



CHAPTER III RESEARCH METHOD

A. Type of Research

The normative jurisprudence is the legal science that is *sui generis*, means that it cannot be compared with another science. Its main discuss is positive law, therefore, normative jurisprudence possesses many name. In jurisprudence literature, either in Dutch, English, German, or Indonesia, is also known by positive jurisprudence, dogmatic jurisprudence or dogmatic of law and also known as *jurisprudence* term.⁶⁷

In other word, every science activity that is heading to study the content of concrete positive law has been include, scope and the object of what was named dogmatic jurisprudence.⁶⁸ The dogmatic of law is studying the regulation from juridical technique aspect and talks the law from legal side and concrete legal issue, actual, or

⁶⁷Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum*, (Bandung: PT. Mandar Maju, 2008), 80

⁶⁸Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, (Malang: PT. Bayumedia Publishing, 2007), 183.

potential, also to see the law from intern perspective.⁶⁹ Therefore Bellefroid stated that dogmatic jurisprudence or dogmatic of law is portraying the content of existing law, explaining the meaning from legal determines, and composing the legal regulation according to its legal principle within legal system.⁷⁰

Thereby, the function of dogmatic of law, according to Meuwissen, is to explain, to analyze, to systemize, and to interpret the prevailing law. Such as what has been explained by Kelsen that Dogmatic jurisprudence possesses own characteristic, it is the *sui generis* science. In position to give the judgment toward content and structure of positive law so none of empirical methods are necessary because the required scientific action is to perceive concepts and background of legal principle what based upon.⁷¹

Therefore, this research is obviously choosing the type of normative juridical research which tends to enquiry the fact according to dogmatic jurisprudence perspective.

B. Approach of Research

The normative research must, of course, use the statute approach, because what be enquired is the various legal ruling that becomes the focus also a central theme of research. Hence, the writer must see the law as an enclosed system that possesses the following qualities:⁷²

- a. *Comprehensive* means the legal norms that exist therein have been relevant to each other logically.
- b. *All-inclusive* that such group of legal norm is sufficient to accommodate the existing legal issue, until it will not exist the lacking of law.
- c. *Systematic* that is aside from relevant to each other, such legal norms also hierarchically composed.

⁶⁹Ibid, 181.

⁷⁰Ibid, 185.

⁷¹Ibid, 187.

⁷²Ibid, 302.

Statute approach is performed by perceiving the whole statute and regulation which is related with the legal issue being processed in their way. For research of practically conduct purposed, the statute approach will open the chance for writer to study whether had existed consistency and conformity between legislations and other legislations or between legislation and constitution or between regulation and legislation. The result from such comprehension has been an argument to solve the confronting issue. For research of academic conduct purposed, the writer needs to pursue *ratio legis* and *ontology* base from such legislation birth. By studying *ratio legis* and *ontology* basis of legislation, the writer is actually able to grasp the philosophy content that exists behind legislation. To comprehend the philosophy content that exists behind legislation, the writer will be able to conclude about whether exist or not the philosophy crash between legislation and the confronting issue.⁷³

In statute approach method writer needs to understand the hierarchy, and the principles within legislation. According to article 1 verse 2 UU Num. 10 Year 2004, legislation ruling is the written regulation that is made by a state institution or the authorized official and it is binding generally. According to such definition, shortly could have been said that what is implied as a *statute* has been legislation and regulation. The product which is to be *beschikking/decreet* namely a verdict published by administration official that has the quality of concrete and specific, for example: President Verdict, Minister Verdict, Regent Verdict, The Verdict of a certain institution etc, cannot be used in statute approach.⁷⁴

Conceptual approach is conducted when the writer not moving from existing regulation. For thus be conducted because indeed never or has not existed any regulation for overcoming problem yet. For example, the writer in his research topic will perform

⁷³Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: PT. Kencana, 2007), 93.

⁷⁴Ibid.

investigation about the meaning of general interest within Perpres Num. 36 Year 2005. If the writer refers to that regulation, he cannot find any definition he sought for. What he found was only definition in general quality which surely inappropriate to establish legal argumentation. If he overturn into another decrees he cannot find it neither. Therefore, he must establish certain concept to be the reference in his research.⁷⁵

In establishing the concept, he is not just speculating and searching in fantasy but to move first from developing views and doctrines in jurisprudence. Regardless of denying, that general interest is the law concept not political nor economic concept neither. The concept is universal in quality. Therefore, the writer must comprehend the legal scholar's views from every country on the matter concerned. And therefrom the ability's legal writer to understand jurisprudence substance is very necessary.⁷⁶

The writer may want performing investigation about legal concept indigenous to certain law system which is not universal in quality, Sharia Banking for instance. On such regard the writer must refer to developing doctrines in Islamic law at the banking section. However though, he also needs to understand the basic substance of Islamic law, the concept moved therefrom.⁷⁷

By these dual approaches using on law system comprehension will help the writer focused in the matter concerned. About how local regulation be viewed from Islamic law perspective.

C. The Sources of Law

Legal research does not recognize the data term. To solve legal issue and to give prescription concerning what ought to be, the sources of research are very necessary. The sources of research can be differentiated into the sources of research which is to be the

⁷⁵Ibid., 137,

⁷⁶Ibid.

⁷⁷Ibid.

primary source of law and the secondary source of law. Primary source of law is the authoritatively source of law in other word possesses the authority. Primary source of law consist of legislation, legal notation or letter in legislation making and judge decisions. Whereas secondary sources of law are the entire legal publication concerned which not to be the official document.⁷⁸

Considering Indonesia is a former colony of Dutch, as another European continental countries and its colony, Indonesia is too the follower of civil law system. Unlike USA and other common law system follower countries, the primary source of law is not court decision or *yurisprudensi*, but legislation instead. For the primary source of law that is to be the legislation, the one possesses the highest authority is constitution (UUD 1945) because all regulation below either its content or spirit must be not against such constitution. The next source of law is statute. Statute is an arrangement between the government and the governed (citizen) hence it has the binding force to perform national life. Inline with statute, on regional level local regulation is too posses the high authority potential for its region because it was made by local government and DPRD. The primary source of law which authority below the statute is government regulation (PP), president regulation or the regulation of a state institution as cited in article 7 (4) UU Num. 10 Year 2004 about legislation. Whereas in regional level Head Region Verdict has a lower authority compared with local regulation. The primary source of law beside legislation that possesses the authority is the court decision. Court decision is the concretizing from legislation. Such court decision truly is the *law in action*.⁷⁹

The secondary source of law basically is textbooks because textbook contains basic principles of jurisprudence and classical views of scholars who have high qualification. In choosing the textbook, once again considering Indonesia was former

⁷⁸Ibid., 141.

⁷⁹Ibid.

colony of Dutch is very suggesting if to be used textbook to be the textbooks that is written by the author of European continental and the textbooks that is written by the author of Anglo-American. In jurisprudence, the textbooks exist on books of *jurisprudence* or *rechttheorie* or perhaps *rechtswetenschap*. Beside textbook, the secondary source of law could have been the writings about law either in book form or journals. Such writings of law contain about the development or actual issue concerning certain study of law. Even suggested to the writer, in preparing his research, is first referring to secondary source that is to be the writings of law either in book form or journal. By first referring to such secondary source, the writer could have known the recent development from the target that will be enquired. It is necessary to get forwarded here that the secondary source of law which is to be the books of law must also relevant with research topic.⁸⁰

In other word, concisely, the sources of law which is going to use in this research is in the following paragraph:

Primary Legal Source

- Legislation
- Yurisprudensi*
- Treaty, ratified convention
- Personally treaty

Secondary Legal Source

- Jurisprudence book
- Jurisprudence journal
- Jurisprudence research report
- Jurisprudence paper

⁸⁰Ibid, 142.

-Seminar, workshop, etc.

D. The Sources of Law Collecting Technique

Document study is the first step of legal research, because the legal research has always begun from normative premise.⁸¹

Document study for legal research is including the legal material which consisted of primary source of law and secondary source of law. Every legal material must be re-verified its validity and its reliability, because as such is very confirming of research's result.⁸²

Legislation in Indonesia, either had or still prevail, either was made in colonial era or independent era as in present day has been so various either its form or its subject also it is many in number. Considering today's circumstance that is felt so hard to unravel relevancy between one regulation and another without exist a way or system to trace it.⁸³

A technique has been developed by FH UI since medieval 1980 through its Legal Documentation Center (Pusat Dokumentasi Hukum) which is to be TAPIS (Tabel Penunjuk Inti Sari). Tapis is the instrument of legal documentation to unravel relevancy series, namely the performing also the status of legal provision.⁸⁴

Thereby, Through TAPIS could have been known how far is the connection or relationship between regulation and another regulation, or between the legal concept that is consisted in article and another article. Besides, research's TAPIS could obtain the benefit as follows:⁸⁵

1. Enable to pursue the background of a policy in legal aspect.

⁸¹Amiruddin, Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: PT. Raja Grafindo Persada, 2006), 68.

⁸²Ibid.

⁸³Ibid, 69

⁸⁴Ibid.

⁸⁵Ibid.

2. Used as regulation re-meeting media through re-investigating the existing legal material
3. To see how far has the regulation been memorized, considered, revolved, amended, added, and so forth by other regulation.
4. To present the whole viewing concerning regulation as main wisdom which is to be connected with it that would be explained clearly also easy to follow.

To tapis (pentapisan) activity of legal material has been the collecting and composing legal concepts or article of the same regulation which is consisted in one or another kind of regulation.⁸⁶

The using of this source of law collecting technique which is very fundamental will help the accuracy of collecting the sources of law. And therefore it will sharpen the analysis and may be makes the explanation easier to understand.

E. Legal Reasoning Method

Legal reasoning is one of prime component that must be understood by a legal research writer. Without whole understanding toward legal reasoning, then the writer will be losing direction and even confronting a big difficulty in systemizing the legal material that becomes the topic, also influencing its quality of scientific research deduction.⁸⁷

The study of legal reasoning basically is to study the scientific responsibility from jurisprudence aspect toward the making process of judicial decision that encompasses argumentation and logical reasons as justification reason against institution made legal judicial. As such, of course, is partaking relational explanation between submitted reasons and decision that is made concerning judge consideration to support the decision he made. Therefore the legal logic which controls the process of justification in every

⁸⁶Ibid, 70

⁸⁷Johnny Ibrahim, *Op Cit*, 239.

judicial decision is necessary. The proper judicial decision is the decision that uses logic and correct legal argumentation and based on authoritative source of law.⁸⁸

Logic is a study to direct its prime attention to compose criterion of how to evaluate a correct argument. Therefore, logic is studying methods and principles that are used to differentiate a correct reasoning and incorrect reasoning. Logic merely just related with logical interest (consequential relationship) that exists between conclusion and its premises. So then, logic is related with to think activity, yet it not just only to think as human ratio nature, but to think straight, namely discussing the reasoning path based on postulate or reasoning rule therefore could have avoided people from mistake and digression of thinking.⁸⁹

In logic exists footstep for philosophy and science, that is, logic has been the connecting bridge between philosophy and science. From philosophy aspect, understanding logic means understands critically logical function of human and at the same time open up itself toward philosophy explore. Logic is harmonizing the objectively principles with subjectively situation and concrete. In this case logic is a technique that is invented to enquiry the exact reasoning in attempt to avoid digression of thinking.⁹⁰

Legal logic is the logic that is applied within the law. Hans Kelsen emphasized that legal logic is a regular logic (common logic) that is applied on descriptively proposition of jurisprudence, in exact same as it applied as long as logic is indeed applicable here at prescriptive norms of law.⁹¹

⁸⁸Ibid.

⁸⁹Ibid, 242.

⁹⁰Ibid, 244.

⁹¹Ibid.

The classical form of legal reasoning is actually following the principles of logic which is called syllogism. Legal reasoning in syllogism form is simply described as follows.⁹²

If	A=B
And	B=C
Then	A=C

First line is called the major premise, while second line is called minor premise, and the third line is called conclusion. If it applied toward law, then reasoning in syllogism form can be shown as follow:⁹³

Legal ruling threatens the planned homicide with death penalty
 Martin has performed planned homicide
 Because such conduct, Martin is threatened by death penalty

From above example could have been seen the reasoning in syllogism form is the reasoning that conducted perfectly straightforward. The analysis toward example indicating that the first line is the statement of law and has been the major premise, second line is the statement of legal fact and has been the minor premise. And the third line is conclusion as major premise applying toward such minor premise.⁹⁴

The reasoning with deductive logic using is the reasoning which begins from legal ruling prevails commonly upon the confronting individual and concrete case. The reasoning with deductive logic using for confronting concrete legal case could also be done by taking the model mathematically. On this model mathematically the proposition is attached and used as basic reasoning. Example is as follow.⁹⁵

If	A	=	B
And	2A	=	2B
Then	A-B	=	0

⁹²Ibid, 247.

⁹³Ibid.

⁹⁴Ibid, 248.

⁹⁵Ibid, 250

The main weakness of this deductive logic using is if its premise is false, if that happen, then its reasoning result would have false too or invalid.⁹⁶

In other word, the deductive logic using as analyzing equipment is strictly necessary. Especially, when comes to normative jurisprudence research which is much of source of law has been the regulation and statute.



⁹⁶Ibid.