

From Internalization To Formalization; Islamic Law Development in Indonesia

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Abstract

Islamic law in Indonesia is growing in the community and become part of the national legal system. In Indonesian society, Islamic law is internalized through the education system, both formal and informal. Although Indonesia does not formally enact Islamic law in its constitution, substantially they use Islamic law principles and values in its legislations. The internalization of Islamic law into the national legal system in Indonesia arose from a political movement, called the formalization of Islamic law. Meanwhile, an essential event in the development of Islamic law in Indonesia is the phenomenon of eclecticism, namely the rivalry of two rules in society between Islamic law and national law made by the government. Indonesian people prefer Islamic law over national law.

Keywords: *Islamic law; formalization; eclecticism, Indonesian laws.*

Preliminary

Before the Western legal system was applied, there were two legal systems existed in Indonesian society, namely customary law and Islamic law (Alfitri, 2015). Both of it work in harmony in the community. Customary law and Islamic law support each other, as we can say that the customary law is Islamic law that has been internalized and acculturated in a society (Suntana, 2014).

In reality, there is no rivalry between Islamic law and customary law; however, in theory, both of them was fall in a piercing competition (Rosyada, 1996). This concept arose as an attempt of two Dutch scientists,

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Cornelis Van Vollenhoven and SnouckHurgronje, who positioned Islamic law and customary law on the opposite side. Both scientists made a theory that emphasizes competition between Islamic law and customary laws in Indonesian society.

At this moment, Islamic law becomes part of Indonesian law system and as a social phenomenon in society. As a social phenomenon, Islamic law has two dimensions, namely the maintenance and development dimensions. The maintenance dimension is directed to maintain Islamic law sustainability, while the development dimension is directed to the utilization of Islamic law as an added value for the community.

Islamic law in Indonesia is both a product and a process. As a product, Islamic law is the works of legal experts that have been existed and survived from one generation to the next. Islamic law in Indonesia is quite old, as old as the presence of Islam in the archipelago. As a product, Islamic law contains maintenance dimension. Meanwhile, as a process, Islamic law covers the process of law finding and formulation, so it contains a development dimension as well, both academic and practical development (Ismatullah, 2012).

Method

The Islamic law development is a continuous and everlasting process. It is an effort of all elements of the society in planning, explore, understand, formulate, institutionalize and enforce all of the inherent materials (Bisri, 1997). This development arose in two forms, namely internalization and formalization.

This study used descriptive analysis bynarrating the development process of Islamic law in Indonesia from internalization to formalization, as well as the phenomenon of eclecticism, with a socio-historical approach. This method was chosen because the data varietyin this article were qualitative data which can be observed and recorded so that these methods and approaches more easily explained it. The data referred to in this article is historical evidence of the development of Islamic law in Indonesia in the form of observable information.

Internalization

The maintenance of Islamic law in Indonesia comes in the form of internalization in society. Internalization is an effort to convey Islamic law by one generation to another through teaching, both formal and informal, and made the conviction/faith and awareness manifests in their behavior. This internalization is performed by the people either individually or group through engraving values, materials, and rules of Islamic law. This internalization is more spontaneous; based on the awareness and willingness of society, driven by a sense of responsibility and attachment to the religion (Horak, 2017). This maintenance in form of internalization is done by the people in some places such as houses, mosques, *majelistaklim* madrasas, schools, boarding schools, and universities. Internalization takes the form of teaching and indoctrination.

In general, the schools of Islamic law chosen to be internalized in Indonesian society are the teachings and doctrines of the Shāfi'ī's school, even though other schools of law are taught, but only a simple introduction. The internalization of Shāfi'ī's school was more dominant than other schools because Indonesia was an area that was once controlled by Yemeni Arabs who were members of the Ottoman Turkish military expedition to the Nusantara region.

The internalization of the Shāfi'ī's school is carried out through the teaching of the classical book (*turāth islāmiyyah*), known as the yellow book in Indonesian Muslim communities. The mention of the yellow book seems to be related to the color of the paper used in printing the classic books. In general, classic books in Indonesia are printed using yellow paper. Also, the classic book is known in Indonesia as the 'bare book', because the Arabic writing on these books does not have diacritics (*ḥarakat*) as punctuation. Internalization of Islamic law in Indonesian society focuses more on ritual matters, such as the law of prayer, fasting, pilgrimage, and other ritual matters.

Meanwhile, economic rules (*mu'āmalah*), criminal law (*jināyah*), and state law (*siyāsa*) are less internalized in Muslim communities in Indonesia than the rituals. Internalization in the field experienced scarcity in Indonesian society due to several factors. Among these are political factors, where the Indonesian government during the Old and New Order periods was

suspicious of the Islamic State movement, both in the form of communal movements and in the form of thought.

Internalization of law that can be considered successful in Indonesian society is in the fields of family law, marriage and inheritance, of course within the framework of the Shāfi'ī's school of thought. The majority of Indonesian Muslim communities follow the rules of Islamic marriage law in marital institutions. This is evident in the marriage contract activities that meet all the provisions of marriage in the Shāfi'ī's school.

In the field of inheritance, Indonesian Muslim communities make the provisions of Islamic law their guide in the distribution of inheritance. The heir quota provisions follow the provisions stipulated in Islamic law, including in the case of the heir provisions that are entitled to inheritance.

However, in the case of inheritance, there is disobedience of some Muslim communities to the provision of inheritance quota differences based on sex. Islamic law governs different inheritance quotas between men and women, Qur'ān, 4:11. Many Indonesian Muslim communities want the inheritance quota for men and women to be equalized.

There is a practice of deviation of the Indonesian Muslim community in implementing the different provisions of the heir quota based on the sexes governed by Islamic law. They believe in the truth of the rule of the Islamic law that distinguishes inheritance quotas based on gender, but they outsmart it through a grant system. After the distribution process of inheritance is based on Islamic quota, male heirs give some part of their rights to female heirs. In this way, they believe that the provisions of Islamic inheritance are implemented, but the equality aspect in the distribution of inheritance quota is fulfilled.

There is debate among Islamic legal experts in Indonesia about the different inheritance quotas. Some Islamic law experts are of the view that inheritance quotas do not need to be differentiated between men and women, even though the Koran has arranged differently. The views of these experts are based on the thinking of classical Islamic jurists who are of the view that public benefit must take precedence over the Shari'a text, such as Najm Al-Dīn Al-Ṭūfī who prioritizes the benefit over the Shari'ah text when there is a conflict between the two, arguing that the Shari'a sent down by God for the benefit of humans (Al-Ṭūfī, 1993).

The formalization

The next form of Islamic law development is the formalization, which makes Islamic law as part of legislations substances/matters. It is conducted through political efforts in the legislative process. This formalization is a response to the needs of the community in the form of constitution. Through the formalization, Islamic law not only lives in the community, but it also turns into a positive law imposed by the state.

Also, through this formalization, Islamic law needs to compromise other existing legal system in Indonesia. As a legal substance, Islamic law collaborates with customary (*‘ādah*) law and Western law to formulate acts/laws that fit the real needs of the society.

Formalization opportunities become wider since political reform in 1998. The movement to make Islamic law exists in the national legal system becomes more extensive and massive. Meanwhile, in the New Order and Old Order, Islamic Law development is hampered, because the relationship between Islam and the state tends to conflict.

The progress of formalizing Islamic law in Indonesia occurred during the Reformation Order. After the New Order was ousted, the aspirations of the formalization of Islamic law massively emerged because democracy was wide open. Freedom of expression and opinion was used by Islamist groups in Indonesia to include Islamic law as material for the formulation of laws in the legislative process in the House of Representatives. Also, the aspirations of formalization found a wide-open road through several succeeded Islamic parties in Indonesian parliament.

The formalization of Islamic law in Indonesia produces several laws whose source of legal material is taken from Islamic law (Ma’u, 2017), namely laws on marriage, sharia banking, organizing hajj, zakat management, waqf, sharia securities (*suqūq*), prohibitions on pornography and porno-action, and the guarantee of halal products. The success of the formalization was accompanied by a quite crucial political process in parliament. Opinions occurred among parliamentarians which resulted in the voting process and a walkout in the enactment of some of these laws.

The formalization of Islamic law became a debate among Indonesian Muslims. They are divided into two groups, namely the symbolistic group

and the substantial group. The symbolic group believes that the formalization of Islamic law in the state is a religious obligation and must be done symbolically and technically. Meanwhile, the substantial group believes that the formalization of Islamic law does not have to be technical, but rather substantively, it does not have to be an Islamic symbol but rather through the application of universal values.

The symbolic group has the view that the formalization of Islamic law is the application of legal materials contained in the books of fiqh. According to symbolic groups, fiqh must be chosen as a binding requirement for all people who are Muslim. Meanwhile, the substantialist group believes that fiqh is a product of a thought that is limited by a specific space, time, and culture at the time of its composition. Thus, the application of norms in fiqh is not an obligation but merely a choice of the many norms that can be chosen, provided that they do not conflict with the universal values of Islam.

The formalization of Islamic law in Indonesia does not only occur at the level of the central government through the making of laws but also occurs in regional governments through the making of regional regulations that are loaded with Islamic norms. These regional regulations are better known as *Perda Syariah* (Sharia Regulations) (Suntana, 2014).

Politically, the formalization of Islamic law in Indonesia, both in the central and regional governments, is sometimes not based on an urgent need for the formalization of Islamic law, but because of the political images and interests of politicians. In fact, in certain regions, politicians make the issue of formalizing Islamic law a campaign material to win public sympathy.

The issue of formalizing Islamic law has become increasingly strong among Muslim communities as the phenomenon of identity politics emerges in Indonesia. Democracy opened wide by the reform process in Indonesia fosters identity politics (Fuad, 2014), which was previously buried in the grip of an authoritarian regime. Symbolic groups use democracy as a way to pass the target of formalizing Islamic law, even though in principle, they reject democracy because it is considered contrary to their Islamic doctrine.

The Phenomenon of Eclecticism

The phenomenon of eclecticism is seen in the development of Islamic law in Indonesia, namely the election between two rules by the Muslim community. They experience a clash between choosing fiqh or law. Indonesian Muslim society is guided by two legal systems, namely fiqh and law (Azizy, 2002). As a result, there is a problem of submission to rules among Muslim communities. Indonesian Muslim communities are more obedient to the fiqh than the rules made by the state, as reflected, for example, in terms of marriage practices. The Indonesian government regulates through Law Number 1 of 1974 concerning Marriage that every marriage must be registered through a marriage registrar. However, in practice, many Indonesian Muslim societies carry out unregistered marriages by the state and they believe to be legal marriages because the fiqh of marriage in Islam does not prohibit it.

Another case is related to the age of marriage, which is regulated officially by the state. The age requirement for marriage for a woman as regulated by law is not less than 19 years. Meanwhile, fiqh does not set marital age limits as a legal condition of marriage. Many people who hold the rules of fiqh, so that many of them are carrying out underage marriages that are governed by the laws to get married.

The problem of eclecticism or the race of Islamic law and laws is based on the existence of fiqh that first developed in Indonesian Muslim society compared to the law. Fiqh in Indonesia once governed Muslim communities before the birth of the Republic of Indonesia, namely when Islamic empires developed in Indonesia. The law enforced by the rulers of the Islamic kingdom is Islamic law in the fiqh version.

In the perspective of global politics, the phenomenon of legal eclecticism arose in Indonesia due to the race of two forces that expanded the colonies, namely Arab and European powers (Azra, 2002). Both of these forces entered into Indonesian territory by race and brought their respective legal systems that had developed in their home countries. The legal system that they carry is applied in the areas under their control. When the Dutch colonial controlled Indonesia, the law used was the French Penal Code which was enforced by the Dutch Government by adhering to the principle of concordat (Solihin, 2008).

The impact of the phenomenon of eclecticism to date has been reflected in the aspirations of some Indonesian Muslim communities who want Islamic law to become the dominant legal system in the national legal system. They believe that the choice of Islamic law is the best, because the law is believed to be born of a religion that is free from human interests. The law made by the state is believed by them not to represent the values of religious law, so it is not an option. They prefer fiqh as a legal system that is believed to represent the law of God.

Eclecticism is a unique phenomenon that struck Indonesia as a former colony in the Southeast Asian region. This phenomenon is due to Indonesia not explicitly choosing one of the developing legal systems to become national law. This option is different from some former colonies in other Southeast Asian regions, such as Malaysia and Brunei, which chose the Islamic legal system as their national law. Until now, the Indonesian government applies an open legal system, which receives national legal material from all legal systems that develop in society as long as it does not conflict with Pancasila and the 1945 Constitution.

The legal system that lives and develops in Indonesia is Islamic law, customary law and Dutch colonial law. Of the three legal systems, Indonesia's domestic legal system takes material for the preparation of its statutory regulations in the form of unification, namely uniformity of regulations in one national legal system.

Although there are a variety of legal systems that live and develop in society, the Indonesian government does not adhere to a plurality of laws, especially in the criminal field. The Indonesian government codified the law, which united the law in a written regulation in the form of a law. However, for certain civil cases, the Indonesian government gives people autonomy to apply the law they believe in, such as in inheritance law. Also, the judiciary is given authority by law to interpret justice based on rules that develop in society, such as religious law and customary law. When the available law cannot achieve justice, law enforcers are given the freedom to interpret it from the legal system that develops in the community or other sources that can be used to enforce justice in the judicial process.

Discussion

Formalization of Islamic law in Indonesia was born out of political

movements, in addition to internalization process which born from social processes. When Islamic law knowledge has been internalized in both person and society, there is an urge to formalize the values in legislation form. The formalization is not merely due to the processes and political interests but also born out of the faith that internalized in the individual member of Muslim communities after they experience the internalization process. Through this legal doctrine, a desire emerges to make this belief becomes the rule for every aspect of their life.

In the theory of submission and choice of law, the community's choice of a particular legal substance or system encourages them to obey the law of their choice. Morally, they will be responsible for applying and obeying the desirable rules. When Islamic law is demanded by a society to be applied in their legal system, they will inevitably pay attention to the rules and norms of the chosen law. With accordance to the stated above, the demand of Islamic law formalization by society should be seen in terms of value-in-use, where it should be useful to subdue them on their legal options and practices.

Results

Although Indonesia is not a Sharia-based country, Islamic law evolves and becomes part of the national legal system, where part of its substance is internalized in the existing legislation. The accomplishment of Islamic law to become part of the national legal system cannot be separated from the two forms of development that occurred in the Indonesian Muslim community, namely internalization and formalization. Internalization of Islamic law in Indonesia society occurs through social processes includes the process of education in the community, both in the formal and informal education, as well in family.

The internalization process of Islamic law principles can be seen in the formal education organized by the government or private institution, from primary to the tertiary educational institution. Meanwhile, in non-formal education, especially Islamic schools and Islamic boarding schools, this internalization process is massively occurring. In these institutions, Islamic law becomes the core of curricula.

The Islamic law internalization which occurred in the formal and non-formal education has been amplifying the driving factors of the political

movement to formalize Islamic law into the national legal system in Indonesia. In this case, a connection occurs between the process of Islamic law internalization and the demands to formalize the principles into the domestic legal system.

Conclusion

Internalization is part of Islamic law development in Indonesia through social processes (i.e., educational system), both formal and informal. Furthermore, formalization of the Islamic law development is implemented through political movement, voiced by the people of Indonesia who experienced internalization beforehand.

Internalization and formalization have a close relationship in the process of developing Islamic law. Formalization was born from the process of internalizing Islamic law in society. Muslims who have experienced internalization from the learning process of Islamic law wish that Islamic law is not carried out individually but must be institutionalized by the state. The state is demanded by them to be involved in implementing Islamic law in society.

Internalized Muslims are asking for the formalization of Islamic law to occur comprehensively in various fields of law, namely criminal, civil, and state law. However, the process of formalizing Islamic law in Indonesia only occurs in the area of civil law, not in the area of criminal law and state law. Indonesian criminal law still uses the Dutch colonial legal system while the state administration law uses civil legal procedures through the legislation of the House of Representatives. Islamic civil law has become a current law in society and gets political support, while the criminal law and Islamic state administration become inactive law. The formalization of Islamic law does not occur in criminal law and state administration, because the two areas of law are public arrangements that cannot be based on only one faith, because of the plurality of Indonesian society. The two laws must be formulated as an impersonal rule because they regulate the society without limitation of belief. It is different from civil law which can be based on one faith because civil law involves personal arrangements.

Endnotes & References

¹ *Majelistaklim* is a recitation activity carried out by the Muslim community on a regular place at a certain time by taking certain days. Usually, the place of the activity is carried out in the mosque. The day that is often used for recitation is Friday and the recitation is dominated by women.

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