriage, Article 43 Clause 1, it is stated "children born out-of-wedlock only has legal civil relationships with their mother or mother's family". This

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[17] Max Weber, *On Law in Economy and Society* (New York: A Clarion Book, 1954), p. 12. See also Satjipto Rahardjo, *Hukum dan Perubahan Sosial: Suatu Tinjauan Teoritis serta Pengalaman-Pengalaman di Indonesia* (Yogyakarta: Genta Publishing, 2009), pp. 29-30.

[18] Pagar, *Himpunan Peraturan Perundang-undangan Peradilan Agama di Indonesia* (Medan: IAIN Press, 1995), p. 43.

[19] Soerjono Soekanto and Mustafa Abdullah, *Sosiologi Hukum dalam Masyarakat* (Jakarta: Rajawali, 1987), p. 47.

Law does not cover the case of marriage during pregnancy. In addition to the Law, marriage is also regulated in Islamic Legal Compilation (*Kompilasi Hukum Islam* - KHI), a legal instrument produced by the Presidential Instruction No. 1 Year 1991 on 10 June 1991. It is stated n Chapter VIII of the KHI, Article 53: (1) a woman pregnant out-of-wedlock can marry the man who impregnates her; (2) the marriage stated in clause (1) can be conducted before the birth of her child; (3) when marriage has been conducted during pregnancy, there is no need for remarriage after the birth of the child.[20] However, most Indonesian Muslims believe that marriage must also be conducted after the child's birth. This is an evidence that even in the case of religious law, the KHI which has been sanctioned by the state does not supersede the religious law, or *fiqh*, believed by the society and which have practiced from generation to generation.

4. *Fiqh* Conservatism

With regards of Islamic law, there are two terms which deserve closer scrutiny: *sharia* and *fiqh*. The former term, *sharia*, etymologically originally means 'path to the water'. Historically, this term is taken by Muslims to mean all the guidance of God (as can be found in the 'signs' of God) related to human actions. The word *sharia* and its variation can be found five times in the Qur'an.[21] It is usually directed towards the Messengers of God, such as the sharia of Musa, Ibrahim, and Muhammad. Even though Allah as the Creator sends different kinds of 'sharia' to His Messengers, however after the period of end-of-Messengers (*khatam al-nabiyyin*) as manifested in the prophethood of Muhammad, sharia becomes permanent and unchanging, its sources being the Qur'an and Sunna/Hadith.

The Qur'an as the main, primary, source of Islam and the Sunna as the main, secondary source of Islam, cannot be internalized by Muslims without intermediation. In human terms, this intermediation takes the form of ulama (dubbed the 'inheritors of the prophet'), who perform their utmost (*ijtihad*) to obtain understanding (*fiqh*) of the sharia. The word *fiqh* means a deep understanding (*fahm al-daqiq),* which can be frequently found in the Qur'an as God's instruction to all humans (that is to possess deep understanding of

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[20] See *Kompilasi Hukum Islam di Indonesia* (Islamic Legal Compilation in Indonesia), issued by the Minister of Religious Affairs Munawir Sjadzali. *Kompilasi Hukum Islam* (*KHI*) is formulated based on the cooperation between the government, Supreme Court, and society, especially the ulama who are directly or indirectly involved in the implementation of Islamic law. The functional foundation of KHI is Indonesian *fiqh* as it is formulated based on the conditions and needs of Indonesian Muslims. Consisting of 299 articles, KHI is composed of three books: Book I on Marriage Law, Book II on Inheritance Law, and Book III on Endowment (Waqf). See Rifyal Ka'bah, *Hukum Islam di Indonesia: Perspektif Muhammadiyah dan NU* (Jakarta: Universitas Yarsi, Jakarta, 1999), p. 56.

[21] Amir Syarifudiin, *Ushul Fiqh,* Jilid I, h. 1-2.

God's creation). Even though this word is found 20 times in the Qur'an, the closest verse related to the scientific activities of Muslims is the verse 9:122 which reminds Muslims to not all go to war, but to let a few Muslims remain behind to learn and understand through the 'path' showed by the Most Knowledgeable.

Hence, there is a clear difference between *sharia* and *fiqh. Sharia* is unchanging and permanent while *fiqh* is changing and temporary. *Fiqh* is an effort of humans to understand religion (*din*) and formulate these understanding in terms of guidance which can take the form of legal stipulations in certain cases. No only this, *fiqh* can cover the gamut of human activities, which may change depending on the situation and condition. Laws produced from *fiqh* can change due to time, place, and condition. Legal change can mean behavioral and cultural change approved by religion, as long as the main religious principles are not violated. Due to its structural and functional role in Muslim society since the advent of Islam, *fiqh* is often misunderstood by Muslims as the religion, Islam, itself.[22]

Many Indonesian Muslims are still traditional or conservative. Most of them adhere to the axiom which states: law does not apply retroactively.[23] Hence, if no argumentation which can become proof and necessitation of behavioral change, past behavior is referred to as 'standard'. What has been inherited and passed on from previous generation must be implemented even when the context has changed due to the conservative nature of most Indonesian Muslims.

5. Judge Insight

Judges are members of the law enforcement in Indonesia. As law enforcers, their duty is mainly in the judiciary branches of government; receiving, examining, deciding, and solving all legal cases presented to them. As the sole arbiter of legal cases in the court of law, their decisions are very important in upholding the law and creating order in society. It is indeed not easy for a judge to make a decision (*idee des recht*), which ideally is composed of 3 elements: justice/impartiality (*gerechtigkeit*), certainty/confidence (*rechtsicherheit*) and benefit/utility (*zwechtmassigkeit*).[24] However, in actuality or practice, judges are often presented with cases which details have not been covered by existing or prevailing law, or have only been covered in parts of partially by the law. This necessitates the judge to perform legal discovery (*rechtsvinding*). An example is the marriage during

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[22] Cik Hasan Bisri, *Model Penelitian Fiqh, Paradigma Penelitian Fiqh, dan Fiqh Penelitian* (Jakarta: Pranada Media, 2003), p. 33.
[23] Beni Ahmad Saebani, *Sosiologi Hukum* (Bandung: Pustaka Setia, 2007), p. 95.
[24] Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar* (Yogyakarta: Liberty, 1990), p. 15. See also Bambang Sutiyoso, *Metode Penemuan Hukum: Upaya Mewujudkan Hukum yang Pasti dan Berkeadilan* (Yogyakarta: UII Press, 2006), pp. 5-6.

pregnancy as mentioned above. A wise judge would not perform legal unification, that is using only one source of law for all people in all cases, especially in issues as sensitive as marriage. As such, the said wise judge would interpret the marriage law stipulated by the state to suit the perceived justice in society. In other words, the judge would pay attention to the "living law", that is the law adhered to by the society.[25]

However, these legal wisdom among judges seemed to not have been extended to judges in religious court. These judges are content with using existing law, unable or unwilling to perform legal discovery. Recent development in legal scholarship has found that legal discovery should be transformed from one that is 'system-oriented' (merely based on existing law), to one that is 'problem oriented' (based on societal tendency). The society has the tendency to make more general laws, giving judges more freedom in their decision-making process..[26]

D. Conclusion

Indonesian Muslims live in a diverse, dynamic, and complex society. In terms of law, many have shown astute preference towards state or Islamic law. An example is in cases of marriage. Even though Islamic law regulation marriage has been sanctioned by the state, in practice, many Indonesian Muslims still adhere to the *fiqh* as has been practiced traditionally from generation to generation. Legal pluralism is a theory which can satisfactorily explain this phenomenon. In this paper, it was found that the factors influencing Indonesian Muslims preference towards state or Islamic law are: legal culture, economic condition, social values, *fiqh* conservatism, and judge insight.

E. References

Atmasasmita, Romli. *Teori Hukum Integratif: Rekonstruksi terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif,* Yogyakarta: Genta, 2012.

Bisri, Cik Hasan. *Model Penelitian Fiqh, Paradigma Penelitian Fiqh, dan Fiqh Penelitian,* Jakarta: Pranada Media, 2003.

Ember, Carol R., Melvin Ember dan Peter N. Peregrino. *Anthropology: Tenth Edition,* Upper Saddle River, New Jersy: Prentice Hall, 2002.

Effendi, Satria. *Ushul Fiqh,* Jakarta: Kencana, 2005.

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[25] Utrecht, *Pengantar dalam Hukum Indonesia* (Jakarta: Ichtiar Baru, 1959), p. 250.

[26] Bambang Sutiyoso, *Metode Penemuan Hukum,* p. 38. For more on 'legal discovery', see also, Ahmad Rifai, *Penemuam Hukum oleh Hakim dalam Perspektif Hukum Progresif* (Jakarta: Sinar Grafika, 2010), pp. 21-27.

Ferrante, Joan. *Sociology: A Global Perspektive,* Belmont: Wadswort, 2003.

Huma, Tim (ed). *Pluralisme Hukum: Sebuah Pendekatan Interdisiplin,* Jakarta: HuMa, 2005.

Ka'bah, Rifyal. *Hukum Islam di Indonesia: Perspektif Muhammadiyah dan NU,* Jakarta: Universitas Yarsi, Jakarta, 1999.

Kompilasi Hukum Islam di Indonesia.

Manan, Mahmud (ed). *Studi Hukum Islam,* Surabaya: IAIN SA Press, 2012.

Marshall, Gordon. *Oxford Dictionary of Sociology,* Oxford: Oxford University Press, 1998.

Merry, Sally Engle, "Legal Pluralism", dalam *Law and Society Review,* Vol. 22/1988.

Mertokesumo, Sudikno. *Mengenal Hukum Suatu Pengantar,* Yogyakarta: Liberty, 1990.

Pagar, *Himpunan Peraturan Perundang-undangan Peradilan Agama di Indonesia,* Medan: IAIN Perss,1995.

Qutb, Sayid. *Masyarakat Islam,* Bandung: Al-Ma'arif, 1978.

Rahardjo, Satjipto, *Hukum dan Perubahan Sosial: Suatu Tinjauan Teoritis serta Pengalaman-Pengalaman di Indonesia,* Yogyakarta: Genta Publishingh, 2009.

Rifai, Ahmad. *Penemuam Hukum oleh Hakim dalam Perspektif Hukum Progresif,* Jakarta: Sinar Grafika, 2010.

Saebani, Beni Ahmad. *Sosiologi Hukum,* Bandung: Pustaka Setia, 2007.

Soekanto, Soerjono. *Hukum dan Masyarakat,* Surabaya: Universitas Airlangga, 1977.

Soekanto, Soerjono dan Mustafa Abdullah. *Sosiologi Hukum dalam Masyarakat,* Jakarta: Rajawali, 1987.

Susanto, Anthon F. *Hukum dari Consilience Menuju Paradigma Hukum Konstruktif-Transgresif,* Bandung: Refika Aditama, 2007.

Sutiyoso, Bambang. *Metode Penemuan Hukum: Upaya Mewujudkan Hukum yang Pasti dan Berkeadilan,*Yogyakarta: UII Press, 2006.

Syarifuddin, Amir. *Ushul Fiqh,* Jakarta: Logos Wacana Ilmu,1997.

Syani, Abdullah. *Sosiologi, Kelompok dan Masalah Sosial,* Jakarta: Fajar Agung, 1987.

Utrecht, *Pengantar dalam Hukum Indonesia,* Jakarta: Ichtiar Baru, 1959.

Weber, Max. *On Law in Economy and Society,* New York: A Clarion Book, 1954.

List of Internet Sources

http:/en.wikipedia.org/wiki/State

http://www.mdx.ac.uk/www/study/xweb.htm.

abdulhakim9511.blogspot.co.id

www.artikelsiana.com

http://id.m.wikipedia.org>wiki>slam

pengertian-pengertian-info.blogspot.com

fh.uisu.ac.id

id.m.wikipedia.org