

THE EXISTENCE OF PROPHETIC LAW IN THE DEVELOPMENT OF CHILDREN'S LAW IN INDONESIA

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Abstract

This paper aims to 1). Describe and provide analysis of the prophetic legal paradigm and the development of children's law; 2) Describe and analyze the existence of prophetic law in the development of child law in Indonesia. This research is a normative legal research conducted by researching literature materials or secondary data. The approach used is a legislative approach and a conceptual approach. The international convention on the rights of the child has formulated universal principles and legal norms regarding the legal protection of children. Positive laws that apply in Indonesia tend to only regulate aspects such as child custody, recognition, and legalization. In fact, the development of children's law in the future does not only talk about administrative aspects but must be comprehensive. Islamic law has a deeper perspective compared to conventional law in general. The prophetic law paradigm can be one of the approaches in the development of child law in Indonesia that can integrate the protection of children from the womb to adulthood.

Keywords : Children's Law Development, Prophetic Law Paradigm

1. Introduction

Legal reform is a necessity in the era of multi-field development like today. The law is required to be able to answer every problem in society so that the law must always develop dynamically. Not only laws as legal representation, even the country's Constitution does not rule out the possibility of being updated to accommodate the demands of the times. According to Ni'matul Huda (2008), the making, improvement, and change of legal rules as part of legal development apply in a broad sense, meaning that laws in any form, whether in the Constitution, laws, customs or conventions can be changed or updated (Huda, 2008).

Harold J. Berman said that legal change refers to the meaning of law that is always growing (Berman, 1983). Legal growth follows an internal logic where change is not simply an adaptation from the old to the new, but is part of a larger pattern of change. These changes do not occur randomly, but rather come from the reinterpretation of past regulations according to current conditions and future needs. Law develops through systemic interaction with various sectors of social life, and in the process, there is a tug-of-war between reality and ideals in the legal community. Soetandyo, while discussing the socio-political dynamics of legal development in Indonesia, argues that change is understood as a shift from what is ideologically desirable to other functions outside of the ideology that is not expected. This shows that there is a gap between what is ideal (*das sollen*) and what actually happens (*das sein*) (Soetandyo, 1995).

The crisis of western society is considered a failure of modern civilization because modern thought has separated spiritualism from all aspects of life and the development of human civilization. According to Suhirman Djirman, to understand complex human life and civilization, human thinking needs to be reconstructed with a spiritual approach. Modern science, which is analytical, logical, and systemic, is incapable of reaching the spiritual dimension, whereas the spiritual approach involves the peace of mind and the activity of the heart connected to the complex universe, which opens up a deep understanding of life full of wonders (Absori, 2015). *Spirituality* is a dimension to the substance of the concept of divinity which is manifested in an understanding of life as a human being who is godly as in the precepts of Godhead as an emphasis on the existence and prebule of the constitution that gives the point of "grace of God" as well as all laws and regulations that begin before the consistent with a *transcendental meaning* (Absori, 2015).

Deconstruction has dismantled modernism which has been considered the truth in the field of law by modern society. J. Balkin stated that deconstruction and interpretation are a means to seek justice. According to him, the law in certain aspects is unfair (Weruini, 2018). The conception of legal truth is a very important value, showing a relative and vague tendency. The value of truth is understood using different views and leads to an understanding that truth is measured according to the perception of the lawmaker. Lawmakers are based on the will of the ruling party supported by the majority political group by being outlined in the form of a law (Bukhari, 2018). In fact, the political will and views of the majority group do not necessarily reflect the truth. According to the Islamic view, modernizing the law does not have to be accompanied by secularization, as the opinion of Imam Shafi'i who explains the position of reason towards the Shari'a, he said that the intellect follows the Shari'a and is likened to the eye that has a limited view where its reach stops at that limit. Likewise, the intellect has a limit where it stops at that limit (Paryono, 2018).

According to Daniel S Lev (1990), Islam and customs in the perspective of law influence each other. Historically, customary law in Indonesia has had many relationships with Islam and Islamic law itself. Considering that Indonesia is implementing a national law reform agenda, and Islamic law is part of the national legal system, the author argues that Islamic law needs to be used as an object of study in legal reform. This aims to ensure that national legal reform also includes the renewal of Islamic law, taking into account aspects of Islamic law that can be integrated into national law. Thus, Islamic law that lives and develops in society can be part of a responsive, adaptive, and dynamic legal system within the framework of the Unitary State of the Republic of Indonesia (NKRI).

The spirit of legal reform in Indonesia brings opportunities and challenges for the study of Islamic law. If previously the study of Islamic law was considered theoretical and only memorized the thoughts of scholars from the last century, now Islamic law is required to be empirical and realistic. Islamic law must play a role and be useful in the lives of Muslims and the Indonesian nation in general. The positivization of Islamic law is a must in the context of academic studies and the democratization process, as well as a challenge for Islam to realize its great promise as rahmatan lil 'alamin and to ensure the benefit of mankind (Asshiddiqie, 2001).

The Qur'an as the main source of reference for mujtahid in establishing Islamic law has not escaped the attention of legal observers. Noel J. Coulson (1964) states that the teachings of the Qur'an generally consist of broad and general propositions, not specific legalistic formulations. The specific laws taken from the Qur'an depend heavily on the interpretation chosen by the jurists and the emphasis they give. Savigny's (1984) view of law seems to be applicable to the analysis of Islamic law as well. According to Savigny, law is not just an expression consisting of a set of rules (judicial precedent) (Coulson, 1964). This means that here, there is a dialogical atmosphere between the law and the existing social conditions of the community. The social conditions that surround the lives of mujtahid (legal experts) have contributed to the birth of Islamic legal thought. The products of Islamic law that apply in Indonesia are legal products born by mujtahid in the first centuries of hijri (10th century AD). The social conditions that existed at that time were very different from the social conditions of Indonesia at this time. Social changes brought about by space and time directly affect legal changes.

Islamic law determines that there are five rules that are used as a benchmark to measure human actions, both in worship and muamalah. The five rules, known as Al Ahkam Al Khamsah, include Jaiz (or mubah/ibahah), Sunnat, Makruh, Obligatory, and Haram (Zuhdi, 1987). And there are several terms in Islamic law, including sharia, fiqh, and ushul fiqh. According to Hasbi Ash Shiddieqy (2000), shari'a is the laws that Allah has set for His servants through the medium of His Messenger so that they are practiced with full faith, whether the law is linked to practice or linked to their faith and morals. Islamic Shari'ah includes all world laws and religions, Judging from the perspective of legal science, Shari'ah is a basic legal norm set by Allah SWT that must be followed by Muslims based on faith related to morals both in relation to Allah and with His fellow creatures. This basic legal norm was then explained by Muhammad S.A.W and the sunnah of the Prophet SA was born. W, then by Kuntowijoyo (2018), this method of developing science and religion is often termed as a Prophetic paradigma.

2. Methods

This research is a normative legal research conducted by researching literature materials or secondary data. In relation to normative research, several two approaches are used, namely the legislative approach and the conceptual approach. The statute *approach* is an approach that is carried out to various legal rules related to the development of children's law and other organic regulations related to the object of research. The conceptual approach is used to understand the prophetic law paradigm.

3. Results And Discussion

Prophetic Legal Paradigm and Indonesian Legal Ideals

As Daniel S Lev stated, Islam and customs in the perspective of law influence each other. Historically, customary law has had many relationships with Islam and Islamic law itself in Indonesia (Lev, 1990). So it is not an exaggeration to say that Islamic values (prophetic law) are the heart of Indonesian law.

The term prophetic is basically related to the ideal figure of a prophet, including all his prophetic qualities. If the term prophetic is applied to another entity, it must fulfill those prophetic traits and characteristics, therefore, prophetic can be defined as an entity that seeks to prepare itself to understand and grasp Divine messages and draw wisdom from them, then implement those messages in daily life for the good of oneself, society, and the universe (Wardiono, 2014).

Kuntowijoyo, who interprets the method of developing science and religion in prophetic terms, based on the Qur'an and Sunnah is the main basis of the overall development of science (Absori, 2018). Prophetic Law is a law that is based on culture and objective norms resulting from the appreciation of religion (Islam). As a science that is based on transcendental values, prophetic law affirms faith, not doubt as the basis for building its theoretical framework.

Islam does not recognize the dichotomy in science, Islamic thinkers simultaneously reject western liberal secular science which is claimed to be free of value and contributes significantly to the gradation of humanity in the modern era. Islamic thinkers offer a way out according to the Islamic perspective which is indeed different from the western mainstream way of thinking. The difference can be seen from the worldview, epistemological and axiological aspects (Ahmad, 2012). Allah as the creator of nature and man and revealed his revelation. The relationship of each person occupying the point of the triangle is reciprocal. To explain who he is and how to worship him. Nature and humans worship and obey him (Ridwan, 2018).

The prophetic paradigm as Kuntowijoyo thought is based on three things, namely humanization (amar ma'ruf), liberation (nahi mungkar) and transcendence (faith) (Kuntowijoyo, 1991). These three bases are prerequisites for the presence of human choice, which if contextualized in law enforcement in Indonesia is the presence of moral, responsive and progressive law enforcers who hope that in the future they will be able to improve against the crisis of ongoing law enforcement.

Kuntowijoyo is of the view that prophetic terms based on the Qur'an and Sunnah are the main basis for the overall development of science. The Quran and Sunnah are used as the foundation for the entire building of prophetic science, both natural sciences (*Ayat Kauniyah*) as the basis of natural laws, humanities (*Ayat Nafsiyah*) as the basis of meaning, values and consciousness and divinity (*Ayat Qauliyah*) as the basis of God's laws (Wijoyo, 2004). Basically, the content of Islamic values is normative, there are two ways how these normative values become operational in daily life, the first way, actualized in daily life, this approach has been developed through the science of fiqh. Second, transforming into a theory of knowledge before it is regulated into daily behavior from subjective values to objective (Arifin, 2014).

Pancasila is seen as the foundation for the development of legal science in Indonesia and the substance of Pancasila is basically a balance of interests between individuals, society and the state guided by divine precepts. Divine values as a source of ethics and spirituality (which are vertical-transcendental) are considered important as the ethical foundation of state life (Erwinsyahbana, 2018). The same balance model was basically developed in the Islamic system during the reign of the Prophet.

The balance of individuals, societies and rulers controlled by the divine will (principles of the charter of Medina) (Fauzi, 2005).

Children and the Existence of Prophetic Law in the Development of Children's Law in Indonesia

John Gray in *Children are from Heaven* tells how children are born good and sinless (Gray, 2001). Islam also said about the essence of a child's chastity long before John Gray said that children are born without sin and parents and the environment take part in shaping children's behavior. As the hadith of the Prophet narrated by Imam Tarmizi (Ibn Hajar al-Asqalani, 2008), which means: *"Every child is born in a religious state (Islam), both parents (have a part in) making him a Jew or a Christian or making him a polytheist.* (H.R. Imam Tarmizi).

Human rights are a gift from God, as a consequence of human beings are God's creation, so they cannot be deprived or abolished by the state (Nobleman, 2016). Children are human beings and therefore respecting children's human rights is the same as respecting human rights (Noble, 2018). Children are also young human beings at a young age, in a young soul and in their journey are easily influenced by the surrounding circumstances (Koesman, 1998). During the age of children between the ages of 4-12 years, children absorb a lot of environmental knowledge, values, and habits observed in their environment (Hariyanto, 2009), therefore the law must be present to provide special protection.

After the end of World War II, in 1948 the UN General Assembly then adopted the Universal Declaration of Human Rights on December 10. This event, which is later celebrated annually as World Human Rights Day, marks an important development in the history of human rights and several matters concerning the special rights of children are covered by this declaration. In 1959 the UN General Assembly adopted the second Declaration of the Rights of the Child. Meanwhile, the UN Human Rights Commission has begun work on a draft Convention on the Rights of the Child (CRC). Then in 1989 the working on the CRC was completed and the Convention was adopted by the UN General Assembly. The Convention on the Rights of the Child was ratified by the United Nations General Assembly on November 20, 1989, and entered into force on September 2, 1990. The Convention on the Rights of the Child is an instrument that formulates universal principles and legal norms regarding the position of children. Therefore, the Convention on the Rights of the Child is an international treaty on human rights that includes civil rights, political rights, economic rights and cultural rights (Darwan, 2003).

This convention has been ratified by all countries in the world, except Somalia and the United States. Indonesia has ratified the Convention on the Rights of the Child with Presidential Decree Number 36 of 1996. The President of the Republic of Indonesia together with the House of Representatives of the Republic of Indonesia passed Law Number 23 of 2003 concerning Child Protection (UUPA). This law as a whole guarantees, respects, and protects the rights of children. Third, the Government of Indonesia established the Ministry of Women's Empowerment and Child Protection as a coordinating and advocacy institution for child protection in Indonesia. This ministry is tasked with compiling the National Action Plan for Development in the Field of Children. And finally, Indonesia established the Indonesian Child Protection Commission (KPAI), as an independent institution to guarantee, respect, and protect children's rights as stipulated in the provisions and basic principles of the KHA (Lestari, 2015).

Indonesia already has a legal basis to provide protection for children who are in conflict with the law as outlined in Law Number 23 of 2002 concerning Child Protection and Law Number 3 of 1997 concerning Children's Courts, but the Law on Children's Courts is considered no longer in accordance with the legal needs in society and has not comprehensively provided special protection to children who are in conflict with the law. So that in 2012 Law Number 11 of 2012 concerning the Juvenile Criminal Justice System was promulgated which came into effect on July 31, 2014 (Prihandoyo, 2014). This new law aims to realize a justice that truly guarantees the protection of the best interests of children who are in conflict with the law by realizing restorative justice.

The responsibility of child protection is the responsibility of all parties (government, community, and family). The family is the first and main party who is fully responsible for the protection of the child (Endang, 2006). The concept of child protection covers a wide scope, in the sense that child

protection is not only about the protection of the child's body and soul, but also spiritually, physically and socially so that it is hoped that Indonesian children who will later develop into people who are willing and able to work to later achieve and maintain the formation of national development. Thus, it is clear that child protection also concerns aspects of the development of the young generation and national problems that require structuring in an integrated and well-coordinated system (Afriadi, 2014).

The implementation of juvenile justice in recent years is considered not to fully reflect the philosophical goal of the law, which is to bring welfare to all. This is evident from the increasing number of children who have experienced crimes and are handled by the Integrated Service Unit under the Directorate General of Corrections, which increased from 2,320 children in 2016 to 2,559 children in 2017, spread across 33 regions in Indonesia as reported by the Institute for Criminal Justice Reform (ICJR). This shows that the main goal of the criminal justice system, which is to protect, secure, and calm the community, has not been fully felt by most people. Similarly, efforts to get criminals back on track and prevent the repetition of their criminal acts have also not been fully successful (Rusli, 1999).

Islam, considers children as weak and noble beings, whose presence is the will of Allah SWT through the process of creation (Jauhari, 2008). Literally, children are candidates who will continue the generations of family, nation, and country. They are also valuable human resources that will later play a role in building the nation and state. The position of children gives a very important meaning to parents, and even more broadly, they provide important value to families, communities, nations, and countries in an effort to prosper the world as a blessing for the universe and as the inheritors of Islamic teachings. This understanding emphasizes that every child born must be recognized, believed, and protected as an implementation of the values embraced by parents, society, nation, and state (Syarifuddin, 2004).

A child has the right to get protection and affection from his parents, because from there the child will be able to show his character as a child and feel the comfort of his parents' love for himself. Therefore, the Prophet Muhammad PBUH was very affectionate with children until his back was stretched by children when he was prostrating during prayer, until the children were on his lap when he was doing worship and when he wanted to prostrate the child was placed beside him and when he wanted to stand upright on his back again. He said: "A house without children, there is no blessing in it". (Abu Shaykh, Ibn Hibban). In another Hadith, the Messenger of Allah said: "Children are half of the fragrances of paradise (Turmidhi), take care of your children and improve their character. Indeed, the children are a gift from Allah to you." (HR. Bukhari)

According to Islamic law, there are no specific provisions that regulate the position of children in the context of marriage bonds. However, the main purpose of marriage in Islam is to fulfill Allah's command to have children. The concept of nasab or descent refers to a person's relationship or origin in the Compilation of Islamic Law (KHI). The criteria for a legitimate child are explained in Article 99 of the KHI, while Article 100 of the KHI stipulates that a child born out of a legal marriage only has a nasab relationship with his mother and his mother's family.

Islamic law affirms very special basic principles and values by paying extra attention to human rights, regardless of age—be it children, adults, or the elderly. Islamic law is comprehensive and complex in its approach. In the context of child protection, Islamic law has a deeper perspective compared to conventional law in general. Positive law, especially the one that applies in Indonesia, tends to only regulate aspects such as alimentation, recognition, and legalization of children (Konoras, 2013).

Some of the rights of children as a form of alignment with Islamic law include: (1) The right to protect the child while in the mother's womb (womb); (2) The right to breastfeed for two years; (3) The right to be given education, teaching, coaching, demands and correct morals; (4) The right to inherit property belonging to both parents; (5) The right to receive alimony from their parents; (6) The right to defend their religion and creed (Jauhari, 2003), the right to be protected their rights, the right not to get violence, the right to get punishment in accordance with the interests of the child. Meanwhile, in another opinion, it is mentioned in more detail that children's rights include many things, namely: (1) The right to life; (2) The right to a good name; (3) The right to be slaughtered for aqîqah; (4) The right to breast milk (two years); (5) The right to good food and drink; (6) The right to be given good wealth; (7) The

right to religious education; (8) The right to prayer education; (9) The right to separate beds between men and women; (10) The right to education with good manners education; (11) The right to good teaching; (12) The right to receive the teaching of the Qur'an; (13) The right to literacy education and teaching; (14) The right to health care and education; (15) The right to Islamic skills teaching to eradicate unemployment; (16) The right to a good place in the hearts of parents; (17) The right to affection.

4. Conclusion

Changes in the law show that the law always experiences dynamic growth to answer every problem that exists in society. Legal reform in Indonesia is a challenge for the study of Islamic law, if initially the study of Islamic law seemed to be sky-high or *arrogant*, because it was seen as only memorizing the results of the thoughts of scholars who have been many centuries ago, now the study of Islamic law is required to be able to be empirical and realistic. Islamic law must be able to play a role and be effective for the needs of the lives of Muslims and the Indonesian nation in general. And reality shows that Prophetic law, as Kuntowijoyo calls the study of Islamic law, is a model of legal approach that is in accordance with the ideals of Indonesian law. Some of the conceptual values of prophetic law teachings can be accommodated in the improvement of child law in Indonesia, including: (1) The right to protect the child when in the mother's womb (womb); (2) The right to breastfeed for two years; (3) The right to be given education, teaching, coaching, demands and correct morals; (4) The right to inherit property belonging to both parents; (5) The right to receive alimony from their parents; (6) The right to defend their religion and creed, (7) The right to be protected their rights, (8) The right not to be violent, (9) The right to receive punishment that is in accordance with the interests of the child.

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