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Consultation Urgency and Counseling as Islamic Legal Strategy in Legal Positivisation in Indonesia

Muhammad Shohibul Itmam
IAIN Kudus, Jawa Tengah, Indonesia

shohibulitmam@iainkudus.ac.id

Abstract

Islamic law in the context of fiqh positivization needs certain strategies. consultation and counseling can be a strategy in islamic law positivisation. various strategies and explanations provide a special pattern in islamic legal thinking in indonesia. this writing discusses consultation and counseling as an islamic legal strategy leading to legal positivity in indonesia. with an elaborative approach between normative law and empirical law this writing concludes that islamic law is one part of the raw materials of national law that can be managed pluralistically with other laws that grow in indonesia. the plurality of indonesian law which is an empirical constitution can bring with islamic law through professional consultation and consequences. The practical strategy is uniting perceptions which are the substance of islamic teachings related to the meaning of sharia and fiqh in the values of universality of humanity such as the substance of justice, honesty, equality of balance and liking. with the strategy such islamic law can be a solution for national law at the secondary of islamic laws can move to color the development of national law into positive law.

Keyword: Counseling, Islamic Law, Positivation, National Law

Introduction

The discourse around the position and strategy of positivisation of Islamic law in Indonesia has long been in existence even since before I saw independence. The debate about the existence of seven words on the first precept of Pancasila, for example, contained in the Jakarta Charter which ended in compromise on behalf

of national unity and unity became historical evidence that positivisional discourse persisted and would continue to exist along with the dynamics of state law and positive Indonesian law. This is due to the great potential for the adoption of Islamic law in Indonesia, given that the majority of Indonesia's population, which is actually Muslim, is supported by the massive and permissive nature of pluralist communities towards efforts to reform Islamic law in Indonesia nationally (Itmam, 2015).

Questioning regarding the implementation of Islamic law in the context of its position and strategy is almost certainly always starting from the discourse around shariah and fiqh, because these two terms are the core of Islamic law itself, so discussing it is a necessity if you want to understand Islamic law. Islam teaches a complete law in managing complex life so that Islamic law develops its understanding between shariah and fiqh (Itmam, 2015). Explanation of Islamic law, shariah and fiqh has actually been given to many experts and has been a conversation for a long time, but the degree of flexibility of this term to be used in different time spaces has made it an interesting term to be discussed. Because it examines and discusses Islamic law, sharia and fiqh primarily in the context of the position and role of its strategy in contributing to increasing the space for the movement of Islamic legal positivisation in Indonesia (Wahid, 2014).

Research Methods

This writing uses literature or library research, which is done through collecting and tracing both primary data related to the transformation of Islamic law into positive law through consultation and counseling as well as secondary ones, related to references supporting consultations and counseling in Islamic law then proceed with in-depth critical analysis with relevant library materials. The approach used is a normative or doctrinal legal approach.

Discussion

Islamic Law, Between Shariah and Fiqh

An Islamic law scientist, Yahya ibn al-Laithi (W. 234 H) said that the sanctions that must be taken for an Andalusian emir who is in contact with one of his wives during the day of Ramadan is fasting two months in a row and may not

choose to free the servant or feed sixty poor people, because the two sanctions are too light for him (Mubarak, 2000).

The narrative of the problem and the story can illustrate how Islamic law can be applied in different forms depending on the space of time, when and where it is used in solving legal problems. Islamic law in western studies is often referred to as the Islamic law, which can be interpreted as shari'ah or even fiqh, but within a certain frame of time these three terms can also have different meanings.

Taher Mahmood saids, "In those Arabic countries where French remains the second language the expressions 'statut personnel and code du la famille' are in official use. And in the English-speaking Islamic countries of South Asia the term "Muslim personal law" applicable to the laws of marriage, divorce, family relations, successions, wills, gift, pre-empation and waqfs-is widely prevalent. Interchangeably this law is also described as "Islamic law" "Muslim law", "Shari'ah", or "Shari'at". All the expression are in use also in the Muslim countries of South East Asia (Mahmood, 1987).

Then in another discussion Taher Mahmood also mentioned, "As is well known, Islamic law has been known through its various versions called the madhahib "schools of law". Among the Sunni Muslims there have been the Hanafi, the Shafi'i, the Maliki and the Hanbali schools of law (Mahmood, 1987). It is clear from the description above that Taher Mahmood wants to equate between Islamic law and shariat and shools of law or madhahib which are represented by Hanafi, Shafi'i, Maliki, and Hanbali as understood by the four madhab representations of fiqh struggle discourse on the time.

In this definition Islamic law is once again equated with Shari'a. Shariat himself in lughawy means the road to a place of irrigation or a road that is originated from, or a place where water is in the river (Syarifuddin, 1999). Whereas according to the terms namely the teachings and rules originating from the Qur'an and as-Sunnah. In the same sense Jaih Mubarok cites the opinion of Muhammad Ismail (1999) asserting that:

ما وضعه الله لعبيده في مجالات الإيمان والأفعال والأخلاق

What has been set by God for his servants both in the fields of faith, deeds and morals. While Hasbi Ash Shidiqy quoted Syaltut's opinion as giving a shariat meaning to laws and rules that Allah established for his servants to follow in

relation to Allah and human relations with each other (Ash-Shiddieqy, 1975). Thus, what is meant by shariat is a regulation that has been established (revealed) by Allah to the Prophet Muhammad for human beings which includes three fields, namely beliefs, deeds, and morals (Mubarok, 1999). In contrast to the above understanding, for some orientalists the Shariat is nothing more than a product of reason that experiences gradual dimensions of development like thought in general. It was Ignaz Goldziher, with his development theory, who wrote many times at length that Islamic law was undergoing development (Entwicklung: development) and expansion (Entfaltung: Unfolding) in the sense that it was not immediately mature, complete or orderly from the beginning, but through a long process from the period of formation, birth (genesis), growth (growth), maturation (ossification) and the end of decline (decline) (Mubarok, 2009). All of that is said to have occurred due to the demands of the times and changes in society from time to time, "…nach Massgabe des öffentlichen Bedürfnisses die gesetzliche Entwicklung des Islams gleich nach dem Tode des Propheten ihren Anfang nimmt."

The theory that accompanied this historical approach became "harmonious faith" orientalism which was bitten strongly by contemporary commentators and later - Allois Sprenger, David Samuel Margoliouth, Duncan B. Macdonald, and E. Graf. The next theory is 'loan theory' which is also the principle of historical research methods. This theory presupposes that religion - as well as knowledge, skills and art - is the result of human cultivation and inventions. He does not emerge from the blue sky, but comes from associations between members of society, people or certain nations with other nations. So Islam and its teachings are treated as human creation (not divine revelation) (Inpasonline, 2016). Terminologically, fiqh is a scientific discipline that focuses on shara 'laws which are practically derivative (istinbat) from detailed arguments (Tamrin, 2015). So fiqh is understood as the connotation of hermeneutical meaning, besides having social meaning and meaning in the meaning of religious law. In addition, with the influence of the metaphysical presuppositions of Islamic theology (kalam), fiqh then distinguishes between the understanding and interpretation to protect the authenticity and perfection of revelation. So fiqh is more directed at understanding the meaning of the text with bayaniyah rules, and not on interpretations that are functional for human life. In short, fiqh is a window in seeing social phenomena in an Islamic perspective (Itmam, 2015).

Fiqh stands alone but does not come out and remain in the realm of shariah and when carrying out its functions as an eyewear in seeing social phenomena, it functions operatively by considering the social facts around it. It means borrowing an explanation from Shohibul Itmam, shariat applies eternally while fiqh is very related to space and time. Thus, Islamic law in Indonesia can be understood as a law originating from the teachings of Shariat Islam, namely the Qur'an and al-Sunnah which are a combination of fiqh and shariat (Itmam, 2015).

This theory of course criticizes the opinions of Orientalists. For Alfred von Kremer, I. Goldziher, G. Bergsträsser, Joseph Schacht, G.-H. Bousquet, Judith R. Wegner, Patricia Crone, Norman Calder, Harald Motzki, Christopher Melchert, and Wael B. Hallaq, all these Orientalists are essentially a voice that fiqh and ushul fiqh as a new building of science emerged in the second and third centuries of the Hijri , about one hundred to two hundred years after the death of Prophet Muhammad SAW. Still according to them, fiqh originated from the practice of the community which is still preserved for generations aliasliving traditions - the term Schacht - which was later written and discussed by a group of scholars until gradually it was composed and formed into a scientific discipline. The hadith and the sanad are created as a means of justifying a particular action or opinion in the polemic between schools. Imam As-Syafi'i is considered to have meritorious service for the ushul fiqh but has also been accused of being a key to the door of ijtihad and the cause of the stagnation of fiqh as Schacht and his followers believe.

Shari'at Islam is an Islamic law that applies forever. While fiqh is the concrete formulation of Islamic syari'at to be applied to a particular case somewhere and at a time. Both can be distinguished but cannot be separated (Makrifah, 2016).

If later this understanding is used to read the story of the king of Andalusia above, then the provision that sanctions for people who have conjugal relations during the day of Ramadan according to Shariat can choose one option, fasting for two consecutive months, freeing slaves, or feeding 60 poor people. But that there are certain considerations of social facts which therefore the last two options were not applied to Andalusian amirs, this was merely the result of ijtihad fiqh. Fiqh is also identified as one of the dimensions of Islamic law, namely the product of jurisprudential reasoning towards shariah, which is empirically used as applied law by Muslims in various regions. Islamic law has a dual function, namely shariah function and fiqh function. Shariah is an institutional function

that is commanded by God to be fully obeyed, or the essence of God's guidance for individuals in regulating relations with God, fellow Muslims, fellow humans, and with all beings in this world. While fiqh is a product of human thought. Fiqh is a human effort which intellectually tries to interpret the application of Shari'ah principles systematically (Bisri, 2004)

Position of Islamic Law in the Legal Positivisation

Context Positivisation of Islamic law can be given an understanding as an effort to make Islamic law a positive law in Indonesia. Positivisation is an effort to renew national law by arranging a grand design, placing a variety of values that grow in Indonesia in accordance with the demands of national law development and Islamic legal values as religious laws embraced by the Indonesian population (Itmam, 2015). Shariat himself, actually aims for the benefit of human life in the concept of Islamic teachings summarized in five purposes of Religion or commonly called al-maqasid al-khamsah or maqasid al-shariah, namely maintaining religion, keeping souls, guarding reason, maintaining nasab, and preserving property . So that the spirit of positivation is not only focused on our interests as a nation but also intersects our interests as servants of God who have an obligation to uphold religion by fighting for the five religious goals in question. There are several historical and social reasons that can at least provide space for efforts to renew the position of Islamic law in Indonesia: First, that the Indonesian people have socio-cultural roots that tend to be receptive and permissive to the culture from the outside. Historical facts about the entry of Islam in the homeland and the development of values both east and west from the past until now are undeniable evidence of the receptive and permissive attitudes of the people.

Second, that there is a growing awareness among the legal community that the current law in Indonesia, according to Arifin, is the law resulting from the politicization of Dutch law with the engineering of scientific law through the theory of Recepcio in Complexu. Thus it is acceptable that positivisation of Islamic law as a form of embodiment of law is enforced according to national legal awareness and the condition of society that requires reformulation of national law in accordance with the conditions and characteristics of a pluralistic Indonesian diversity through state legislation with relevant stake holders. Third, the population of Indonesia, which is largely Muslim, is also a great potential for the positivist efforts of Islamic law. Empirical reality has proven that, although not

without challenges, the birth of 'Islamic-style' regulations such as the Marriage Law, Zakat Law, Islamic Law and so forth have received tremendous acceptance from the public.

Shariat and fiqh as representations of Islamic law with its flexibility towards the reality of space and time are believed to be able to make a positive contribution to the dynamics of the law in order to answer the problems that continue to evolve as the dynamics of the times will never stop. Shariat and fiqh's position is very important because it will become a basic resource that can be explored to the maximum for scavenging as much as possible for humanity (Wahid, 2014). Certainly it cannot be denied that in the reality of the positivisional discourse of Islamic law in Indonesia, it is often confronted with the diversity of fiqh as one of the obstacles in its application, but when the understanding and understanding of fiqh has been put in place proportionally there should be no polemic, because once again fiqh dynamic and can be negotiated with space and time where it will be applied (Makrufah, 2016).

Strategy and Formulation of Islamic Law in National Law In the Indonesian context as a consequence of pluralist countries, diversity, one of the effects is the rise of ways or perspectives in seeing religion, especially in terms of religion - Islamic law. Such a phenomenon seems justifiable, among others by observing the development of Indonesian legal studies and Islamic law in Indonesia which are very vulnerable to differences and conflicts from time to time. The tug of political interest in the struggle of Islamic law and Indonesian national law forms an opinion that focuses on the value of universality in Islam (Itmam, 2013). While Ratno Lukito as an Indonesian legal expert explained that Islamic law in Indonesia had arrived at the issue of positivism which was understood as an effort to make the values of Islamic teachings in harmony with various other values that developed in Indonesia integral as part of the development of a national legal system through transformation of plurality of values into national law without sacrificing certain laws or values. According to him the effort needs to unite perceptions between sacred law and secular law (Lukito, 2012).

Ahmad Qodri Azizy developed Islamic legal thinking with the theory of eclecticism (a system of religion or philosophy) which was formed critically by choosing from various sources and doctrines as an effort to reform Indonesian Islamic law. His argument by giving an example on the regulation of Compilation of Islamic Law (KHI) as a product of national law in terms of language and

substance still raises a variety of understandings. Its orientation cannot be separated from the idea of a national political struggle with Islamic law by removing the dichotomy between national legal science and Indonesian Islamic law (Azizy, 2003).

From a different angle, Ahmad Syafi'i Maarif explained that the development of Dutch colonialism which had succeeded in taking over all the power of the Islamic kingdom in Indonesia had resulted in a gradual cut of Islamic law, until finally what was left behind - besides worship - was only part of family law (marriage, divorce, referral, inheritance) with the Religious Courts as executors so that reorientation is needed in accordance with the plurality of laws in Indonesia. According to him, a strategic step is needed by building a legal culture that is in harmony with the plurality of laws that develop in Indonesia (Maarif, 2009).

While Gunaryo explained that the long history of the political struggle of Islamic law has proven the existence of Islamic law in the archipelago that cannot be separated from understanding that is in accordance with culture. According to him, adjustments to Islamic law with a variety of cultures can be explained, among others, by building legal reconciliation that is accommodative of the dynamics of Islamic law so that through reconciliation of Islamic law with national law, actual national law can be formed (Gunaryo, 2006).

From the various opinions above, it is emphasized that the struggle of Indonesian Islamic law is a form of national legal political struggle related to the development of the study of Islamic law regarding al-Din-Shari'ah-Fiqh which is really needed along with the development of Indonesian social culture by packaging the study of fiqh with modern legal language. It is also an effort to straighten out perceptions about the Shari'ah through the Religious Courts, especially the judges, familiarize Muslims (ulama) with jurisprudence, and make compilations of Islamic law and legislation in accordance with the needs of the Indonesian people with their socio-culture (Arifin, 1996).

From exposure to Islamic law it is understood that Shariah has a more general understanding of fiqh. Shariah covers all Islamic teachings set by Allah both in the field of beliefs (i'tiqadiyah), deeds, and morals, while fiqh focuses more on the issue that is amaly (mukallaf). Islamic Shariah is an Islamic law that applies forever. While fiqh is the concrete formulation of Islamic syari'at to be applied to a

particular case somewhere and at a time. Both can be distinguished but cannot be separated. Fiqh is also a product of fuqaha reasoning towards shari'ah, which is empirically used as applied law by Muslims in various regions.

Shariat and fiqh as representations of Islamic law with its flexibility towards the reality of space and time are believed to be able to make a positive contribution to the dynamics of the law in order to answer the problems that continue to evolve as the dynamics of the times will never stop. Thus the position of Shariat and fiqh becomes very important because it will be a resource that can be explored to the maximum for scavenging as much as possible for humans. In this context the positivation of Islamic law as a representation of shariat and fiqh is very likely to be enforced anytime and anywhere, including the positivation of Islamic law in Indonesia.

Consultation Urgency And Counseling As Islamic Legal Strategy In Legal Positivisation In Indonesia

The discourse on the position and strategy of Islamic law in legal positivity in Indonesia is always related to the problem of the struggle of Islamic law in the legal politics of the reform era is the effort of legal development in order to realize national law in accordance with national interests, with the compilation of legal material as a whole based on Pancasila and the 1945 Constitution the spirit of Islam. Therefore, the preparation of the National Legislation Program is an effort to change the laws and regulations originating from the Pancasila and the 1945 Constitution and is a smart effort to realize the law inspired by the national values and the religion of the Indonesian nation. The position of Islamic law affirms the value of Islamic law as the majority value in Indonesia based on the legal politics of the reform era has a great opportunity in the context of the development of the Pancasila democracy through a scientific academic approach.

Based on its position, Islamic law has bright prospects because it has a responsive legal character. The Western / colonial legal system has not developed, the majority of the population is Muslim, government politics supports the development of Islamic law, and Islamic law has become one of the sources of raw material in the formation of national law in addition to customary law and Western / colonial law. Departing from such a mindset, the Islamic legal strategy can be simply explained that the State cannot make laws that oblige (impose)

certain religious laws, but the state can make rules that regulate the implementation of religious law that has been carried out on its own consciousness by its adherents. So that the laws made by the state on the basis of religion are limited to serving and protecting the awareness that grows on its own from its followers so that there is no conflict between religious people.

In addition, the principle of diversity in Indonesia and the reform era is in line with the development of national legal politics and also Law No. 12 of 2011 concerning the establishment of legislation confirms that the position of Regional Regulations (Perda) for example, is very strong in line with the granting of positions to regional heads. It should be noted that the New Order substantively did not actually have regional autonomy, but centralized decentralization. Regions cannot determine their own regional heads democratically, DPRDs are made subordinated to local governments, the economic wealth of the regions is sucked up for central political interests. Whereas all reforms have been reorganized according to the spirit of democratization. The broad autonomy which was later adopted in Law No. 22 of 2009 for this spirit was strengthened by the entry of broad autonomy in the amendments to Article 18 of the 1945 Constitution, even broad autonomy which emphasized democratization was strengthened by the birth of Law No. 32 of 2004 and followed by Law No. 22 of 2009.

Whereas in the context of the strategy of Islamic law, legal experts agree that religion politically has an important role in the social change of society. The role is mainly as a factor integrating integrators for the life order based on the will of the majority. The role of religion in creating a common partnership, both among members of several societies as well as in social obligations that help unite their interests is crucial to politics. In addition, the values underlying the systems of social obligation along with religious groups need to be accommodated so that religion guarantees consensus towards political unity. This argument is further strengthened by the sacred concept of religious values so that religion is not easily shaken, changed because it has strong authority in the midst of the social community.

Sociologically, religion also has a big influence in changing a society. Religion can be a unifier or vice versa in the context of community social development. In the context of the positivist Islamic law, it appears that religious values have an urgent role not only for individuals but at the same time for the community. For individuals, religion plays a role in identifying individuals with

groups, entertaining when hit by disappointment, strengthening morale, and providing elements of identity. As for social life, religion serves to strengthen the unity and stability of society by supporting social control, sustaining established values and goals, and providing a means to overcome mistakes and alienation. With a strategy model of unifying the influence of religion on social phenomena that gave birth to a national tradition that will have a synergistic effect on the prospects of Islamic law in Indonesia supported by national legal politics that are legally built through the National Legislation Program (PROLEGNAS).

Thus the position and strategy of Islamic law is one of the most important issues in the development of Islamic law and the development of thoughts that occur between Islamic philosophy and religions, because both of them develop the methods and meanings of ijtihad which then become actual fiqh that is transformative and accommodating towards social dynamics in Indonesia. Developing thinking is strongly influenced by several interrelated factors, the link between religious belief and thought/ rationalization towards the social development of the Indonesian people who continue to experience developments including Islamic law as an effort to positivity. Apart from that, the debate about Islamic law in which, with ijtihad and what methods are also very influential on efforts to transform Islamic law in Indonesia according to national legal politics that are accommodating to the aspirations and needs of the community, especially in accordance with the mandate of Law No. 12 of 2011 concerning the establishment of legislation that emphasizes the need for aspirations and legal needs of the community in accordance with the position and strategy of Islamic law in Indonesia.

Conclusion

The Consultation and counseling as a strategy in positivating national law is a bright hope for Muslims. The strategy of Islamic law towards national law, becomes positive law full of challenges and strenuous struggles and is of course controversial on an ongoing basis from time to time. The portrait of the position of Islamic law in its various strategies and the explanation of Indonesian Islamic law provide a special pattern for the thought of Islamic law in Indonesia. The position of Islamic law as part of the raw material for national law can be managed pluralistically, together with other laws that grow in Indonesia. The plurality of Indonesian law which is a must to be a positive partner to complete Islamic law

towards the positivation of national legal law. Strategy through consultation and counseling is done by unifying perceptions, especially in the field of fiqh, which is the substance of the teachings of Islam in the form of universal human values in Islam such as justice, honesty, equality of balance and liking. With such a position and strategy, Islamic law can simultaneously become a great opportunity for Indonesian Islamic law to encourage the development of national law through positivist Islamic legal processes in Indonesia.

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