The Development of the Politics of Law in Indonesia’s Sharia Economic Environment

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Abstract: The sharia economic law in Indonesia applies in non-formal term as the part of the law that lives in community and in juridical formal term. The non-formal term of sharia economic law can be actualized in the form of *fiqh mu’amalah iqtishadiyah* or DSN MUI fatwa while the juridical formal term must be actualized in the form of the enactment of laws and regulations whose formulation is carried by the authorized government agency. In turn, the accommodation of *Mu’amalah* principles brings out the politics of law of sharia economy. This research is a normative legal research. The object of a normative legal research is the law that conceptualized as a norm or rule. There are several norms that becoming the objects in this study, including laws, government ordinances, etc. This research uses historical approach and statute approach. The result of this research shows that the sharia economic law in Indonesia has a specific type. Recognition process of the sharia economic law has a different recognition than another Islamic laws. Fatwa DSN MUI has strong legitimation in laws related to sharia economic. This is a concrete manifestation that the state supporting the development of Islamic economic in Indonesia.

Keywords: Politics of Law, Sharia Economy

1. Introduction

In the last several years, development in shariah economy fields was quite rapid, fatwas (opinion or interpretation) concerning shariah economy activities has filled more and more legal voids. Even Dewan Syariah Nasional-Majelis Ulama Indonesia (DSN-MUI) was established in order a) to create the form of Moslem aspiration concerning economy and to encourage Islamic means in economy/financial implementation according to Islamic laws, b) establishing DSN-MUI is the efficiency and coordination measures taken by scholars in addressing economy/financial related issues. Numerous problems/cases needing fatwas would be collected and discussed in order to obtain similar views in its handling by each Dewan Pengawas Syariah (DPS) lies within shariah financial institution, c) to encourage Islamic means implementation regarding economy and financial life, DSN-MUI would always involved and proactively contributing in addressing dynamic development of economy and financial among Indonesian society.

Religious judicial authority which tasked and authorized in examine, decide and completing first level cases, between those of Moslem particularly in a) marriage, b) inheritance, will and grant, c) endowment (wakaf) and alms (sadaqah). Based on Statute No. 3 of 2006, its authorization could be
extended and covers shariah economy, such as shariah bank, shariah insurance, shariah reassurance, and shariah medium term obligation, shariah security, shariah court, Dana Pensiun Lembaga Keuangan (DPLK) shariah, shariah business and shariah microfinance institution. Islamic laws were already valid since Islam was brought to Indonesia [2]. Islamic laws in its next development were made as one of the basic foundation of national laws other than custom and western laws. During colonialization, Netherland implemented statute known as Indische staatregeling S 1855-2 which convey Hindia Belanda laws. In those statutes, it was clearly accomodate the three existed law systems: Islamic law, custom law and western law. However, Islamic law accommodated by the government was still very limited, and during old order and new order, the development of Islamic law was still quite limited.

Regulation development regarding shariah economy activities in Indonesia in the form of fatwas regarding shariah economy was absorbed into statutes about regulation of Bank Indonesia (Indonesian Central Bank), Financial Service Authority regulation, and Minister Decisions. Assuring shariah economy’s legal politic in post-reformation era was more dynamic than other legal part of Islamic law. Islamic economy can be said as the most real and harmonic relationship between religion and state. Religion supports the establishment and development of Islamic economy.

2. Method

This study was a normative legal study. The object of this normative study was the law under the concept of norm or rule. Norms as the object of this study, would covers statutes, government regulation and others. In essence, normative study is a study which review and analyze legal norms determined by authorized official. This study was using historical approach and statuta approach. Data source used in this study was secondary data, which are data obtained from statute regulation, scientific journals, and legal literatures. Data collection technique used in this study was literature study. Data analysis technique used in this study was qualitative analysis. Focus of this study was observing legal political configuration of shariah economy and its existence in national legal political configuration.

3. Result

Result of this study showed that legal development of shariah economy in Indonesia has a very specific pattern. Legal recognition process of shariah economy has differed from other Islamic law recognition. Fatwa from DSN MUI has strong legitimatization in statute related with shariah economy fatwa, as the concrete evidence that the state support the development of Islamic economy in Indonesia.

3.1 The Existence of Shariah Economy

Constitutionally speaking, legal basis for shariah economy law [3] lies in Pancasila as the foundational philosophical theory of the Indonesian state and based on “Article 29 section 1 of 1945 Constitution, “The state is based on the belief in the One and Only God” and continued with section 2, “The state guarantees each and every citizen the freedom of religion and of worship in accordance with his religion and belief.” Government has the obligation to regulate the religious life in Indonesia.[4]

Concept of religious life in Indonesia, juridically, has a strong foundation in the foundational theory of the state and also in “1945 Constitution of Republic of Indonesia (UUD NRI 1945)”. The state was based on the One and Only God (acronym YME) carry meaning that Indonesian people is those with religion or belief but not under certain religion or belief and also not a secular state which separate religion and state affairs. The concept of state administrative and its current reality showed that relationship between religion and state in Indonesia stays in the form of intersectional or there was contact relation between religion and the state, not fully integrated and also not fully separated. This type of
relationship shows that there were several religious aspects within the state and also there were state issues within religious legitimation. It can mostly say that Indonesia is not a religion-based country and also not a secular one. Indonesia is a secular in institution but philosophically acknowledge the existence of religion within its boundaries. Religion as the foundational theory of the state was explicitly mentioned in “Article 29 section 2 of 1945 Constitution of Republic of Indonesia, which says The state is based on the belief in the One and Only God”. [6]

Siti Hamidah [7] suggests that shariah economy in Indonesian constitution was allowed to exist and developed based on correlation theory between the state and the religion. Indonesia is not a religion-based country and also not a secular one. Refers to Pancasila and Article 29 section 1 of 1945 Constitution of Republic of Indonesia, Moslems in Indonesia has the right to adopt his religion including in shariah economy and the state was obliged to guarantees it. Legal pluralism in this state was not a problem, because differences are the typical of Indonesian. Article 33 of 1945 Constitution of Republic of Indonesia which also used for economy constitution has the same spirit with shariah economy.

According to Ahmad Zuhdi, the struggle concerning the relation of the state and Islam in Indonesia, that fatwas from DSN has become the basis for all standard manual in shariah economy, represent the view that positivization Islamic law in private legal domain was easily accepted with public law. [5] In this domain, scholars and ‘umara (government/state), functionally, could cooperate well for people sake. The state accommodates aspiration of DSN MUI, through its fatwas, to become part of the national economy dynamics. Meanwhile, DSN-MUI formulates its fatwas to meet the need and (shariah) legal legitimation needed by the people and the state. This relation became more important when there is legal void felt regarding shariah economy, while practices of this law has already exist among communities as the living law and also has already become the world trend. Current condition shows that the existing positive law was not covering the need of shariah economy regulation, thus it should take Islamic law as the partner which commonly viewed as the aspired law (ius constituendum).

Ismail Sunny illustrated Indonesian legal politics as a process of accepting Islamic law described in two periods, first, persuasive source in which each Moslem was believed to accept the validity of Islamic law. Second, authority source in which each Moslem was believed that Islamic law has the power to be complied to. In other words, Islamic law could be formal juridical valid if codified in national statutes. To develop positivization process of Islamic law into the supremacy of national law, participation of all related people and institution were needed, such as relationship of Islamic law with state power which refers to the predetermined legal political policies. This legal politic was the interaction product of political elite based in numerous social cultural groups. When Islamic political elite has the strong bargaining power in this political interaction, the chance of Islamic law to be positivized would be larger. In other words, transformation of Islamic law in the form of statutes is the interaction product between Islamic political elites (scholars, mass organization figures, religion-related official and Moslem intellectuals) with the rulling elites such as politician and state officials. [7]

Economy development was advancing along with the development of civilization and technology-related knowledge. As a moslem, he should believe that al-Qur’an and Sunnah has regulate the economy life, and to create such a life, Allah SWT has provide His resources and allow human to utilize it. The reality is that the world economy system was ruled by conventional economy system which develops more rapidly than Islamic economy system. Even most Moslems would understand more and accustomed to the pattern and procedures of conventional economy with all of its strength and weaknesses. Therefore, Moslem was demanded to implement his belief in all aspect of life, including its economy aspect. [8]. Shariah economy is the living law among the people of Indonesia and this living law should be implemented. To implement it, we need to struggle in the legal political domain, so that Islamic values could bring color in it and to materialize it in legal product particularly in private law domain. A good law was a law based on the existed values, living, grow and develop in the society.
Thus the law as the people’s guides would be in accordance to the development and the need of the people (the living law). However, attention should be given to how does the society developed, because in the current globalization, there were numerous pattern of people’s life and it can bring positive and negative consequence toward it. [9]

3.2 The Revival of Islamic Economy

In Indonesia, the concept of shariah economy was born in around 1980s, but it was introduced to the people in 1991 when Bank Muamalat Indonesia was established and then followed by other financial institution. At that time, socialization of shariah economy was done by each shariah financial institution. Another important moment recorded in the development of shariah economy in Indonesia was the experience of economy crises which occurs between 1997 until 1998s. [10]

The revival of Islamic economy movement cannot be separated from the struggle of Moslems to establish shariah Islam in Indonesia. Debate concerning Islamic syariat was initiated when Indonesia decide its state form. The currently existing Pancasila was a compromise, in which the preliminary draft of article 1 would suggest “The state is based on religion with the obligation of Islamic syariat for its believers”. Moslems cannot forget about the history of Jakarta charter. Although during new order this Jakarta charter was considered to be over, but it was still exist during reformation era. This is the evidence of debate concerning syariat which would bring color into the political atmosphere in Indonesia. [11]

Discussion concerning the future prospect of shariah economy would ideally initiated with putting its legal support as formal legality. The position of shariah economy within national economy system was strongly supported after banking deregulation that occurs in 1983, whereas bank as financial institution was given freedom, including in determining interest rate and even in removing interest system. Based on this, juridically formal speaking, the acknowledgement toward shariah economy principles has been accommodated in various national statutes.

This can be seen from the Statute No 7 of 1992 concerning Banking, government regulation number 72 of 1992 concerning Bank based on profit sharing principle, Statute No 10 of 1998 concerning amendment of Statute No 7 of 1992 concerning Banking, and strengthened by Statute No 23 of 1999 concerning Bank Indonesia, Statute No 21 of 2008 concerning Shariah banking. It was clearly stated that shariah economy system, particularly within banking system of Indonesia, has obtain legitimation and legal acknowledgement, juridical formally. This juridical perspective means that institutionalizing shariah principle is a form of concrete transformation process over Islamic law as subsystem to become an intact part within national and positive legal system and also become an exclusive tools to arrange operational system of banking activities, which in turn would strengthened the authority of Islamic law in the operational of shariah economy’s concept and system.

The state accommodation toward the principles of Muamalah would in turn create the legal politics of shariah economy. In this matter, two interests were met such as the scholars interest (DSN-MUI) who wants to relieve the ummat from the practice of usury and to relate economy activities with their belief’s values, also the state interest who wants to accommodate people’s aspiration. Belief’s values has philosophically differentiate shariah economy from conventional economy, because shariah economy was built above the common, togetherness, whereas stakeholder would help each other through outcome sharing as the important instrument within economy distribution fairness process, and not through the profit sharing as commonly practiced in conventional economy. [12]

Rifqinizamy Karsayuda in his study suggested that to see how far national legal politics was taking sides concerning shariah economy existence in Indonesia, we can see it through two aspects, which are institutional aspect and legal substance aspect that reflected from the currently existing statutes regulation. In institutional domain, national legal politics was contributing regulation to bring institution
with authority in managing shariah economy. As an example, the existence of Court for Religious Affairs as judicial power institution with the authority to address dispute concerning shariah economy in its absolute jurisdiction. This can be seen in Article 49 Statute No 3 of 2006 concerning First Amendment of Statute No 7 of 1989 concerning Court for Religious Affairs.

Still in institution domain, the existence of Dewan Syariah Nasional (DSN) and Badan Arbitrase Syariah (Basyarnas) is another advance leap regarding national legal politics. Both institutions was below MUI. In administrative structure, MUI is not part of the state official power organ. MUI should be known as common legal institution. It was in equal with other religious organization. The existence of DSN and Basyarnas within national legal structure was in accordance with Statute No 21 of 2008 concerning Shariah Banking. This statute demand the existence of institution to determine legislation and supervising fatwa in shariah economy conducted by DSN, and also an institution to address out-of-court dispute (alternative dispute resolution). Basyarnas institution was meant as alternative dispute resolution other than Court for Religious Affairs. In regulation aspect, the existence of various statutes such as Statute No 21 of 2008 concerning Shariah Banking, Statute No 19 of 2008 concerning Shariah Obligation/Security, Statute No 23 of 2011 concerning Management of Zakah, Statute No 7 of 1989 as renewed with Statute No 3 of 2006 and Statute No 50 of 2009 concerning Court for Religious Affairs, Statute No 41 of 2004 concerning Wakaf and numerous other statutes.

3.3 Theorization of Islamic Law Absorption:

3.3.1 Ecclectism of Islamic Law

After the era of reformation, legal direction and policies were always founded on Pancasila and 1945 Constitutional which suggested in a sustainable long, medium and short term development plan by observe and prioritize the development of intact and integrated national legal system by acknowledging and honoring religious law and customary law also by renewing colonial statute s and its discriminative national law, including gender inequality and its disagreement with reformation demand through proglenas (national legislation program).

In the context of national legislation, Qodry Azizy [13] suggested that national law development during post-reformation era would cover three legal source elements with equal position: customary, western and Islamic laws. These three was competing in free and democratic manner, and not under oppression. [14] This was known as national law ecclecticism, which means, Qadri ecclecticism theory, in essence, highly supports democratic system and process in Indonesia. The law of one religion/belief cannot and should not be forced upon other religion/belief, without the work of democracy in constitutional manner. Therefore, if Moslems wants Islamic law to become positive law, they should fight for it through those state institutions acknowledged and authorized by Indonesian constitution, 1945 Constitution of Republic of Indonesia.

Islamic syariat before being absorbed into state law in the form of statute was a non formal law. The existence of Islamic syariat as non formal law can be used as main reference in building formal law in Indonesia. When other legal system was having concept constraints, Islamic syariat through its legal products (fiqh or fatwa) was already displayed provisions concerning human as individual and human as the society. Even if there were new issues not yet shown in fiqh/fatwa, through legal disclosure theory (ushul fiqh) the issue would be addressed immediately, for instance issues among people in the society was those related with economy.

By viewing the state’s acknowledgment over fatwa of MUI in national legal order, thus in this stage, the position and role of MUI was quite strategic, because fatwa is one of the model among several other model of Islamic law, fatwa was always dynamic and adaptive to give response toward the problem of ummat and humanity. In the context of this role, MUI can be said as the front line pioneer to produce
responsive fatwa in accordance with the demand and condition of Indonesian Moslems nowadays. And not just become a dogma-normative fatwa of halal and haram which its trait and substance was just repeating those existed in books of 13th and 14th centuries ago, but a responsive fatwa from MUI addressing Indonesian moslem’s needs from various domains, such as the fatwa of shariah economy.

Islamic economy can be suggested as the most real and harmonic relationship between religion/belief and the state. Religion supports the establishment and development of Islamic economy. The state was also issuing policies which support the development of Islamic economy in Indonesia. Viewed from the theory of relationship between religion and the state, the concept of Islamic economy showed integration between religion and the state. This conclusion can be seen from the increasing role of scholars in the instrument of shariah economy policies. Indonesian scholars assembly (MUI) as the societal organization is the one and only social entity acknowledged and mentioned explicitly in the statutes.

3.3.2 Existence Theory

The existence theory was proposed by Ichtianto S.A [5] and shows Islamic law existence in shariah economy within national law. The existence of Islamic law as one of the source for national law were stated as follows: 1) It is an integral part of national law, 2) Its existence, independence, strength and power were acknowledged by national law and carry national law status, 3) Islamic law norms works as filter for national law composition, 4) It works as the main element and aspect of Indonesian national law.

This existence is the excess of socio-juridical fact of Islamic law existence in Indonesia viewed from the history of development in Indonesia. From the formulation of Jakarta charter whereas the state is based on religion with the obligation of Islamic syariat for its believers, and then changed to carry broader meanings for the sake of national interest in August 18th, 1945 and then changed into “The state is based on the belief in the One and Only God”. The preamble of 1945 Constitution of Republic of Indonesia along with Article 29 section 1 and 2, and Broad Outline of State Policy that always expected religion to not only lies in personal domain but also enter communal domain and legal study results which indicates the desire to refers to Islamic law.

4. Conclusion

1) The existence of shariah economy has a strong basis in the Constitution of Indonesia and it would develop and absorbed in national law.
2) Enforcement of shariah economy law in Indonesia has a specific pattern. The recognition process for shariah economy law has different pattern than recognition of other Islamic law.
3) Fatwa from DSN MUI has the strong legitimation in statute concerning fatwa for shariah economy. This is the real configuration that the state supports the development of Islamic economy in Indonesia.

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