

# *The Challenges of Teaching Comparative Law and Socio-Legal Studies at Indonesia's Law Schools*

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## **Abstract**

This article addresses the role of legal research methodologies in the development of legal science and the creation of social change in Indonesia. Based on fieldwork conducted at Indonesian law schools between 2014 and 2016, this article reveals that legal research methods taught in Indonesia are starkly divided into normative-juridical and empirical-juridical approaches. Misunderstandings between adherents of these different schools of thought pose significant obstacles to the development of interdisciplinary approaches to law that span or go beyond the divide. Methodological conflicts resulting in the absence of socio-legal approaches in Indonesian law schools, coupled with outdated and limited source materials, limit the study of comparative law in Indonesia to the mere comparison of statutes and rules shorn of socio-political context. They also fail to instill awareness of the importance of considering social – on top of legal – impact in the context of Indonesia's complex and pluralist legal system.

The field of socio-legal studies is critical to the study of comparative law. Annelise Riles posits that the tradition of socio-legal approaches in comparative law has an eminent pedigree. Comparing laws goes beyond merely comparing legal rules or directly adopting legal rules from one jurisdiction to another.<sup>1</sup> Rather, comparative law must be sensitive to the context of the legal rules in question and the specific approaches deployed. One must undertake an in-depth study of the historical and ideological background of law and legal practice, and consider elements of legal culture such as social and cultural contexts.

Socio-legal studies began in the US as a reaction against legal formalism. The newest socio-legal approach of 'law in society' seeks to examine 'law in action' and 'how

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1. Annelise Riles, 'Comparative Law and Socio-Legal Studies' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006).

the legal system actually operates'.<sup>2</sup> In a globalized society, law and its application have been shaped by multiple actors and interests. To understand the full range of factors influencing 'law in action', context-sensitive approaches are necessary. Employing an interdisciplinary research approach may also be necessary, as is taking advantage of the relative strengths of more comprehensive approaches, including in comparative law studies. This article argues that a socio-legal approach is critical for the continued development of comparative law in Indonesia. Failure to harmonize the theories and methods from both socio-legal studies and comparative law would be a missed opportunity to explore the social complexities and nuances of people's expectations when dealing with institutions, including the informal justice system, which is a significant part of Indonesia's legal pluralism.

Indeed, the field of socio-legal studies is by its very nature heterogeneous because it encompasses a range of methodologies. As Ferdinand Stone observes, 'We must study the history, the politics, the economics, the cultural background in literature and the arts, the religions, beliefs and practices, the philosophies, if we are to reach sound conclusions as to what is and what is not common.'<sup>3</sup> In comparative law, it is always necessary to test the functionality of the legal rules in question, as well as the presumption of similarity of results (*praesumptio similitudinis*).<sup>4</sup> Every investigation in comparative law begins by posing a question or a working hypothesis – that is, an 'idea'. It is always necessary to consider the principle of functionalism in comparative law. This principle encourages comparative legal scholars to understand how different laws in different countries provide solutions to similar social problems.<sup>5</sup> Other rules that determine the choice of laws to compare, the scope of the undertaking, and the creation of a particular system or legal tradition in comparative law can be derived from this basic principle. In law, only rules that fulfil the same function can be compared with each other.

When it comes to legal transplants, it is also important to consider historical contexts, not just of the legal ideas transplanted, but also of the societies receiving them. Watson posits that 'voluntary major legal transplants' fall into three categories: first, when a people moves into a different territory where there is no comparable civilization, and takes their law with them; second, when a people moves into a different territory where there is a comparable civilization, and takes their law with them; and third, when a people voluntarily accepts a larger part of the system of another people or peoples.<sup>6</sup> Legal transplants are more likely to 'fit' into a new civilization where the receiving culture has also been considered and the transplant is adapted to it. Nelken's

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2. Lawrence M Friedman, 'The Law and Society Movement' (1986) 38(3) *Stanford Law Review* 775, 777.
  3. Ferdinand Stone, 'The End to Be Served by Comparative Law' (1951) 25 *Tulane Law Review* 325, 332.
  4. K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 31.
  5. *ibid* 34.
  6. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University Press of Virginia 1974) 29–30.

extensive works analyze the relationship between law and culture,<sup>7</sup> including the criminal justice system, in the context of globalization.<sup>8</sup> He believes that one of the most sophisticated recent efforts to provide a framework for examining transnational processes is the one that is put forward by Halliday and his colleagues in studying the ‘recursive’ relationship between transnational and national law-making.<sup>9</sup> According to Nelken, Halliday sets out an agenda for socio-legal work (in addition to and in tandem with other disciplines) that aims to take historical contingencies seriously, and is inherently comparative across issues and levels of governance. He emphasized that the ‘added value’ of a ‘socio-legal approach to global norm making’ lies in its particular sensitivity to legal forms and institutions, and the constitutive power of law. His approach seeks to show the influence of different global actors in contests over meaning in making and applying transnational norms.<sup>10</sup>

This article benefits from the author’s previous research, which includes in-depth interviews of more than 100 instructors at Indonesian law schools in Indonesia between 2014 and 2016.<sup>11</sup> The research findings demonstrate that the majority of Indonesian legal scholars who teach legal research methods are still trapped within the two major paradigms of legal research, namely the ‘normative-juridical’ approach (*yuridis normatif*) and the ‘empirical-juridical’ approach (*yuridis empiris*). In reality, both approaches are clearly inseparable and complementary, but the former has acquired a cult-like following that dominates Indonesian legal scholarship.<sup>12</sup> This article departs from this established dogma by analyzing the extent to which legal research methodologies are used to improve teaching and learning methods, especially in comparative law courses, and whether socio-legal methods will eventually attain acceptance in comparative law and legal education in Indonesia.

## I. SOCIO-LEGAL STUDIES IN TWO EMPIRES

In the context of Indonesia, comparative law has become a contested issue, particularly concerning the relation between a legal and a socio-legal approach. Legal education in Indonesia is dominated by doctrinal or formalist approaches to teaching and research. However, such an approach excludes the perspectives of other social sciences, such as sociology, anthropology, or political economy. This has been

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7. David Nelken, *Comparing Legal Cultures* (Dartmouth 1997); David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001); David Nelken, *Using Legal Culture* (Wildy, Simmonds & Hill 2012).
  8. David Nelken, *Comparative Criminal Justice: Making Sense of Difference* (Sage 2010); David Nelken, *Comparative Criminal Justice and Globalisation* (Ashgate 2011).
  9. Terence C Halliday and Bruce G Carruthers, ‘The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes’ (2007) 112 *American Journal of Sociology* 1135.
  10. David Nelken, ‘Transnational Legal Processes and the (Re)construction of the ‘Social’: The Case of Human Trafficking’ in Dermot Feenan (ed), *Exploring the ‘Socio’ of Socio-Legal Studies* (Palgrave Macmillan 2013).
  11. Widodo Dwi Putro and Herlambang P Wiratraman, ‘Penelitian Hukum: Antara yang Normatif dan Empiris [Legal Research: Between Normative and Empirical]’ (2015) 5 *Digest Epistema* 3.
  12. *ibid.*

influenced by the idea that legal scholars are ‘professional jurists’, and law schools that subscribe to this idea merely employ a ‘normative’ or ‘doctrinal’ perspective in legal studies and education. Hence, this article also questions to what extent the idea of a ‘professional jurist’ is at the prevalent narrative in Indonesian law schools.

Socio-legal approaches are mostly viewed negatively by Indonesian legal scholars who teach legal research methodology, since it is believed that such an approach is simply not part of ‘traditional’ legal studies. Yet, the field of socio-legal studies is considered a part of the social sciences, of which legal studies is an important component.<sup>13</sup> This article argues that it is unnecessary to portray both research methods as binary opposites because researchers pursuing socio-legal research would simultaneously pursue doctrinal legal research. In a socio-legal study, doctrinal research is also important as a normative approach. In fact, doctrinal analysis should be made the starting point of the study, prior to unpacking the law from the perspective of non-legal disciplines. Therefore, socio-legal approaches can be seen as an interdisciplinary exercise – one that attempts a more comprehensive approach to studying law.

The ‘socio’ aspect of ‘socio-legal’ studies defies easy definition. Disciplines have their own schemes of intelligibility, informing distinct ontological and epistemological points of view on social reality; this is further complicated by the interdisciplinary nature of socio-legal studies.<sup>14</sup> For the purposes of this article, I will focus on the ‘contextual’ aspect of socio-legal studies, that is, understanding legal rules according to their context.

Contextualization of law should be regarded as indispensable to the comparative study of law aspiring to transcend the understanding of law as merely a body of rules and doctrines. Banakar posits that ‘the method of contextualization situates legal action, behaviour, institution, tradition, text, and discourse in specific time and socio-legal space, thus revealing law’s embeddedness in societal relations, structures, developments, and processes.’<sup>15</sup> Comparative law as a subject for research and teaching should therefore necessarily involve interdisciplinary studies characteristic of socio-legal studies. Why, then, is this approach absent from Indonesian legal scholarship generally?

Discourse on socio-legal studies in Indonesia is limited because courses on socio-legal studies are rarely offered by law schools. Law schools are generally barred from offering courses involving the social sciences, and the origins of this policy are unclear. However, the rejection of socio-legal studies as a meaningful and legitimate course of study appears to be endemic at both the institutional and professoriate levels, although there are notable exceptions. Legal scholars generally prefer to cling to the assumption that socio-legal studies are not a proper subject for serious study, rather than consider how socio-legal studies is and should be taught at their own institutions. Discourse on socio-legal methods in Indonesian law schools is therefore often

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13. Peter Mahmud Marzuki, *Penelitian Hukum [Legal Research]* (Kencana Prenada Media Group 2010) 93.
  14. Geoffrey Samuel, ‘Does One Need an Understanding of Methodology in Law before One Can Understand Methodology in Comparative Law?’ in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kinds of Method for What Kind of Discipline?* (Hart Publishing 2011).
  15. Reza Banakar, ‘Power, Culture and Method in Comparative Law’ (2009) 5 *International Journal of Law in Context* 69, 71.

superficial. From interviews conducted, most instructors believe in fallacies such as applying a single approach to addressing all legal problems. For example, most interviewees from numerous law schools said that legal scholars in Airlangga University hew closely to Hans Kelsen's 'pure theory of law', while the legal scholars in Diponegoro University and Brawijaya University preferred Satjipto Rahardjo's 'progressive law' model.<sup>16</sup> These findings reveal the continued influence of the 'two empires' in models of legal research.

This study is based on interview and data collection (research publications, student theses, and teaching curricula), which were carried out between 2014 and 2016, and the analysis of legal research methodologies in academic works, including Bachelor's, Master's, and Doctoral theses at law schools in Indonesia.<sup>17</sup> Although many textbooks on socio-legal studies have been written by Indonesian scholars, including texts by Bedner and others<sup>18</sup> and Koeswahyono and others,<sup>19</sup> socio-legal studies have not been incorporated into Indonesia's law school curricula as well as academic works. Only a few law schools recognize and explicitly adopt socio-legal research methods in their research. However, these attempts were motivated by the poor quality of legal research in Indonesia, and the need to discover the extent to which socio-legal research methods have been adopted in Indonesian law schools.

Several observations about the current state of legal education in Indonesia can be made. First, anecdotal evidence suggests that many Indonesian students engage in legal research for the sole purpose of completing their university degrees, and not out of genuine interest or enthusiasm for the topics being researched. While many students have written dissertations as part of their Bachelor's, Master's, or Doctoral degrees, their work is often highly descriptive with little analysis, and many pad their dissertations with direct quotations from articles, cases, and legislation – relevant or otherwise – to meet the required word count. Analyses of judicial precedents are often superficial and rarely consider the judges' reasoning or even their relevance to the candidates' research question. As Sulistyowati Irianto observes, the resulting dissertations are 'very dry' despite their apparent length.<sup>20</sup>

Second, socio-legal research methods and interdisciplinary methods continue to face serious obstacles that prevent them from establishing themselves as valid legal

16. Putro and Wiratraman (n 11).

17. The study in Putro and Wiratraman (n 11) raises three key questions. First, how should legal research methods used in higher education in Indonesia be mapped? Second, why have research methodology fossilized into ideology, and why is there a permanent schism between normative research methods and empirical research methods? Third, how can both research methods be propagated as valid methodologies and how can research methods beyond the two 'empires' be developed? The authors conducted fieldwork at several universities, including University of Syiah Kuala (Banda Aceh), University of Sumatera Utara (Medan), University of Indonesia (Jakarta), University of Padjadjaran (Bandung), Catholic University of Parahyangan (Bandung), Diponegoro University (Semarang), University of Gadjah Mada (Yogyakarta), University of Airlangga (Surabaya), University of Jember (Jember), University of Mataram (Mataram), University of Hasanuddin (Makassar), and University of Cendrawasih (Jayapura).

18. Adriaan Bedner and others (eds), *Kajian Sosio-Legal [Socio-Legal Studies]* (Pustaka Larasan 2012).

19. Imam Koeswahyono (ed), *Sosio-Legal: Bekal Pengantar dan Substansi Pendalaman [Socio-Legal: Introduction and Deepening Substance]* (Intimedia 2014).

20. Sulistyowati Irianto (ed), *Metode Penelitian Hukum: Konstelasi dan Refleksi [Legal Research Method: Constellation and Reflection]* (Yayasan Obor dan JHMP-FHUI 2009).

research methodologies in Indonesian law schools, especially because they go beyond the ‘two empires’ of legal research. Most instructors in Indonesian law schools treat research method preferences like ideologies or even religions. Deeply-rooted hostility prevails between members of the ‘normative’ school – who claim that the proper object of legal study is a norm or ‘positive law’ – and adherents of the ‘empirical’ school, who focus on ‘law in action’. Both schools employ a highly rigid dichotomy and often refuse to cooperate or combine legal methods. This dichotomy also assumes that legal research in Indonesia has reached an evolutionary dead end, and that the development of other research methods beyond the accepted ‘empirical’ and ‘normative’ schools are sanctioned.

Third, students often fail to critically engage with methodological issues in their dissertations, and are content with simply replicating whole sections from their textbooks or dissertation proposals. Virtually all dissertations employ precisely the same research methodology, down to the way primary data, secondary data, primary legal materials, secondary legal materials, and other relevant sources are used. Little, if any, innovation or customization is involved, regardless of the legal issue being examined.

Fourth, limiting legal scholars to a few research methods and reducing multi-faceted laws to superficial rules have led to an incomplete understanding of Indonesia’s complex legal system. These have serious implications on the quality of legal research and reasoning in Indonesia. These also have consequences for legal practice: only a small minority of Indonesian cases can be considered ‘landmark cases’, and Indonesian jurisprudence has been greatly impoverished as a result. The judiciary is also affected by this, since judges in Indonesia ‘have to reinvent the wheel from one case to the other and produce quite diverse decisions in similar cases’.<sup>21</sup>

In spite of these challenges and obstacles, numerous Indonesian scholars have begun to develop legal research methods that combine approaches from the normative and empirical schools through approaches integrating social science and law (socio-legal approaches). They are primarily still based on the normative or empirical schools, but have socio-legal elements that make such approaches still acceptable. These approaches were created in response to the enormous complexity of various legal problems they encountered. Socio-legal methods have become increasingly important given the limitations of doctrinal scholarship in a jurisdiction that has little access to domestic and foreign resources, such as the full texts of court judgments, records of parliamentary meetings, and academic articles from international journals. Difficulties in access to resources have had serious practical consequences for practitioners, judges, and scholars. For example, judges have gradually become less accustomed to reading and understanding precedents, which has inevitably had an impact on the quality of judgments they produce.<sup>22</sup> In the recent cyber defamation case of *Baiq Nuril Maknun*,<sup>23</sup> the Supreme Court followed neither previous judgments nor the developments in legal

21. Adriaan Bedner, ‘Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions’ (2013) 5 *Hague Journal on the Rule of Law* 253–56.

22. *ibid.*

23. Supreme Court of Indonesia, Decision No 574 K/Pid.Sus/2018 (delivered on 26 September 2018) on *Government Prosecutor v Baiq Nuril Maknun*.

precedents involving the *Law No 11 of 2008 on Electronic Information and Transaction*. The judges also did not consider numerous laws and conventions on the elimination of discrimination against women, including their own regulation on how cases involving women who were sexually abused should be handled.<sup>24</sup>

Whilst legal research is an integral part of education in most Indonesian law schools, socio-legal studies is rarely a topic of serious instruction. Some scholars believe that because ‘law is a science’, legal research methods are *sui generis* and have a distinctive character of their own. This belief has become entrenched through the works of Airlangga University’s professors, Philipus M Hadjon<sup>25</sup> and Peter Mahmud Marzuki,<sup>26</sup> who are popular amongst Indonesian scholars. Legal research methods thus never embraced sociological aspects even when examining fundamental legal issues, and certainly not for research or teaching purposes. Socio-legal methods would, however, add considerable value to both established and emerging fields of research. For example, a study of Islamic law in Indonesia would require one to look beyond express rules, such as the *Law No 1 of 1974 on Marriage*, which incorporates Islamic values. Islamic law is arguably a legal transplant that precedes even the colonial legal system, and as Otto observes, Islamic law and state law have become increasingly integrated over the past forty years.<sup>27</sup> In this regard, socio-legal studies would be more important in understanding how Islamic law in Indonesia has been adopted into the national legal system, what factors enabled this development, and the ways in which society can benefit from having Islamic law as a part of the national legal system.

The ‘socio’ in socio-legal studies refers to an interface with a context within which law exists, be it sociological, historical, economic, geographical, or other contexts.<sup>28</sup> The role of ‘socio’ in the context of Indonesia’s plural legal system is necessary for a complete and a more solid understanding of how law operates in society. Refusing to engage in socio-legal research methods would only create further misunderstandings among scholars who merely focus on legal rules. As I have illustrated above, this is detrimental both to the practice of law as well as the development of a better understanding of the science of law.

## II. TOWARDS GREATER DISCIPLINE IN RESEARCH AND TEACHING?

The book edited by Esin Örüçü and David Nelken, *Comparative Law: A Handbook*, is an invaluable addition to the teaching of comparative law that fills a longstanding

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24. Supreme Court of Indonesia, Regulation No 3 of 2017 on Guidelines on Handling Legal Cases for Women.
  25. Philipus M Hadjon, ‘Pengkajian Ilmu Hukum Dogmatik (Normatif) [Researching Dogmatic Legal Studies (Normative)]’ (1994) 6 *Yuridika Law Journal* 1.
  26. Marzuki (n 13).
  27. Jan Michiel Otto, ‘Sharia and National Law in Indonesia’, in Jan Michiel Otto (ed), *Sharia Incorporated. A Comparative Overview of the Legal Systems in Twelve Muslim Countries in Past and Present* (Leiden University Press 2010).
  28. Sally Wheeler and Phil A Thomas, ‘Socio-legal Studies’ in David Hayton (ed), *Law’s Future(s): British Legal Developments in the 21st Century* (Hart Publishing 2000) 271.

gap.<sup>29</sup> It is useful to students with no previous exposure to comparative law or socio-legal research, especially its first two sections which are mainly devoted to theoretical and methodological issues. Most chapters in the handbook focus less on describing various topics in comparative law, but rather on analyzing, reconsidering, or deconstructing them.

The need to combine and improve teaching methods depends on the extent to which research can benefit from improvements in teaching, and how this helps to develop perspectives and foster changes in policy, legal, or institutional reforms. In comparative law teaching, the transplantation of laws and perspectives plays an important role in introducing foreign laws into domestic contexts. According to Bedner, there is unfulfilled potential in combining scholarship on the promotion of the rule of law and scholarship on legal transplants. Most comparatists have largely ignored the situation in developing countries and paid little attention to problems of legal epistemology when transplanting law into these countries, whereas those looking at promoting the rule of law benefit from making such distinctions in the first place. The latter have become aware of the need to assess whether a legal transplant is suitable for a society, but the question of whether the ‘recipient’ legal system is capable of reconstructing a rule or institution so as to integrate (or internalize) it has received little attention. Given the context of Indonesian law schools, which are less concerned with socio-legal studies, comparative law teaching remains trapped in patterns of reductionism.<sup>30</sup>

Why then do we need socio-legal approaches in legal education? Samuel offers an example of three students who study sociology, cinema, and law at university. The cinema and sociology students both graduate with an understanding of film-making techniques, film criticism, directing styles, theoretical methods, and the ability to differentiate between hermeneutics, structuralism, deconstruction, and functionalism. On the other hand, the law student will graduate with only the most elementary sense of legal theory and method.<sup>31</sup> This illustration alludes to the failure of modern legal education to engage with law in context, which includes aspects such as the authorship of judgments, the multiple capabilities of legal actors, and the arguably central idea of law as a social form that reproduces itself by certain processes.<sup>32</sup>

The strong preference in Indonesia for only one legal research method (ie, the doctrinal approach) has calcified into something akin to a ‘religion’ or ‘ideology’. This has the consequence of calcifying the dichotomy between different methodological approaches in legal studies. Socio-legal research finds an opponent in the ‘professional jurist’ who engages in legal argumentation based on *sui generis* or normative-juridical insights. Proponents of socio-legal methods in legal education, conversely, see the importance of an interdisciplinary study of law for the improvement of legal realities or the creation of social change. Socio-legal methods do consider or engage in legal

29. Esin Öricü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007).

30. Bedner and others (n 18).

31. Geoffrey Samuel, ‘Is Law Really a Social Science? A View from Comparative Law’ (2008) 67 *Cambridge Law Journal* 288, 311.

32. *ibid.*

and doctrinal analyses as part of their approach. Therefore, those who engage in the interdisciplinary study of law also try to connect the ‘legal’ and ‘social’ aspects in their research. This means that those who do interdisciplinary legal research do not neglect traditional legal research methods. However, in practice such arguments are often neglected and the two methods are made to look diametrically opposed. Let us consider the case of two professors prominent within Indonesia for their diametrically opposed positions on socio-legal methods in legal education: Peter Mahmud Marzuki (Airlangga University) and Sulistyowati Irianto (University of Indonesia).

### A. *Normative vs Empirical?*

According to Marzuki, ‘before socio-legal discourse entered the law faculty, there was no dichotomy between normative and empirical legal research. The dichotomy only began to form at the same time as socio-legal thinking spread in Indonesia from the 1970s.’<sup>33</sup> Marzuki, who received his Master’s degree from the Washington College of Law at American University, said that while many Indonesian jurists studied in the United States in the 1970s, they studied legal sociology instead of law. In Indonesia’s context, ‘[t]his “erroneous thought” [ie socio-legal studies] began after the G30S (communist movement of 30 September). Soerjono Sukanto’s *Method of Research*,<sup>34</sup> for example, was considered a “holy book” for socio-legal thinkers.’<sup>35</sup>

At several points during the interview, he firmly asserted that the field of socio-legal studies is not a legitimate approach to legal research, and that they originated from ‘leftist ideas’. From Marzuki’s perspective, the ‘science of law’ is not a form of social science that focuses on behaviour. Law does not recognize unlawful *behaviour*, but rather unlawful *acts*. He also takes the position that the social sciences are descriptive in nature, while law is prescriptive in nature:<sup>36</sup>

Make no mistake: the law has its own method. Legal sociology is not part of jurisprudence! Social research on the law or so-called socio-legal research is often misunderstood as legal research. This is because both socio-legal research and legal research have the same object, that is, law. However, socio-legal research only places the law as a social phenomenon. In such cases, the law is only viewed from the outside...

According to him, the term ‘data’ is never used in legal studies. Similarly, qualitative and quantitative analyses are not commonly used terms in legal research. Descriptive research methods are simply beyond the realm of the ‘legal’. Marzuki observes that: ‘Many people accuse me of legal positivism. However, I reject both Hans Kelsen’s Pure Theory of Law and classical legal positivism in the mould of John Austin. I am firmly opposed to positivism; I am a normativist. Normativism is

33. Interview with Peter Mahmud Marzuki, Professor, Faculty of Law, Airlangga University (Surabaya, Indonesia, 13 August 2014).

34. Soerjono Soekanto, *Pengantar Penelitian Hukum [Introduction to Legal Research]* (Universitas Indonesia 1986).

35. Interview with Peter Mahmud Marzuki (n 33).

36. *ibid.*

different from positivism.<sup>37</sup> Interestingly, such views confuse students, given that the dichotomous model has been influential in other law schools, as this snippet from an interview with a student shows:<sup>38</sup>

I get confused when researching a legal topic [in law school] since I cannot research how reality is in society. Cases arise in the field [society], but doing fieldwork would be problematic at a law school. My supervisor said, 'if you want to do research on legal science, please read Peter [Marzuki]'s book [on legal research]. If you want to do social science research, enrol in a research degree programme at Diponegoro University [in Semarang] or Brawijaya University [in Malang]'.

On the other hand, Sulistyowati Irianto, Professor of Legal Anthropology at the Faculty of Law of University of Indonesia, tells a different story. A scholar who earned her Master of Arts with a focus on legal anthropology from Leiden University and University of Indonesia, she said that many legal academics misunderstand socio-legal studies as a method:<sup>39</sup>

... so many lawyers and legal scholars think that socio-legal studies (SLS) methods are only methods of empirical legal research or field studies. That's a big mistake! In fact, SLS also draws on the study of doctrine. The SLS method goes to the heart of legal studies, from the Constitution to village regulations. Misconceptions about SLS perpetuated in public universities are causing the destruction of teaching legal research methods, which then spreads to other universities. They are always trying to find a 'pure' legal research method that will never meet their needs, especially with today's paradigm shift towards the multidisciplinary and interdisciplinary. In the current situation, the study of documents, texts, or doctrine is not well taught. We see that there are so many dissertations running into the hundreds of pages that just 'copy-and-paste' legislation. And if there is any judicial decision, it is also copied and pasted. There is no attempt at critically analyzing the text. In such a situation where doctrinal research methods are not taught properly, they go straight to blaming the bad or unclear direction of legal research methodology on the infiltration of social science methods into the field of law.

Sulistyowati added that:<sup>40</sup>

Unfortunately, what they call the social science method is only Professor Soerjono Soekanto's method, which is actually never used by those of us in the 'new' generation. They think that the method of Soerjono Soekanto is the only method of social science. But look at socio-legal research methods elsewhere... I am a legal anthropologist, and I have never used quantitative analysis or methods that talk about variables, hypotheses, and statistical methods using SPSS which are part of sociological approaches, even though I have studied them in a quantitative course as part of my Public Administration degree at UGM [Universitas Gadjah Mada].

Sulistyowati perceives the general misunderstanding about socio-legal research methodologies as the consequence of inadequate teaching of and engagement with

37. *ibid.*

38. Interview with HP, a doctoral student from University of Jember (Jember, 12 April 2015).

39. From an interview as quoted in Putro and Wiratraman (n 11).

40. *ibid.*

materials on methodology in law schools. As she observed from her experience as a doctoral supervisor, institutes of higher education in Indonesia – especially law schools – teach only ‘black-letter’ law. As a result, there is no space for instructors to teach students how to think, build legal theories, or develop methodologies. Hence, even doctoral students do not master the methodological foundations of law unlike their peers outside Indonesia. The explanation of legal research methodology in many theses simply imitates or copies the methodological descriptions found in previous dissertations of peers and seniors.

### B. *Should Socio-Legal Studies Be Taught in Law Schools?*

As a matter of legal philosophy, Marzuki claims to take a view very close to that of Thomas Aquinas, the famed natural law theorist: ‘As a natural law thinker, I argue, even if a law is passed, if it is contrary to morals, then it is not worthy of the title of “law”.’<sup>41</sup> Marzuki’s proposition contradicts his approach because Marzuki limits research to only legal documents. Hence, it is unclear how he assesses morality without sociological inquiry. He emphasized the importance of finding the philosophical basis of a law as described in the ‘Consideration’ (*Menimbang*) part of an Act. The interpretation of this philosophical basis simply means referring back to the legal documents instead of sociological inquiry.

Two law students at Airlangga University, Rizky Ayu Nataria and Dizar Al Farizi, who received their Master’s degrees in law at Airlangga University’s law school, confirmed Marzuki’s position and its application in the classroom: ‘[Marzuki] did not let students in his classroom use the socio-legal method. Students were to do legal research, legal studies must be normative... Hence, the faculty of law at Airlangga University has never introduced socio-legal studies in class.’<sup>42</sup> Interestingly, although student theses employing the normative-juridical method dominated in numbers, this methodology was not necessarily adopted by other instructors. Other instructors in the same faculty have through their own scholarly works and teachings encouraged students to employ socio-legal research methods, although very few are willing to go public about it and directly oppose the dominant view.<sup>43</sup>

41. Interview with Peter Machmud Marzuki (n 33).

42. *ibid.*

43. One such instructor is Iman Prihandono, Head of the International Law Department and teacher of comparative law at the Faculty of Law, Airlangga University. He received his PhD from Macquarie University Law School. He argues that data and the socio-legal approach are necessary to be considered in order to analyze law from its context. His writings on transnational human rights litigation have been cited by many scholars, and such writings actually adopted interdisciplinary studies of law. See Iman Prihandono, ‘Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries’ (2011) 3 *Journal of Law and Conflict Resolution* 89. Another instructor is Amira Paripurna, member of the Criminal Law Department and senior researcher at the Center for Human Rights Law Studies (HRLS) at the Faculty of Law, Airlangga University. She received her PhD from Washington University Law School. She also uses a multidisciplinary approach in analyzing law for both teaching and research. One of her latest articles exemplifies the use of this approach. See Amira Paripurna, Masitoh Indriani, and Ekawestri P Widiati, ‘Implementation of Resolution no. 4/2016 of the ICPO-INTERPOL Concerning Biometric Data Sharing: Between Countermeasures Against

At the University of Indonesia, Sulistyowati Irianto takes a different view, and explains why many academics in Indonesia misunderstand socio-legal studies. According to her, there are three disciplines that are often conflated, namely socio-legal studies, legal sociology, and sociological jurisprudence. The sociology of law sees law as a social phenomenon, whereas socio-legal studies takes the law, from the constitution down to legislation and judicial decisions, as the subject. Socio-legal studies is distinguished from traditional legal research in that one does not stop at only reading the *text* of the law, but rather studies the law as an element embedded within culture (ie systems of thought and knowledge), and considers the power relations between lawmakers, law enforcers, stakeholders, and the wider community.<sup>44</sup>

In Indonesia, sociological jurisprudence is associated with ‘law as a tool of social engineering’, a term that can be traced back to the works of Roscoe Pound.<sup>45</sup> The term was first introduced into Indonesia in the 1970s by a professor at Padjajaran University, Mochtar Kusumaatmadja. Kusumaatmadja interprets ‘social engineering’ here as ‘top-down social engineering’, such that all laws and policies must come from the government.<sup>46</sup> To Pound, legal science is more or less the same as technology. Pound’s notion of social engineering can thus be given effect through judicial and administrative processes. Therefore, for adherents of sociological jurisprudence, it is important to look at the extent to which judicial or administrative decisions have a positive effect on society.<sup>47</sup> But Mochtar recognizes that Indonesia follows the civil law tradition, and that the role of legislation in the social engineering process is more pronounced compared to the United States, which relies more on ‘judge-made law’.<sup>48</sup> Moreover, given the stronger and more deeply-rooted influence of classical legal positivism in Indonesia, social engineering relies more on lawmaking through the enactment of legislation.

Sociological jurisprudence is certainly different from socio-legal studies because it reduces law into a technology that shapes society. The field of socio-legal studies is broader in scope as a hybrid between legal science and social science, notwithstanding its commonalities with the sociology of law and sociological jurisprudence in that neither views the law as an element isolated from power and culture. Sulistyowati doubts that conventional ‘MPH’ (*Metodologi Penelitian Hukum* or Legal Research

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Terrorist Foreign Fighters (FTFS) and Protection of the Privacy of Indonesian Citizens’ (2018) 5 Brawijaya Law Journal 117.

44. From an interview as quoted in Putro and Wiratraman (n 11).

45. One of the works of Roscoe Pound that is representative of the concept of ‘law as a tool of social engineering’ is *Social Control through Law* (Yale University Press 1942).

46. Mochtar Kusumaatmadja, ‘Pemantapan Cita Hukum dan Asas-Asas Hukum Nasional di Masa Kini dan Masa Yang Akan Datang [Developing Legal Aims and Principles of National Law in the Present and Future]’ (1995) Special Edition (1) *Majalah Hukum Nasional* 91.

47. Soetandyo Wignyoebroto, ‘Mochtar Kusumaatmadja: Manusia yang Pernah Saya Kenal dan Pemikirannya (Sebuah Pengantar Ringkas) [Mochtar Kusumaatmadja: The Man I Once Knew and His Thoughts (A Brief Introduction)]’ in Shidarta (ed), *Mochtar Kusumaatmadja dan Teori Hukum Pembangunan [Mochtar Kusumaatmadja and Legal Theory of Development]* (HuMa-Epistema 2012) vii-xxiv.

48. *ibid.*

Methodology), which restricts students to one approach, will do anything other than sap their ability to engage in critical reasoning.<sup>49</sup>

Hence, excluding socio-legal studies in law schools is undesirable. Socio-legal approaches in comparative law studies would train students to develop a contextualized understanding of the law. Therefore, law schools in Indonesia should acquaint themselves with various types of interdisciplinary studies of law to improve research and teaching in comparative law.

### C. Bridging the Gap

Given the large gap between the two scholars in their positions on legal research methodology, what can we learn from them? Bedner discusses three major schools of thought that influence research methodologies,<sup>50</sup> but none offers a practical solution to the problems faced by Indonesian legal scholars and practitioners. The first are the proponents of so-called ‘pure law’ (*hukum murni*), who argue for a system that only looks at legal rules contained in a very limited number of legal sources and consider everything outside of them as non-law at best. They are vehemently opposed by a ‘leftist group’ that argues against legal positivism and is in favour of considering a plethora of non-legal sources to achieve a just solution to any given case. Finally, a less outspoken group advocates for a socio-legal approach – which they refer to variously as realism, sociological jurisprudence, or simply socio-legal approaches – under which a jurist should take into account social realities when devising just solutions to legal problems.

These groups seem more engaged in a debate about what law is than trying to improve the study of law as a discipline. ‘Pure law’ scholars subscribe to a version of Hans Kelsen’s Pure Theory of Law (*Reine Rechtslehre*). Notably, law professors Philippus Hadjon and Peter Mahmud Marzuki have waged a crusade against what they call ‘empirical law’. While their writings acknowledge that ‘justice’ is important in legal reasoning and that legislation is not the only source of law, the ensuing debate has lost all nuances and now focuses only on what are the permissible sources and methods of law.

The most vocal opponents of the pure law approach are of a radical streak, many of whom rallied around the late Professor Satjipto Rahardjo, a legal sociologist of repute who worked at the Diponegoro University of Semarang, and famous for his idea of ‘progressive law’. Several volumes and many articles referring to this idea have been published over the past few years and there is a group active on Facebook calling themselves the ‘Tjipian Group’ (*Kaum Tjipian*). The progressive law movement in Indonesia is a parallel to the early 20th century *Freirechtslehre* movement in Germany, which also attacked statutory law and its interpretation. The common enemy of supporters of progressive law and others with similar views is ‘positivism’ – a term strongly associated with the pure law proponents. The problem

49. From an interview as quoted in Putro and Wiratraman (n 11).

50. Bedner and others (n 18).

is that this group offers little in terms of legal certainty and tends to throw out the baby with the bathwater.

Given this context, Bedner's observations are unsurprising. A legal philosopher from Padjadjaran University, Lili Rasyidi, said:

Legal research methods seem to be split into two schools of thought: 'pure normative' against a very sociological model. I associate 'normative pure' thinking with Bagir Manan, Sunaryati Hartono, Peter Mahmud and Hadjon, whereas sociological thought is led by Surjono, Satjipto Rahardjo, Soetandyo Wignjosoebroto, Ronny, and his students.<sup>51</sup>

The moderate group has another problem: it is incapable of bridging the gap between themselves and proponents of the pure law approach. Instead of arguing in terms of 'pragmatist' versus 'interpretivist' epistemologies – which are both clearly part of the legal spectrum – they tend to position themselves as socio-legal scholars, rendering their ideas unacceptable to pure law adherents from the outset.

Indonesian legal scholarship thus finds itself in a stalemate that can be broken only by translating the different arguments into a terminology that is acceptable to all involved, and that addresses the problems of law and social justice as a part of legal scholarship instead of being preoccupied with an artificial dichotomy between law and the social sciences.<sup>52</sup>

### III. TEACHING COMPARATIVE LAW IN INDONESIA: SOCIO-LEGAL CHALLENGES

The teaching of comparative law in Indonesia has been shaped by the lack of interdisciplinary studies in legal education. Zweigert and Kötz state that 'legal science in general is sick, and comparative law can cure it'.<sup>53</sup> This is not the case in major Indonesian law schools where formalist studies of law are predominantly taught, hence comparative law would not help either in improving legal education.

The challenge for socio-legal scholars in Indonesia is connected to the idea of 'modern law' and in situating the debates on it within the country's plural legal system and constitutional context. 'Modern law' (or the 'modern legal system') in a post-industrial society has been perceived either as (1) political imperialism in making law for occupied or colonized countries; or (2) economic imperialism in injecting law into 'third world' countries. Hence, the ideas of 'democratization', 'good governance', 'access to justice', or even 'human rights' have been softly and systematically designed as ways to discipline policies in particular countries. According to Galanter, a legal system is 'modern' due to a 'cluster of features that characterize, to a greater or lesser extent, the legal systems of the industrial societies of the last century'.<sup>54</sup> Modern legal norms are 'uniform and

51. From an interview as quoted in Putro and Wiratraman (n 11).

52. Bedner and others (n 18) 263–264.

53. Zweigert and Kötz (n 4) 34.

54. Marc Galanter, 'The Modernization of Law' in Myron Weiner (ed), *Modernization: The Dynamics of Growth* (Basic Books 1966) 154–56.

unvarying in their application', with the same rules applying to everyone in society. Modern law is also transactional; the legal system hierarchical and bureaucratic. It encourages the imagination of certainty, and justice in a particular legal system is defined as 'legal' justice. The effectiveness of 'modern law' is closely connected to the promotion of a market-friendly legal system. Therefore, the main strategy in transplanting laws is to replace 'old laws', 'plural systems', and 'indigenous governance' with 'legality'.

The Indonesian legal system is not merely a state-based legal system because it also encompasses a plurality of legal orders. Whether it is *syariah* law in Aceh or 'Hukum Rakyat' (*adat* law and local law) in various places throughout Indonesia, they are important legal systems with much influence on society.<sup>55</sup> Hence, when considering the impact of the legal system, it is necessary to carefully consider the extent to which such legal impact translates to social impact, and on which particular segment of society. Law and society perspectives teach us how to connect the *law as text* (textual norms) to its realities (context, process, and law's adaptation in society).

The 'modern' international legal system, as conceptualized by most legal scholars, concerns the development of human rights, international environmental law, law of the sea, international organizations, arms control and disarmament, and international dispute settlement. In this regard, the challenge for teaching comparative law is in explaining the great diversity of empirical facts in various contexts, which are not limited to formal state institutions and extend to informal legal norms and processes. Since socio-legal approaches are strongly rejected by Indonesian law schools, the difficulty in law schools lies in the lack of commitment to using socio-legal studies in comparative law. This was what Creutzfeldt, Kubal, and Pirie meant when they said that:<sup>56</sup>

The issue that concerns scholars contemplating forms of comparison that go beyond doctrinal issues and span very different cultural contexts is the assumption of sufficient similarity in order to make the identification of difference meaningful... The complexity of socio-legal studies that results from the exploration of empirical detail offers possibilities as much as challenges. This is so whether the comparison is planned and systematic or it develops out of richness of qualitative research, and whether it involves small numbers of cases or more wide-ranging comparison.

There is, of course, no single correct approach to comparison, and different objectives lead to the use of different methods, with different outcomes. Indeed, variety in possible comparative questions and methods is a feature of the rich and complex field of socio-legal studies.

#### IV. CONCLUDING REMARKS

Law schools, as providers of 'market-friendly legal education', orientate themselves towards producing professional jurists instead of developing the legal sciences for

55. Herlambang P Wiratraman and others, *Hukum Rakyat [People's Law]* (HuMa 2015).

56. Naomi Creutzfeldt, Agnieszka Kubal and Fernanda Pirie, 'Introduction: Exploring the Comparative in Socio-Legal Studies' (2016) 12 *International Journal of Law in Context* 377, 379, 386.

social change. Due to the success and dominance of ‘market-friendly legal education’ discourse, legal education did little to support the interdisciplinary study of law or socio-legal research in Indonesia. This is not merely about the debate over ‘purifying’ law from the influence of the social sciences, but also legal formalism that ensures certainty in the state’s legal framework. Transplanting the law and legal research methodologies by those who studied abroad has been influential to some extent, whether this is in selecting issues for doctrinal legal research, or for promoting interdisciplinary studies of law. The absence of socio-legal research in Indonesian legal studies, especially in the study of comparative law, has contributed to the lack of rigour in comparative legal analyses. The absence of socio-legal studies has caused the serious problem of approaching ‘law’ as an object isolated from context and history.

In the context of Indonesian law schools, the lack of socio-legal research is primarily caused by legal scholars refusing to provide space for non-legal studies within Indonesian legal scholarship. Most do not concern themselves with the interdisciplinary study of law because they believe law has a *sui generis* character. Normative legal research is then unsurprisingly, as shown by Bedner and others,<sup>57</sup> supportive of neither legal practice nor developing legal science. The impact of this can be observed from how comparative law is taught in Indonesia – on the basis of statutes and other legal sources instead of a deeper study of the law within its particular social and political context. Hence, comparative law as taught is more on comparing rules rather than their application within particular socio-political settings or socio-cultural contexts. Without socio-legal approaches, it is highly possible that comparative law teaching in Indonesia will continue to be trapped in a reductionist mould.

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57. Bedner and others (n 18).