

# The Contextualization of Sharia and Its Contribution to the Development of the Indonesian National Law

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# The Contextualization of Sharia and Its Contribution to the Development of the Indonesian National Law

Siti Mahmudah

**Abstract:** *The Contextualization of Sharia and Its Contribution to the Development of the Indonesian National Law.* This article asserts an argument that sharia needs to be contextualized along with changing conditions, place and time. The reason is very clear, Islam and the initial Islamic Shari'a revealed in Mecca in 610 AD were very flexible and contextual. Islam accepts Hanif religion (the religion of Prophet Ibrahim) with the aim of perfecting the Hanif religion which has been misunderstood, perpetuating the teachings of the good and great Hanif religion, and rectifying its teachings to perpetuate its noble and invaluable teachings. Islam also respected Arab tradition as well to perpetuate noble and beneficial Arab traditions, and to remove the traditions that were no longer beneficial. This is the foremost nature of Islam according to Khalil Abdul Karim which he termed as a blueprint for the practice of Islam and Islamic law in today's public space. Religion is for humans, as Allah the Most Just is very concerned with the realities of the social life of people. The law is also created to discipline the community life, and therefore, its main concern is the benefit of human life,. In this context, the historicity of the initial Shari'a can be used as the basis in applying Islamic law anywhere and anytime.

**Keywords:** contextual, Islam, sharia, Indonesian law

**Abstrak:** *Kontekstualisasi Syariah dan Kontribusinya Terhadap Perkembangan Hukum Nasional Indonesia.* Artikel ini menegaskan sebuah argumen bahwa Islam dan syariat Islam mesti dikontekstualisasikan seiring dengan perubahan kondisi, tempat, dan waktu. Alasannya sangat jelas, Islam dan syariat Islam awal yang diturunkan di Mekah pada tahun 610 M adalah sangat fleksibel dan kontekstual. Islam menerima agama Hanif (agama Nabi Ibrahim as) dan tradisi Arab dengan tujuan untuk menyempurnakan agama Hanif yang telah disalahpahami, melanggengkan ajaran agama Hanif yang baik dan maslahat, serta meluruskan ajarannya. Agama ini juga menghormati tradisi masyarakat Arab untuk melanggengkan tradisi yang baik dan maslahat, dan menghapus tradisi yang tidak maslahat. Islam dan syariat Islam datang demi untuk kemaslahatan kehidupan kemanusiaan sejak awal sampai akhir jaman. Inilah karakter Islam awal menurut Khalil Abdul Karim yang diistilahkannya sebagai blueprint (gambaran) untuk praktik Islam dan syariat Islam di ruang publik jaman sekarang. Agama adalah untuk manusia, karena Allah Yang Maha Adil sangat memperhatikan realitas kehidupan sosial manusia. Hukum juga diciptakan untuk mendisiplinkan kehidupan komunitas, dan oleh karena itu, perhatian utamanya adalah manfaat kehidupan manusia. Dalam konteks ini, historisitas syariah awal dapat digunakan sebagai dasar dalam menerapkan hukum Islam di mana saja dan kapan saja.

**Kata Kunci:** kontekstual, Islam, syariat Islam, hukum Indonesia

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## Introduction

History noted that sharia was introduced to Indonesia simultaneously with the entry of Islam to the Archipelago in the 7th century CE. Islam was introduced in Indonesia and was inseminated by traders from Arabia in a peaceful way, and without cultural shock.<sup>1</sup> Islam did not go against the existing traditions and religions in Indonesia. Daniel S. Lev states the existence of limitation of the application of sharia in Indonesia, because Islam did not change the community, and did not refuse the forms of a society that accepted Islam as a new religion.<sup>2</sup> For this reason, Islam and sharia were accepted by the Indonesian community since the beginning of preaching of Islam in the archipelago. Islamic law and customary law<sup>3</sup> had become sources of law in Indonesia before the Dutch occupation of the Indonesian archipelago. They were like the judiciary of 'Serambi'<sup>4</sup> which was a form of religious courts that existed at the Islamic Kingdom era in Indonesia before the colonial era.<sup>5</sup> During the occupation, sharia and customary law were still enforced, in addition to Western law brought by the Dutch colonizers.

When the West colonised almost the whole of the Islamic world, including Indonesia, a policy was undertaken, namely, imposing legal restrictions on the colonial region. Like in Indonesia, the laws used by the Indonesian community were sharia and customary law. Western legal system was introduced gradually to replace certain aspects of sharia. It started with the criminal law—which was the weakest position in the fluctuation of the application of sharia—followed by other laws.

<sup>1</sup> Rahmawati Pardjaman, 'Transformasi Nilai-Nilai Syariah Ke Dalam Sistem Hukum Nasional (Sebuah Pendekatan Hermeneutika)', *Al-'Adalah*, 11.2 (2013), 249–56 (p. 251) <<https://doi.org/10.24042/adalah.v11i2.272>>; see Ali Imron, 'Transformasi Hukum Islam ke dalam Hukum Nasional Indonesia', 5.2 (2016) <<http://203.89.29.50/index.php/hdm/article/view/379>> [accessed 4 July 2019].

<sup>2</sup> Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, (Berkeley: University of California Press, 1972), p. 5.

<sup>3</sup> Mansur Mansur, 'Kontekstualisasi Gagasan Fiqh Indonesia Terhadap Hasbi Ash-Shiddieqy (Telaah atas Pemikiran Kritis Yudian Wahyudi)', ., 46.1 (2012), p. 37 <<https://doi.org/10.14421/asy-syir'ah.2012.%x>>.

<sup>4</sup> The form of sharia implementation was formally.

<sup>5</sup> Ahmad Qodri A Azizy, *Eklektisisme Hukum Nasional: Kompetisi antara Hukum Islam dan Hukum Umum* (Yogyakarta: Gama Media, 2002), p. 136.

Meanwhile, the family law and Islamic law of inheritance should remain and could be treated as indigenous laws, as long as they do not interfere with the colonialist mission.<sup>6</sup>

This phenomenon describes the laws used in Indonesia before and in the colonial era, namely, sharia, customary law, and the colonial law. After the Indonesian independence debates were held whether the colonial law had to be retained in Indonesian National law with necessary change according to the development of the society, as well as the customary laws as the sources of the Indonesian National law. In addition, there was also a tendency to use sharia as a source of the development of the country and its national law. In Indonesia the dichotomy between positive law and sharia was still going on. There was an image that positive law and sharia were separated in even two contradictory camps, whereas in practicing sharia at the Prophet era, there was no such separation between the two (sharia and the

This problem was still discussed by intellectual figures in Indonesia since the old era until now, where the right solution of it has not been found as yet, although the implementation of the development and construction of the Indonesian national law continue to be attempted in order to meet its requirement as an independent and sovereign nation. C.S.T. Kansil said that any independent and sovereign country must have a good national law in the criminal law as well as the civil law that reflect the personality of the soul and philosophy of life for its people.<sup>7</sup> It is also not incompatible with the ideals of law that contained in the 1945 Constitution and its Preamble with instruction to replace, repair, or improve the colonial laws with the new Indonesian national law.

The development and the construction of the Indonesian national law that has been attempted since post-independence, *i.e.* the Old Order era, the New Order era, and the point of extremely significant developments

<sup>6</sup> Taufik Adnan Amal, *Politik Syariah Islam: dari Indonesia hingga Nigeria* (Ciputat, Jakarta: Pustaka Alvabet, 2004), p. 172.

<sup>7</sup> C. S. T. Kansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia* (Balai Pustaka, 1989), pp. 200–201.

has been found, namely the post-reform era in Indonesia. In this era, direction and policy of the Indonesian national law as political national law gets firmness and clarity, especially for sharia. It has been asserted that the direction of the national law in Indonesia should be based on the GBHN 1999, which is a product of the Reform era. The direction of the policies is as follows:

“To organize the overall integrated legal systems of national law acknowledging and respecting religious and customary laws and updating the colonial legacy of legislation, and discriminatory Indonesian national law, including gender inequalities and incompatibility with the demands of reform through legislation program.”<sup>8</sup>

This argumentation will be used as a foothold for the discussion in this research to find the answers of the problems about the contribution of sharia in the development of the Indonesian national law in relation to the need for the present implementation of sharia in contextual and moderation corresponding to the industrial revolution 4.0 era. Analyses of these problems will be presented and elaborated in the discussion and will be answered in the conclusion of this research.

The method used in this research is a qualitative one with the historical contextualized approach, and Khalil Abdul Karim's theory about historicity of sharia, *i.e.* back to the root of the problem to find a solution for misunderstanding sharia. The reason is that to be able to answer the problem in this research it needs in-depth analysis based on theory and approach.

### Understanding the Law

Pound suggested eight concepts about the law that can distinguish one law from another.<sup>9</sup> First, the idea or the concept of the rule or set of rules that came from Allah (*tauhid* in nature) to human behavior of other nations, like the law of Moses, *i.e.* it separates the Bani Israel from the community of other nations, then it cleans them from diseases, both

<sup>8</sup> BAB IV A.2. GBHN 1999.

<sup>9</sup> Roscoe Pound, *An Introduction to the Philosophy of Law*, 1 edition (s.l.: CreateSpace Independent Publishing Platform, 2014), pp. 25–30.

physical as well as spiritual. The law of Prophet Isa al-Masih created human conscience so that it became the Foundation of all of his teachings. The sharia of prophet Muhammad *s.a.w.* came to destroy the arrogance of the pre-Islamic Arabs, sowing the sense of humanity to all people, then developing the community to its best, and delivering the humanity from its bad condition to to a more noble one.<sup>10</sup> Second, the idea or concept about the law as a tradition from the old customs that had been believed by the community as a path to Allah's blessing, so that people who stick with it will obtain the salvation of the world and the hereafter. Here the law is a form of habit or custom which continued to be retained and practised in everyday life.

Third, there was a relation to the second one; the law was defined as the recorded wisdom of wise men who had studied the religion that teaches about good behaviour for humans. It included a decision or act on the basis of customs, and then it was reduced as a collection of writings of law of primitive people. Fourth, the law was understood as basic system which had been philosophically found. It can express the principal essence of things, where everyone must act in accordance with it.

Fifth, the law was understood as a collection of declarations about the permanent and unchanging moral rules. This means that the law was considered identical to the stipulations of the universal morality.

Sixth, the law was understood as a collection of agreements or decisions of people from the organization/political party in the society. This definition is a democratic version that has the identity of the stipulations from the rules of law. Although the law was the product of politicians, they had moral obligation of fulfilling the promise of keeping their law decisions to the public. Seventh, the law was understood as a reflection of the monotheistic conditions to govern the world. The law was a reflection to govern what should be done by human beings as moral terms.

Eighth, the law was understood as a collection of orders from the authorities who had political sovereignty and authority. The concept of the jury at the Roman era and the doctrine of positive law in the classical era came from understanding this theory. In the case of the Roman Empire, the King was one who had the sovereignty, the authority, and the power to enforce the law. Although at the Roman Empire era, the King had full legal power, but according to this theory, the sovereignty of the law was in the Parliament, since the emergence of the supremacy of Parliament in the United Kingdom in the 17th century and even to the sovereignty of the Parliament on the American and the French revolution. The key- word is that the law is the product of political power from the King's order system to the legislative system.

In general the law can be given a definition as the set of rules made by the authorities with the purpose to organize social life characterized with orders, prohibitions, and force by imposing sanctions against those who break it. So, the law contained elements: regulations were made by the authorities to regulate the conduct of community life; characteristics of governing and prohibiting; and coercive to be obeyed.<sup>11</sup>

Pound also mentions about three steps in applying the law:<sup>12</sup> (1) Finding the law that is to determine the rules or conditions from many rules contained in the legal system to be applied. If a rule that can be applied to a case does not exist then the analogy for existing rules must be used; (2) Interpreting selected or specified rules, that is to determine the meaning of the rules as it should be accompanied by finding the scope of the real meaning, and (3) Applying the rules that have been discovered and interpreted for the cases. In this process, a judge will be able to apply the law properly, and does not take the rules at random.

<sup>11</sup> R. Soeroso, *Pengantar Ilmu hukum* (Sinar Grafika, 1993), pp. 38–39.

<sup>12</sup> Pound, p. 48.

## Historicity of Sharia

Sharia is the law of Allah the obligations of which has already been regulated clearly and firmly in the Qur'an as well as the laws set directly by revelation, such as the obligation of *salat*, *zakat*, *fasting*, and *hajj*. The revelation, according to Khalil Abdul Karim (1930-2002)<sup>13</sup> was the provision of Allah as the answer to the problems that arise at the time of the revelation, that was at the Prophet Muhammad *saw*'s era in Mecca and Medina.<sup>14</sup> Sharia was revealed gradually (*at-tadarruj*) in 22 years 2 months 22 days in Mecca on 610 CE, and continued in Medina after the *hijrah* of the Prophet Muhammad *s.a.w.* until his death in 632 M. The goal was to be the improvement of the social condition of people where the decisions in the sharia came to solve the problems that emerged. Another goal of the gradual revelation was in order to implant the sharia in the hearts of the believers, strengthening their faith and devotion to Allah.<sup>15</sup> This is a blueprint<sup>16</sup> for the implementation of sharia in Indonesia now.<sup>17</sup>

The description of the gradually method at the Prophet Muhammad *s.a.w.*'s era in Mecca and Medina had hinted that sharia was extremely flexible and contextual. Flexibility and contextuality of sharia still continue until now,<sup>18</sup> wherever and whenever the sharia is put into practice and made into the rule of law for the community.

Historicity of sharia was the result of the blend between revelation and the existing tradition of the pre-Islamic Arabs. According to Khalil 'Abd al-Karim Islam had inherited some pre-Islamic Arab tradition,

<sup>13</sup> Reformist figure in the sharia from Egypt 33

<sup>14</sup> Dr Siti Mahmudah Ag M., *Historitas Sari'ah; Kritik Relasi-Kuasa Khalil Abd. Al-Karim* (Lkis Pelangi Aksara, 2016), p. 197.

<sup>15</sup> al-Asymawi, p. 12

<sup>16</sup> Siti Mahmudah, 'Islam and Local Traditions: The Study of the Thinkings of Abdurrahman Wahid (1940-2009) and Khalil Abdul Karim (1930-2002) an Indonesian and an Egyptian Perspective', *Sunan Kalijaga: International Journal of Islamic Civilization*, 1.2 (2018), 191-214 (p. 200).

<sup>17</sup> Siti Mahmudah, *Historitas Syariat Islam: Analisis Sejarah Kemunculan Hukum Islam dengan Perspektif Falsafah* (Bandar Lampung: Aura Printing dan Publishing, 2013), p. 73.

<sup>18</sup> M. Usman M. Usman, 'Analisis 20oris dan Filosofis Terhadap Pemikiran Kontekstualisasi Hukum Islam', 45.1 (2011), p. 1081 <<https://doi.org/10.14421/asy-syir'ah.2011.%x>>.

even was overloaded in all aspects of life in Islam: ritual worship, civic, economic, social, political, legal (statutory).<sup>19</sup> The pre-Islamic tradition of the Arabs was derived from the Prophet Ibrahim *a.s.*'s religion, that was Hanif religion which had been misunderstood by most of the Arabs at that time. The tradition which has been adopted in Islam and is still practiced until now by Muslims all over the world, such as: the respect towards the Ka'bah, *hajj*, *umrah*, the tribute to Prophet Ibrahim *a.s.* and Ismail *a.s.*, the glorification of Ramadan and fasting, *Salat*, the share of inheritance, the congregation on Friday (*Salat* Friday), and the glorification of the sacred months. With regard to the problems of the social institution and penalties, there were *jampi-jampi* and incantations, polygamy, honouring lineage, slavery, *al-Aqilah* (*diyat*/blood money), and *Qasamah* (the oath).

The Historicity of the description of sharia which had been blended with the pre-Islamic Arab tradition could be used as a rationale of law in Indonesia. Making sharia and customary law in Indonesia as raw-materials for the formation of the Indonesian national laws is not violating the historicity of sharia.

Both sharia and pre-Islamic tradition can be blended in order to create a better law for human life, in accordance with the conditions and the realities in every time. This is the sharia that is very contextual for every time and place, and became the blueprint in Indonesia now.

### **The Position of Sharia in Indonesia**

This subject leads to strategies for the implementation of sharia that sharia is one of the three raw materials in the construction of Indonesian national law. The condition of Indonesia as a plural country in terms of religion is also taken into consideration in the legal thinking for building, creating, and developing the law in Indonesia. So, the contextual historical or cultural approach, according to the author, is more appropriate to select as a strategy bringing forward the sharia, either replacing the law that was not relevant in this era, or adjusting

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<sup>19</sup> Usman, p. 12.

law with the needs of modern society, or even creating a new law in the industrial revolution 4.0. at the present time. The most important thing, according to A. Qodri Azizy,<sup>20</sup> is not in implementing the formalism of the Islamic sharia or normative ideological approach as strategies for incorporating sharia into the Indonesian national law which has to be practiced by the Indonesian community because of its plurality. However the absorption of sharia values into public life is more important than its formalization.

The position of the Islamic sharia could be actualised contextually—together with other laws—as one of the raw materials of the Indonesian national law. It can be created in almost all legal materials without having to become a formal law. Its form can be substantial substansialistik<sup>21</sup> or its values can be essential (*saqasid al-shariah*), and not as labels or symbols. Such thinking is an opportunity to render the sharia positive within the framework of Indonesian national laws that are more open and contextual.<sup>22</sup> According to the author, in the context of Indonesia, despite the majority of its people are Muslims, sharia should not get rid of other law sources, such as customary law, and the western law. All of laws (three laws) could be taken into consideration to generate more impartial law on humanitarian life fairly without discrimination. This is how the early sharia at the time of Prophet Muhammad *s.a.w.* in Mecca and Medina in dealing with the existing traditions and religions to make contextual law appropriate to the needs of that time and era.

Sharia within the framework of the Indonesian national law according to the K.H.M.A. Sahal Mahfudz, the creation of an ideal law in civil society must begin with a proportionally bsorbing values of the universal

<sup>20</sup> 34 y, p. 195.

<sup>21</sup> Rahmatunnair Rahmatunnair, 'Paradigma Formalisasi Hukum Islam di Indonesia', *AHKAM : Jurnal Ilmu Syariah*, 12.1 (2012), p. 99 <<https://doi.org/10.15408/ajis.v12i1.984>>; see also Labib Muttaqin, 'Positifisasi Hukum Islam dan Formalisasi Syari'ah Ditinjau dari Teori Otoritarianisme Khaled Abu El-Fadl', *Al-Ihkam: Jurnal Hukum & Pranata Sosial*, 11.1 (2016), 67–92 <<https://doi.org/10.19105/al-ihkam.v11i1.859>>.

<sup>22</sup> A. Syafi'i Ma'arif, 'Hukum Nasional Diferensiasi dalam Unifikasi Yang Dinamis', *Disampaikan Sebagai Pengantar Dalam Buku Karya Kamsi, Politik Hukum Dan Positivasi Syariat Islam Di Indonesia* (Yogyakarta: SUKA-Press, 2012), p. x.

laws within the framework of the community. The values of universal laws are, among others: fairness, honesty, freedom, justice, the legal protection for everyone, and upholding the supremacy of Allah's law.

These values need to be instilled and implemented in all elements of civil society, from the institutional system and community supporters. The term of absorption value is meant by cultural process, and not normative coercion. The cultural process is expected to be able to minimize the constraints on the implementation phase. The role of sharia in creating a civil society in Indonesia, according to a K.H.M.A. Sahal Mahfudz is as follows:

“Creating a civil society in the context of Indonesia from Islamic law perspective, is not “with” or “without” sharia, but rather in considering and absorbing positive moral values contained in the sharia. Applying sharia in the sense of its formalization is sometimes not the best solution to the ideal legal formulation process for a civil society. Similarly, the elimination of law that exists in the community, in particular the sharia in the process is not a wise step either, whether as values or as fixed regulations to get a strong legitimacy in Indonesian society. But even so, the space for the process of developing law in Indonesia, especially sharia, must still be left freely. This is to stimulate law so that it could grow dynamically which in turn will also contribute to the development of the entire Indonesian national law.”<sup>23</sup>

The condition of society should be a basic consideration in formulating the law. The reason is that the reality of the community life will greatly influence the legal thinking. This is the need for the formulation of law contextually and substantially to introduce sharia values in Indonesian national law. The example of the existence of the renewal of sharia (redefinition) as a result of social, cultural, and political influence, namely the position of non-Muslims (freedom of religion and belief) in the words of God, is as follows:

لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ فَمَنْ يَكْفُرْ بِالطَّاغُوتِ وَيُؤْمِرْ  
 بِاللَّهِ فَقَدِ اسْتَمْسَكَ بِالْعُرْوَةِ الْوُثْقَىٰ لَا انفِصَامَ لَهَا وَاللَّهُ سَمِيعٌ عَلِيمٌ <sup>37</sup>

<sup>23</sup> K.H.M.A Sahal Mahfudz, 'Peran Hukum Islam dalam Menciptakan Masyarakat Madani Indonesia', (presented at the Diskusi di Pascasarjana IAIN Wali Songo Semarang, Semarang, 2001).

<sup>5</sup> “There is not compulsion in religion. Verily, the Right Pathy has become distinct from the wrong path. Whoever disbelieves in Taghut (false deities) and believes in Allah, then he has grasped the most trustworthy handhold that will never break. And Allah is All-Hearer, All-Knower.” *Knower*.<sup>24</sup>

This verse describes the position of non-Muslims or the freedom of religion, where choosing a religion is the right for everyone. The Prophet Muhammad *s.a.w.*'s wars against the Jews in Medina were political, not religious ones,<sup>25</sup> as they try to destroy the Muslims. So, Prophet Muhammad *s.a.w.*'s wars against the Jews, were not in the framework of converting them to Islam.

Next, talking about sharia in Indonesia it cannot be separated from discussing about the religious courts from its institution to its authority.<sup>26</sup> However, it should be made clear that the implementation of Sharia in Indonesia is not so shallow as being through exclusively religious courts authority. In this case it includes philosophy and science of law up to the essence and types of law, and not merely related to religious courts. The reason is that the explicit and implicit values in sharia can be used as contextual<sup>27</sup> and substantive sources of the Indonesian national law for all materials of law.

Sharia is a form of flexible rule and can vary, but as long as its substance is still in line with the *maqashid syari'ah*, then the form of sharia should be open to a variety of elements. It is dynamic, because it is never final and static. Sharia can be very harmonious with local traditions and can form Indonesian national law simultaneously. The result is an Indonesian national law based on sharia which is contextual, cultural, and substantive that has been compared with the sources of applicable laws in Indonesia in accordance with the dynamism and pluralism of Indonesia society.<sup>28</sup>

<sup>24</sup> Q.S. al-Baqarah (2): 256.

<sup>25</sup> Azizy, p. 34.

<sup>26</sup> <sup>16</sup> Azizy, p. xv.

<sup>27</sup> Sehat Ihsan Shadiqin, 'Islam dalam Masyarakat Kosmopolit: Relevankah Syariat Islam Aceh untuk Masyarakat Modern?', *Kontekstualita: Jurnal Penelitian Sosial Keagamaan*, 25.1 (2010), 43.

<sup>28</sup> Mahmudah, *Historitas Syariat Islam: Analisis Sejarah Kemunculan Hukum Islam dengan Perspektif Foucauldian*, p. 211.

The GBHN 1999 reaffirms the existence of sharia as one of the three raw materials of the Indonesian national law. The other materials are the customary law and the Dutch colonial law, in dynamic sense, *i.e.* the laws of developed countries. The result of the analysis is that the sharia is cultural, rather than dogmatic, normative, ideological, and textual. This is a very important and strategic position to create an independent Indonesian national law in order to create a new Indonesian national law based on other sources of law.<sup>29</sup> The Law in Indonesia based on Pancasila (the Five Basic Principles of the Republic of Indonesia) and UUD 45 (the 1945 Constitution) bore the responsibility and accountability to Allah the Almighty. This is the most important case, so that every judge is required to exercise *ijtihad*, and bears responsibility for his decision in this world and the hereafter.

Islam in Cosmopolitan Community, as Pancasila refers to the Qur'an, this means that substantive sharia is very instrumental in the development of the Indonesian national law. Pancasila is not incompatible with religion.<sup>30</sup> Pancasila could be seen as the practical continuation of interpretation of Islam.<sup>31</sup> For example, Pancasila precepts refer to the words of Allah, as follows:

**1. The first principle, the Belief in the one God, Allah the Almighty.**

The first principle means that the Indonesian citizens have the right to choose one of the existing religions in Indonesia without any coercion from anyone. The reasons are: first, that the choice to embrace religion is the absolute right for every citizen. Second, Indonesia is not an Islamic state, but it is a religious country. For these reasons the first principle of Pancasila was formulated. It is very relevant to the words of Allah, as follows:

<sup>29</sup> Azizy, p. 14

<sup>30</sup> M. Arskal Salim Gp, 'Competing Political Ideologies on the Implementation of Islamic Law in Indonesia: Historical and Legal Pluralist Perspectives', *AHKAM : Jurnal Ilmu Syariah*, 17.2 (2017), p. 276 <<http://journal.uinjkt.ac.id/index.php/ahkam/article/view/6233>> [accessed 21 June 2019].

<sup>31</sup> J. M. Musli, 'Islamic Law in the Pancasila State', *AHKAM : Jurnal Ilmu Syariah*, 12.1 (2012), p. 21 <<https://doi.org/10.15408/ajis.v12i1.976>>.

قُلْ هُوَ اللَّهُ أَحَدٌ

“Say (O Muhammad): ‘He has been Allah, the One.’”<sup>32</sup>

هُوَ اللَّهُ الَّذِي لَا إِلَهَ إِلَّا هُوَ الْمَلِكُ الْقُدُّوسُ السَّلَامُ الْمُؤْمِنُ الْمُهَيَّبُ  
الْعَزِيزُ الْجَبَّارُ الْمُتَكَبِّرُ سُبْحَانَ اللَّهِ عَمَّا يُشْرِكُونَ

“He is Allah, beside Whom none has the right to be worshipped but He), the King, the Holy, the One Free from all defects, the Giver of security, the Watcher over His creatures, the All-Mighty, the Compeller, the Supreme. Glorified is Allah! (High is He) above all that they associate as partners with Him.” (to Him).”<sup>33</sup>

## 2. The second principle, just and civilized humanity.

The meaning behind of just and civilized humanity is that the people of Indonesia are very appreciative of the rights inherent in every human being as a private Indonesian citizen. The Qur'an had taught that every human being needs to know himself/herself well in order to know well other human beings, appreciate and respect them as servants of Allah.

Such understanding is contained in the words of Allah, as follows:

<sup>39</sup> وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ  
وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا تَفْضِيلًا

“And <sup>7</sup>indeed We have honoured the Children of Adam, and We have carried them on land and sea, <sup>34</sup> and We have provided them with lawful good things, and We have preferred them to many of those whom We have created with a marked preferment.”<sup>35</sup>

<sup>27</sup>

<sup>32</sup> Q.S. Al-Ikhlash (112): 1

<sup>33</sup> Q.S. Al-Hasyr (59): 23

<sup>34</sup> That means: Allah made easy to the son of Adam for transportation on land and in the sea to make a living.

<sup>35</sup> Q.S. Al-Israa' (17): 70



18

وَإِن طَافَيْنَانِ مِنَ الْمُؤْمِنِينَ أَقْتَلُوا فَأَصْلِحُوا بَيْنَهُمَا فَإِن بَغَت إِحْدَاهُمَا عَلَى  
 الْآخَرَى فَقْتَلُوا الَّتِي تَبَغَى حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ فَإِن فَاءَتْ فَأَصْلِحُوا بَيْنَهُمَا  
 بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ

2

*“And if two parties (or groups) among the believers fall to fighting, then make peace between them both. But if one of them outrages against the other, then fight you (all) against the one which outrages till it complies with the Command of Allah. Then if it complies, then make reconciliation between them justly, and be equitable. Verily, Allah loves those who are the equitable.”<sup>40</sup>*

#### 4. The fourth principle, democracy guided by the wisdom of representative deliberation.

The formulation of the fourth principle means that in order to make a collective decision for the sake of common interest a discussion based on the wisdom of representative deliberation has to be conducted. Islam had taught how to deal with *dissent* (different of opinion) through *mudzakarah* (negotiation) and *shura* (consultation) in resolving any problem that urgently need a just and equitable decision. The Qur’an in several verses mentions and told people to be wise in dealing with the problems of life, and to have a discussion in a democratic atmosphere. The verses, among others, are as follows:

وَالَّذِينَ اسْتَجَابُوا لِرَبِّهِمْ وَأَقَامُوا الصَّلَاةَ وَأَمْرُهُمْ شُورَى بَيْنَهُمْ وَمِمَّا رَزَقْنَاهُمْ يُنْفِقُونَ

19

*“And those who answer the Call of their Lord and perform the prayers and who (conduct) their affairs by mutual consultation, and who spend of what We have bestowed on them.”<sup>41</sup>*

يَأْتِيهَا الَّذِينَ ءَامَنُوا إِذَا تَنَجَّيْتُمْ فَلَا تَنَجَّوْا بِالْإِثْمِ وَالْعُدْوَانِ وَمَعْصِيَتِ الرَّسُولِ  
 وَتَنَجَّوْا بِالْبِرِّ وَالتَّقْوَى وَاتَّقُوا اللَّهَ الَّذِي إِلَيْهِ تُحْشَرُونَ

<sup>40</sup> Q.S. Al-Hujuraat (49): 9

<sup>41</sup> Q.S. Asy-Syuura (42): 38

<sup>6</sup> “O you who believe! When you hold secret counsel, do it not for sin and wrongdoing, and disobedience towards the Messenger (Muhammad s.a.w.) but do it for al-Birr (righteousness) and at-Taqwa (virtues and piety); and fear Allah to Whom you shall be gathered.”<sup>42</sup>

##### 5. The fifth principle, Social justice for all Indonesian people.

The formulation of the fifth principle means that the Indonesian state as the highest organisation has an obligation to make all of the Indonesian people fairly and justly prosperous. Islam always emphasizes the importance of teaching of social justice for our fellow human beings, that there is no discrimination in Islamic teachings, and all human beings are equal in front of Allah, and the most noble among them is the just and pious person. The verses, among others, are as follows:

<sup>36</sup> وَاللَّهُ فَضَّلَ بَعْضَكُمْ عَلَى بَعْضٍ فِي الرِّزْقِ فَمَا الَّذِينَ فُضِّلُوا بِرَأْدِي رِزْقِهِمْ  
<sup>43</sup> عَلَى مَا مَلَكَتْ أَيْمَانُهُمْ فَهُمْ فِيهِ سَوَاءٌ أَفَبِعِزَّةِ اللَّهِ يَجْحَدُونَ

<sup>3</sup> “And Allah has preferred some of you to others in wealth and properties. Then, those who are preferred will by no means hand over their wealth and properties to those (slaves) whom their right hands possess, so that they may be equal with them in respect thereof. Do they then deny the Favour of Allah?”<sup>43</sup>

وَلَا يَحْسَبَنَّ الَّذِينَ يَبْخُلُونَ بِمَا آتَاهُمُ اللَّهُ مِنْ فَضْلِهِ هُوَ خَيْرًا لَّهُمْ بَلْ هُوَ  
 شَرٌّ لَّهُمْ سَيُطَوَّقُونَ مَا بَخُلُوا بِهِ يَوْمَ الْقِيَامَةِ وَلِلَّهِ مِيرَاثُ السَّمَوَاتِ وَالْأَرْضِ  
 وَاللَّهُ بِمَا تَعْمَلُونَ خَبِيرٌ

“And let not those who covetously withhold of that which Allah has bestowed on them of His bounty (wealth) think that it is good for them. Nay, it will be worse for them; the things which they covetously withheld, shall be tied to their necks like a collar on the Day of Resurrection.

<sup>42</sup> Q.S. Al-Mujaadilah (58): 9.

<sup>43</sup> Q.S. An-Nahl (16): 71, This verse is one of the basic Ukhuwah and equation in Islam.

*And to Allah belongs the heritage of the heavens and the earth; and Allah is Well-Acquainted with all that you do.*<sup>44</sup>

وَفِي أَمْوَالِهِمْ حَقٌّ لِّلسَّائِلِ وَالْمَحْرُومِ

*“And in their properties there was the right of the beggar who asks and the poor (who does not ask others).”*<sup>45</sup>

مَنْ ذَا الَّذِي يُقْرِضُ اللَّهَ قَرْضًا حَسَنًا فَيُضْعِفُهُ لَهُ، وَلَهُ أَجْرٌ كَرِيمٌ

*“Who is he that will lend Allah a goodly loan, then (Allah) will increase it manifold to his credit (in repaying), and he will have (besides) a good reward (i.e. Paradise)?”*<sup>46</sup>

Similarly, Indonesian customary law/local traditions can be used as sources of Indonesian national law. The reason is that when the sharia was introduced for the first time in Mecca in 610 M there had been religions and pre-Islamic Arab traditions practiced and inherited as their ancestors' legacy. Sharia never claims, “this is me!”, but rather tolerates other laws and systems before it. Sharia takes into consideration the religions and Arab traditions to form a new law for the benefits of the human life. The image of the early sharia could be a blueprint in Indonesia nowadays.

Pancasila increasingly strengthens the position and the role of sharia in national legal systems in the context of Indonesia. The position and the function of the sharia in Indonesia are like the theory of the science of law, the sources law, and national law's raw materials. This means that it is very likely that the UUD 45 contains sharia, and it is not right to say that there is a dichotomy between positive law and Islamic law in Indonesia.

<sup>44</sup> Q.S. al-Imran (03): 180

<sup>45</sup> Q.S. Al-Dzaariyaat (51): 19, The Poors did not get share, they did not beg..

<sup>46</sup> Q.S. Al-Hadiid (57): 11

## The Contribution of Sharia in the Development of the Indonesian National Law

This subject focuses on the discussion that sharia can be gradually applied into the Indonesian national law. This is what is meant by *kontekstualisasi* (the contextualisation) of the sharia in the development of the Indonesian national law. The concept is especially relevant to the formation of the early sharia at the Prophet Muhammad *s.a.w.*'s era in Mecca and Medina for 22 years 2 months 22 days, *i.e.* starting from the 17th of Ramadan 610 CE until the Farewell pilgrimage on 9 Dzulhijjah, 632 CE (10 H).

The major legal systems in the world consist of Roman law, Common law, and Islamic Law. So, the system of sharia is one of the three major legal systems in the world.<sup>47</sup> According to Rahmawati Pardjaman the role of sharia in the development of the Indonesian national laws is not new and unusual.<sup>48</sup> The reason is that sharia had already been well-established in Indonesia before the Dutch colonial era beginning in the 16th century CE, *i.e.* the first Islamic Kingdom era in Indonesia in the 13th century CE. For example, the existence of Islamic judicial practice in the Papakeum (the book of) Cirebon, Pasai, Pagar Ruyung, Padre (Minangkabau), Demak, Pajang, Mataram, and the application of sharia at that time in marriage, Inheritance, *waqf*, *infaq* and alms charity.

The supreme judge of the Supreme Court of the Republic of Indonesia Yastudin says that the sharia values can be adopted in the development of Indonesian national law through legislation, the rules of the Supreme Court, *Qanun*, the *Fatawa* of DSN and Jurisprudence. Hence the transformation of the sharia values begins, and it can be developed through national rules. Values or religious law is to be used as "raw materials" of the Indonesian national law.<sup>49</sup> For example, the law of banning theft, lying, drinking alcohol, philandering, using drugs, fraud, and forgery. These practices are against the law, according to the positive law.

<sup>47</sup> Azizy, p. 87.

<sup>48</sup> Pardjaman, p. 249.

<sup>49</sup> Yastudin, 'The Transformation of Sharia Values into the Development of Indonesian National Law' (presented at the National Seminar, UIN Syarif Hidayatullah, Jakarta, 2018).

The Secretary of the Assembly of the Ulama of Indonesia (MUI) says of the existence of the tenets of the sharia from the *fatawa* of the scholars and MUI. The *fatawa* of MUI in the context of the national development are also influential as legal opinions. The *fatawa* are not incumbent in nature, but they are used for the development of the sharia values. The *fatawa* are used as options, which can be used as sources of public law in Indonesia.<sup>50</sup> It is clear that the cultural transformation of sharia has been practiced by MUI in order to give a legal decision based on sharia.

The above analysis concerning the cultural implementation of sharia in the Indonesian national laws, according to the author is more fitting. Masykuri Abdillah argues that the application of the values of the sharia into the Indonesian national law can be done in a substantive way, *i.e.*, the substance is applied even if its name is not exactly the same as that in sharia.<sup>51</sup> The reasons are: *first*, the Indonesian people consist of followers of various religions. *Second*, the cultivation of the Islamic values in the life of society could be practiced more rapidly. *Third*, remaking the early sharia very appreciative of the pre-Islamic Arab tradition as a blueprint is to be practiced in Indonesia at present.

*Fourth*, Indonesia nowadays is in need of having a law its own, and no longer uses the colonial law. *Fifth*, the common law should not mean a secular law, because it could include the sharia substantively, that is its spirit and its moral message. Positive law can become any implementation of sharia, namely: (1) The Constitution No.1 1974 about the marriage law; (2) PP No. 28 1977 about the *waqf* (endowment); (3) The Constitution No. 7 1989 about religious courts; (4) The Constitution No. 7 1992 about the Constitution No. 10 1998, and The Constitution No. 23 1999 about National banking system that allows the operation of sharia banks; (5) The presidential instruction No. 1 1991 about the compilation of Islamic law (KHI); (6) The Constitution No.17 1999

<sup>50</sup> yasardin.

<sup>51</sup> Masykuri Abdillah, 'Religious Democracy: Chat Again the Concept of Democracy in Indonesia' (presented at the the inaugural speech, UIN Syarif Hidayatullah, Jakarta, 2004), pp. 37-38.

about the organization of Hajj; and (7) The Constitution No. 39 1999 about the management of *zakat*.<sup>52</sup> Sixth, the implementation of sharia gradually, contextually, culturally and substantively, so that it can be realized in almost all Indonesian national law materials in order to create an independent law.

Furthermore, Muslims judges are able to implement Sharia into Indonesian national law. The judges in Indonesia have a positive role in the sharia, or as the law makers,<sup>53</sup> when they need to decide a matter where the Constitution did not set it explicitly.<sup>54</sup> CST Kansil and Christine ST Kansil classify the decree or the application of laws by judges into three categories. First, the *legisme* trend, where the judge just implements the Constitution (*Wetstoepassing*) with the *jurisdische-syllogisme* (logical deduction from a broad formulation). Second, *Freie Rechtsbewegung*, i.e. the opposite of *legisme* trend, where the judge's job is to create laws (*Rechtsschepping*) and he is free in giving his verdict without any basis from the Constitution. Thirdly, the trend of the *Rechts-vinding*, that is halfway between the two trends above, where the justice has restricted freedom (*Gebonden-Vrijheid*) or non-restricted one (*Vrije-Gebondenheid*) to be in line with the legislation based on the era's demands.<sup>55</sup>

This is obvious according to A. Qodri Azizy that the legal system practised in Indonesia, where any judge can be a source of the law itself, especially when the written law has not yet been available. A judge is not allowed refuse making a decision of a matter claiming that there has not yet been any legislation for it.<sup>56</sup> This is an opportunity for the Muslim Judges to exercise their *ijtihad* based on sharia in order to make their decisions on such matters. It is true that sharia legally and formally can become the cornerstone and the consideration of the judge to give his verdict over a legal matter.

<sup>52</sup> Kamsi, *Politik Hukum dan Politisasi Syariat Islam di Indonesia* (Yogyakarta: SUKA-Press), p. 263.

<sup>53</sup> Azizy, p. 134.

<sup>54</sup> Azizy.

<sup>55</sup> Kansil, pp. 158–60.

<sup>56</sup> Azizy, p. 249.

## Conclusion

Sharia based on the theory of historicity of sharia is a very contextual law. It is where sharia was formed gradually to answer the emerging problems in certain eras along with the *da'wah* of Prophet Muhammad *s.a.w.* in 22 years 2 months 22 days, *i.e.* starting from the night of the 17th of Ramadan 610 CE until the *wada'* Hajj (Farewell Pilgrimage) on the 9th of Dzulhijjah, year 632 M (10 H). The process of the formation of the sharia based on the early revelations was the blueprint, the contextualisation of sharia that needs to be put into practice in the formation of the Indonesian national law today.

The role and position of the sharia in Indonesia are among the raw materials, besides the customary and the colonial laws. The sharia is used gradually, contextually, culturally, and substantively in order to build, cultivate, develop, replace or create a new Indonesian national law, because it is not relevant for today. The sharia values contextually, culturally, and substantively can enter into all the material of the Indonesian national law. The main target is to own an Indonesian national law, and not the colonial inherited one.

The sharia contribution in the Indonesian national law has been implemented in positive law, namely: (1) The Constitution No.1 1974 about the marriage law; (2) PP No. 28 1977 about the *waqf* (endowment); (3) The Constitution No. 7 1989 about religious courts; (4) The Constitution No. 7 1992 jo the Constitution No. 10 1998, and The Constitution No. 23 1999 about National banking system that allows the operation of sharia banks; (5) The presidential instruction No. 1 1991 about the compilation of Islamic law (KHI); (6) The Constitution No.17 1999 about the organizing of Hajj; and (7) The Constitution No. 39 1999 about the management of *zakat*.

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