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THE NATURE OF LAW IN PERSPECTIVE COMPARATIVE LAW

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Abstract
Understanding the legal system as a complete unit, including institutions, procedures, and legal rules, where one element or sub-system has a relationship with other sub-systems. Law as a system has complexity and multiple perspectives, both the law in our own country, such as customary law, Islamic law, and our positive law, as well as western law, such as common law and the civil law system. We can see this complexity and multi-perspective, for example, in Islamic law, which considers religion and law to be one. Meanwhile, the Western legal system, especially in mainland Europe, is carried out through the formation of codification, in contrast to customary law, whose legal identity grows with the identity of the community that forms it, while positive law or national law in our country, Indonesia, which cannot be denied, still uses most of the written law that comes from "inheritance."" invaders. However, the differences in legal systems essentially mean that law always leads to the realization of justice, order, and order in society.
Keywords: Islamic law, customary law, positive law

Abstrak
Tujuan dari penelitian ini adalah untuk memahami sistem hukum sebagai suatu kesatuan yang utuh, meliputi institusi, procedure, aturan hukum, dimana antara unsur atau sub sistem yang satu memiliki hubungan dengan sub sistem yang lain. Hukum sebagai suatu system memiliki kompleksitas dan multiperspektif, baik hukum yang ada di negara kita sendiri seperti hukum adat, hukum islam dan hukum positif kita maupun hukum barat seperti common law dan civil law system. Kompleksitas dan multiperspektif ini dapat kita lihat misalnya dalam hukum Islam yang menganggap bahwa agama dan hukum adalah satu. Sementara Sistem hukum Barat khususnya di daratan Eropa dilakukan melalui pembentukan kodifikasi, berbeda dengan Hukum Adat yang identitas hukumnya tumbuh dengan identitas masyarakat yang membentuknya, sedangkan hukum positif atau hukum Nasional negara kita Indonesia tidak dapat dipungkiri masih mempergunakan sebagian besar hukum tertulis yang berasal dari "warisan" penjajah. Namun, perbedaan sistem hukum pada hakikatnya hukum selalu bermuara pada terwujudnya keadilan, keteraturan maupun ketertiban dalam masyarakat.
Kata Kunci: *Hukum islam, hukum adat, hukum positif*

INTRODUCTION

The essence of the existence of law in a country is basically to regulate the lives of citizens to be orderly and better by providing a clear legal basis for maintaining order, justice, and security in society. The law acts as a guide in determining the rights and obligations of each individual, group, and government, thereby creating a fair and balanced framework (Handoko & Rohmah, 2023). Apart from that, according to Hainia & Alhakim (2022), law also has a role in protecting human

rights, providing legal security guarantees, and creating social and economic stability. With the existence of laws, society can live in a structured and reliable system where every action has consequences in accordance with established norms. Through legislative, judicial, and executive processes, law becomes an effective tool for resolving conflicts, upholding justice, and providing protection for all citizens. Thus, the existence of the law not only creates a formal legal framework but also provides the basis for sustainable social, economic, and political development.

Anas & Budianto (2023) explain that law is not only a formal set of rules but also reflects the values, norms, and culture of a society. By establishing norms of acceptable behavior and regulating interactions between individuals, the law forms the moral and ethical basis of society. This creates a system in which society can live together in harmony, respecting the rights and interests of each individual. One of the main functions of the law is to maintain order and security in society. Through regulations governing citizen behavior, the law creates limits and sanctions for actions that could threaten social order. This includes regulations regarding crimes, violations of the law, and other unlawful acts. With enforced laws, people can feel safer and protected from threats that can arise from unlawful behavior.

Apart from that, the law also plays a role in balancing the interests of individuals and groups, as well as between individuals and the government. The law provides a basis for resolving conflicts and disputes through fair and transparent legal processes (Ferdy et al., 2020). The justice system is the main tool for enforcing the law and ensuring that every individual has equal access to justice. The existence of laws also provides a foundation for a country's economic development. With clear legal rules regarding business, contracts, and property ownership, investments can be made with confidence and stability. Business law creates an environment conducive to economic growth, increases investor confidence, and reduces risks in business transactions.

According to Fadhilah (2019), law is also an important instrument in protecting human rights. By providing guarantees of basic rights such as freedom of expression, the right to justice, and protection against discrimination, the law becomes the main guard against potential abuse of power by the government or certain groups. Human rights law aims to create a just and equal society for all citizens. Along with technological developments and social changes, the law must also be able to adapt. This includes the development of regulations related to information technology, personal data protection, and environmental issues. The law must be responsive to the dynamics of society in order to remain relevant and effective in dealing with these changes.

Law is not only about setting and enforcing rules but also about education and understanding. People who are legally aware tend to be more law-abiding and understand its importance in maintaining social order. Therefore, legal education in society is very important to form legal awareness and increase compliance with applicable regulations.

Despite its positive role, criticism of the legal system often appears. Some criticism relates to unequal access to justice, legal uncertainty, and potential abuse of power by law enforcement officials. Therefore, legal reform and continuous improvement are necessary to increase fairness and efficiency in the legal system. In a global context, law also has an important role in relations between countries. International law regulates interactions between states and forms the basis for international peace and cooperation. International treaties, conventions, and international organizations are an integral part of this legal system, creating a framework for conflict resolution, global environmental protection, and poverty alleviation.

Overall, the existence of laws in a country plays a very important role in forming and maintaining a well-functioning society. By providing rules, certainty, and protection, the law creates the basis for sustainable development and a just life for all citizens. However, challenges and changes in social and technological dynamics require the law to continue to develop and adapt in order to remain relevant and effective in responding to the needs of modern society.

The position of comparative law as a legal discipline is one of the sciences of legal reality alongside legal history, legal sociology, and legal psychology. Another opinion suggests that comparative law is a method. The development of the comparative study of legal systems is a science that is as old as the discipline of law itself. However, in its development, the study of comparative legal systems only appeared in the 19th century as a special branch of the legal discipline. Historically, comparative legal studies developed in Europe in the 19th century, pioneered by Germany, France, and England. There are several benefits or uses to studying comparative legal systems, including: According to Rane David and Brierley, studying the benefits and comparative laws, namely; useful in historical and philosophical legal research. b. It is important to understand better and to develop our own laws. c. helps in developing understanding of other nations and therefore contributes to creating good relations and an atmosphere for the development of international relations (Terry & Chittock, 2010). Meanwhile, according to Ade Maman Suherman, comparison of legal systems is aimed at obtaining a comprehensive understanding of all legal systems that exist globally and at least to obtain the following benefits: a. By studying comparative legal systems, you can understand the portrait of your own country's legal culture and adopt positive things from foreign legal systems for the development of national law. b. By studying comparative legal systems, individuals, organizations, and countries can adopt the right attitude when carrying out legal relations with other countries with different legal systems. c. in the interests of legal harmonization in the formation of supranational law (Sudrajat, 2020). Based on the explanation above, researchers are interested in studying in depth the nature of law from a comparative legal perspective.

METHODS

The type of research used is normative juridical where research is carried out by examining library materials or secondary data of a legal nature (Krisanto, 2008) . The approach method used is the comparative legal method. The comparative legal approach is a study that uses two or more legal systems to compare their differences or similarities (Iswadi et al., 2023) . By using the comparative legal method, we will compare Hans Kelsen's thoughts about law with Satjipto Rahardjo's ideas about Progressive Law.

RESULTS AND DISCUSSION

Islamic law

Islamic Law (Islamic Law), or what is known as Sharia (The Right Way). Islamic law or sharia plays an important role, especially in areas of law which are regulated in detail in the sources of Islamic law, especially in the area of family law and inheritance law and to some extent in the area of criminal law. Distinguishing between religious rules and legal rules is not always easy for Muslims, because they consider religion and law to be one. In the same way that science is difficult to separate from theology, Islamic law contains a number of commandments and prohibitions which actually have nothing to do with actual legal sanctions, so that in the eyes of westerners,

these commandments and prohibitions belong more to the realm of religion and morals. (Siregar, 2019) .

The primary and fundamental source of Islamic law comes from God (the Qur'an) and from His Messenger (Sunnah), both of which are considered by Muslims to be the final and perfect law which will one day be recognized and adhered to by all mankind. Islamic law can in fact be a system, rules that are extraordinarily flexible in all circumstances if the court or authority that interprets and applies it tries to achieve flexibility.

Every Muslim understands very well that religion regulates all aspects of life and there is no dichotomy between political, religious and social areas so that Islam is also a legal norm, a social norm and a state norm. In the context of the plurality of Indonesian society, it is very possible for there to be a clash of norms (coalition of norms), for example, the contradiction between Islamic law and positive law that a person who is bound by marriage and then commits adultery according to Islamic law must be stoned or thrown with stones until he dies and if the perpetrator of adultery those who are not yet married are punished by one hundred lashes. The application of legal sanctions is not justified according to positive law.

The role of law in the Islamic concept turns out that law is one of the many models for developing society so that it does not lead or fall into the world of crime or wallow in sin. In the opinion of an Islamic thinker, Yusuf Qadrawi, stated that:

"Islam is not just laws and regulations, but Islam is a creed that interprets life, worship that educates the soul, morals that cleanse the dirt of the heart, understanding that clears perception, values that elevate human dignity, and ethics that beautify life."

Before arriving at the decision to use its legal norms, Islam prepares other tools, because it is not a dry system like existing legal content, but much more than that, namely sharia, da'wah, direction (Taujih), guidance (Tarbiyah), encouragement. (tarqib), as well as a threat (tarhib).

Life and order in society cannot possibly only be based on the application of law in the form of maximum criminalization of various human activities in society, something that is much more important is changing something that is in the human soul which is the most basic and vital, namely instilling faith. By planting the seeds of faith values in every human heart, a new person will be created, which will give him good goals for life in this world and the hereafter.

At the practical level, law is a process, interacting with other factors or variables, what is the situation with Islamic law in Indonesia, according to Ahmad Imam Mawardi, reformulation of Islamic law is a necessity, according to him Islamic legal experts in Indonesia must take the following steps:

a. Reformulation of Islamic law is a necessity in order to improve the application of Islamic law which leads to the realization of public benefit. Apart from that, reformulation is also needed to emphasize the existence and role of Islamic law in Indonesia.
b. Efforts to reformulate Islamic law in the reform era have quite a big opportunity, apart from the existence of a demand, it turns out that it is also supported by existing legal theories. Most of the existing obstacles are only sociologically normative and can be overcome gradually.
c. The reformulation of Islamic law should no longer only focus on the choice of legal material, but must firmly emphasize the certainty of its legal istinbath methodology.

The enthusiasm for realizing the values and concepts of Islamic law in legal development in Indonesia increasingly manifests in various forms of regulation in the criminal, social and economic fields. In the context of Indonesia, where the majority of the population is Muslim, it is appropriate and time to become an inspiration for the development of national law from secular products to Islamic law without denying diversity as a pluralistic nation.

Customary law

The term customary law actually comes from the Arabic "Huk'm" and "adah" which means orders or provisions. The term customary law, which means customary rules, has long been known in Indonesia, such as in Aceh during the reign of Sultan Iskandar Muda, then this term was recorded by Christian Snouck Hurgronje for the benefit of the Dutch Government, who translated it into the Dutch term "Adat Recht".

A system is usually an orderly arrangement consisting of various elements that are interconnected with each other, so that they can provide an understanding. This is also the case with a legal system, because each law is essentially a system, that is, its regulations are a whole based on the unity of the mind that forms it.

Likewise with customary law, its legal identity grows with the identity of the community that forms it. Therefore, customary law is a legal system that is formed based on the nature, outlook on life and way of thinking of the Indonesian people or nation.

Customary law is an aspect of the life and culture of Indonesian society which is also the essence of the necessities of life, way of life and outlook on life of the Indonesian people or nation which gives birth to a legal system based on the above thoughts.

According to R. Soepomo, there are fundamental differences between customary law and western law, some of these differences include:

a. Western law recognizes "Zakelijk rechten" and "Persoonlijkerechten", that the rights to an item apply to every person and to certain people. Customary law does not recognize the essential division into the two groups as mentioned above.
b. Western law recognizes the difference between public law and private law, whereas in customary law there is no difference between public and private customary law regulations.
c. Legal violations according to the western legal system are divided into criminal violations or violations that have consequences in the field of civil law, whereas in customary law there is no such distinction. Every violation of customary law requires correction by the judge (customary head) deciding what customary measures (customary reaction) should be used to correct the violated law. This is due to the belief that a peaceful life is synonymous with cosmic balance (Lawson, 1982) .

The customary law system has a simple legal system compared to western law. In simple terms, it can be said that in the customary law system the material is original Indonesian law, whereas in the western legal system (Common law system) it contains many elements of ancient Roman law which are said to have undergone "reception in complex".

Positive Law

Legal development is the development of the national legal order as a whole, so as a system in its entirety or a legal system in the broadest sense. This means that the legal system is composed of

a number of subsystems as components that are interconnected and interact. Mochtar Kusumaatmadja views the components of the legal system as consisting of:

a. Principles and rules
b. Legal institutions
c. Processes of realizing rules in reality.

Soedarto put forward three important aspects in the framework of drafting national laws, namely: political aspects, psychological aspects and practical aspects. The political aspect is that Indonesia as an independent country must have a national law, the sociological aspect is that the national law must reflect the culture of Indonesian society, and the practical aspect is that the national law must be able to be read and understood by the people.

Muladi added that in drafting national laws it is necessary to pay attention to the fourth aspect, namely that national laws must be adaptive, namely that the Criminal Code in the future must be able to adapt to new developments, especially international developments.

As a developing country, it cannot be denied that currently Indonesia still uses most of the written laws originating from the "legacy" of the Dutch colonial government. Especially if we remember that the development of the legal sector in Indonesia is the takeover of foreign law into the Indonesian legal system with the label or stamp of national law. Even though the substance of foreign law is needed to direct development in all fields, it is important to remember that this can be done selectively through critical methods based on the real legal needs that are developing in Indonesian society.

For example, in terms of the implementation of criminal law in Indonesia, since Indonesia's independence, the emphasis has been on the application of law in concrete incidents which has been carried out by legal practitioners. After enacting the main law on Judicial Power no. 14/1970 which, among other things, stipulates that judges are required to follow developments in community needs or developments in community legal awareness, so judges are required to explore the legal values that apply in society.

Concept of Islamic Law with Positive Legal Concepts

The term Islamic law is a translation of the words 'al-fiqh al-islami' which in Western literature is called 'the Islamic Law' or in looser terms "the Islamic Jurisprudence". The first is more inclined towards sharia while the second is towards fiqh, but both cannot be used consistently.

Likewise, the term Islamic law experiences ambiguity between fiqh, namely practical law taken from tafsili (detailed) postulates and syari'ah, namely the rules revealed by Allah to humans so that they can be guided in their relationships with God, with each other, with their environment and with their lives. .

However, this term of Islamic law, when traced in the formulation of ushul fiqh scholars, has a different meaning from the two terms mentioned above. Islamic law in the ushul fiqh discourse is more like al hukm ash-syar'i which is interpreted as Allah's khitab (God's commandments/greetings), which relate to the actions ofmukallaf in the form of taklif, tahyir (choice) and determination.

In the ushul fiqh discourse, the sources of Islamic law can be in the form of dalil nash (textual) and dalil ghairu nash (paratextual). The postulates of the nash are the Qur'an and Sunnah, while the postulates of the ghairu nash include qiyas, ijma', istihsan, istislah, istishab, 'urf, the opinions of friends and the shari'ah of previous people.

The concept of Islamic law has several differences with the concept of positive law, but in essence (the essence of law) there are similarities. Likewise, regarding sources of law, there are differences between sources of Islamic law and sources of positive law. Therefore, this article will discuss the concepts and sources of Islamic law using comparative analysis with positive law.

The Nature of Law

In legal science there are several different definitions of law. Among them, according to E. Utrecht, an Indonesian legal scholar who believes that law is a collection of guidelines for the life and order of a society and should be obeyed by the members of the society concerned." Meanwhile, according to JCT Simorangkir and Woerjono Sastropranoto, law is regulations that are coercive in nature , which determine human behavior in the social environment which are made by official authorities, violations of these regulations result in action being taken, namely certain punishments (sanctions), and there are still many different legal definitions (Brand, 2020) . From these different definitions, it can be formulated that law contains the following elements:

a. Regulations regarding human behavior in social interactions,
b. These regulations are made by the competent authority,
c. The regulations are coercive
d. There are strict sanctions against violators.

Connection

There are several views about the law, including:

a. Law is a relationship between a person and a thing (object, affair) which causes that thing to be in a certain relationship with the person, such as being his property.
b. Law is a law or a statute.
c. Law is a science that provides knowledge about law, knowledge about legislation, and knowledge about the relationships mentioned above.

Comparison of the Concepts of Islamic Law and Positive Law

1. Legal elements

The elements in positive law are different from the elements of Islamic law, including:

a. Law Maker

In Islamic law, the lawmaker (al-hakim) or Syar'i is God Himself, so the law is God's command. Meanwhile, positive law is made by an authorized body as a representation of the community where the law applies

b. Legal Subjects

The subject of law (mahkum 'alaih) in Islamic law is themukallaf, namely a person who has fulfilled the requirements for competence to act legally (Ahliyah al-ada').

c. Jurisdiction

Positive law is a regulation that regulates human behavior in social interactions. Meanwhile, Islamic law regulates the actions ofmukallaf (as legal subjects).

d. Force

Positive legal regulations contain orders and prohibitions that are binding and coercive, so that sanctions for violations are stated firmly.

Meanwhile, Islamic law does not only contain commands and prohibitions, but also contains taklif, takhyir (options) and determinations.

2. The Nature of Law

Law as command. In this case, Islamic law and positive law are different, namely that Islamic law is God's commandment which contains taklif, tahyir (choice) and

determination. Meanwhile, the essence of positive law is an order accompanied by sanctions. Law as judgment. In this case there are similarities between Islamic law and positive law, that law is a judgment. In law there are categories of human actions as obligatory (must be done), haram (must be abandoned) and so on, which means there is an assessment of good and bad actions according to the law.

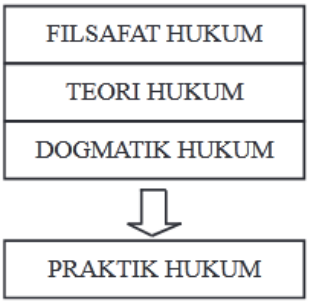
3. Source of law

Sources of positive law are divided into material and formal sources of law. Material legal sources are legal materials in the form of behavior and realities that exist in society, including customary law. Meanwhile, formal sources of law are laws, customs, jurisprudence, treaties and doctrine.

Islamic law also has material legal sources, but it is different from positive law. Namely that the source of Islamic law comes from revelation, while positive law originates from behavior and reality in society. As for Urf as a habit which can also be called community behavior, it still has to be separated into 'sahih urf (which is in accordance with the texts or sources of textual law) and 'bahil urf (which is not in accordance with the text), so that only 'sahih urf' can be used as a source of law. .

Application and Formation of Law

Legal science is seen as a science, both from a positivistic point of view and a normative point of view. Legal dogmatics, legal theory and legal philosophy must ultimately be directed towards legal practice. Legal practice concerns 2 (two) main aspects, namely law formation and law application.



a. Application of Law

Applying the law means applying general regulations to a concrete case. In the classic expression, it is called De rechter is bounche de la loi, which contains a figurative meaning that the judge is the mouthpiece or instrument of the law.

This illustrates how difficult the judge's task is to be able to understand the intentions of the legislator. Therefore, the role of legal discovery carried out with interpretation is large, meaning in determining the content or intent of written law.

Roscue Pound explains the steps for implementing the law into 3 (three) parts, namely:

1. Finding the law, means making a choice among the many laws that are appropriate to the case to be examined by the judge;
2. Interpreting the legal rules of the law that has been chosen according to the meaning when the rules were formed;
3. Applying the rules that have been discovered and interpreted to the case that will be decided by the judge.

b. Legal Formation

Problems with the application of law include: legal interpretation, legal emptiness (leemten in het trecht), antinomies and vague norms (vagenormen). Legal interpretation arises from the difficulty of judges when understanding the intentions of the legislator36, apart from that in relation to efforts to discover the law (rechtsvinding).

This means that the law must be found and if one cannot find written law, the law must be sought from the law that lives in society, namely in the form of law formation by judges (rechtsvorming). The importance of interpretation refers to a means of regulating the flexibility of statutory regulations and can also occur in laws made by legislators.

Legal Studies Methods

According to Peter M. Marzuki, legal research is carried out to find solutions to legal issues that arise. The results achieved are not rejecting or accepting the hypothesis, but rather providing a prescription regarding what should be proposed. Therefore, the methods used in studying legal science are also different from methods in studying sciences other than legal science, for example social sciences and natural sciences. The differences in methods of studying legal science basically arise from the nature and character of legal science itself, namely its nature. normative, applied and prescriptive.

Following these scientific characteristics, legal science is always concerned with what should be or what should be. Now the question with this character is whether the scientific method can be applied to legal science? According to the Webster Dictionary, scientific method is principles and procedures for the systematic of knowledge involving the recognition and formulation of a problem, the collection of data through observation and experiment, and the formulation and testing of hypotheses.

Based on this, in general the flow of thinking included in the scientific method can be described in several steps, including:

a. Formulation of the problem,
b. Preparing a framework for thinking in proposing a hypothesis,
c. Hypothesis formulation,
d. Hypothesis testing, and
e. Drawing conclusions.

All of the steps above must be taken for a study to be called scientific. Although these steps are conceptually arranged in an orderly sequence, where one step is the basis for the next step, in practice there are often jumps. The relationship between one step and another is not bound statically but is dynamic in the scientific assessment process, which does not solely rely on reasoning but also imagination and creativity.

Thus, step one is not only the foundation for the next step but also the basis for corrections for other steps. In this way, according to Bambang Sunggono, it is hoped that knowledge will also be processed that is consistent with knowledge that is consistent with previous knowledge and has its truth tested empirically. Initially, the scientific method was only used for the natural sciences. This is because this science is descriptive, namely stating what exists based on empirical facts.

According to Berbard Barber, the scientific method can also be applied in the social sciences. This is because the difference between the natural sciences and social sciences is only in their

level of development, not in their characteristics. In contrast, Barber, according to Edwin W. Patterson, offers the use of scientific methods in legal research. However, in the following conversation, he was trapped in problems of behavior and effectiveness. He does not touch on things that are prescriptive..

CONCLUSION

Law as a system has complexity and multiple perspectives, but in principle, the various forms of existing legal systems such as Islamic law, customary law, western law, and positive law in our country, Indonesia, essentially lead to the achievement or realization of justice, happiness, peace, and order in the world. community life.

According to Satjipto Rahardjo, law is a social construction where law serves humans or is made for humans based on good human ethics and morals. Progressive law aims to restore the meaning of law by ensuring that law always has its status as law in the making and is never final. The birth and development of progressive law cannot be separated from the large gap between law in theory (law in books) and law in reality (law in action), as well as the failure of law to respond to problems that occur in society. Legal formation should respond to other things outside the law itself, for example, social aspects. Laws must adapt to the development of needs in society. In this way, the law is able to realize justice, prosperity, and concern for humans.

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