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From Living Law to National Law: Theoretical Reconstruction of Applying Islamic Law in Indonesia

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Abstract

Islam entered and developed in Indonesia by bringing new values to life. The entry of Islam amid the plurality of Indonesian society then gave rise to a distinctive pattern of interaction. The intersection of Islamic values with Indonesian cultural values gives rise to various patterns of interaction. Now Islamic values have been accepted as a living value in Indonesian society. Acceptance of Islamic values and norms also occurs within the jurisdiction. Islamic law developed together with the customary law system and western law. Even now, Islamic law has become one of the important sources of law in developing national law. The inclusion of Islamic law in The national legal system certainly goes through long social and political dynamics and involves various parties. This article aims to examine the process of accepting Islamic law in the national legal system from a theoretical perspective. The study was conducted with a library research approach. This study is needed as material for reflection and projection of the development of Islamic law in Indonesia in the future.

Keywords

Islamic Law, Theoretical Reconstruction, Islamic Law , Living Law, National Legal System

INTRODUCTION

Islam entered and developed in Indonesia around the 7th century AD. Arab and Persian traders brought it. It is marked by the presence of Islamic villages around the Malacca Strait. Apart from Arab and Persian traders, the role of ulama' and tarekat leaders was also huge in the development of Islam in Indonesia, especially in Java. In Java, the name "walisongo" is known as a tarekat teacher who successfully spread Islam with a distinctive style. They spread Islam with a cultural approach. The success of the Walisonggo approach can be seen by integrating the values of Islamic teachings with local Javanese culture so that there is no conflict between Islamic teachings and local culture or teachings (Sunyoto, 2006).

Many historians argue that before Islam developed in Indonesia, there had been teachings or beliefs among the archipelago people. At that time, the belief in the gods was firm, especially among the Javanese people who embraced Buddhism and Hinduism. Likewise, ancient teachings such as animism known in the megalithic era have also developed in Indonesia. Menhirs, dolmens, and punden terraces are tools to carry out ritual offerings to ancestors (Steimer-Herbet, 2018).

The teachings brought by Islam contain new values in life in the form of faith, sharia, and morals. Of the three main teachings of Islam, sharia, or Islamic law, is a set of rules used for worship. Carrying it out is obedience that deserves a reward, and leaving or deviating is disobedience that is rewarded with torment in the hereafter. Sharia or Islamic law is also a guide and a basis for acting for its adherents. The roots of Islamic law raise the question of how Islamic law can dominate Indonesian society, which already adheres to its value system, like customary law? As a religion with the teachings of peace, Islam does not just come but there is space and time that has historical traces. In the context of carrying out religious teachings, its adherents try to make Islamic law work and become a country's culture.

In essence, Islamic law coexists with the teachings of Islam itself. Islamic law is fundamental for Muslims because it guides various life problems and is considered part of obedience to Allah. Islamic law greatly influences building social order and people's lives (Ja'far, 2012). The consequence of the acceptance of Islamic teachings is the acceptance of Islamic law as the living law or the law that always lives in society for its adherents without denying that there are adherents who do not implement their teachings.

What are the three legal systems? There are three legal systems in Indonesia, although the situation and time of application are not the same, namely, customary law, Islamic law, and western law. Each of these legal systems has a different nature. There are contradictions between one another, giving rise to various theories of applying these laws, in this case, the theories of applying Islamic law in Indonesia.

ISLAMIC LAW AS THE LIVING LAW

Islamic law that always lives, grows, and develops in Indonesian society is the result of the entry of Islam into Indonesia. According to Nyong Eka Teguh Iman Santosa, the locus of discussion regarding the arrival of Islam in Indonesia so far has revolved around three main themes, namely: the place of origin, the carriers, and the time of arrival. (Rana, 2018). Azumardi Arza put forward various theories that developed about the entry of Islam in Indonesia. Some of them, the theory of Gujarat, Mecca, and Persia. As the name of these theories suggests that the place of origin of the arrival of Islam came from Gujarat (India), Mecca (Saudi Arabia), and Persia (Iran). These theories are reinforced by concrete evidence, such as the tombstone in Pasai has similarities to the tombstone of Maulana Malik Ibrahim

found in Gresik. Both of these tombstones have similarities with the tombstones in Cambay Gujarat (India). This theory was put forward by Snouck Hurgronje and J. Pijnapel who stated that Islam entered Indonesia in the 13th century AD brought by the Gujarat people who were Muslim. In addition, the Meccan theory states that Islam entered Indonesia around the 7th century AD brought by Arab traders, this is evidenced by the existence of an Islamic village in 674 in Baros, Banten, and in the Persian theory initiated by Umar Amir Husen and Hoesein Djajadiningrat, there is a celebration or tradition in memory of the grandson of the Prophet Muhammad SAW in Persia, this tradition is also found in Bengkulu and West Sumatra known as the Tabot Tradition which is always commemorated on the 10th of Muharram (Azra, 1995) .

Apart from developing theories regarding the arrival of Islam to the archipelago, it can be seen from the history of Islamic law legislation in Indonesia that it can actually be read from the entry of Islam into Indonesia around the 7th or 8th century AD or in the first century Hijri (Abdullah, 1994; Suryanegara, 2004). 2002) . Sociologically and culturally, Islamic law has been integrated with customary law and has become a law that always lives, grows, and develops in society (living law). Not only Islamic law has become the living law , but religions outside of Islam have also become the living law , but not in a broad scope only in certain areas that have become part of the community's customs. (Rumandi, 2001)

This happens because between customary law and religious law in this case Islamic law does not rule out the possibility of social and cultural contact. So the potential for acculturation or assimilation is very high between religious values and traditional values. In the end, there is the legitimacy of religious teachings in customary law or can be termed "integration" between Islamic law and local rules.

COLONIALISM LEGAL POLITICS

There were three legal systems in force during the Dutch East Indies period, namely the customary law system, Islamic law, and western law. These three legal systems have various kinds of differences. There are differences that are created accidentally, things that are not intentional can be seen from the basis of its application, such as customary law originating from habits and behaviors that are carried out repeatedly causing sanctions, Islamic law originating from the Qur'an and Sunnah, and western law. which stems from the consensus results from the community that aim to maintain order and community rights, but there are also differences that were deliberately created, one of which was when the Dutch East Indies government deliberately clashed the dogma of Islamic law with customary law which can be seen from the opinion of Snouck Hurgronje who said that customary law has been entered by the influence of Islamic law, but that influence only has legal force if it has been accepted by customary law (Daud, 1982) .

The purpose of the clash was to weaken the power of Islamic law which has indications against the government. On the other hand, the Dutch East Indies government felt threatened by the large number of adherents of the Islamic religion who could at any time fight massively. This clash also aims to perpetuate western law under the guise of clashing Islamic law with customary law. This difference in perspective was deliberately created by the Dutch East Indies government to weaken the power of Islamic law through the suppression of Islamic law. The obedience of Muslims in carrying out their teachings received a negative response from the Dutch East Indies government and looked down on the existence of Islamic law as seen in the mass conflict that occurred during the Padri War between young people who supported the implementation of Islamic law and older people who actually wanted customary law to be enforced. . At that time, the Dutch supported and won over the elderly so that customary law could be enforced (Jarir, 2018) .

THEORIES OF THE APPLICABILITY OF ISLAMIC LAW

A. Reception in Complexu

The theory proposed by Prof. Mr. Lodewijk Willem Christiaan van den Berg (1845-1927) was a prominent Dutch orientalist during the Dutch East Indies era because of his research writings and is known as the person who discovered and demonstrated the enactment of Islamic law in Indonesia. According to Van den Berg, the applicable law in Indonesia is Islamic law for its adherents. In his writings on the principles of Islamic law (*Mohammadaansche Recht*) in 1884.

The *Receptio in Complexu* theory is a period of full implementation of Islamic law by people who adhere to the Islamic religion even though there are deviations in its implementation. The existence of Islamic civil law (inheritance law and marriage law) has been recognized by the colonial government, besides that at first the inheritance law and Islamic marriage law were proposed by Van den Bergh to be applied by court judges at that time with the help of Islamic Qadi leaders. So it is not surprising that the Religious Courts Board has been able to permanently and steadily resolve various inheritance and marriage cases of Muslims (Thalib, 1985).

Islamic law is still running and its existence is recognized even though at that time the Dutch (VOC) had controlled the territory of Indonesia . . Thus it is not surprising that Islamic inheritance and marriage laws are still recognized and implemented in the “ *Rejuangie Der Indersche Regeering* ” which contains a collection of Islamic inheritance and marriage laws by Dutch courts known as the *Compedium Freijher , Cirbonsch Rechtboek* (made at the suggestion of the resident of Cirebon), *Compendium der Voornaamste Javaansche Wetten nauwkeurig getrokken uit het Mohammeaansche Wetboek Mogharraer* , and *Compedium Inlandsche Wetten biu de Hoven Bone en Goa* (ratified by VOS in Makassar, South Sulawesi).

The theory put forward by Van den Bergh gave birth to *Staatblad 1882 number 152* which is an official acknowledgment and legalization of something that already exists and develops in society. The existence of *Staatblad 1882 No. 152* which contains the issue of the application of the Islamic natives to apply their religious law. The result of this *Staatblad* was the establishment of Islamic courts under various names, such as the *Syari’ah Court* in Sumatra, the *Kadhi Density* in Kalimantan, the *Syara’ Council* in Sulawesi, Maluku, and Papua. This further strengthened the position and understanding of Islamic law to colonial government officials as well as benefiting adherents of the Islamic religion (Tobroni, 2009) . In *Reglement of het Beleid der Regering ven Nederlandsch (RR) Staatblad 1885 No. 2* articles 75 and 78 confirm that:

- a. Indonesian judges must enact religious laws (*godsdiertige*) wetten) and the habits of the Indonesian population;
- b. European laws and customs are used by European judges when deciding higher cases in appeals. Article 105 confirms that Articles 75 and 78 also apply to foreign eastern groups and all those who are Muslim as well as non-religious people (equated with *Inlanders*).

B. Receptio

Receptio theory proposed by Snouck Hurgronje (1857) states that the law that applies to the people of Bumi Putera is essentially customary law. Islamic law can apply if desired or accepted by the community as customary law. This theory was put forward by Prof. Christiaan Snouck Hurgronje (1857-1936) who worked as an adviser to the Dutch East Indies government on Islam and society. Snouck

Hurgronje has studied Islamic law and religion in general to specifically in Indonesia.

The formation of this theory is a phenomenon that can be considered an intentional and an effort to get rid of the development of Islamic law in Indonesia which is not realized, strengthens the existence of the Netherlands itself. The existence of Islamic law in the wider community will have an impact on hampering the expansion and socialization of the ideas that will be implanted in Indonesia (Rana, 2018) . The Dutch East Indies government was well aware of the obstacles in front of it which, if allowed to develop, would backfire. In article 134 paragraph (2) Indische Staatsregeling (IS) 1925 (1929) or better known as the reception article. Islamic law, which was already known to the public, was hampered after the Dutch invaded the archipelago which resulted in the development of Islamic law being “controlled” and further hampered by the existence of statutory regulations in article 134 paragraph (2) IS. The introduction of western law coincided with the entry of the Netherlands in order to trade in Indonesian territory. This law should only apply to Europeans, but with various existing regulations, legal and voluntary submission to western law states that western law also applies to those who are equated with Europeans, foreign easterners, and natives. Of course, the application of western law greatly benefited the colonial side rather than using customary law and Islamic law (Daud, 1982, p. 209) .

Snouck Hurgronje actually opposed Prof.’s opinion. Mr. Lodewijk Willem Christiaan van den Berg who put forward the theory of reception in complex because Snouck Hurgronje did not want to develop and strengthen Islamic values among Bumi Putera. If Islamic values are firmly held by the community, it is feared that socialization or the spread of western cultures will be hampered and fear of the development of Pan Islamism, the arguments put forward by Snouck Hurgronje become a stimulant for this theory.

Efforts made by the Dutch East Indies Government to eliminate Islamic law in the archipelago were carried out in various forms, one of which was statutory regulations:

- a) The book of the Criminal Law that applies in Indonesia comes from *Wetboek van Strafrecht voor Indonesie* (Staatsblad 1915: 732), which has been in effect since January 1919, does not at all include elements of *Jinayah Fiqh*, such as *hudud* and *qisas* in the field of criminal law. The fully applicable criminal law took over *Wetboek van Strafrecht* from the Netherlands.
- b) The Dutch East Indies government tried to destroy Islamic law regarding state administration and politics by prohibiting recitations related to constitutional law and the elaboration of the Koran and hadith relating to politics and the state.
- c) The field of *Fiqh Muamalah* is also narrowed by limiting the law of marriage and inheritance along with efforts so that the inheritance law is not explained by the Muslims. (Drs. H. Anshoruddin, 2015)

C. Reception Exit

Prof. Dr. Hazairin, SH is the one who put forward the *Receptio exit* theory . After the proclamation and ratification of the 1945 Constitution on August 18, 1945, all the laws and regulations of the Dutch East Indies were no longer valid according to Hazairin because when Indonesia had proclaimed its independence, the Dutch East Indies laws and regulations based on the *Receptio* theory had to exit or outside the legal Indonesian legal system. The release of the laws of the Dutch East Indies

era from the Indonesian legal system was not only because Indonesia had liberated itself and had a new constitution, but also based on this theory the laws that prevailed in the Dutch East Indies era based on the theoretical basis put forward by Snouck Hurgronje were not in line and contradicted with with the Quran and the Sunnah.

Opinion of Prof. Hazairin stated that after Indonesia's independence, it would be better for Muslims to obey Islamic law because Islamic law is one of the teachings of Islam besides creed and morals, which of course Islamic law is a provision from Allah and His Messenger. This opinion is also based on the ideals of being a nation and state in accordance with Article 29 paragraph (1) of the 1945 Constitution which reads "The state is based on the One Godhead". Thinking of Prof. Hazairin is very important to be used as a guide in restoring the purity of Islamic law as it should be. Prof.'s view. Hazairin regarding article 29 of the 1945 Constitution of the Republic of Indonesia has a big role in the Indonesian legal system because in the life of the Indonesian state there may not be legal rules that conflict with religious values.

D. *Receptio a Contrario*

The *Receptio a Contrario* theory is a development of the *Receptio exit* theory proposed by Prof. Hazairin. Sayuti Talib is the originator of the *Receptio a contrario* theory which in his opinion states that customary law has a lower position than Islamic law so that customary law can apply to Muslims if it does not conflict with Islamic law. The perspective of this theory is seen from the position of Islamic law against customary law and views Islamic law must take precedence as applicable law. It means that the *Receptio a contrario* theory is the inverse of the *Receptio* theory . This theory can also apply to religions outside of Islam. Prof. Hazairin and Sayuti Talib have a similar view regarding the *Receptio* theory proposed by Snouck Hurgronje which is very contrary to Islamic teachings, especially in the aspect of Islamic law.

Receptio a contrario theory is that custom is only used as a legal basis if it does not conflict with the textual provisions of the Fiqh experts. Based on the provisions of the texts or constitute a strong view, customs should not be considered valid if in the Shari'ah there are textual provisions that are different from the custom. The presence of this theory is not only due to the development of the *Receptio exit* theory but also based on research on the current laws of inheritance and marriage, among the points of thought are as follows (Thalib, 1985, p. 17) :

- a) Islamic law applies to Muslims;
- b) This is in accordance with the beliefs and ideals of the law, the ideals of the mind and morals;
- c) Customary law can apply to Muslims if it is contrary to Islamic teachings.

E. *Existence Theory*

This existence theory was put forward by a lecturer in the *Kapita Selecta Islamic Law and History of Islamic Law* at the Postgraduate Faculty of the University of Indonesia (UI), namely Ichtijanto SA. This theory explains that there is a connection between Islamic law in the manifestation of the existence of Islamic law and Indonesian national law. The form of the existence of Islamic law as a source of Indonesian national law is also explained in this theory, the forms referred to include (Djatnika et al., 1991) :

- a) Islamic law covers all parts of Indonesian national law;
- b) Its existence, independence, strength, and authority are recognized by Indonesian national law as well as national law;
- c) Islamic legal principles serve as a filter for Indonesian national legal materials;
- d) as the main ingredient and element of Indonesian law.

The forms put forward emphasize that Islamic law has a great influence in the implementation of Indonesian national law. Concrete evidence that there is Islamic law as national law is the enactment of statutory regulations which are in written or unwritten form, but are often implemented in society as a habit. The following are the laws and regulations based on Islamic law:

No.	Juridical Rules	Implementing Regulations (PP), Amendments, and Additions
1.	Law No. 1 of 1974 concerning Marriage	Amended/added to Law no. 16 of 2019 concerning Marriage
2.	Law No. 7 of 1989 concerning Religious Courts	Amended/added to Law no. 50 of 2009 concerning Religious Courts
3.	Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law	-
4.	Law No. 10 of 1998 concerning Islamic Banking	Amended/added to Law no. 21 of 2008 concerning Islamic Banking
5.	Law No. 17 of 1999 concerning the Organization of the Hajj	Amended/added to Law no. 8 of 2019 concerning Hajj and Umrah
6.	Law No. 38 of 1999 concerning Management of Zakat	Amended/added to Law no. 23 of 2011 concerning Zakat Management
7.	Law No. 41 of 2004 concerning Waqf	PP No. 42 of 2006 concerning Waqf
8.	Law No. 19 of 2008 concerning Securities	-
9.	Law No. 5 of 1960 concerning Basic Agrarian Regulations	-
10.	Law No. 18 of 2001 concerning Special Autonomy for the Province of the Special Region of Aceh	-

The adaptation of Islamic law into positive national law that is quite actual is the enactment of the Halal Product Guarantee Act (UUJPH). The provisions in UUJPH are sourced from the provisions of Islamic law regarding the obligation for Muslims to consume halal products. This provision was followed up by the state by formulating mandatory (mandatory) provisions for all consumption products and used goods circulating in Indonesia to confirm their halal status (Rohmah, 2021).

Islamic law has an existence and contributes to the formation of national legal reforms, this arises from the basic norms of the nation's ideology (Pancasila) which are stated in the first precept that all applicable rules in Indonesia must be rooted in religious values. (Gunawan, 2017). The existence or contribution of Islamic law deserves to be taken into account in the development of national law which has normative power and its presence further strengthens the authority of Islamic law in Indonesia (Ma'u, 2018). A state based on belief in God that is embraced by

the Indonesian nation makes it clear that Indonesia is not a secular state and does not mean that a state based on divinity is a state that adheres to one religion, but rather the result of a compromise between the two and produces the term Nation State Religion . The results of the compromise of the two reflect the position of Islamic law as a representation of religious law which is always developing in the national legal arena (Rohmah, 2018) .

F. Concentric Circle Theory

The relationship between the state, law, and religion can be compared with the concept of al-din al-Islami according to the Koran and the concept of religion according to western understanding. There are differences between Islam and Christianity, which since their birth have separated religion from state power, resulting in an emptiness of state doctrine in Christianity. However, with its development in the Middle Ages, Christianity dominated power and state life, in this case what happened in Europe. This is different from the concept of Islam brought by the Prophet Muhammad. In addition to spreading the teachings of Islam, he is also a statesman or a leader of a country. The relationship between the state and religion has close implications, this is reflected in the teachings of Islam from the beginning of its existence, this is reinforced by the doctrine of Islamic teachings that regulate human relations with God (*hablum minallah*) and human relations with fellow humans (*hablum minannas*). So that the existence of this doctrine reinforces that Islam, the state, and law have a strong relationship, supported by historical facts from the time of the Prophet and *Khulada'Rashidun* during the period of the State of Medina, which is strong evidence that the religion of Islam from birth has always been related to aspects of the state and society. (Azhary, 1992)

The link between law and religion occurs because there is a rationalization that is quite dominant with an Islamic thought approach that does not alienate religion from the "legal area" (Azhary, 2003) . So that Islamic thinking about the implications of Islam, the state, and the law is part of al-din al-Islami which is then called the "Concentric Circle Theory".

CONCLUSION

The enactment of Islamic law in Indonesia is inseparable from the history of the entry of Islam into Indonesia and the intervention of the Dutch colonial government. The firm of Islamic law in Indonesia is shown by researchers such as Van den Berg with the theory of reception in complex with the idea that the applicable law in Indonesia is the religious law adopted by each of its adherents. This theory is opposed by Snouck Hurgronje, who argues that Islamic law can apply if it is desired by customary law. So it can be said that the reception theory is the antithesis of the reception in complex theory . Then the Receptio theory was contradicted by the Receptio a contrario and Receptio exit theory. The two theories argue that Islamic law has a higher position than customary law because religious values underlie people's behavior. It emphasizes that the Receptio theory does not follow Islamic teachings because many deviations exist. Fundamentally Islamic teachings and incompatible with the basis of the state.

Islamic law is also part of the enactment of Indonesian national law because the norms contained in the ideology of the Indonesian nation are the basis for the participation of religion in the process of developing national law that has normative power. On the other hand, the relationship between law and religion is firm, supported by Islamic teachings, which are essentially a guide to human life which not only regulates vertical relationships but also horizontal relationships and the relationship between Islam, the state and law is related to each other.

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