

The Transformation of Islamic Law Into the National Legislation

Akhmad Khisni¹, I Gusti Ayu Ketut Rachmi Handayani²

¹Faculty of Law, Universitas Islam Sultan Agung, Semarang, Indonesia.

²Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia.

Abstract: National legislation or national regulation is established to regulate and order the law for its citizens. In order the law is adhered to by its citizens, it must conform to the values of its social base. The Muslim dominates Indonesian people, so it is appropriate to transform Islamic law into legislation (national legislation). It can be tangible Islamic values, principles that contain and reflect the principles of Islamic ideals, functions and objectives Islamic law and the universal principles of Islamic law (general) and it generally applicable as well. More concretely, Islamic law is as a source of national law through Islamic values that exist in the Qur'an and as-Sunnah. All of the ideas are made the principles laws and its application in national law or legislation, as well as the application in positive law and its enforcement.

Keywords: Transformation, Islam, National Law.

I. INTRODUCTION

The direction of the future legal policy, among others, mandates to recognize and respect religious law (including Islamic law) in arranging comprehensive and integrated national law. Moreover, it strives that all laws and regulations do not conflict with religious morals. Allah obliges Muslims to implement the Shari'a of Islam in their private, community and state life. Shari'a is obligatory, both as a religion and as a social institution. Shari'ah is, among other things, composed of norms to be exercised on the basis of consciousness, and norms which under normal circumstances must be exercised on the basis of consciousness by enforcing them with the help of state equipment. In other words it can be said that shari'ah consists of ethical norms, moral norms, and legal norms.[1]

Shari'ah is not a systemically arranged regulation and it is ready to be applied in societies that have different social systems and always change from time to time. For that reason, ijtihad is needed to be used by reasoning from the 'ulama' and qadli. This result is structured systemically in Islamic jurisprudence, then the fiqh is the result of the lectures of the fuqaha 'and qadli by using certain methods in the framework of the application of shari'ah in a social system and at a certain time.[2]

The Islamic community in implementing the Shari'ah, self-sufficient by applying the teachings of the jurisprudence of the schools they profess. The newly emerging Islamic society faces problems in the application or transformation of shari'ah through the application of jurisprudence to the madhhab (school), in a social system different from the social system behind the jurisprudence. Because of the importance of religious law (Islamic) in arranging comprehensive and integrated national law, all legislation should not conflict with religious morals, it is important to be appointed this paper under the title: "Transformation of Islamic Law into National Legislation".[3]

From the background of the importance of religious morals (including Islam), it is urgent to put religious morals included in the legislation in order to organize a comprehensive and

integrated national law, then in the formulation of the problem in this paper is: "How to transform Islamic law into National legislation".

II. RESULTS AND DISCUSSION

To solve the problem of transforming jurisprudence or Islamic law as *iusconstituendum* in national law as *iusconstitutum*, this paper used the theoretical approach of law that states that the enactment of a law must be returned to the higher law of its position. Thus, we will get the following improvements: [4]

1. There is a legal goal (Rechtsidee) which is an abstract norm,
2. There is a norm between (law in books) that is used as an intermediary to achieve the goals, and
3. There are concrete norms that people enjoy as a result of applying norms between or enforcement in court.

If the theory of law enforcement is applied to the issue of Islamic law as a source of national law, then the picture of legal grades are as follows:[5]

- a. Abstract norms, the values in the holy book of the Qur'an (universal and eternal and should not be changed by human),
- b. The intermediate norms, the principles and arrangements, the results of human creations according to circumstances, conditions, cultures and periods of time, appear as State regulations, clerical, expert/scientific opinion, customs, and
- c. Concrete norms, namely all the results of the application and legal service of human creation is not the Prophet, as well as the results of law enforcement in court (positive law, living law).

In summary, it can be formulated as follows islamic values, principles and its imposition in national law, and Its application in positive law and enforcement. Contribution in the form of legal principles is very important, consider that: [6]

- a. The legal principles are the elements underlying the rule of law, so that if certain legal principles can be accepted as the principles of national law, then all the rule of law will get the spirit and soul of the principle,
- b. The legal principle contains and reflects the principles contained in the ideals of law, function and purpose of law. The existence of legal principles will reflect the application and enforcement of the law in a fair, precise and beneficial for individuals and communities. The legal principle is the control,so that the rule of law is not applied or enforced deviate from the ideals of law, function and purpose of law,
- c. The legal principle is a *dynamicator* instrument of a rule, so that it can still be applied and enforced fairly, rightly, appropriately and beneficially to individuals and society.

It would have a great contribution if the parallels of Islamic jurisprudence could be brought to the fore of the development of national law containing democratic legal jurisprudence, based on the principles of constitutional state based on legal principles and on the basis of social justice for all Indonesians. With regard to the possibility of contributing to the rules of Islamic law, it is necessary to understand some of its characteristics, among others: (a) Normally Islamic norms of law will apply only to persons of the Islamic faith and general law norms

which may be treated to all persons without having to touch the concerned religion, (b) The legal rules relating to worship and mu'amalah. [7]

Things that are worship, only apply to those who are Muslims, matters concerning mu'amalah there is also only applicable to those who are Muslims and can apply in general. The path of Islamic law contribution, viewed from the perspective of national law development can be through legislation or through jurisprudence, custom law and other decision rulings that are not legislation. Contribution through legislation, because the legislation can be diverse, then the contribution of Islamic law can occur in every kind of legislation, ranging from the Constitution to regional regulations. The contribution of legislation recently has been very limited, because of several matters: (a) Up to now the attempt to place Islamic law in national legislation is more directed to provisions that are peculiar to those who are Muslims, (b) Islam in many national legislation systems is directed at general principles of law, which can apply in general. [8]

Contribution through jurisprudence is another instrument in the formation of law. Legislation in the field of judicial power requires judges to find the right law in determining a decision. It is necessary for the judge to give justice as it deserves. In such occasions, the judge may use Islamic legal principles or rules which are deemed to satisfy the justice of justice seekers. Contribution through the development of customary law can be done if Islamic law has become a reality rooted in the life of the community, then the law will be enforced and executed without having to wait for confirmation by legislation. One of the problems of this matter is what methods and techniques have been used by scholars to transform *fiqh* (Islamic law) as the intermediate norm in national law as a concrete norm. The law applicable in Indonesian, as Muslim societies, relating to Islam is marriage law and inheritance law as an example and has become a national law. [9]

The method of transformation of Islamic law before the XX century was through *hilah* method with cultural approach. After the influence of Islam extended to the territories outside the Arabian Peninsula, Islamic law in the form of jurisprudence began to enter the region. Islamic law (jurisprudence) deals with long-standing laws in the community of the region. The scholars left the law in effect, as long as it did not conflict with Islamic law, but they step by step replaces the applicable legal language with the jurisprudence language, socialize the legal institutions in *fiqh* into the existing law and replace the institution-legal institutions that have been in effect and are contrary to the provisions of *fiqh*, with similar legal jurisprudence institutions or unequal legal jurisprudence institutions. [10]

After Islam entered Indonesia, Islamic law also entered with it. The scholars carried out their obligations to Islamize the existing law in the territory of Indonesia, or to transform Islamic law with existing laws and customary law. Therefore existing customary law remains allowed prevailing as long as it did not contradict the law of *fiqh*, but its legal language was replaced by the Jurisprudence. As for customary law institutions that apply, but it was contrary to the provisions of jurisprudence, such as inheritance law institutions, they seek to replace them gradually with similar legal jurisprudence institutions, namely the provisions of the Syafi'i school of law or other jurisprudence institutions namely grants and wills, cultural. [11]

For example, the inheritance law that enters in Indonesia is Islamic law with a background of patrilineal kinship, a system that determines members of a relative consist of men who have blood relations through male lines. Meanwhile, the kinship system in Indonesia is diverse,

some of which are matrilineal (mother line) and others share a parental kinship system (mother-father line). Medium inheritance system is closely related to the kinship system. According to the inheritance *faraidl* system, the relative who have blood relation according to the female line will get inherited. On the other hand, the heir portions are determined by al-qur'an and heirs according to the male line when extinct. Meanwhile, according to the legal system of matrilineal inheritance, inheritance only falls on the female heirs according to the mother line. According to the parental heredity parentage system either by the father line or the maternal line and the male portion is equal to the female part. According to the inheritance of adapt in these three systems, inheritance only falls to the heirs. Unlike the Islamic heritage, the inheritance also falls to descendants also falls to parents and widows and widowers.[12]

Therefore, the *ulama* transforms the Islamic inheritance law in customary law in two ways: (1) socializing the law of Islamic inheritance through the enhancement of the Islamic community's strength, with the aim of the community will apply the Islamic inheritance law and leave the customary law inheritance that contrary to the law of inheritance, and (2) Replacing the law of inheritance of Islam with the inheritance law of grant and will, namely the inheritance system by the owner of the property before death divides his property to his immediate family or other persons through the institution of grant or testament according to his will, so after the death of the heir, already split out. In the field of marriage law, scholars transform Islamic marriage law by substituting Customary marriage law with Islamic marriage law, then customary marriage law is derived from legal institution becomes a moral provision. Then the marriage law of Islam is given status as a positive law, and carried out together with the provisions of Adat/customary as moral. [13]

The transformation of Islamic law in the twentieth century on the predominantly Muslim countries that were newly independent from Western colonialism and later in the region were born nationalist countries that Islam is at least as official religion. In the colonial period in Muslim countries, Western law is treated both private and public law, except family law (*al-ahwal al-syakhshiyah*), it still apply Islamic law both formal and material. After escape from colonialism, these countries sought to establish their own national legal system to replace colonial law. In the formation of their national law, they seek to transform Islamic law in their national law. Hence, they faced the fact that some of the prevailing laws are derived from western laws under the colonial government. To address the above challenges and to respond to the challenges of existing social change, Islamic law can be transformed using the following techniques: [14]

1. *Takhshish al-qadla*, limiting the right of the state to restrict the jurisdiction of both the person's session, its territory, its jurisdiction and the procedural law applied. States may adopt procedural wisdom to restrict the judiciary from applying the provisions of family law in certain circumstances, without seeking to alter the substance of Islamic law,
2. *Takhayyur*, choosing the teachings of jurisprudence other than the majority school of society, if the opinion is more in line with the development of society, the community will follow the. This technique is also known as *talfiq* technique, which combines several different schools of thought,
3. Reinterpretation, make a new interpretation of the verses of the Qur'an and al-Hadith with regard to social change. As an example of the provision in some family law in Middle Eastern countries that determines that a person who will engage in polygamy must obtain a court permit. Thus, the Tunisian family law specifies that a divorce should be made before the court,

4. *Siyasahsyar'iyah*, in the form of a ruling policy to implement useful administrative regulations and not against the shari'ah.

In a state of great openness as a consequence of the reform era and at the same time in the critical condition as it is today, Islamic law or jurisprudence has a greater role as a source of national law. The meaning of the sources here will undergo a very significant development, not only in the judicial system that has been firmly within the Religious Courts, as it has been so far, but also in the judicial system (including legal materials and judicial systems within the framework of the rule of law). Included in this context puts fiqh in one form of jurisprudence in the world of law, which can give the meaning that Islamic jurisprudence or law is the source of study in the science of law and also as the source of material law. If placing fiqh or Islamic law in the ranks of law science in general, then in the operational level or material law, Islamic jurisprudence or law can be used as source through several paths, as follows: [15]

1. Legislation. Here fiqh can serve both as material law or fiqh in the context of legal ethics/morality,
2. Sources of government in implementing policies that are not always in the sense of legislation as the Government Regulation, but in the context of discipline which ultimately relates to legislative values as well,
3. Jurisprudence, this is very clear with the legal system adopted in Indonesia that every judge can be the source itself especially when the written law has not yet been manifested,
4. Sources for law enforcement. The journey of the legal process in Indonesia leads to a process, in which a judge will issue a legal verdict will not escape altogether from the process performed by those who litigate,
5. Sources of legal science or legal philosophy. Here, in general, Islamic law has the same position with the science of Western law. However, for Indonesian people who are predominantly Muslim, they should have a larger population, because they can be placed in a position of awareness of Muslims to practice it,
6. Sources of cultural values of the community. This is usually referred to as the culture of Islamic values or cultural Islam. Even at the same time making Islamic law as a source of customary law, and in fiqh know 'urf (custom) and' aadah (customary) which also exist rule "*al-'adahmuhakkamah*" (customs can be a source of law).

The development towards widespread adoption of Islamic law in accordance with the dynamics of legal consciousness in our society, set forth in the form of legislation and embodied in the essence of developed legal institutions can be attributed also to philosophical and constitutional considerations. In general, it can be acknowledged that the 1945 Constitution recognizes and embraces the Godhead of the Supreme God in the life of society, nation and state. The Idea of Belief in the Almighty is not only confirmed by the nature of the formulation of the Preamble of the Constitution which explicitly states the existence of this recognition, but also firmly includes the idea of Belief in the One Supreme God as the first and main principle in the formulation of Pancasila. Even in Article 29 of the 1945 Constitution, it is also affirmed that the state is based on Belief in the One Supreme God. [16]

The idea of the Divine Essence of God is even related to the idea of God's omnipotence which is nothing but the idea of God's Sovereignty in Indonesian state thinking. However, the principle of God's Sovereignty is different from the Western theocracy that is embodied in the king's power. Therefore, based on the system of constitutional thinking, based on the 1945

Constitution, it is embodied in the principles of people's sovereignty that are used as the source of legal authority for the implementation of the Islamic legal system within the framework of national law.[17]

From the perspective of Islamic law, such thought processes can be attributed to an understanding that is closely related to the innovative interpretation of the Qur'anic verse that obliges obedience to Allah, to the Messenger of Allah, and to '*ululamri*'. The notion of '*ululamri*' which is often misunderstood as the concept of leader (*waliyu al-amri*'), is understood as the concept of "leadership representation" or "leaders representing the people" (*ululamri*). Therefore, the concept of parliament in the modern sense is acceptable within the framework of Islamic law, through the norms of Islamic law it is treated with the support of the authority of public power that is through its development into a "*qanun*" or regulation of the state. Therefore, it can be said that the existence of Islamic law within the framework of Indonesia's national legal system is very strong position, philosophically, sociologically, politically, and juridical. [18]

III. CONCLUSION

The study determined that in the transformation of Islamic law into national legislation can be as Islamic values, principles that contain and reflect the principles contained in the ideals of Islamic law, the functions and objectives of Islamic law, as well as the rules of Islamic law which pour it in the legislation of national law and its application in positive law and its enforcement in court. In addition, it can also be through the contribution of Islamic law when viewed from the perspective of national law development. It can be through legislation or through jurisprudence, custom law or other decisions that are not legislation. Until now, the effort to put Islamic law in the national legislation is more directed to the provisions that are typical to apply to those who are Muslims, while the idea of incorporating Islamic law in the national legislation system is directed to general principles of law and also generally applicable. In addition, the transformation of Islamic law into the legislation of national law can be realized through jurisprudence, the development of customary law and the source of cultural values of society commonly referred to as the culture of Islamic or cultural values. Even at the same time making Islamic law as a source of customary law and in fiqh recognize '*urf* (custom) and' *adah* (custom) which is also the rule of "al- '*adahmuhakkamah*" (customs can be a source of law).

REFERENCES

- [1] Baranyanan, SD., Handayani, I.G.A.K.R., Isharyanto, "Political law of local government to resolve disputes adat law in Kei Island" *International Journal of Advanced Science and Technology*, Volume 28, Issue 20, 31 December 2019, Page. 494-499.
- [2] Suhartini, E., Hartiwiningsih, Handayani, I.G.A.K.R., Roestamy, M., "Legal politics and policy setting of wage systems for creating social justice of workers", *Journal of Legal, Ethical and Regulatory Issues*, 22(6), pp. 1-7
- [3] Aprilindo, N., Handayani, I.G.A.K.R., Sulistiyono, A., "Developing the law model for resolving disputes over presidential election result with a progressive law approach" *International Journal of Advanced Science and Technology*, Volume 28, Issue 20, 31 December 2019, Page. 490-493.
- [4] Lego Karjokoa, Djoko Wahyu Winarno, Zaidah Nur Rosidah, I Gusti Ayu Ketut Rachmi Handayani, "Spatial Planning Dysfunction in East Kalimantan to Support Green Economy", *International Journal of Innovation, Creativity and Change*, Volume 11, Issue 8, (2020).

- [5] Sudarwanto, A.S., Handayani, I.G.A.K.R., “The implementation of land provision for development for the public interest in Merauke land Papua Province”, *International Journal of Advanced Science and Technology*, Volume 28, Issue 20, 31 December 2019, Page. 269-275.
- [6] Suwari Akhmaddhian, Hartiwingsih & I Gusti Ayu Ketut Rachmi Handayani, “The Government Policy of Water Resources Conservation to Embodying Sustainable Development Goals: Study in Kuningan, Indonesia”, *International Journal of Civil Engineering and Technology*, Volume 8, Issue 12 (2017).
- [7] Soediro, Handayani, I.G.A.K.R., Karjoko, L., “The Spatial Planning To Implement Sustainable Agricultural Land”, *International Journal of Advanced Science and Technology*, Volume 29, Special Issue 3 (2020), Page. 1307-1311.
- [8] Leonard, T., Pakpahan, E.F., Heriyatia, Karjoko, L., Handayani, I.G.A.K.R., “Legal review of share ownership in a joint venture company”, Support Green Economy”, *International Journal of Innovation, Creativity and Change*, Volume 11, Issue 8, (2020).
- [9] Prasetyo, B., Handayani, I.G.A.K.R., Sulistyono, A., Karjoko, L., “Legal framework for social security state civil apparatus”, *International Journal of Advanced Science and Technology*, Volume 28, Issue 20, 31 December 2019.
- [10] Sari, S.D., Handayani, I.G.A.K.R., Pujiyono, “The Factors Making The Law Protection For The Patients Of Esthetic Beauty Clinic In Indonesia Not Fulfilling Citizen’s Constitutional Right”, *Medico-Legal Update*, Volume 19, Issue 1, 2019, Pages 252-256.
- [11] Jaelani A.K, Handayani I.G.A.K.R, Karjoko L, “Executability of the Constitutional Court Decision Regarding Grace Period In The Formulation Of Legislation”, *International Journal of Advanced Science and Technology* Vol. 28, No. 15, (2019). Page. 816-823
- [12] Surachman A, Handayani I.G.A.K.R, Taruno Y. “Effect of Globalization on Establishment of Water Resource Law: A Practice in Indonesia”, *International Journal of Economic Research*, Volume 14, Number 13 Tahun 2017.
- [13] Sudarwanto, A.S., Handayani, I.G.A.K.R., “The implementation of land provision for development for the public interest in Merauke land Papua Province”, *International Journal of Advanced Science and Technology*, Volume 28, Issue 20, 31 December 2019, Page. 269-275.
- [14] Jaelani A.K, Handayani I.G.A.K.R, Karjoko L, “Development of Tourism Based on Geographic Indication Towards To Welfare State”, *International Journal of Advanced Science and Technology* Vol. 29, No. 3s, (2020). Page. 1227-1234.
- [15] Sudarwanto, A.S., Handayani, I.G.A.K.R., “The implementation of land provision for development for the public interest in Merauke land Papua Province”, *International Journal of Advanced Science and Technology*, Volume 28, Issue 20, 31 December 2019, Page. 269-275.
- [16] Baranyanan, SD., Handayani, I.G.A.K.R., Isharyanto, “Political law of local government to resolve disputes adat law in Kei Island” *International Journal of Advanced Science and Technology*, Volume 28, Issue 20, 31 December 2019, Page. 494-499.
- [17] Suhartini, E., Hartiwingsih, Handayani, I.G.A.K.R., Roestamy, M., “Legal politics and policy setting of wage systems for creating social justice of workers”, *Journal of Legal, Ethical and Regulatory Issues*, 22(6), pp. 1-7
- [18] Aprilindo, N., Handayani, I.G.A.K.R., Sulistiyono, A., “Developing the law model for resolving disputes over presidential election result with a progressive law approach” *International Journal of Advanced Science and Technology*, Volume 28, Issue 20, 31 December 2019, Page. 490-493.

Copyright of Talent Development & Excellence is the property of International Research Association for Talent Development & Excellence (IRATDE) and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.