

The Feasibility of Implementing Islamic Law in Distribution System of Civil Servants' Inheritance

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Abstract

Muslim in Indonesia faces dualism of law derived historically from the advent of Islam and national law as a form of combination during the age of colonialism. The legal law of inheritance does not represent Islamic law hitherto. Therefore, this research aims at analyzing the clash of laws and its' distribution specifically on Muslim civil servant inheritance in Indonesia. Identifying principles and legal norms approach to inheritance, this research covers philosophical, statue, and conceptual. Legal material sources which are based on normative-prescriptive are this research's primary, secondary and tertiary materials. Thus, it employs juridical qualitative analysis based on legal interpretation, reasoning, and argumentation. Finally, the wealth sourced from savings/stoppage of civil servants is inheritance that should be divided in accordance to the law of community property and Islamic inheritance law or *Faraidh*.

Keywords: Islamic Law, Distribution of inheritance, Muslim civil servant, Indonesia

1. Introduction

Muslims in Indonesia are confronted with the dualism of national law in which positive law and Islamic law might be the same or might be different. One of differences of positive law (regulations/legislations) and Islamic law is about distribution of Muslim civil servants' inheritance. Muslim civil servants' inheritance is already regulated by positive law, but on the other side, Islamic law also regulates the distribution of Muslim civil servants' inheritance as regulated in Compilation of Islamic Laws (KHI) Article 176 to Article 191).

There are differences between positive law and Islamic law in the distribution of inheritance. The distribution of Muslim civil servants' inheritance to their heirs is not equally given (Budiono, 2006, p.37). In other word, not all of heirs will get the inheritance. The distribution of Muslim civil servants' inheritance is given by using a hierarchy system. If the first heir is still alive, the second heir and the other heirs will not get the retirement savings. If the first heir is already passed away, the second heirs will get the retirement savings and so on.

Islamic inheritance law does not recognize the rules governing, that inheritance is only given to one heir and arranged in hierarchy (Law Number 11 Year 1969). The position of each heir is already regulated in detail. The norm of positive law regulating the inheritance of Muslim civil servant shows that inheritance will be given to one or more heirs. Ignoring other heirs is essentially incompatible with philosophical and juridical perspectives. Philosophically, the regulation of the ones entitled to receive the inheritance of Muslim civil servant is still not fair (Budiono, 2006, p.36).

Legal norms regulating the ones entitled to receive the inheritance of Muslim civil servant have already given legal certainty. Yet, there is uncertainty whether the legal certainty is correct, certain, and sufficient for all parties in an inheritance sharing or not. *Nieuwenhuis cited* in Herlien Budiono also states that it is questionable because a threat toward certainty is regarded as "an unpredictable attitude from human beings (*het toekomstig gedrag van zijn medemens*)" (Nieuwenhuis dalam Budiono 2006, p. 210). Legal certainty does not always results in justice.

In Islamic inheritance law, the right of the heirs is already arranged without prioritizing one heir and nullifying other heirs. The heirs in Islam are divided into two kinds: *nasabiyah* and *sababiyah* (Sarmadi, 2013). Philosophically, several legal norms stated in legislations and government regulations are unable to regulate and to solve problems that might arise in the community (among the heirs) whereas the function of law is essentially to serve the interests of society (Friedman, 1975, p. 17-18). Legal norm must have the aspect of legal certainty and must also meet the need for justice.

The position of widows/widowers of the deceased civil servants in legislations and government regulations are already set in such way that they will be the only heir who acquire the property (in hierarchy), and the other heirs are not entitled to the property owned by the deceased civil servants (Government Regulation Number 25 Year 1981 on Civil Servants Social Insurance Article 10 Section 1 and 2). This rule contains elements of injustice. It can be compared to the relevant customary law in which widows have no inheritance, because they are considered as strangers. This rule is previously perceived to be fair but it changes due to its development and eventually it is considered unfair (Budiono, 2006, p.213).

Islamic Legal Compilation that have the form of Presidential Instruction which its existence not yet entered Indonesia legal system, and the substance there have many interpretations, supposed problem of inheritance should be included in it fully, so there is no disparity in the decision by the Religion Judicial Magistrate (Budi, 2013, p.1). The provisions of chapter 834 of Civil Code Law enable the heirs to use the wealth based on his right as heir. This claim like the other claim of ownership can be maintained from anyone including who have the same claim. Legally, the rules regulating the inheritance of Muslim civil servants do not fulfill *sharia* legal certainty because there are the rights of heirs which are violated. Although legal norms about the distribution of Muslim civil servants' inheritance can fulfill legal certainty, Islamic law has not been applied yet. This is the legal certainty which implies uncertainty. The concept of legal certainty contains a number of interrelated aspects. One of the aspects is the protection afforded to individuals against arbitrariness of other individuals, judges, and administration (government). The aspects of legal certainty can guarantee the enforcement of the law, including the enforcement of Islamic law for a Muslim (Koldman et.al, 2012).

2. Theory

2.1. Theory of Legal Purposes

Muhammad Ali (2002, p.72) believes that law has three purposes; (1) juridical-normative perspective, (2) philosophy of law, and (3) sociology of law. Gustav Radbruch teaches three ideas of the basic elements of law that must be identified by law experts as legal objectives, namely legal certainty (*rechtssicherheit*), justice (*gerechtigkeit*), and benefits (*zweckmasigkeit*) (Fence, 2007, p 395). The different view on legal interpretation depends upon legal interpretation variety either in the form of the legal itself or the nature. Justice is one of the legal perspective attainment. *Etische theory* is the first theory proposed by Aristoteles in his works *Ethica Nicomachea* (Syahrani, 1996, p. 20). This theory elaborates that the sole quest of law is only justice. According to this theory, the presence of law should be whether it is justice (Apeldoorn, 1996, p. 12).

Robert Reiner whose work titled *Justice* contests the idea of justice (Penner, 1997, p.719). Justice is the final purpose of law legal system which is linked to the function of law that is used to distribute and allocate values within the society giving direct points justice (Friedman, 1975, p.17-18). Philosophically, justice links to balance principles (Shidarta, 1994, p.26). Furthermore, Aristotle distinguishes justice into two types: distributive justice and corrective justice. R. Soeroso states that first, distributive justice is a justice which gives to everyone based on their services or division according to their respective rights. Secondly, cumulative justice or *cummulative justitia* that received by each member regardless of service "(R Soeroso, 2007, p. 63-64).

In the other hand, justice is the interaction between hope and reality which is derived from individual or community. Justice in Arabic is derived from the word *adala* which is synonymous with *wasith* which means the person who stands in the center meaning equality. Justice in Arabic can also mean *inshaf* or *'itha al mar'I ma lahu wa akhaza ma 'alaihy* means giving what belongs to others and having what belongs to self (al'Arabiyah, 1980, p. 558). *Insyaf* means conscious, because justice is equal without a priori (Madjid, 1992, p.512-516).

In the theoretical development of Aristotle's work, ethic has its relevance to justice principles which as relevance to Islamic law. Because it is the most important principle in Islamic law (Ali, 2006, p.45). Thus, it impacts to the revival of goodness and avoidance of evil (Hassan, 1994, p. 21). According to Abu Ishaq Ash-Syathibi, the main aim of the Islamic Shari'ah is to achieve human welfare which lies in the protection of five benefits (*usū al-khamsah*), which is to maintain religion (*zhifzh ad-dien*), soul (*zhifzh an-nafs*), intellectual (*hifzh al-aql*), family / offspring (*hifzh an-nasl*), and wealth (*hifzh al-mal*) (Ash-Syathibi, 2003, p.8). Abu

Zahrah states that “there is no law that is made except in purpose of goodness (Zahrah, 1958, p.336). Therefore, the purpose of Islamic law is maintaining goodness in the life of human being socially or individually. If it is seen through the perspective of constitution basic foundations, good or bad, law can be interpreted in three dimensions philosophical, juridical, sociology. Philosophy means law has to consist justice, juridical means guaranteeing the law, and sociology that matches to the humanity values (Arrasjid, 2008, p. 17-18).

2.2. The Theory of Law Enforcement

Islamic Law has strong roots in Indonesia. It grows among Indonesian society in coexistence with customary law and mutually influencing each other (Jazuni, 2005, p.240). There are two Islamic law implementation theories that were born under Dutch colonial regime in Indonesia. *First, receptie in complexu* theory. *Second*, receptive theory pioneered by Lodewijk Willem Cristiaan Van Den Berg (1845-1927). According to *receptie in complexu* theory: society that holds certain religion will have customary law based on their religion. All legal sanctions of customary law will submit to sanction based on Islamic law. Customary law is under Islamic law (Aseri, 2014, p.2). Therefore in Indonesia, there was a time when Islamic law is fully accepted and implemented by muslim society (Rafiq, 2006, p.12). Islamic law can be implemented when it is already accepted by customary law. This theory states that Islamic law is considered law when it is already absorbed by local customary law.

During post-independence era, the existence of Pancasila and 1945 Constitution as sources of law created counter theory towards colonial era theory. H. Ichtijanto SA articulates the relation of *receptie exit* and *receptie a contrario* with legal theory he called existence theory. This existence theory is cementing Islamic law existence in national law (Rumadi, 2001, p.83-84). This existence theory is actually emphasizing *receptio a contrario* theory in the relation with national law (Fuad, 1975, p.51-52). Thus, Islamic law cannot be separate from Indonesian people.

3. Methods

Research on Civil Servant Inheritance sharing is a normative law that researched on law norms and principles exist in inheritance as law concept in Islam, related to inheritance in Indonesian law concept. Source of legal material in this research is primary legal material, secondary legal material, and tertiary legal material. Primary legal material are binding legal materials, consisted of rules and regulations or jurisprudences that directly consisted of heritage treasure of civil servants (Soekanto, 2001, p.13). Secondary legal material is the one provides explanation on primary legal source (Soekanto, 2001, p.13). This legal material has supporting characteristics and provides explanation that generally consisted of references including books, research results, law journals, scientific magazine, mass media, articles relevant with the researched problems. Tertiary legal material is material that gives clue or explanation towards primary material and secondary material (Soekanto, 2001, p.13), for example Law Encyclopaedia and Law Dictionary.

In accordance with normative research in which the research focus is on written legal materials, legal material compiling procedure is conducted through library studies with document studies technique. The search for legal material begin by searching and compiling literatures related to the analyzed topic. The primary legal material searched can take form of basic norms (Al-Qur'an and Hadiths) and several rules and regulations related to research topic, added with secondary material and tertiary is conducted by directly come to several location of university libraries and regional libraries. After legal materials, primary, secondary, and tertiary materials, are compiled, the next stage is reading intensively and taking notes by using card where reading material based on alphabetically arranged subjects.

This research is based on legal materials with normative-prescriptive characteristics. This normative-prescriptive in the context of legal studies is required to find the rule of law. In finding the rule of law, the sharing of inheritance of Civil Servants is understood based on law hermeneutics perspective which consisted of two meanings: interpretation method on normative text and law discovery (Hamidi, 2005, p.48). Sharia law discovery is conducted by theological interpretation method by focusing on *maqāṣid asy-syari'ah* study.

Legal materials with normative-prescriptive characteristics in this research is used to study legal problems related textually to the substance of the law both from the aspect of norms, principles, and values inside it.

Legal materials obtained from library study research are critically researched by qualitative juridical analysis method which is analysis based on coherent legal interpretation, legal reasoning, and legal argumentation with the following characteristics: (1) positivity: law must have authority; (2) coherence: law

must be established as life order; (3) justice: consisted of values used to regulates correctly human relations (Hamidi, 2006, p.6). Legal material analysis process begin by viewing inheritance concept in several literatures (book of) fiqh by looking for substances in the form of principles and norms that regulates inheritance law. Next, analysis can be conducted towards legal material in the form of laws and regulations related to research subject.

4. Discussion

4.1. Legal Dualism in Indonesia Culture History

In Indonesia there are various laws regulating society, one of them is Islamic Law. During 1960s, there are three or four main streams of legal theory in Indonesia: Customary Law, Islamic Law, Positive (Western) Law, and Indonesian Socialist Law (Jaspan, 1988, p. 242). Islamic Law grows in Indonesian society in a coexistence with customary law (Fanani, 2008, p. 113), even between both of them there are “Mutual Influence” (Jazuni, 2005, p. 240-241). Besides that, contemporary Islamic law absorbed many concepts from the West (Coulson, 1987, p. 113). This is admitted by Daly (in Jazuni, 2005, p. 240) states “Islamic law required to ‘borrow’ from Western Law in the forming. On the other side, Islamic law also influences Western law. Therefore the law in Indonesia is a mix from European legal system, religious law, and customary law. The majority of the systems followed both civil and crime, based on Continental European law, especially from Dutch due to Indonesian past history as it’s colony: Netherland Indie (*Nederlandsch-Indie*).

The meaning of various legal perspective aforementioned, can be achieved as an attempt to unite two different norms in national legal system: positive law and Islamic law related to muslim civil servants inheritance. Related to that norm problems, a comprehensive understanding attempt towards philosophical and juridical bases conducted at the same time with an attempt for law discovery in the context of national legal renewal are required. The necessity of national legal renewal on inheritance related to civil servants inheritances by adopting Islamic inheritance law is one dimension of national legal development in the form of renewal dimension, aside of maintenance dimension and invention dimension (Ali, 1989, 242).

4.2. History and its Impact on Inheritance Distribution

The manifestation of norm in laws and regulations on muslim civil servants inheritances sharing or distribution studied from philosophical perspective, from Islamic inheritance law, when a muslim left inheritances, that inheritances will be distributed to the heir decided by Islamic inheritance law. It is because after the deceased passed away one of the heir’s obligation is to distribute the heritages among the rightful heirs according to Islamic inheritance law. In Indonesia, it has been regulated - in the positive law - the inheritance distribution of Muslim civil servants is given by a hierarchical system. If the first heirs are still alive, the second and other heirs will not get the inheritance (pension guarantee) and so on. On the inheritance rights, Islam does not recognized hierarchy/priority to certain heirs. In the term of inheritance sharing or distribution, Islam only recognize heir order, who takes more precedence and who takes less on inheritance sharing (Tim El-Madani, 2014, p.32). If it is studied from jurical perspective, muslim civil servants inheritances have not fulfill certainty in sharia because there are heirs’ rights violated (Arrasjid, 2008, p.17-18).

Philosophically, that in Islamic inheritance law, inheritance can be shared to other heirs, while inheritance of civil servants which only inherited by one person (hierarchy system). It is not fair on the benefits (*mashalahat*) other heirs who are entitled. (Zahrah, 1958, p. 336-338)

Based on the meaning of various perspectives aforementioned, at least there are possible attempts to unite the two different norms in national legal system: positive law and Islamic law related to muslim civil servants inheritance sharing or distribution. Related to that, there is necessity of national legal renewal on inheritance on civil servants inheritances by adopting Islamic inheritance law as one dimension of national legal development: renewal dimension (Ali, 1989, p. 242).

Djatnika (in Wahid, 1990) generally concluded that Islamic law conception implementation in Indonesian society life need to be conducted by adapting to Indonesian culture. The same goes with it’s implementation through jurisprudence in religious courts therefore it can develop in Indonesian laws and capable of facing challenges and society needs towards Islamic law purposes, for example in the case of poligamy, minimum age for marriage, divorce in front of the courts (Abdurrahman, 1922, p. 20).

The purposes of Islamic law compilation formulation in Indonesia is to prepare a unified guide for Religious Courts and to be positive law that must be obeyed by all muslim citizens in Indonesia (Abdurrahman, 1922, p. 20). Therefore there is no more contradictions in Religious Courts verdict.

Thus, it will be clear that in Indonesian context, Islamic law have undergone development from thought product not only dominated by fiqh but also coupled with other institution for example muslim cleric fatwas as responds to the occurred problems, courts verdict, and rules and regulations formulated by legislature body that binds all citizens.

4.3. Inheritance Distribution for Muslim Civil Servants in Indonesia

Characteristics of Muslim Civil Servants' inheritance in Indonesia can be seen from their rights, sources and status (Sembiring, 2016, p. 202). The right of the heirs on the inheritance, in the form of continuous salary and death security, compensation, mourning money, funeral fees and scholarship assistance derived from government awards which is in Islamic law called *Hibah*. Meanwhile, Muslim civil servants' inheritance in the form of pension security, old age security and housing savings is a collection of mandatory monthly contributions of civil servants along with the results of their development in the form of social insurance, assets that have been obtained during life (it is not directly possessed by heirs), ownership rights are limited, and it will be obtained after Muslim civil servants die. Based on the theory of the application of Islamic law and the theory of legal objectives (*maqoshidus syari'ah*) which is based on justice, benefit and certainty in the frame of *maslahat*, the inheritance of Muslim civil servants includes *tirkah* or inheritance and joint assets, all heirs have the right to take into account aspects (*mulahadzah al-hajat*) (Al Amruzi, 2014, p. 21). Aristotle's concept of distributive justice is in line with Islamic law that the divisions of inheritance of civil servants, for heirs who have more urgent needs, measures of inheritance get a larger share. Thus, the division of Muslim civil servants' inheritance should be in accordance with Islamic inheritance law (*faraidh*). The widow / widower of the deceased civil servant gets a share of the joint assets $\frac{1}{2}$ (half) of the Muslim civil servant inheritance, and half ($\frac{1}{2}$) is again shared with all heirs including widows / widowers as the wife / husband of the heir (Ali, 2006, p.87-88).

5. Conclusion

Indonesia Law is a combination of European legal systems, religious law and customary law. Most of the systems adopted, both civil and criminal, are based on continental European law, especially from the Netherlands because of aspects of Indonesia's historical past which were colonized by the Dutch East Indies (Nederlandsch-Indie). The law is used as the basis for the distribution of civil servants' inheritance.

Muslim civil servants' inheritance is in the form of a continuous salary and death security as compensation, mourning money, funeral fees and scholarship assistance that are given by government, in Islamic law called grants (*Hibah*). Meanwhile, Muslim civil servants' inheritance in the form of pension security, old age security and return of civil servant housing savings is a collection of monthly contributions of civil servants along with the results of their development in the form of social insurance which is divided hierarchically, it is not providing justice, benefit and certainty law for all Muslim civil servants heirs and it is also contrary to Islamic law, because based on the theory of the application of Islamic law and the theory of the purpose of the law which is *maslahat*, the inheritance of civil servants includes *tirkah* or inheritance and joint assets. So, the division of inheritance of Muslim civil servants should be adjusted to Islamic inheritance law (*faraidh*).

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