

# THE POLITICS OF CONSTITUTIONALISM AND ITS IMPLICATION ON SHARIA IMPLEMENTATION: Efforts to Execute and Legalize Islamic Penal Code in Indonesia

Nurrohman Syarif

State Islamic University (UIN) Bandung

Email: nsyarif2006@yahoo.co.id

## INTRODUCTION

In the era of reformation in which Indonesia entering the era of democracy, Indonesian people who more than three decade under oppression of New Order authoritarian regime likely find momentum to voice and express all ideas and notions that had been kept for a long time. One of them is the wishes of part of Muslims to implement Islamic law in Indonesia which according to them is not completely implemented yet/*kaffah*.

Although Islamic law has long been practiced in Indonesia , for some of Muslims it is not completed yet, because what is related to criminal law, particularly its sanction like *rajam* (stoning to death) and cutting hand not yet accommodated in criminal law system in Indonesia. Since the era of reformation, at least there are three accidents that described the effort to impose *rajam* sanction and legalized it. Despite controversial, *rajam* ever implemented in Ambon.

Effort to legalize this penalty and others that occurred in *Fiqh Jinayah* , later conducted by Suryani, the citizen of Banten province , through his request to Constitutional Court. Suryani demanded Constitutional Court to accept his plea to increase Islamic Court Jurisdiction, so it has an authority to proceed and ruled cases related to Islamic criminal law or *Fiqh Jinayat*. Suryani' request was refused by Constitutional Court.

Through *qanun jinayat* that was approved by DPRA, Aceh also want to implement this sanction. But this qanun also faces rejection from many parties including from Aceh people themselves. Therefore it is interesting to study or review how execution of *rajam* be done, why this act able to materialize. Why Suryani has a need to request additional authority of Islamic court and why the DPRA able to legalize *qanun* that later invite controversy.

Through this paper I will try to analyze the position of three accidents viewed







On the other side, Muhariadi, politician from PKS (Prosperous Justice Party) said that points that have been approved in *Qanun Jinayat* cannot be disturbed again. “If there is a review it should be limited only on language editing” he said.

## DISCUSSION AND ANALYSIS

### *The Position of Sharia in Constitution*

In the modern history, when many Muslim countries declared their independence from colonialism, they need to formulate constitution in a written form. Because of there aren't any exact model of government in Islamic teaching, when they write their constitution many models adopted in formulating the relation between sharia and constitution in Muslim countries. At least there are four types of constitution.

The first is state that its constitution recognized Islam as a state religion and placed sharia as a primary source in drafting legislation such as Saudi Arabia, Iran and Pakistan. Secondly, state that its constitution denote Islam as state religion but not mentioned sharia as a primary source of legislation. It means that sharia treated only as one source of many sources used to make legislation such as Malaysia. The third, state that not made Islam as a state religion and also not mentioned sharia as a primary resource in formulating legislation but acknowledged sharia as a living law in society and considered it as one of many source in drafting legislation such as Indonesia. The fourth, state that declared itself as secular state and try to make sharia not influenced its legal system such as Turkey.

In Indonesian history, discourse on the position of sharia in constitution, at least has been discussed five times in parliament; at the Council and Committee for Independent Preparation (BPUPKI-PPKI) in 1945, the Constitution Council in 1956-1959, Temporary of People Consultative Assembly (MPRS) in 1966-1968, annual meeting of People Consultative Assembly (MPR) in 2000, and annual meeting of MPR in 2001.

Each time, when sharia will be formally included in Indonesian constitution, it always invited pros and cons. The proponents of formalization of sharia, commonly argue that since the majority of Indonesian is Muslims it is understood if the law imposed in Indonesia particularly for Muslims is sharia. Secondly, the assurance of sharia in constitution actually part of gentlemen agreement of founding fathers expressed by their acceptance to Jakarta Charter (Piagam Jakarta). This charter is a compromise choice between secular and Islamic state. Thirdly, the formalization of sharia not affected non Muslim because sharia law will gave blessing to humankind.

The opponent of sharia formalization in constitution exposed arguments, among other ; firstly, the inclusion of seven words of Piagam Jakarta will pave the way of state









up from Ulema. According to Ja'far, *rajam* punishment in Ambon is preceded by declaration approved by some of Islamic figures to maintain security and upholding sharia. When the blessing or permission from Ulema placed above the existing legal system of Indonesia, it means that Ulema likely have the veto right to abandon the existing laws or regulations that they deemed contradict to sharia. This stance is, of course, challenged by other Islamic scholars.

In commenting *rajam* case in Ambon, KH Umar Shihab, one of the chairman of Indonesian Ulema Council (MUI), said: "Implementing sharia law should follow the mechanism of legal system legitimized by the state". Umar Shihab argues that according to Qur'an, who asked to enforce law is government or the holder of power. "Sharia law should be based on what is approved" He added. Similar comment also presented by Prof.Drs.Asmuni Abdurrahman from State Islamic Institute (IAIN) Sunan Kalijaga, Yogyakarta.

According to Asmuni, in implementing sharia law, the rule of game should be clear. "The government should be Islamic government, the adulterer or the perpetrator should be processed and ruled by the council of judges". Asmuni said to Sukoco from Gatra magazine. Prof. Dr. Syechul Hadi Pernomo, Islamic law scholar from IAIN Sunan Ampel, Surabaya, tries to offer solution. "If they want to have autonomy in legal affairs, at least there should be a region and *waliyul amri* (government)," he said. That is why Syechul advised, if Islamic law want to be implemented it should be collaborated to KUHP (Penal Code) that currently accepted as positive law for Indonesia.

If the arguments presented by proponent of exclusive model of sharia at national discourse are weak, why DPRA able to pass *qanun jinayat*. The answer can be seen in the dynamic of local politics.

When Regional Council of Aceh (DPRA) passed this *qanun*, there is no single faction who explicitly exposed to it. Democrat faction is the only faction of eight that implicitly exposed its objection. The remaining others: Golkar party, United Development party, PKS, Crescent and Star party, National Mandate party, Reform Star, and Combined faction voiced their support to include *rajam* clause. Yusrizal Ibrahim, from Democrat faction, in its general review on this *qanun* only ask to revise article 24 that regulates adultery. Democrat suggested this *qanun* be adjusted to condition of Aceh and Indonesia that uphold Pancasila and 1945 constitution as the base of state. Democrat recommended the punishment mentioned in article 24 verse (1) be changed to 10 lashes and fine 100 gram of gold or 10 months in prison.

Although this *qanun* has been passed by Aceh legislative body it remains keeping numerous problems. The first problem is how to escape this *qanun* from the annulment. It is right that based on article 235 verse 3 of Law No.11/2006 on Government of Aceh, (central) government no more able to overrule *qanun* on the



cannot be implemented because parts of prerequisite in *wad'iy* law unfulfilled, Muslims not obliged to perform it. There are many examples that can be exposed in this regard. Pilgrim to Mecca (*haji*) for instance is obliged to each Muslim but if situation is not conducive or there is an obstacle, this obligation was fall or delayed. In this regard, all regulations that hampered *rajam* punishment in Aceh can be seen as *mawani' syar'iy* (legal obstacles). Therefore, there is no need to Muslims in Aceh to force themselves to conduct *rajam* punishment. This punishment can be replaced by other sanction that in line with the existing law in Indonesia.

From historical and sociological argument, the objection to this punishment also voiced by Muslim Abdurrahman, noted Muslim scholar from Muhammadiyah. Muslim Abdurrahman, one of the noted scholars in Indonesia, said that experience from other countries like Sudan , Iran , Afghanistan under Taliban regime tell us that forced implementation of sharia has caused more victims especially among women , non Muslims, and the poor. According to him if we are ready to get lesson from experience of Sudan, Pakistan or other countries that have previously imposing sharia law, I think, the first people who realize the bad impact of sharia implementation are women. Because in sharia law there are many regulations directed to women such as regulation on dress and inheritance. For instance, because of poverty, woman who has deprived socially, enable to work in garment factory and so on, eventually with no choice available, sinks in the prostitution world. Meanwhile, actually there is no woman who has an ideal to become prostitute unless circumstance forces her. So, becoming prostitute is not woman choice. Then, when sharia law implemented, they are ordered, raided, captured and punished with flogging or stoning.

The second victims are non-Muslims, because they are treated as second class of citizens with limitations on political rights. The third victims are poor family or the lower class of society because when they steal chicken, for instance, it is clear that they have stole something while if the officers or rulers performed corruption or abused their power the evidence often not so clear. So it is easy for them to evade punishment.

Insufficiency support in society is also revealed by the result of surveys. Survey conducted by Pusat Studi Agama dan Kebudayaan ( *The Center for Study of Religion and Culture*) UIN Syarif Hidayatullah, Jakarta in early 2009 toward 250 mosque manager (DKM) in greater Jakarta finds that only 31 % of them agree, if Indonesia implement Islamic criminal law. The remainig 56 % not agree and 13 % not answer. Other survey conducted by The Wahid Institute and Indo Barometer toward 1200 respondents from 33 provinces revealed that 88% respondent not agree using violence to overcome or to punish immoral act.

In sum the arguments presented by supporter of exclusive model of sharia implementation has no strong back up from legal, theological, or sociological arguments. This *qanun* is the result of the power of political configuration in Regional



