

## LEGAL POLICY OF FORMALIZATION OF ISLAMIC SHARIA IN INDONESIA

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### Citation Guide:

Muhammad Ainun Najib, 'LEGAL POLICY OF FORMALIZATION OF ISLAMIC SHARIA IN INDONESIA' [2020] 2 (2) Prophetic Law Review 3.

### Received:

14 February 2020

### Accepted:

22 December 2020

### Published:

28 December 2020

### DOI:

10.20885/PLR.vol2.iss2.art3

### Abstract

*There are always some Indonesians that discourse and fight for the idea of Islamic state and formalization of sharia. Their effort through constitutional channels gains some success, like 1974 Marriage Act, 1989 Religious Courts Act, and Compilation of Islamic Law (KHI). Sharia formalization is strongly influenced by political interests of the rulers which are inseparable from the socio-political context of its application. This article discusses on how the change of political circumstance has influenced the formalization of sharia in various eras of Indonesia's government and political factors that influence the dynamic of the formalization of sharia. By using socio-legal research, this study reveals that the formalization of sharia in Indonesia experienced ups and downs according to the relation between state and religion applied by each regime. The formalization is more influenced by the relationship between Islam and the state. When Islamic camp got formalist in character, the formalization was difficult. but if a cultural character was used, formalization became easier. Furthermore, the formalization of sharia by the rulers at least has political, administrative, and contextualization interests.*

**Keywords:** *Formalization, Sharia, Islamic Struggle, Interests.*

### A. Introduction

Indonesia in the Islamic world has uniqueness, both in terms of state and the people. Having the largest Muslim population in the world, all issues of Indonesia's statehood, nationality, and society, however, are not based on religious teachings (Islam). In fact, the principle that is used as a way of life and state ideology is Pancasila, which is several basic

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values extracted from Indonesian's own philosophy that at some level can become a "meeting point" (*kalimat sawa'*) between various groups in the country.<sup>2</sup>

In the rule of law (*rechtstaat*) based on the Pancasila, a Muslim Indonesian practices some of the laws of their religious teaching and must follow the "state law" adopted from the West as well. Of course, it can be simplistically assumed that throughout its history, the struggle to uphold Islamic law in Indonesia has always experienced periods of tension and bargaining of power which were quite tiring, between the fellow citizens and the politicians. In this context, the state's legal policies play an important role — sometimes even hegemonic — in determining the implementation of Islamic law.<sup>3</sup>

After Indonesia's independence, the discourse of establishing an Islamic state and formalization of Islamic law has become an always-on issue. From time to time, there are always some Muslims who discourse and fight for such ideas. These political Muslim groups<sup>4</sup> inevitably face opposition of the state and other parties at times. Muslim efforts to gain such ideals have been pursued through various means, such as legislation to generate national or local laws, or even rebellion and the use of violence. In other words, the efforts have been made, both constitutionally and unconstitutionally.<sup>5</sup> Until recently, such ideals are still held by some Muslim communities. Important findings from Fossati's research indicate that the majority of Muslim respondents feel comfortable with the idea that Islam should occupy a higher position among religions or in Indonesian political life.<sup>6</sup>

The struggle to formalize sharia through constitutional channels gains some successes. For example, various laws and regulations that have been issued include Law 1 of 1974 concerning Marriage, Law 7 of 1989 concerning the Religious Courts, Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law (KHI), Law 13 of 2008 concerning the Organization of Pilgrimage or Hajj, Law 23 of 2011 concerning Management of Zakat, Law 10 of 1998 concerning Banking, Law 11 of 2006 concerning the Government of Aceh, and others.

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<sup>2</sup> Pancasila contains five principles for statehood: Trust in God, humanity, Indonesian unity, deliberation, and social justice.

<sup>3</sup> Marzuki Wahid and Rumadi, *Fiqh Madzhab Negara: Kritik atas Politik Syariat Islam di Indonesia* (LKIS 2001) 1-2.

<sup>4</sup> The term 'political Islam' is used to refer to a group of Muslims who fights for the idea of formalizing Islamic law, even the establishment of an Islamic state.

<sup>5</sup> Ahmad Yani Anshori, 'Islam dan Negara-Bangsa: Studi Perjuangan ke Arah Negara Islam di Indonesia Pascakemerdekaan' (Dissertation, UIN Syarif Hidayatullah, 2006) 5-9; Agussalim Sitompul, *Usaha-Usaha Mendirikan Negara Islam dan Pelaksanaan Syariat Islam di Indonesia* (Misaka Galiza 2008) 281-436.

<sup>6</sup> Diego Fossati., 'The Resurgence of Ideology in Indonesia: Political Islam, Aliran and Political Behaviour', *Journal of Current Southeast Asian Affairs*, Vol 38(2). pp. 127.

As mentioned above, the implementation of sharia is very dependent on the legal politics of the authorities in determining the characteristics and style of laws. Legal policy is a statement of the will of ruler regarding the law in force and the direction of legal development to be built. In other words, legal politic is a policy towards the law that will or has been implemented nationally by the government.<sup>7</sup>

Efforts to scrutinize the construction of a country's legal politics are not enough by just examining what is written in official texts but must involve other factors outside the law. The formation of law is not autonomous, meaning that the law must be influenced by the maker's political vision, the culture of the community as well as economic, political, socio-cultural, religious, and other interests. In other words, the law is not born in a vacuum.<sup>8</sup> The existence of law in the midst of society, therefore, is no value-free, no interest-free, no power-free. The law is always fulfilled with certain values according to the will of the makers. Even generically, the meaning of law itself is the accumulation and formulation of values.<sup>9</sup>

What about Islamic law? Does the conception of legal politic above-mentioned suit it? Islamic sharia is substantively an integral dimension of Islamic teachings. As religious teaching, sharia come from Allah and directly grows from the Qur'an and Sunnah (prophetic traditions). Thus, sharia is not a political product. However, throughout Muslim history, it was not uncommon to find it, as an effort to implement and enforce Islamic law in a particular political area, that the existence of Islamic law required legitimacy of political power, even had been conducted with certain political activities, such as legislation. Therefore, although normatively there is no necessity for the implementation of sharia through political decision or legalization of the authority, sharia, within certain limits, can be said a political product too. Even its legitimacy from the ruler may become a necessity because of large benefits for its legal certainty.<sup>10</sup>

Various laws and regulations containing sharia that have emerged in Indonesia, therefore, are products of agreement or compromise among various political forces within particular socio-political context at the time of the formulation. From this perspective, it is interesting to discuss what legal politics behind such laws and regulations.

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<sup>7</sup> Hartono Hadisoeparto, *Pengantar Tata Hukum Indonesia* (3<sup>rd</sup> Ed., Liberty 1993) 6; Moh. Mahfud MD, *Politik Hukum di Indonesia* (RajaGrafindo Persada 2012) 17.

<sup>8</sup> Marzuki Wahid dan Rumadi, *Op. Cit.*, 40-41.

<sup>9</sup> *Ibid.*, 2.

<sup>10</sup> *Ibid.*, 4-5.

## **B. Problem Formulation**

Based on the background outlined above, the article addresses: First, how has the change in political circumstance influenced the formalization of Islamic law in various eras of Indonesia's government? Second, what are political factors that influence the dynamic of formalization of Islamic law in Indonesia?

## **C. Methodology**

This article is based on socio-legal research. Data concerning the object of this study were traced and collected through library research in which relevant library resources regarding Indonesian politics, history, Islamic law, and constitutional law were consulted.

The collected data was then analyzed qualitatively using inductive and comparative analysis. Inductive analysis was employed when concluding various particular data pertaining to records about implementation of sharia by various governments that once ruled Indonesia. Then, general conclusion could be obtained that is the reality of sharia under different rulers throughout Indonesian history. On the other hand, a comparative analysis was used in comparing Indonesia's political configurations that varied since bygone era until today. A particular political configuration or socio-political context has its own impact on the formalisation of sharia. Having been compared, the similarities and differences between various political configurations and their influence on sharia could have been clearer in explaining the issue of formalization of sharia.

## **D. Discussion and Results**

### **1. Changes in Political Circumstance Influencing Sharia Implementation**

Islam has long evolved in the archipelago of Nusantara before the creation of the Republic of Indonesia. Even before European colonialism, Islamic kingdoms had emerged and implemented sharia within their jurisdictions respectively. At the end of the day, those sultanates were conquered by Europeans. The Dutch controlled most parts of the archipelago that they named the *Nederlands-Indie* (Dutch East Indies). Likewise, the British controlled the Malay sultanates in the north. Initially, the European colonial governments faced resistance from the sultans and the natives. However, their political and military power was superior and succeeded in subjugating and ending the political power of the native rulers.

Nevertheless, the power of the colonial governments did not erase the existence of Islam. In fact, the Muslims driven by religious zeal had often rebelled in order to free

themselves from colonial rule. In turn, the colonial government were forced to make right policies on Islam to maintain power over Muslims. Those policies concerned almost all aspects like worship, civil law, and politics. For instance, *Nederlands-Indie* advisor, Snouck Hurgronje, suggested the Dutch government to differentiate policies towards Islamic worship and political Islam. However, the European rule in the archipelago were finally ended by the Japanese Army when World War 2 broke out. The Japanese military government also made policies on Islam to maintain power over Muslims who formed the majority of the population.

It continued until Japanese rule ended at the end of World War II. After a vacuum of power, Soekarno and Hatta proclaimed Indonesia's independence as a new republic whose territory covers the former *Nederlands-Indie* from Sabang to Merauke.

#### **a. Sharia in the Nusantara's Sultanates before European Colonialism**

Efforts to establish an Islamic state and formalize sharia were held in *Nusantara* or Indonesian Archipelago long before the Europeans arrived. Muslims had dominated politics in Islamic kingdoms. Sharia could be freely enacted with the support of Muslim rulers.<sup>11</sup>

The sultanate system at the time certainly placed sovereignty in the hands of the royal family. Thus, the governments were not democratic. The royal family determined whether or not people's lives were prosperous. The family also determined the types of rules that were applied. As a consequence of a religious state, sharia was implemented, including matters of muamalah (social laws), *ahwal asy-Syakhsiyyah* (family laws), court, and worship. Islamic law became an independent legal system used in the sultanates.<sup>12</sup>

Various Islamic courts emerged in several places, like the *Serambi* Courts in Java, the *Syar'iyah* Courts in Sumatra, and the Qadhi Meetings in Banjar and Pontianak. These courts not only made judgement on civil matters but to some extent used to deal with criminal matters.<sup>13</sup> Thus, it is true that long before the Dutch arrived, Islamic law was ruling the Archipelago's states.<sup>14</sup> Islamic kingdoms imposed sharia, especially the Shafi'i school.

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<sup>11</sup> Alaidin Koto et. al., *Sejarah Peradilan Islam* (RajaGrafindo Persada 2012) 197-198.

<sup>12</sup> Mohammad Idris Ramulyo, *Azas-Azas Hukum Islam Sejarah Timbul Dan Perkembangannya* (Sinar Grafika 1997) 38.

<sup>13</sup> Mahsun Fuad, *Hukum Islam Indonesia* (LKIS 2004) 49.

<sup>14</sup> Mohammad Idris Ramulyo, *Op. Cit.*, 38.

The overview of the Islamic court and law had attracted Lev to research religious courts in Indonesia. According to him, wherever had strong Islamic influence, there was a religious court. Nevertheless, the forms were diverse. Religious judges in several regions such as Aceh, Jambi, South and East Kalimantan, South Sulawesi were appointed by local authorities. If there were no religious courts, such as in North Sulawesi, Gayo, Alas, South Sumatra, then Islamic scholars who mastered sharia were given the task by local authorities to carry out judicial duties. In Java, since the 16th century, every district had a religious court. The judicial process was carried out by the *penghulus* (religious officers). The trials took place in the foyer of the mosque so it was called the foyer court (*pengadilan serambi*). Lev even ensured that at the time there were no other official courts serving the Javanese besides the religious court.<sup>15</sup>

#### **b. Sharia under Dutch Colonialism**

Regarding the formalization of Islamic law, there were two periods of Dutch occupation in the archipelago, namely the period before 1800 and the period after 1800. In the first period (before 1800), colonial rule was held by a trade cartel named *Vereenigde Oost Indische Compagnie* (VOC). While the second period witnessed direct control by the military-political power of the Dutch East Indies government as a subordinate of the Dutch royal government in Europe.

There were several characteristics of VOC policies related to Islam. *First*, there was some tolerance providing relatively vast space for sharia in several sultanates. *Second*, the VOC tried slowly to understand the nature of Islamic law and customary law. *Third*, the agenda and process of westernization of law were carried out in a very gradual manner so that it did not affect trading interests between the Dutch and the natives.<sup>16</sup>

The Dutch behavior then changed significantly in the second period (post-1800) after the VOC went bankrupt. In this period, the Dutch East Indies government<sup>17</sup> run a more aggressive legal politics to carry out the exclusion of sharia more systematically. The steps were taken like: (1) confronting Islamic law directly with customary law; (2) real

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<sup>15</sup> D.S. Lev, *Peradilan Agama Islam di Indonesia: Suatu Studi tentang Landasan Politik Lembaga-Lembaga Hukum*, trans. Zaini Ahmad Noeh (Intermasa 1980) 25.

<sup>16</sup> Quoted by Sukron Kamil et. al., *Syariah Islam dan HAM: Dampak Perda Syariah terhadap Kebebasan Sipil, Hak-Hak Perempuan, dan Non-Muslim* (CSRC UIN Syarif Hidayatullah and KAS 2007) 98.

<sup>17</sup> Dutch East Indies government (now: Indonesia) was part of the Dutch royal government. Article 1 of the 1938 Constitution of the Kingdom of the Netherlands stipulated that "the Kingdom of the Netherlands includes the territories of the Netherlands, the Netherlands East Indies, Suriname and Curacao." Read: Wirjono Pradjodikoro, *Azas-Azas Hukum Tata Negara Indonesia* (Dian Rakyat 1983) 19.

and direct westernization and Christianization projects; (3) colonialism in various fields was increasingly intensive and massive.<sup>18</sup>

In its legal policies, specifically those related to sharia, the government sought a proper formula. The aim was to protect its colonial interests and smooth the westernization of Indonesian law. Within this framework, the Netherlands used several legal politics, such as *receptie in complexu* and *receptie* legal politics.<sup>19</sup> They recognized the existence of religious court (*Priesterraden*) of Java and Madura in 1882 but revoked the court's power in handling inheritance cases in April 1937. The reason was that Javanese traditional law had not yet received (*receptie*) Islamic inheritance law.

The late period of the Dutch regime in the early twentieth century saw popular movements demanding Indonesian independence. For the first time, differences of opinion emerged among the movement's leaders regarding the position of religion in the future Indonesian state. According to Harry J. Benda, there were three influential groups. *First*, aristocratic groups, such as *priayi* in Java, *uleebalang* in Aceh, and customary leaders in other areas. They used to be the foundation of the Dutch government's bureaucracy for decades even centuries.<sup>20</sup> They maintained the status quo so that they tended not to support independence campaigns. *Second*, the secular nationalist group, which began to build various organizations to oppose the rule of Dutch. *Third*, political Islam leaders or Muslim nationalists. They aspired to establish a state based on Islam.

Since 1930s, secular nationalists gained a strong position with the support of western-educated intellectuals who had just returned from their studies in the Netherlands and formed several nationalist parties. The nationalists succeeded the Islamists in directing the movement towards independence. The most serious implication of this development was the ideological conflict between political Muslims and secular nationalists about the relation between religion and state in future Indonesia.<sup>21</sup>

### **c. Sharia during the Occupation of the Japanese Army**

Once Japanese military forces entered the archipelago during the second world war, the conflict between the Islamists and the secular nationalists stopped completely. Political parties from the Dutch era were not allowed to live anymore. Instead, associational groups

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<sup>18</sup> M. Mahfudz MD (ed.), *Peradilan Agama dan Kompilasi Hukum Islam dalam Tata Hukum Indonesia* (UII Press 1993) 58.

<sup>19</sup> Quoted by Sukron Kamil *et. al.*, *Op. Cit.*, 99.

<sup>20</sup> Harry J. Benda, *The Crescent and the Rising Sun* (The Hague 1958) 199.

<sup>21</sup> Bahtiar Effendy, *Islam dan Negara: Transformasi Pemikiran dan Praktik Politik Islam di Indonesia* (Paramadina 1999) 70.

were made by the Japanese with the main objective to mobilize people to support Japan in the war, such as the Three-A Movement.<sup>22</sup>

The Japanese Military Government was authoritarian and cruel. Political groups that were considered sympathetic to the Dutch government were suppressed in various ways. Previous political parties were weakened. The military was superior and controlled civil bureaucrats. The allowed political parties were those that agreed with the new regime's policies. Thus, the political configuration during the Japanese occupation was the same as Dutch's, namely configuration with full of control and restraint of the authoritarian governments.<sup>23</sup>

However, the arrival of Japan made Islamic groups achieved several benefits. Unlike the Dutch, the Japanese aligned themselves with Islamic leaders to gain support for winning World War II. Moreover, they appeared to be more willing to make concessions to the Islamist's demands, rather than to secular groups, or aristocratic groups (*priayi*). The concessions included (1) the establishment of the Office of Religious Affairs (*Shumubu*); (2) the formation of the Indonesian Muslim Deliberation Council (Masyumi); and (3) the formation of *Hizbullah*, a military organization for Muslim youth.

With Japan's decreasing efforts to win the war, and hence, it opened more doors towards Indonesian independence, the Japanese military government changed its policies. They increasingly gave support to secular nationalists. The Japanese military government had more confidence in this group to lead future Indonesia. Several state bodies and committees were formed for the preparation of independence, such as the Advisory Council (*Sanyo Kaigi*) and BPUPK (Investigation Agency for the Preparatory Efforts of Independence), and were handed over to this group.<sup>24</sup> Consequently, Japan not only made secular nationalists more dominant in the preparation of independence but also strengthened the polarization between secular nationalists versus Islamists. It appeared in the debate on state philosophy taking place at BPUPKI meetings.<sup>25</sup>

After the first trial period, the ideological conflict that occurred in BPUPKI between the Islamist camp and the nationalist camp regarding state ideology grew even more heated until a committee of nine (Panitia Sembilan) was eventually formed. On June 22,

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<sup>22</sup> Deliar Noer, *Partai Islam di Pentas Nasional 1945-1965* (Grafiti Pers 1987) 22.

<sup>23</sup> Moh. Mahfud, M.D., *Karakter Produk Hukum Zaman Kolonial*, 31-33.

<sup>24</sup> Bahtiar Effendy, *Islam dan Negara: Transformasi Pemikiran dan Praktik Politik Islam di Indonesia*, trans. Ihsan Ali Fauzi (Paramadina 1998) 84.

<sup>25</sup> Zainal Abidin Amir, *Peta Islam Politik Pasca-Soeharto* (LP3ES 2003) 33.



1945, the committee reached a political compromise between two groups. The agreement was written in a form called the Jakarta Charter. The charter certified Pancasila as Indonesia's ideology with a change of first principle becoming "Trust in God with obligation for the adherents to observe sharia."<sup>26</sup>

Nevertheless, before the agreement took effect on August 18, 1945, objections arose with requests from Eastern Indonesian to remove some elements of the Jakarta Charter (namely the obligation to implement Islamic law for its adherents, Islam as the state religion, and the requirement that the president must be a Muslim). The Islamists then succumbed for the sake of national unity.<sup>27</sup>

#### **d. Sharia under Old Order Government**

The day after the proclamation of independence, the Indonesian Independence's Preparatory Committee (PPKI) established the 1945 Constitution and appointed Sukarno and Hatta as President and Vice President. President Sukarno's power lasted until Suharto's creeping rise in 1966-1968. The Soeharto administration that was called the New Order automatically labeled the Sukarno era as the Old Order. The Soekarno's Old Order government can be divided into two periods: the period of liberal democracy and the period of guided democracy.

From 1945 to 1959, Indonesia adopted a parliamentary system, with the note that in the period 1945-1949, the official government system was quasi presidential but in practice, the parliamentary system was implemented. The parliamentary system at the time was based on three constitutions: the 1945 Constitution, the RIS's Constitution, and the Provisional Constitution of 1950. Because of the similarity in the political configuration in this period of three constitutions, experts consider it the same and name it the period of liberal democracy.<sup>28</sup> The period was marked by the free contestation of political parties which often overthrew the ruling government.

Next, the period of guided democracy (1959 to 1966) emerged officially after the Constituent Assembly (*Konstituante*) was deemed to have failed to draw up a permanent constitution and Soekarno then issued a Presidential Decree on July 5, 1959. Although the juridical-constitutional justification for the decree was controversial, this decree was

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<sup>26</sup> Bahtiar Effendy, *Op. Cit.*, 88.

<sup>27</sup> *Ibid.*, 89-90.

<sup>28</sup> See Moh. Mahfud MD, *Politik Hukum*, 35.

accepted and considered final for the re-enactment of the 1945 Constitution. The decree also became the starting point of a new model of democracy called guided democracy.<sup>29</sup>

### 1) Period of Liberal Democracy

The 1955 Indonesia's first election for Parliament and the Constituent Assembly revealed the real political configuration in the country. The top four winners were PNI (nationalist), Masyumi, NU (Nahdhatul Ulama) and PKI (communist).

The main task of the Constitutional Assembly was to draft a permanent constitution. The new constitution would replace the 1950 Provisional Constitution. Despite difficulties, the assembly could finally complete most of its work. During the two and a half years of its existence (November 1956-June 1959), It completed 90% of its duties, including making various provisions regarding human rights, principles of state policy, and form of government.

Unfortunately, debates regarding state fundamental norm did not proceed as smoothly as debates on other issues. In fact, the debate about it had a big role in bringing the assembly to a dead end. In the debate, the political Islam groups, represented mainly by Masyumi and NU, restated their ideological-political aspirations expressed before independence, namely the establishment of a state based on Islam. They proposed Islam as the country's ideology. The reasons were (1) the holistic character of Islam, (2) the superiority of Islam over all ideologies, and (3) the fact that Islam was embraced by the majority of the population. On the other hand, the nationalist camp, represented mainly by the PNI and PKI, rejected this idea. The diversity within Indonesia made them doubt that Islam could act as an worldview for the whole society while Pancasila, although imperfect, had proven to be the solid ideology of all citizens. Moreover, others rejected Islam as the ideology because they were worried that it would be applied to all Indonesians.<sup>30</sup>

Having faced the impasse of the assembly on defining the basis of state, President Soekarno intervened with the Presidential Decree on July 5, 1959, which dissolved the *Konstituante* and declared the re-enactment of 1945 Constitution. Although the Islamists once again lost politically in enacting Islam as the state ideology through constitutional way, this decree brought a new hope for stating that the Jakarta Charter has imbued the 1945 Constitution.

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<sup>29</sup> *Ibid*, 129.

<sup>30</sup> Bahtiar Effendy, *Islam dan Negara: Transformasi Pemikiran dan Praktik Politik Islam di Indonesia*, trans. Ihsan Ali Fauzi (Paramadina, 1998) 105-109.

Outside the constitutional channel, rebellious efforts emerged to establish an Islamic state. In the historical stage of the Old Order, several rebellions had been carried out by some Islamists. They were DI (*Darul Islam*-Islamic region) movements with their TII (Indonesian Islamic Army) operating in areas such as West Java, South Sulawesi, and Aceh.

## 2) Period of Guided Democracy

The guided democracy period started with the decree on July 5, 1959. During the guided democracy under Soekarno, the legalistic/formalistic articulation of Islamist ideas and practices, especially the idea of Islam as the basis of state, began to get negative implications. Except NU that immediately reorganized its political orientation and accepted Sukarno's Manipol-Usdek,<sup>31</sup> other Islamic political forces declined drastically. Masyumi leaders, who from the beginning were seen as true supporters of the idea of an Islamic state, were imprisoned for their opposition to the government. And finally, because some of its leaders, such as Mohammad Natsir and Sjafruddin Prawiranegara, were involved in the PRRI rebellion, Sukarno dissolved Masyumi in 1960.<sup>32</sup>

In the period of guided democracy, the political power of Islam was clearly under the hegemony of Sukarno who presented himself as an authoritarian ruler. Along with Sukarno's authoritarian leadership, two other forces supported his power, namely the Army and the Indonesian Communist Party (PKI). This period was marked by a tug-of-war between the three political forces: President Sukarno, the Army, and the PKI.<sup>33</sup>

## 3) Formalization of Islamic Sharia in the Old Order Era

The struggle's spirit of the Islamists did not recede after "political defeat" in fighting for the Jakarta Charter because their efforts were finally paid off with the government's acceptance of establishing the ministry of religion.<sup>34</sup> On January 3, 1946, the ministry of religion was formed and H.M. Rasjidi was the first person to hold this new ministerial position.<sup>35</sup>

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<sup>31</sup> Acronym of Manifesto politik / Undang-Undang Dasar 1945, Sosialisme Indonesia, Demokrasi Terpimpin, Ekonomi Terpimpin, dan Kepribadian Indonesia (Political Manifesto / 1945 Constitution, Indonesian Socialism, Guided Democracy, Guided Economy, and Indonesian Personality).

<sup>32</sup> Deliar Noer, *Partai Islam di Pentas Nasional 1945-1965* (Pustaka Utama Grafiti 1987) 349-357.

<sup>33</sup> Moh. Mahfud MD, *Politik Hukum*, 129.

<sup>34</sup> Agussalim Sitompul, *Op. Cit.*, 81-82.

<sup>35</sup> Endang Saifuddin Anshari, *Piagam Jakarta 22 Juni 1945: Sebuah Konsensus Nasional tentang Dasar Negara Republik Indonesia (1945-1959)* (Gema Insani Press 1997) 58-59.

At the time of the ministry's establishment, religious courts were still under the ministry of justice. After the request of the minister of religion, the religious courts were transferred to the ministry of religion based on Government Decree Number 5/SD dated March 25, 1946. This transfer was expected to improve everything related to the enforcement of the judicial process. However, this hope turned out to be disappointing. According to Lev,<sup>36</sup> the improvement only happened on a few things, such as giving a fixed salary to religious judges. This salary was a consequence of the demands of another Islamic law enacted in this era, Law 22 of 1946 on Registration of Marriage, Marriage, Divorce, and Refer that was actually more an administrative ruling rather than Islamic one.

#### **e. Sharia under New Order Government**

The September 30th Movement (G30S), allegedly masterminded by PKI, was a momentum of the collapse of Soekarno's authoritarian guided democracy. Sukarno was dismissed by the MPRS because he was deemed unable to provide accountability for the G30S national disaster. The PKI was dissolved and declared as a banned party. Finally, the army as one of the dominant political forces remained the main actor in the political stage at the beginning of the New Order.

The New Order government initially held a libertarian style which was a transitional style to find a fixed format for the New Order's politics. Once the new format was determined in 1969/1971, Indonesia began experiencing a bureaucratic authoritarian style of political configuration. Programs of national development that focused on economy had to be secured with national stability. This "national stability" was upheld by the authoritarian government of New Order.<sup>37</sup>

In sum, in the New Order era, the relationship between Islam and the government underwent a metamorphosis. At first, their relationship was antagonistic (1966-1981), then turned into reciprocal-critical (1982-1985) marked by a political test of the acceptance of Pancasila. Since 1985, their relationship had been accommodative.<sup>38</sup>

Since 1985 the accommodative period began. Muslims had been considered to "pass the test" by the government after going through a political test of the acceptance of Pancasila as a sole principle for any organization in the country. Muslims understood the government would not alienate them from Islamic teachings. Accepting Pancasila by

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<sup>36</sup> D.S. Lev, *Op. Cit.*, 85-86.

<sup>37</sup> Moh. Mahfud MD, *Politik Hukum*, 195.

<sup>38</sup> Abdul Aziz Thaba, *Islam dan Negara dalam Politik Orde Baru* (Gema Insani Press 1996) 239-240.

Islamic mass organizations has strengthened *ukhuwah Islamiyah* (brotherhood among Muslims). Then an accommodative relation between Islam and the state began.

Several phenomena have marked this accommodative relationship. The first was the issuance of a policy to remove the ban on Muslim dress (hijab) in schools. This positive development continued, for example, the ratification of the national education bill; *Monitor* case settlement; ratification of the religious courts bill of 1989; preachments for transmigrants; ICMI formation; increasing work of the Pancasila-Muslim Charity Foundation led by President Soeharto; the establishment of Bank Muamalat; "Greening" (Islamization) in the Parliament (DPR/MPR), the sixth Development Cabinet, and the management of the 1993/1998 Golkar party;<sup>39</sup> Istiqlal Festival; settlement of SDSB cases; handling Bapindo cases; crime and pornography eradication; settlement of the Darul Arqam case and the Pandeglang group;<sup>40</sup> socialization of Islamic Law Compilation (KHI), and others.

#### **f. Sharia in the Reform Era**

The Asian financial crisis weakening Indonesian economy and the dissatisfaction in Soeharto's undemocratic government led to massive demonstrations in various regions demanding reforms in all fields. The protests expanded almost throughout Indonesia. Under great pressure from inside and outside the country, Soeharto finally did chose to resign from his post. Afterwards, the reform era began. Indonesia has been consolidating democracy since then.

Reform has paved the way for democracy as well as Islamization of public space. The wave of democracy after Soeharto's fall allowed all groups, including fundamentalist Islamists, to dare to voice their aspirations more openly and vulgarly. Among the most powerful aspirations was sharia.<sup>41</sup> The emergence of various Islamic groups, including hardline Islamic groups such as the Islamic Defenders Front (FPI), Laskar Jihad (LJ), Ahlus Sunnah wal-Jama'ah Communication Forum (FKAWJ), Indonesian Mujahidin Council (MMI), and others, confirmed the matter. These groups urged the re-inclusion of seven words "dengan kewajiban menjalankan syariat Islam bagi pemeluknya (with obligation for the adherents to observe sharia)" in the process of amending Article 29 of 1945 Constitution in 2002. The demand was supported by Islamic parties in parliament, such as the United Development Party (PPP), the Bulan Bintang Party (PBB), and the

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<sup>39</sup> Green is color associated with Muslims.

<sup>40</sup> Abdul Aziz Thaba, *Op. Cit.*, 278-279.

<sup>41</sup> Sukron Kamil et al., *Op. Cit.*, xxi

Nahdlatul Ummah Party (PNU). The struggle finally failed, because it was not supported by the majority in parliament. This failure was not surprising. The surprise was the absence of significant political turmoil afterwards. Nevertheless, it showed that such a demand did not represent the aspiration of most Muslims.<sup>42</sup>

Although the idea of establishing the state based on religion (Islam) in the reform era was rejected in the amendment process of 1945 Constitution, the formalization of sharia was massively done by both central and local governments. It continued the phenomenon of accommodation of Islamic interests since the late New Order period. The difference is, now it is conducted in a democratic era when government power is not dominant to determine everything and when democratization is implemented at regional level through regional autonomy policy. Various Islamic laws and regulations that emerged in the reform era are Zakat Law, Pilgrimage (Haji) Law, Endowment (Wakaf) Law, various regulations on Islamic economics, Halal Product Act, Law for Aceh Administration that prevents Aceh separatism with the concession of application of sharia in the province. Reform era has also seen several local regulations throughout Indonesia that contain Sharia. Some local governments have interpreted local autonomy as freedom to apply Sharia.

Muntoha has classified the sharia-based local laws or regulations into four categories as follows: 1. The ones related to morality issues in general, such as anti-prostitution, anti-adultery, whose generic term is called anti-immorality laws; 2. The ones related to clothing fashion, such as the need to wear a headscarf and other types of clothing in certain places; 3. The ones related to religious skills, such as the requirement of ability to read and write the Qur'an, the necessity to study in Madrasah Diniyyah Awwaliyyah (elementary Islamic School) as some pre-requisites for certain activities. For example, Qur'anic literacy is one of the prerequisites to get marriage, promotion of civil servants, and even to get public services. Madrasah Diniyyah certificates are also used as a requirement to pursue higher education; 4. The ones related to the collection of social funds through zakat, infaq, and alms.<sup>43</sup>

A local regulation containing sharia does not matter if it has passed through the legislation process taken by the regional government and the DPRD (local parliament). However, Muntoha's findings show that much of the materials regulated by these local regulations overlap with the national laws and regulations. Therefore, further reviews over

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<sup>42</sup> *Ibid.*, 108-109.

<sup>43</sup> Muntoha, 'Otonomi Daerah dan Perkembangan Peraturan-Peraturan Daerah Bernuansa Syariah' (Dissertation, Indonesian University, 2008) 407-408.

local sharia-based law or *Qanun* need to be done, both through *judicial review* and *executive review*.<sup>44</sup>

## 2. Political Factors Influencing The Dynamic of Formalization of Sharia

### a. Development of Cultural Islam and Formalization of Sharia in Indonesia

The term 'political Islam' or Islamism is often opposed to the term cultural Islam. Political Islam is considered as Islam which is presented as the basis of an ideology incarnated in the form of political parties, or Islam that seeks to be recognized in official political institutions whereas cultural Islam is Islam which only operates in the fields of propagation, education, art, etc. without being involved in politics.<sup>45</sup>

Most Indonesian Muslims belong to cultural Islam that began growing since the New Order era. In contrast to political Islam, cultural Muslims avoid the ideologization of Islam. The New Order circumstance which did not support the growth of political Islam gave rise to the cultural Islamic movement with the birth of new intellectualism and activism. Beginning in the 1970s, this movement developed an Islamic format that paid more attention to substance than form. Their work consisted of three main areas: renewal of religious thoughts, political/bureaucratic reform, and broad social transformation.<sup>46</sup> Today, the most visible communities as cultural Islamic forces are Nahdlatul Ulama (NU) and Muhammadiyah. These two largest Muslim organizations support Indonesia as a non-religious state with Pancasila as the ideology and the 1945 Constitution as its constitution. Their acceptance of Pancasila as the sole principle occurred in the New Order era. NU and Muhammadiyah have also resigned from politics in this era. They are no longer among political Islamic groups that fight for the formalization of sharia.

At the end of the story, President Soeharto began to feel that the Army (ABRI) was getting bored to provide support to him. The military, according to Vatikotis, had begun to want a change in national leadership. This was a result of the dissatisfaction that had arisen in the military, especially regarding the aspect of cronyism which was built by a small circle around the palace. Feeling that his main supporters had begun to feel uncomfortable with his leadership, Suharto began to glance at the power of Islam.

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<sup>44</sup> *Ibid.*, 282-365.

<sup>45</sup> Azra, *Op. Cit.*, 75-77.

<sup>46</sup> Bahtiar Effendy, *Op. Cit.*, 125-126.

Finally, a meeting had taken place between two interests which were previously often in conflict.<sup>47</sup>

The meeting of the two parties resulted in the political attitude of the regime who was responsive and accommodative to Muslim interests. Besides, the acceptance of the Pancasila as the only principle by Muslim organizations further paved the way for Suharto to convince the opponents of Islamic power that the Islamic group was no longer a threat.<sup>48</sup> The result of this development was the accommodation of Muslim interests by formalization of some aspects of sharia.

In the late period of New Order and in the Reform era, along with the rise of cultural Islamic communities that did not fight for an Islamic state, the formalization of sharia was surprisingly massive conducted by the government. It must be kept in mind that the strengthening of sharia was due to a shift in the political strategy of Muslims. Muslims are no longer exclusive by grouping themselves in Islamic parties. Their political goals have favored substantive Islam, no longer symbolic Islam. Islamic activists have placed themselves in an inclusive circumstance.<sup>49</sup> It makes them no longer considered as a threat to the principle of diversity and unity. Furthermore, it smooths sharia to be formalized. This is an ideal that is ironically difficult to be achieved by political Islamic groups before.

It can be argued that the political configuration in Indonesia does not affect the number of sharia-based laws. The democratic configuration of politics does not always increase the formalization of sharia. For instance, the Liberal Democracy government did not do much the formalization although the aspiration of Islam as the basis of state was freely expressed in the *Konstituante*. Only in the current democratic Reform era, the sharia is quite massive formalized by the governments. Conversely, an authoritarian political configuration does not always hinder the formalization of sharia. Many undemocratic governments in the past were accommodative to the interests of Islam, such as the government of the sultanates, the Japanese military government, and the late period of New Order. An authoritarian government that did not impose much Islamic law was the Guided Democracy government.

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<sup>47</sup> Michael R.J. Vatikotis, *Indonesian Politics Under Soeharto: Development and Pressure of Change* (Routledge 1993) 132-133.

<sup>48</sup> *Ibid.*, 167.

<sup>49</sup> *Ibid.*, 376.



These pieces of evidence are not in line with Moh Mahfud MD's theory of the causal relationship between political configuration and the character of law. Mahfud MD's theory says that a country with democratic political configuration will have responsive/populistic legal products, whereas a country with authoritarian political configuration will have orthodox/conservative/elitist legal products. There is indeed a different definition in the character of legal product referred to Mahfud MD with the one of this article. In this article, the responsive character of legal product is defined as legal product that meet the expectations of political Islam groups. The more aspirations of political Muslims are accommodated by the state, the more responsive/populist the legal character of the ruling government.

The formalization of Islamic law, in fact, is also inseparable from the wills of the government throughout Indonesian history. In this context, the formalization of sharia has several objectives: politics, administration, and the contextualization of Islamic law. Some examples of the formalization of sharia that has political objectives to maintain power of the ruler are: (1) The Japanese military government in the effort of seeking supports in the second world war gave more concessions to the demands of the Islamists, such as the establishment of the Office of Religious Affairs (*Shumubu*), the formation of the Indonesian Muslim Shura Council (*Masyumi*), and the formation of Hizbullah. (2) The New Order government accommodated several aspects of sharia such as the 1989 law on Religious Courts, Compilation of Islamic Law (KHI), and others. Some observers considered these as efforts to increase the position of Soeharto to win the 1993 Election. (3) The Indonesian government in the reform era has enacted a series of laws that enable sharia formalization in Aceh. Having studied the case of East Timor's separation, the government would give everything to Aceh, except independence.

Some cases of formalization of sharia are related to administrative tasks of government, so it can be considered religiously neutral: (1) The Dutch East Indies government issued *bijblad* that the land of *waqf* (endowment) had to be informed to the government so would not be affected by changes and development plans made by the government. (2) The birth of Law 5 of 1960 concerning Basic Agrarian Regulations had strengthened the existence of *waqf* in Indonesia. (3) Law 22 of 1946 concerning Marriage Registration, Divorce, and Referral was more like an instrument of government to manage population data as well as to provide legal certainty for Muslims in their marriages.

In addition to having political and administrative motivations, some formalization of sharia also contains the agenda of contextualization of Islamic law to adjust it with the conditions of Indonesia in modern times. Some cases confirm this. (1) Law 22 of 1946 concerning the Registration of Marriage, Divorce, Referral required the recording of marital events, divorce, and referral to ensure legal certainty. It was an innovation (*bid'ah*) due to the absence of this requirement in classical Islamic marriage. (2) The Marriage Law of 1974 contains modern provisions compared to classical fiqh (traditional sharia) like determining the minimum age for marriage, marriage registration, monogamous marriage principle, although polygamy was not prohibited under certain conditions. (3) KHI introduces new heirs not known in classical fiqh, namely, substitute heirs (4) Law 41 of 2004 concerning Waqf determined endowment is not only to immovable objects but could include movable objects such as money, precious metals, securities, vehicles, intellectual property rights, rental rights, and others.

#### **b. Formalization of Sharia in the Pancasila State**

The rise of formalization of sharia in the late period of the New Order and the Reform era certainly pleases the Islamists but also worries other groups. This phenomenon engenders concerns because there is no limit to the extent to which the state takes care of religious affairs. Thus far, it has only been stated that Indonesia that is based on Pancasila is neither a religious state nor a secular one. Concerns about the state's inclination towards sectarianism are worth mentioned due to the absence of such a limit. Indonesia was designed by the founding fathers to be an "all for all" country so that there should be no oppression or denial of the existence of minority groups while favoring the majority group. Such concerns had indeed been put forward, for example by Christians when discussing the 1989 Religious Courts Bill. Their objections to the bill were not related to the substance but were more connected to their trauma to political Islam in the past. The absence of a comprehensive agreement of the position of religion in the country, as well as the growing concern of the state toward Islam, have feared the minority groups, especially Christians, regarding their place in the republic in the future.<sup>50</sup>

The voice of minority groups must be taken into accounts, especially due to recent growing influence of political Islam. Indonesia once again witnesses an ideological battle that was sharpened by political contestation in the 2017 Jakarta

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<sup>50</sup> Bahtiar Effendy, *Islam dan Negara: Transformasi Gagasan dan Praktik Politik Islam di Indonesia* (Democracy Project--Yayasan Abad Demokrasi 2011) 341.

gubernatorial election and the 2019 presidential election.<sup>51</sup> This contestation was marked by continuously-held protests by Islamists over the blasphemy case allegedly committed by Governor Ahok, a Christian and of Chinese descent.<sup>52</sup> The two major demonstrations with the label of 'Action for Defending Islam' which became known as the 411 Action and 212 Action have become world concern.<sup>53</sup> Many people call these actions, which are claimed to have been attended by millions of white-dressed Muslims, as "people power movements" or "populist Islamic movements."<sup>54</sup> Questions about the status of non-Muslims to become political leaders such as governors, regents, mayors, lurahs or village leaders, or the like have attracted the attention of Indonesian society and become a sensitive issue regarding Muslim-non-Muslim relations at the moment.

### **E. Conclusion**

From the discussions, the author made the following conclusions related to the questions of the article.

Firstly, the formalization of sharia in Indonesia experiences ups and downs according to the relation between the state and religion applied by each government. The Islamic kingdoms could certainly be free to implement sharia while the Dutch and the Japanese governments who were not Muslim had limited sharia according to the interests of colonialism. The government of Republic of Indonesia which is based on Pancasila has formalized sharia with various dynamics. The formalization was quite massive in the late New Order and the Reform era along with the rise of cultural Islamic communities.

Secondly, the formalization of sharia by the state is more influenced by the relationship between the state and Islam. This is related to struggle characters of Islamic camp and the interests of the rulers. In terms of the character of Islamic struggle, when Islam tends to be of a formal character, which is fought by political Islamic groups, formalization is difficult because the institutionalization of Islamic interests will be considered a stepping stone to form an Islamic state. This will deny Indonesia's

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<sup>51</sup> The 2017 Jakarta Governor Election was actually one of the many regional elections held simultaneously in Indonesia. Jakarta's position as the nation's capital and the re-nomination of Ahok, a Christian and Chinese, have made it feel like a presidential election.

<sup>52</sup> The blasphemy case allegedly committed by Governor Ahok was caused by his controversial statement during his working visit in the Administrative Region of the Thousand Islands, Jakarta on September 27, 2016. At that time, he alluded to some Muslims who would not vote for him in the election because they had been deceived with verse of the Koran: *Almaidah* 51.

<sup>53</sup> The 411 action refers to the date of the event, November 4, 2016, as well as the 212 action held on December 2, 2016.

<sup>54</sup> Haedar Nashir, et. al. (2019), 'Muhammadiyah's Moderation Stance In The 2019 General Election Critical Views from Within', *Al-Jāmi'ah: Journal of Islamic Studies* Vol. 57(1): 4-5.

fundamental identities, namely diversity and national unity. The Islamic state is feared that it will oppress non-Muslim citizens. Conversely, if Islam tends to be cultural, which pays more attention to substance than the form of state so that it does not question Pancasila and diversity, the formalization will be easier and more massive, especially in the late period of the New Order and in the Reform era. This is because cultural Islam is not considered a threat to Pancasila state which equates the status of all the nation's children. Moreover, in terms of the interests of the government, the formalization of Sharia has at least objectives: politics, administration, and contextualization of sharia.

As suggestions, there are some points to be considered. *First*, given the Indonesian plurality, the revitalization of cultural Islam needs to be done. Islam should take part in the development of socio-political systems following the Islamic political values, such as justice, deliberation, egalitarianism, and participation. Islamic aspirations should not emphasize or sacred Islamic symbols or institutions that are actually worldly (profane). These values are certainly more acceptable to all citizens, and in accordance with the Islamic vision, *rahmat lil-'alamin* (mercy for the whole universes). *Second*, it is necessary to hold a "negotiated settlement" among the country's religio-political elites regarding how the state and religion must relate appropriately. Considering that Indonesia is not a secular state and guarantees the implementation of religion, the extent to which the state takes care of religious matters must be clear. Without a model or formula that is accepted nationally, the process of mutual influence of the state and religion can take place almost indefinitely. If that happens, tensions will emerge, because Indonesia is a country with very diverse socio-religious units.

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