Taqnin al-Ahkam: Sharia Economic Law Legislation as Ius Constitutum in Indonesia

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Abstract. This study aims to determine the process of forming Sharia economic law through the taqnin method. The taqnin or law formation method in Indonesia can be done through the democratic process or the national legislation program (prolegnas). The author uses qualitative methods with a normative juridical approach. The normative juridical procedure is carried out by examining legal concepts, theories, and pre-existing laws and regulations. The results of this study show that the formation of Sharia economy law in Indonesia into positive law (*ius constituentum*) requires various aspects, such as sociological, political, economic, and philosophical. This is stipulated in Law of the Republic of Indonesia No. 10 of 2004 as amended into Law of the Republic of Indonesia No. 12 of 2011 concerning the Establishment of Laws and Regulations.

Keywords: Taqnin al-Ahkam, Sharia Economic Law, Legislation, *Ius Constitutum*.

1 Introduction

The development of Islamic law today can be seen from various kinds of legal positivism that are used as a basis in Islamic law, such as ijtihad jurisprudence, fatwas or legal decrees based on the opinions of Islamic jurists, decisions of judges of religious courts and q a n u n or taqnin al-ahkam[1]. The taqnin is a method of formulation of Islamic law, which is compiled from various regulations into binding rules and applies to all Muslims. There is a difference of opinion among jurists, some agree with this formulation, and some do not accept the formulation of taqnin as a method of forming Islamic law.

Some classical and contemporary jurisprudence scholars who agree on the validity of taqnin as the establishment of Islamic law are Imam Abu Haneefa and his two students, namely Abu Yusuf and Muhammad ibn al-Hasan. This opinion assumes that if judges are limited to rules passed by the government, then the legal resources used by judges are limited to those rules [2]. Therefore, modifying and updating Islamic law through q a n u n or taqnin al-ahkam is necessary as for some other jurists such as Salih bin Ghashun, Abdul Majid bin Hasan, Abdullah bin Mani', Abdullah Khayyath, Muhammad bin Jabir, Rashid bin Hunain, and Rashid bin Khunain,

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Musthafa al-Zarqa, Muhammad Abu Zahrah, Ali al-Khafif, Yusuf al- Qardhawi, and Wahbah al-Zuhaili [3].

The classical jurisprudence scholars who disapproved of the validity of taqnīn as the establishment of Islamic law were Imam Malik, Imam al-Shafi'i, Imam Ahmad ibn Hanbal, Abu Yusuf, Muhammad ibn al-Hasan, Ibn Qudamah and Ibn Taimiyyah. This group argues that no one can establish a law other than directly derived from the Qur'an verses and the Holy Prophetsa's hadith [4]. Some contemporary scholars who do not recognize the validity of taqnīn, namely Shaykh Bakr bin Abdullah Abu Zaid, Shaykh Salih bin Fauzan al-Fauzan, Shaykh Abdullah bin Abdurrahman al-Bassam, Shaykh Abdullah bin Abdurrahman al-Jabirin, Abdurrahman bin Abdullah al-Ajlan, Shaykh Abdullah ibn Muhammad al-Ghunaiman and Shaykh Abdul Aziz bin Abdullah al-Rajihi [5]. This dissenting group recognizes only four blasphemies in Islamic law: the Qur'an, hadith, ijma, and qiyas. The Qur'anic proposition used as a foundation is found in the word of Allah in surah Shad verse 26, which reads:

يٰدَاوٗدُ اِنَّا جَعَلْنٰكَ خَلِيْفَةً فِى الْاَرْضِ فَاحْكُمْ بَيْنَ النَّاسِ بِالْحَقِّ وَلَا تَتَّبِعِ الْهَوٰى فَيُضِلَّكَ عَنْ سَبِيْلِ اللّٰهِ ۗاِنَّ الَّذِيْنَ يَضِلُّوْنَ عَنْ سَبِيْلِ اللّٰهِ لَهُمْ عَذَابٌ شَدِيْدٌۢ بِمَا نَسُوْا يَوْمَ الْحِسَابِ ٢٦

It means:

"O David, verily We made you caliphs (rulers) on earth, so make decisions (things) among men justly and do not follow lust, for he will lead you away from the way of God. Surely those who go astray from the way of Allah will be severely punished, because they forget the day of reckoning."[6].

Differences in the opinion of jurisprudence scholars in determining the validity of taqnin as legal legitimacy in Indonesia are natural. This is based on differences in sources or rules used by jurisprudence scholars in conducting ijtihad to determine legal istinbat. Juhaya S. Praja, in his book, explains that a judge can be broadly interpreted in two meanings, namely as a jurist, namely someone who has intelligence in thinking so that he can know the nature of a law that depends on his time. At the same time, another meaning of a judge is a wise person in the judicial system[7]. The establishment of sharia economic law based on judicial jurisprudence can be used as a source of law. The birth of Sharia economic law products provides legal certainty in the economic sector that applies to the community's needs.

2 Methods

This type of research is normative legal research, also called doctrinal legal research, based on legislation (law in books) [8]. This research uses the normative juridical approach, which is based on legal concepts and theories as well as laws and regulations related to Islamic economics. Based on data sources, this study uses literature data, namely secondary data, as legal sources. Secondary data sources are books related to this research, scientific papers such as journals, and related laws and regulations. According to Soerjono Soekanto, literature study research in normative legal research is often called literature law research [9]. After all the material is collected, the data analysis technique uses qualitative descriptive analysis methods.

Descriptive qualitative is to describe all data obtained from the research results and then compiled systematically to be analyzed qualitatively so that it can be a conclusion.

3 Finding and Discussion

3.1 Taqnin Method as Law Formation

Taqnin etymologically comes from Arabic, which means lawmaking [10]. Taqnin is a synonym of the word derived from qannana, qanun, which means the measure of everything, the way, and the way [11]. Understanding terminology, jurisprudence scholars define taqnin al-ahkam, as a way or method of determining sharia law related to community problems [12]. The process of taqnin al-ahkam is arranged systematically based on short and firm sentences as in law, following the order of chapters, articles, verses, and numbers, then passed and established as laws and regulations that apply to society.

The broad definition of Qanun is also interpreted in several literature, which can be summarized into three meanings: first, a general understanding, namely a collection of legal rules (codex) such as Ottoman criminal law rules. Second, the meaning of qanun is sharia or law. Third, the sense that is used explicitly in rules or regulations that have legal force **[13]**. Orientalists consider that qanun or taqnin comes from a collection of Roman (*canonic*) laws that the Holy Prophets brought down to taqnin al-ahkam [13]. Those who think so are Ignaz Goldziher, Alfred von Kremer, and Sheldon Amos. But this is refuted by Muslim scholars who say that the Holy Prophets never left Mecca and went to Rome to spread the teachings of Islam. The term canonic is used to define church laws often used by several European countries. At the same time, qanun was used by some Muslim scientists with the term scientific knowledge [14].

In legal science, the term qanun is known as rules in the form of laws and statutes. In legal science, qanun is a law in the state of orders or prohibitions that regulate order in the life of a society. Therefore, the law should be obeyed by the community concerned, and violations of these regulations can result in action from the government of that community. Law is generally defined as regulations made by the state. Laws are characterized by authorized officials' written decisions and general rules of conduct and binding. Meanwhile, qanun, in terms of Islamic law, experiences development as events occur in society. Several forms of law or rules in Islamic law are fiqh, namely ijtihad, the opinion of Islamic legal experts based on the Koran and hadith. A fatwa is an opinion or decision by ulama or a council of ulama regarding a law. Qadha is the decision of judicial judges and the qanun itself.

Qanun is often seen as a formalization of Islamic law or rules in Sharia law compiled by the Government as positive or applicable. The birth of Qanun in this modern era was a response to the legal system, which developed mainly due to the influence of the European legal system. Based on this, some scholars consider the formalization of Islamic law necessary to guide judges' legal decisions on the same issue in different judicial institutions. Taqnin al- ahkam can be applied in Indonesia through legal legislation, which is a lawmaking process derived from Islamic law and has a binding nature so that all Indonesian people can use it. Rules passed by the government are the product of the results of the formation of laws based on rules that have no applicable legal basis. Based on this process, the taqnin method results from the ijtihad of

judicial judges. It can be made into national law by formulating laws until the government passes it.

3.2 Legislation of Islamic Law into Positive Law

The positivization of Islamic law in Indonesia is based on the reason for a constitution, the sense of history, and the need for Islamic law itself [15]. The application of Islamic law to positive law in Indonesia, including in legal politics, is based on legal problems that occur in society and how to solve the legal issues themselves. Bellefroid explained that legal politics is part of legal science that studies changes in applicable laws (*ius constitutum*) into laws that should apply (*ius constituendum*) to meet changes in people's lives. The applicable law is called "*ius constitutum*," and the rule that has no legal basis that should apply is called "*ius constituendum*" [16].

The application or positivism of Islamic law in the national legal system is through the process of democracy or prolegnas, not indoctrination. In the democratic process, there is consensus deliberation, which is then outlined in the prolegnas (national legislation program). According to Jazuni, the only entry point to legalizing Islamic law is democracy [17]. The product of this legislation gained legitimacy from Islam and became part of Islamic law. Furthermore, more in-depth study through academic manuscripts is needed to become a positive law because it involves reviewing various aspects. Both sociological, political, economic, and philosophical. This is stipulated in Law of the Republic of Indonesia No. 10 of 2004 as amended into Law of the Republic of Indonesia No. 12 of 2011 concerning the Establishment of Laws and Regulations. Over time, several norms of Islamic law have become positive laws.

Legal politics concerning the plan for the development of legal material in Indonesia is currently contained in the National Legislation Program (Prolegnas), meaning that if we want to know the mapping or portrait of plans about what laws will be made in a certain period as legal politics, we can see it from the Prolegnas [18]. This Prolegnas is prepared by the House of Representatives (DPR) and the Government, which the DPR coordinates in its preparation. That the DPR coordinates the preparation of these Prolegnas is a logical consequence of the results of the first amendment to the 1945 Constitution, which shifted the direction or emphasis of the formation of laws from the Government to the DPR. As is known, Article 20, paragraph (1) of the 1945 Constitution as a result of the First Amendment reads, "The House of Representatives holds the power to form laws."

Prolegnas is a legal, political forum for a certain period, as can be seen from Law No. 10 of 2004 concerning the Establishment of Laws and Regulations, which in Article 15 paragraph (1) outlines that, "Planning for the preparation of laws is carried out in a National Legislation Program." As for each region, according to Article 15, paragraph (2), creating a Regional Legislation Program (Prolegda) to create consistency between various laws and regulations from the central to regional levels is also outlined. Thus, from this Prolegnas, we can see every type of law that will be made for a certain period as legal politics.

3.3 Sharia Economic Law Producs in Indonesia

The approach or methodology in Islamic economics forms economic concepts based on Islamic law, sourced from the Qur'an, hadith, ijma', and qiyas. Aslam Haneef, in his book, divides three groups of Islamic economists, namely: the jurist group is an expert in the field of fiqh, the modernist group is an expert who can answer the problems of sharia economics today, and the

western-trained group is the practice of Islamic economists who have completed studies in the West [19]. These three groups are usually known as schools or schools in Islamic economics: the iqtishaduna school, the mainstream stream, and the critical alternative stream.

The iqtishaduna school is a school pioneered by Moh. Baqir as-Sadr considers that the existence of Islamic economics is very different from conventional economics. As-Sadr thought that uneven economic problems resulted from the application of unlimited human greed [20]. The mainstream is Islamic economists at the Islamic Development Bank, such as Umar Chapra, M. Nejatullah Shiddiqi, etc. They try to integrate today's Islamic economic problems with the approach of Islamic law or fiqh [21]. The critical alternative stream criticizes the previous two streams. They tried to develop a new theory even though it had already been discovered by the iqtishduna school and the mainstream school [22]. Islamic economics has different views according to the opinions of each stream (group). But in reality, the Islamic economy is only formed with the principles designed to build a universal one.

The concept of Sharia economic law in Indonesia is to maintain economic and financial balance to avoid a monetary crisis that significantly impacts the state, institutions, and society, especially economic business actors. The source of Sharia economic law in Indonesia as a reference in forming laws passed by the government as a political discourse of economic law. In its legal principles, the Sharia economy is regulated by several laws related to the Sharia economy or banking, such as Law No. 10 of 1998 concerning Amendments to Law No. 7 of 1992 concerning Banking. Law No. 21 of 2008 concerning Sharia Banking. Article 49 of Law No. 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning Religious Courts. In addition to law, Sharia economics has a legal basis, such as the Compilation of Sharia Economic Law (KHES).

Some of the products of Sharia Economic Law that have become laws and regulations through the process of Islamic law legislation into positive law in Indonesia are as follows:

The promulgation of Law Number 21 of 2008 concerning Sharia Banking, this legal product aims to achieve Indonesia's national development goals in the form of the creation of a prosperous, just society based on economic democracy, the development of an economic system based on the values of justice, togetherness, equity, and expediency following sharia principles. Furthermore, the increasing public need for Islamic banking services and regulations regulated through Law Number 7 of 1992 as amended in Law Number 10 of 1998 have not been specific, so they have not confirmed the position of Islamic and conventional banks in the national banking system.

Promulgation of Law Number 19 of 2008 concerning Sharia Securities State (SBSN) was ratified on May 7, 2008. This legal product was born to finance the State Revenue and Expenditure Budget, which is always in deficit and is included in project financing. The government has fundamental reasons for releasing products, and this law will support the development of Sukuk as an alternative source of state funding.

Sharia Economic Law Complication (KHES) began with the issuance of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts. This law expands the authority of the Religious Courts following the development of law and the needs of Indonesian Muslims today; with the expansion of this authority now, the PA is not only authorized to resolve disputes in the fields of marriage, inheritance, wills, grants, waqf, and sadaqah only, but handles cases in child bonding, resolves in zakat disputes, infaq, as well as

property rights disputes and other civil disputes between fellow Muslims, and Islamic economics.

Promulgation of Law Number 41 of 2004 concerning waqf to complement the law, the government has stipulated Government Regulation 42 of 2006 concerning the Implementation of Law Number 41 of 2004 plus Ministerial Decree Number 4 of 2009 concerning the administration of money endowments. This shows the Islamic political economy demonstrated by the Indonesian government in the realm of Islamic public finance in a formal legal manner. Law Number 38 of 1999 concerning Zakat Management, the regulation on zakat in Indonesia, has been started since 1968 through the Regulation of the Minister of Religious Affairs Number 4 of 1968. The government's legal politics regarding zakat reached a bright spot when the issuance of Law Number 38 of 1999 concerning zakat management, which in this case resulted in the National Amil Zakat Agency (BAZNAS) through Presidential Decree Number 8 of 2001. Furthermore, the Law on Zakat Management was changed to Law Number 23 of 2011.

Conclusion

The formation of Sharia economic law through taqnin al-ahkam is included in the realm of legal politics, which is part of legal science that studies legal changes that do not have a positive legal basis into national laws that have a written legal basis. The application or positivism of Islamic law in the national legal system is through the process of democracy or prolegnas (academics), not indoctrination. In the democratic process, there is consensus deliberation, which is then outlined in the prolegnas (national legislation program). To become a positive law, more in-depth study through academic texts is needed because it involves a review of various aspects. Both sociological, political, economic, and philosophical. This is stipulated in Law of the Republic of Indonesia No. 10 of 2004 as amended into Law of the Republic of Indonesia No. 12 of 2011 concerning the Establishment of Laws and Regulations. Some of the products of Sharia economic law that have become laws and regulations through the process of Islamic law legislation into positive law in Indonesia are, among others, Law Number 21 of 2008 concerning Sharia Banking, Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts, Law Number 41 of 2004 concerning Waqf and Law Number 23 of 2011 concerning Zakat Management.

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