WORLD CLASS ISLAMIC CYBER UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY
DOCTORAL PROGRAM OF LAW
FACULTY OF LAW
PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE
ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

Analysis of the Standing of Islamic Law in Legal System in Indonesia

Wahyu Ririn Erawati[1)], Anis Mashdurohatun[2)] & Bambang Tri Bawono[3)]
[1)]Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: Wahiririnerawati71@gmail.com
[2)]Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: anism@unissula.ac.id
[3)]Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: bambang@unissula.ac.id

Abstract. *The legal system in Indonesia consists of western law, customary law and Islamic law. In this paper the author wants to discuss more concretely the position of Islamic law in the Indonesian legal system. Because this law is considered not widely understood by the public, it is the source of law for the Unitary State of the Republic of Indonesia. The purpose of writing is to analyze the position of Islamic law in the legal system in Indonesia and provide input for solutions. The approach method in this research uses normative juridical. Data collection was carried out through library research studies. Processing of this research data with secondary data is divided into primary, secondary and tertiary legal materials. As a result of this research, the researcher provides conclusions and suggestions that legal pluralism is contrary to legal centralism, because centralism ignores the basic social and cultural diversity of society, including local legal norms taken from customs/customary law. So what is happening in Islamic law at the moment is that it includes legal pluralism, that is, apart from the Indonesian State implementing national legal policies, it is also thinking about customary law and Islamic law that apply in that area.*

Keywords: *Complexu; Islamic; Law; Position; Reception.*

1. Introduction

Rule This fundamental new idea was finally made into philosophie grondslag (State Philosophy/State Philosophy[1]). The philosophy of the Indonesian State is Pancasila, so

[1] philosophy/fal·sa·fah/ the most basic assumptions, ideas and inner attitudes held by people or society; views of life; source: kbbi.web.id/falsafah

everything contained in the implementation of statehood must be based on Pancasila. This is reinforced by the Stufenbau Theory (the inverted pyramid created by Hans Kelsen).

Previously we discussed the system. A system is a unit that originates from sub-parts that have their respective functions, are related to each other and have the same goal. The legal system is something that consists of sub-orders, namely customs, morality and law which have the aim of achieving justice and order (order and prosperity).

Stufenbau Theory is a legal system created by Hans Kelsen which has sub-sections/orders (UUD, MPR Decree, etc.). The higher you go, the more abstract the information becomes and it is difficult to change because it relates to the constitution. The further down you go, the more concrete the information language becomes. The closer to the constitution, the higher the legal regulations. The highest level of the system is Grundnorm (Legal ideals/Rechtsidee/basic norms). These norms are legal principles, so they are more than regulations. Basic norms grow, live and develop in legal regulations. Legal norms are separated from material law (legal regulations/metajuridical/metajuridical) and the legal system becomes Grundnorm. In Indonesia, the Grundnorm position is Pancasila.

The legal system in Indonesia consists of western law, customary law and Islamic law. In this paper the author wants to discuss more concretely the position of Islamic law in the Indonesian legal system. Because this law is considered not widely understood by the public, it is a source of law for the Unitary State of the Republic of Indonesia, such as Law No. 1 of 1974 concerning marriage, the Law on religious justice, sharia economics and others. Therefore, the author will write a journal regarding "Analysis of the Position of Islamic Law in the Legal System in Indonesia".

Talking about theory, 3 (three) theories will be referred to to analyze this research, namely:

a. Basic Theory (Grand Theory): Stufenbau theory. According to Hans Kelsen, norms are layered in a hierarchical structure.[2]In other words, the legal norms below apply and originate and are based on higher norms, and higher norms also originate and are based on even higher norms and so on until they stop at the highest norm which is called the Basic Norm (Grundnorm) and still according to Hans Kelsen, it is included in a dynamic norm system. Therefore, law is always formed and abolished by the institutions whose authorities have the authority to form it, based on higher norms, so that lower (inferior) norms can be formed based on higher (superior) norms, in the end the law becomes hierarchical. -levels

[2]Satjipto Rahardjo, Legal Studies, (PT Citra Aditya: Bandung), page 43.

and layers form a hierarchy.

b. *Middle Theory*: Theory *Legal Pluralism*. According to John GriffithLegal pluralism is a situation where two or more legal systems work side by side which have their own methods/functions but have the same goal, namely social control in social life.[3]

c. *Applied Theory:* Islamic Legal Theory. The word law comes from Arabic, Al-Hukm, namely: "To determine something on something or eliminate something from it[4]. *Or another definition states: "Carry out decisions in everything*[5]*Meanwhile, in this case it is defined as regulations consisting of command and prohibition provisions which give rise to obligations and/or rights*[6]*. And because the word law is combined with the word Islam (Islamic law), then of course in defining law we return to the concepts of experts. It is defined: "God's Word regarding the behavior of Mukalaf people, whether in the form of demands (commands and prohibitions), choices (to do or not) and being a cause, condition or barrier to a law.*[7]

The problem in this paper is the existence of existing conditionslegal policy in the countryIndonesia, in its implementation - Islamic law and customary law-- is seen as ignoring the fact of legal pluralismand the existence of indigenous communities and Islamic communities. This is reflected in the enactment of Law Number 5 of 1990 concerning Conservation of Living Natural Resources and their Ecosystems. This law views forests (SDA) as something unique and intact that must be preserved and protected legally; Utilization may be limited to research, education and tourism. Meanwhile, one of the indigenous communities, namely Tengger, views that forests are the result of constructionsocial relationship between society and its ecosystem; Forest is a living space, control and access to its integrity is carried out jointly by the community through customary law.[8]The government should implement legal pluralism.

According to John Griffith, legal pluralism is a situation where two or more legal systems work side by side which have their own methods/functions but have the same goal, namely social control in social life. This legal pluralism is in conflict with legal centralism, because centralism ignores the basic social and cultural diversity of society, including local legal norms taken from customs/customary law. So what is happening in Tengger law currently is the centralization of

[3]Purnawan Dwi Negara's dissertation, "Reconstruction of Tengger Area Management Policy Based on Ecological Communal Values in a Socio Legal Perspective".
[4]Hasbi Ash-Shiddieqy, Introduction to Islamic Law, Bulan Bintang, Jakarta 1963, p. 118
[5]Ibn Hazm, Al-Ihkkam fi ushul al-Ahkam, volume I, Dar Al-kutub Al-Islamiyyah, Bairut 1985, p. 48
[6]Abdoerro'uf, Al-Qur'an and Legal Science, Bulan Bintang, Jakarta, 1970, page 21
[7]Abdul Karim Zaidan, Al-Wajiz fi Ushul al-Fiqh, Mathba' ah al-Ani, cet. IV, Baghdad, 1970, p. 17
[8]Retired Dwi Negara Dissertation, Loc.cit.

law, namely implementing national legal policies/those with a higher position without considering customary law/other laws that apply in that area.

At first glance, this theory is very pro-Islamic law and Muslims, because he states that in his theory, existing customary law uses the religious law of his beliefs, but on the other hand, religious law, especially Islamic law, does not need to be codified, because it has been incorporated into that theory and This merged the development of Islamic law in Indonesia.

Codification means the recording of a law in one book with the aim of increasing the strength of the law/so that it strengthens it to be obeyed and is ipsojure (without directly recognizing its truth). Because of Snouck's theory, Islamic law is not completely lost, but it can slightly destroy Islamic law because by accepting it from the Islamic understanding of society where deviations are considered exceptions, it can be confusing and hinder codification because it is deemed unnecessary to create obstacles to the science of Islamic law in Indonesian society. The resolution of Islamic legal problems is carried out by applying one of the theories of legal pluralism, John Griffith.

2. Research Methods

The approach method in this research uses a normative juridical research type, namely legal research using a juridical-normative approach method, namely legal research carried out by examining library materials or secondary data.[9]Research specifications are carried out descriptively analytically, namely a way of describing the condition of the object under study based on actual facts at this time.[10]In this case, it is describing an analysis of the position of Islamic law in the legal system in Indonesia. Normative research uses secondary data collection, namely data obtained from literature studies. Secondary data itself can be divided into primary, secondary and tertiary legal materials.[11]To complete secondary data, primary legal materials were taken from books, journals and scientific works in the form of dissertations and so on. The data collection technique in this research is library research, namely a collection of data obtained by studying related laws and regulations, books, journals, newspapers and other written sources related to the problem. researched as a theoretical basis. The data analysis method used to describe and process the data collected in this research is qualitative

[9]Soerjono Soekanto and Sri Mamudji, Normative Legal Research, (Rajagrafindo Persada: Jakarta), p. 12.
[10]Hadari Nawawi, Social Research Instruments, (Gadjah Mada University: Yogyakarta), p. 47.
[11]Mukti Fajar ND and Yulianto Achmad MH, Dualism of Normative & Empirical Legal Research, (Student Library: Yogyakarta), p. 42.

description. Qualitative descriptions are used in the method of describing data in this research because the main data used is not in the form of numbers that can be measured.[12]

3. Results and Discussion

Islamic law has existed in the Indonesian archipelago since Muslims came and settled in this archipelago. According to the opinion concluded by the Seminar on the Entry of Islam to Indonesia which was held in Medan in 1963, Islam entered Indonesia in the first Hijriah century or in the seventh/eighth century AD. Another opinion says that Islam only reached the archipelago in the 13th century AD (PA Hoesein Djajadiningrat, 1961: 119). The first area he visited was the North coast of the island of Sumatra with the formation of the first Islamic community in Paureulak, East Aceh and the first Islamic kingdom in Samudera Pasai, North Aceh.

Western law was introduced in Indonesia by the VOC government after receiving the power to trade and "rule" the Indonesian archipelago from the Dutch government in 1602. At first Western law was only applied to Dutch and European people, but later, as has been stated in the other part, through various regulations and efforts, is declared to apply to Asians and is deemed to also apply to Indonesians who submit themselves to Western law voluntarily or because they carry out certain legal acts in the fields of finance, trade and the economy in general.[13]The Indonesian legal system, which previously had implemented an acculturation of customary law and Islamic law, has been supplemented with Western law, so that the Indonesian legal system consists of Western law, customary law and Islamic law.

The journey of Islamic law in the legal system in Indonesia does not always run smoothly, in the beginning it was after the presence of the sultan, sunan-sunan, and so on that Islamic law was very accepted by the Indonesian people because the introduction of Islamic law in a peaceful way, not coercive, and providing the benefit of the people made law Islam is a trusted source of law apart from customary law/Hindu-Buddhist law which was previously introduced to Indonesia.

After the arrival of the VOC, which appointed Snouck Hurgronje to be an advisor to the Dutch East Indies government from 1889-1906, it was used to destroy the Indonesian legal system. Initially he was highly praised by the public because he was a Dutch person who converted to Islam, then studied Islam and went to Mecca, the holy city of Muslims. However, after returning home and being appointed as an advisor to the Dutch East Indies government, several

[12]Bambang Waluyo, Legal Research and Practice, (Sinar Graphics: Jakarta), p. 77-78.
[13]Ali, David. Islamic Law, 18th Printing. Jakarta: PT RajaGrafindo Persada, p. 2012

Indonesians gradually learned that this was actually just Snouck's way of learning about the Islamic legal system and the application of Islamic law in everyday life.

One of his famous theories is the "Receptio in Complexu" theory. The essence of this theory is as follows: "As long as the opposite can be proven, according to this teaching the law is for natives to follow their religion, because if you embrace a religion you must also follow that religion faithfully." So strictly speaking, according to this theory, if a society adheres to a certain religion, then the customary law of the society concerned is the law of the religion it adheres to.

If there are things that deviate from the religious law in question, then these things are considered as "exceptions/deviations" from religious law which has been "in complexu garepecipireerd" (accepted in its entirety).[14]

At first glance, this theory is very pro-Islamic law and Muslims, because he states that in his theory, existing customary law uses the religious law of his beliefs, but on the other hand, religious law, especially Islamic law, does not need to be codified, because it has been incorporated into that theory and This merged the development of Islamic law in Indonesia.

Codification means the recording of a law in one book with the aim of increasing the strength of the law/so that it strengthens it to be obeyed and is ipsojure (without directly recognizing its truth). Because of Snouck's theory, Islamic law is not completely lost, but it can slightly destroy Islamic law because by accepting it from the Islamic understanding of society where deviations are considered exceptions, it can be confusing and hinder codification because it is deemed unnecessary to create obstacles to the science of Islamic law in Indonesian society. The resolution of Islamic legal problems is carried out by applying one of the theories of legal pluralism, John Griffith.

Legal pluralism is a situation where two or more legal systems work side by side which have their own methods/functions but have the same goal, namely social control in social life. This legal pluralism is in conflict with legal centralism, because centralism ignores the basic social and cultural diversity of society, including local legal norms taken from customs/customary law. So what happened in Islamic law in the past was the desire of the Dutch East Indies government to centralize law, namely implementing national/higher position legal policies without considering customary law/other laws that applied in that area.

[14]Soerojo Wignjodipoero, Introduction and Principles of Customary Law, PT Toko Gunung Agung, Jakarta 1968, p. 28-29

Law is basically plural and cannot be generalized amidst the cultures and laws of different societies. The concept of legal pluralism emerged as a rebuttal to legal centralism that state law is the only direction and guideline for behavior. However, in the same social field, there is more than one legal order that applies.[15]Departing from the thoughts above, the author provides conclusions for writing this journal first, the terminology of Islamic legal society and the terminology of legal pluralism, which have been explained above. Second, the dominance of positive law and legal centralism. The dominance of centralist law causes some people to be forced to apply national law because of the desire to make the law equal without knowing the character of a particular region and sometimes certain regions are comfortable with customary law/Islamic law for Islamic law communities (Example: Aceh). Third, knowing the impact of the dominance of legal centralism on the existence of an Islamic legal community. The impact will not be implemented if it is truly not in accordance with the character and is deemed unable to solve the community's problems. Fourth, we want to explain the importance of implementing legal pluralism. It is very important because after implementing legal pluralism, the position of Islamic law becomes equal to Customary law and Western law.

4. Conclusion

Thus, if we want to know the legal system in Indonesia, we also have to know Islamic law, especially its position with other laws. Consequently, all those who study legal disciplines inevitably have to understand Islamic law because Islamic law also has a big influence on the development of Indonesian law, such as Law Number I of 1974 concerning Marriage, Law Number 7 of 1989 concerning Religious Courts, PP Number 28 of 1978 concerning Land Ownership Trust, and much more. This legal pluralism is in conflict with legal centralism, because centralism ignores the basic social and cultural diversity of society, including local legal norms taken from customs/customary law. So what is happening in Islamic law at the moment is that it includes legal pluralism, that is, apart from the Indonesian State implementing national legal policies, it is also thinking about customary law and Islamic law that apply in that area.

5. References

Journals:

Anis Mashdurohatun, 2018,The Urgency of the Notary Honorary Council in Enforcement of the Notary Code of Ethics in Pati Regency, Deed Journal, Volume 5 No. 1, January 2018.

_____, 2018,The Role of Notaries in Making Deeds of Granting Mortgage Rights (APHT) for Credit Agreements Between Creditors and Debtors with Mortgage Guarantee in Purwokerto, Deed Journal, Volume 5 No. 1, March 2018.

_____, 2017,The Role of Notaries in Making Credit Agreement Deeds from the Perspective of Positive Law and Islamic Law, Deed Journal, Volume 4 No. 4, December 2017.

Seidman, Robert B. (1972). Law and Development, A General Model. Law and Society Review, 5-13. DOI link:https://doi.org/10.2307/3052987.

Purnawan Dwi Negara, Reconstruction of Tengger Area Management Policy Based on Ecological Communal Values in a Socio Legal Perspective. Diponegoro University Dissertation.

Books:

Abdoerro'uf. Al-Qur'an and Legal Science, Bulan Bintang, Jakarta, 1970

Ali, David. Islamic Law, 18th Printing. Jakarta: PT RajaGrafindo Persada, 2012

Hazm, Ibn. Al-Ihkkam fi ushul al-Ahkam, volume I, Dar Al-kutub Al-Islamiyyah, Bairut 1985

ND, Mukti. Fajar., & MH, Yulianto. Ahmad. (2019). Dualism of Normative & Empirical Legal Research. In MF ND, & YA MH, Dualism of Normative & Empirical Legal Research (p. 42). Yogyakarta: Student Library.

Nawawi, Hadari. (1992). Social Sector Research Instruments. In Hadari Nawawi, Social Sector Research Instruments (p. 47). Yogyakarta: Gadjah Mada University.

Rahardjo, S. (2014). Legal studies. In S. Rahardjo, Legal Science (p. 43). Bandung: PT Citra Aditya.

Shiddieqy, Hasbi Ash. Introduction to Islamic Law, Bulan Bintang, Jakarta 1963

Soekanto, S., & Mamudji, S. (2013). Normative Legal Research. In S. Soekanto, & S. Mamudji, Normative Legal Research (p. 1). Jakarta: Rajagrafindo Persada.

Waluyo, B. (1991). Legal Research and Practice. In B. Waluyo, Legal Research and Practice (pp. 77-78). Jakarta: Sinar Graphics.

Wignjodipoero, Soerojo. Introduction and Principles of Customary Law, PT Toko Gunung Agung, Jakarta 1968

Zaidan, Abdul Karim. Al-Wajiz fi Ushul al-Fiqh, Mathba' ah al-Ani, cet. IV, Baghdad, 1970

Regulation:

The 1945 Constitution of the Republic of Indonesia.

Law Number 5 of 1990 concerning Conservation of Biological Natural Resources and Their Ecosystems.

Law Number 1 of 1974 concerning Marriage.

Law Number 7 of 1989 concerning Religious Courts.

Government Regulation Number 28 of 1978 concerning Waqfation of Owned Land.

Internet:

Mufridah, A. (2022, January Thursday). Ana Mufridah's thesis. Retrieved from repository.uksw.edu: https://repository.uksw.edu/bitstream/123456789/16550/2/T2_322014009_BAB%20II.pdf

Ricardo Simartana, Legal Pluralism, Why is it Necessary?, in Donny Donardono (Ed), Discourse on Legal Reform in Indonesia, HuMa, 2007, page 73(source: http:// http://mohammadsyafiie.blogspot.co.id/2013/02/pluralisme- Hukum-bagi-community-adat.html on 5 May 2024

http://mohammadsyafiie.blogspot.co.id/2013/02/pluralisme- Hukum-bagi-community-adat.html