



# The Role of Islamic Law in the Development of the National Law System in Indonesia

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## **Abstract**

Islamic law provides a point of view in the national legal development system in Indonesia, the paradigm of Islamic law contains 2 dimensions, namely transcendental and horizontal, these two dimensions are placed in accordance with applicable norms and laws. The results of the study state that in the effort to apply Islamic law in Indonesia, there are relevant theories of thought so that Islamic law can be applied over time, first the Formalistic-Legalistic Theory of Thought, Second the Structuralistic Thought, Third Culturalistic thinking and finally the Applicative-Substantialistic Thought Theory.

**Keywords:** Islamic law; National Law; Indonesia

## **1. Introduction**

The paradigm of the Indonesian legal system is essentially a system, which consists of elements or parts that are interrelated and connected to achieve goals based on the 1945 Constitution and inspired by the philosophy of Pancasila. . According to Abdul Gani Abdullah, Pancasila within the framework of legal science theory occupies a dual position, namely:

- a. First, Pancasila is the embodiment of the ideals of law and legal awareness of the Indonesian nation which grows and is born out of a series of views of life and their moral ideals. If the sequence is pulled back, you will see a stretch of social religiosity that mixes this view of life and moral ideals. Thus, the ideals of law and legal awareness of the Indonesian nation cannot be separated from the potential value of religiosity.
- b. Second, Pancasila is the source of all sources of law. Such a position, however, causes every norm in Indonesian law to contain transcendental and horizontal dimensions. In addition, the norms or laws to be established that are declared valid must support a view of life which requires vertical accountability to God for all activities of legal norms. .

In the political life of Indonesian law, the obsession with Islam is considered to be formulated in the Jakarta Charter and interpreted as a gradual conception, and there are two points of view when the formation of the law is in progress: First, a broad interpretation of Article 29 paragraph (2) of the 1945 Constitution and one of

its meanings. The obsession with Islamic politics above places Islamic law as part of Islamic teachings. Second, the organic interpretation of Articles 24 and 25 of the 1945 Constitution places Islamic law as something that must be defended outside or in front of the court which is covered in the exercise of judicial power. .

Islamic religious law entered the Indonesian legal system at the same time as the arrival of Islam. Therefore, as the majority of people are Muslim, Islamic law is one of the systems that apply in Indonesia, although it is recognized that there are other religions besides Islam that are adhered to by a small part of Indonesian society. However, it should also be noted that Islamic law has a dynamic meaning as a law that is able to provide answers to social change and legal development and can be transformed over time and place.

Islamic law with its characteristics is able to be in line with legal development in Indonesia and social change. TM Hasbi as-Shiddiqy argued that Islamic law has 3 (three) characters which are provisions that never change, namely:

- a. Takamulthat is, perfect and complete. This means that Islamic law forms the Muslim ummah in a unified unity, even though they are of different ethnic groups and of different ethnicities, but they are united.
- b. Wasathiyah (harmony, moderate), that is, Islamic law takes a middle way, a balanced path that is not too heavy to the right that is concerned with the psyche and also not concerned with material things. Islamic law always harmonizes facts with the ideals of law.
- c. Harakah (dynamic), namely Islamic law has the ability to move and develop, has the life force, can shape itself in accordance with development and progress .

These three characteristics make Islamic law able to adapt to any world law, including the Indonesian national legal order. The flexibility of Islamic law will be able to answer current problems as well as fill the legal void that is not regulated in Indonesian legislation.

## **2. Result and Discussion**

### **2.1 Theory of Application of Islamic Law**

Conceptually, there are actually many theories of thought regarding the application of Islamic law (syari'at) in Indonesia, including:

- a. Formalistic-legalistic theory of thought. Opinion that the application of Islamic law must go through state institutions. This was conveyed by Habib Rizik Shihab, chairman of the Islamic Defenders Front. Regarding the question: whether Islamic syari'at must be formulated in a constitution, Rizik replied: "Yes." The country will later be able to keep the shari'ah running. Therefore, the formalization of shari'ah through the constitution or laws must be endeavored to maintain the substance of the shari'ah so that religion can be carried out properly. Therefore, he did not agree to separate between substance and formal .[5]

The Hizb ut-Tahrir group, which is considered to be keen, shouted out the need for Islamization through state ideology as one of the prerequisites for the establishment of Islamic law in the Indonesian jurisdiction. In the view of Hizb ut-Tahrir, fighting for the enforcement of Islamic law for a Muslim is a must. It must be a

belief that there can be no glory except with Islam; there is no Islam except by shari'ah; and there is no shari'ah except with the daulah (state). This thought is conveyed by putting forward an argument based on historical facts and the belief that Allah's rule is definitely the best. Only the shari'ah alone is able to answer all the problems that are currently entangling Indonesian Muslims in the economic, political, social, cultural, and educational fields.

**Structuralistic Theory of Thought.** This approach emphasizes the transformation in the social and political order to make it Islamic, while the cultural approach emphasizes the transformation of social behavior so that it is Islamic. However, the reciprocal relationship between the two is very synergistic. Because transformation through a structural approach is intended to influence the transformation of social behavior so that it is more Islamic. Social behavior is expected to influence the transformation of social and political institutions to become more Islamic. A structural approach requires a political approach, lobbying or through the socialization of Islamic ideas, which then becomes input for general policy. One of the main proponents of this approach is Amin Rais, who argues as quoted by Rahmat Rosyadi and Rais Ahmad, that the transformation of Islamic values through da'wah activities must cover all dimensions of human life. In other words, political, economic, social, cultural, scientific and other activities must be a means of realizing Islamic values. As a consequence of this view, Amin supports the formulation and implementation of an Islamic social system including legislating Islamic law in the Indonesian state legal system based on Pancasila and the 1945 Constitution. .[6]

**Culturalistic Theory of Thought.** This approach only requires the socialization and internalization of Islamic shari'ah by Muslims themselves, without direct support from political authorities and state institutions. The supporters of this cultural approach want to make Islam a source of ethics and morals; as a source of inspiration and motivation in the life of the nation even as a complementary factor in the formation of social structures. The supporter of this theory is Abdurrahman Wahid (Gusdur). According to him, not all Islamic teachings are legislated by the state. Many state laws apply purely in moral guidance. implemented in the full awareness of the community. The glory of religious law will not be lost with its function as a social ethical system. Its glory will even appear because its development can take place without the support of the state. For this reason, he is more inclined to make Islamic law as a moral injunction rather than as a formalistic-legalistic order. .[7]

**Substantialistic-Applicative Theory of Thought.** In academic circles, the thought of applying Islamic shari'ah is more inclined towards academic analysis which does not show pros and cons because they do not take sides with the opinion of anyone and any party. This thought is only born from the theoretical point of view of dogmatic Islamic teachings. and applicable. Its application is left to the Muslims themselves; whether it must be based on state authority or structural, cultural, substantial, individual, or collective. For example, comments from Juhaya S. Praja, Professor of Islamic Law at IAIN Sunan Gunung Jati Bandung, on the discourse on how to make Islamic law a support for development within the framework of the Pancasila legal system. According to him, although in practice it no longer plays a full and comprehensive role,

- 1) First, Islamic law has participated in creating a value system that governs the lives of Muslims, at least determining what should be considered good and bad; what are the orders, recommendations, regulations, and prohibitions of religion.
- 2) Second, many legal and jurisprudential decisions from Islamic law have been absorbed into the applicable positive law.
- 3) Third, There are groups that still have theocratic aspirations among Muslims from various countries so that the full application of Islamic law is still a slogan of struggle which still has considerable appeal .[8]

Based on the above theories, it can be concluded that the process of implementing Islamic law in Indonesia can be pursued in various ways, including through formalistic legality, culture, academic analysis, and behavior (morals). All these methods have existed since the pre-proclamation and post-reform era.

b. The role of Islamic law in the Development of Indonesian National Law Satjipto Raharjo stated:

"Legal guidance includes service providers and law enforcers, administrative guidance or management of the establishment, service and law enforcement, including these things that require a comprehensive planning for the development or development of national law. Only in this way, the law will influence the fabric of society towards a new and modern Indonesian society ".[9]

In accordance with what Satjipto expressed about the development of national law, at least Islamic law can contribute to the development of national law in several ways, namely:

- 1) Fill in the legal void where there are no rules in the laws or regulations in Indonesia;
- 2) Providing moral education for law enforcers and society.

Furthermore, the role of Islamic law in the development of national law must be pursued through the legislative process of law enforcers. Even though, there are some Islamic laws that are difficult to enforce by the authorities, such as the obligation to pray and fast. In theory, the state can force the implementation of prayer and fasting for Muslims and impose sanctions for those who break them. Law enforcement of the obligation to pray and fast is difficult to realize, due to:

- 1) Technically, regulations like this are difficult to enforce. How is it possible for the state to monitor for 24 hours just to find out whether its citizens are praying and fasting or not?
- 2) Prayers and fasting are individual rituals. Of course, it does not have much correlation with the 'public interest'. The state enforces the law for the public interest, not for individual interests.

The provisions of Islamic law that need to be legislated are legal provisions which have the following categories:

- 1) Enforcement requires assistance from state powers.
- 2) Correlates with public order .[10]

If the efforts to foster and develop Islamic law in Indonesia through the legislative route experience obstacles, then the alternative can be pursued through

non-legislative channels. For the condition of Indonesia, according to Warkum Sumitro, non-legislative alternatives are more possible for several reasons:

- 1) First, it does not give the impression of "majority domination," because its form does not place the label of Islam, it is sufficient to include values that are considered principles.
- 2) Second, support from political structures does not need to be done openly so that it is the voice of conscience that plays a role. This means that the commitment of Islamic leaders in the structure to the struggle for Islamic values (Islamic law) is very important.
- 3) Third, the matter of form and process is not important. The important thing is the matter of substance.
- 4) Fourth, because the form and process are not very important, it can be done in the field of law around the public and in this case it is more strategic .[11]

c. The orientation of Islamic law in the order of legal development in Indonesia Peace, happiness in life, legal protection, legal assurance and legal certainty in the orderly life of individuals and communities, nation and state, world peace is the goal and function of law in the national legal system with the philosophy of Pancasila .[12]

According to Masykuri Abdillah, in terms of orientation, the application of Islamic law can be classified into three groups, namely: First, it is an orientation that seeks to fight for the implementation of teachings in a comprehensive manner (kaffah), both in the fields of faith, syari'ah, and moral ethics. Second, is an orientation that only seeks to fight for the implementation of Islamic faith and morals. Third, is an orientation that only seeks to fight for the implementation of shari'ah as far as possible - in addition to the creed and moral ethics - or at least its principles, which are integrated into the national system. The first orientation makes Islam an ideological, the second makes Islam a source of ethics, and the third makes Islam a sub-ideologue i.[13]

The first presentation is very idealistic in the context of Islam, but less realistic in the context of a very pluralistic Indonesian society and nation, while the second presentation is very idealistic in the Indonesian context but less realistic in the context of Islam, where its teachings do not separate religion and state. A strong pull against one orientation will result in a stronger pull towards the opposite orientation, and will even lead to greater internal conflict. Therefore, a middle way is needed between the two, namely to make Islam a sub-ideology for Pancasila .[14]

d. Strategy of Islamic law legislation in legal development in Indonesia

The strategy of Islamic law legislation in legal development in Indonesia can be carried out through three sectors (citing Weiner Friedman's theory), among others:

1) Legal substance

In Article 5 of Law Number 10 of 2004 concerning the Formation of Legislative Regulations, it is stated that in forming statutory regulations must be based on principles which include:

- a) Clarity of purpose;
- b) Institution or appropriate forming organs;
- c) Conformity between the type and material of charge;

- d) Can be implemented;
- e) Efficiency and efficiency;
- f) Clarity of formulation; and
- g) Openness.

The content of statutory regulations as stipulated in Article 6 of Law Number 10 of 2004 contains principles which include:

- a) Protection;
- b) Humanity;
- c) Nationality;
- d) Kinship;
- e) Nusantara;
- f) Unity in diversity;
- g) Justice;
- h) Equal position in law and government;
- i) Order and legal certainty; and / or.
- j) Balance, harmony and harmony.

If you pay attention to the principles and material of the content of legislation in the Indonesian legal system, there are many similarities to the principles and material of Islamic law content (fiqh). Islamic law has regulated the relationship of the ummah in the life of worship (ubudiyah), social (muamalat), kinship (munakahat), state (siyasah and jinayah).

## 2) Legal structure

The structure according to this theory includes institutions or agencies that form and enforce the law. Islamic law can contribute to moral / moral teachings to the authorities in forming and enforcing the law. The moral teaching of Islamic law is felt to be important in improving the mentality of law enforcers. If the morals of law enforcers are good, then the implication is that law enforcement will become authoritative in society. This is in accordance with the second point of the Pancasila precepts, "Just and civilized humanity".

## 3) Legal culture / culture

A glimpse of the history of the journey of Islamic law in Indonesia is a law that lives in society and is an integral part of the legal awareness of Indonesian society. Although in fact not all aspects of Islamic law apply as positive law in Indonesia.

The enactment of Islamic law in the realm of national law is also very much determined by the extent to which supporters of Islamic law have the awareness to accept and implement it. Temporary facts show that Muslims as supporters of the enactment of new Islamic laws are potential, not yet an effective social basis. For the enforcement of Islamic law in the development of national law, it needs to be addressed more intensively. Efforts are still needed to nationalize Islamic law among Muslims as the majority population so that they really have a high awareness of Islamic law and are expected to comply with it.

With the support of these three components, namely the structural component, the substance component, and the cultural component with

various requirements, Islamic law will have a high bargaining position in the transformation process for the development of national law.

### 3. Conclusion

In an effort to apply Islamic law in Indonesia, there are four theories of thought regarding the application of Islamic law (syari'at) in Indonesia:

- a. The theory of formalistic-legalistic thought;
- b. Structuralistic Theory of Thought;
- c. Culturalistic Theory of Thought;
- d. Substantialistic-Applicative Theory of Thought.

The role of Islamic law in the development of national law is to fill the void in laws that do not yet exist in the laws or regulations in Indonesia and provide moral education to law enforcers and public legal awareness.

The orientation of Islamic law enforcement is in line with the ideals of National law contained in the preamble to the 1945 Constitution, namely welfare, guaranteeing human rights, upholding justice, kinship, deliberation and consensus in matters and educating people's lives.

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