

Transformation of Islamic Values in the Development of the National Legal System

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ABSTRACT

The positivization of Islamic law to national law is part of the transformation of a positively justified legal system. The role of Islam in national development exists as a paradigm in the legal development system. The formulation of the legal texts contained in the state's ideology of Pancasila is inseparable from the values of Islamic religion, meaning the transplantation of Islamic law through the national legal system, or a transformation of Islamic values in the national legal system. The focus of this article is to discuss about the construction of the transformation of Islamic law into the development of the national legal system and the existence of Islamic law as a paradigm for the development of the national legal system. This study uses qualitative methods with constructivist paradigms and socio-legal research. The results of the study argues that the construction of the transformation of Islamic law into national law through adjustments to the values of the law and through the transplantation system. The existence of Islamic law in the development of national law has been overlooked by the use of Pancasila as a paradigm basis.

Keywords: *Transformation system, legal transplantation, positivization of Islamic law*

1. INTRODUCTION

Discussion on the relation between Islam and state, is not a new topic, but one that has been a heated topics since thousands of years ago. Analysis from various perspectives, holistically and progressively, has made this theme to be always relevant and contextual. Theologically, Islam is a system of values and teachings which is divine, and therefore at the same time is transcendent. Besides, from a sociological point of view, it is a phenomenon of civilization, cultural and social reality in human life. Islam in social reality is not merely a number of universal doctrines, but on that manifests itself in social institutions influenced by the situations and dynamics of space and time [1]. According to the teachings of Islam, change is often said to be a *sunnatullah*, as a part of human nature and law of the universe. All humans, groups of human, and their environment experience change continuously [1].

In this connection, it is necessary to affirm a recognition from an Orientalist, Joseph Schacht, as quoted by Qardhawy, stating that Islam is an integral system, which includes religion and the state as well. In the Qardhawy language, true Islam is *aqidah* (theological belief), worship, homeland and nationality, tolerance and strength, morale and material, culture and law. Although Islam is a universal teaching, it involves various living systems, such as social, political, economic, cultural and legal; but the value is associated with a particular country, the universal teaching clashes with culture in the society concerned.

According to the author, there are two views which are equally "extreme" in dealing with the relationship between Islam and state. The first view tends to combine Islam and

the state in totality, without looking at the cultural context and background of a particular country, while the second tends to separate altogether diametrically. To see how to combine the two extreme views about Islam, the state, law, democracy and politic in order to become a creative synthesis, a deeper analysis needs to be done so that those are not to fall into confusing understandings. Islam is not just a religion which contains a set of ritual doctrines, but it is a holistic and systematic worldview.

Islam is an *ad-din*; and the term *ad-din* in the Qur'an is contained in Chapter Ali 'Imran [3]: 19 and Al-Ma'idah [5]: 3. The word *ad-din* in Indonesian is closely translated as "religion". Conceptually, the words *ad-din* and "religion" have very different connotations. The words of religion [2] which are commonly used in Indonesian come from *Sanskerta* which has a very close connotation to the traditions in Hinduism and Buddhism. The *ad-din's* words as stated in the two verses of the Qur'an mentioned above are a concept which consists of two main components governing human relations with God (vertical relations) and between human and human in society or the state. maybe even between countries and people and their environment (horizontal relationship).

Islamic law is one aspect of Islamic teachings that occupies an important position in the view of Muslims, because it is the most concrete manifestation of Islam as a religion. It is impossible to understand Islam without understanding Islamic law [3]. Considering that the Indonesian state is currently implementing an agenda of national legal reform, and Islamic law is a part or sub-system of national law, Islamic law needs to be an object of review so that the agenda for ameliorate or reform of

national law also includes the notion of renewal of Islamic law taking into account Islamic legal system factors which can be transformed into national law towards the future which is expected to make Islamic law as a 'supreme' system in the Unitary State of the Republic of Indonesia (NKRI). Thus, Islamic law as a law that lives and develops in society has its own characteristics, which are responsive, adaptive and dynamic [4]. In other words, the legal material reform agenda covers the whole system in components that include the notion of institutional reform (institutional reform), legal reform, (instrumental reform), and legal culture reform (cultural reform).

Islamic law can be transformed in the national law so that the renewal of Islamic law is absolutely accomplished by developing the principles of Islamic law without any interaction between the principles of Islamic law and development of society, the goal of realizing of Islamic law and becoming a national law is impossible [5]. Legislation of Islamic law is an Islamic modernism manifestation which is important, by the Islamic law integration with national law so the internal epistemological issues of Islamic law will break up by themselves [6].

Transforming of the principles of Islamic law into national law is fully possible. It can be seen that there are several power and possibility in the Islamic law, among other things in the terms of force:

- The character of Islamic law which is universal and flexible and has very high dynamics because it has two dimensions, namely *tsabat* (consistency) and *tathawwur* (transformation) that enable Islam to be relevant to social and temporal changes that always occur.
- As a law which originates in religion, Islamic law has a very strong binding capacity, not limited to a rule that has a humanistic profane dimension, but also has a transcendental dimension.
- Islamic law is supported by the majority of Indonesia's population, because the majority of Indonesia's population is Muslim,
- Historically and sociologically Islamic law has taken root in the practice of people's legal life.

The opportunities for Islamic law to be transformed into national law include:

- Pancasila as the source of all sources of law in Indonesia and the 1945 Constitution as the state constitution gives an important position for religion. This opens up opportunities for the development of laws that originate from religion (Islamic law),
- The development of law is directed at the growth of public legal awareness and legal awareness of the majority of Muslims who cannot be separated from Islamic law. This means that the national

law desired by the Republic of Indonesia is a law which accommodates and incorporates religious law and does not contain norms that conflict with religious law,

- The existence of *political will* from the government to develop Islamic law in the national legal system although it is still limited,
- Indonesian Muslim community has a strong desire to punish with religious law (Islamic law) according to the requirements of faith.

Starting from the national development policy in the field of law concerning legal material, legal apparatus, legal facilities and infrastructure, as well as the realization of a national legal system which originates from the Pancasila and the 1945 Constitution through the structuring of national law by strengthening the national legal framework, inventorying and adjusting elements of the order law in the context of legal renewal. The development of legal apparatus, legal facilities, infrastructure, national discipline, the greater respect and upholding of human rights for the realization of a legal culture in the context of development and renewal of national law becomes important, Legal material, apparatus and law enforcement, construction of legal facilities and infrastructure, legal culture and human rights. The drafting of an inventory of the national legal system in the adjustment of elements of the legal order in the context of legal reform is consistently concerned with diversity. The legal structure in force in Indonesia is customary law, Islamic law and Western law. The three legal systems also function as raw materials for national law development [7].

The legal development is part of national development. However, it should be noted that according to the mandate of the opening of the 1945 constitution "Law" is not just a tool, but also national development itself must be within the legal framework [8].

According to Ismail Saleh, there are three dimensions to national law development. First is the maintenance dimension, the second is the renewal dimension, and the third is the dimension of creation, which means the dimension of dynamics and creativity [9].

Starting from the three dimensions of national law development above, it can be explained that "legal excavation" and "legal development" are part of the second and third dimensions. Legal exploration and development is a necessity and at the same time is a logical consequence of being able to reform and create new laws in order to realize national law. The legal system which applies in our homeland is not only one but three, respectively according to its existence in our archipelago, such as customary law, Islamic law and Western law either coming from Europe (Continental) or from Anglo Saxson [10].

In the formation (and development) of law, including Islamic law, it is necessary to pay attention to the provisions that fulfill philosophical values with core sense

of justice and truth, sociological values in accordance with the prevailing values in society (both cultural and religious) and juridical values which comply with regulatory provisions current regulation [7].

From the development point of national law, it means renewal or the establishment of legal principles, legal principles, and "new" legal principles" [11]. Islamic law has an element or value in the development of a national legal system which has been absorbed and has transformed by one of the paradigms of developing national law. From this background, point of view, it can be explained that the focus of the problem can be the focus of the discussion including the following: How is the construction of the transformation of Islamic law into the development of the national legal system, and how the existence of Islamic law as a paradigm for the development of the national legal system.

2. RESEARCH METHOD

This study uses a socio-legal approach (*socio-legal research*). Through this approach, the legal object is positioned in a broad social context by not placing distributed materials that are isolated from culture (systems of thinking, systems of knowledge) and power relations among law makers, law enforcers, parties and the wider community. Understanding that law is limited to a set of norms that are detached from social unity will only deny legal linkages as norms from the social basis from which law was born and where law works. Through this approach, the study is carried out by describing the substance of legal norms and social reality, as well as the interrelationship between the two study objects.

By using the constructivism paradigm and the qualitative methods, this approach is intended to gain a deep understanding (*verstehen*) about the meaning behind a phenomenon (*nomena*). In a social context, the meaning is behind individual actions which encourage the realization of certain social phenomena. *Socio-legal* research that departs from the constructivism paradigm is a never-ending process of finding truth values. This research no longer divides the fields of both social and legal sciences but rather socio-legal research as an *integrated* social activity. This research aims to continuously build or reconstruct laws which can elevate human dignity. The qualitative model is chosen in addition to the information needed to be descriptive, namely information in the form of a concept description in a document and story from the informant, also wanted to obtain information from within (emic perspective) [12] [13].

3. DISCUSSION

3.1. Construction of Islamic Law Transformation in the Development of the National Legal System

The development of Islamic law was also influenced by the policy of the Dutch colonial government, which tried to hamper the entry into force of Islamic law in various ways. All policies, especially politics and law, are formed to castrate the existence of Islamic law. In the political field, for example the Netherlands carried out Christianization of politics, such as efforts to support the mission of zending and the spread of Christianity into Dutch Indies society.

As a historical fact, religion and culture can influence each other because both have values and symbols. Religion is a symbol which symbolizes the value of obedience to God. Culture also contains values and symbols so that humans can live. Religion requires a symbol system. In other words, religion requires religious culture. However, both need to be different. Religion is something that is final, universal, eternal (perennial) and does not recognize change (absolute). Meanwhile, culture is particular, relative, and temporary. Religion without culture can indeed develop as a personal religion; but without a culture, religion as a collectivity will have no place [14]. Religion and culture have two things in common: both are value systems, symbol systems, and both are easily threatened every time there is a change. Religion in the perspective of social science is a value system containing a number of conceptions about the construction of reality that plays a major role in explaining the structure of normative, social order and understanding and interpreting the world around. Meanwhile, traditional art is an expression of human creativity, work, and initiative (in certain societies) that contains values and messages of religiosity, philosophical insight, and local wisdom [15].

The enactment of Islamic law in Indonesian has experienced ups and downs along with the legal politics implemented by state power. In fact, behind it all rooted in the socio-cultural forces that interact in the process of political decision making. However, Islamic law has developed continuously, both through political infrastructure and political superstructure with the support of social and cultural forces.

Different perspectives and interpretations in the diversity of Muslims' understanding of the nature of Islamic law have implications in their application angle. M. Atho Mudzhar explains the different perspectives in the field of Islamic legal thinking which according to him are divided into four types: fiqh (Islamic jurisprudence) books, decisions of religious courts, laws and regulations in Muslim countries and religious edicts [16].

Charles J. Adams also revealed that Islamic law is the most important subject in Islamic studies because of its overall character; covering all areas of Muslim life in life. Different from the way of studying other laws, the study of

Islamic law requires a special approach, because what is included in the field of Islamic law is not only what is referred to as law in European law, but also includes other social problems outside the area said the law [17].

Transformation of Islamic law in the form of legislation (*takhrij al-ahkâm fî al-nash al-qun*) is a product of interaction between Islamic political elites (*ulama*, community leaders, religious officials and Muslim scholars) with the ruling elite (ruling elite) namely among politicians and state officials. For example, in the promulgation of the Marriage law No.1/1974, the role of the Islamic elite is quite dominant in approaching the elite at the legislative level so that RUU of marriage No.1 / 1974 can be codified [18].

The conceptual procedure of Islamic legal legislation as explained by A. Hamid S. Attamimi, is that the government and the Parliament hold power in the formation of laws. It is stated in appendix. 5 verse (1), UUD 1945, that the president holds the power to form laws with the approval of the House of Representatives. Whereas, in the explanation of appendix 5 verse (1) UUD 1945, it is stated that, "except executive power, the president together with the Council House of Representatives runs the legislative power in the country [19].

Apart from these two theories, Islamic law in the era of the Dutch East Indies still applies even in certain fields of civil law. Inheritance law for example, in the mid-1937 government, the Dutch East Indies gave authority to regulate inheritance to the District Court with Stablat 1937 No. 116, by reason of Islamic inheritance law has not been fully accepted by customary law. However, the religious court is still a court that resolves civil disputes on marriage for Muslims and based on Islamic law.

Regarding the position of Islamic law in the politics of law in Indonesia, Ismail Suny divides it into two periods: 1) the period of acceptance of Islamic law as a source of persuasion which is the source of law that people must be believed to accept; 2) the period of acceptance of Islamic law as an authoritative source is the source of law that has power. Ismail Suny's opinion is based on the formation of the Unitary State of Indonesia in which the Jakarta Charter animates UUD 1945, based on a Presidential decree dated July 5, 1959 to return to UUD 1945.

In the amendments to the 1945 Constitution, the third stage stated that as a democratic country, Indonesia upheld the people's sovereignty as mentioned in Article 1, paragraph (2), saying that sovereignty was in the hands of the people and implemented according to the Basic Law. Meanwhile, the statement as a state of law is mentioned in Article 1, verse (3), namely that the state of Indonesia is a state of law. This basic concept differs from Rousseau's social contract theory of popular sovereignty in which law is based on popular sovereignty itself. The sovereignty of the people in the context of the Indonesian state is the sovereignty of the people which is imbued and encompassed by the Godhead of the Almighty and the precepts of Pancasila.

In the context of national law, Islamic law and customary law can also be used as a source of national law. Islamic

law is still in the order of ideals (*ius constituendum*) not in the order of application as a positive law (*ius constituendum*). For ethical values and Islamic law to apply in society, ethical values and Islamic law must be contained in the form of UU.

3.2. The Existence of Islamic Law as a Paradigm for the Development of the National Law System

Islamic law is sourced from the Qur'an and Hadiths which is one of the sources of raw materials in the development of national law. The Qur'an as the main authority of reference of *mujtahid* (jurists) in establishing Islamic law, cannot be separated from the spotlight of legal observers. Noel J. Coulson [20] argues that the teachings of the Qur'an consist mostly of various broad and general propositions rather than specific legalistic formulations. The specific legal content obtained from the Qur'an is largely dependent on the interpretation chosen by the jurists to be enforced by applying pressure.

Savigny's view [21] of law additionally seems to be used to analyze Islamic law. According to Savigny, law is not just an expression consisting of a set of regulations (*judicial precedent*). Meaningfully, there is a dialogical atmosphere between the law and the social conditions which exist. The social conditions surrounding the *mujahid*' lives (jurists) have contributed in giving birth to Islamic legal thinking. The product of Islamic law which applies in Indonesia is a legal product that was born by *mujtahids* in the first centuries of Hijra (10th century AD). The social conditions existing at that time were very much different from the current social conditions in Indonesia. Social changes brought about by space and time directly affect changes in law.

In the context of legal objectives, Islamic jurists agree that the existence of Islamic law is aimed at realizing benefit for humanity (*li tahqiqi al-maslahat al-'ammah*). If the law in its implementation is not able to provide the role as its purpose, the law naturally will integrate and adapt to its environment (*tagayyur al-ahkam bi tagayyur al-amkinah wa al-azminah*). The function of this law integration, Parsons said: "*law's special functions are similarly defined in terms of these conditions and the requirements for their maintenance and extension*". In the concept of law, Islam is known by several methods of *ijtihad* in an effort to respond to social changes which occur [21].

Among law practitioners, Bismar Siregar [22] states that the obligation to carry out Islamic law does not need to be formally ordered based on the law. Once a person declared her or himself as the follower of the Prophet Muhammad, by saying the *syahadat*, then, the Islamic sharia is applied to himself. The establishment of sharia does not depend on the existence of an institution called an Islamic state. Islam as a religion and a law does not justify the so-called legal formalism because the application of law is neither by the state nor by anyone, but by oneself as an *aqidah* demand.

It is realized that the existing system when speaking of national law development is oriented towards the codification and unification of national law which leads to the formation of laws. Furthermore, when Islamic law is positioned as a theory of legal science and the source or raw material of national law, it is very likely that the law contains Islamic law, either in part or in certain cases entirely. At this point, it seems that the dichotomy between Islamic law and the other two laws is not exactly right. Meaningfully, Islamic law can become national law not only with a normative approach, but also academic and analytical.

4. CONCLUSION

Firstly, the legal system reform or legal system development is sourced from community values and external values in the legal record. The transformation of the Islamic legal system, among others, is an effort to provide improvements in a legal product in the record of the legislation. That is in the form of values which are practiced in the Holy Qur'an then codified or unified in the form of positive law. National law is currently being renewed both partially and integrally. In some areas of legal concentration or in the whole legal system, Islamic law has a strategic position, because the politics of national development law cannot be separated considering the majority of the people. Therefore, the transformation of Islamic teachings in the national legal system continues to develop with adjustments into positive law.

Secondly, Islamic law is one of the paradigms in the preparation of the national legal system and in the renewal of the national legal system. At present, in some areas of partial regulation, there are specific positive laws that specifically regulate Islamic law, such as the compilation of Islamic law. In the level of integral Islamic law has consistently been a tool for the considerations contained in a positive legal norm setting.

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