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Social

ACTUALIZATION OF ISLAMIC LAW IN MODERN LEGISLATION

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Abstract

Islamic law in the form of legislation in Indonesia is that which is legally binding on the constitution, even its binding capacity is broader. Therefore, as an organic regulation, sometimes it is not elastic to anticipate the demands of the times and change. For example, Law Number 1 of 1974 concerning Marriage. The law contains Islamic law and is binding on every citizen of the Republic of Indonesia.
Problems that occur such as in Jambi Province at this time the fiqh law which is very broad in its scope is worthy of being called "Islamic law" is marriage law, inheritance law and waqf law. Laws or provisions that are applied to administer and settle marriages, inheritance and endowments as material laws, are still diverse. Marriage and Wakaf cases are regulated in statutory law; marriage is regulated by Law No. 1 of 1974 concerning Marriage and waqf law regulated by Government Regulation No.28 of 1977; as executor of the Agrarian Basic Law of 1961. Whereas inheritance law has not been regulated by law and by itself is still guided by Jurisprudence.

Keywords: Islamic Law; Modern Legislation; Marriage and Endowments.

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1. Introduction

1.1. Background

Putting Islamic law in a proportional position, that in general Islamic law has a position similar to Western law. However, for the Indonesian people with the majority being Muslim, it should have a greater position, because it can be placed in the position of awareness of Muslims to practice it.

Laws that contain norms and rules if you want to be obeyed by various interests must be implemented in the applicable positive law and must be realized in the field. Actualization of positive law is contained in written regulations that accommodate the interests of related parties in order to maximize the benefits that will be obtained by the community. Especially for the Law,

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according to Soetandyo Wignjosoebroto legislation is a process of law formation, which is carried out by a body formed specifically for that purpose. In this case the intended agency is the legislature (DPR and Government).

Planning for drafting the Act is carried out in a National Legislation Program. PROLEGNAS is a program planning instrument for the formation of laws that are planned in a planned, integrated and systematic manner that is prepared based on certain methods and parameters and is inspired by the vision and mission of national law development. The development of national law implies the actualization of the function of law as a social engineering tool (law as a tool of social engineering), an instrument for problem solving (dispute resolution), and an instrument for regulating community behavior (social control).

Marriage and Endowments cases are regulated in statutory law; marriage is regulated by Law No. 1 of 1974 concerning Marriage and waqf law regulated by Government Regulation No.28 of 1977; as executor of the Agrarian Basic Law of 1961. Whereas inheritance law has not been regulated by law and by itself is still guided by Jurisprudence

2. Islamic Law: Marriage and Endowments

Islamic law in the form of legislation in Indonesia is that which is legally binding on the constitution, even its binding capacity is broader. Therefore, as an organic regulation, sometimes it is not elastic to anticipate the demands of the times and change. For example, Law Number 1 of 1974 concerning Marriage. The law contains Islamic law and is binding on every citizen of the Republic of Indonesia.

If viewed from the aspect of the basic formulation of the state, Islamic Law in Indonesia as formulated in the Jakarta Charter on June 22, 1945 which was agreed upon by the founding fathers that the state was based on the Godhead with the obligation to carry out Islamic law for its followers. In this case Islamic law covers all aspects of human life, regulates human relations with God, and relations between human beings.

In legal discourse in Indonesia, the words "law" and "law" are known. Although the functions of both are the same, that is, they both regulate human life in a group, but there are definitive differences in understanding. All kinds of provisions that regulate or become guidelines in social life can be called laws, whether binding or compelling or not; whether the provisions in written form or not, are determined by the state body or not, managed and resolved by the state or not, can be called law. The law is a law in a special sense. It is a set of written regulations compiled and stipulated by certain state bodies; legislative power (the House of Representatives) with the President, applies and is binding on all citizens.

In its special form, the law is usually referred to as "Law on Legislation". In the provisions in force in Indonesia, the statutory law consists of several levels, one of which is called "Law." If the word "Law" is linked to the word "Islam" of course the meaning is "Islamic Law". In the sense of Indonesian and not exactly the same as "Law" in this sense. Islamic law in terms of Indonesian is a translation and syara law that has been formulated and specified in fiqh. In the beginning it was indeed Shara law or fiqh called "Law" because it indeed regulates the behavior of mankind in the

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world and in the face of the afterlife. It is binding and obeyed by Muslims even though it is not directly a matter of state power. Then the notion of "law" developed among legal experts, especially those oriented to Western law. For them the notion of special law is understood as a regulation of human behavior in social relations that is managed and resolved by and / or through judicial or judicial authority. Thus the word "law" is only used for something related to "court or court", both as a reference to written law or unwritten law.

In the legal sense as explained above, at this time the very broad range of fiqh law that is worthy of being called "Islamic law" is marriage law, inheritance law and waqf law. Laws or provisions that are applied to administer and settle marriages, inheritance and endowments as material laws, are still diverse. Marriage and waqf cases are regulated in statutory law; marriage is regulated by Law No. 1 of 1974 concerning Marriage and waqf law regulated by Government Regulation No.28 of 1977; as the executor of the Agrarian Basic Law of 1961. While inheritance law has not been regulated by law and by itself is still guided by fiqh mawaris which has been mixed and compiled in the Compilation of Islamic Law.

Even though Law No. 1 of 1974 is a law that becomes a guideline in the settlement of Muslim marriage cases in Indonesia, but it is not an Islamic Law; he is the State Law of the Republic of Indonesia which applies to all Indonesian citizens who adhere to the five official religions in Indonesia. Likewise, Government Regulation No.28 of 1977 which regulates waqf affairs is a regulation that applies to all Indonesian citizens who are diverse in their religious followers, even though practically only Muslims are followed. Although both of these laws are formally not Islamic Law, but because the material also regulates marriages and endowments for Muslims, the Act as far as regulating the case of Muslims can be called Islamic Law.

In Law No.1 of 1974 it was stated that marital matters relating to Muslims were managed and resolved by religious court institutions while those relating to non-Muslim religious people were managed and resolved by the general court. The Religious Court is a state court institution with the same position as other state court institutions.

Law No.7 of 1989 specifically regulates the Religious Courts in Indonesia, including regulating the position, authority and events of religious courts. Pasai 49 explains that religious courts have the duty and authority to examine, decide and settle cases in the first level between people who are Muslim in the fields of: marriage, inheritance, wills and grants based on Islamic law; and endowments. Thus, even though this law is state law, it can be called Islamic law.

Another case with the Compilation of Islamic Law (KHI), is the result of a workshop held in Jakarta in 1988. The results of this workshop became a compilation plan set by the government in the form of Presidential Instruction Number 1 of 1991 on June 10, 1991. Minister of Religion through Ministerial Decree Religion No. 154 of 1991 promulgated and established Compilation as a guideline for judges in religious courts in settling marital, inheritance and endowments cases. For legal experts in Indonesia this compilation is not stated as a statutory law that applies binding because it is not included in the statutory order that applies in Indonesia. Nevertheless, all levels of religious courts in Indonesia have recognized it as a law and a guideline that must be carried out and obeyed by Muslims. So this Compilation can be called Islamic law.

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In addition to the state laws mentioned above, Law No. 17 of 1999 concerning the Implementation of Hajj and Law No.38 of 1999 was also issued, concerning the Management of Zakat. Both of these laws, although in the form of a law, specifically regulate the interests of Muslims. As a state law, he does not directly regulate the legal material; but only regulates the administration and management so that the people who carry out the worship are not harmed by certain parties. The worship material itself is like pillars, hajj terms and obstacles; so also about the provisions of Nisab, haul and people who are entitled to receive zakat, still referring to religious law, namely fiqh books.

From the description and explanation above, it can be assumed that Islamic law and its legal force in the state of the Republic of Indonesia are Pancasila and the 1945 Constitution, which are then elaborated through Law Number 1 of 1974 concerning Marriage, Law Number 7 of 1989 concerning Courts Religion, Law of the Republic of Indonesia Number 38 of 1999 concerning Management of Zakat and some Government instructions relating to Islamic law. Likewise the emergence of the Compilation of Islamic Law which became a guideline for judges in special courts (Religious Courts) in Indonesia. The matter referred to is the emission and legal norms contained in Article 29 of the 1945 Constitution. Therefore, the applicability and strength of Islamic law in the state of the Republic of Indonesia are Pancasila and Article 29 of the 1945 Constitution.

Based on these assumptions, as well as the reality that occurs in the midst of Muslims, it can be concluded that the implementation of Islamic Law is determined by the attitude of Muslims which is reflected in the attitude of the ulama in viewing the Law relating to the fiqh law that has been in effect so far. As long as the ulama have not put the fiqh together with Islamic law, then the Islamic law will not be carried out perfectly. At this time it seems that not all scholars have behaved like that. Therefore the implementation of Islamic law is still constrained.

In an effort to apply and apply Islamic law proportionally, in the prevailing legal and regulatory framework in Indonesia, the position of the MUI fatwa in a positive legal perspective is very meaningful and can even be a solution. Because, in essence the source of law can be divided into two types, namely; material and formal legal sources. The source of material law is several factors that can determine the contents of the law. Among several factors that can determine the contents of the law, namely ideal and reality factors. The ideal character is a number of fixed standards, about justice that must be obeyed by the legislators and other law-makers in carrying out their duties. Whereas reality factors are things that really live in the community and are a guide to life for the community concerned. Included in this reality factor are (1) economic structure and community needs; (2) customs and habits that are carried out repeatedly and become a permanent pattern of behavior; (3) beliefs about religion and morality; (4) various symptoms in society.

Formal legal sources are legal sources in terms of their formation, namely legal feelings or individual legal beliefs and public opinions which are determinants of the contents of the law, while formal legal sources can be divided into five, namely (1) law (statue); (2) custom and custom (custom); treaty (treaty); (4) jurisprudence (case law, judge made law); (5) the opinion of a famous legal expert (doctrine).

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In a very open situation as a consequence of the reform era and at the same time in the current crisis conditions, Islamic law or fiqh has a big role as a source of national law. The meaning of Islamic law or fiqh as a source of law here will experience very significant developments, not only in the court system that is already firm in the context of religious courts, such as so far. But also in the court system (including legal material and a system of court work in the framework of the rule of law) which is broader. Included in the context of placing fiqh as a form of legal science in the world of law, which can give the meaning that fiqh or Islamic law is a source of study as well as a source of material law.

Nor is it just simply transferring fiqh which is a product of several centuries ago, but it also does not mean that we must just throw away the results of the fuqaha 'thinking of the past. The thoughts or works of the fuqaha of the past constitute living knowledge that is very meaningful for today's thinkers. It is even not impossible if it is also a source of thought now, as a process of historical continuity in the academic tradition.

If placing jurisprudence or Islamic law in the ranks of sources of legal knowledge in general, then in operational measures or material law, fiqh can be used as a source through several paths or paths, among others, are; the first is in legislation, this includes the Basic Law, Acts / Regulations Substituting the Law (PERPU), Government Regulations, Presidential Regulations, Regional Regulations; even regulations issued by the executive, but have the power of legislation.

In this case Jurisprudence can play a role, both as a material law (legal essence) or fiqh in the context of legal ethics or morality. Need to realize that al-Ahkam al-Khamsah is basically a concept of ethics or morals, which is very easy to take part in the world of law or law philosophy. In other words, books that discuss fiqh can be positioned as rechboek, on the one hand; and its contents which are the opinions of Islamic law experts can be positioned as doctrines or opinions of legal experts. Both as rechboek and as a doctrine, fiqh or Islamic law can clearly be a source of legislative making.

Second is the source of government policy implementation that is not directly in the meaning of legislation as Government Regulation; but in the context of administrative discipline, even though it ultimately relates to legislative values. It can even enter in this sense, which is basically only a Presidential Instruction. Third is jurisprudence. This is very clear with the legal system adopted in Indonesia that each judge can be the source of the law itself, especially when the written law is realized.

The expression that "the judge may not refuse to decide the case with legal origin does not yet exist". Judges can do analogies and interpretations of the law, as is commonly discussed in the science of ushul fiqh and fiqh. Formal legal fiqh can be used as a basis and consideration by judges to give legal decisions.

The fourth is a source for law enforcement, police, prosecutors, and lawyers. If we observe the course of law in Indonesia it seems that it will lead to arbitration. That is, a Judge will issue a legal decision not completely separated from the process carried out by those who litigate, which in this case involves directly lawyers, prosecutors, witnesses, and others. Fifth is the source of legal

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science or legal philosophy (jurisprudence or philosophy of law). With the direction of national legal development policies.

Sixth is the legal source of community cultural values and at the same time as a customary law or living law. This is usually referred to as civilizing Islamic values or cultural Islam. In the discussion of ushul fiqh, the term `urf (habit) and` adah (adat) is known, so that there is a rule of al`adah muhakkamah (adat can be used as a basis for legal provisions).

Based on the explanation above, it is time to put Islamic law in a proportional position, that in general Islamic law has the same position as Western law. However, for the Indonesian people with the majority being Muslim, it should have a greater position, because it can be placed in the position of awareness of Muslims to practice it.

Thus, the relationship between positive law and Islamic law cannot be separated. Therefore, related to the role of the MUI in establishing positive law in Indonesia began to show bright spots. This means that all this time the MUI has been involved in voicing its products to the Government or the House of Representatives.

3. Research Methodology

This research is a field research that uses qualitative research methods or approaches. The focus of attention is centered on the issue of Actualization of Islamic law in modern legislation. The quality method applied in this study is based on rational considerations, that the data in this study are qualitative in nature and not appropriate to the quantitative method. Through a qualitative approach, it is expected that all images of actuality, reality and perceptions of the research objectives can be lifted clearly. In accordance with what Lexy Moleong said that qualitative methods are very appropriate to use in dealing with the reality of events and are more able to sharpen various existing value patterns.

4. Analysis of Research Results

Ideologically to fill the legal vacuum experienced by Muslims due to modernization, it is the duty of scholars to carry out ijtihad in response to various problems that arise in people's lives. Ulama in the face of society, always get and face new problems that have not existed in the past, have not been discussed, have not been written in books that have developed in the community and have been studied. The scholars must always use the power of ijtihad and use the istinbath method to determine the laws of all growing problems and which must grow as a necessity for the living community.

This opinion is in line with the ideals of the establishment of National Law, that the big problem faced today is whether the applicable law in this country has been in harmony with the souls of its people who happen to be 90% Muslim. On this basis, it is very feasible and appropriate if the MUI struggles to fight for its fatwas to be part of positive law. Thus, the presence of fatwas by competent Islamic religious institutions (MUI) is a necessity in today's modern era to break the deadlock in the perspective of Islamic law in Indonesia.

ISSN- 2350-0530(O), ISSN- 2394-3629(P)
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The importance of the role of the MUI through its fatwa in participating in shaping positive law in Indonesia, but in reality, according to Muhammad Atho Mudzhar, the development of the role of fatwas is not the same as the development of the role of the MUI in general. When the MUI is increasingly influential in society, especially in the Muslim community and in its relations with the government and other Islamic organizations, the role of fatwas decreases, especially since the enactment of the regulation limiting the issuance of fatwas in 1986. This means that in the the practice of the MUI gradually devoted the role and capabilities of its own fatwas, and preferred to look for other ways that were directly more political and pragmatic, including "advice letters".

In other words, the role of the MUI fatwas has shifted from the first position to the second position. Coupled with the limited number of progressive elements in the body of the MUI, this matter will eventually not support the progress of Islamic legal thinking in this country. The MUI should use the authority to make fatwas to produce more fatwas on various issues, and strengthen their arguments in a consistent manner according to the principles of the methodology adopted. The transition of the role of the fatwa seems to be in line with the change in leadership of the MUI. Under Hamka's leadership, the MUI has been more active in issuing fatwas than under Syukri Ghozali.

Under Hasan Basri, the MUI became increasingly reluctant to issue a fatwa, even though it was very necessary. The long-awaited fatwa regarding Porkas lottery never materialized. Thus, differences in the personality of the MUI leadership are partly and partly the cause of the turnaround. However, there seems to be another factor that is strong in determining the transition, namely the existing social mechanism. The greater the general acceptance of the MUI by the community has been obtained in exchange for the reduced role of the fatwa.

The condition of a fatwa famine from the MUI as described by Atho Mudzhar, will certainly have an impact on the development of Islamic law. The effect will be a chain of confusion in the midst of Muslim communities if there is a problem that has no legal basis. Finally, the position of the MUI fatwa in a positive legal perspective does not function.

The changes in the 1945 Constitution of the Republic of Indonesia as much as 4 times had a profound impact on the constitutional system of the Unitary Republic of Indonesia. This change has specifically placed the position of the House of Representatives (DPR) as the holder of the power to form a law which was previously in the hands of the President. The change in the paradigm of the holders of power to form a law basically reinforces the position of the DPR as a representative body of the people, even though these changes did not erase the existence of the President to contribute to the formulation of the Law. Changes in the state constitutional system of the Republic of Indonesia have the consequence that the DPR is more proactive in the formation of the Act, even though in the process it still involves the President through a discussion mechanism to get mutual agreement.

On the basis of this significant power, the DPR has a legislative function, namely the function of forming Laws discussed with the President for mutual agreement, as stated in article 69 letter a of Law Number 27 of 2009 concerning the Structure and Position of the People's Consultative Assembly, House of Representatives People, Regional Representative Council and Regional People's Representative Council. The formation of the Act, both from the DPR and the

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Government, rests on the National Legislation Program. Law Number 12 of 2011 concerning the Establishment of Legislation Regulations defines PROLEGNAS as a planning instrument for the formation of laws that are planned in a planned, integrated and systematic manner.

The main focus of National Legislation Program is certainly also related to one element of the law, namely the material / legal substance in the development of a legal system that includes four legal elements or sub-systems which are interrelated, namely: material / legal substance; legal facilities or institutions; legal apparatus; and culture or community legal awareness.

The difference between the definition of National Legislation Program as an instrument and substance is important to be stated. This is because so far the understanding of the National Legislation Program in general tends to be in terms of material / substance. Thus it is not surprising that there are some people who think that the National Legislation Program is actually not important because it is only a "wish list" submitted by the Ministry / LPNK, even though it really must be put forward as an instrument / mechanism that is part of the process of establishing legislation - invitation. This is clearly stated in Article 16 of Law Number 12 t of 2011 that planning for drafting the Act is carried out in the National Legislation Program.

Provisions regarding National Legislation Program are also stipulated in Presidential Regulation Number 68 of 2005 concerning Procedures for Preparing Draft Laws, Draft Government Regulation in Lieu of Laws, and Draft Presidential Regulation. Broadly speaking, it was explained that in preparing the Draft Law (RUU) that came from the Government, the inter-ministerial and initiator committee could prepare the Academic Script first. In inter-ministerial meetings, proponents can invite experts, both from universities and other parties. After the bill was discussed, the initiator was given the opportunity to hold a socialization to the community as a manifestation of the principle of openness of input on the substance of the bill.

The procedure in practice has not been fully implemented, either by the Government or by the DPR. This is what resulted in the drafting of the Bill not being optimal. Many of the titles of the bills included in the Prolegnas list are only just given the title, without being accompanied by Academic Scripts, even the substance of the Bill has not been prepared. The Bill's proponent often cannot answer the reason why a bill needs to be established so that many people think that the National Legislation Program is only a collection of bill titles without clear standards, both from the Government and the House of Representatives in determining the bill that is the top priority. The list of bills that have been set in the 2015 Priority Prolegnas list is 37 (thirty seven), 26 of which are proposals from the DPR. While the proposal from the Government is 10 bills. And the proposal from the DPD is one bill. To compile a National Legislation Program that contains a justification of the needs of a bill in a real way and not only contains the draft bill, a study must be included which contains a summary of these needs based on several indicators.

5. Conclusion

Islamic law has the same position as Western law. However, for the Indonesian people with the majority being Muslim, it should have a greater position, because it can be placed in the position of awareness of Muslims to practice it. Islamic law in the form of legislation in Indonesia is that which is legally binding on the constitution, even its binding capacity is broader. Therefore, as an

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