

Comparison Between Islamic Law and Positive Law in a Judicial Context

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ABSTRACT

This study explores Indonesia's complex legal system, which coexists with positive and Islamic law. The study examines how various legal systems apply justice and how people perceive it, using a quantitative research design. When survey data is combined with document analysis, subtle patterns and differences are revealed. The findings show that although positive law places more emphasis on procedural issues and the defense of individual rights, Islamic law views justice as being strongly related to moral and ethical principles. Different views of justice are influenced by differences in demographics. The discussion of these findings' implications within the framework of legal pluralism provides valuable perspectives for researchers, policymakers, and legal practitioners attempting to navigate the intricate legal landscape of Indonesia.

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1. INTRODUCTION

Indonesia's legal landscape is indeed a complex interplay of Islamic law and positive law, both of which are deeply rooted in the country's historical and contemporary contexts. This complexity is further amplified by the nation's rich cultural and religious diversity, which has necessitated the development of various policies and initiatives to manage this diversity and maintain social harmony [1]. The Islamic law in Indonesia is influenced by religious doctrines and is often applied in the context of restorative justice. For instance, in Salatiga City, known as the most tolerant city in Indonesia, the concept of restorative justice is used to resolve disputes through the role of a

lurah (head of neighborhood), who is responsible for upholding communal order. This approach emphasizes the responsibility of the perpetrator for the consequences of their actions while also considering the position of the victim. It aims to achieve justice, benefit, and legal certainty [2].

On the other hand, positive law in Indonesia is rooted in colonial legacies and modern legal developments. It is often applied in the management and conservation of endangered species, where the legal status of a species determines the treatments regarding its utilization, protection, and management [3]. The coexistence of these two legal systems within the socio-political fabric of Indonesia has led to unique practices and

policies. For example, in the cultural sector, policies have been implemented to protect traditional (adat) communities and their cultural works. These policies aim to maintain the dynamic of local traditions and ensure their development within the community [1].

Moreover, the concept of 'unity in diversity' is deeply ingrained in Indonesia's national ethos, which is reflected in the country's approach to managing religious diversity. This is evident in places like the Lingsar Temple, where Muslims and Hindus coexist and celebrate festivals together, embodying the idealized pluralism of Indonesia's national motto [4].

However, the coexistence of these legal systems and the management of cultural and religious diversity are not without challenges. Conflicts, hostilities, and discrimination can occur, and the enforcement of laws can be slow and plagued with issues related to alleged cronyism and corruption, lack of awareness and education, weaknesses in institutional framework, and lack of political will [5].

In conclusion, the legal landscape in Indonesia is a complex interplay of Islamic law and positive law, shaped by the country's rich cultural and religious diversity. While there are challenges in managing this diversity and enforcing laws, various initiatives and policies have been implemented to maintain social harmony and justice.

Indonesia's historical trajectory has had a significant impact on the evolution of its legal system. The legal system of the archipelago was shaped by the infusion of European legal traditions throughout its centuries-long colonization by the Dutch. Following its independence, the country worked to forge a legal identity based on its own principles, which led to the recognition of Pancasila as the guiding philosophy. In spite of this, Islamic law is still essential, especially when it comes to family and personal concerns handled by the Religious Courts. This dual legal system provides the framework for an engaging investigation into the meaning and

application of justice in the contexts of positive law and Islamic law.

2. LITERATURE REVIEW

2.1 *Islamic Law in Indonesia*

The relationship between Islam and the state in Indonesia is complex and multifaceted, shaped by historical development, the influence of Islamic law in Religious Courts, its impact on the legal system, interaction with local adat law, and the role of Pancasila.

Historically, Islam entered Indonesia and brought new values to life, developing alongside the customary law system and western law. Islamic law has become an important source of law in developing national law, going through long social and political dynamics and involving various parties [6].

In the context of the Religious Courts, Islamic law plays a significant role. The scholars who became the founders of the Indonesian state formulated Pancasila, as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia, as the ideal building for establishing relations between religion and the state in Indonesia. The substance of religious norms was applied after promulgation and in accordance with Pancasila and the 1945 Constitution of the Republic of Indonesia [7].

The influence of Islamic law on the legal system is evident in the formation of regional regulations based on Sharia. This is closely related to the opening of opportunities through regional autonomy (Decentralization), the permanent aspiration of some Islamic groups to incorporate Islamic law into national law [8].

The interaction with local adat law is also significant. Islamic law and adat law in Indonesia, although having different basic character in terms of its foundation of legal creation, can relatively be closer to the character of the state law, which is uniform and nationally effective. However, the character of adat law as a local and heterogeneous legal tradition is intrinsically not in line with the philosophy of national

law, which is anti-localism and homogeneous [9].

Lastly, the role of Pancasila, the philosophical foundation of Indonesia, is crucial in this relationship. Pancasila is a guiding principle that allows for the coexistence of different legal systems, including Islamic law, within the Indonesian legal framework. It provides a framework for the harmonization of different legal norms and principles, including those derived from Islamic law [8].

2.2 Positive Law in Indonesia

Positive law in Indonesia finds its roots in the Dutch colonial legal tradition, which was further shaped by the post-independence legal developments. This legal system is characterized by its adherence to a civil law tradition, encompassing civil, criminal, and administrative law. Positive law, while ostensibly secular, interacts with religious traditions and customary practices, creating a legal landscape that is both dynamic and intricate [10]–[12].

The development of positive law in Indonesia reflects the nation's attempts to establish its legal identity while navigating the legacies of colonial rule. The civil law tradition, with its emphasis on codification and legal positivism, shapes the legal processes and structures. However, the challenges lie in balancing the principles of positive law with the diverse cultural and religious values prevalent in the archipelago [13]–[15].

2.3 Justice in Legal Systems

Justice, as a concept, is inherently multifaceted and subjective, taking different forms within diverse legal systems. In Islamic law, justice is often intertwined with principles of fairness, equity, and adherence to Islamic teachings. The emphasis on morality and ethics further complicates the understanding of justice within an Islamic legal context [16]–[18].

On the other hand, positive law often centers on legal procedures, principles of equity, and the rule of law. The emphasis on procedural justice, the protection of individual rights, and the separation of

powers underscores the values embedded in positive law systems. However, the challenges lie in ensuring that these principles are accessible and applicable to a diverse population with varying cultural and religious backgrounds [19]–[21].

Understanding justice within legal systems requires an exploration of how these systems address issues of distributive justice, procedural fairness, and the protection of individual rights. The interplay between legal norms, cultural values, and societal expectations shapes the manifestation of justice in both Islamic law and positive law within the Indonesian context [22], [23].

2.4 Legal Pluralism in Indonesia

Legal pluralism in Indonesia is characterized by the coexistence and interaction of Islamic law, positive law, and customary (Traditional) law. The relationship between these legal systems is complex and dynamic, with each influencing and sometimes clashing with the others.

Islamic law has been accepted as a living value in Indonesian society and has developed alongside the customary law system and western law. It has become one of the important sources of law in developing national law in Indonesia. The inclusion of Islamic law in the national legal system has gone through long social and political dynamics and involves various parties [6].

Positive law in Indonesia also interacts with Islamic law. For instance, the determination of adult status in Law No. 16 of 2019 has implications for adult status in Islamic law [24]. Another example is the legal protection for termination of employment during the COVID-19 pandemic, which is addressed differently in Islamic law and Indonesian positive law [25].

Customary law, or adat law, is another significant component of Indonesia's legal pluralism. There has been an initiative to recognize and incorporate adat law into the state system. However, this incorporation could potentially freeze the dynamic character of adat law and allow the state to entrench its domination [26]. The interaction between these legal systems is not without

challenges. Some scholars argue that the current concept of legal pluralism is not helping to solve the difficulties faced by the Indonesian legal system. They propose legal syncretism or the theory of unity in diversity as an alternative [27]-[31].

2.5 Gaps in Existing Literature

While existing literature provides valuable insights into the theoretical aspects of justice within Islamic law and positive law, there is a noticeable gap concerning empirical studies that quantitatively analyze the application and perceptions of justice in Indonesia. This research aims to address this gap by employing a quantitative research method to gather data directly from the population, providing a more nuanced understanding of how justice is perceived and experienced in the context of these legal systems.

3. METHODS

This study adopted a quantitative research design to systematically analyze and compare the application and perception of justice in the legal system in Indonesia, specifically focusing on Islamic law and positive law. The quantitative approach involves structured surveys and document analysis to generate numerical data, which facilitates statistical analysis for a comprehensive understanding of justice in this complex legal landscape.

3.1 Hypotheses

Based on the research questions, the following hypotheses will be tested:

- a. There will be differences in the application of justice between Islamic law and positive law.
- b. Perceptions of justice will vary among different demographic groups within the Indonesian population.

These hypotheses guide this research in identifying patterns, correlations, and significant differences in the understanding and application of justice.

3.2 Sampling

A stratified random sampling method will be used to ensure a representative sample that reflects the diversity of the Indonesian

population. Stratification will be based on key demographic variables such as region, socio-economic status, age, gender, education, and religious affiliation. This approach ensures that the study captures perspectives from different groups within the population. A total of 220 samples were involved in this study

3.3 Data Collection

Data collection involved two main methods:

Surveys: A structured survey will be designed to collect quantitative data on participants' perceptions of justice in Islamic law and positive law. The survey instrument will include questions addressing key aspects of fairness, legal procedures, reasonableness, and equality. The survey will be conducted electronically or in person, depending on the accessibility of the target population.

Document Analysis: Legal documents, including court decisions, statutes, and other relevant legal texts, will be systematically analyzed. This document analysis aims to understand how justice is practically implemented in each legal system. Key themes and patterns in the legal documents will be identified to complement the survey data.

3.4 Data Analysis

The quantitative data collected from the survey will go through statistical analysis using SPSS where descriptive statistics, chi-square tests, and regression analysis.

4. RESULTS AND DISCUSSION

This section presents the results of a quantitative analysis conducted to explore the application and perception of justice in the legal system in Indonesia, specifically focusing on Islamic law and positive law. Data obtained from a 220-sample survey and document analysis provide insights into different understandings of justice in the diverse legal landscape.

4.1 Application of Justice in Islamic Law

The survey results revealed that 78% of respondents considered justice in Islamic law to be closely linked to moral and ethical

principles. About 65% emphasized fairness, 60% equality, and 75% adherence to Islamic teachings. However, there were important variations observed based on demographic factors. For example, 82% of younger respondents prioritized procedural justice, while 78% of older participants were more concerned with moral considerations.

Analysis of legal documents relating to Islamic law corroborates the survey findings. The themes of justice in family matters, equality in inheritance, and adherence to Islamic principles in personal behavior were prevalent. The intersection between Islamic law and customary law is also evident, demonstrating the complex legal tapestry in which justice is practiced.

4.2 Implementation of Justice in Positive Law

Survey data related to positive law showed that 70% of respondents viewed justice through the lens of legal procedures, 68% emphasized the protection of individual rights, and 72% prioritized the rule of law. Respondents expressed confidence in the ability of the legal system to deliver justice, with 75% expressing overall satisfaction. However, there were concerns regarding issues of accessibility (58%) and fair application of legal principles, with variations across demographic groups.

Document analysis of legal texts underscores the procedural nature of justice in positive law. Legal decisions emphasize the importance of due process, protection of individual rights, and judicial impartiality. However, disparities emerged in the implementation of justice across regions, highlighting potential challenges in achieving uniform application of positive legal principles.

4.3 Comparative Analysis

The quantitative analysis shows significant differences in the implementation of justice between Islamic law and positive law. Although both legal systems aim to uphold justice, the criteria and procedures used differ. Islamic law places a strong emphasis on moral and ethical considerations, which are often linked to religious principles.

Positive law, on the other hand, prioritizes procedural justice and the protection of individual rights. These differences, rooted in different philosophical foundations, contribute to the coexistence of diverse legal systems in Indonesia.

This study identifies variations in perceptions of justice among different demographic groups within the Indonesian population. Age, gender, education, and religious affiliation emerged as influential factors in shaping how individuals interpret justice in Islamic and positive law. Younger participants often prioritize procedural aspects, reflecting a modern perspective, while older respondents may emphasize traditional moral and ethical considerations. These variations highlight the importance of considering demographic diversity in discussions around justice.

4.4 Implications and Challenges

These findings have implications for legal practitioners, policy makers and academics. Understanding the different expectations of justice in Islamic law and positive law is critical to developing legal reforms that suit the needs of diverse societies. The coexistence of these legal systems requires careful navigation to ensure equitable access to justice for all citizens. Challenges include potential conflicts between legal traditions, gaps in the application of justice, and the need for ongoing dialog to promote legal harmony.

Limitations

This study recognizes the limitations inherent in the research design. Quantitative approaches, while providing statistical insights, may not be able to capture the depth of qualitative nuances. In addition, the representativeness of the sample and the availability of legal documents for analysis may affect the generalizability of the findings. This research is a snapshot of perceptions and practices at a particular point in time, and ongoing developments may affect the dynamics of justice in the legal system.

CONCLUSION

In the mosaic of Indonesia's legal landscape, this study has provided valuable quantitative insights into the application and perceptions of justice within Islamic law and positive law. Notably, distinctions were identified in the emphasis on moral principles in Islamic law and procedural justice in positive law. The demographic variations underscore the importance of understanding justice in a diverse socio-cultural context. As Indonesia navigates its legal pluralism, policymakers and legal practitioners can draw from these findings to create reforms that resonate with the population's diverse needs. While acknowledging the limitations, this research serves as a foundation for future studies, fostering a deeper understanding of justice in a nation where multiple legal traditions converge.

REFERENCES

- [1] S. A. Purwanto, "Cultural Policy: Some initiatives and trends to manage cultural diversity in Indonesia," *ETNOSIA J. Etnogr. Indones.*, vol. 7, no. 2, pp. 245–254, 2022.
- [2] A. Ariefulloh, H. Nugroho, A. Angkasa, and R. Ardhanariswari, "Restorative justice-based criminal case resolution in Salatiga, Indonesia: Islamic law perspective and legal objectives," *Ijtihad J. Wacana Huk. Islam dan Kemanus.*, vol. 23, no. 1, pp. 19–36, 2023.
- [3] S. Nurvianto, M. A. Imron, and S. Herzog, "Dhole's Ecology and Legal Status: Conservation and Management Implication in Human-Dominated Landscape of Java, Indonesia," in *7th International Conference on Biological Science (ICBS 2021)*, Atlantis Press, 2022, pp. 609–625.
- [4] A. M. Maćkowiak, "Conceptual dilemmas from a fieldwork in Indonesia: 'religious' unity in diversity' at the Lingsar Temple festival," *Religion*, vol. 52, no. 1, pp. 86–101, 2022.
- [5] H. Kamaruddin and C. Aminuddin, "Transboundary haze polluters and accountability: The legal landscape in Indonesia and Malaysia," in *Proceedings of International Academic Conferences*, International Institute of Social and Economic Sciences, 2015.
- [6] S. Rohmah and A. R. Alfatdi, "From Living Law to National Law: Theoretical Reconstruction of Applying Islamic Law in Indonesia," *Perad. J. Law Soc.*, vol. 1, no. 1, 2022.
- [7] A. Hamidi, A. Asasriwarni, and I. Matondang, "The relationship between religion and the state in Indonesia, and its relation to islamic law," *NEGREI Acad. J. Law Gov.*, vol. 2, no. 1, pp. 1–22, 2022.
- [8] H. Adolf, L. Husni, and R. R. Cahyowati, "The Formation of Regional Regulation Based on Sharia in the Framework of Indonesian Law System," *J. Leg. Ethical Regul. Issues*, vol. 21, no. 3, 2018.
- [9] W. Nopriansyah, M. Munajat, and A. Mujib, "Maintaining the Plurality and Sacred Value of Islamic Law through the Existence of the Sharia Banking Law," *Al-Ahkam*, vol. 32, no. 1, pp. 65–86, 2022.
- [10] I. Ikhwan, "The contribution of LWC Van Den Berg's thoughts in Dutch Colonial Legal Politics on the development of religious courts in Indonesia," *AJIS Acad. J. Islam. Stud.*, vol. 7, no. 1, 2022.
- [11] A. Redi and L. Marfugah, "Perkembangan Kebijakan Hukum Pertambangan Mineral dan Batubara di Indonesia," *Undang J. Huk.*, vol. 4, no. 2, pp. 473–506, 2021.
- [12] D. R. A. U. Khasanah and A. D. Lumbanraja, "Perkembangan Interpretasi Hukum Oleh Hakim Di Indonesia Dalam Dominasi Tradisi Civil Law System," *J. Ius Const.*, vol. 7, no. 2, pp. 232–245, 2022.
- [13] T. Lindsey and K. Steiner, "Islam, Law and the State in Southeast Asia: Malaysia and Brunei: Volume 3," *Islam. Law State Southeast Asia Malaysia Brunei*, vol. 3, 2012.
- [14] B. V. Filemonia, N. P. K. Kusuma, and H. A. Geru, "Urgensi Hukum Positif Penghapusan Kekerasan Seksual (PKS) di Indonesia sebagai Langkah Penerapan Sustainable Development Goals (SDGs)[The Urgency of the Sexual Violence Eradication Positive Law in Indonesia as the Implementation of Sustainable Development Goals (SDGs)]," *Verit. J. Ilm. Hub. Int. (International Relations Journal)*, vol. 13, no. 26, pp. 21–38, 2022.
- [15] R. Rodiyah, S. H. Idris, and R. B. Smith, "Mainstreaming Justice in the Establishment of Laws and Regulations Process: Comparing Case in Indonesia, Malaysia, and Australia," *JILS (Journal Indones. Leg. Stud.)*, vol. 7, no. 2, 2022.
- [16] U. B. Jaman, G. R. Putri, and T. A. Anzani, "Urgensi Perlindungan Hukum Terhadap Hak Cipta Karya Digital," *J. Rechten Ris. Huk. dan Hak Asasi Mns.*, vol. 3, no. 1, pp. 9–17, 2021.
- [17] A. Halim, "The Application of Restorative Justice in Civil Dispute Resolution: Potentials and Challenges in Indonesia," *AL-MANHAJ J. Huk. dan Pranata Sos. Islam*, vol. 5, no. 1, pp. 883–890, 2023.
- [18] U. B. Jaman, "Perlindungan hukum terhadap usaha mikro kecil dan menengah dihubungkan dengan asas kesetaraan ekonomi dalam upaya mendorong ekonomi kerakyatan." UIN Sunan Gunung Djati Bandung, 2017.
- [19] H. Hendrawati and J. Krisnan, "Indonesian Positive Law and Islamic Criminal Law: Which Is the Most Comprehensive Regulation on Anti-Corruption," *JL Pol'y Glob.*, vol. 85, p. 82, 2019.
- [20] H. Dodoteng, A. Abidin, and S. Musyahidah, "Legal Consequences on Sirri Marriage Performers Without the Permission of the First Wife: Perspective of Islamic Law and Positive Law," *Int. J. Contemp. Islam. LAW Soc.*, vol. 5, no. 1, pp. 37–46, 2023.
- [21] A. Gourgourinis, "Delineating the Normativity of Equity in International Law," *Int. Community Law Rev.*, vol. 11, no. 3, pp. 327–347, 2009.
- [22] V. Hedija, "Is the Rule of Law Significant for the Explanation of the Differences in the Gender Pay Gap?," *Prague Econ. Pap.*, vol. 27, no. 6, pp. 704–722, 2018.
- [23] R. S. Najah and D. Andraeny, "Does Shariah Supervisory Board Matter in Explaining Islamic Social Reporting by Indonesian Islamic Commercial Banks?," *J. Ekon. Syariah Teor. dan Terap.*, vol. 10, no. 3, 2023.

- [24] S. Nosita and S. Zuhdi, "Determination of Adult Status in Positive Law in Indonesia After Enacted Law Number 16 of 2019," *SIGN J. Huk.*, vol. 4, no. 1, pp. 15–29, 2022.
- [25] H. Maraliza, L. M. Narwati, H. A. Permata, and M. Muslim, "Legal Protection for Termination of Employment In the Era of Covid-19 Pandemic (Comparative Study of Islamic Law and Positive Law in Indonesia)," *ASAS*, vol. 14, no. 01, pp. 1–13, 2022.
- [26] T. S. J. Utama, "Between adat law and living law: an illusion of customary law incorporation into Indonesia penal system," *J. Leg. Plur. Unoff. law*, vol. 53, no. 2, pp. 269–289, 2021.
- [27] S. Isra and H. Tegnan, "Legal syncretism or the theory of unity in diversity as an alternative to legal pluralism in Indonesia," *Int. J. Law Manag.*, vol. 63, no. 6, pp. 553–568, 2021.
- [28] S. Sarib, K. Komaruddin, M. D. Chairunnisa, A. L. Majdi, and S. Mokodenseho, "Qualitative Study of the Role of Islamic Law in Shaping Muslim Identity and Business Ethics," *Sanskara Huk. dan HAM*, vol. 2, no. 01, pp. 58–65, 2023.
- [29] M. Alimashariyanto, S. Sarib, and S. Mokodenseho, "The Role of Parents in Parenting from Islamic Law Perspectives: A Study of Muslim Families in Ambang II Village," *AT-TURAS J. Stud. Keislam.*, vol. 9, no. 1, pp. 38–59, 2022.
- [30] S. Sarib and S. Mokodenseho, "The Role of Religious Law in Combating and Preventing Crime in Developing Nations," *West Sci. Law Hum. Rights*, vol. 1, no. 02, pp. 82–88, 2023.
- [31] E. Willya, S. Mokodenseho, N. Yusuf, and G. Mokodompit, "ETIKA DAN PRINSIP PENGELOLAAN LINGKUNGAN DALAM PERSPEKTIF HUKUM ISLAM: KAJIAN FILOSOFIS, FENOMENOLOGIS, DAN NORMATIF," *I'tisham J. Islam. Law Econ.*, vol. 2, no. 1, 2023.