



# THE 3<sup>rd</sup> INTERNATIONAL CONFERENCE AND CALL FOR PAPER

**"Legal Development in Various Countries"**



**IMAM AS SYAFEI BUILDING**  
 Faculty of Law, Sultan Agung Islamic University  
 Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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## **The 3<sup>rd</sup> PROCEEDING**

“Legal Development in Various Countries”

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## INFORMATION OF THE CONFERENCE AND CALL PAPER

**WORLD CLASS ISLAMIC UNIVERSITY**  
**UNISSULA**  
SULTAN AGUNG ISLAMIC UNIVERSITY

# Welcome to Participants on International Conference

## "LEGAL DEVELOPMENT IN VARIOUS COUNTRIES"

*This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.*

**KEYNOTE SPEAKER:**  
**Prof. Henning Glaser**  
Thammasat University, Thailand

**IMAM AS SYAFEI BUILDING**  
Faculty of Law, Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Organized by : Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang-Indonesia

**SPEAKERS :**

1. Prof. Shimada Yuzuru  
Nagoya University, Japan
2. Prof. Dr. Ruzian Markom  
Universitas Kebangsaan Malaysia, Malaysia
3. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M  
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Indonesia, September 05<sup>th</sup> 2017

**WORLD CLASS ISLAMIC UNIVERSITY**  
**UNISSULA**  
SULTAN AGUNG ISLAMIC UNIVERSITY

# International Conference

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Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Organized by : **Faculty of Law UNISSULA**  
Semarang-Indonesia

**FACULTY OF LAW**  
Sultan Agung Islamic University

5  
September  
2017

**SPEAKERS :**

1. Prof. Shimada Yuzuru  
Nagoya University, Japan
2. Dr. Hilaire Tegnau, LL.M.  
Faculty of Law, Sorbonne University
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5. Assoc Prof. Dr. Ahmad Zaharuddin S.  
Universitas Utara Malaysia, Malaysia
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Sultan Agung Islamic University, Indonesia

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day: Tuesday

Date : September 5<sup>th</sup> 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3<sup>rd</sup> Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584 Fax.(024)6582455  
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AND CALL FOR PAPER  
“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”**

---

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## PREFACE

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Assalamu'alaikum, Wr. Wb

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 Tegnan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from SebelasMaret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third 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 to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development 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.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5<sup>th</sup> 2017

**Chairman of the Committee,**



**Dr. Anis Mashdurohatun, S.H., M.Hum**  
**NIDN : 06-02105-7002**

## GREETING FROM THE DEAN OF FACULTY OF LAW

---

*As-salamu'alaikum Wr. Wb.*

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Legal Development in Various Countries**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on September 5<sup>th</sup> 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.

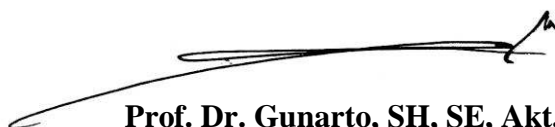
Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme “**Legal Development in Various Countries**” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

*Wassalamu'alaikum Wr. Wb.*

Semarang, September 5<sup>th</sup> 2017

Dean,



**Prof. Dr. Gunarto, SH, SE, Akt, M.Hum**  
NIDN.062004670

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**THE EXISTENCE AND RECONSTRUCTION OF SALE AND PURCHASE FIQH  
MADHAB SYAFI' I IN GLOBALIZATION ERA  
(Sale and Purchase Practice Study in Pondok Pesantren Tahfidzul Qur'an Al-  
Asy'ariyah Wonosobo Central Java and  
Pondok Pesantren Al-Munawir Krpyak Jogjakarta)**

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## **A. INTRODUCTION**

The influence of globalization has implications or impacts in many countries or nations. It is apparently based on two assumptions. First, at least to some degree, the actors or subjects of globalization are the industrialized nations. Secondly, worries, anxieties, or even the fear of negative or especially negative effects or impacts from globalization are generally felt especially by developing countries. They are the object of globalization, instead of subject. Nevertheless, both because of the dependence of developing countries on developed countries in various fields, finance, economics, and technology, or the desire to pursue progress, consciously or unconsciously, the developing countries actually support the process of globalization. (H.A.R. Tilaar, 2005: 165)

In its development, the flow of globalization also entered the world of boarding schools. Pondok Pesantren as an educational institution is not only identical with the meaning of Islam, but also contains the meaning of local wisdom (Indonesia), because its existence began to spread in Indonesia in the 7th century period (M. Enung K. Rukiati and Fenti Hikmawati, 2006: 20). Tradition of pondok pesantren at least has five elements namely, house, mosques, students, teaching the books of classical Islam (Pole Al-Shofro ') and kyai (Islamic teacher). This is what according to Martin Van Bruinessen, one of the great traditions in Indonesia is Pondok Pesantren, which aims to transmit traditional Islam as it is found in the classical books written centuries ago. (Martin Van Bruinessen, 1995: 17).

Pesantren is not only an educational institution that shapes the character of Muslims, but also a base in maintaining Islamic teachings associated with fiqh which mostly teach the jurisprudence of Syafii madhab (Karel A. Steenbrink, 1994: 45). Madhab fiqh Syafii (ideal-traditional) is the largest majority of Madhab in Asia including in Indonesia. In the development of the era of globalization, it has been reduced to become a minority madhab in the Muslim world today. Even  $\frac{3}{4}$  of Muslim in the world have been ruled by the rational and relative mahzab Abu Hanifah. So it is not impossible, the fiqh Syafii madhab will be abandoned his followers in line with technological advances and this era of globalization.

This is where the researcher is interested to study the existence and reconstruction of trading (selling-buying) based on Madhab Syafi'i in pesantren in the middle of globalization. Pondok pesantren which served as the object of this research are PPTQ Al-Ash'ariyah Wonosobo and PP Al-Munawir Krapyak Jogjakarta. The formulation of the problem in research are, (1) How is the existence of Sale and Purchase in PPTQ Al-Asy'ariyah Wonosobo Central Java and PP Al-Munawir Krapyak Jogjakarta?, (2). How to reconstruct fiqh sale and purchase in PPTQ Al-Ash'ariyah Wonosobo and PP Al-Munawir Krapyak Jogjakarta in the middle of globalization?

This study aims to explain the existence of fiqh sale and purchase of madhab Syafi'i in Pondok Pesantren al-Munawir Krapyak Jogjakarta, and explain the reconstruction of jurisprudence trading in the midst of globalization.

This research is a qualitative research, it was conducted by using multi-case studies. It is said to be a compound case study because the boarding schools used as a research object were not only one but there are two boarding schools, namely PPTQ Al-Asy'ariyyah Wonosobo Central Java which is in the countryside, and PP Al-Munawir Krapyak Jogjakarta which is in the middle of urban areas. The paradigm used in this research is the paradigm constructivism. Constructivist paradigm is a paradigm that almost the antithesis of the notion that lays observation and objectivity in finding a reality or science. This paradigm views social science as a systematic analysis of socially meaningful action through direct and detailed observation of the social behaviors concerned with creating and maintaining / managing their social world. (Dedy N. Hidayat, 2003: 3).

This study used two approaches, namely socio-anthropological and phenomenological approach. (Turnomo Rahardjo, 2005: 44). In the socio-anthropological approach, the

researcher attempted to enter the boarding school, and found to integrate with the elements of the boarding school which were the object of study, but not soluble with the values being sought. While through the Phenomenological Approach the researcher tried to understand the phenomenon from the point of view of the person experiencing the phenomenon himself, how they understand the situation, or interpret the incident. It was not intended to measure the extent or extent of an event, or explain the cause of the event. (Turnomo Rahardjo, 2005: 44). The data collection was done by the method of observation, interview, and documentation study, while data analysis used is descriptive qualitative analysis critical.

## **B. RESULTS AND DISCUSSION**

### **1. Existence of Sale and Purchase at Pondok Pesantren**

Along with the current globalization pattern or model of sale and purchase in PPTQ Al-Asy'ariyah Wonosobo Central Java and PP Al-Munawir Krapyak Jogjakarta, they experienced shift from traditional pattern (syafiiyah) to modern patterns (hanafiyah) such as online and self- /supermarket. One of the arguments is that buying and selling like this is in accordance with the nature and character of modern man who is very practical, simple, innovative, and much help in his life.

In practice, the practice of fiqh sale and purchase in PPTQ Al-Asy'ariyyah Wonosobo Central Java is implemented in (1). Warung Serba Ada (Waserda) "Al-Hikmah" (2). Photo Studio "Al-Lion" (3). Photocopy of El-Nusa, (4). Bahana Printing. While Practice muamalah on PP Al-Munawir Krapyak Jogjakarta among them are Kopontren, Mini Market, and Bookstore/book and so on.

### **2. Reconstruction of Sale and Purchase Fiqh**

The most important aspect of the fiqh muamalah in relation to the sale and purchase is the law of the transaction which includes general principles and special provisions. In the sale and purchase transactions the most significant thing concerning the validity of legal buying and selling is akad. The covenant generally in the opinion of the scholars of 'Shafi'iyah, Malikiyah and Hanabilah, is, "Everything done by a person on the basis of his own wishes, such as waqf, divorce, liberation, or something that requires the desire of two people such as sale-purchases, pledge".

Based on the contract, something that needs to be reviewed further about the transaction are as-Salam and Istishnah transactions, both are two types of transactions that prioritize the use of the contract with suspension or hasten the delivery of goods according to the agreement in the contract which is the object of the study.

#### **a. Salam Akad**

Actually there is no fundamental difference among scholars about whether or not this practice of greeting is done. The majority of salaf and khalaf scholars from all fiqh agreed that the greetings allowed and ruled by Allah Swt, both in the Qur'an and through the elaboration of Prophet Muhammad SAW. The only proposed text of hadith used by some scholars such as Ibn Musayyib and others. Among the arguments state the permissibility of greeting practices as mentioned by fiqh scholars is al baqaroh verse 282. Also in Mausû'ah Al Um, Imam As Syafi'I RA. said about ijma 'ulama about the permissibility of salam as follows: "... Salaf or salam may be according to the sunnah of the Prophet. and atsar and there is no difference among the scholars, as I know ".

If classified terms are met in the greeting transactions in accordance with the pillars, then any existing element must meet certain conditions. Terms that must be met in aqad salam we can differentiate into two. First, the general terms, it includes the conditions that must be met in every contract of sale and has been agreed by the scholars. The requirements are as follows: (1) The aqad (2) Ijab and qabul connection are not hung on condition. (Nasrun Haroen, 2007: 105); (3) The suitability between lafadz qabul and the consent. Second, the special conditions on lafadz aqad salam are as follows: (1). Ijab may only use lafadz salam or salaf. (2) There shall be no khiyâr condition. (3). Mentioned where the delivery of goods if the place can only be reached by using the cost. (4) Mentioned time of delivery of goods known together. According to Malikiyah there are at least 15 days after the contract occurred. (5) Mention the properties, type, shape, and size of the goods.

#### **b. Istishna' Akad**

Some scholars claim that in essence Muslims de-facto have agreed to knit consensus (ijma ') that istishna' contract is a justified contract and has been carried on since time immemorial without a friend or ulama'pun deny it. Sale and purchase istishna 'is a form of transaction that is closely related to greetings. In this case about istishna 'and greetings,



istishna' itself is still concerned with the greetings, even most of the classical fiqh scholars define istishna 'as a modified form of greeting.

Istishna' means asking the manufacturer to make certain items with certain characteristics. In addressing this contract, the classical ulama are divided into two opinions. The majority of Fiqh Hanafiyah clerics allow istishna transactions of the salam, they also require the terms of greetings to istishna '. Hanafiyah argues that istishna may be 'with the proposition of human need for him. In addition they also pegged that the Messenger of Allah. He asked for a ring.

Sale and purchase Istisna 'is a type of transaction based on certain criteria (which is not common) members may pay the order when it is still in the process of making or after the item is finished in one way or installments. The istishna business model 'is permissible by jumhur fuqaha, although they differ on the merging of the salam type system, then under these conditions must follow very difficult requirements because of the possibility of madharatnya, surrendering the price in the aqad assemblies, according to the jumhur ulama, or for three days.

### **3. Reconstruction of Sale and Purchase Practices**

Along with the current globalization pattern or model of sale and purchase in PPTQ Al-Asy'ariyah Wonosobo Central Java and PP Al-Munawir Krapyak Jogjakarta also experienced a skaligus shift from traditional pattern (syafiiyah) to modern patterns (hanafiyah) such as online and self- /supermarket.

#### **a. Buying and selling via online**

Buying and selling via online is a buying and selling contract that is done by using electronic facilities (internet) either in the form of goods or in the form of services. (Ade Manan Suherman, 2002: 179). It can also be interpreted as an agreed contract by determining certain characteristics by paying the price first and then the goods are delivered later "(W.A. Urnomo, 2000: 4).

In the execution of online buying and selling transactions, as well as the ordinary sale and purchase transactions conducted in the real world, conducted by the parties concerned, although in the sale and purchase online this party did not meet directly with each other, but related through the internet. Ijab Qabul can be done via SMS, WA and other social media to

reach agreement between seller and buyer. In the implementation of online buying and selling transaction, related parties are among others: 1). Seller or entrepreneur who offers a product through the internet as a business actor. 2). The buyer or the consumer is any person who is not prohibited by law, who receives an offer from the seller or business actor and wishes to conduct sale and purchase transactions offered by the seller / business actor. 3). Banks as the channel of funds from buyers or consumers to sellers or business actors / merchants, because the sale and purchase transactions electronically, sellers and buyers are not in direct line of sight, because they are located in different locations so that payment can be made through bank intermediaries. 4). Provider as internet access service provider. (Andi Sunarto, 2009: 94).

In the implementation of online sale and purchase transactions basically have in common with the conventional buying and selling mechanism, the different is the system or tool used one is done online, the other is manually (offline). This is in accordance with the opinion of Janus Sibalok, "This sale and purchase transaction can also be distinguished in 3 (three) stages, namely pre-transaction stage, transaction stage (the real), and post-transaction phase. Transactions using e-mail can be done easily. Both parties must have e-mail address. "(Janus Sibalok, 2010: 69).

In the implementation of buying and selling transactions via internet sellers and buyers alike use social media to facilitate direct contact between both parties, and the pre-transaction of its purpose to send personal data seller and buyer before the occurrence of payment, and after-sale transaction after the transaction . Before making a transaction, the buyer must already know the e-mail address, the type of goods and the amount to be purchased. The buyer writes the product name, product quantity, shipping address and preferred payment method. The buyer will then receive a confirmation from the merchant (business actor or seller) of the ordered goods order. (Litbang Wahana, 2001: 63).

Electronic buying and selling transaction is a legal relationship which is done by combining network from computer based information system with communication system based on network and telecommunication service. Implementation of transactions via internet is done in several stages, as follows: Bid, acceptance, delivery, and payment. Buying and selling via the internet (online) which actually includes buying and selling via phone, sms and other telecommunications tools, then the most important thing is there are goods traded, halal and clear by hers.

Contemporary scholars such as Sheikh Muhammad Bakhit al Muthi'i, Mushthofa az Zarqa ', Wahbah Zuhaili and Abdullah bin Mani' argues that transactions with modern devices are valid on the condition that there is clarity in the transaction, the above opinion is based on, First, the opinion of many scholars in the past who claimed the validity of the transactions via correspondence and if the consent (first-party revelation) after the arrival of the letter into the hands of the second party. Similarly, it is given the validity of the transaction by shouting. Second, what is meant by the requirement of 'unity of transaction assemblies' is the existence of a time which at that time two people who make transactions busy with transaction problems. It is not the intention that there are two people who transact in one place. (Wahbah al Zuhaili, 2006: 339).

Majma 'Fihi Islami in his sixth congress in Jeddah also stipulated that it may enter into transactions with modern means of communication. This transaction is assessed as a two-person transaction in one place provided that the conditions are met. However, it is not permissible to use these facilities as currency exchange transactions because the sharf is required to handover directly. Similarly, in salam transactions, because in salam transaction the capital must be submitted as soon as the transaction is executed. However, according to Wahbah Zuhaili, if there is a handover of the currency in the sharf transaction and capital in the transaction of salam, it can be submitted premises using the means of modern communication then the transaction is legitimate and this is something that allows for some global era transaction model.

Based on the explanation, the assembly contract in the sale and purchase online (via internet) is the time of communication used to discuss the transaction. If the transaction is written then the transaction board is the arrival letter or writing from the first party to the second party. If qobul is delayed with understanding when the letter until there is no qobul from the second party then the transaction is not valid. Shaykh Muhammad Bakhit al-Muthi'i was asked about the law of making transactions by telegram. His reply, "telegram is like the law of correspondence. Only the telegram was faster. But there may be mistakes "(Muhyiddin Ali, 2003: 25).

Based on the above opinion it can be understood that there is a necessity for clarification by existing means at this time such as telephone, via internet or others, such as telegram is fax. For other means it may be the same as the telephone and telegram in the

speed and clarity of communication or better still. If it is the same then the law is the same, however, if it is better it is certainly more worth to be allowed.

#### **b. Second, Sell-Buy Supermarket (Supermarket)**

Along with the current globalization of the world trade increasingly experience its own patterns, to the more practical. Technical implementation is no longer using "ijab and qabul", and that does not use qabul ijab is in the language of fiqh called "sale and purchase mu'athah" (give each other and receive), because the actions of the parties who have mutual understanding of the transaction with all its legal consequences. Activities like this often occur in supermarkets, supermarkets, malls, department stores, shopping centers and so on, where there is no bargaining process in it.

The buying and selling system of self-service is done through deed transaction. This can be called by ta'titi or mu'âtah (mutual giving and receiving). Akad "al-Mu'athah is a contract of sale by taking and giving something without having to speak. (Sayyid Sabiq, 1997: 47). The existence of this action from parties who have mutually understand the deed of the transaction with all the legal consequences. This often happens in supermarkets where there is no bargaining process. The buyer has known the price of the goods in writing on the goods. At the time the buyer comes to the checkout table indicates that among them will conduct a transaction (akad) (Imam al-Baihaqi, al-Maktabah al-Shamilah: 263). Therefore, if viewed from the transaction process then according to the study of legal jurisprudence sale in supermarkets, supermarkets and the like is legitimate.

### **C. CONCLUSION**

Based on the above discussion and analysis, it is concluded:

1. The practice of buying and selling Fikih Madhab Syafii in the pesantren world (PPTQ Al-Asy'ariyah Wonosobo Central Java and PP Al-Munawir Krapyak Jogjakarta) has changed from the traditional Syafii madhab trading pattern to the modern buying and selling pattern (madhab Hanafi), which is more practical, simple and aggressive in accordance with modern human charter. One factor of such a change in buying and selling practices is technological progress in this global era. So in the future did not rule out the jurisprudence of Syafii madhab many left by his followers themselves.

2. In essence, the principle of buying and selling desired by Al-Qur'an, As-Sunnah, also in fiqh formulated by the fuqaha (especially madhab Syafii) is a market-based and modern market-based buying, both in terms of contract and system transactions, such as online trading, supermarkets, supermarkets and hypermarkets and the like. So in the future it can be predicted that the modern market can exist, while the traditional market will sink along with the development and technological advances in various fields in this life.

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