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Legal Reconstruction in Indonesia Based on Human Rights

Imam As Syafei Building

Faculty of Law, Sultan Agung Islamic University

Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

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The 5th PROCEEDING

“Legal Reconstruction in Indonesia Based on Human Right”

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“Legal Reconstruction in Indonesia Based on Human Right”

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS

The 5th International Conference and Call for Paper Faculty of Law 2019 Legal Reconstruction in Indonesia Based on Human Right

Table of Contents

<i>FRONT PAGE</i>	<i>I</i>
<i>Information of The International Seminar</i>	<i>III</i>
<i>Committee Composition</i>	<i>IV</i>
<i>PREFACE</i>	<i>V</i>
Fulfillment Of Teacher Protection Rights	
<i>Yenny AS, Rini Setiawati</i>	<i>1</i>
Legal Reconstruction Of Laws Regarding Human Rights Through Judicial Review To The Constitutional Court	
<i>Umar Ma'ruf</i>	<i>13</i>
Legal Analysis Of Social Security Transformation And The Reality Of Its Implementation In The Community In Indonesia	
<i>Siti Ummu Adillah, I Gusti Ayu Ketut Rachmi Handayani ,Adi Sulistiyono</i>	<i>29</i>
Increasing Voluntary Compliance Of Tax Payments In Micro Small And Medium Enterprises (Msmes) Post-Issuance Of Government Regulation Number 23 Of 2018 (Case Study In Semarang City)	
<i>Amin Purnawan, Akhmad Khisni, Aryani Witasari</i>	<i>40</i>
Legal Analysis Of Racist Exams In Surabaya Papua Dormitory	
<i>Ma'aruf Akib</i>	<i>49</i>
Reconstruction Of Misdemeanor Settlement Based On Pancasila Value	
<i>S. Andi Sutrasno</i>	<i>56</i>
Urgency Of Legal Assistance For Poor People As A Request Of Human Rights	
<i>Adhi Budi Susilo, Indra Yuliawan</i>	<i>62</i>
Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice	
<i>Rahmatsyah</i>	<i>66</i>
Problematic Presidential Electoral Threshold In The Operation Of Value-Based Simultaneous Justice	
<i>Widayati , Winanto</i>	<i>72</i>

Reconstruction Of Learning Methods In Criminal Law Subjects Using Inquiry Methodsbased On Human Rights And Islamic Values <i>Ira Alia Maerani, Eko Soponyono, Nuridin.....</i>	81
Reconstruction Of Criminal Sanction And Rehabilitation Combating On Narcotic's Victims Based On Religious Justice <i>Carto Nuryanto, Gunarto, Anis Mashdurohatun.....</i>	91
Study of the theory of Legal Protection Against Online High Yield Investment Program Contracts in Indonesia (HYIP) <i>muhamad Iqbal al Hakiem,aryani witasari.....</i>	96
Reconstruction Completion Of The Crime Of Light On Value Pancasila <i>Andi S. Sutrasno.....</i>	102
Law Reconstruction Of Registration On Fiduciary Obligation Based On Justice Value <i>Wieke Dewi Suryandari ; Gunarto; Amin Purnawan.....</i>	108
Reconstruction Of Transport Regulatory On Marine Toll To Support Sea Connectivity Based On Pancasila Justice <i>Hartanto, Gunarto, Anis Mashdurohatun.....</i>	114
Reconstruction Of Scientific Investigation In Indonesia Based On Justice <i>Teguh Prihmono; Gunarto, Sri Endah Wahyuningsih.....</i>	120
Legal Construction On Training Ship Management Belongs To Human Resources Development Of Transportation (Bpsdmp) Based On Dignity Justice Value <i>Wahyu Wibisono, Gunarto, Anis Mashdurohatun.....</i>	126
Protection Of Law Refugees/Asylum Seekers In Indonesia (As A Transit State) No Ratify 1951 Convention Of And The 1967 Protocol <i>Muhammad Djamir.....</i>	133
Reconstruction Of Legal Policy On Decency Crime In Indonesia Based On Pancasila Value (Lgbt Rehabilitation Institute For Children) <i>Cucuk Kristiono, Gunarto, Anis Mashdurohatun; Suparji.....</i>	144
Legal Protection Against Indonesian Workers (Tki) In Abroad <i>Yaya Kareng (Sripatum UniversityOng Argo Victoria ,Sri Yulianingsih.....</i>	149
Reconstruction Of Auction Execution Of Mortgage Object In Determine The Auction Price Based On Justice <i>Moh Djarkasih**.....</i>	158

Reconstruction Policy Of Sanctions Against Destruction Of Evidence Illegal Fishing Based Small Fishing Welfare Values <i>R. Juli Moertiyono</i>	165
Reconstruction Of Legal Policy Interfaith Marriage In Indonesia <i>Moh. Zeinudin, Dian Novita</i>	179
Reform Of Couple Sexual Rights Protection In Case Of Diseases Hiv / Aids In Indonesia <i>Nana Ruhyana</i>	186
Legal Protection Against Disability In Getting Work <i>Oktavianto Setyo Nugroho</i>	193
Reconstruction Of Authority To Arrest In Doing Judge Accused Of Value-Based Justice <i>Agus Sugiarto</i>	203
Enforcement Of Criminal Law In False News (Hoax) Management According To Law No. 11 In 2008 That Has Been Amended To Be Law No.19 Of 2016 Concerning Electronic Information And Transactions In Islamic Law And Positive Laws <i>Yanto Irianto</i>	208
Reconstruction Validity Legal Deeds Are Dealing With Children In The Process Of Law Criminal Justice System Based Child Justice <i>Asep Hermawan</i>	220
Reconstruction Of Performance Assessment Of Drinking Water Companies (Pdam) Based On Consumer Protection <i>Bustaman</i>	225
Reconstruction Legal Rights Associated With A Warranty Not A Bank Debt <i>Euislistianti</i>	229
Reconstruction Of Operational System As A Community Economic System Based On Welfare <i>Abbas Ibrahim Idris</i>	234
Reconstruction Of Criminal Responsibility For Actors Prostitutorial Criminal Justice In The Criminal Justice Based On Value <i>Iwan Rasiwan</i>	242
Reconstruction Of Legal Drinking Water Management Company (Pdam) Based On Justice <i>Suharyadi</i>	248

Reconstruction Of Private Criminal System Implementation In The Commitment Values In Indonesia Justice

Sumanto 252

Reconstruction Of Justice Law Protection Law Protection

Wamyani 260

Criminal Code Draft Law And Development In Indonesia

Nany Pujianti Suwigjo 265

Deconstruction of the Principle of Legal Thinking

Sriyati 270

Development Of The Law Of Complete Systematic Land Registration (Ptl) And Effect Of Conduct Values of Land Based On Dignify Justice In The District Of Kendal, Central Java

Desy Dwi Nurhayati Hartanti 279

Interpretation Teaching Of Human Rights Laws Against Material In Corruption Provisions

Burham Pranawa, Hartiwiningsih, Hari Purwadi 293

Reconstruction Of Article 156 Paragraph (1) Of Law Number 13 Year 2003 Regarding Manpower As A Guideline For The Provision Of Workers' Rights Based On Justice

Rahmatsyah 301

Law Due To Delay The Registration Under Fiduciary Guarantee Pmk No 130 / Pmk.010 / 2012

Jaenudin Umar 307

The Effectiveness Of The Handling Of The Criminal Acts Of Light Tend To Be Settled Judicial Custom

Supena Diansah 313

Urgency Of Legal Assistance For Poor People As A Request Of Human Rights

Adhi Budi Susilo, Indra Yuliawan 327

Independence Institute Of Justice And Judge In Perspective Judicial Reform Blueprint 2010 - 2035

Ahmad Agus Bahauddin 331

Policies Against Crime Criminal Law Made By Children

Achmad Arifulloh 340

Law Enforcement Of Law Number 23 Of 2004 In Preventing Efforts Human Rights Violations In Indonesia

Andri Winjaya Laksana, Lathifah Hanim 350

Reform Of Couple Sexual Rights Protection In Case Of Diseases Hiv / Aids In Indonesia

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ABSTRACT

HIV / AIDS cases in Indonesia has expanded to a population previously low-risk populations, namely Housewife. But this time the case is already on the highest position in the case of AIDS, namely 15 916, so it's time to do the reconstruction laws unfavorable to women, as was done by some states in the United States. 1945 is already mandated in Article 28A, 2D Paragraph (1), 28I Paragraph (2), 28J Paragraph (1), and Law No. 23 of 2004 on Elimination of Domestic Violence. Some legal theory offers an alternative to overcome the various problems that exist in the community, especially to raise the dignity, degrees, and the dignity of women in HIV / AIDS cases. Women are still considered to be a weaker party and keompok men as superior, so that is quite dominant in the household. Legal responsive Philippe Nonet and Philip Selznick, progressive law initiated by Satjipto Rahardjo, and Werner Menski with legal pluralism approach, gives insights brilliantly to tackle HIV / AIDS in Indonesia were poured into a kebijakansanaan as stated by Esmi Warassih, Cases of HIV / AIDS in Indonesia have penetrated the population that was originally a low risk population, the housewife. But now the case is at the highest position in AIDS cases, 15.916, so it is time for a legal reconstruction in favor of women as practiced by Several states in the United States. The 1945 Constitution has mandated Article 28A, 2D Paragraph (1), 28I Paragraph (2), 28J Paragraph (1), and Law Number 23 of 2004 concerning the Elimination of Domestic Violence. Some theories offer legal alternatives to Overcome various problems that exist in society, especially to raise the dignity, degree and dignity of women in cases of HIV / AIDS. Women are still Considered a weak group and men as a superior group, so that within the household is quite dominant. Responsive law from Philippe Nonet and Philip Selznick,

A. PRELIMINARY

Cases of AIDS in Housewife (IRT) in Indonesia reached 15 915 people.²⁵⁴ High incidence of AIDS in the IRT case illustrates that HIV transmission to sexual partners was very alarming. This means that if you see the episode when it happened, they have been in-

fectected since the minimum of five years ago from her husband. The main cause is that the husband did not inform HIV status to his wife or her husband did not know that he was infected with HIV because it has never been tested. IRT is a victim of the behavior of the husband who likes “snack sex” with no safe in the sense not use protection (condoms). In the long term, it will continue and affect the unborn child if a pregnant wife someday. Problems will continue with the extinction of

²⁵⁴ Director General of Disease Prevention and Control of the Ministry of Health, Reports Third Quarter 2018.

the family.

The government in this case the Ministry of Health and Local Government continues its efforts to suppress the spread of HIV infection / AIDS, which are expected in 2030 can be eliminated, but if you look at the progress of cases continues to increase each year is highly unlikely if not accompanied by appropriate policies, by looking at the root of the problem that occurred during this time, and implemented by all levels of implementing HIV prevention, supported by stakeholders at all levels of policy.

Protection in order to save the women and children were already taken by the government to issue a policy on HIV Transmission Prevention Program of Mother to Child (PPIA), but this program was very slow in control efforts, where evidence of transmission of HIV is still rising from year to year.

Please note that to date in Indonesia does not have an Act to specifically address HIV / AIDS, to overcome this only made the regulation of the extent of Indonesian Presidential Regulation No. 75 Year 2006 on the Establishment of the National AIDS Commission, which was amended by Presidential Decree Indonesia Number 124 Year 2016 then followed up with the Minister Regulation No. 20 Year 2007 on General Guidelines for the Establishment of the National AIDS Commission, Ministry of Health Regulations No. 21 of 2013 on HIV and AIDS, Ministry of Labor on the Prevention and Control of HIV / AIDS in Workplace.

Later in the protection of human rights as enshrined in the Constitution of the Republic of Indonesia Year 1945 (Constitution 45), so that women had the right to be protected and respected and free from discriminatory action. It is, as stated in Article 28, as follows:

²⁵⁵ Ossia Sosondoro, Riris Andono Ahmad, Yayi Suryo Prabandari, Mohammad Hakimi, *Internal Stigma Of An Hiv-Infected Housewife: A Logical Phenomeno- Study*, *Journal of Public Health*, Pack 13 (2) (2017) 158-168

²⁵⁶ Linda Rae Benner, Sharyn Graham Davies, Irwan Martua Hidayana (ed), 2018, *Sexuality in Indonesia: Politics Sexual Health, Diversity, and Representation*, Translator: Nina Nurmila, Hanny Savitri Harsono, Iskandar Julkarnaen, velvet tongue Divine and Irawan Martua Hidayana, Ed. I, Cet. 1, Jakarta: Yayasan Pustaka Obor Indonesia, p. 119-120

Article 28A, Everyone has the right to live and to defend life and livelihood.

Article 28D Paragraph (1) Everyone has the right to recognition, security, protection and legal certainty and equal treatment before the law.

Article 28 Paragraph (2) Everyone shall be free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment.

Article 28J Paragraph (1) Every person shall respect the human rights of others in an orderly society, nation, and state,

Stigma also remains a constraint faced by people living with HIV, this is in line with the results of research conducted Sosondoro Ossia revealing the housewife may have experienced internal stigma, which may have an impact on HIV prevention and treatment of AIDS. Twenty-three housewives who are infected with HIV were interviewed in a qualitative study conducted in North Jakarta. Data were analyzed using a phenomenological approach. Seven themes emerged to explore the internal stigma housewife, and construct the essence of internal stigma. The essence of a housewife who are infected with HIV who have internalized the stigma can be illustrated as an Indonesian proverb that “Segan Living Dead Not Want”²⁵⁵

Constraints also felt by women living with HIV at the time of undergoing HIV prevention from mother to child (PPIA) because they do not want to disclose HIV status to sexual partners, thus adding to a series of problems within a family and enjoy their sex lives. These individual responses are also very complex and varied.²⁵⁶

The results of research that has been done in terms of the law of one of them is carried out by Nanik Trihastuti and Pujiyono of the Faculty of Law UNDIP²⁵⁷, by title “*Reconstruction Law of Human Rights Protection and Enforcement Housewife For Infected Risk Against HIV / AIDS from her husband*”. The result of this research is that HIV criminalization husband, the first, the concept of human rights protection and enforcement to prevent the risk of contracting HIV / AIDS from husband to wife. Second, is to criminalize the husband who really know that he was suffering from HIV / AIDS and the disease is a result of deviant sexual behavior / wrong (adultery / “like pocket”) and deliberately did not tell his wife that he had the disease at the time marital relationship.

But if you look at some countries, especially in the states in the United States, disclosure of HIV status is set in the Penal Code and the Federal Law, as it can be described as follows:

1. Philippines

The Philippines requires that people living with HIV / AIDS (PLWHA) to disclose HIV status to sexual partners as well as Article 34 of the Law of Prevention and Control of AIDS Philippines 1998 (RA 8504), that every person with HIV must disclose their HIV status and health condition to his partner or their sexual partner at the earliest time.

*“Any person with HIV is obliged to disclose his / her HIV status and health condition to his / her spouse or sexual partner at the earliest opportune time.”*²⁵⁸

2. Virginia

In Virginia, the same as the Philippines, where people living with HIV must disclose

their HIV status to a partner before doing anything sexual activity. Even if people living with HIV do not have the intention to transmit the disease, failure to disclose their HIV status before having oral sex, anal sex or vaginal sex is a violation of Class 1 as VA. C ODE ANN. 18.2-67.4: 1 (b) (2016).²⁵⁹

Violations carry a penalty grade 1 confinement in jail for up to 12 months and / or fines of up to \$ 2,500. Conditions offense for HIV exposure in the Virginia Statute requires the claimant to show that these people do not disclose their HIV status. However, it is often difficult for the defendant to prove that the disclosure did appear as a response to allegations that it did not happen because the relevant evidence is usually limited to the conflicting testimony of the accused and the complainant.²⁶⁰

To convict someone based on this provision, the prosecution must prove that the defendant engaged in sexual activity with the specific intent to transmit HIV. HIV transmission element unnecessary offense. Hypothetically, one could reveal their HIV status to a partner but still be prosecuted under the provisions of a crime if there is evidence to show that the individual intends to transmit HIV.²⁶¹

3. georgia

Begitupan in the state of Georgia, HIV status to be disclosed to sexual partners to avoid criminal prosecution. Georgia HIV exposure Statute targeting people living with HIV / AIDS (OHIDA) which do not disclose their HIV status before sex anal, oral, and / or penile-vaginal with others. This violation of the Statute resulted in criminal penalties of up to ten years in prison. Good intention to transmit HIV or HIV transmission is actually not necessary for the prosecution, it is as stated in the

²⁵⁷ Nanik Trihastuti and Pujiyono, 2014, *Reconstruction Law of Human Rights Protection and Enforcement Housewife For Infected Risk Against HIV / AIDS from her husband*, Journal of Legal Issues, Vol 43 (No. 4), UNDIP, p. 514-529

²⁵⁸ UNDP, in 2015, *HIV and the Law in South-East Asia*. Bangkok, UNDP, p. 70

²⁵⁹ *The Center For Hiv Law And Policy, 2017, Virginia, HIV Criminalization In The United States: A Sourcebook On State And Federal Hiv Criminal Law And Practice. Third Edition* www.hivlawandpolicy.org

²⁶⁰ Ibid.

²⁶¹ Ibid.

Act GA. C ODE A NN. 16-5-60 (c) (2016).²⁶²

Disclosure of one's HIV status is only an affirmative defense to prosecution. Viral load the defendant is not a consideration, and there is no defense if protection, such as condoms, used during sexual intercourse activity. Regardless of, at most, the risk of HIV transmission from oral sex is much sexual activity as it fell within the scope of liability legislation.²⁶³

4. Arkansas

Arkansas considers people living with HIV / AIDS (OHIDA) be a danger to the public when they engage in sexual behavior without disclosing their status or the parenteral transfer of blood or blood products. A law is universal and does not take into account the actual risk of transmission. Moreover, if people living with HIV involved in any of these actions by knowing their HIV status, they are criminally responsible and can be charged with a crime Class A. Sexual behavior including oral sex, anal, and vaginal and genital or anal penetration by any object, Ejaculation is not necessary for the prosecution. The scope of "transfer parenteral blood or blood products" (exposure via the mucous membranes or broken skin) is not defined, but potentially including blood or organ donor, sharing needles, spit, or bite. There is no intention to transmit HIV or HIV transmission is necessary for the prosecution. Conviction could result in a prison sentence of six to 30 years and fines of up to \$ 15,000, as contained in A RK. C ODE A NN. § 5-14-123 (a) (2016).²⁶⁴

All HIV-positive people in Arkansas who know their HIV status should tell your doctor or dentist about their HIV status before receiving care.²⁶⁵ Failure to meet these requirements is a Class A offense punishable by up to one year in prison, a fine of \$ 2,500, or both.

HIV / AIDS cases in Indonesia, es-

²⁶² *The Center For Hiv Law And Policy, 2017, Georgia, HIV Criminalization In The United States: A Sourcebook On State And Federal Hiv Criminal Law And Practice. Third Edition www.hivlawandpolicy.org*

²⁶³ *Ibid.*

²⁶⁴ *The Center For Hiv Law And Policy, 2017, Arkansas, HIV Criminalization In The United States: A Sourcebook On State And Federal Hiv Criminal Law And Practice. Third Edition www.hivlawandpolicy.org*

²⁶⁵ *Ibid.*

pecially in some provinces have been categorized as widespread as in Papua, and the category is concentrated in West Java. That is the case of HIV / AIDS is alarming.

Shifting HIV cases initially on high-risk groups, such as injecting drug users, female sex workers, high-risk men, transgender, and LBGT, it is now an increase in cases in low populations, such as pregnant women, housewives and children. This is evident by the number of AIDS cases in IRT reached 15.915 people. Women's rights to a superior in the health sector, especially in HIV disease as neglected.

With this, it is appropriate that government policies that really touches on the real problem at the moment, as the legislation in some countries.

B. DISCUSSION

1. Women's Rights

Based on Law No. 23 of 2004 on the Elimination of Domestic Violence, which is defined as violence in the household is any act against someone, especially women, misery or suffering physical, sexual, psychological, and / or negligence of household including threat to commit acts, coercion, or deprivation of liberty unlawfully within the domestic sphere.

Victims of domestic violence are mostly women, so it should get protection from the state and / or society in order to avoid and free from violence or threat of violence, torture or degrading treatment and human dignity.

Consequences in the case of HIV / AIDS on women is suffering physically and psychologically as well as the results of Ossie Sosondoro

that a housewife who are infected with HIV who have internalized the stigma can be illustrated as an Indonesian proverb that “Segan Living Dead Not Want”. This could explain that AIDS is forcing them to live in anxiety in all aspects of life but as a housewife, they have to keep thinking to keep fighting continued life, especially with regard to the future of children.

2. Morality

Cleaning places brothel as in Gang Doli Surabaya bring positive and negative impacts, positively that the region is now free from the hangout women commercial sex workers, but on the other hand the residents who come from out of town instead moved to areas others or to the street so as not monitored his health. They further grow and develop with various sexually transmitted infections that can be transmitted to men who like “snack”.

In Semarang, localization Sunan Kuning will follow in the footsteps Gang Doli Surabaya, but this plan failed, which was originally to be closed August 15th, 2019 for various reasons, among which is related to the readiness of the budget, the pros and cons in the community.²⁶⁶

Of the two examples of cases localization It is appropriate to do a deeper analysis of good and bad effects, so that the various aspects that will occur in it can be overcome, especially in the impact of the spread of sexually menular infectious disease such as syphilis, gonorrhea and HIV.

John Stuart Mill said that “the

only goal that makes the power can be enforced fairly in any civilized community members who opposed their will is to prevent someone injure another person”.²⁶⁷

3. Policy

Laws and public policy are variables that have a strong bond, so that the study of the wisdom of the government is needed to understand the role of the current law.²⁶⁸

Urgent need at this time if they see HIV cases continues to increase at the discretion of the IRT needs to be created in order to prevent transmission of the disease, as was done in some American states, such as Arkansas, Georgia, and Virginia even in the Philippines was already applied. In the United States until now there are twenty-one states that criminalize against people living with HIV.

When viewed on a responsive legal theory, initiated by Philippe Nonet and Philip Selznick, that this theory to cope with the strain of repressive legal theory, and the autonomous legal response to the dilemma that exists between integrity and openness. Signs of repressive laws are passive and opportunistic adaptation of the legal institutions of the social and political environment. Autonomous law is a reaction against against openness haphazard. Activity or his main concern is how to maintain the institutional integrity. To achieve these objectives, the legal isolate itself, narrowing its responsibilities, and receive a blind formalism in order to achieve an integrity “.²⁶⁹ Type responsive law is not a law that is open or adaptive,

²⁶⁶ Detik.com <https://news.detik.com/berita-jawa-tengah/d-4665101/penutupan-lokalisasi-sunan-kuning-semarang-diundur-ini-alasannya> downloaded 23 Agustus 2019

²⁶⁷ HLA Hart, 2009, *Law, Liberty, and Morality (law, the freedom of, and Morality)*, translation: Ani Mualifatul Maisah, Genta Publishing, Yogyakarta, p. 5-6

²⁶⁸ Esmi Warassih P, 2016, *Legal Institution, A Sociological Assessing, cet 4, Reader Masters, Semarang, p. 100*

²⁶⁹ Philippe Nonet and Philip Selznick, 2015, *Responsive Law, Translator: Raisul Muttaqien, Nusa Media, Bandung, p. 86-87*

to demonstrate a capacity to adapt is responsible, and thus the adaptation selective and haphazard.²⁷⁰

Public policy as defined by Thomas R. Dye is as whatever is chosen to do or not to do. While James E. Anderson said, Public policies are policies Reviews those developed by governmental bodies and officials. David Easton gives meaning policies as the authoritative allocation of values for the whole society.²⁷¹

Obviously from the description above shows that there is no definition of the same wisdom, but in essence is a must contain elements of value, purpose and means. "Interest" in this context is ideal Warassih according Esmi is a desired state will look at the policy objectives set by the government. Nevertheless, it is necessary elaboration of concrete and clear, while the "means" in this context is defined as something that can be used to achieve the means or purpose, as well as something that can be used for short-term, where one of them is legislation.²⁷²

Satjipto Rahardjo as the originator of the progressive law offered as an alternative in addressing the legal developments that have aggravated, so that the rule breaking is very important in the system of law enforcement. According Satjipto Rahardjo there are three ways to do rule-breaking, first with spiritual intelligence for the wake of the slump of law and not allow themselves unfettered old ways, both to search deeper meaning should be the new size in the running of law and state law, and the third, the law should do not run according to the principles of logic, but with feelings, awareness and engagement (compassion) to vul-

nerable groups.²⁷³

To address various legal issues in Indonesia are very plural, then it can no longer didmegggunakan philosophical approach, narmatif approach and socio-legal approach, then it is time to use legal pluralism approach (legal pluralism approach) were initiated by Werner Menski. Approach to legal pluralism approach relying on the linkage between the state (positive law), social aspects (socio-legal approach), and natural law (morality / ethics / religion).²⁷⁴

C. CONCLUSION

Pandemic HIV / AIDS in Indonesia has expanded to a population previously low-risk populations, namely Housewife. But this time the case is already on the highest position in the case of AIDS, so it's time to do the reconstruction laws unfavorable to women, as was done by some states in the United States.

1945 is already mandated in Article 28A, 2D Paragraph (1), 28I Paragraph (2), 28J Paragraph (1), and Law No. 23 of 2004 on Elimination of Domestic Violence.

Some legal theory offers an alternative to overcome the various problems that exist in the community, especially to raise the dignity, degrees, and the dignity of women in HIV / AIDS cases. Women are still considered to be a weaker party and keompok men as superior, so that is quite dominant in the household.

Legal responsive Philippe Nonet and Philip Selznick, law progrefis initiated Satjipto Rahardjo, and Werner Menski with legal pluralism approach, gives insights brilliantly to tackle HIV / AIDS in Indonesia were poured into a kebijakansanaan as stated by Esmi Warassih ,

270 *Ibid.* p. 87

271 *Esmi Warassih P, op. cit., pp, 101-102*

272 *Esmi Warassih P, op. cit., p, 102*

273 *Suteki, 2015, The Future of Progressive Law, Thafa Media, Yogyakarta, p. 38*

274 *Suteki, Ibid, p. 40*

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