

## BEYOND DICHOTOMIES: SOETANDYO WIGNJOSOE BROTO'S VISION FOR A MODERATED LEGAL PARADIGM

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### ***Abstract***

*This article employs a legal biography approach to review the thoughts of Indonesian legal philosopher Soetandyo Wignjosoebroto regarding the complexity and distinctiveness of this field of study, as well as the importance of moderating it. Soetandyo portrays law as a system that must maintain its complexity as it reflects the intricate nature of reality. In an increasingly pluralistic and intricate societal context, identifying applicable laws becomes a challenging task. Consequently, Soetandyo underscores the significance of interconnecting legal science with other disciplines. In terms of decolonization of law, Soetandyo's perspective, which avoids dichotomizing Western law from indigenous legal systems, assumes paramount importance. He alerts us to the peril of falling into the myth of the Western vs. Eastern dichotomy within the realm of legal science. Such a line of thought could impede our legal system's ability to adapt to universal values. Taken as a whole, Soetandyo's thoughts illustrate the necessity of tempering the study of law by perceiving it as an open system unbound by rigid methodologies. He also highlights the need for a robust epistemological foundation and a moderate approach when addressing complex issues such as the decolonization of law and the integration of legal studies with the social sciences.*

**Keywords:** *legal biography, moderation, decolonization of law, interdisciplinary.*

### ***Intisari***

Artikel ini menggunakan pendekatan biografi hukum untuk mengulas pemikiran filosof hukum Indonesia, Soetandyo Wignjosoebroto, tentang ilmu hukum yang menekankan kompleksitas dan kekhasan ilmu ini serta pentingnya memoderasinya. Pemikiran Soetandyo menunjukkan hukum sebagai sistem yang harus mempertahankan kompleksitasnya karena merefleksikan realitas yang kompleks. Dalam masyarakat yang semakin plural dan kompleks, identifikasi hukum yang berlaku menjadi tugas yang rumit. Oleh karena itu, Soetandyo menekankan pentingnya menghubungkan ilmu hukum dengan disiplin ilmu lain. Dalam konteks dekolonisasi hukum, pandangan Soetandyo yang menghindari pemisahan antara hukum Barat dan hukum lokal menjadi signifikan. Dia mengingatkan tentang bahaya jatuh ke dalam mitos dikotomi Barat dan Timur dalam ilmu hukum. Pemikiran semacam itu bisa membuat sistem hukum kita gagal beradaptasi dengan nilai-nilai universal. Secara keseluruhan, pemikiran Soetandyo mengilustrasikan kebutuhan untuk memoderasi ilmu hukum dengan melihatnya sebagai sistem terbuka yang tidak terikat pada satu metode tertentu. Ia juga menyoroti pentingnya landasan epistemologi yang kuat dan pendekatan

moderat dalam menghadapi isu-isu kompleks seperti dekolonisasi hukum dan integrasi dengan ilmu sosial.

**Kata Kunci:** *biografi hukum, moderasi, dekolonisasi hukum, interdisipliner.*

## A. Introduction

One of the legal scholars from the United States frequently cited in Indonesian legal literature, Roscoe Pound, advocates for legal science to transcend the confines of legalistic perspectives toward a sociological understanding. This proposition is necessitated by the prevalence of social authorities operating naturally within reality.<sup>1</sup> Strict adherence to Pound's proposition, namely the transition towards a sociological perspective of legal science, would accentuate the interpretation of law as an empirical science over its normative dimensions.

In the context of Indonesia, Pound's ideas are moderated within the framework of Soetandyo Wignjosoebroto's (hereinafter referred to as Soetandyo) thinking. Soetandyo's thoughts illustrate the uniqueness of legal science as an open and complex system, particularly within the context of Indonesia, which acknowledges the position of Islamic law and *adat* law within its legal system. To demonstrate this uniqueness, Soetandyo critiques positivism, which separates law and morality. However, on the other hand, according to Soetandyo, the empirical approach, as also employed in positivism, is necessary for the interaction between juridical and non-juridical studies. This is where Soetandyo's moderation lies, offering an open perspective in the study of legal science.

According to Soetandyo, an open legal science is not solely about positive law but is also interconnected with cultural, social, political, and economic aspects. Soetandyo perceives legal science as a reflection of societal dynamics and the changes occurring within it, thereby having close interactions with various other disciplines such as sociology, economics, and politics. Consequently, legal science cannot be isolated; instead, it should be studied within a broader interdisciplinary framework.

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<sup>1</sup> Muji Kartika Rahayu, *Sengketa Mazhab Hukum: sintesis berbagai mazhab dalam pemikiran hukum* (Jakarta: Kompas Media Nusantara, 2018).

Soetandyo's perspective on positive law also carries the urgency regarding the development of Indonesian law in the post-colonial era. The post-colonial era in Indonesia represents a crucial period in the formulation of legal identity: whether to continue the Western legal tradition, formulate an entirely new tradition, or absorb it entirely. If we trace it through the moderation of his thinking, it is intriguing to consider it within the context of legal decolonization to shape the legal framework of Indonesia.

Based on this background, this article will analyze Soetandyo's thoughts in three aspects. First, what is Soetandyo's view on legal science as a complex and distinctive field of study? Second, how does Soetandyo perceive the relationship between legal science and other disciplines? Third, how is his thinking contextualized within the trajectory of Indonesian legal history, particularly in the discourse of post-colonial legal decolonization? By analyzing these three aspects, we can comprehend the moderation of legal science in Soetandyo's thought.

Through a descriptive legal biography approach, this article constructs Soetandyo's thought in relation to efforts to establish a distinctive identity of legal science in Indonesia. The construction of his thought is focused on his ideas regarding the unique complexity of legal science, the interaction between juridical and non-juridical studies, and the discourse of legal decolonization.

## **B. The Distinctiveness of the Complexity of Legal Science**

The term 'positivism' originates from the Latin word 'positum', which means 'placed' or 'put in place'. The term 'positivism' can be encountered as a philosophical notion within the philosophy of science that prioritizes the methodology of the natural sciences and critiques the metaphysics prevalent in the Middle Ages. Scientific positivism and legal positivism are two distinct entities despite their interconnections. One such connection between them, for instance, relates to the independence of law from morality. Legal positivism, akin to scientific positivism, rejects the notion that law exists independently without human enforcement. This implies that the role of humans is crucial in determining which laws are applicable and which are not. Legal positivism

also claims that there is no inherent connection between law and morality.<sup>2</sup> However, this last argument of legal positivism does not fully reflect the context of the Indonesian legal system due to the significant intensity of debates regarding the importance of morality in Indonesia after the *Reformasi* era.<sup>3</sup>

Legal positivism can be explained by two fundamental principles. First, what can be considered law is solely positive law, or in the context of Indonesia, statutory regulations. Second, because only positive law can be considered law, positive law must be regarded as valid even if it conflicts with moral principles. Therefore, the assessment of law cannot be based on evaluating its substance but rather on assessing the correctness of the procedures for its formation.<sup>4</sup>

The basic principles of legal positivism stand in contrast to the natural law perspective, with its main proponent being Thomas Aquinas. For Aquinas, the law that fails to conform to natural law cannot be considered law. If human-made law deviates from natural law, then it ceases to be law and becomes a perversion of law. This is often expressed through the adage “*lex iniusta non est lex*” (an unjust law is not a law).<sup>5</sup> For legal positivism, as long as the law is enacted by a legal authority, there is no justification to reject it as law. The legitimacy of law in this perspective emphasizes the correctness of the procedures followed in its formation.

The legal positivist viewpoint in this methodological aspect aligns with the positivistic paradigm in the philosophy of science. According to the positivistic paradigm, the quest for truth in scientific inquiry can only be pursued through a single method, known as the scientific method. This scientific method is then applied not only in the natural sciences but also in the social sciences because, within positivism, the scientific method does not

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2 Raymond Wacks, *Philosophy of Law: a very short introduction* (New York: Oxford University Press, 2006).

3 Maria Platt, Sharyn Graham Davies, and Linda Rae Bennett, “Contestations of gender, sexuality and morality in contemporary Indonesia”, *Asian Studies Review* 42, No. 1(2018).

4 Franz Magnis-Suseno, *Etika Politik: prinsip-prinsip moral dasar kenegaraan modern* (Jakarta: PT Gramedia Pustaka Utama, 2019).

5 Simplesius Sandur, *Filsafat Politik dan Hukum Thomas Aquinas*, (Yogyakarta: Kanisius, 2019).

differentiate between the characteristics of studying inanimate objects and human behavior. Both areas of study are considered capable of employing the same approach to explain reality, which can then be generalized into universally applicable conclusions.<sup>6</sup>

The development of positivism subsequently gave rise to critical questions for legal science: is legal science a form of knowledge? From a positivistic perspective, a field of study can be considered as a science when it can formulate truth in correspondence, meaning formulating theories that correspond with empirical reality as objective knowledge.<sup>7</sup> However, if legal science is forced to produce objective knowledge through empirical verification processes, it may lose its normative dimension. This normative dimension suggests that legal science should refer to the study of norms that serve as controllers or evaluators of the correctness or incorrectness of human behavior. As controllers or evaluators, these norms contain certain values that cannot be subjected to empirical verification to assess their conformity with empirical reality.<sup>8</sup>

Referring to Soetandyo's ideas, it is evident that his perspective asserts that legal science is indeed a form of knowledge without necessitating the imposition of empirical verification as seen in positivism. Soetandyo also critiques the dominance of positivism within the paradigm of science, which subsequently influences legal thought.<sup>9</sup> According to Soetandyo, positivism allows for experimentation based on observation and various methods of data collection with validity testing to yield tested conclusions. However, Soetandyo is skeptical that such an approach can fully and comprehensively explain and understand the complex behavior of humans. This skeptical view is based on the influence of values on human behavior, and the difficulty in

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6 Soetandyo Wignjosoebroto, *Positivisme: logika saintisme untuk ilmu sosial dan ilmu hukum* (Kongres Ilmu Hukum, 2012).

7 J.J.H. Bruggink, *Rechts-Reflecties: Grondbegrippen uit de rechtstheorie, Refleksi tentang Hukum*, ed. A. Sidharta (Bandung: Citra Aditya Bakti, 1999).

8 Budiono Kusumohamidjojo, *Teori Hukum: Dilema antara Hukum dan Kekuasaan*, (Bandung: Yrama Widya, 2016).

9 Soetandyo Wignjosoebroto, *Pergeseran Paradigma dalam Kajian-Kajian Sosial dan Hukum*, (Malang: Setara Press, 2013).

explaining such value influences solely through empirical verification.<sup>10</sup>

Furthermore, according to Soetandyo, the deductive process in science, which employs a thesis as the major premise, can only be accepted as a premise if its truth has been demonstrated through the process of induction introduced by John Stuart Mill. However, when compared to the method of formation and application of law, in legal science developed by positivists, the prescriptions used as the major premise are generally formulated based on normative judgments rather than conclusions obtained through inductive syllogism.<sup>11</sup> Normative judgment is an assessment based on moral standards, ethics, or certain values to produce a norm (legal basis). Therefore, according to Soetandyo, the cause-and-effect relationship in each legal prescription functioning as the major premise is more often based on belief rather than on empirical testing and proof.<sup>12</sup> Thus, legal norms (as major premises) do not always have to seek their objectification through empirical proof in inductive logic.

Therefore, Soetandyo's criticism of the scientific approach in legal science also aims to demonstrate the uniqueness of legal science as a field of knowledge that cannot be simplified through objectification. For Soetandyo, humans as subjects in law are entities that are too complex to be simplified through positivist approaches. Attempts at simplification can lead to an understanding of the functioning of law as a deterministic process, while humans with their free will can thwart this perceived deterministic process. The implementation of law and its resulting impacts cannot be projected in a deterministic perspective using a causality mindset.

Soetandyo observes that this complexity can be seen in the failures of law in society due to the dilemma faced by legal subjects between adhering to positive legal norms that have been legislated or following norms outside of positive law that are considered to represent societal morality.<sup>13</sup> It turns

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<sup>10</sup> *Ibid.*

<sup>11</sup> Soetandyo Wignjosoebroto, *Positivisme: logika saintisme untuk ilmu sosial dan ilmu hukum*, above note 6.

<sup>12</sup> *Ibid.*

<sup>13</sup> Soetandyo Wignjosoebroto, *Pergeseran Paradigma dalam Kajian-Kajian Sosial dan Hukum*, above note 9.

out that modern law exists in an increasingly complex society, while the universality of positive legal norms is solely in the hands of central authorities who oversee society. There may be legal norms that exist outside of positive law, but law in a complex society cannot be defined solely as norms that exist within society. The appropriate premise, according to Soetandyo, is that law currently exists within a plural and complex societal order.<sup>14</sup> Therefore, law should not be simplified into a binary choice between positive law or societal norms, but rather moderating the interaction between the two.

Soetandyo's critique of the simplification of law when faced with human complexities is relevant for critiquing the notion that law serves as a tool for social engineering, whether in the form of legislative regulations or court decisions. Law at the level of prescription does not automatically compel the subjects mentioned in the law to act according to those prescriptions. Each subject possesses consciousness and rationality to assess the prescriptions. Moreover, this consciousness may be false consciousness or the rationality may be irrationality. This means that prescriptions in law do not become deterministic entities that can direct subjects to act or not act in specific contexts.

Soetandyo's critique can be further elaborated from another approach, namely the Kantian categorical imperative, which posits that subjects must understand a prescription as valuable for themselves and for the general society to achieve the common good.<sup>15</sup> According to the Kantian categorical imperative approach, human reason must play a role as a subject in understanding the value of the law for the common good. The desired social engineering projections within the law may then conflict with the rationality of the subjects who are intended to be controlled. Soetandyo also criticizes the perspective of social engineering because it shifts the function of law as a regulator of social order into a tool for social engineering to achieve national development in the New Order (*Orde Baru*) era.<sup>16</sup> When law becomes a tool

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<sup>14</sup> *Ibid.*

<sup>15</sup> Endang Daruni Asdi, "Imperatif Kategoris dalam Filsafat Moral Immanuel Kant", *Jurnal Filsafat* 23 (1995).

<sup>16</sup> Soetandyo Wignjosoebroto, "Mochtar Kusuma-Atmadja: manusia yang pernah saya kenal dan pemikirannya (sebuah pengantar ringkas)", in Shidarta (ed.), *Mochtar Kusuma-Atmadja dan*

for national development, Soetandyo's critical question deserves reflection: "Who gains the earliest opportunity to utilize law as a control tool, and to use it for whose/what interests?"<sup>17</sup>

Soetandyo's reflective question should not only focus on the issue of "who utilizes law as a control tool" but should also be developed to address "how the rationality of subjects can be controlled by law, which becomes a control tool." However, Soetandyo's analysis using the sociology of law approach seems to be limited to entering into that issue. The answer to this question must then be formulated using other approaches or analyses, which Soetandyo terms as the interaction between juridical and non-juridical studies. This term indicates moderation in Soetandyo's thinking about the relationship between legal science and social sciences. Legal science does not need to be positioned as a discipline that stands alone without the assistance of other disciplines, nor should legal science be forced to exclusively use social science approaches.

The interaction between juridical and non-juridical studies becomes inevitable because law, in reality, often relies on non-juridical instruments to influence subjects to act in accordance with legal prescriptions. This can be seen in the role of surveillance cameras at intersections, which represent another form of panopticon.<sup>18</sup> The surveillance cameras make subjects feel constantly watched and encourage them to act according to the regulations governing traffic at the intersection.<sup>19</sup> However, subjects may not understand the common good value of traffic order at that intersection, and it is also possible that the surveillance cameras may not function as intended. This

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*Teori Hukum Pembangunan: eksistensi dan implikasi* (Jakarta: Epistema Institute dan HuMa, 2012).

17 Soetandyo Wignjosuebrotto, *Positivisme: logika saintisme untuk ilmu sosial dan ilmu hukum*, above note 6.

18 The term panopticon was first coined by Jeremy Bentham as a design for surveillance of prisoners in prisons or workers in factories to make them constantly feel watched so they would act according to expected behavioral standards. This term was later utilized by Foucault in "Discipline and Punish" to illustrate the method of societal discipline employed by the system.

19 The effectiveness of using non-juridical instruments to monitor legal subjects can be observed in research conducted in Malaysia regarding the impact of using CCTV cameras at traffic lights to reduce the number of traffic violations. See Hawa Mohamed Jamil, Akmalia Shabadin, and Sharifah Allyana Syed Mohamed Rahim, *The effectiveness of automated enforcement system in reducing red light running violations in Malaysia: pilot locations*, (Selangor Darul Ehsan, 2014).



means that deterministic thinking in law cannot be used to simplify the law in terms of implementation unless the law is simply understood as an instrument to create order based on fear.

This section has demonstrated how legal issues in society cannot solely be resolved with a single approach. Law is a complex system, so it cannot be understood simply as a binary choice between positive law or law as it exists in society. According to Soetandyo, what must be done is to moderate the interaction between the two in the form of juridical and non-juridical studies. Therefore, the next section of this article will delve into Soetandyo's thoughts on the issue of legal science with other disciplines that are useful in explaining the deadlock of deterministic thinking.

### **C. The Issue of the Relationship Between Legal Science and Other Disciplines**

Soetandyo's critique of positivism does not indicate a total rejection of empirical approaches in examining law. Soetandyo still emphasizes the importance of a descriptive perspective in social science when studying law. However, Soetandyo underscores the importance of distinguishing between social sciences that make law their object of study and legal science that utilizes interdisciplinary approaches to examine legal issues. The sociology of law, in Soetandyo's perspective, remains part of the social sciences by making law its object of study.

"...sociology of law – which has been considered one of the specialized branches of sociology from its inception – indeed focuses specifically on social order. Even though this social order is closely related to social norms (including legal norms), it is not the norms themselves that will be prioritized for study, but rather their actualization along with conditional variables and/or their causes. Therefore, in this regard, the sociology of law does not concern itself with legislative legal norms or judicial decisions (along with the techniques for systematizing and interpreting them as traditionally taught in legal science). Nevertheless, following recent developments, the sociology of law studies has been able to make significant contributions to the advancement

of legal science...”<sup>20</sup>

According to Soetandyo, this empirical sociology of law emphasizes the descriptive aspect through explanations. The problem, according to Soetandyo, is that this descriptive sociology of law cannot be fully analyzed without involving the prescriptive elements that should also be present in the law. This is a methodological issue that must be addressed by researchers.<sup>21</sup>

Soetandyo’s thinking is in line with Van Hoecke’s view that legal science, at the doctrinal level, is not solely empirical or merely concerned with interpretation. Legal science encompasses both dimensions, leading Van Hoecke to describe legal dogmatics as a discipline with an empirical-hermeneutic character. On one hand, this discipline requires descriptive explanations to understand how the law operates in reality. On the other hand, these descriptive explanations also necessitate interpretation through hermeneutic science due to the presence of intersubjectivity within the law.<sup>22</sup>

Therefore, Soetandyo chooses to position sociological jurisprudence as part of legal science rather than legal sociology. Sociological jurisprudence, according to Soetandyo, emerged to criticize and correct the view that law must be devoid of social and cultural factors. Sociological jurisprudence has encouraged legal studies and practices to be open to non-legal studies while still being part of jurisprudence.<sup>23</sup>

The scope of sociological jurisprudence differs from the scope of sociology of law. The sociology of law does not start from the position of being an internal participant or actor within jurisprudence. The sociology of law positions itself as an objective observer to then describe law as its object of study and not to provide prescriptions, as is the case with legal dogmatics. As expressed by Soetandyo:

“Sociology, and thus sociology of law as well, is an intellectual exercise

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20 Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode dan Masalah*, (Jakarta: ELSAM dan HuMa, 2002).

21 *Ibid.*

22 Mark van Hoecke, “Legal doctrine: which method (s) for what kind of discipline?”, in Hoecke, Mark van (ed.), *Methodologies of legal research: which kind of method for what kind of discipline?* (Portland: Hart Publishing, 2011).

23 Soetandyo Wignjosoebroto, above note 20.

that will be (more) explanatory, starting from a methodical observation effort, which is therefore also controlled, to avoid any form of subjectivity interruption. Even if it does not lead to the creation of explanations regarding the relationship between life phenomena, sociology will engage in making descriptions; however, it will never make prescriptions.”<sup>24</sup>

According to Soetandyo, sociological jurisprudence and the sociology of law have equal roles in the development of legal science due to the constantly changing reality. The changes occurring in the world, according to Soetandyo, indicate the need for legal studies to shift from pure legal studies to studies that are more ‘in-between’. The pattern of legal studies also needs to change laterally to interact with non-legal studies that can strengthen the social significance of law in society. Soetandyo cites the development of studies like realism in jurisprudence and critical jurisprudence as examples of the incorporation of legal studies into the socio-political context.<sup>25</sup>

The equivalence of roles between sociological jurisprudence and the sociology of law in the development of legal science indicates that Soetandyo’s thinking is not confined to a rigid perspective that strictly distinguishes between normative and empirical aspects of understanding reality. Both can play a role in explaining the meaning within texts as well as the meaning within contexts and pretexts that shape the law.

However, Soetandyo’s perspective on the interaction between juridical and non-juridical studies still contradicts the actual situation in legal education in Indonesia. The fanaticism towards doctrinal legal studies free from non-juridical perspectives remains quite dominant in the curricula of bachelor’s, master’s, and doctoral programs in several law faculties. Research conducted by Dwi Putro and Wiratraman clearly shows an unfavorable situation for the development of interdisciplinary approaches in legal studies in Indonesia. Some law faculties treat research methods as an ideology that cannot have diversity or be modified. Legal research methods are categorized very rigidly,

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<sup>24</sup> *Ibid.*

<sup>25</sup> Soetandyo Wignjosoebroto, “Memperbincangkan ‘Hukum’ dari Perspektif Filsafat: Paradigma Hukum dan Pergeserannya dalam Sejarah”, *Jurnal Digest Epistema* 1, (2011).

making it seem as though an issue in the field of law can only be examined using one method.<sup>26</sup>

The rejection of non-juridical approaches in legal studies in some law faculties can be observed in the uniformity of approaches used in thesis and dissertation research. Research by Putro and Wiratraman indicates explicit or implicit prohibitions on master's and doctoral students at several campuses from using socio-legal approaches. Socio-legal research, which employs non-juridical approaches, is deemed non-legal research.<sup>27</sup> This rejection has led to an overly simplistic methodological dichotomy between doctrinal legal methodology and empirical legal methodology, resulting in the rejection of empirical research in some law faculties as well. However, interdisciplinary approaches are not solely related to empiricism but involve the interaction of legal discipline methods (such as text and context interpretation, and legal semiotics) with methods from other disciplines (such as ethnography, phenomenology, and others).<sup>28</sup>

Soetandyo refers to it as an inevitable mutual greeting. Various reflective, interpretative, and qualitative methods are not only used to observe what is being enforced but also to understand what is truly being conceptualized and the sources of motives behind decisions or concrete laws. These methods are employed when the law is conceived as an institution, i.e., an empirical social phenomenon, or as symbolic meanings manifested in society.<sup>29</sup> According to Soetandyo, the use of interdisciplinary approaches strengthens the efficacy of legal studies, transforming them from overly pure inquiries – which examine the law with doctrinal yet narrow convictions about the existence of law as a separate discipline – into a broader-dimensional study. Soetandyo believes that by being open to utilizing the findings of social science studies, legal studies have acquired a new character as what he calls ‘in-between jurisprudence’.<sup>30</sup>

Although the development of legal studies has led to a more ‘in-between’

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26 Widodo Dwi Putro and Herlambang Perdana Wiratraman, “Penelitian Hukum, antara yang Normatif dan Empiris”, *Jurnal Digest Epistema* 5 (2015).

27 *Ibid.*

28 Candra Kusuma, *Penelitian Interdisipliner tentang Hukum*, (Jakarta: Epistema Institute, 2013).

29 Soetandyo Wignjosoebroto, above note 20.

30 Soetandyo Wignjosoebroto, *Hukum dalam Masyarakat* (Yogyakarta: Graha Ilmu, 2013).

approach, as suggested by Soetandyo, its progression can be utilized to justify certain ideological interests. For instance, socio-legal studies, traditionally identified as a critical approach used to deconstruct positivist paradigms in legal research, have shown through global developments their potential to modify capitalist projects in developing countries. Putro, for example, criticized the World Bank's Justice for the Poor project, which seemingly aimed to portray the institution as not solely profit-driven but also supportive of the impoverished population.<sup>31</sup>

Soetandyo's perspective within the context of developing the interaction between juridical and non-juridical studies may appear to lack self-criticism regarding the unintended consequences of employing interdisciplinary studies in Indonesia's legal reform projects. However, the illustrations typically employed by Soetandyo to elucidate the essence of research methods convey an implicit message about the potential use of legal research methods to justify certain ideological interests. Soetandyo illustrates research methods as cutting tools. The type of cutting tool used depends on the object to be cut.<sup>32</sup> For instance, scissors as a cutting tool would only be effective when used to cut hair and would not be effective for cutting wood. This illustration can be further interpreted in terms of the intentions behind the use of such methods. For example, what intentions are directed when using scissors to "design" someone's hairstyle? Are these intentions aimed at the hair owner's interests or the interests of others?

The simple illustration demonstrates that Soetandyo disagrees with an a priori stance when using specific approaches or methods in legal research. Fanaticism toward a single approach is irrelevant to analyzing a legal issue. Soetandyo's opinion is also relevant to the social projection in the context of legal reform projects in post-colonial Indonesia. His views on post-colonial Indonesian law are elaborated upon in his book titled "*Dari Hukum Kolonial ke Hukum Nasional*" (From Colonial Law to National Law). The subsequent discussion will expound on Soetandyo's thoughts and position them within

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31 Widodo Dwi Putro, "Kritik Proyek Justice for the Poor", *Arena Hukum* 5, No. 2 (2013).

32 Widodo Dwi Putro and Herlambang Perdana Wiratraman, above note 26.

the critique of the discourse on national legal decolonization.

#### **D. Decolonizing Law: The Issue of Western and Eastern Dichotomy**

The discourse on Indonesian law decolonization emerged when colonial powers ended their rule, leading to the need for the formation of new legal systems. Initially, decolonization was understood primarily in the political realm, resulting in the establishment of new constitutions. This step was followed by a desire to overhaul the entire existing legal system. However, the aspiration to establish a new legal system gave rise to divergent opinions and tensions among the new national elites. Some groups advocated for the adoption of modern secular law, originally applicable only to Europeans, to be extended to all citizens. Conversely, others argued that customary or religious law should be developed into national law. One faction aimed to establish a unitary state with unified laws, while another sought recognition of diversity and regional autonomy. Such divergent opinions were common in various Asian and African countries that gained independence in the 20th century.<sup>33</sup>

Reading Soetandyo's thoughts, one would find that the practice of colonialism essentially repeats itself in different contexts.<sup>34</sup> The Dutch East Indies freed itself from Dutch colonialism to establish a new nation-state called Indonesia. However, Indonesia then encountered difficulties in formulating a national legal system that could fully break away from the colonial legal framework. According to Soetandyo, restructuring the colonial legal order was not an easy task to accomplish quickly. The national law (which still adopted colonial law) was then implemented alongside Islamic law and *adat* law.<sup>35</sup>

The situation of colonization within the national legal system, even after breaking free from colonialism, was already recognized by Soediman Kartohadiprodjo in the 1960s. According to Kartohadiprodjo, the mindset

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33 Jan Michiel Otto, "Kepastian Hukum yang Nyata di Negara Berkembang", in "Kepastian Hukum yang Nyata di Negara Berkembang", *Kajian Sosio-Legal*, (Jakarta: Pustaka Larasan, Universitas Indonesia, Universitas Leiden, Universitas Groningen, 2012).

34 Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional: Dinamika Sosial-Politik dalam Perkembangan Hukum di Indonesia*, (Jakarta: HuMa, VVI-Leiden, KITLV-Jakarta, Epistema Institute, 2014).

35 *Ibid.*

ingrained in Indonesian jurists was not fundamentally different from the Western paradigm in general. However, this Western paradigm effectively justified an unjust colonial system. The Western paradigm referred to by Kartohadiprojo overlooks the collectivist aspect of the Indonesian way of thinking.<sup>36</sup>

Criticism of the influence of colonial law also caught Soetandyo's attention, and he evaluated it through a legal historical approach. According to Soetandyo, those responsible for the development of law in post-independence Indonesia recognized the complex issue of building a legal system capable of unifying this nation. Legal unification was a rational choice, but it was not favored in the atmosphere of the revolutionary spirit that was prevailing. However, on the other hand, questions also arose: can *adat* law serve as a catalyst for progress or does it become an impediment to progress?<sup>37</sup>

The issue also arose when there was a desire to position Islamic law as a source of law worthy of development. Islamic political groups also questioned the position of Islamic law. Western law and *adat* law, for them, should be marginalized, and the state should develop Islamic jurisprudence as national law. However, this discourse did not gain strong support in the 1950s era.<sup>38</sup>

One of the initial efforts to decolonize the law was carried out in the agrarian sector. Law Number 5 of 1960 concerning the Basic Principles of Agrarian Law (UUPA) was enacted to replace the existing agrarian regulations in Book II of the Civil Code (*Burgerlijk Wetboek*). The UUPA, in its considerations, states that colonial agrarian law had a dualistic nature with the application of *adat* law and Western law. However, according to Soetandyo, the substance of the UUPA merely adopts rights that existed in Book II of the Civil Code. The difference lies in the principle of "social function of land," which limits the interests of individuals holding land rights. The UUPA also abolishes special rights for certain groups of people in the field of land tenure, as previously enjoyed by European and Eastern Foreigners during the Dutch

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36 Bernard Arief Sidharta, *Refleksi tentang struktur ilmu hukum: sebuah penelitian tentang fundasi kefilsafatan dan sifat keilmuan ilmu* (Bandung: Mandar Maju, 2009).

37 Soetandyo Wignjosebroto, above note 34.

38 *Ibid.*

East Indies era. In the end, the implementation of the UUPA was not optimal because the principles contained therein appeared “foreign” to the general public.<sup>39</sup>

Until the New Order, the discourse on decolonization was divided into two schools of thought. The first group believed that there should be continuity in the development of law from the colonial era to post-independence. This group believed that dismantling the traditional and institutional ties with the colonial legal system was impossible. Such dismantling would be futile as it would discard the achievements that had been made, particularly in terms of legal systems and institutions. The other group believed that national law should originate from the law that lives within society, namely *adat* law. This group appears to be inspired by the historical school of thought pioneered by Friedrich Karl von Savigny.<sup>40</sup>

Soetandyo’s perspective on the differences between legal unification and pluralism is nuanced. He does not overtly reject the use of Western law in the Indonesian legal system. Soetandyo recognizes the importance of continuity in the Western legal system used during the colonial era, particularly in the areas of government administration and urban economics. His emphasis is not solely on sectors of life that need to adopt Western law, but also on the necessity of the principle of legal certainty found in modern law – commonly encountered in Western law – in building our legal system. The following is a direct quote reflecting Soetandyo’s perspective:<sup>41</sup>

“It is undeniable that for industrial and commercial life in urban centers, a law that provides more certainty and applies to all members of society without exception is highly necessary. The fields of industrial and commercial life are areas that can be considered neutral and therefore can be immediately regulated with codified and unified legal prescriptions. For this purpose, Western law – which is not always contrary to the essence of modern nationalism – need not be overly evaluated as a law that will undermine the nation’s character. Western law, which was quite well developed during the colonial period, can

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39 *Ibid.*

40 *Ibid.*

41 *Ibid.*



indeed be continued and utilized to unite the nation, maintain political stability, streamline government administration, and promote economic growth.”

Therefore, Soetandyo does not reject the discourse of decolonizing the legal system, but at the same time, he does not dichotomize Western law and *adat* law. Instead, Soetandyo emphasizes the importance of the foundation of legal certainty as a principle of modern law. Decolonization efforts should not lead the new legal system into a realm of uncertainty that would ultimately result in governmental and economic inefficiencies. According to Soetandyo, Western law that is to be dismantled should not be viewed from a ‘black-and-white’ ideological perspective. Soetandyo’s perspective demonstrates the consistency of his thinking, which does not solely view legal positivism from a binary perspective. The prominent aspect of legal certainty in legal positivism is still considered necessary by Soetandyo in legal reform.

Soetandyo’s view to avoid getting caught up in the dichotomy of ‘black-and-white’ regarding colonial legacy law is influenced by his analysis that the ethical politics of the early 20th century have shaped the administrative and modern legal order in Indonesia. The ethical politics were based on moral calls within a framework of childcare policies aimed at improving the economic and social welfare of the native population according to Western models. Structuring of the administrative government down to the village level was carried out, followed by decentralization policies and the establishment of the Volksraad during the era of the Colonial Minister, Th. B. Pleitje.<sup>42</sup> These efforts were prompted by pressure from various political groups in the Dutch parliament for the Dutch government to advance democratization in the colony. Therefore, according to Soetandyo, when Dutch East Indies authority ended with the arrival of Japan, the modern legal system had already taken shape. Soetandyo asserts his argument:<sup>43</sup>

At the time of the recapitulation of Dutch East Indies authority and the beginning of the Japanese military government in Indonesia, the modern

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42 Soetandyo Wignjosoebroto, *Desentralisasi dalam Tata Pemerintahan Kolonial Hindia-Belanda: kebijakan dan upaya sepanjang babak akhir kekuasaan kolonial di Indonesia, 1900-1940* (Malang: Bayumedia, 2004).

43 *Ibid.*

legal system modeled after Continental Europe had begun to manifest its development. Although somewhat slow, and often hindered by controversies between universalist and particularist factions (implying hidden intentions to slow down the process of emancipation), this development had more or less taken on a contoured form.

Ultimately, this formed modern legal system gave rise to the paradox of post-colonial Indonesian law. This paradox arises because Indonesia formulates its legal system based on three legal sources. In addition to state law, the Indonesian legal system also recognizes Islamic law and *adat* law as legal sources. This practice continues what was implemented by the Dutch colonial government, which applied Islamic law and *adat* law to the natives of the Dutch East Indies. The colonial government placed *adat* law and Islamic law in the realm of private law. This colonial practice continued after independence, resulting in Islamic law and *adat* law pulling in opposite directions with state law, leading to the emergence of forum shopping.<sup>44</sup>

Inheritance, for example, may refer to state law by referring to the Civil Code, which is also a colonial legacy. However, if one party feels it is more advantageous to them to use *adat* inheritance law, then the Civil Code will be disregarded. Supreme Court jurisprudence, for instance, has clearly shown that daughters have the right to inherit their father's property. However, in practice, inheritance based on *adat* law, which disadvantages daughters, continues to occur and subsequently leads to disputes in court.<sup>45</sup> This is due to the significant opportunity for forum shopping. However, legal certainty, as one of the inherent values in modern law, cannot simply be disregarded.

Legal scholars in Indonesia today seem to be facing a dilemma similar to that of the 1950s, namely between comprehensive legal unification to provide legal certainty or accommodating the law that exists within society. The dilemma regarding the principle of legal certainty can be seen in the debate over the decolonization of criminal law codification through Law Number 1 of

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44 Muchamad Ali Safa'at, *Dinamika Negara dan Islam dalam Perkembangan Hukum dan Politik di Indonesia* (Jakarta: Konstitusi Press, 2018).

45 Victor Imanuel W. Nalle, "Pembaharuan Hukum Waris Adat dalam Putusan Pengadilan (Penghormatan Identitas Budaya Vs Perkembangan Zaman)", *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30, No. 3 (2018).

2023 concerning the Criminal Code (New KUHP). The spirit of incorporating the law that exists within society can be read in the considerations of the New KUHP, which states that “...the national criminal law material must also regulate the balance... between written law and the law that exists within society.” This spirit can then be seen in Article 2 of the New KUHP. Article 2 paragraph (1) of the New KUHP states that the Criminal Code does not diminish the application of the law that exists within society (living law), which determines that a person should be punished even though the act is not regulated by law. Paragraph (2) of the article does indeed stipulate that the law that exists within society must be in accordance with the values of Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and the general legal principles recognized by civilized society. The explanation of Article 2 then specifies that the law that exists within society is limited to *adat* criminal law compiled into Regional Regulations (*Peraturan Daerah*).

The effort to decolonize criminal law through the New Criminal Code (KUHP) raises several reflective questions. Should the spirit of decolonizing the codification of criminal law be pursued by granting significant space for *adat* criminal law to be legalized through legislation at the local level? Is the rejection of Western thinking in the old colonial legacy Criminal Code – perceived as individualistic– relevant as a basis for thought in the decolonization of criminal law?

The reflective questions can be addressed by referring to Soetandyo’s thoughts, which do not dichotomize Western law and *adat* law in the discourse of national legal decolonization. According to Soetandyo, the development of national law cannot be denied as a continuation of colonial law (Western law). Removing Western law would dismantle established structures in various aspects, including the judiciary, legal education, and others.<sup>46</sup> Similarly, *adat* law can provide relevant concepts or principles for the development of national law. Legal institutions such as *Maro*<sup>47</sup> can be found in international concepts such as production-sharing contracts.<sup>48</sup>

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46 Soetandyo Wignjosoebroto, above note 42.

47 *Maro* is a type of profit-sharing agreement for agricultural land in rural areas of Indonesia.

48 Soetandyo Wignjosoebroto, above note 42.

In the context of drafting national law, Soetandyo emphasizes moderation in thinking, emphasizing the importance of rationality rather than being trapped in the dichotomy between Western law, *adat* law, and Islamic law. These three sources of law can emerge in proportional portions and develop naturally while considering the guarantees of human rights in the Constitution. For example, the implementation of *adat* law, such as in inheritance, if it violates the constitutional rights guaranteed, can be set aside either voluntarily or based on court decisions.

Through Soetandyo's approach to viewing the Indonesian legal system, the practice of blending Western law, *adat* law, and Islamic law can be seen as a way forward. The continued presence of Western law is not intended to displace *adat* law and Islamic law. Similarly, Western law that remains applicable in certain areas (such as civil law) must also be respected.

#### **E. The Common Thread in Soetandyo's Thought**

The exposition of Soetandyo's thoughts regarding three issues – the complexity of legal science, interdisciplinary approaches, and legal decolonization – needs to be interconnected in a coherent thread of Soetandyo's thought. Therefore, this section will abstract Soetandyo's thoughts on these three issues through the fundamental ideas that form the basis of his thinking, enabling us to understand Soetandyo's overarching view of law as a science. Soetandyo's fundamental idea as a gateway to delve into his thinking is law as an open and integrative system with reality.

Soetandyo positions legal science as an integrative discipline with reality. Therefore, he emphasizes the importance of developing legal science as an open system. When legal science is positioned as an open system, its development is inseparable from the dynamics of reality. Soetandyo even refrains from promoting law as a branch of social science because what matters most is the willingness to be open to reality and to integrate with other scientific approaches to explain or address issues in reality. He also avoids fostering fanaticism towards specific methods or approaches in legal studies. This perspective simultaneously asserts the irrelevance of conservative

attitudes in the development of knowledge through sharp categorizations based on the tree of science.

Because it is open to reality, Soetandyo also does not want to sideline micro approaches in examining law through in-depth and holistic analysis of specific cases. Micro approaches can contribute to portraying law in its entirety within reality without bias and reduction due to generalization, as commonly done with macro approaches. It is precisely through micro approaches that we can simultaneously observe the complexity of law intertwined with the complexity of economic systems, social structures, power dynamics, and so on.

From the perspective of law as an open and complex system, Soetandyo's stance on decolonizing colonial law needs to be understood not just as deconstructing colonial heritage law. Deconstructing colonial-era Western legal systems cannot fully resolve the overlapping legal norm issues arising from the pluralism of colonial heritage laws. The significant task required in the project of decolonizing national law is to formulate legal principles to create understanding among legal subjects who have different legal preferences within the framework of legal pluralism.

Soetandyo also does not deny the reality that industrialization in modern nations has created a need for more certainty in the law. Therefore, important and universal principles in modern law cannot be abandoned, such as the principle of legal certainty. Decolonizing law needs to be done with the awareness that these universal values can be found in both Western legal systems and in our societal laws. If decolonizing law then completely rejects the Western legal system, then such rejection must have a solid epistemological foundation. Without a solid epistemological foundation, rejection of Western thinking will lead us into collective unawareness of universal knowledge. This collective unawareness will be inherited latently without requiring rational justification and will continually be glorified.

The best example of this collective unawareness was experienced when placing respect for human rights in the state as a particular principle incompatible with Indonesian culture. Instead of achieving an integralistic

state that is just and certain, we ended up with three decades of Soeharto's authoritarianism. This latent collective unawareness continues post-New Order and then materializes in an a priori attitude towards knowledge from outside our community. However, the problem may lie in the inability of critics of Western thinking to prove that Western knowledge is not compatible with protecting the dignity of the Indonesian people.

## **F. Conclusion**

The above paragraphs have outlined Soetandyo Wignjosoebroto's thoughts on the law as a complex and distinctive field by moderating legal studies. Soetandyo aims not to simplify law because it is a system open to complex realities, and thus law should be reflected upon as a complex system. Moreover, law should not be understood simply as a tool for social engineering or merely as a system of norms. The evolution of society makes law increasingly plural and complex, so identifying the law that exists within a society is not a simple matter. As a system that exists within a plural and complex society, the law needs to be adaptive without forsaking valuable prescriptions necessary to guide the general populace toward the common good.

In its position, legal studies cannot be separated from other disciplines. According to Soetandyo, legal studies have evolved into an 'in-between jurisprudence'. Rather than standing alone and claiming uniqueness, legal studies should open themselves in utilizing the findings of social science studies. Herein lies Soetandyo's stance on the importance of socio-legal approaches in legal research.

In the context of legal decolonization, Soetandyo's perspective, which does not dichotomize Western law and indigenous law, becomes significant to prevent us from falling into the myth of the West-East dichotomy in law. Immersion in such a dichotomy can indeed trap our legal system in two issues. First, we may never formulate a legal system that addresses the problem of forum shopping in interactions among legal subjects. Second, our legal system may become unadaptive to universal values that are a priori identified

as Western thinking, diametrically opposed to Eastern thinking, neglecting the possibility of universality of values within it.

The analysis of these three issues illustrates the common thread in Soetandyo Wignjosoebroto's thinking, which moderates legal studies by viewing law as an open system that is not dogmatic toward specific methods. Moreover, in the context of legal decolonization, Soetandyo advocates for a more moderate approach focusing on the formation of legal principles that foster understanding amidst the pluralism of colonial legal heritage. He also emphasizes the importance of a strong epistemological foundation to avoid succumbing to collective unconsciousness regarding universal knowledge. On the other hand, he also advocates for maintaining a critical stance toward Western thinking while remaining open to knowledge from outside the community to safeguard the dignity of the Indonesian people.

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