

THE *KOMPILASI HUKUM ISLAM* AND DEBATES ON SHARI'A Reconsidering Islamic Law in Indonesia

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Abstract

The discourses on the application of shari'a law through state enforcement have become public concerns in Indonesia and constituted a controversial issue. The idea of the application has been brought up by a number of Muslim politicians and Muslim groups and organizations that consider shari'a the best solution for the multi-dimension of socio-economic and political crisis upon the downfall of the New Order Regime in 1998. They believe that shari'a enforcement not only fits the spirit of democracy, assuming that the majority of population in the country is Muslims, but also offers a comprehensive solution to the crisis. Unfortunately, this idea is not grounded on a comprehensive apprehension to the nature of shari'a itself and pluralistic Indonesian society but more on political impetus, namely a strong plea to realize an Islamic state that integrates the state and religion and Islam and politics. By examining the *Kompilasi Hukum Islam*, as one example of shari'a legislation in Indonesia, this article demonstrates the problems of Islamic reform that most proponents of shari'a application have overlooked. It argues that application of religious law by the state must consider the methodology of the law and its impacts for broader society.

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Wacana tentang penerapan hukum Islam (syari'ah) melalui kekuasaan negara telah menjadi perhatian publik di Indonesia dan menimbulkan isu-isu kontroversial. Ide tentang penerapan itu telah dibawa oleh sejumlah politisi, kelompok, serta organisasi yang menganggap syari'ah sebagai solusi terbaik atas krisis multi dimensi, sosial, ekonomi, dan politik pasca jatuhnya rezim Orde Baru pada tahun 1998. Mereka percaya bahwa penegakan hukum Islam tidak hanya cocok dengan semangat demokratisasi, karena asumsi bahwa mayoritas penduduk di negara ini Muslim, namun juga menawarkan solusi yang komprehensif bagi krisis tersebut. Sayangnya, hal ini tidak didasarkan pada pembacaan yang komprehensif terhadap sifat syari'ah itu sendiri dan terhadap kondisi sosial masyarakat Indonesia yang majemuk, melainkan lebih pada dorongan politik, yaitu dorongan yang kuat untuk mewujudkan sebuah negara Islam yang mengintegrasikan negara dan agama serta Islam dan politik. Dengan menganalisis *Kompilasi Hukum Islam*, sebagai salah satu contoh produk hukum Islam di Indonesia, muncul argumentasi bahwa penerapan hukum agama oleh negara harus mempertimbangkan metodologi hukum dan dampaknya bagi masyarakat luas.

Keywords: *Kompilasi Hukum Islam, shari'a, changes, response, Islam-state relations, Indonesia*

Introduction

Debates on shari'a remains an actual issue in Indonesia.¹ This article is an attempt to enrich such debates from the perspective that is based on critical evaluation of the *Kompilasi Hukum Islam*. This paper aims to examine the *Kompilasi Hukum Islam* (Compilation of Islamic Law) and puts it as a starting point to figure out the problems of the enactment of shari'a law. The Compilation is a good example of modern Muslim family law code to analyze the nature of shari'a and its changes when integrated into state legal system. This examination also delineates the response that the Muslims evoke to this code. This code poses a crucial question about the position of shari'a in the state legal system and its role for the development of national law. My purpose here is to show the changes and ambiguity of shari'a law when enacted by the state and the implication of this to Islam-state relations in Indonesia and to remind that the application of shari'a law is not as simple as one may presume.²

The idea of the Compilation comes from the state through the establishment of a joint committee between the Supreme Court and the Ministry of Religious Affairs in a response to the demand of creating an independent judiciary and administration. Unlike other courts, such as general court, military court and state-administrative court,³ that have been able to run an independent administrative judiciary since the issuance of the Statute Number 14/1970 about Judicial Authority, religious courts⁴ suffered from discriminations until at least 1989. Before the endorsement of the Religious Judicature Act Number 7/1989, religious courts had a minor status compared to other courts. For example, legal decisions meted out by religious courts

¹On the debates over this issue see Syafi'i Ma'arif (ed.), *Shari'at Islam Yes, Shari'at Islam No* (Jakarta: Paramadina, 2001).

²Muhammad Ismail Yusanto, "Shari'a and caliphate for a better Indonesia", *The Jakarta Post*, April 23, 2008. Yusanto is the spokesperson of *Hizbut Tahrir Indonesia* (HTI) that strongly advocates shari'a.

³Four courts exist in Indonesia; General Court (*Pengadilan Negeri*, State Administrative Court (*Pengadilan Tata Usaha Negara*), Military Court (*Pengadilan Militer*), and Religious Court (*Pengadilan Agama*). General Court is a court with general jurisdiction in both civil and criminal court for all people. The other three courts are ones that are concerned with special jurisdiction and adjudication for state apparatus, military officials and Muslim personal and family law.

⁴The term "religious court" here is a literal translation from Indonesian term *pengadilan agama*. This term can also be translated as shari'a court and Islamic court, since it is concerned with the application of Muslim personal and family law such as marriage, inheritance and endowment.

were not legally binding and had no coercive power until they were endorsed by general courts, even though both held an equal position in the state judiciary system under the supervision of the Supreme Court.⁵ Similarly, religious courts had different jurisdictions and their authority fragmented in different provinces and regions.⁶ The religious courts in Java, for instance, had a wider authority to adjudicate Muslim legal disputes than the religious courts outside Java. Moreover, judges of religious courts had no equal position as state judges because they were only appointed by the Minister of Religion, in contrast to judges of other courts who were directly appointed by the President.⁷

Upon the promulgation of the Religious Court Statute No. 7/1989, religious courts gained a similar status with other courts and had unified jurisdiction across the country regarding Muslim personal and family laws which cover marriage, inheritance and endowment fields. However, one fundamental problem left unresolved. This issue dealt with fragmented references used by judges, in which this plurality of legal source can lead into uncertainty when people seek for justice through religious courts, especially if they subscribe to different legal schools. Therefore one way to resolve this problem is by issuing a codification of Islamic law that will be uniformly applied in religious courts. Although codification does not guarantee that there would be no discrepancies and dissenting opinions amongst judges, the uniform law code reduce potential gaps amongst judges. It is on this ground that the idea of the Compilation emerged, namely to fulfill a legal code unification for religious courts. The joint committee had been working since 1985, earlier even before the issuance of Religious Court Statute in 1989, but the draft of the Compilation could not be passed except after independent judiciary of religious courts was established. This technical matter was mixed with political constellation during the courses of the late 1980s and the beginning of the 1990s.⁸ The project of

⁵Article 63 b (2) of Marriage Law No. 1/1974 states "every decision of a Religious Court shall be confirmed by a General Court".

⁶Government Regulation No. 45/1957 prescribed different names, authorities and jurisdictions of Religious Courts in Java and outside Java Island

⁷Bahtiar Effendi, *Islam and the State in Indonesia* (Singapore: ISAS, 2003), p. 159.

⁸There was a political impetus behind the enactment of shari'a law which massively took place in the end of the 1980s and the beginning of the 1990s. Both the Religious Judicature Act Number 7/1991 and the Compilation of Islamic Law by Presidential Instruction Number 1/1991 were issued in those periods which were seen a turning point of the state in employing accommodative approach to Islam in return to gain a political support from Muslims. See Effendi, *Islam and the State*, especially chapter 6, p. 125-149.

the Compilation thus took several years starting from 1985 until its endorsement in 1991 and run through various processes. It was finally endorsed through Presidential Decree No. 1/1991.

The Procedural Enactment of the *Kompilasi*

At least four steps were taken by the committee before the draft of the Compilation was finally endorsed.⁹ The first step was collecting data gained from Islamic law books (*kitab al-fiqh*) which serve as the bulk of the Compilation. The committee selected thirty eight books ranging from classical to contemporary legal works and comprising of various schools. The majority of the books were derived from the Shafi'ite school, such as *al-Umm* of al-Shāfi'i, *Nihāya al-Muḥtaḥ* of al-Ramlī and *Fatḥ al-Wahhāb* by Zakariyya al-Anṣārī. This decision to adopt books from the Shafi'ite school was based on the fact that the majority of Indonesian Muslims subscribe to this school. However, works from other Sunni schools were also included. They are Ibn Qudama's *al-Mughnī* and Ibn Taymiya's *Majmū' Fatāwa Ibn Taymiyya* from the Hanbalite school, Malik's *Muwatṭṭa'* and Zaynabi's *al-Muḥalla* from the Malikite school and al-Nizām's *al-Fatāwa al-Hindiyyah* of the Hanafite school.¹⁰ This composition of the various sources shows that the Compilation is purported to be a unifying code that includes all Muslim Sunni legal schools. In addition, it is also intended to cover contemporary Islamic legal thoughts by inserting for example Sayyid Sabiq's *Fiqh al-Sunnah*. This book has been translated into Indonesian language and is widely used in the national curriculum of Islamic law school at the State Islamic College (IAIN) throughout the country. The committee also enriched the data by adding jurisprudential works gained from sixteen books of law which can be classified under different genres: four books of compiled legal decisions, three books of compiled *fatwa*, five books of jurisprudence from religious court and the last four law report books.¹¹ After the data were gathered, a number of scholars from seven IAIN were appointed and assigned the responsibility to examine those legal sources and books.

⁹Imam Ahmad Mawardi, "The Political Backdrop of the Enactment of the Compilation of Islamic Law in Indonesia", in Arskal Salim and Azyumardi Azra (ed.), *Shari'a and Politics in Modern Indonesia* (Singapore: Institute of Southeast Asian Studies, 2003), p. 128.

¹⁰On the complete list of the books see Mawardi, "The Political Backdrop", p. 128-129.

¹¹*Ibid*, p. 130.

In addition to this scholarly endeavor, the committee also sought to interview a large number of *'ulamā'*. One hundred and sixty six *'ulamā'* participated in this interview, some of which were representative from Muslim organizations and others were individual figures from Islamic boarding schools (*pesantren*).¹² This process of enlargement of perspectives that encompassed Indonesian Muslim religious scholars' opinions resembles to the concept of *ijmā'* or consensus, at least at the national level, and proves that the Compilation necessitates a throughout consideration from the whole representative of Muslim communities because it would be enforced nationally. At this point, the Compilation is projected to be responsive and accommodative by including the majority's voices.

This preparation for the Compilation's draft did not end here, but continued to include to an effort to make international comparison. In order to gain a good product of legal code, the committee carried out a comparative study abroad. They visited Muslim countries that have already carried out a similar project of codification, such as Morocco, Egypt and Turkey.¹³ It was however unclear why the comparison was conducted with only those three countries. If the reason was to examine the diversity of legal traditions in those countries —as Morocco is deemed to follow Malik, Turkey follows Hanafi and the Shafi'ite school is dominant in Egypt— then why they did not visit Saudi Arabia which follows the Hanbalite. The last phase of composing the Compilation was a five-day workshop. The meeting was designed to accomplish the whole processes of the preparation and to finalize the draft. Attended by representative from every province that included the heads of provincial Indonesian Ulama Council (MUI), heads of high religious court, rectors of IAINs, deans of Islamic law schools, emissaries from Islamic organizations and women's organizations, the forum eventually completed a final draft. In June 1991, the draft was enacted through the Presidential Decree Number 1.¹⁴ This code consists of three parts. Part one pertains to marriage (*nikāh*) which includes nineteen chapters and 170 articles. Part two is concerned with inheritance (*waris*) that contains six chapters and 44 articles and the last part deals with endowment (*waqf*), covering 5 chapters and 15 articles. This code constitutes a unified reference used by judges in religious courts to adjudicate legal disputes amongst Muslims in personal and family legal matters.

¹²*Ibid.*

¹³*Ibid.*

¹⁴*Ibid.*

Reforms Introduced by the *Kompilasi* and Muslim's Responses

Although the Compilation was accomplished through several phases and adopted various methods, some of which resemble to the methodology of Islamic law (*uṣūl al-fiqh*) such as *ijmā'*, *maṣlaḥa*, *sad al-dzarī'a* and *adat* and present Indonesian Muslim thoughts, its large dependency on classical jurists' law books has resulted in domination of classical legal thoughts in it. According to Hooker, one of the salient features of the Compilation is "straight forward reproduction" of classical *fiqh* into a modern codification in such a simple way that it can be easily understood by judges with even a minimum knowledge of Islamic law.¹⁵ In his view, this process rarely changes the substance of shari'a, but simply transforming it into another form, from fragmented classical books to a uniform modern compilation, and into another language, from Arabic into Indonesia. The only major change that he found was concerned with administrative procedures such as registration for marriage and divorce and in some provisions regarding inheritance and endowment.¹⁶ For example, Chapter VXI about dissolution of a marriage requires fulfillment of a set of papers which should be proposed to the court if such a marriage is to be legally terminated.¹⁷ According to Hooker, although this rule will not substantially affect the substance of shari'a, since a *ṭalāq* in shari'a's conception remains valid once it is verbally uttered by the husband, this procedure (submitting a written statement of repudiation) is a sort of state's intervention that influences *ṭalāq* application without which shari'a will not be applied.¹⁸ So, if the husband intends to repudiate his wife, he must submit reason and a written request to a religious court. If accepted by the court, such a request is registered as a proof of divorce.

Following his argument, I think, another example regarding marriage procedure can be advanced here. Chapter II on Principles of Marriage states that "marriage done without the presence or not supervised by official is considered invalid".¹⁹ This provision has also been emphasized in the Marriage Law Number

¹⁵M.B. Hooker, "The State and Shari'a in Indonesia" in Arskal Salim and Azyumardi Azra (ed.), *Shari'a and Politics in Modern Indonesia* (Singapore: Institute of Southeast Asian Studies, 2003), p. 44.

¹⁶*Ibid.*

¹⁷*The Compilation*, Article 129.

¹⁸M.B. Hooker, "The State and Shari'a in Indonesia", p. 44.

¹⁹*The Compilation*, Article 6: (2).

1/1974 which applies to all Indonesians, regardless of their religion. Article 2 (point 2) of Chapter I on Foundations of Marriage declares that "every marriage shall be registered according to the regulations of the legislation in force".²⁰ These rules demonstrate that the state only recognizes a registered marriage and accepts a written request for a valid divorce, meaning that unregistered marriage and unilateral divorce have no any legal consequence in the state's view. Written proof thus constitutes an additional administrative and substantial requirement for the application of shari'a by the state. In this regard, shari'a enforcement becomes a subject of intervention and limitation by the state, most of which relate to the procedural and administrative requirements, and yet this supplementary requirement does give tremendous impact in the society.

Hooker might be correct in his comments when he said that no fundamental change of shari'a was introduced in the Compilation and its pure rules remain applied in some ways, except in a small portion dealing with administrative procedures. However, he should not overlook other dimensions which I think clearly reveals the changing nature of shari'a from its classical to modern conception that covers both administrative aspects and substantial provisions. Moreover, the shifting paradigm from Middle Eastern to local views is also evident. By this I do not mean a total substitution of shari'a as it is transmitted from Arab jurists and then it switches into a purely Indonesian and local characters. Rather, some local elements or national thoughts are visible in this Compilation, a point that Hooker missed. I presume Hooker did not take into consideration the methodology of the Compilation and missed an important point as to how such methods considerably influence the nature and subject matter of shari'a law. I mean with shari'a here is a historically Muslim jurists' understanding and interpretation to the normative sources of the Qur'an and the Hadith. In this definition, shari'a is similar to *fiqh*, a product of jurist legal thoughts. By employing those methods, such as *ijmā'*, *adat*, *maṣlaḥa* and *sad al-dzarī'a*, the Compilation produces different legal prescriptions and reformulates subject matter of law which are in many ways distinctive from classical conceptions. Take for example the articles on joint property.

In many regions, such as in Java, West Sumatera, Kalimantan, Sunda West Java, and Bali, joint property has been accepted as unwritten law and the people

²⁰Marriage Law Number 1/1974, Chapter One, Article 2: (2).

acknowledge it as a living tradition. Because of its existence and acknowledgement as the people's crucial practice regarding the management of property, this practice is accommodated into the Compilation. It is perhaps argued that since this matter is an important issue within the household that involves Muslim spouse's relation, regulating it into Islamic legal code is necessary.²¹ Chapter XIII comprising of thirteen articles especially addresses this issue. Article 85, for example, states that "The existence of joint property does not by any means reject the possibility of the individual property for the husband or the wife".²² It must be underlined that joint property is different from personal property. The husband and the wife can still have their own property and have an absolute supervision and utilization. The concept of joint property does not deflect from acquiring personal property owned by each party. As a living tradition which is not contrary to shari'a law, the Compilation was willing to adopt it.²³ This tradition is considered as good and valid practice (*adat sahīh*) in terms of maintaining a balanced relation of the spouse, since the husband and the wife has an equal responsibility and supervision to their joint property, besides their own supervision to their own properties. By incorporating the spouse's collective ownership and control into their joint property, then equal responsibility, shared right and obligation to that property between the husband and the wife are hoped to be well preserved. This effort can lead to a family harmony and boost gender equity in the Muslim family.

Having cited those examples, I would emphasize that the nature and the subject matter of shari'a does change in some ways and much broader than what might many assume, such as Hooker, when it is adopted by the state and enforced through its legal system and mechanism. The encounter of shari'a with the context of the Indonesian Muslim's conditions has yielded reform and changes. It is true that one salient feature of the changes pertains to administrations and procedures of justice imposed to shari'a in religious court. Those changing provisions are

²¹Ratno Lukito, *Islamic law and Adat Encounter: The Experience of Indonesian* (Jakarta: Logos, 2001), p. 109. See also Mark E. Cammack and Michael Feener, "Joint Marital Property in Indonesian Customary, Islamic and National Law", in Peri Bearman, Wolfhart Heinrichs and Bernard G. Weiss (ed.), *The Law Applied: Contextualizing the Islamic Shari'a* (London and New York: I.B. Tauris, 2008), p. 92-102.

²²*The Compilation*, Article 85.

²³Customary law is considered as valid source for Islamic law as long as it is not contrary to the Qur'an and the Sunna. See Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Text Society, 1991), p. 283-296.

different from, or unavailable in, shari'a classical formulations to which the Compilation refers to. Several articles regarding joint property, marrying pregnant women and the status of adopted children show that these provisions are essentially new products of law echoing the spirits of reform and change coming from below. The changes are a logical consequence from the changing context of law, which arises from many various factors.

No less important than those substantial changes is the acceptance of the Compilation by the Muslims. I need to include this issue to point out that the application of shari'a by the state has sparked various responses from Muslims. The response relates to divine character of shari'a which is inherent to its nature as many Muslim often assume. By changing its status from divine and religious to man-made and state law, and its brand from shari'a to the Compilation, shari'a is no longer perceived as a sacred law and consequently forfeits its religious boundary. Once shari'a is formally codified and transformed into state law as well as applied through state apparatus and mechanism, its religious dimension, in many Muslims' views, significantly diminishes. This in turn leads to the ways in which the Compilation is appreciated and accepted by Muslims. Besides, Muslims' perceptions about the Compilation is also shaped by the issue of human right and gender justice as well as by the disagreement about the basic nature of shari'a, whether it is a guide for human conducts or a regulation that should be applied through the state. To Muslims who perceive shari'a as a guide for human behaviors, its application remains compliant.

Generally speaking, there are three difference responses to the Compilation. *First*, those who accept the Compilation and consider it as "an Indonesian fiqh" that applies to Muslim subjects when they bring their legal disputes into religious court. Amongst these groups are judges of religious courts, religious body of Indonesian *ulama* (MUI) and those who involved in the project of this codification. To these people, the Compilation is conceived of a compromise of high and local tradition of various Islamic legal schools which does not exclude voices and aspirations from the Indonesian perspective. They emphasize the need of reformulating shari'a which is not only adaptive to the actual condition of the Muslim in this country, but also essentially transformative in terms of substituting classical to modern conception. This change accepts language issue as one important element of the socialization of the code to the society and admits vernacular language so that the Compilation is more accessible and readable by wider audiences. Not surprisingly, the Compilation is even regarded a realization of the idea of "Indonesian *mazhab*" that has been proposed by Muslim scholars who consider it necessary to integrate

fiqh to the Indonesian context. Hasbi as-Shiddiqi, the first scholar to come up with this idea,²⁴ maintains that the books of *fiqh* that have been widely spread and used in both modern and traditional Islamic institutions presumably reflect much on legal practices and traditions of the Middle Eastern regions. The jurists might also have been likely unaware that their works would be read by readers in subsequent centuries from different cultural and geographical backgrounds as far as Southeast Asia. Adoption of their works into different contexts should therefore entail critical examination since scholarly works remain relative and limited in scope. The product of legal thought is thus not merely perceived as a purely intellectual and scholarly works, but also contains ideological assumption, cultural traits and gender biases. By criticizing all these elements and accommodating local aspirations, the Compilation is designed to be able to neutralize such tendencies and is reflective and adaptive to its own context.

Second groups are those who are ambiguous to either partly accept or decline the Compilation. On one hand, they never criticize the compilation as a concept of legal code. On the other hand, if certain provisions in the Compilation do not match to their legal interests, they simply abandon it. To these people, the Compilation, unlike shari'a, cannot in no way attach to itself a religious brand. They perceive the Compilation as a state law which is different from to the traditional or classical shari'a. Consequently, disobeying the Compilation does not count as religious deviation for it is no longer a God's law. This meant that the religious dimension remains empty in the Compilation for it cannot be transformed into such a positive, man-made law. The religious and secular dichotomy in looking at the Compilation has profoundly influenced the ways the Indonesian Muslims accept and apply it. Many Muslims believe that the Compilation is concerned with the formal application of shari'a as the state requires so, while essentially such a formality does not alter the substance of shari'a. In other words, many still believe that the "true essence" of shari'a is what is covered in those classical *fiqh* texts. This stumbling block often leads to abandoning the Compilation. A wide disobedience to this code commonly relates to the issues of marriage and the inheritance. It is not uncommon that many Muslims consummate their marriage without heeding the provisions of marriage laid down in both the Marriage Law and the Compilation. They arrange their marriage secretly, without reporting it to the marriage registrar

²⁴Hasbi is a professor of Islamic law in the oldest Islamic law school of the state institute of Islamic studies (IAIN) Yogyakarta. He has authored several books, including *Fiqh Indonesia* which promotes his idea about the establishment of "Indonesian Madzhab" of Islamic law.

office. In this practice, only main players such as the groom, the bride, the bride's guardian and two male witnesses, are present during the contract agreement, while the officials from the office of state registration are not invited or informed.

The *third* response to the Compilation comes from liberal and feminist Muslims who regard the Compilation as an uncritical legal codification to the issue of gender justice. To them, the Compilation remains granting privileges to men over women in such issues as marriage and inheritance. Since the compilation in their view still put men superior over women, there is no fundamental reform regarding equal male and female relation. This gender bias is a result from the adoption of *fiqh* books which were mainly composed by male scholars. This statement does not imply that being male will necessarily lead to bias, for many Muslim male scholars are also proponent of gender justice and maintain this principle as a fundamental perspective in Muslim legal reform. Therefore a new idea of reform for the Compilation was offered by this group. They proposed a counter legal draft to the Compilation. According to Musdah Mulia, a chairperson on this project, the draft was composed on the basis of the Qur'anic values of equality and freedom, and these principles must become the spirit for the re-formation to the regulations on marriage and family matters.²⁵ The draft which was completed in 2003 proposes several substantial reforms that promote gender equity. For example, failure to register a marriage could be punished or imprisoned. Some issues such as minimum age, polygamy, the roles and status of the husband and wife, and the rights of the husband and the wife on divorce receive a special attention since those are often claimed as a manifestation of gender biases.²⁶ In fact, the state through the Ministry of Religious Affairs initially supported this endeavor. However, due to a strong opposition from the conservative Muslims who are afraid of tremendous liberal reform, the state withdrawn its support and as a result this new draft has not been enacted.

What I want to underline from these various responses to the Compilation is that there is no single opinion or unified perception to the *Kompilasi* amongst Indonesian Muslims. On the one hand, they do support this code arguing that it is necessary to have a codification as a uniform legal reference in religious courts. This "structural view" is held mostly by state officials, religious judges, state-appointed '*ulamā*' body,

²⁵Siti Musdah Mulia with Mark E. Cammack, "Toward a Just Marriage Law: Empowering Indonesian Women through A Counter Legal Draft to the Indonesian Compilation of Islamic Law", in R. Michael Feener and Mark E. Cammack (ed.), *Islamic Law in Contemporary Indonesia: Ideas and Constitutions* (Cambridge: Harvard University Press, 2007), p. 128-129.

²⁶*Ibid.*, p. 135.

and others who involved in composing the Compilation. On the other hand, progressive Muslims accept the Compilation if the articles containing conservative views and gender biases are amended. They even decline the idea of unification and formalization of shari'a because they believe that it as a guide for moral conducts, not a code. This "progressive reformist view" offers two options, either reforming the Compilation on the basis of human right and gender equity, or constructing an alternative thought about shari'a as a socio-cultural guide, rather than a formal state codification. Another perspective reveals "an ambiguous view" that tends to accept the Compilation provided that it is not contrary to the shari'a as the Muslims holding this view understand it. Although this last perception does not represent the majority, it counts as an influential perspective that might potentially disturb the application of the Compilation. The heterogeneous views on and responses to the Compilation must be taken into consideration by the Muslims who insist on the application of shari'a that covers a wider field, not merely on private and family laws, as what has been prevailed so far. The enactment of the Compilation also triggers a crucial question about the state's relation with religion and the rule of religious, including shari'a, law in the non-religious state.

The State and Islam in Indonesia

From historical point of view, there are strong evidences that Indonesians attempt to negotiate the tension between religious and nationalist ideology in shaping the country. This struggle has resulted compromises that the state finally takes its form in a republic, nor monarch, nor religious, yet religion remains powerful in influencing the state's policy and in the society. Surprisingly enough, Muslims have been always active agents in promoting this view and opting for a republic form of the state rather than religious. It is quite clear from the very beginning of Independence in 1945 that the founding fathers agreed upon the form on which the state would be based, which is non religious. Although eight out of the nine committees of the preparation for the Independence were Muslims, they did not force Islam to be accepted as a state ideology. Rather, they displayed their high tolerance and remained accommodative to the minority who wished not to accept an Islamic state. Had there been an Indonesian Islamic state,²⁷ the minority would not

²⁷The idea of Islamic state was in fact an invention of the fourteenth century, promoted by Ibn Taymiyya (1328). See Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld, 2008), p. 7.

have joined it. The willingness of the Muslim leaders to omit “the seven shari'a words”, which declares the obligation to observe shari'a for Muslims, from the state philosophy and the Constitution demonstrates that Islamic state was not a suitable choice for the multi-cultural Indonesian society. These historical accounts suggest that in almost every pivotal moment in defending the unity of the state, Muslim's role has been always decisive. This may also explain the reason why the majority Muslims and a number of Muslim social religious organizations have not been interested in the idea of Islamic state, for they fear that it would interrupt nation's integrity.

Therefore, based on such normative and historical evidences about the relation between state and religion and about the responses to the Compilation, as has been explained in previous passage, proponents of shari'a law application must seriously re-think it. Proposing the whole adoption of shari'a law appears to be problematic for both normative and historical viewpoints and seems absurd since the enforcement of shari'a in its limited part regarding personal and family laws is itself also dilemmatic, as the experience of the Compilation reveals.²⁸ Nor a total rejection to the transformation of shari'a into state legal system is a viable solution, since Muslims are badly in need of it to regulate their family matters. In my view, those perspectives can be compromised by proposing an alternative view that accepts the Compilation on the ground of necessity for a unified legal code in religious courts, without which there would be no certainty of administrative justice and no unified sources or references to which judges should refer to. This acceptance, however, must be based on a fundamental amendment and reform on the basis of human right and gender equity. Any rules which do not reflect those spirits must be omitted and substituted with provisions which reflect gender equity and human right perspectives. The provisions which still grants special privilege to men, restrict women choice and contain gender biases must therefore be amended. By accepting the Compilation within this human right and gender framework will help establish a Muslim legal tradition that is relevant to the most contemporary aspirations.²⁹ In addition, this view will not transgress beyond the

²⁸MMI goes further by proposing a draft of what is “called as Shari'a criminal code”. They strive to implement shari'a as a supreme rule in the country, for it is, in their mind, a complete legal system. See Tim Lindsey and Jeremy Kingsley, “Talking Code: Legal Islamisation in Indonesia and the MMI Shari'a Criminal Code”, in Peri Bearman, Wolfhart Heinrichs and Bernard G. Weiss (ed.), *The Law Applied: Contextualizing the Islamic Shari'a* (London and New York: I.B. Tauris, 2008), p. 295-320.

²⁹As many have already shown and criticized that of the problems of shari'a is its minimum acknowledgement of women's roles and its admittance of non-Muslim's inferior status to their

Constitution nor betray national legal tradition, which to some extent remains accommodative to limited enforcement of various living religious law and traditions of the people. Within this limited area, in personal and family matters, religious laws can still play their roles.

The field of personal and family law belongs to a private matter which can be exclusively governed by personal faith with the assistance of the state through religious court, because it is the state that assumes power and authority. The laws employed in this special terrain will only prevail to the followers of certain religion and not to be enforced to the other people with different faith. It is in this theoretical framework that the Compilation is understood in its relation to the issue of the relation between the state and religion.

Conclusion

The examination on the *Kompilasi Hukum Islam* and the re-reading of current debates on shari'a suggests that the application of shari'a law is not a simple issue. If Muslims themselves are in no agreement about the *Kompilasi Hukum Islam*, which represents shari'a concerning family law, how they could reach agreement on shari'a as a total system of Islam. However, shari'a, understood as a total system of Islamic law and doctrines, can still play role in this state-religion relational framework by promoting its values such as humanism and justice. If we accept a proposition that the shari'a purposes are to promote justice and uphold humanity, then any law that advocates those spirits must be essentially "Islamic" whether or not they are called shari'a law. By applying those principles as substantive shari'a, then any legislation, whether in forms of state law, statue, regulation, regional ordinance or presidential decree, for example, remain in the line with the shari'a principles.

This perspective can be advanced as an alternative view for shari'a legal formal application. A recent study about the constitutional reform in Indonesia, especially after the Reform era in 1998, discloses that shari'a values regarding human right,

Muslim counterparts. See Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretation of the Qur'an* (Austin: Texas University Press, 2002); Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Right, and International Law* (New York: Syracuse University Press, 1990), especially chapter seven; and Robert Spencer (ed.) *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslim* (Amherst: Prometheus Books, 2005).

rule of law and religion can be inserted into the amendment of the 1945 Constitution.³⁰ Nothing in such amendment is contrary to shari'a basic principles. This changing approach from "formal" to "substance" means that shari'a's values are more applicable than its legal provisions. This strategy will keep the state-religion relation harmonious and the unity of the Indonesian multi cultural society is well preserved, while at the same time not neglecting the roles of Islam in guiding the state and the society. [a]

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³⁰Nadirsyah Hosen, *Shari'a and Constitutional Reform in Indonesia* (Singapore: IAS, 2007).

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