

THE POSITION OF SHARIA AS A SOURCE OF POSITIVE LAW IN THE PERSPECTIVE OF MARRIAGE LAW

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Abstract

The codification of sharia as a source of positive law in the marriage law field is massive in use. This study aims to determine the position of sharia as a source of positive law from the perspective of marriage law. This study uses normative research methods, while data collection techniques are carried out through library research. The study results show that sharia's position as a source of positive law is the main reference source in the perspective of marriage law.

Keywords: Sharia, Positive Law, Marriage Law

INTRODUCTION

History records the development of law starting from the history of ancient laws, then developed by the Byzantine and Roman empires. After that, the Islamic world, which was quite advanced in the eastern world, also developed laws inspired by Islamic law derived from the Koran and Hadith. Subsequently, European countries, both ancient Europe and modern Europe, began to codify laws. However, most western literature referred to Roman law as the beginning of modern law as it is known today (Maksum, 2016). Islamic law is universal, according to Anderson (Saladin, 2021). Its specifics concern all areas of law. Munakahat arranged marriage and divorce. Wirasah regulates inheritance. Muamalat established trade procedures. Jinayat concerns criminal law. Al ahkam as sulthaniyah concern the constitutionality and administration of the state. Siyar establishes peace and warfare in the field of international law. Finally, Mukhasamat regulates both judicial power and judicial matters.

Islamic Sharia includes spiritual beliefs and political ideologies. When defining Shari'a in the sense of Islamic law, there is a separation of law as a legal discipline. Indeed, Islamic law does not distinguish explicitly between private and public law, as understood in understanding Western law, because in private law, there are aspects of public law and vice versa (Aulia & Effida, 2018).

The development of Indonesian law is the hope of creating a law in harmony and balance for all aspects of life. The history of the development of Indonesian law has shown that unification and codification are very difficult to implement in Indonesia because of the complexity of Indonesian society (Sugiantari, 2015).

The codification of Islamic law in Indonesia has existed since the colonial period. However, its legal status is still under the domination of customary law. Because the receptive theory was

very influential in the legal system of the time, the product of Islamic law during Dutch rule already existed, namely regulating the Religious Courts and their legal materials. However, the role of customary law dominated the rule. With the emergence of Law number 1 of 1974 concerning Marriage, Islamic law became a direct source of law without going through customary law. The role of Muslim leaders is quite dominant in approaching the elite so that the Marriage Bill (UUP) can be codified and follow the codification of other Islamic laws (Ma'u, 2018).

The position of sharia as a source of positive law is very dynamic. Legal sources can be interpreted as materials used as a basis by courts in deciding cases (Marzuku, 2008). This is because the codification of sharia in positive law is massive in family law, especially marriage law. But on the contrary, in the field of labor law, sharia law is not a staple source when compared to Western law (Maksum, 2016). Based on the background of these problems, researchers are interested in conducting a study with the title "The Position of Sharia as a Source of Positive Law in the Perspective of Marriage Law".

RESEARCH METHODS

This research uses normative research methods. Normative Law Research is legal research conducted by examining library materials or secondary data (Soekanto & Sri Mamudji, 2003). Data collection techniques in this study were carried out with literature studies, according to Mestika Zed in (Supriyadi, 2017) Literature or literature studies can be interpreted as a series of activities related to library data collection methods, reading and recording and processing research materials.

DISCUSSION

The highest goal of enforcing sharia is kindness (maslahah). This kindness is for Muslims but for all human beings simultaneously. The reason is that sharia is, etymologically, meaning "way", "rule", or "law". All three have positive connotations, namely good "way", reassuring "rule", and protecting "law". From this etymological understanding, a terminological understanding emerged that sharia is the path, rule, and law created by Allah Almighty that humans must enforce. The reason is that sharia is the common law of Islam. All the commandments of Allah Almighty in the Qur'an and the Prophet SAW in the al-Sunnah must be followed. In other words, sharia, as the common law of Islam, not only regulates the laws of human worship vertically to Allah Almighty but further regulates human relations with others horizontally, such as civil, criminal, and siyasah (political) matters. Everything must be enforced with sharia (Yakin, 2021).

In Indonesia, the position of Islamic law is also a source of positive law in addition to western law and customary law. In these conditions, comparing Indonesia and Morocco becomes interesting because of the position of Islamic law in both countries as a source of positive law (Maskum, 2016). Sources of positive law are divided into sources of material and formal law. Sources of material law are legal materials in the form of behavior and reality that exist in society, including customary law. Meanwhile, the sources of formal law are laws, customs,

jurisprudence, tracts, and doctrines. Islamic law also has a material source of law and positive law, but the difference between the two is that the source of Islamic law comes from revelation (God). In contrast, positive law comes from behavior and reality in society. As for 'urf as a custom that can also be called the behavior of society, it remains to be sorted into 'urf shahīh (which corresponds to the nas} or the source of textual law) and 'urfbātil (which is incompatible withnas), so that all that can be used as a source of law is 'urf shahīh (Tamam, 2018).

If Islamic law is systematized into the Indonesian legal system, it can be described as follows (Ramdhani, 2015):

1. Islamic civil law, including:
 - a. Munakahat, regulates everything related to marriage and divorce and its legal consequences
 - b. Wirasah, arranging all matters with heirs, heirs, inheritances and division of inheritance
 - c. Muamalat, regulates matters of treasury and rights to objects, the system of human relations in matters of buying and selling, renting, borrowing and borrowing, unions, contracts and so on.
2. Islamic public law, including:
 - a. Jinayah, who contains arrangements on acts threatened with punishment, both in the finger of hudud and the finger of ta'zir
 - b. Al Akhsam As Sulthaniyah discusses issues related to the head of state/head of government, the right of the central government to the regions, about taxation, etc.,
 - c. Shia, regulating war and peace affairs, governance of relations with adherents of other religions and other countries
 - d. Mukhasamat regulates matters of justice, judiciary and procedural law.

Man is a more glorified and preferred being of God compared to other beings. God has established rules about marriage for humans with rules that must not be broken, and humans are not allowed to do as they please like animals, mating with the opposite sex at will or as with plants mating through the intercession of the wind (Halimi & Dimyati, 2022). In Chapter I Article I of Law Number 1 of 1974 concerning Marriage, it is explained that what is meant by marriage is an inner birth bond between a man and a woman as husband and wife to form a prosperous, eternal family based on the One True God (Yudowibowo, 2012). Meanwhile, marriage, which in religious terms is called "marriage", means a contract that justifies association and limits the rights and obligations between men and women who are not muhrim (Indo, 2019). The word nikah in the Quran has been mentioned 23 times, and nikah etymologically means "gathering" while the meaning of majazi is "sex" (M.Quraish Shihab, 2007)

The government, together with the House of Representatives of the Republic of Indonesia (DPR RI), has included a Draft Law on the Applied Law of Religious Justice in the field of

marriage in the 2005-2009 National Legislation Program as a form of national legal policy that wants the realization of a material law of religious justice regulated by law. The agreement between the House of Representatives of the Republic of Indonesia and the Government, as stated in the Prolegnas, reflects the willingness or goodwill to place religious law as one of the sources of national law, in this case, material law in the field of marriage. This view is in line with the philosophical view of the Indonesian nation, which always begins the formation of its laws with the phrase WITH THE GRACE OF GOD ALMIGHTY. This phrase articulates the conscience consciousness of the shaper of the law that the resulting product of the law is believed to be the mercy of God Almighty. In line with the spirit and goodwill of the government in the House of Representatives of the Republic of Indonesia, Law No. 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning Religious Justice has also been passed. This law increasingly shows a legal, and political configuration conducive to implementing Islamic law in the national legal system (Ridwan et al., 2021).

A marriage that everyone must have lived or at least born out of a marriage. This makes the family law necessarily pertaining to everyone without exception (poor people, rich, officials, people, merchants, peasants, and so on), while other mu'amalah laws relate only to certain persons according to their involvement.

So when viewed from the importance of the study of Islamic family law, in this case, the law of marriage and divorce, compared to other laws included in the muamalah legal family. According to J.N.D. Anderson, as a branch of muamalah law, the importance of Islamic family law among other branches for several reasons: (1) Family law is considered the core of Shari'a because it is this part that Muslims consider a gateway to further entry into their territory; (2) Family law is considered the core of Shari'a because it is the family law that has for centuries been recognized as the main foundation for the formation of a Muslim society (ummat); (3) broadly speaking it can be said that only family law still applies to some 400 million Muslims worldwide, and only in the Arabian Peninsula, Afghanistan and Northern Nigeria is the Shari'a Law outside the family law and individual status still valid today; (4) family law and divorce in the present times are the subject of debate between the forces of conservatism and the progressive forces in the Islamic world and the consequences arising from this debate are the emergence of rapid progress in the social sphere as a reflection of the presence of inner modernism. Islam, as well as an illustration of the fact that nominally impossible laws can actually change in practice (Hammad, 2018).

CONCLUSION

Man is a more glorified and preferred being of God compared to other beings. God has established rules about marriage for humans with rules that must not be broken, and humans are not allowed to do as they please, like animals, to marry the opposite sex at will or as with plants to mate through the intercession of the wind. Family law is considered the core of Shari'a because it is this part that Muslims consider to be a gateway to further entry into their territory, Family law is considered the core of Shari'a because it is family law that for centuries has been recognized as the main foundation for the formation of a Muslim society (ummah). It can be

said that only family law applies to some 400 million Muslim people worldwide, and only in the Arabian Peninsula, Afghanistan, and Northern Nigeria is the Shari'a Law outside the family law and individual status still valid today. Hence, the position of sharia as a source of positive law becomes the main reference source in the perspective of marriage law.

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