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Article

Bustanul Arifin and A. Qodri Azizy on The Absorption of Islamic Law Into National Law: A Discourse of Thinking

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Abstract

Bustanul Arifin and A. Qodri Azizy are two well-known Indonesian legal experts, especially in matters of Islamic law legislation in Indonesia. both of them have major contributions to the dynamics of Islamic law legislation in Indonesia. although both thoughts have been widely reviewed, most of them are still in separate partial reviews. Because of this, this paper seeks to present the thoughts of the two figures in one frame regarding the absorption of Islamic law into national law. The study was conducted using normative legal research methods, applying historical and conceptual approaches, and using qualitative analysis methods. The results of the study found that the two figures agreed on the urgency of absorbing Islamic law into Indonesian national law. Bustanul stated the importance of absorbing Islamic law through legislation. Meanwhile, A. Qodri Azizy put forward the eclecticism of Islamic law and general law. The development of post-reform democracy has made Islamic law able to compete with customary law, as well as Western heritage law in a democratic and free manner. So that all three of them can run eclectically without prioritizing Muslim majoritarianism.

Keyword

Islamic law; National Law; Bustanul Arifin; A. Qodri Azizy

INTRODUCTION

Indonesia is not a secular country. It can be seen from the various instruments of state management based on religious values. The 1945 Constitution also clearly involves a theological dimension. At the same time, every judge's decision in Indonesian courts is also preceded by mentioning the name of God. But on the other hand, Indonesia is also not an Islamic country. The highest source of existing law is not the Koran and As-sunnah, but Undang-Undang Dasar 1945. Interestingly, Indonesia can carry out a synthesis between state management and Islamic values so that the legal system in Indonesia becomes a distinctive legal system (Sumitro, Kumkelo, & Kholish, 2014, p. 155).

This distinctive configuration of legal products is expressed through the absorption of Islamic law into national law. Positivism through the absorption of Islamic law began with the birth of Law No. 1 of 1974 concerning Marriage until Law No. 33 of 2014 concerning Guarantees for Halal Products. In a span of 46 years, various regulations have been born that adopt Islamic values (Jazuni, 2005, p. 7).

This success cannot be separated from the tug-of-war of the implementation of Islamic law in Indonesia. Behind this success, there is a discourse on the debate over the implementation of Islamic law in Indonesia which continues to show dynamic development (Rohmah & Alfatdi, 2022). Among the thinkers who contributed to the theoretical discourse were Bustanul Arifin and A. Qodri Azizy. Both offer theoretical perspectives that contribute to the dynamics of reform in the development of Islamic law within a constitutional framework. In Bustanul Arifin's perspective, the renewal of Islamic law in Indonesia must be carried out by making Islamic law a positive law. Because if reform of Islamic law is not incorporated into the framework of the national legal system, then the contextuality of Islamic law will not be realized properly (Hendrawati, 2018).

These efforts must be supported by appropriate Muslim resources. This means that the role of Muslim scholars must continue to be encouraged so that they are transformed into modern mujtahids who can give birth to a progressive perspective of Islamic law, to advance national law (Arifin, 1996).

On the other hand, A. Qodri Azizy also offers an important perspective of thought. According to Azizy, post-reform Islamic law has occupied an equal position with customary law and Western inherited law. This means that with the development of democracy, the position of Islamic law as a source of national law must be able to compete fairly with the other two sources of law. Namely the source of customary law and the source of Western inherited law. To respond to this opportunity, A. Qodri Azizy offers an eclecticism of Islamic law and Western law. According to Qodri Azizy, Islamic law does not have to be formalized with an Islamic label. This aims to make Islamic law widely accepted

by the multicultural Indonesian society (Azizy, 2004; Itmam, 2019).

The ideas offered by Bustanul Arifin and A. Qodri Azizy must certainly consider and involve maqasid sharia as a theoretical basis. Because, the absorption of Islamic law into national law without involving maqasid sharia as a perspective, the absorption effort will lose its transformational spirit (Tohari & Kholish, 2020). These efforts were also affirmed by the two figures. So that Islamic law products that have been legislated are eclectic legislation and are in line with the spirit of the Indonesian state constitution.

Therefore, the article will conduct in-depth research on the thoughts of Bustanul Arifin and A. Qodri Azizy. This is because so far the theoretical studies on the two thinkers of Islamic law are still fragmented in the form of articles and independent studies. Previous studies of the two figures have never been conducted in-depth to discuss theoretically the absorption of Islamic law into national law.

METHODS

This article is normative legal research or literature research. This means that research is carried out by analyzing data taken from written materials, whether books or others related to the theme being studied (Nazir, 2005, p. 63). The study was carried out by referring to methods in the historical approach (Marzuki, 2017), and the conceptual approach. There are two sources used in this study, namely primary materials which consist of research results or writings by the figures studied (Creswell, 2013). In this case, the works written by Bustanul Arifin and A.Qodri Azizy such as " Pelembagaan Hukum Islam di Indonesia Akar Sejarah, Hambatan dan Prospeknya" by Bustanul Arifin and " Elektisisme Hukum Nasional " by A. Qodri Azizy. The secondary materials used include books related to Islamic law and national law; books related to the thoughts of Bustanul Arifin and A. Qodri Azizy; journals related to the absorption of Islamic law. This study uses a qualitative analysis method that describes analytically all the information and data collected to then describe the facts that already exist to produce conclusions and suggestions by utilizing deductive thinking (Muhammad, 2004).

RESULTS AND DISCUSSION

Absorption of Islamic Law into National Law from Bustanul Arifin's perspective

Sociologically, Muslims are one of the social groups that receive legal protection under constitutional law in Indonesia. Therefore, Muslims cannot be separated from Islamic law, which is their belief. The majority of Indonesian people are Muslim. This situation has led to the ideals of forming a national law following

the moral ideals formed by the inner ideals and legal awareness of the Indonesian people. Islam greatly influenced the thoughts and spirit of the Indonesian nation's independence and the formation of the Republic of Indonesia (Arto, 2012, p. 63).

Dalam konteks inilah Bustanul Arifin melihat bahwa Sistem hukum Indonesia, sebagai akibat dari perkembangan sejarahnya bersifat majemuk. Disebut demikian karena sampai sekarang di dalam negara Republik Indonesia berlaku beberapa sistem hukum yang mempunyai corak dan susunan sendiri. Yang dimaksud adalah sistem hukum Adat, sistem hukum Islam, dan sistem hukum Barat. Ketiga sistem hukum itu berlaku di Indonesia pada waktu yang berlainan. Hukum adat telah lama ada dan berlaku di Indonesia, walaupun sebagai suatu sistem hukum baru dikenal pada permulaan abad ke-20. Hukum Islam telah ada di kepulauan Indonesia sejak orang Islam datang dan bermukim di nusantara ini (Arifin, 1996, p. 52).

In this context, Bustanul Arifin sees that in its development the Indonesian legal system is plural. Because until now in the Republic of Indonesia, several legal systems have their style and structure. What is meant, is the Customary legal system, the Islamic legal system, and the Western legal system. The three legal systems applied in Indonesia at different times. Customary law has existed and been in effect for a long time in Indonesia, although as a new legal system it was recognized at the beginning of the 20th century. Islamic law has existed in the Indonesian archipelago since Muslims came and settled in this country. Bustanul Arifin sees that Islamic law is a law that already exists in society. It grows and develops and coexists with the customs or habits of the existing community. Occupying the islands in Indonesia, even before the Dutch confirmed their rule in Indonesia.

In other words, Islamic law is the law that has lived in society and is part of Islamic teachings and beliefs. Islamic law exists in the life of national law and is an ingredient in fostering and developing it.

Bustanul Arifin also sees that Islamic law occupies a vital role in the legal system in Indonesia. Both juridically and sociologically. Juridically, Islamic law is a source of national law that has been regulated in the 1999 GBHN. Meanwhile, sociologically Bustanul Arifin said that the position of the majority of Muslims in Indonesia is a social and cultural capital for implementing Islamic law into national law in Indonesia. According to Bustanul Arifin, Islamic law as a source of national law must be properly organized and regulated. Legal materials must be carefully prepared in the form of drafting which is supported by well-done academic texts. These efforts are none other than to fill space in the legal system in Indonesia as one of the concrete examples offered by Bustanul Arifin is the birth of Law Number 7 of 1989 concerning the Religious Courts. Because if it is

not properly regulated, Islamic law will not be able to color the development of national law which was the government's program at that time.

In the reform era, the direction and policy of national law have been determined. The development of national law must be based on the 1999 Outlines of State Policy (GBHN), which was established during the reform era. In the policy directions of the GBHN, it is stated that the national legal system must be organized in a comprehensive and integrated manner by recognizing and respecting religious law and customary law and renewing colonial heritage legislation and discriminatory national laws, including gender inequality and its incompatibility with demands for reform through legislation programs.

Recognition and respect for the system of religious law or Islamic law as an integral part of the national legal system itself will have a very positive impact on efforts to foster national law. At least Muslims, who make up the largest population in Indonesia, are familiar with Islamic values. It will bring up cognitive awareness and behavior patterns that support norms that are following Islamic values.

Thus, fostering public legal awareness can be more easily carried out to build a legal supremacy system in the future. It will be very different if the legal norms that are enforced originate and come from outside the legal awareness of the community. From the perspective of Bustanul Arifin's thought, Islamic law, as a source of national law, must receive proper guidance. Thus, it can enhance the development of national law. Because Islamic law is an important part of the development of national law in Indonesia. Without the institutionalization of Islamic law in the form of religious courts, the existence of Islamic law will not be strong and will continue to be subordinated to the western legal system. One of the institutionalization efforts is the establishment of a religious court that is directly under the authority of the Supreme Court.

Without a religious court, Islamic law in Indonesia is not implemented and runs well. It is like the Arabic saying "wujudihi ka'adamihi" (presence equals absence). At this point, it is necessary to strengthen the religious court institution both materially and formally. More than that, human resources must also be improved. Judges, case analysts, clerks, bailiffs, and so on must also be improved in quality and quantity. The absolute authority of the post-reform religious courts is no longer given a narrow authority, but the absolute authority is wider and more complex. So that in the future, the maturity of judges and the institutional structure of a strong religious court are needed.

Absorption of Islamic Law into National Law from the perspective of A. Qodri Azizy

According to Qodri Azizy, the thinking of classical jurists is living knowledge,

namely living knowledge that can be an inspiration or foundation for today's thinkers. In fact, it is not impossible that this thought is also a source of legal thought at this time, as a process of historical continuity in the academic tradition. Azizy states that efforts to make Islamic law or fiqh an integral part of the legal discipline must go through several channels, namely (Azizy, 2004, pp. 248–251): First, the regulations. It includes constitutions, statutes, government regulations in substitute of laws (Perpu), government regulations; even regulations issued by the executive branch, but have the power of legislation. Here fiqh can play a role either as material law (the essence of law) or fiqh in the context of legal ethics/morality.

It should be realized that al ahkam al khamsah (the five Islamic laws: obligatory, haram, sunnah, makruh and permissible) is an ethical/moral concept, which is very easy to take part in the world of jurisprudence or legal philosophy. In other words, books that discuss fiqh can be positioned as rechtboek. On the other hand, fiqh books which contain the opinions of Islamic jurists can also be positioned as doctrines or legal provisions. Both as a rechtboek and as a doctrine, fiqh or Islamic law can become a source of legislation.

Here there is something that is explicitly from the source of Islamic law and there is also something that is a source or raw material implicitly. Some explicit examples of Islamic law include the Law on Hajj, the Law on Marriage, the Law on zakat, and others. What is now being urgently demanded to be issued include the Law on sharia services; because during a community that is already running its development is very rapid. Laws on pornography are also among those that have been pushed to be born, even though they contain public debate.

The law on pornography is different from the law on sharia services which includes sharia banking, types of investment, and types of services related to an economy based on sharia. This is because this sharia-based law is not something that causes controversy; however, there are many demands for unification and legal certainty, as described above.

Some of these examples relate to the Act. But in reality, regulations are not only in the form of laws. In this context, Islamic law can also act as a raw material in the preparation of various other types of regulations.

Second, government policy. Sources of government-implemented policies are not always direct in terms of legislation as government regulations; but in the context of administrative discipline, in the end, government policies are also related to the values of laziness. It can even be included in this sense, the model for forming the Compilation of Islamic Law (KHI), which is just a presidential instruction.

Third, jurisprudence. This is very clear with the provisions of the

Indonesian legal system which make it possible for every judge to become a source of law, especially when the written law has not yet been realized. The phrase that "judges may not refuse to decide on cases because the law does not yet exist" is a golden opportunity to make fiqh a source/foundation/consideration for judges in deciding cases. In the scientific tradition of Islamic law, the discovery of this law is called ijtihad. It can be remembered in the dialogue between Muadz bin Jabal's and the prophet PUBH, a hadith that is often quoted in discussions about Islamic jurisprudence. Judges can make legal analogies and interpretations, as is usually discussed in the science of ushul al-fiqh and the fiqh. If in the process of making legislation, Islamic law or fiqh can be positioned as a doctrine or opinion of legal experts and at the same time the book can be positioned as a rechtboek, in the process of jurisprudence this is even clearer. Namely, that legally formal fiqh can be used as the basis and consideration of judges to give legal decisions. Fourth, a source for law enforcers in problem-solving. Like police, prosecutors, and lawyers. If this article observes, the course of the legal process in Indonesia appears to be heading toward arbitration. That is, a judge will issue a legal decision that cannot be separated from the process carried out by those who are in litigation, which in this case directly involves lawyers, prosecutors, witnesses, and others. Of course, in the future, there will be an emphasis on legal arguments, so every lawyer has a big role to play. This also happens in the West, including in criminal law. In that process, it would be better if Islamic law played a role so that it could guide law enforcers to realize that what they are doing has demands for responsibility in the afterlife, in addition to administrative and legal accountability in this world.

Fifth, sources of law or philosophy of law. With the policy directions for the development of Indonesian national law, as described above, Islamic law is in an equal position with western law (secular jurisprudence). However, for Indonesian people, who are predominantly Muslim, Islamic law should have a higher position. This is based on the fact that Islamic law has become a legal system and value system in the consciousness of Muslims, and because of that, the effectiveness of its implementation is very high. This matter rarely gets the attention of legal experts. Social science experts have begun to realize this, so for Islamic societies, such as in Indonesia, the study of social sciences - political science, sociology, anthropology, and the like - cannot be separated from Islamic values and teachings. This fifth point can be carried out in particular by the National Legal Development Agency, law faculties, sharia faculties, and legal study institutions, either individually or in collaboration.

Sixth, a source of community cultural values as well as a source of custom (customary law or living law). This is what is usually called the cultivation of Islamic values or Islamic culture. This is somewhat different from the receptive

theory that has been applied in Indonesia but is quite close to customary law in general. Even at the same time making Islamic law a source of customary law, as mentioned above. In the discussion of ushul al-fiqh, the terms 'urf (customs) and adat (customs) are known, so that there is a rule of al Adah muhakamah (customs can be used as [the basis for] legal determination). This is also the duty and obligation of the sharia faculty in the framework of the socialization of Islamic law has cultural value.

Thus, according to the author, the reforms that took place in Indonesia, which later gave rise to legal reforms, became an opportunity and at the same time a challenge for the study of Islamic law. If at first the study of Islamic law seemed to be soaring or floating, because it was more dominated by the model of memorizing the results of the thoughts of classical Islamic jurists centuries ago, now the study of Islamic law can play a more empirical and realistic role (down to earth which is easy to understand and then practiced by her adherents).

Islamic legal thinkers are required to be able to put Islamic law play a role and be effective in the context of the needs of the life of Muslims and the Indonesian nation in general. Here there is a huge opportunity for the position of Islamic law but at the same time a challenge to the ability of those who study it. As a consequence, it is time for the models and approaches to Islamic law studies in Indonesia, particularly in academic institutions such as universities and study centers, to be updated. Models, approaches, and philosophical studies of Islamic law or fiqh at State Islamic Universities (UIN), State Islamic Institutes (IAIN), State Islamic Colleges (STAIN), and Private Islamic Colleges (PTAIS) need to be reoriented or even changed. to be truly useful and meet these demands. This includes reconstructing Islamic legal thinking with the language of the law, such as the KHI so that it will be easier to understand using legal language in general. Efforts to positivize Islamic law are a must both in the context of academic studies which always follow eclecticism and the process of democratization which is based on the majority of the population. In the end, it becomes a challenge that Islam must be able to show its big promise, namely rahmatan lil alamin (to be a mercy to the universe) and li tahqiq masalih al nas (to ensure the realization of human benefit). This is a challenge for Islamic jurists as well as general jurists. To combine the two, Qodri Azizy uses the term Indonesian jurisprudence, which does have specific differences from western law.

Based on the previous research, it can be concluded that according to A. Qodri Azizy, the urgency of absorbing Islamic law into national law is a juridical and empirical necessity. It has to be acknowledged juridically that Islamic law is one of the pillars of national legal sources in addition to customary law and western inheritance law. Therefore, efforts to positivize Islamic law in Indonesia

must be transformed through the doors of the national legislation program (prolegnas) and regional legislation programs (prolegda). As for empirically according to A. Qodri Azizy the existence of the majority of Indonesian citizens who are Muslim must be able to optimize their aspirations and voices to be voiced through the legislative channels in Indonesia. Islamic law according to A. Qodri Azizy is a law that has lived in society since tens of centuries ago, therefore as a consequence of positivist civilization, Islamic law must be able to be positivized, not just to become a living law that has no legal certainty.

Meanwhile, according to A. Qodri Azizy, the existence of the development of Islamic law in Indonesia today is also influenced by the increasingly democratic pattern of relations between religion and the state. This democratic climate certainly could not be found during the old or new order. Better relations between Islam and the state will support the process of internalizing Islamic laws in constitutional practice.

Islamic law has been recognized as one of the raw materials of national law, so in this context, the position of fiqh as a codification of Islamic law is also expected to have a contribution to national law. As a consequence, fiqh must be able to show a progressive character and be responsive to all problems that occur in society. Fiqh must also move more dynamically, not as easy as talking about halal and haram.

Therefore, to facilitate the internalization of Islamic legal material into national law, there must be Ijtihad efforts. This is done by finding the universal values behind the formulations and contents of fiqh formulations. Ijtihad is required to provide legitimacy and legality of normative fiqh which will be formalized through the Indonesian legal system. So that in the future, the Indonesian state with Islam as the majority religion, fiqh which is the needs of the Indonesian people in general can be accommodated in the national arena with a national label as well.

According to A. Qodri Azizy, the theory of eclecticism of Islamic law and national law is a consequence of juridical capital (one of the pillars of national legal sources) and empirical (the existence of a majority of Indonesian citizens who are Muslim must be able to optimize their aspirations and voices to be voiced through legislation in Indonesia).

On the other hand, according to Qodri Azizy, with the opening of the democratic faucet in the reform era, Islamic law, customary law, and western inherited law can compete democratically and freely. So as a consequence the three legal systems must be able to be eclectic without having to put forward the Islamic ego and the position of the majority of Islam. Because, if this way is done then what will happen is authoritarianism on behalf of the majority. Whereas in A. Qodri Azizy's theory of eclecticism, among the three sources of national

law, each has its advantages and disadvantages. So, it needs to be eclecticized moderately and democratically.

CONCLUSION

Based on Bustanul Arifin's perspective, theoretical arguments about the absorption of Islamic law into national law are based on two issues: first, the position and position of Islamic law in the legal system in Indonesia. According to Bustanul Arifin, Islamic law occupies a vital role in the legal system in Indonesia. Islamic law is a source of national law that has been regulated in the 1999 GBHN and the position of the majority of Muslims in Indonesia is a social and cultural capital for implementing Islamic law into national law in Indonesia; Second, the development and development of Islamic law into national law. Islamic law as a source of national law must be properly organized and regulated. These efforts are none other than to fill space in the legal system in Indonesia as one of the concrete examples offered by Bustanul Arifin is the birth of Law Number 7 of 1989 concerning the Religious Courts. Because if it is not properly organized and carried out with coaching and institutionalization, Islamic law will not be able to color the development of national law which became the government's program at that time. Without institutionalization in the form of a religious court, the existence of Islamic law is like nothing. On the other hand, Qodri Azizy also expressed the urgency of absorbing Islamic law into national law. According to Azizy, efforts to positivize Islamic law into national law are a juridical and empirical necessity. It has to be acknowledged juridically that Islamic law is one of the pillars of national legal sources in addition to customary law and western inheritance law. Therefore, efforts to positivize Islamic law in Indonesia must be transformed through the doors of the national legislation program (prolegnas) and regional legislation programs (prolegda). As for empirically according to A. Qodri Azizy the existence of the majority of Indonesian citizens who are Muslim must be able to optimize their aspirations and voices to be voiced through the legislative channels in Indonesia. On the other hand, A. Qodri Azizy also offers an eclectic theory of Islamic law and common law according to A. Qodri Azizy, with the opening of the democratic faucet in the reform era, Islamic law, customary law, and western inherited law can compete democratically and freely. So as a consequence the three legal systems must be able to be eclectic without having to put forward the Islamic ego and the position of the majority of Islam. Because, if this way is done then what will happen is authoritarianism on behalf of the majority.

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