

A Comparison of the Concept of the Rule of Law in Indonesia and Islamic Law

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ABSTRACT

This research examines the idea of the rule of law in the theory of absolute liability and the perspective of Islamic law in Indonesia through comparative and conceptual analysis techniques. To compare and contrast the two, this research integrates the idea of the rule of law from general theory with the understanding of Islamic law. This research emphasizes the state's initiative to incorporate the ideas of Islamic law into its legal framework. While the idea of the rule of law and the principles of Islamic law are relevant, combining the two presents both opportunities and obstacles. This research is innovative in how it blends these ideas in Indonesia's diverse environment. The findings from this research can help create an inclusive and just rule of law.

Keywords: Rule of Law, Indonesia, Islamic Law.

INTRODUCTION

Many countries now view the rule of law as the ideal idea for creating a nation and state, as evidenced by the evolution of their constitutional systems over the past few years. This shows the fundamental role and importance of law in the life of the nation, especially to better manage the life of the country. As human life becomes more organized, law becomes more important. Throughout the history of Indonesian state governance, the constitution has consistently emphasized the importance of the rule of law.

The country's constitution has been changed and amended many times, but the statement that Indonesia is a state of law has always been made in the constitution. This shows that Indonesians recognize the value of the idea of the rule of law in managing the affairs of the state and nation. The idea of the rule of law has always had its own place in the constitution, both in the 1945 Constitution before the amendment, the Constitution of the

Republic of Indonesia Union (RIS) 1949, and the Temporary Constitution (UUDS) 1950 until the re-enactment of the 1945 Constitution and the amended 1945 Constitution.

The idea of the rule of law is developed by creating a functional and equitable legal system, by creating orderly and organized political, economic, and social institutional supra and infra structures, and by encouraging the development of a rational and impersonal legal culture and awareness in society, nation, and state (Azhari 2005a). This requires the proper construction (law making) and enforcement (law enforcing) of the legal system, which starts with the constitution as the highest legal authority (Zulfa 2009). To ensure the upholding of the constitution as a basic law that has the highest position (The Supreme Law of the Land), a Constitutional court is also formed which functions as The Guardian and at the same time The Ultimate Interpreter of the Constitution (Safa'at 2009).

The implementation of world order based on independence, lasting peace, and social justice is one of the noble goals of the Indonesian nation, but the real goal of the rule of law is that the state elevates the law to a position of supremacy, so that every state or government organizer must be subject to the law. There is no power above the law; everything is governed by the law (under the rule of law). There can be no arbitrary power or abuse of power in this role (Nasution 2013a).

This essence evolves in line with the demands of society and the progress of civilization. The idea of the rule of law develops in line with the times and the demands of humankind, as has been said, but human needs, theories and beliefs about the state also change over time according to what humankind needs. In fact, the concept of the rule of law is much older than State Science (Assihiddiqie 2005).

According to Sardjono (2004) the idea of state and law dates back to the fifth century BC. With the expression that the crumbling Greek civilization was described as a heavenly civilization, to exalt itself, Augustine summed up this new perspective admirably. Every contemporary legal pioneer during that century understood that the state's conception was based on public opinion, individual freedom, and strong moral relationships within society.

Plato was the first to advance the concept of the rule of law, and Aristotle later highlighted it. The great thinker Plato produced several scholarly writings. At least three of his many scholarly writings, namely *Politeia* (the Republica), *Politicos* (the Statement), and *Nomoi* (the Law), which he wrote when he was still young, were very much concerned with matters of state (Gultom 2003).

In his second book, Plato states that only citizens should be subject to the law, while the ruler no longer needs to be controlled because he is a clever person and philosopher. This can be seen from Azhari's statement that there are indeed laws made to regulate citizens, but only for citizens. Again, rules made by humans only apply to citizens, in contrast to the king, which does not apply to him. It certainly does not apply to the ruler himself (Azhari 2005).

Allah SWT has bestowed upon us the idea of the Rule of Law (Islamic Nomocracy). This shows that it is a blessing and a source of happiness for society and individuals who receive power. This is possible if the power is used in accordance with the prescriptions of the Qur'an and the customs of the Prophet Muhammad SAW. Conversely, the true meaning of power will be lost if it is exercised in a way that deviates or contradicts the basics outlined in the Qur'an and Prophetic traditions. In this situation, having authority is not a gift or favor from Allah SWT. Instead, this kind of power will be a disaster and calamity from Allah SWT (Hornby, 2006).

In order to understand how various theories of strict liability define the rule of law and evaluate how these theories do so, this research aims to investigate how Indonesian society views the rule of law from an Islamic law perspective. The research aims to identify Islamic legal theories that relate to the idea of the rule of law and investigate how these theories can be incorporated into the Indonesian legal system.

This research integrates two different fields, namely the idea of the rule of law from general theories and the perspective of Islamic law, to analyze and understand how the concept of the rule of law can be implemented in the context of Indonesia, where most of the population is Muslim. Through this investigation, the author compares and contrasts the idea of the rule of law derived from strict accountability theory with Islamic legal theory, and highlights efforts to incorporate Islamic legal principles into the Indonesian legal system. This approach advances our knowledge of the Indonesian legal system and how it relates to Indonesia's social, religious and cultural heritage.

RESEARCH METHOD

Comparative research methods and conceptual analysis were used in this study (Smith 2010). The comparative technique is used to compare the viewpoint of Islamic law with the idea of the rule of law according to strict liability theory. In this approach, the characteristics, guiding principles and other aspects of the state of law conceptions of the two paradigms are

compared. By comparing carefully and thoroughly, this research can highlight relevant similarities and differences.

In addition, a conceptual analysis methodology was also used in this study (Rahman 2015). This approach will make it easier to understand and analyze the rule of law in the theories and perspectives studied and identify the implications and significance of these concepts. By using conceptual analysis, this research can better understand the notion of the rule of law in the Islamic legal system in Indonesia.

Through comparative techniques and conceptual analysis, this research seeks to provide a more thorough and comprehensive understanding of the notion of the rule of law in strict liability theory and the perspective of Islamic law. By using this method, it will be possible to investigate and evaluate the notion of the rule of law in the context of socially, culturally and religiously diverse Indonesia, as it will provide a solid foundation for doing so.

RESULTS & DISCUSSION

The Concept of the Rule of Law in Various Theories of Order

One basic concept to understand the rule of law is its philosophy. This view emphasizes the importance of justice, legal certainty and the rule of law as the basic principles of the rule of law. This philosophy argues that just and righteous laws should govern the rule of law, and everyone should be treated equally before the law (Raz 1979). These ideas represent the goals of the rule of law, which include upholding individual rights and preventing the abuse of power by the government.

However, the rule of law regards the law as the highest authority in the legal system. In accordance with this theory, the law must be obeyed in all situations involving government operations and policies because it has a higher authority than the power of rulers or individuals (Hart 1961). This idea places a strong emphasis on maintaining the rule of law and avoiding excessive personal authority in the judicial system.

Before learning what a state is, we must first define it. The concept of *Nomocracy*, derived from the words *Nomos* and *Cratos*, is also related to the idea of *Rechtstaat* and the rule of law as a concept. *Demos* and *cratos*, or *kratein* in democracy, can be analogous to *Nomos* and *Cratos*, the phrase *nomocracy* or *Kratine* in democracy (Mahmud Marzuki 2007). *Nomos* signifies standard, while *cratos* means authority. Norms or laws are what is envisioned as the controlling factor in the exercise of authority. Consequently, the concept of the rule of

law or the belief that the rule of law is the supreme authority is strongly associated with the term nomocracy (Setiawan 2018).

This is always linked to the idea of popular sovereignty. Simply put, popular sovereignty means that the people have full power. Another way of saying it is from the people, for the people. In all areas of life, including political, economic and social, the people are seen as sovereign. In order to build a government that does not oppress the people, this is in line with the idea of the rule of law. In fact, according to Jimly Asshiddiqie, one of the ideas initially discussed in the process of writing the Constitution was popular sovereignty.

Rechtstaat is the German word for “rule of law” in continental countries. The opposition to the idea of a police state is intricately linked to the rise in Continental Europe of the *Polizei Staat*. Police State refers to a government that organizes law and order and takes care of all the needs of its citizens and fulfills all the demands of its citizens (Melki 2018). However, the authorities have further distorted this idea of the State. A good police officer, according to Robert Van Mohl, performs his duties in accordance with the law and is considerate of society. However, many police are bad, acting abusively towards society and abusing their position of authority to advance their own or their group’s interests. As a result, the *Rechtstaat* was born as a revolutionary attempt to counteract the absolute power of the ruler (Hendra Sudrajat 2018).

In his scientific book, *Methaphysiche Anfangsgrunde*, Immanuel Kant explains his conception of the rule of law, stating that the rich and the intellectuals are the ones who oppose the police state. The rich (bourgeois) and the intelligentsia want their citizens to have the freedom to look after their own interests. In short, citizens are responsible for solving their own economic problems; the government is not involved. Therefore, the only role of the state in this situation is to enforce order and security. As a result, this idea is often referred to as Kant’s liberal theory of law (Assihiddiqie 2005).

By understanding the concepts underlying the various ideologies, we can see how the idea of the rule of law can be applied in society. Regardless of the differences in approach, it is important to ensure that the rule of law is founded on laws that are impartial, just and binding on all interested parties. The values and principles of Islamic law have an impact on how Indonesians interpret the idea of the rule of law. From the perspective of Islamic law, justice, equality, legal certainty and the protection of human rights are significant foundations in the development of the idea of the rule of law.

In the Qur'an (Qur'an, Surat An-Nisa, Verse 135), Allah commands humans to stand up for justice, obey the law, and protect individual rights. It is essential to have a full understanding of the concept of the rule of law in the various theories and viewpoints of Islamic law in Indonesia in order to establish sufficient harmony between the principles of Islamic law and the principles of the rule of law sanctioned by the state. A just, equitable and inclusive legal system that meets society's needs can be achieved over time by maintaining this balance.

The Qur'an and Islamic legal writings do not mention Islamic law at all. Shari'ah, Fiqh, and the Law of Allah SWT are all found in the Qur'an. This is also the case with terms that share the same root. The phrase "Islamic Law" has been translated from Western literature as "Islamic Law". Islamic law is defined as the entire book of Allah SWT in the explanation of Islamic law found in Western literature. Islamic law governs every element of every Muslim's life. According to this definition, sharia and Islamic law are more similar. Islamic law is defined by Hasbi Ash-Syiddiqy as "the collection of the efforts of the *fuqaha* in applying Islamic law in accordance with the needs of society." This definition of Islamic law is more in line with the definition of fiqh (Hoesein 2006).

It is essential to know the definition of the word "Law" first in order to explain the meaning of Islamic law more clearly. Otherwise, there is no ideal interpretation of law. However, to come closer to an understandable, albeit flawed, definition, Muhammad Muslehuddin's definition from the Oxford English Dictionary needs to be expressed. According to him, law is "the body of rules whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects" (Djoko Prakoso, Bambang Riyadi Lany 2009). A body of laws recognized by a particular community or country as obligatory for its citizens. These laws can be official or unofficial.

When law is associated with Islam, then Islamic law means: "a set of rules based on the revelation of Allah and the Sunnah of the Apostle about the behavior of *mukallaf* humans who are recognized and believed to be valid and binding for all people of the religion of Islam." By looking at the meaning of *syarak* and fiqh in the description above, Islamic law includes Sharia law and fiqh law (Putra, 2009). In place of colonial law, national law was created by the Indonesian people after their country gained independence and applies to all Indonesians, particularly citizens of the Republic of Indonesia. It is not easy to apply one

national law to the Indonesian population, which consists of several ethnic groups with diverse traditions and religions, coupled with the diverse laws left behind by the colonial government. Care needs to be taken in making national laws that will apply to all citizens regardless of their religion as some of the religions practiced by the population of the Republic of Indonesia are indistinguishable from the law. One religion that has rules governing interactions between people and other people and with objects in society is Islam. Islam, in the truest sense, is a religion of law. Therefore, aspects of Islamic law must be carefully considered when developing national law in a country like Indonesia, where Muslims make up most of the population. Therefore, a clear understanding and careful procedures are required.

Significant differences also exist between the viewpoints of Islamic law and the concept of the rule of law. The difference is the recognized authoritative source. However, according to these ideas, it is state power or positive legislation that determines what the concept of the rule of law looks like. According to Islamic law, God, as revealed in the Quran and Hadith, is the ultimate authority. In addition to its primary goals of social justice, community, and moral excellence, Islamic law also incorporates an important spiritual and ethical component (Kamali 1998).

The Indonesian government recognizes the various socio-economic and religious groups that exist and encourages diversity in law and policy making. The aim of this strategy is to ensure that the concepts of positive law and Islamic law are in line with each other by ensuring that they do not contradict each other (Rahman 2012).

Understanding the similarities and differences between Western and Islamic notions of the rule of law will help Indonesia build an inclusive and just legal system. Through in-depth dialog and investigation between positive and Islamic law, common ground can be identified that allows the incorporation of universal concepts of justice, legal certainty and the protection of human rights that exist in both paradigms. This can serve as a solid foundation for the realization of the concept of the rule of law in accordance with Indonesian national values.

The Concept of the Rule of Law in Indonesia in the Perspective of Islamic Law

The rule of law is an essence that emphasizes the submission of state power holders to the rule of law (Nasution 2013). In other words, state institutions can only exercise their authority in accordance with the applicable laws and how it is regulated in law. Looking back,

the Glorious Revolution of 1688 AD had its roots in England, where the concept of the rule of law was first introduced. The concept was developed in a charter known as the *Bill of Rights* 1689 in response to absolute monarchy. This document shows parliament's victory over the monarch and several popular victories during the upheaval that accompanied the Bill of Rights conflict.

In other words, state institutions can only exercise their authority in accordance with the applicable laws and how it is regulated in law. Looking back, it was the Glorious Revolution in 1688 AD from England, where the concept of the rule of law was first introduced. This concept, which emerged in opposition to absolute monarchy, was codified in a charter known as the *Bill of Rights* in 1689, which described parliament's victory over the king and a series of popular victories during the upheaval that accompanied the *Bill of Rights* campaign (Assihiddiqie 2005).

Since there is no limit to the use of power by a dictator, the idea of the rule of law is a protest tyrannical government that oppress the people (Lay 2002). Bothling's definition of the rule of law is "*de staat waarin de wilsvriheid van gezagsdragers is beperket door grezen van recht,*" consistent with this idea. (Countries where legal requirements limit the freedom of power holders to vote) (Qamar 2013).

There has always been a voice or form of resistance to oppression, marginalization and suppression in almost all civilizations on this planet. Human rights have been developed today to express everyone's desire to be protected from such injustices. However, there is a problem with the definition of human rights itself (F. Budi Hardiman, 2011).

A rule of law state has unique attributes attached to it, such as upholding the position of human rights, equality, and equity among individuals in addition to adhering to laws, norms, and standards that have been enacted and enforced for its population without discrimination (Handoyo 2015). Andrew (2018) This is revealing because there are three diverse types of law in Islamic civilization, namely: Shari'ah law or *Syara* law is "Allah's decree relating to the subject of law, in the form of performing an action, choosing, or determining something as a condition, cause, or hindrance."

The liberal democratic view of the principle of deliberation, which corresponds to the formula "half plus one" or a majority vote of more than half as the result of an agreement, is different from the view of the principle of deliberation in Islam. Deliberation in this context

can be seen as a type of forum for sharing ideas, especially those that are proposed to address problems (Dahlan 2014). Islamic nomocracy includes:

Deliberation aims to involve or invite all parties to participate in the life of the state;

- a) It must be based on a spirit of brotherhood that is based on faith in Allah;
- b) The purpose of deliberation is for the benefit of the people;
- c) In deliberation, the most important factor is not who speaks, but rather what ideas or thoughts are discussed, what ideas or thoughts are discussed;
- d) Islam does not recognize opposition (those who oppose the government or refuse to accept the obligations of the state);
- e) Decisions can also be made by majority vote, and in Islam, consensus or discussion is known as *Ijma*. Scholars differ on the necessity of *mustanads* in legal agreements that occur, but they all agree that there must be evidence that guides the *mujtahids* in doing *ijtihad*.

In matters of worship such as prayer, zakat, fasting, Ramadan and Hajj, all of which are clearly outlined in the Qur'an and Hadith as part of sharia law, there should be no room for disagreement. Other principles of sharia law include reflection (*al-shura*) and justice (*al-adalah*), both of which are expressly required by Allah in the Qur'an. Secondly, *fiqh*, which refers to the knowledge or understanding of the rulings of *shara'*, learned from comprehensive proofs (Arief 2014).

As part of its efforts to incorporate the principles of Islamic law into its legal system, the Indonesian government has recognized the Quran and Hadith as authoritative sources of law (Kusuma 2019). This understanding is reflected in the Indonesian Constitution, especially the 1945 Constitution, which states that God Almighty is the foundation of the Indonesian state. In fact, the position of the Qur'an and Hadith as sources of law has encouraged the formation of laws and regulations that uphold Islamic beliefs.

The law that is derived from the understanding of *mujtahid* scholars of certain propositions (mostly Qur'anic verses and Hadith) is known as *fiqh*. *Fiqh*, which is ever-changing and respects differences of opinion, is created through *ijtihad* and scholars' understanding of legal ideas. Third, *qanun* (laws), plural *alqawanin* (legislations), made by recognized state entities that are in harmony with or do not violate sharia (religion). The term "siyasah shari'yah" is defined as "the authority of the government to implement policies

desired for the public good, through rules that do not contradict religion despite the absence of specific evidence” and refers to the government’s ability to do so. (Arief 2014).

The Indonesian government has recognized and incorporated the fundamentals of Islamic law into its legal system to meet the objectives of a predominantly Muslim country. One of the steps taken was to recognize the Qur’an and hadith as the sources of law derived from the Islamic faith. An additional source that offers justification and application for the teachings of the Qur’an is called hadith (traditions of the sayings and actions of the Prophet Muhammad). The hadith, considered the primary source of law, contains regulations for religious life and administration.

The principles of Islamic law associated with the idea of the rule of law, such as justice, equality, legal certainty, and the protection of human rights, will be crucial in helping Indonesia build a fair and equitable legal system. Regardless of inequalities in their social, economic, or religious status, everyone should have access to equitable rights, in accordance with Islamic law (Kusuma 2019). The purpose of the rule of law is to ensure that all citizens are treated fairly and equally, and this idea is consistent with that purpose (Honrby 2006).

The idea of equality is also emphasized in Islamic law, where it is stated that no distinction should be made based on gender, skin color, ethnicity, or religion (Al-Hibri 2009). The goal of the rule of law, which calls for treating all citizens fairly and equally, is consistent with this idea of equality. For people to understand their rights and obligations, it is important to highlight clear and simple rules. The idea of legal certainty underpins this. This idea of legal certainty is also used as a key component in the concept of the rule of law, which emphasizes the need for rules that are predictable and understood by all parties (Hallaq 2005).

One of the key principles of Islamic law is the protection of the fundamental rights of every person, including the right to life, freedom of religion, freedom of speech, and humane treatment. The principles of the rule of law, which place a strong emphasis on upholding human rights as the foundation of impartial law enforcement, are also in line with this strategy. To fully embrace Islamic legal concepts related to the idea of the rule of law, there must be free discussion between jurists, scholars and other interested religious figures and a complete understanding of the Qur’an. The concepts of Islamic law and the rule of law must be perfectly balanced to create a legal system that is fair, certain and supportive of human rights. This requires an integrated and balanced strategy.

In addition to the Qur'an and Hadith as authoritative sources of law, the Indonesian government has established organizations such as the National Sharia Council (DSN) and the Indonesian Ulema Council (MUI) that aim to provide legal guidance based on Islamic principles (Kamali, 2008). These institutions play a significant role in issuing legal opinions, or fatwas, on topics related to Islamic law.

In addition, Indonesia has created a religious court system that parallels the civil court system (Tahir 2016). The religious court system aims to provide remedies based on Islamic law in matters relating to marriage, inheritance, and other issues related to family law. This decision demonstrates the Indonesian government's efforts to integrate the principles of Islamic law into its judicial system. However, diverse legal interpretations continue to complicate the application and enforcement of Islamic law (Hosen 2018). Harmonization and the relationship between Islamic law and positive law are still being pursued to achieve the right balance between the two paradigms.

CONCLUSION

Integrating the idea of the rule of law and the perspective of Islamic law in Indonesia is a challenging endeavor with many aspects. The country's legal system must reflect the principles of Islamic law, which requires full knowledge of the Qur'an, honest debate, and agreement among all viewpoints. It is also important to consider the potential inconsistencies between Islamic law, which has a specific point of view, and generally applicable positive law. However, this integration also opens opportunities for a more inclusive, just and equal legal system. The Indonesian government has taken several steps, such as recognizing the Qur'an and Hadith as official sources of law, adopting Islamic legal concepts in certain situations, and establishing institutions such as the Indonesian Ulema Council.

When the concept of the rule of law is combined with the perspective of Islamic law, the unity of the state and the basic principles of the rule of law must be maintained. This procedure must consider the values of democracy, justice, and the protection of human rights. Therefore, in-depth dialog, discussion, and understanding among legal professionals, academics, and other stakeholders are needed to maintain a proper balance between these two legal systems. The process of integrating the idea of the rule of law and the perspective of Islamic law in Indonesia is difficult because it must be inclusive and consistent with the goals of Indonesian Muslim society.

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