



The Relationship Between Islamic Law and Positive Law of Indonesia and Recht Customs

Bustomi

STIH Painan Law Study Program, Email Achmadbustomi568@gmail.com

Abstract. The relationship between Islamic law, Indonesia's Positive Law, and customary law so far, when viewed in terms of implementation, sometimes has not been found, but nevertheless, the law of the potion has become a measure of national law for the citizens of the community, including Muslims or cultures in the territory of Indonesia. The formation of positive law is primarily influenced by the values contained in the teachings of Islam so that several regulations are legitimized in the Indonesian legal system, including marriage law, waqf, and hajj, as well as some customary laws included in the compilation of Islamic law and Indonesia legal system. This study uses a literature research method that approaches the supporting books in this paper. It is hoped that the synergy of the three legal systems can continue to harmonize as a form of diversity and create harmony between citizens. The result of this research was The correlation between Islamic law, Indonesia's positive law, and customary law, and shows how these three legal systems interact and influence each other. Harmonious integration between these three legal systems is important to create a fair and effective legal system in Indonesia.

Keywords: Islamic, Positive, Law, Recht, Customs

INTRODUCTION

The diversity of community life in Indonesia is a gift from various religions recognized in Indonesia, including tribes, cultures, and customs. Concrete evidence of complex diversity in law, including Islamic law, Indonesia's positive law, and customary law. The contribution and essential role of the three laws in social interaction with each other.

Legal recognition in Indonesia does not contradict each other, noting that the practice of life is not just a theory but is lived and understood so that the law and other laws do not contradict or collide. Islamic law is carried out for citizens who adhere to the beliefs of Islamic teachings; customary law is applied according to the customs that apply in the area of enforcement that is indeed growing and developing amid the community, while positive law is used for all citizens regardless of ethnicity, culture, and religion because of the positive law of the law that applies in a country, namely the state of Indonesia.

The enactment of Islamic law recognized in the Indonesian legal system in civil affairs is *lex specialist* because it applies to its adherents. Some of the enactments of Islamic law recognized in Indonesia include marriage law, inheritance, zakat, infaq, sadaqah, grants, waqf, and marriage. This is proof of recognition of national regulations as stated in Law Number 1 of 1974 concerning marriage and the Compilation of Islamic Law (KHI).

The state determines the legal system of Indonesian society. Therefore, the existence of a new Indonesian legal system since the birth of the State of Indonesia at the time of the establishment of the state was formed. The legal system is all the legal regulations that are held or regulated by the state, its parts, and apply at that time to the entire society in the state; the point is that all the laws that apply in society, then some scholarly opinions equate the legal system with positive law or *Ius constitution*. The purpose of Indonesia's positive law is to provide justice, legal certainty in the form of regulations and court decisions, and finally, order. In implementing positive law, the existence of Islamic law and customary law in society must be considered.

Customary law, or in the Netherlands, known as "*Utrecht*", the use of the term came into effect in 1893 and was initiated by Snouck Hurgronje.¹ There are two opinions about the origin of the word adat; some argue that adat comes from the Arabic language, namely customs, which means good habits and bad habits. Meanwhile, according to Amura, Hilman explained that the term customary comes from Sanskrit because, according to him, the Minangkabau people have used this term.² So customs reflect the personality of the nation, one of the incarnations of the soul of the country concerned from century to century. So customs are like the deposits of morality in society; that is, the customary rules are morality whose truth has been generally recognized in society.³

The relationship between the above legal systems is very close, and it is not uncommon to influence and interact with each other in the application in Indonesia, for example, in the settlement of legal disputes over land disputes in a particular area between customary law and Islamic law plays a role in getting the answer to the problem. Another correlation between Islamic law and Indonesia's positive law in terms of marriage law is that Islamic law inheritance law significantly contributes to Indonesia's positive law.

¹ Moh. Shohib and Bustomi, *The Existence of Customary Hukium in Indonesia Introduction to Customary Law Studies*, CV. Pena Persada, Banyumas, 2021, p. 2.

² Hilman Hadikusuma, *Introduction to Indonesia Customary Law*, Mandar Maju, Bandung, 2002, p. 14.

³ Bushar Muhammad, *Principles of Customary Law*, Jakarta, PT. Pradaya Pratama, 1994, p. 30.

Sometimes, in the application of Islamic law, positive law, and customary law do not always go in sync; moral things arise from both the principles and values of the three laws. Therefore, the author wants to analyze, identify, and try to find answers that provide a fair legal system according to applicable norms.

METHOD

This study uses a qualitative method with a descriptive-analytical approach. We are using literature study data. The second method used in making literature reviews is traditional reviews. Traditional review is a method commonly used by researchers to create literature reviews. The results of the conventional review method, which is widely used to make literature reviews, are often found in survey papers. Therefore, the literature reviews produced through this method focus on only one topic. In addition, the selected paper is known to the creator in advance. With this traditional review method, the documents used as references are still in the same topic of discussion as the research being conducted. This method can make literature review more unique, but the papers that can be used as a reference are limited. It is possible that data or sources that can be used can be obtained from different discussion topics.

DISCUSSION

General Definition of Islamic Law

The term Islamic law consists of two words, namely "*law*" and "*Islam.*", in the Great Dictionary of Indonesian Language, the meaning of law is:

1. Rules or customs that are officially considered binding;
2. Laws and regulations to regulate people's life associations;
3. Benchmarks or rules, provisions regarding certain events;
4. Decisions/considerations set by the Judge in court.⁴

Islamic law is a law that originates from and is part of the Islamic religion; there are four terms used in terms in Islamic law, namely: (1) law, (2) law and ahkam, (3) sharia or sharia, (4) fiqh or fiqh.⁵ In the Islamic legal system, there are five laws or rules that are used as a guide to measuring human actions both in the field of worship and mullah. Five types of rules, namely:

1. Ja'iz or mubah or worship;
2. Circumcision;
3. Makruh;

⁴ Bustomi, Moh. Shohib, *The Relevance of Islamic Law from Time to Time Introduction to Islamic Law Studies*, Pena Persada, Banyumas, p. 1.

⁵ Mohammad Daud Ali, *Islamic Law Introduction to Islamic Law and Governance in Indonesia*, Jakarta, Rajawali Pers, 2019, p. 42.

4. Mandatory;
5. Forbidden.⁶

There are two (2) terms used to show Islamic law, namely:

- a. Islamic Sharia;
- b. Islamic Fiqh.

In the Islamic law library in the United Kingdom, Islamic sharia is called *Islamic Law*, while Fiqh Islam is *Islamic Jurisprudence*. In Indonesian, the words 'sharia law' or 'sharia law' are often used for Islamic sharia. For Islamic fiqh, the term 'fiqh law' or 'Islamic fiqh law' is used in practice. The two terms are summarized in the word 'Islamic law'.⁷ To carry out Islamic law, of course, it must be based on order and example, where the command of obedience to the law comes from Allah *subhanahu was ta'ala*, and examples of the deeds of the Prophet contained in the Sunnah. Of course, in the practice of orders based on the guidelines or regulations that are enforced, the teachings of Islam have a legal source or hierarchy of laws as guidelines, where the rules used are:

- a. The Qur'an as the holy book of Muslims;
- b. Sunnah is the original hadith of the Prophet;
- c. Ijma' is unity of opinion or equality of opinion. According to the accent, the word *Ijma'* comes from the word "*Jama'a*" which dances together. Interpreting fiqh means the equality of opinion between the jurists (mujtahidin) regarding the law about a new case or event in society;
- d. Qiyas is a decision using the analogy of legal experts. Qiyas according to the etymological accent comes from the word "*qaasa*" meaning to measure or weigh. According to fiqh, it means to establish a law or a new case, thing or event by the law set by the Qur'an and the Sunnah (for cases contained in its almn) if it can be shown that there is a relationship (*illat*) between the new thing/event and what is included in the Qur'an and the Sunnah.⁸

Islamic law, or sharia, is a legal system derived from the teachings of Islam. This law is based on four primary sources:

1. The Quran: The holy book of Muslims, which is considered the revelation of Allah, the main source of law.

⁶ *Ibid*, p. 48.

⁷ *Ibid*, p. 48.

⁸ Palmawati, Dini Handayani, *Islamic Law*, Sinar Grafika, Jakarta, 2018, p. 17.

2. Hadith: A collection of words, deeds, and agreements of the Prophet Muhammad PBUH that guide Muslims.
3. Ijma': The agreement of scholars on a law based on the Qur'an and Hadith.
4. Qiyas: The determination of law by analogy based on the nash (text) in the Qur'an or Hadith.

Islamic law covers various aspects of life, such as:

1. Worship: Rules on how to worship, including prayer, fasting, zakat, and hajj.
2. Muamalah: Rules on social relations and economic transactions, such as buying and selling, debts and receivables, and contracts.
3. Jinayah: Rules about crime, including punishment for theft, adultery, and murder.
4. Ahwal Syakhsiyah: Rules about family law, such as marriage, divorce, and inheritance.

As explained above about sources in Islamic law, it is appropriate that every determined regulation must have a purpose. In general, the purpose of Islamic law is to achieve happiness in this world and the hereafter by carrying out Allah's commandments and forsaking His prohibitions. Abu Ishaq al-Shatibi formulated five goals of Islamic law as written in the title of the book *Islamic Law* written by Prof. Dr. Palmawati, SH., M.H and Dini Handayani, SH., M.H, where the five goals are:

1. Maintaining religion,
2. Nurturing the soul,
3. Nurture intellect,
4. Preserving property,
5. Raising offspring.⁹

The Islamic Law Assessment Team of the National Law Development Agency of the Ministry of Justice in 1984 mentioned several principles of Islamic law, which are (1) general, (2) in the field of criminal law, and (3) in the field of civil law. So, as a contribution to the preparation of national legal principles, it is explained below:

1. General principles

The general principles of Islamic law that cover all fields of Islamic law are (1) the principle of justice is a fundamental principle in Islamic law. It is so vital that it can be called the principle of all Islamic law principles. In the Qur'an, justice is mentioned more than 1000 times, (2) the principle of legal certainty that a person accused of committing a crime must be considered innocent before the judge with convincing

⁹ *Ibid*, p. 25.

evidence firmly states the person's fault, (3) the principle of utility. This principle explains the ability to conduct all civil relations as part of the muamalat relationship as long as the Qur'an and As-Sunnah do not prohibit the relationship.

2. Principles in the field of criminal law

The principles in the field of Islamic criminal law include (1) the principle of legality, (2) the principle of prohibition of transferring guilt to others, (3) the principle of presumption of innocence.

3. Principles in the field of civil law

The principles in the field of Islamic civil law include (1) the principle of ability, (2) the principle of the benefit of life, (3) the principle of freedom and voluntariness, and so on.¹⁰

General Definition of Positive Law in Indonesia

Indonesia's positive law is a valid law, written and unwritten, where there is a mixture of European law, religious law, and customary law. The European legal system is included in the cause factor because the colonizers stopped in Indonesia. The religious legal system influenced the Indonesian legal system due to the spread of religion in the archipelago through educational, trade, and marriage methods. At the same time, customary law grew and developed from the community's cultural culture, which was used to handle social interaction.¹¹

Understanding the law is indeed difficult to explain because it is difficult for all legal experts to define the law to satisfy the answer to all parties. But at least the understanding of law given as a result of expert thinking as a guide for society in stepping and acting E. Utrecht, in his book entitled "Introduction in Indonesia Law," has tried to create a limit as a handle for people studying law. Utrecht gives the Limitation of Law: "The law is a set of rules (commandments and prohibitions) that govern the order of a society. Therefore it must be obeyed by that society."¹²

The following is the definition of law according to experts:

1. S.M. Amin, S.H.

In his book "Sightseeing to the Realm of Law," the law is translated as follows: "The collections of rules and sanctions are called laws, and the purpose of the law is to establish order in human relations so that security and order are maintained."

2. J.C.T. Simorangkir, S.H dan Woerjono Sastropranoto, S.H

In his book entitled "Lessons of Indonesia Law," he argues about the law as coercive regulations that determine human behavior in society made by competent official

¹⁰ *Of.cit*, hlm. 128.

¹¹ Winitya Paresti, *The Influence of Colonial Law on Positive Law Indonesia*, Unair, AC.id, u 2019.

¹² C.S.T. Kansil, *Introduction to Indonesia Law and Governance*, Balai Pustaka, Jakarta, 2018, p. 37.

bodies, and violations of these regulations result in actions taken, which are with certain punishments.¹³

To better understand the meaning of the law, we must also know the characteristics of the law itself; the characteristics of law consist of the existence of orders/prohibitions, and everyone must obey both prohibitions and orders. Positive law, as a guideline for Indonesian society, has a source of law as a reference, where the source consists of material and formal legal sources. As for what is meant by formal law, it is anything that gives rise to rules with coercive power, namely rules that, if violated, result in firm and real sanctions. The source of the law can be reviewed in terms of material and formality:

1. Material law sources can be reviewed from various perspectives, such as economics, history, sociology, and philosophy.
2. Formal legal sources include:
 - a. Statutes ;
 - b. Habits (*costumes*);
 - c. Judges' Decisions (*Jurisprudentie*);
 - d. Treaty ;
 - e. Opinion of a legal scholar (*doctrine*).

Legal division according to its division:

- 1) According to the source, the law is divided into:
 - a. Legal Laws;
 - b. Customary law
 - c. Treaty law;
 - d. Jurisprudence law.
- 2) According to its form, the law can be divided into:
 - a. Written law
 1. Codified written law.
 2. Written laws that are not codified.
 - b. Unwritten law (Customary law).
- 3) According to the enactment of the law, it can be divided into:
 - a. National Law.
 - b. International Law.
 - c. Foreign Law.

¹³ *Ibid*, p. 38.

4) According to the time of its enactment, the law can be divided into:

- a. Ius Constitutum (Hukum Positif)
- b. Ius Constituendum, a law that is expected to apply in the future.
- c. Basic Law (Natural law).¹⁴

Indonesia's positive law is a legal system created by official state institutions through legislation. The system consists of several primary sources:

1. 1945 Constitution: The Constitution of the Republic of Indonesia, which is the supreme legal basis.
2. Law: A regulation made by the House of Representatives (DPR) with the approval of the President.
3. Government Regulation: Rules made by the President to implement laws.
4. Presidential Decree: A policy issued by the President to carry out executive functions.
5. Local Regulations: Rules made by local governments to regulate local affairs.

Indonesia's positive law aims to create legal certainty, justice, and order. Examples of positive laws in Indonesia include:

1. Civil Law: Governs relationships between individuals, such as contracts, inheritances, and agreements.
2. Criminal Law: Regulates prohibited acts and provides sanctions for violators, such as the Criminal Code (Criminal Code).
3. Constitutional Law: Regulates the relationship between state institutions and government procedures.
4. State Administrative Law: Regulates the relationship between the government and citizens and administrative procedures.

C. Definition of Customary Law

Customary law comes from the Arabic language, *hakama yahkumu hukman* which is a provision, and 'adah custom, so if combined, customary law is customary law.¹⁵ The term customary law is a translation of the Netherlands term *adatrecht*,¹⁶

Customary law is a legal system that develops in Indonesia's indigenous people, is unwritten and based on the customs and values embraced by indigenous communities. Sources of customary law include:

¹⁴ *Ibid*, p. 72

¹⁵ Hilman Hadikusuma, *Introduction to Indonesia Customary Law*, Bandung, Mandar Maju, 1992, p. 8.

¹⁶ Bushar Muhammad, *Principles of Customary Law An Introduction*, Jakarta, PT Pradnya Paramita, 2002, p. 9.

1. Customs: Practices that are consistently practiced by indigenous peoples and recognized as binding norms.
2. Customs: Traditions and cultures that are passed down from generation to generation in indigenous communities.
3. Decisions of Customary Leaders: Decisions made by traditional leaders or customary institutions recognized by the community.

The fields of customary law are:¹⁷

1. Forms of customary law societies;
2. About personal;
3. Government and judiciary;
4. Family law;
5. Marriage law;
6. Inheritance law;
7. Land law;
8. Law of debts and receivables;
9. Delik law;
10. Sanctions system.

The recognition of customary law in Indonesia's positive law is reflected in various laws, such as:

1. Law No. 6 of 2014 concerning Villages: This law officially recognizes the existence and rights of indigenous peoples.
2. Law No. 41 of 1999 on Forestry: Recognizing the rights of indigenous peoples to customary forests.

Correlation of Islamic Law, Indonesia's Positive Law, and Customary Law

1. Legalization of Islamic Law in Indonesia.

Islamic law began to receive juridical constitutional recognition. The Indonesian government has ratified various laws and regulations, some of which are taken from the book of Fiqh as a representative. Among them are Law No. 1 of 1974 concerning marriage and PP. No. 28 of 1977 concerning the waqf of particular property for the last time is a follow-up to Law No. 5 of 1960 concerning Agrarian Principles; one of the articles reads that the waqf of property has the right to obtain legal protection. 1989 Law No. 7 of 1989

¹⁷ Siska Lis Sulistiani, *Customary Law in Indonesia*, Jakarta, Sinar Grafika, 2021, p. 45.

concerning Religious Justice was born, a court dedicated to Muslims. So, in 1991, the President of the Republic of Indonesia issued Presidential Instruction No. 1 of 1991 concerning the compilation of Islamic law (KHI). In addition to some of the legislation mentioned, several laws and regulations still contain and support the implementation of Islamic law in Indonesia, including Law No. 38 of 1999 concerning the management of zakat, and Law No. 17 of 1999 concerning the implementation of Hajj. Law of the Republic of Indonesia. No. 21 of 2008 concerning Sharia Banks, Presidential Decree No. 8 of 2001 concerning the National Amil Zakat Agency, and Law of the Republic of Indonesia No. 41 concerning waqf.

2. Enforcement of Customary Law in a Positive Legal Framework

The enactment of customary law as a positive law needs to highlight two concepts of thought about law that are very sharp in contradicting the position of customary law in the legal system, namely the idea of legislation law.¹⁸ Customary law is recognized and integrated into the national legal system, especially in the management of natural resources and the rights of indigenous peoples. Examples of such recognition are:

- a. Law No. 6 of 2014 concerning Villages: Granting the right to indigenous peoples to regulate and manage their household affairs.
- b. Law No. 41 of 1999 on Forestry recognizes customary forests and grants rights to indigenous peoples to manage forests according to customary law.

3. Adatrecht Acculturation in Indonesia Islamic Law

One of the local traditions and cultures adopted by the Compilation of Islamic Law (KHI) into Islamic law in Indonesia is common property. Joint property is the property of husband and wife obtained during the marriage bond, either individually or jointly, without questioning in whose name the property is registered. The provisions on joint property are contained in Chapter XIII KHI Articles 85-97.¹⁹

Islamic and customary law often interact and influence each other in Indonesian society. These two legal systems have sometimes aligned principles, especially regarding social justice and dispute resolution. An example of this interaction is in the settlement of land disputes in certain areas, where customary law and Islamic law can be used together to reach a fair and acceptable solution for the community.

¹⁸ *Of. Cit*, hlm. 36

¹⁹ Depag RI, *Legal Counseling Materials*, Jakarta, Directorate General of Islamic Religious Institutional Development, 1997, p. 109.

CONCLUSION

The correlation between Islamic law, Indonesia's positive law, and customary law, and shows how these three legal systems interact and influence each other. Harmonious integration between these three legal systems is important to create a fair and effective legal system in Indonesia.

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