

The Effect of Democracy on the Law Islamic Family In Indonesia

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ABSTRACT

A democratic political system will develop liberalism of thought and legislation on Islamic Family Law. The existence of open public space causes the influence of democracy on the development of liberalism of view to express discourse so that during the democratic period, there was contestation of religious discourse, both liberal and conservative. John L. Esposito (1982) argues that there is a renewal in the marriage law due to social changes, which will lead to new demands according to the situation's needs and conditions. Esposito's opinion is strengthened by Ahmad Tholab Kharlie (2013), who concludes that legal modernization and social change are interconnected entities that influence each other. Maznah Mohammad (2011) explains that law and legal interpretation have changed according to the changing structure of state and community authorities. Refute the opinion of Lama Abu Odeh (2004), which states that the only way to encourage the reform of Islamic Family Law is with a system of legal secularization. It can also refute the opinion of Abdullahi Ahmed an-Na'im (2008), which states that secularisation is the only way to make a Muslim practice religion properly. Odeh and An-Na'im's argument can be refuted by following the development of Islamic Family Law legislation in Indonesia which uses a presidential system. Moh. Mahfud MD (2010) concluded that to make changes to Islamic law and enforce it nationally, Muslims must struggle in the political arena nationally. So, it can be supposed that secularism is not the only way to change Islamic Family Law in Indonesia.

KEYWORDS

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Introduction

The dynamics of law and politics are historical phenomena that often occur in the dynamics of law in Indonesia. As a political product, the law cannot be understood from only imperative articles or norms, but it is also necessary to explain the political background. In many ways, political determination towards the law is firm. The law is the construction or crystallization of political wills that interact and compete. (Moh. Mahfud, 2010). Also experienced by the dynamics of the development of Islamic law in Indonesia (Barton, 2002) and its interrelationships with specific political configurations and constellations. (Effendy, 2005) In political reality, Indonesia is constitutionally not an Islamic state but a Pancasila state, so Muslims formally can't realize the Islamic principles of law. To enforce Islamic law on its people based on the current political system, Muslims can fight within a political framework to make Islamic law material into national law material (Moh. Mahfud, 2010). According to legal experts, legal development contains at least two meanings. First, as an effort to update positive law, or it can be said as legal modernization. Second, to function the law by carrying out social changes following the community's needs (Sapto, 2006).

Legal reform and social change are directly related. Socio-political society is one of the factors that determine the occurrence of social change. The same happened with Islamic Family Law in Indonesia before and after independence. Islamic Family Law in Indonesia is formally regulated by the issuance of Law no. 1 of 1974 concerning Marriage. Regardless of the dynamics behind the formulation of the UUP until it was ratified, especially after the ratification of Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law, the fact is that Islamic Family Law in its form as normative law has not changed. The most significant efforts in proposing changes to Islamic Family Law were the emergence of Interfaith Fiqh books published by the Paramadina Waqf Foundation and the preparation of the Counter Legal Draft KHI compiled by the Gender Mainstreaming Working Group from the Ministry of Religion (Nabilah Lubis, 2005). As well as several judicial requests. Review submitted to the Constitutional Court. Khairudin Nasution explained that the objectives of the marriage law reform efforts in various Muslim countries could be grouped into three groups; (Khoiruddin, 2000). First, the state aims for the unification of marriage law. The unification effort was carried out because several schools were followed by the country concerned. Second, the attempt to reform Muslim marriage law is to improve the status of women. Although this goal is not explicitly stated, it can be seen from the history of the emergence of which is to respond to demands for increasing the status of women. The marriage laws of Egypt and Indonesia are examples that fall into this category.

The third is to respond to and develop the demands of the times because the traditional fiqh concept is considered less able to answer it. The birth of a more democratic political system in Indonesia has led to the emergence of a discourse of liberalism of thought as a consequence of democratic state rights of freedom of expression. Then a group that is considered liberal emerged with its reform discourse. The atmosphere of a democratic political climate makes lessons on Islamic Family Law appear significantly. The urge to reform the UUP and KHI has received significant attention. Although the UUP is ijtihad of national marriage legislation, it cannot be denied that the UUUP is ineffective in society. In contrast, the UUP should be able to become a juridical, philosophical, and sociological basis for society, especially the Muslim community. The use of hermeneutics among Islamic thinkers in Indonesia is also caused by the democratic political system built after the New Order. The opinion of Mohammed Arkoun. Arkoun argues that Muslim scholars refuse to use the scientific method (biblical criticism) for political and psychological reasons. Political because the democratic mechanism is not yet in effect. (Hamid Fahmy Zarkasyi, 2012)

The development of thought and dynamics of Islamic Family Law in Indonesia is exciting to study in-depth and comprehensively. This research is not only focused on the framework of thinking but also looks at the socio-cultural aspects, configuration, and political constellations that underlie this thought. According to Abdullahi Ahmed an-Na'im, although Islam has never been the official state religion in Indonesia, Islamic discourse influences and is influenced by state policies. However, this research examines the impact of political configuration on the dynamics of Islamic Family Law thought in Indonesia. As has been explained, the democratic political arrangement of Indonesia after the New Order made the flow of thought liberalism develop rapidly. If the democratic system is implemented, biblical criticism will also be used in Islamic studies. For this reason, a comprehensive analysis of this thinking will be carried out.

Methodology

The research method used is a qualitative socio-legal method. The approaches used in conducting a critical analysis of the problems in this research are the social approach, the normative juridical approach, and the fiqh approach. The primary sources in this research are the book of Interfaith Fiqh, Counter Legal Draft of KHI, and the decision

of the Constitutional Court no. 38/PUU-IX/2011, the conclusion of the Constitutional Court No. 46/PUU-VII/2010, and the decision of the Constitutional Court No. 12/PUU-V/2007.

The study of normative law cannot answer the various problems that arise amid the dynamics of legal thought in society. Many social issues are complicated and cannot be answered in a textual and mono-disciplined manner. An interdisciplinary, more fundamental, enlightening explanation can be obtained in situations like this. Therefore, a legal approach is needed to explain the relationship between law and certain socio-cultural conditions and political systems. Describe comprehensively, and it is necessary to use socio-legal research methods (Sulistiyowati, 2012), which are qualitative (Sugiyono, 2011) based on library data.

With a socio-legal approach, this study uses two approaches: a social approach and a normative juridical one. The social method is used to analyze the socio-political situation to explain the background of Islamic legal thought that developed due to the implementation a more democratic political system. The normative juridical approach is used to analyze the norms of legislation and decisions of the Constitutional Court. The analysis carried out is qualitative, which emphasizes its quality. The study was conducted using library data by tracing the documents of legislation, books, legal journals, research results, and relevant Constitutional Court decisions to explain the problems in this research. The qualitative research method intended in this study is a qualitative research method based on phenomenology. (Khoiruddin, 2009).

The basis of phenomenology in research means looking at the problem with a holistic approach, placing the object of study in a dual construction, and seeing the thing of research in a natural context, not partial. Another approach used in this research is the fiqh approach. The fiqh approach intended in this study is to analyze the problem by expressing the opinions of the fiqh scholars. Previous scholars have also discussed the object used in Islamic law discourse. Such an approach is critical to proving that the speech on reforming Islamic Family Law is not new in the study of fiqh.

Islamic Legal Liberalism In Indonesia

According to Hassan Hanafi, freedom means freeing oneself from the mainstream and saving one's thoughts from wanting to be known, and then returning to self-freedom to examine the root of the problem in a complex and comprehensive manner. (Hassan, 2002). Freedom is not only understood as the expression of hopes and desires, but the meaning of freedom must be a formula for formulating problems better. Freedom supported by democracy will mean respect for the ideas of others without the disbelief of one group by another. So the freedoms protected by democracy will open a more comprehensive dialogue space where the importance of liberalism lies in the sense of freedom supported by a more democratic political constellation.

Renewal of Islamic Thought, which is progressive and relies on rationality, has existed since the 1920s, in the 1920s and post-independence decades. In Indonesia, the understanding of the renewal of Islamic thought is always influenced by global discourse and the political constellation. The momentum of its development began to appear the developed speech received a dialogical response from the 1970s to the 1990s. The main themes that emerged included the relationship between Islam and nationalism/nationalism, imperialism and colonialism, and the basic ideology of Pancasila. Under the New Order government, main themes emerged: the relationship between Islam and the state ideology Pancasila, secularization, rationalization, modernization, democratization, and others. The climax is that after the reforms that brought about changes in Indonesia's democratization, the renewal of Islamic thought began to carry out social movements and a deep mass of opinion with the establishment of the liberal Islamic Network group. The themes used as discourse are

follow-up themes from the previous decade, which have been modified in such a way as human rights, gender, pluralism, and terrorism.

Influence of Government Policies on Legal Discourse Islamic family

The transfer of government power from Suharto to Habibie did not influence the development of the discourse on Islamic Family Law. Course understandable given the short period that Habibie has held. After Habibie, the Indonesian government was led by Abdurrahman Wahid. Abdurrahman Wahid is known as an NU figure who has progressive thoughts in religious discourse. Discourses on religious pluralism, human rights, and gender issues are often the main topics of Gus Dur's ideas, which are based on the education and culture of the community. Barton explained the factors that influenced the liberalism of Gus Dur's thought. According to Barton, four factors led to the liberalism of Gus Dur's thought. First, the Islamic Family's influence taught him to be open and question everything intellectually. Second, being raised in the Sufistic world of traditional Indonesian Islam. Third, it is influenced by the cultural orientation of modern Indonesian society, which leads to pluralism and egalitarianism. Fourth, he was influenced by his education which eventually led him to synthesize modern Western thought with Islam (Barton, 2002).

Issues regarding feminism stem from the Koran being revealed amid a patriarchal Arab society. Arab society is not only tribal-oriented (tribal orientation) but is also seen as male-oriented. This fact has prompted many feminists to regard the classical doctrine of Islam as a religion that demeans women a lot. Women in Arabia had almost no important position and were often considered a disgrace at that time. Therefore, it is necessary to reconstruct an understanding of gender issues in Islamic teachings. However, feminism, with its reform agenda, sometimes cannot be accepted by society. Feminist or liberal thought cannot be taken in the community because the understanding is wrong. According to Azyumardi Azra, people's disapproval of ideas is because they are seen as changing things that have been established and have lasted for centuries. Azra gave an example of when Muhammadiyah was rejected and opposed because it prohibited the reading of talqin and tahlil even though such teachings have been considered part of Islamic teachings (Azyumardi, 2002).

The issue of gender equality is one of Gus Dur's programs. Gus Dur issued Presidential Instruction No. 9 of 2000 concerning Gender Mainstreaming in National Development. This program is known as the expression gender mainstreaming. According to Syafiq Hasyim,⁵² two important things need to be observed with the issuance of the Presidential Instruction: First, the distribution of the Presidential Instruction cannot be separated from the struggle of women's groups to make the issue of equality a national problem. Second, the Presidential Instruction is expected to reduce or eliminate the spatial dichotomy against women. The spatial dichotomy toward women is meant by the existence of a stigma in society that states that women only take care of the household. The Presidential Instruction issued by Gus Dur is considered a starting point for women's empowerment formulated by the executive. Finally, this Presidential Instruction was also used to reform Islamic Family Law. As explained by Ali Reda Bariklou that the issue of women's rights is essential in modern society. According to her, the government should be in a position to protect women. Bariklou added that democracy forces the government to pay special attention to the rights of its citizens and prioritize women's rights. In addition, the movement for equality of women's rights is an international issue emphasized in all countries. (The issue of gender equality became one of Gus Dur's programs.

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Issuance of the Presidential Instruction. First, it aims to improve women's position, role, and quality, as well as efforts to realize equality in an Islamic family, society, nation, and state life. Second, I want to include the paradigm of gender mainstreaming in the national development process in all government agencies. In the Presidential Instruction, there are four presidential instructions: first, carry out gender mainstreaming to carry out planning, preparation, implementation, monitoring, and evaluation of national development policies and programs with a gender perspective following their respective duties and functions as authorities. Second, pay serious attention to the guidelines for mainstreaming gender in national development. Third, the Minister of Women's Empowerment is tasked with providing technical assistance to government agencies and institutions at the central and regional levels. Next, give the president a report on the results of the implementation of gender mainstreaming. Fourth, must make further provisions required for the Presidential Instruction.

Political Dynamics Islamic Law

It also describes how law and politics interact with society sociologically. Although many other aspects are described in this section, they cannot be separated from the theoretical concept of political influence on the development of Islamic Family Law thought and legislation in Indonesia. The dynamics of the politics of Islamic law will be visible and apparent if it is described systematically and thoroughly. People faced with a plurality of cultures, religions, races, ethnicities, and geographical positions of the region will experience a battle of religious discourse called political identity. Political conflicts between groups of people or society with the state will produce laws because the law is a dialectical interaction that constantly gives rise to syntheses in the form of legal products.

Sometimes a law will be effectively applied in a period or a region and become ineffective if it is involved in another period or area. The resulting legal product does not have to be valid throughout the period and location. It is in this dialectical relationship between law and society that politics plays a significant role. Politics can be used as an instrument to realize the goal of Islamic law. Mentioning the statement that the law is a political product can be a very dilemma for ordinary people. It becomes a dilemma because the law is seen as inferior, while politics is in a superior position. According to Mahfud MD, in an ideal state order that adheres to the rule of law, political positions should be objects affected by the law (dependent variable) (Moh. Mahfud, 2017).

From a methodological point of view, the statement that politics influences law is actual, and also the statement that politics influences law is also valid. According to Mahfud MD, the law as a political product is correct if it is based on das seen by

conceptualizing law as law. Crystallization formalization and legalization of competition through political compromise or domination by the majority power. Meanwhile, from das Collen's point of view, the statement of the law as a political product is a mistake. Because the law should have to influence politics, these two views can be equally wrong if faced with the view that law and politics are inter-determining things (influence each other). Furthermore, to use the terminology of Islamic law as a political dependent variable is also very problematic. The mainstream thinking is that Islamic law is a sacred and holy law. Islamic law is considered religious because it comes from Allah through the Qur'an (divine law) texts. In comparison, the sacredness of Islamic law can be repositioned into profane law if the terminology of Islamic law is distinguished between the terms sharia, fiqh, and Islamic law.

In a positivistic view of the law or other social sciences, it is said that facts and values must be strictly separated. The law is enforced by its positive legality. However, this stance has been challenged by critical legal theorists, as explained by Ben Agger that all knowledge (including law) is perspective and flows from specific epistemological, metaphysical, and political commitments (Ben Agger, 2006). Moving from the assumptions used by Agger, the point is the law cannot be separated from the outside of the law. The outer side of the law that is meant is the sociological and political side of the law. In formulating laws, sociological, philosophical, and juridical reasons are always included when issuing the law. The aspects of federal law are customary law, civil law (Western law), and Islamic law. The three legal systems have conflicted with the entry of the Dutch government into the archipelago. As for what happened in Indonesia, Islamic law is one element of national law.

The conflict between the three legal systems is not a conflict that occurs naturally but a conflict that is deliberately created (by design) with the aim of colonialism. (Arifin, 1996) Legal politics at that time was adjusted to the needs of colonialism. Politics fulfill needs in allocating Islamic values and principles in society, nation, and state life. In meeting these needs, political life is reorganized through state decisions. The political articulation is done through the political infrastructure and superstructure (Basri, 1997). Impose Islamic law on its people based on a political system as Mahfud MD argues that what Muslims can do is fight within the framework of legal politics. Islamic values can color the legal regulations in Indonesia and can even become material in the products of private laws (Islamic Family Law) (Moh. Mahfud, 2010).

Based on the understanding of legal politics, Islamic law is a transformation of fiqh posited by the state. In the pontification process, political influence can become very dominant. The form (government) indirectly acts as a censor of Islamic law, which may and may not be formalized. That is what happened to Islamic Family Law in Indonesia. Islamic family law in Indonesia is a form of fiqh transformation into positive law. Because indeed, in the history of its formulation, Islamic law has become the primary reference in compiling existing provisions. The debate about the relationship between law and politics discusses how the law works in a particular political situation. In this case, the law is meant to embody developing values, and the values in question are justice. (Asshiddiqie & Safa'at, 2016).

Thus, ideally, the law is made by considering the interests to realize the values of justice. With the characteristics of containing orders and prohibitions, demanding compliance and sanctions, the law that runs will create order and justice in society. The law is ideally an instrument for obtaining justice. However, there is also an opinion that states that law is not the same as justice. Therefore, something that is considered by the law is not necessarily regarded as fair by the community. Justice is also perspective, which is adjusted to the paradigm of understanding justice.

This paradigm difference regarding justice will make the law very dynamic. The value of justice must also be adapted to situations and conditions that cannot be separated from social reality. For example, something that is considered fair by the Islamic legal

paradigm may be regarded as unfair by the feminist paradigm. Although legal politics cannot be separated from social and traditional realities, as a member of the world community, Indonesian legal politics cannot be separated from the political realities of international law. These two aspects, namely the locality and the global aspects, have an essential role in the development of law. Legal actions in other countries will also determine Indonesian legal politics. Likewise, the development of thought will also be influenced by global discourses. The very significant domination of politics over law is because politics is more substantial than law. Political solid intervention against the law could be a means of legitimizing government power. Van Apeldoorn, as quoted by Mahfud MD, explains that there are some followers of the notion that law is power;

First, the Sophists in Greece argued that justice is what benefits the strong. Second, Lassale said that a country's constitution is not a written constitution but the natural power relations in a country. Third, Gumplovics says that law is based on the subjugation of the weak by the strong to maintain their power. Fourth, some followers of positivism also say that obedience to the law is nothing but the submission of a more vulnerable person to a stronger will so that the law is only the right of the strongest person. Suppose the subjectivist approach, pluralist and elitist variants, are used as described by Anthony Giddens. In that case, the assumption is that something the ruler does when he is in power is to maintain his control (Held, 1987).

A democratic political system will have a different effect than an authoritarian one. In this context, intentionally or unintentionally, the subject of the ruler will be very influential (dominant) on what he controls. Even that influence will be influenced by what political system is used. The approach used by Giddens can be used to observe the development of Islamic law in Islamic countries. Responsive law usually emerges and develops from a democratic system of government. An authoritarian political system will usually produce rigid rules; conversely, a democratic system will have democratic legal products. However, the problem is that accepting democracy as a system of government in Muslim countries is still problematic and debated.

Raises the assumption that Islamic law used in Muslim countries cannot be separated from the interests of the rulers because the majority of Muslim countries are still in the form of monarchies, for example, Saudi Arabia. In Saudi Arabia, known as a Wahhabi adherent, the line of state regulations is set based on the official school adopted by the government. Society cannot get out of the Wahhabi hegemony. That confirms the opinion of Maznah Mohammad, which states that law and legal interpretation have changed following the structure of state and community authorities. Rules of decency and decency based on conscience or the basics of etiquette and habit, legal authorities are made to provide direct sanctions based on actual actions on what has been agreed/stipulated forms of violation based on political decisions. Rules officially confirmed by the state authorities, the law can be read from the context and interests that gave birth to the law and how the law is implemented, in contrast to religious rules, which are based on individual obedience to God.

The role of politics in influencing the law can be seen as a way to maintain the status quo in the hegemony of power. During colonialism in Indonesia, for example, legal politics was adapted to the needs of colonialism. The Dutch government at that time was trying to enforce Dutch law in Indonesia. Eventually led to legal conflicts. Legal conflicts that are deliberately created aim to create new rules and weaken one of the laws that live in society. Islamic law at that time was weakened by strengthening the customary law system. Customary law received legitimacy from the Dutch government because it was considered in line with its interests.

Legal politics in the normative-operational dimension is outlined in the form of state law, which is institutionally a product constructed and posited by the state apparatus. Therefore, the substance of the policy will not automatically follow the ideals of social

justice. Even sometimes considered foreign by the public. When a responsive legal theory approach is used to understand the law, good law should offer more than just procedural justice. A good law must be able to recognize the wishes of the public and have a commitment to achieving substantive justice. A country's legal and political construction is not just enough to examine what is contained in official texts but must include other factors outside the law.

Law is always influenced by the maker's political vision, the society's culture, and economic, political, socio-cultural, and religious interests. So the law is not value-free. Philippe Nonet and Philip Selznick explain that legal theory has social consequences and is not free from colonial influence.³⁵ They further clarify that the position of law is very decisive and influences the form of political community and the range of social aspirations. From another perspective, Abdul Hakim G. Nusantara views legal politics as an instrument for formulating legal development strategies, namely orthodox legal development strategies and responsive legal development strategies. The permitted development strategy will determine the path and effectiveness of the law. Satjipto Rahardjo illustrates that modern law is a specialist, even esoteric field; therefore, collisions with other areas and forces in society are unavoidable. He further said that the law is not only influenced by politics but also by the economic field. Law is embedded in particular social structures. In a social construction, politics is only part of the other components of the law. Besides that, there is still a cultural component, values, and community aspirations that cannot be ruled out. Indeed, in the context of modern law, many laws have been united and allied with the state.

Conclusion

Based on the research discussion, it can be concluded that a democratic political system will lead to the development of liberalism in thought and legislation on Islamic Family Law. The existence of open public space causes the influence of democracy on the development of liberalism of view to express discourse so that during the democratic period, there was contestation of religious discourse, both liberal and conservative. Meanwhile, external (external) reform efforts are carried out through brainstorming thoughts on the community with the instruments of publishing books, journals, and articles to issue these renewal ideas. The publication of the book on Interfaith Fiqh by the Liberal Islam Network is one of the efforts to disseminate information to the public on reforming Islamic Family Law in Indonesia. Further external efforts for the renewal of Islamic Family Law.

Islamic Family Law Islam is considered a gender-biased provision that must be reinterpreted. One of the shortcomings of reform efforts with the instruments of publishing books, journals, and articles from this liberal group is that they are not structured within a clear methodological and systematized framework. So the thoughts considered reform are only limited to sporadic thoughts and explosions of ideas that are not built from a methodology that can be debated academically. Reform efforts by issuing ideas to conduct brainstorming in the community are also ineffective, which means that the discourse is wrong and is not accepted by the community because of errors in concluding. The failure of the reform was more due to the existence of an established and mainstream opinion among the public regarding Islamic Family Law. Another reason is the cultural reality of the Indonesian people, predominantly Shafi'i, so opinions outside this school are not common among ordinary people. One example is the guardian in Marriage. In the opinion of Shafi'iyah, a guardian in Marriage is a pillar of Marriage that must exist, but among the Hanafiyah scholars, women can marry themselves without a guardian. The opinion of the Hanafi clerics is certainly not common among the people who are the majority of the Shafi'i sect. As described, the failure of reform efforts from outside and from within also

caused the assumption in society's problem of Marriage as something sacred that should no longer be interpreted.

Judging from the development of Islamic Family Law during reform in a democratic political constellation, it can be generally concluded that the development of liberalism in thought and legislation on Islamic Family Law is influenced by democracy. But the significant influence of democracy is limited to developing liberalism of thought. Meanwhile, the result of democracy on the development of Islamic Family Law legislation is only tiny. This slight influence changed with the annulment of Article 43 paragraph (1) of the UUP.

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