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Legal Reconstruction in Indonesia Based on Human Rights

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Faculty of Law, Sultan Agung Islamic University

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“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

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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
Recontruction 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

Reconstruction Of Authority To Arrest In Doing Judge Accused Of Value-Based Justice

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Abstract

The authority of judges to make arrests based defendant subjective reasons contrary to the presumption of innocence, and the authority of PT and the Supreme Court judges to make an arrest for the purpose of examination is unfounded, because the PT and the Supreme Court did not conduct a physical examination of the defendant.

Keywords: Reconstruction, Judge Authority, Detention, defendant,

A. Preliminary

Article 1 (3) of the Constitution of the Republic of Indonesia Year 1945 stated that Indonesia is a country of law²⁷⁶, Indonesia as a country that adheres to state schools of law²⁷⁷, Is obliged to carry out development in the field of law and order to the order of society orderly, peaceful, just and prosperous. The context of the development of the law²⁷⁸ of course, must be interpreted as a manifestation of a deep thought about how national law is established, implemented and used to regulate people's lives, then to ditegakannya The enactment of Law No. 8 of 1981 on Criminal Proceedings or (Criminal Code) is penggati HIR (Herziene Inlandsch Reglement and as a

safeguard of Human Rights (HAM) less given in HIR. Human rights are the rights of human beings because of his birth, not because it was given by the community or the state²⁷⁹, In protecting the rights of citizens and create a fair legal process includes at least ²⁸⁰:

1. Protection from arbitrary actions of state officials;
2. The court is entitled to determine whether or not any suspects or defendants;
3. Court proceedings must be open to the public (not to be confidential);
4. The suspect and the defendant must be given guarantees to be able to defend

²⁷⁵ The author is Lecturer Faculty of Law, University of Nahdlatul Ulama (UNU) Cirebon, and is completing the Doctoral Program at the Law Faculty of Law, University Islam Sultan Agung Semarang.

²⁷⁶ Leden Marpaung, 1992, *the Criminal Case Management Process Part One*, Sinar Grafika, Jakarta, p. 1-3

²⁷⁷ Feature State laws: power sharing, teachings Trias politica. Ideology: State material law, the State not only provide legal protection to the public but also the State that provide welfare to the community.

²⁷⁸ Development of a national law that done in a planned, integrated, and sustainable in the national legal system that guarantees the protection of the rights and obligations of all the people of Indonesia based on the Constitution of the Republic of Indonesia Year 1945;

²⁷⁹ BN Marbun 2009, *Indonesia's Law Dictionary Second Edition Revised, Molds 1*, Pustaka Sinar Harapan, Jakarta, p. 29.

²⁸⁰ Mien Rukmini, 2003, *the Human Rights Protection Through the principle of Presumption of Innocence and Equality Principle Position in the Law on Criminal Justice Systems Indonesia*, Alumni, Bandung, p. 32

themselves fully.

Restrictions on freedom of human rights seemed at the time a person suspected of committing a crime, the law enforcement authorities to restrict their freedom, namely through arrest and detention. Related to the detention, Article 8 (1) of Law No. 48 of 2009 (Judicial Power Law) states “every person suspected, arrested, detained, prosecuted, or appear before the court shall be presumed innocent before the court decision that declare his guilt and has obtained permanent legal force “. This provision is known as the presumption of innocence (presumption of innocence).

According to article 1, paragraph (21) Criminal Procedure Code detention is the placement of the suspect or defendant in certain places by the investigator or the public penutut or judge by its adoption in the event as well as the manner contemplated Act. Judge detaining defendants who had been delegated by the Public Prosecutor, usually follow and / or forwarding Attorney, if the Prosecutor made no arrests, the judges were usually do not do. Unlike the case of Ahmad Dhani personnel of Band Dewa, whose arrest was recently carried out by the High Court of Jakarta after Ahmad Dhani is located in Rutan Cipinang as executed by the Public Prosecutor (Prosecutor) whereas Ahmad Dhani appealed the District Court decision that does not have the power fixed law. Based on this background the authors are interested in doing legal research.

1. Why is the authority of the judge in the arrest of the accused have not been based on values of justice?
2. Weakness judge in detaining the accused in Indonesia at this time?

3. How reconstruction authority of the judge in the arrest of the accused based on the values of justice?

This study is a qualitative research approach that departs sociolegal of constructivism²⁸¹ , Also through Empirical juridical approach is a method or procedure used to solve the problem by first examining the existing secondary data and then proceed with research on primary data in the field ²⁸², This approach aims to understand that the law is not solely as a statutory set of rules that are normative, but legal as *mengejala* community behavior in public life, interact and relate to aspects of society, socio-cultural aspects.

Results and Discussion

Criminal Procedure Code has been in force more than 38 years and was once dubbed as a masterpiece, it turns out, if considered carefully will find a variety of issues that need attention with regard to the formulation of a specific article in the Criminal Procedure Code²⁸³ , The problems that need attention are referred to with regard to judges the authority to make an arrest. Article 21 paragraph (1) Criminal Procedure Code states:

Detention or continued detention orders made against a suspect or defendant who allegedly committed the crime based on sufficient evidence, in terms of the circumstances which raised concerns that the suspect or the accused will escape, damage or destroy evidence or repeat a crime.

The reason of detention as stipulated in Article 21 paragraph (1) of the Criminal Procedure Code is subjective reasons. Other article relating to the authority of the judges did barrier against the accused in the

²⁸¹ See Sudarwan Danim, 2002. *Being a qualitative researcher, Faithful Reader, Bandung*. See also in Lexy J. Maleong 2005, *Qualitative Research Methodology, Rosda paper, Revised Edition, Bandung*, p. 165. Also in Anas Saidi, 2005 “*Qualitative Research Methods*”, *Papers Research Proposal Preparation Workshop, LIPI, Jakarta*. p. 6. And also in S. Nasution, *Naturalistk Qualitative Research Methods, Transito, Bandung*, hlm.12. see also Esmi Warassih 2006, “*Socio-Legal Studies: History and Progress Dynamics*”, *Paper Workshop, Dynamics Research Forum of Justice and the Ombudsman Magazine, Bandung*, p. 5. Also in Bambang Sunggono 2003, *Methods of Legal Research, King Grafindo Persada, Jakarta*, p. 103.

²⁸² Soerjono Soekanto, 1986, *Introduction to Legal Research, UI Press, Jakarta*, p. 52.

²⁸³ Djisman Naidoo 2006, “*Various Problems Appears in Connection with the formulation of the Criminal Procedure Code*” *Pro Justitia Law Journal, October 2006, Vol. 24, No. 4*. p. 321.

interests of examination include: as stipulated in Article 26 (1), Article 27 (1) and Article 28 (1) Criminal Procedure Code.

Police investigators and the prosecutors are law enforcement under the executive, both agencies tasked to solve the problems in the event of a crime, the investigator and the prosecutor on behalf of the State representing the victim to process, indict and prosecute the alleged perpetrators to justice. Investigator and prosecutor in performing its duty to arrest and detention are allowed to use the presumption of innocence, for the arrest and detention contrary to human rights. While the Judicial Power Act requires the judge to use the presumption of innocence in a dispute between the State with its people in terms of the State indicting people have committed criminal acts. Hakimlah duty to prove whether the defendant actually committed the crime or not, in the process of proving the trial judge should not be subjectively objective in accordance with the presumption of innocence. If the authority of the judge's arrest of the accused using subjective reasons, of course, the judge had removed the presumption of innocence that should be used in all civil and criminal proceedings and other litigation.

Article 27 paragraph (1) and Article 28 paragraph (1) Criminal Procedure Code, relating to the authority to make an arrest in the process of appeal in the High Court (PT) and / or the process of Cassation in the Supreme Court (MA), the provisions of these two Articles are not met, because PT and the Supreme Court did not examine the defendant, but only the decision of the District Court (PN) and the evidence that emerged in the trial PN.

Satjipto Rahardjo states that arbitrate indeed starting from texts (legislation), but let's not stop there. Text the general law that requires accuracy or sharpening creative when applied to real events in the community. In

²⁸⁴ Rif'ah, 2015, "Law Enforcement in Indonesia: A Hope and Reality", *Islamica Justitia Journal*, Vol. 12/1, January-June, 2015, p. 96.

²⁸⁵ E. Fernando M. Manullang 2007, *Reaching Law Fair*, Book Kompas, Jakarta, p. 20.

²⁸⁶ Arief Sidharta, 2007, *Meuwissen About Legal Development, Law, Legal Theory and Philosophy of Law*, Refka Aditama, Bandung, p. 19.

the end, whether the state law to provide benefits to humanity, does not rely on the sound of the articles of the law, but on the behavior of law enforcement can act beyond the call of duty. In the words of Ronald Dworkin, we need to be taking rights seriously and do the moral reading of the law. Arbitrate with the new text is the beginning of a long journey to realize the goal of keeping the law can bring about justice and benefits to humanity²⁸⁴,

Departing from the assumption justice becomes an objective value that must be met, of course, it's not just going to run smoothly in accordance with the perspective of the ideals of a nation's laws. Moreover, objectively something deemed to have meaning or value if the fulfillment factor element of utility (benefit) and importance (importance) and subjectively when factors fulfillment of need (requirement) and estimation (estimated)²⁸⁵, Arief Sidharta reveal flsafat that level, legal flsafat reflection conducted to ascertain the irregularities in the application of the law. The focus is tendentious systematically reflection about "legal fact" which should be considered as a realization (embodiment) of the presuppositions of the law (legal ideals)²⁸⁶, Thus the result of a feeling of reflection flsafat view the law will be more justice concerning the value orientation of view of human life, because therein will be fulfilled at the same time substantial elements and formal of the ideals of social justice law.

The authority of the judges in the arrest of the accused have not been based on values of justice, judges hold the defendants using subjective reasons contrary to the presumption of innocence. Examination of the accused in the trial process is only done in the PN, the trial in the PT and the Supreme Court did not examine the defendant physically, thus retaining referred to Article 27 paragraph (1) and Article 28 (1) is unfounded. Law accord-

ing to Satjipto Rahardjo intended for people not otherwise vote for the law, for the injustice and weakness judge authorized the detention of the accused had to be reconstructed, so that the applicable law for the benefit of people.

The authority of judges to make arrests, to be reconstructed by transferring authority to judge told the prosecutor the authority of incarceration in proceedings in the District Court replaced the authority of the State Attorney, the authority of incarceration in the process persidang PT delegated Into High Court, as well as the authority of incarceration in proceedings in the Supreme Court delegated to the Attorney Great.

Conclusions and suggestions

1.knot

1. The authority of judges arrest of the accused have not been based on values of justice, because judges use subjective reasons that are contrary to the presumption of innocence.
2. Weakness judge in detaining the accused in Indonesia at this time because it is not in all levels of justice, ie PT and MA requires the physical presence of the defendant.

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3. Reconstruction of judges authority to make an arrest in proceedings in the District Court replaced the authority of the State Attorney, the authority of incarceration in the process persidang PT delegated Into High Court, as well as the authority of incarceration in proceedings in the Supreme Court delegated to the Attorney General.

2.Suggestion

1. Judges at all levels should uphold the presumption of innocence in dispute resolution the State against the people suspected of criminal offenses melakuka.
2. Judges should not be burdened at all levels of authority to make arrests, because the detention is based on subjective reasons that should not be owned by the judges to convict a person before proceeding.
3. Should the authority of the judge to make an arrest soon reconstructed.

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