

# Transformation of Islamic Law into National Law: *Models, Problems and Alternative Solution of Practicing Sharia in Indonesia*

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Keywords: Politics, Religion, Secular State, Islamic State

Abstract: In the hands of some Muslims who make religion an ideology, sharia must be realized in real life in society through political instruments that can provide force. Therefore, for them, as long as the Islamic sharia has not been successfully transformed completely into national law, they will continue to fight for it. Ironically, in the struggle, some of them use only one interpretation and one model, so it is difficult to be compromised. Base on assumption that there is more than one model, this research aims to; 1) formulate some models of transformation of Islamic law into national law, 2) identify the problems 3) formulate alternative concepts of solutions, and 4) formulate the juridical and sociological implications of any policy or political law taken by the state. This research is a kind of non-doctrinal qualitative legal research. The object studied is the legal substance, legal structure and legal culture developed within Islamic law as well as in national law. Data were analyzed to see the transformation model of Islamic law into national law, emerging problems, and the types of solutions that can be used to integrate Islamic law into national law and its implications.

## 1 INTRODUCTION

As a source of ethics, morals and spiritual, religion for the people of Indonesia can not be separated from the life of nation and state. Because the State of Indonesia was founded on divine values. Therefore, efforts to separate religious values from the life of the nation and state will always be in vain.

On the contrary, efforts to integrate religious values into the life of a state always have wide support. For Indonesian Muslims, Islamic law is a source of ethics, moral and spiritual that also can not be separated from the life of nation and state. Therefore, if the values of Sharia are not transformed into the national legal system or if Muslims feel that the State ignores the religious values derived from the Sharia then such conditions can cause unrest.

In the field of law, especially Islamic law, the problem is how the model of transformation that can be used to integrate Islamic law into national law, what is the problem and the extent to which *ijtihad* is necessary for Muslims so that Islamic law can be transformed and integrated fully in national law.

This research is very important because there are a number of facts as follows. According to research

by Pew Research Center (PRC) in 2013, there are 72% of Indonesian Muslims who support Islamic law as an official law for the State. But on the other hand there is also the fact that 61 percent of Indonesian Muslims approve of Indonesia as a democratic country. The problems will always arise when the attempts to formalize or transform Islamic law into national law, used only one model that is a rigid, exclusive, conservative or literalist model. The tendency of Indonesian Muslims to use a rigid model does exist. Based on research conducted by PRC in 2013, there are 45% of Indonesian Muslims who hold that the Islamic sharia has only one interpretation. Muslims who hold this opinion tend to see that interpretations that are not the same as theirs are wrong. Such views and attitudes are vulnerable to being exploited by radical Islamic groups or Islamists that make religion a political ideology and Islamic sharia as its political agenda. According to a survey conducted by PRC in 2015, it was found that 4% of Indonesian Muslims support the ideology brought by ISIS (Islamic State in Iraq and Syria). If this percentage is translated into a real population then the number is about 10 million people. (Kompas,2015). For them, Islamic law can not be fully implemented in Indonesia before Indonesia becomes an Islamic

State. In other words, sharia can not be fully implemented because Indonesia is a secular state.

With the assumption that the sharia is a law that is always suitable for all places and times and the assumption that Islamic law can change according to the changing times, places, intentions and circumstances, this study has the following objectives: 1) formulate some models of transformation of Islamic law into national law, 2) identify emerging problems 3) formulate alternative concepts of solutions, and 4) formulate the juridical and sociological implications of any policy taken by the state.

The concept or theory used in this study was Hallaq's concept of sharia as paradigm. Lubna A Alam and Khaled Abou El-Fadl's concept of the relationship between sharia and state in history and the role of religion in politics according to Masykuri Abdillah.

According to Hallaq, sharia in history had emerged as the supreme moral and legal force regulating both society and government. Therefore, according to him, sharia was paradigmatic, having been accepted as a central system of high and general norms by societies and the dynastic powers that ruled over them. (Hallaq, 2013:7)

The relationship between Islamic law and the State in history is unique and complex. The classical era of Islamic history, saw the rise of Islamic states as well as the formation of a complex system of Islamic law. From its very beginnings, the content of Islamic law developed largely free from political influence and pressure (Alam, 2007).

Although, historically, jurists played important social and civil roles and often served as judges implementing the sharia and executive ordinances, for the most part, government in Islam remained secular. Until the modern age, a theocratic system of government in which a church or clergy ruled in God's name was virtually unknown in Islam. (Abou El Fadl, 2003:14).

In the modern age, there are three role of religion in politics, according to Masykuri Abdillah. Firstly, religion as a political ideology; secondly, religion as ethical, moral and spiritual base and thirdly, religion as sub-ideology. Countries that place religion as ideology tend to practice religious teachings formally as positive law and take a structural approach to socialization and institutionalization of religious teachings. Countries that place religion as an ethical, moral, and spiritual source tend to support cultural approaches and reject structural approaches in terms of socialization and institutionalization of religious teachings. This means that the implementation of

religious teachings should not be institutionalized through legislation and state support, but enough with the consciousness of religious people themselves. Countries that place religion as sub-ideology tend to support a cultural as well as structural approach by involving religious teachings in public policy making in a constitutional, democratic and non-discriminatory manner. (Abdillah, 2000)

## **2 RESEARCH METHOD**

This research is a kind of non doctrinal qualitative legal research which covered some problems, policy and law reform based research ((Dobinson and Johns, 2007:20).

The subject of this study is the substance and norms of sharia, both private and public, that has been accommodated by Indonesia legal system or has been practiced through its protection.

Data was collected from the book or documents that have been published. The main data are drawn from the Indonesian constitution (UUD 1945) and laws designed to fulfil the aspirations of Muslims in general or to fulfil the demands of political parties that carry Islamic ideology.

Data will be classified and analyzed by using Friedman' legal system model that consisted of structure, substance and culture. (Friedman, 2017:6).

## **3 RESULT, DISCUSSION AND IMPLICATION**

### **3.1 Sharia in Indonesia Legal System**

According to Friedman legal system consisted of structure, substance and culture. Structure is codes of rules, regulations and orders, rules of procedure, rules about jurisdiction, pleadings, judges, courts, voting in legislatures, and the like. Substance is a living law, not just rules in law books. While culture is people's attitudes toward law and the legal system—their beliefs, values, ideas, and expectations. According to him, three elements of law can be imagined like this. Structure is as a kind of machine, substance is what the machine manufactures or does and culture is whatever or whoever decides to turn the machine on and off and determines how it will be used. (Friedman, 2017:6)

Formally and structurally the position of sharia in Indonesia legal system can be seen in its constitution. The position of Islam and its sharia in the Indonesian Constitution has long been debated since the founding

of this State. The formulation of Pancasila (five pillars) as state ideology in the current 1945 Constitution is different from the formula contained in the Jakarta Charter. The first principle of Pancasila in the Jakarta Charter reads: "Godhead with the obligation to enforce Islamic law for its adherents".

In the current 1945 Constitution, the seven words contained in the Jakarta Charter are removed and replaced with "the belief in the One and Only God". This means, the Sharia no longer has literal or textual basis in the constitution.

Compared with the constitution of other Muslim countries, the position of Islam and its sharia in the Indonesian constitution fall into the third category. The first category is a country whose constitution recognizes Islam as a state religion and makes sharia the main source of legislation, such as Saudi Arabia, Libya, Iran, Pakistan and Egypt.

The second category is a country whose constitution declares Islam as a state religion but does not mention sharia as the main source of legislation means that sharia is only seen as one source of some legal sources of legislation, such as Iraq and Malaysia. The third category is a country that does not make Islam a state religion and does not make sharia the main source of legislation but recognizes sharia as a living law in the community, like Indonesia. The fourth category are states that declare themselves as a secular state and seek to make the Islamic sharia not affect its legal system, such as Turkey. (Nurrohman, 2002:17)

However, there is no correlation between the degree of state in placing the sharia formally in its constitution with the degree of the state in practicing sharia. Based on research conducted by Rehman and Askari, the Indonesian Islamic index is better than the Islamic country index which formally declares itself as an Islamic State or makes Islam a state religion like Egypt, Pakistan and Iran. Based on this index, Indonesia ranked 140, Pakistan ranked 147, Egypt ranked 153 and Iran ranked 163. (Rehman and Askari: 2010). It means that in practicing sharia Muslims do not depend on the existence of a particular state. Sharia is more related to the belief of Muslims themselves.

In addition, although Indonesian constitution not declared itself an Islamic state there are same eight principles between the Indonesian constitution and the constitution of Medina. There are the principle of 1) monotheism 2) unity and togetherness 3) equality and justice 4) religious freedom 5) defending state 6) preserving good tradition 7) supremacy of sharia 8) politics of peace and protection. (Nasution, 1985)

So, from the aspect of substance, sharia occupies an important place in the life of Indonesian Muslim society. All Muslims acknowledge sharia as ethical, moral and spiritual base. Sharia is a living law because justice, benefit, wisdom and compassion, according to Ibn Qayyim (1292-1350), are the substance of sharia.

In commenting on what is said by Ibn Qayyim, Jesser Auda in his book *Maqasid al-Shari'ah as Philosophy of Islamic Law*, said that sharia is based on wisdom and achieving people's welfare in this life and the afterlife. Sharia is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the sharia, even if it is claimed to be so according to some interpretation. (Auda, 2007: xxii).

Justice that is suitable to be applied in Indonesia is the concept of justice initiated by John Rawls. In his book *A Theory of Justice* Rawls states with the assumption that public (society) has a concept of justice, then the justice implemented in a democratic country is a concept of justice formulated and accepted together. The concept of public justice or the shared concept of justice is what should be used to regulate political affairs and interpret the constitution. (Rawls, 2005: 365)

Rawls believes that, in modern conditions, a conception of justice can achieve stability only if it can be the object of an overlapping consensus, that is, only if it can be morally endorsed by citizens who are also committed to diverse and partially conflicting moral, religious, and philosophical worldviews. (Pogge, 2007:41)

If the justice contained in Islamic law is recognized only by Muslims, or is only acceptable to some Muslims but not accepted by others, then such Islamic law can not be applied to all Muslims or all Indonesians. Such laws are morally binding only to those who believe in them. For example, according to some experts, polygamy is forbidden because it is unfair to women, but the other experts allowed it as long as it was done fairly. Since justice can not be unilaterally claimed by a spouse, the Indonesian legislation provides that polygamy should only be exercised after the permission of the wife and the permission of the religious court.

Article 3 of Law Number 1 of 1974 says: (1) In principle in a marriage a man may only have a wife. A woman may only have a husband. (2) A court may give permission to a husband to have more than one wife if desired by the parties concerned. So, someone who practices polygamy without following this law,

such polygamy is not valid even though he or she considers it legitimate according to his or her own belief.

As a result, there is a term that is legitimate according to religion but illegitimate according to state. Such dualism in legal provisions is impossible to avoid because the legal system practiced in society is affected by legal culture. Among the content of culture is people belief and attitude. The next result is that this kind of marriage can not be registered in the civil registry, and when a child is born of this marriage, the child's lineage can only be interconnected with his mother alone. The next consequence is that the child can not be recorded as the heir of his biological father.

### 3.2 Transformation's Model of Sharia and its Implication

If the transformation is a change in the form, nature, or appearance which includes modify or reconstruct then the model of Islamic law transformation into the national legal system can be manifested in three forms, substantive, normative and attributive or symbolic.

Substantively, Islamic law has been transformed into national law because the principle and substance of Islamic law has actually been incorporated into national law. Indonesian Constitution has already accommodated the principles of Islamic law. This is not only evidenced by the research of Harun Nasution but also strengthened by Masdar Farid Mas'udi through his book *Syarah Konstitusi* (Mas'udi, 2011).

The implication is that for Indonesian Muslims, obeying the constitution is equivalent to obeying Islamic law, violating the constitution is the same as violating Islamic law. The problem is, this way of thinking is not acceptable to Islamism especially extreme radical groups. Islamism grows out of a specific interpretation of Islam exclusively, that is believed to be emanate from the will of Allah and is not based on popular sovereignty. (Tibi, 2012:1).

Normatively, the transformation of Islamic law into national law occurs when the norms contained in Islamic law are also accommodated and made norms in national law. In Islamic law, the behavior or actions of a person can be normatively judged by predicate, *haram*, *makruh*, *mustahab* / *sunnah* and *mubah* (known as *taklifi* law) or judged with legitimate or void (known as *wadli'iy* law).

The problem is not all norms in Islamic law can be transformed into national law. Sometimes because it is unnecessary, impossible or because it has not been agreed by legislative institutions that have the authority to make laws.

For example, the obligation to pray five times a day for Muslims, according to the author, does not need to be enacted by the State. Executing someone for apostasy /conversion is impossible in Indonesia because it is against the principle of religious freedom mandated by constitution. In Islamic law, adultery whether *zina mukhson* (done by a married man) or *zina ghairu mukhson* (by a person who has never married) are equally unlawful in Islamic law. It means that all Muslims, morally, should avoid any form of adultery. But when the *ghairu mukhson* adulterers will be criminalized through state law, not all Muslims accept it. Thus, not all acts forbidden by religious norms can be criminalized by the State.

Symbolically or attributively, Islamic law has been transformed into national law if the attributes or symbols of Islamic law such as sharia, *al-adl* (fair), *hikmah* (wisdom), *zakat*, *wakaf* and so forth are accommodated in national law. The problem is that symbolic transformation does not guarantee a normative or substantive transformation.

The solution that can be offered is that Muslims should abandon the *taqlid* theory or dogmatic adherence to one specific School and switch to *talfiq* theory or piecing together or amalgamating doctrines from various Schools (Zakariyah, 2015 :22).

In Muslim countries there are seven methods and five techniques used to reform sharia or Islamic law. The seven methods are: 1) Islamic jurisprudential doctrines of *musawat al-madzahib* ( equality of the schools of Islamic law),2) *istihsan* (juristic equity ) ,3) *masalih al -mursalah* (public interest) 4) *siyasah syar'iyah* ( legislative policy of the state) 5) *istidlal* ( juristic reasoning) 6) *tawdi'*( legislation) 7) *tadwin* ( codification). While five techniques are : 1) *ijma* ( consensus of jurists) 2) *qiyas* (analogical deduction of rules) 3) individual or collective *ijtihad* (evolving new legal principles on the basis of the old ones) 4) *tahayur* (eclectic choice out of divergent legal principles within the Islamic law) 5) *talfiq* (combination of two or more parallel legal rules to evolve a new one). (Mahmood ,1987:13)

For Muslims who make religion an ideology, or Islamism, they must be willing to open up to accept the results of *ijtihad* from the experts and dare to choose which view is more suitable to the purpose of sharia and the condition of Indonesia. So their efforts to apply the sharia totally do not necessarily contradict the Indonesian constitution and the principles of democracy. Because, the constitution of Indonesia is already Islamic. In other words, their ideology should be placed as sub-ideology of state.

In the context of state life, *ijtihad* must be understood as Fazlur Rahman defines it. "*Ijtihad* must

be multiple effort of thinking minds -- some naturally better than others, and some better than others in various areas -- which confront each other in an open arena of debate, resulting eventually in overall consensus” (Rahman,1979: 325).

It is this *ijtihad* that can bring Islamic law closer to Rawls's theory of justice or known as shared concept of justice. In the era of democracy the practice of sharia can not be done through what is called an authoritarian interpretation of sharia. ( Abu El-Fadl,2001:)

Thus, even though Indonesia is a secular state according to Ahmet T. Kuru (Kuru, 2009), the transformation of Islamic law into national law is very open as long as they placed sharia as their paradigm.

## 4 CONCLUSIONS

In line with what is said by Whitehead in his book *Religion in the Making*, “Your character is developed according to your faith” (Whitehead,1927) sharia as a religious norm base on faith should be developed according to the development of faith. Under these circumstances, if the public aspect of the sharia will be applied in Indonesia, then dialogue and deliberation must continue to be made to achieve justice that is acceptable to all citizens, Muslim and non Muslim. As long as they have not been able to find stable justice, the various forms of expression and implementation of sharia in Indonesia must be protected by the State as long as it does not conflict with security and public order, public morals, health and human rights of others. The effort to transform and integrate Islamic law into national law requires total reform on both sides of Islamic law as well as national law. If, the transformation of sharia into the national law is done in an authoritarian, discriminatory way and not able to protect the weak and marginalized group then the sharia will lose its function as the spreading of mercy.

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