

August 29th 2018

THE 4th INTERNATIONAL AND CALL FOR PAPER

Legal Construction and Development in Comparative Study
The Role of Indigenous and Global Community in Constructing National Law

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

UNISSULA PRESS

ISBN. 978-602-5995-94-1

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Reviewer:

Prof. Dr. H. Gunarto, S.H., S.E., Akt., M.Hum

Dr. Hj. Anis Mashdurohatun, S.H., M.Hum

Prof. Henning Glaser

Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM

Prof. Shimada Yuzuru

Prof. Associate Dr. Dr. Ahmad Zaharudin Sani

Dr. Hilaire Tegnan

Editor :

Dr. Amin Purnawan.,S.H.,CN.,M.Hum

Dr. Hj. Widayati.,S.H.,M.H

Dr. Hj. Sri Endah Wahyuningsih, S.H., M.Hum

M. Abdul Hadi.,SE

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Hal i-xii, 1-447

Cetakan Pertama Tahun 2018

Penerbit UNISSULA PRESS

Jl. Raya Kaligawe Km. 4 Semarang 50112

PO BOX 1054/SM,

Telp. (024) 6583584, Fax. (024) 6594366

ISBN. 978-602-5995-94-1

INFORMATION OF THE CONFERENCE AND CALL PAPER

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WORLD CLASS ISLAMIC UNIVERSITY
SULTAN AGUNG ISLAMIC UNIVERSITY

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THE 4th INTERNATIONAL AND CALL FOR PAPERS

"Legal Construction and Development In Comparative Study"
The Role of Indigenous and Global Community in Constructing National Law

29-30 August 2018

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

INVITED SPEAKERS :

1. Prof. Henning Glaser
Thammasat University, Thailand
2. Dr. Hilaire Tegnau, LL.M.
Faculty of Law, Sorbonne University
3. Prof. Shimada Yuzuru
Nagoya University, Japan
4. Prof. Dr. Topo Santoso, S.H., M.H.
Indonesia University (UI), Indonesia
5. Dr. Hj. Sri Endah Wahyuningsih, S.H., M.Hum
Sultan Agung Islamic University, Indonesia

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

Day : Wednesday

Date : August 29th 2018

Time : 08:00 - 15:00 pm

Place : Imam As Syafei Building

Faculty of Law, Sultan Agung Islamic University

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584

Fax. (024) 6582455 Semarang 50112

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AND CALL FOR PAPER**

“Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)”

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PREFACE

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, HilaireTegnan, 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.

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

Wassalamualaikum, Wr. Wb

Semarang, August 31th 2018

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 is an absolute act that we must say after conducting the International Conference and Call for Paper by theme : “Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)” which was held by Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang, on August 29th 2018.

This conference tried to reviews different theories of legal development focusing on The Role of Indigenous and Global Community in Constructing National Law in order to highlight their similarities and differences. In the field of law, the substance of the discussion does not lie in 'whether the law is traditional because of the heritage of the past or not', but on the meaning of justice contained in the law. Often in discussing legal matters, we are caught up in the understanding of law in a procedural sense, not a law in a substantive sense-that satisfies the sense of justice. So it is not realized, there is a reduction of the meaning of the law substantively (which meets the sense of justice) becomes law procedurally. Especially when human life enters the era of globalization characterized by modern, as well as loaded with contemporary challenges and issues.

Globalization, in general people understand it is a process in the life of mankind to a society that covers the whole globe. This process is possible and facilitated by advances in technology, especially communication and transportation technology. Such understanding is not much different from the understanding of globalization as a process that refers to "a single interdependent world in which capital, technology, people, ideas, and cultural influences flow across borders". With such understanding, we are gradually going to live in a one world where individuals, groups and nations become more interdependent. In the global human society there will be patterns of social relationships that are different from before. And that too is a portrait of social life not found before.

Therefore, to discuss more about legal construction and development, Faculty of Law, Sultan Agung Islamic University was confidence to conduct a conference by the theme “Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)” 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 had contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, August 31th 2018

Dean,

A handwritten signature in black ink, consisting of a long, sweeping horizontal line that curves upwards at the end, followed by a small vertical stroke and a hook.

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

TABLE OF CONTENTS

Front Page	i
Information of the International Seminar	ii
Committee Composition	iv
Preface	v
Greeting From The Dean Faculty of Law	vi
DEVELOPMENT OF THE CONSTITUTION AND CONSTITUTIONALISM IN JAPAN: TRADITIONALISM VERSUS MODERNISM (FIRST DRAFT, PLEASE NOT QUOTE WITHOUT THE CONSENT OF THE AUTHOR)	
Shimada Yuzuru	1
COMPARATIVE LAW, LEGAL REFORM AND LEGAL POLICY: HOW TO HANDLE ECONOMIC CRIMES IN GLOBALIZATION ERA?	
Topo Santoso	13
THE IMPLEMENTATION OF FLEXIBILITY PUNISHMENT PRINCIPLES IN ISLAMIC LAW IN THE RENEWAL OF INDONESIA'S CRIMINAL CODE	
Sri Endah Wahyuningsih.....	24
THE ROLE OF INDIGENOUS AND GLOBAL COMMUNITY IN DEVELOPING NATIONAL LAW IN FRANCE	
Hilaire Tegnau.....	34
INDIGENOUSNESS AND THE GLOBAL IN THE CONSTRUCTION OF MODERN STATE AND LAW IN THAILAND	
Henning Glaser.....	41
THE ROLE OF INVESTIGATOR IN CRIMINAL OFFENCE COMMITTED BY SOMEONE INDICATED BY MENTAL DISORDERS	
Kadek Pande Apridya Wibisana.....	56
EFFECTIVENESS OF NARCOTIC ADDICT REHABILITATION SHARE TO SUPPRESS CRIME NARCOTICS (STUDY IN LOKA REHABILITATION OF THE NATIONAL NARCOTICS AGENCY RIAU ISLANDS PROVINCE)	
Alwan Hadiyanto.....	64
THE IMPACT OF GLOBALIZATION ON THE PREVENTION AND THE SUPPRESSION OF AIRCRAFT HIJACKING IN INDONESIA	
Adya Paramita Prabandari, Agus Pramono, Supanto.....	81

THE COUNTERMEASURES OF THE PROLIFERATION OF RADICALISM IN INDONESIA IN THE NATIONAL SECURITY PERSPECTIVE Airlangga Surya Nagara, Isharyanto, Hartiwiningsih	89
THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA: THE BASIS OF THE HIGHEST NORMATIVE ARRANGEMENT OF MASS ORGANIZATIONS IN INDONESIA Elizabeth Ayu Puspita Adi, I Gusti Ayu Ketut Rachmi Handayani, Supanto.....	96
INVESTIGATION PROCESS OF FIDUCIARY CRIMINAL ACT IN SPECIAL CRIMINAL UNIT, POLRESTABES OF SEMARANG CITY Bambang Purwanto	102
REINFORCEMENT OF REGIONAL REGULATION ON ERADICATION OF PROSTITUTION CONDUCTED BY SATPOL PP, BATANG REGENCY Bibet Wiwia Reno	111
ADULTERY LEGAL REVIEW IN ISLAMIC CRIMINAL LAW AND INDONESIAN CRIMINAL LAW Fahri Sundah	121
IMPOSITION OF SANCTIONS ON INVESTIGATORS WHO COMMIT VIOLENCE IN THE INVESTIGATION PROCESS AT KUDUS POLICE STATION Fenny Wulandary	133
EFFECTIVENESS OF THE IMPLEMENTATION OF THREATS OF ADDITIONAL CRIMINAL SANCTIONS TO RETURNS THE STATE FINANCIAL LOSSES IN CORRUPTION CRIMINAL ACT Kasmanto.....	143
LEGAL'S ROLE POLITICS AND THE EFFECT OF POLITICAL PARTIES IN GOVERNMENT (Legal Politics of the Role and Interest of Political Parties in Government) Moureta Vitria Loreent.....	153
THE EFFECTIVENESS OF LEGAL ENFORCEMENT ON BLESPEMNY OF RELIGION IN CIREBON POLICE AREAS Mustamid.....	160
ACHIEVING ETHNICS ORIENTED BUSINESS THROUGH LAW ENFORCEMENT Syafudin Makmur	169
LEGAL PROTECTION FOR DEBTORS IN SELLING OF IMMOVABLE GUARANTEED OBJECTS BELOW THE MARKET PRICE IN INDONESIAN POSITIVE LAW Redy Handoko.....	186

A MALAYSIA OF CITIZENS: ETHNICITY, MEMBERSHIP AND POLITICS OF MERGER	
O. Argo Victoria.....	194
THE DOCTRINE OF PUBLIC POLICY AS A GROUND FOR THE ANULLMENT OF ARBITRAL AWARD IN INDONESIA	
Anang Shophan Tornado, Yati Nurhayati , Ifrani	204
RECONSTRUCTION OF SAVING FINANCIAL STATE LOSSES IN HANDLING CRIMINAL ACTION IN INDONESIA THROUGH JUSTICE-VALUE BASED	
Bastian Lubis	211
IMPLEMENTATION OF RISK MANAGEMENT ON SHARIA BANKING	
Faisal	222
CRIMINAL POLICY TOWARDS INSULTING AND DEFAMATION THROUGH SOCIAL MEDIA BASED ON JUSTICE VALUE	
Gomgom TP. Siregar.....	236
IMPLEMENTATION OF THE CORRECTIONAL SYSTEM IN INDONESIA BASED ON JUSTICE VALUE	
Syawal A Siregar.....	244
COMMUNITY PARTICIPATION IN THE SETTLEMENT OF CHILDREN CONFLICT WITH LAW THROUGH DIVERSION BASED ON JUSTICE VALUE	
Muhammad Ansori Lubis.....	251
GOVERNMENT OFFICIAL DISCRETION POLICY IN DECIDING PUBLIC POLICY BASED ON JUSTICE VALUE	
Mhd. Taufiqurrahman	262
COMPLETION OF BAD CREDITS IN BANKING FINANCIAL INSTITUTIONS BASED ON JUSTICE VALUE	
Muhammad Yasid	268
AUTHORITY OF YUDISIAL COMMISSION IN ENHANCING JUDGE CODE OF ETHICS BASED ON JUSTICE VALUE	
Maurice Rogers	277
NON-CASH PAYMENT SYSTEM IN ECONOMIC SYSTEM IN INDONESIA BASED ON JUSTICE VALUE	
Jonner Lumban Gaol	284
LEGAL ENFORCEMENT TOWARDS THE VIOLATION OF SPATIAL LAW IN SET BACK BUILDING (GSB) BASED ON JUSTICE VALUE	
Darwin Sinabariba.....	294

RECONSTRUCTION OF SALES RIGHTS OWNERSHIP BASED ON JUSTICE IN PUBLIC MARKETS MANAGED BY REGIONAL COMPANY IN CITY MARKET, MEDAN REGIONAL	
Novi Juli Rosani zulkarnain	300
PROVISION OF SANCTIONS ON THE APPLICABILITY OF DECREASING PERMIT ESTABLISHING BUILDING BASED ON THE JUSTICE VALUES	
Paterson Hasiholan Pardomuan Sibarani	309
LEGAL POLICY ON THE DYNAMICS OF DEMOCRACY IN INDONESIA BASED ON THE VALUE OF JUSTICE AND LEGAL CERTAINTY	
Arifin Sihombing.....	320
LEGAL PROTECTION ON CHILD VICTIMS OF PEDOFILIA IN INDONESIA BASED ON JUSTICE VALUES	
Sarma Siregar	329
THE SETTLEMENT OF BUSINESS DISPUTES IN ELECTRONIC TRANSACTIONS (E-COMMERCE) BASED ON JUSTICE VALUES	
Sarman Sinaga.....	346
POLICY OF COSMETICS DISTRIBUTION IN INDONESIA BASED ON JUSTICE	
Ria Sintha Devi	365
THE PROBLEMS IN MULTIPARTY SYSTEM IN THE INDONESIAN PRESIDENTIAL GOVERNMENT SYSTEM	
Widayati and Winanto.....	381
LEGAL ENFORCEMENT OF LAND FUNCTION CONVERSION (CASE STUDY IN KUNINGAN DISTRICT)	
Haris Budiman.....	391
CONSTRUCTION WORK CONTRACT IN GOVERNMENT BASED VALUE OF BENEFIT	
Herwin Sulistyowati, Sumarwoto	399
STUDY OF LAW NO. 11 OF 2008 CONCERNING ELECTRONIC INFORMATION AND TRANSACTIONS IN PROTECTING THE TRADE MARKET THROUGH ELECTRONICS BASED ON THE DEVELOPMENT OF CYBER CRIME IN INDONESIA VIEWED FROM THE PERSPECTIVE OF FREEDOM OF CONTRACT	
Putri Maha Dewi, Setiono, M. Hudi Asrori S	415
JURIDICAL REVIEW OF THE IMPOSITION OF ADDITIONAL PENALTIES FOR PERPETRATORS OF CORRUPTION IN INDONESIA	
Sumarno	425
REFORM OF LEGAL EDUCATION AS AN EFFORT TO PREVENT CORRUPTION	
Yasmirah Mandasari Saragih, Ariansyah	433

SOCIOLOGICAL JURIDICAL REVIEW OF THE CHILD COMMITTING THEFT CRIME AT THE DEMAK STATE COURT	
Achmad Sulchan, Bambang Agus Rianto	449
FUNCTIONALIZATION THE CUSTOMARY INSTITUTION AS LAW ENFORCEMENT EFFORTS IN WEST SUMATERA	
Otong Rosadi, Fitriati Fitriati	457
THE VERIFICATION OF CLOSE CIRCUIT TELEVISION (CCTV) STANDING IN INDONESIA POSITIVE LAW PERSPECTIVE AND ISLAMIC VALUES	
Ira Alia Maerani, Nuridin Nuridin.....	464
COMPARATIVE STUDY OF GUARANTEE LAWS ACCORDING TO ISLAMIC LAW AND CIVIL LAW IN POSITIVE LAW IN INDONESIA	
Lathifah Hanim, Aryani Witasari, Peni Rinda Listyorini.....	470
EXISTENCE AND FORMULATION OF REGIONAL LAWS ON INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL COMMUNITY IN INDONESIA	
Ariy Khaerudin.....	477
RISK OF THE USE OF FOREIGN WORKER	
Rahmatsyah Rahmatsyah.....	484
OVERVIEW THEORY OF LEGAL PROTECTION AGAINST THE DRIVER RESPONSIBILITY PARTNERS (PARTNERS PT. GO-JEK INDONESIA) UNDER LAW NO. 8 OF 1999 ON CONSUMER PROTECTION	
Aryani Witasari, Wahyu Ibnu Musthofa	492
ANALYSIS OF THE INDONESIAN CRIMINAL CODE ARTICLE NO. 359 IMPLEMENTATION ON MEDICAL MALPRACTICE CASE (Case Study on the Supreme Court Verdict No.: 365-K/Pid./2012)	
Mohammad Abdul Hakam	499
RECONSTRUCTION OF THE PROVISIONS OUTSOURCING	
Muhammad Andri	507
THE ROLE OF INDIGENOUS PEOPLES AND CUSTOMARY LAW IN THE DEVELOPMENT OF NATIONAL LAW THE PARADIGM OF PANCASILA	
Lathifah Hanim, MS. Noorman.....	515
THE ANALYSIS OF LEGAL PROTECTION ASPECTS FOR WOMEN AS VIOLENCE’S PERPETRATOR BASED ON JUSTICE VALUE	
Hadjar Handokojati	522
THE WEAK OF THE REGIONAL REPRESENTATIVES IN MAKING LAWS	
Herlina Hanum Harahap.....	530

REVIEW THE PRODUCTIVITY OF THE PEOPLE'S REPRESENTATIVE IN MAKING LAWS	
Muhammad Ridwan Lubis	538
HONEST AND FAIR GENERAL ELECTIONS TO ORGANIZE THE LAW	
Kasmudin Harahap	545
REGULATION FOR THE POLITICAL PARTY FUNDING IN INDONESIA	
Sudimun Sudimun	552
REGULATION OF CORRUPTION IN INDONESIA	
Danial Syah	559
LAND REDISTRIBUTION ARRANGEMENTS AND ITS CHALLENGES	
Raja Induk Sitompul.....	567
MANAGEMENT OF POLITICAL PARTIES FOR PREVENTION OF CORRUPTION	
Muhammad Evin Barus.....	574
STRENGTHENING THE CORRUPTION ERADICATION COMMISSION TO ELIMINATE CORRUPTION CRIMINAL ACTION	
Tajuddin Noor	580
LEGAL CODIFICATION RELEVANCE WITH THE NATIONAL LEGAL SYSTEM	
Khomaini Khomaini	588
DRAFT LAW ON CRIMINAL CODE AND LEGAL DEVELOPMENT IN INDONESIA	
Syaiful Khoiri Harahap.....	595
DYNASTIC POLITICAL TRADITION IN CONSTITUTION	
Ahmad Rusly Purba.....	602
RULES FOR ERADICATION OF TERRORISM AND STATE SECURITY	
Elawijaya Alsa.....	608
REFORM OF THE IMPLEMENTATION OF PROTECTION AND RECOVERY RAPE VICTIM'S CHILD RIGHTS	
Fatin Hamamah, Teguh Prasetyo, Anis Mashdurohatun.....	614
JUSTICE REPOSITIONING IN THE LEGAL POLITICS OF HEALTH INSURANCE	
Himawan Purwo Handuto, Teguh Prasetyo, Maryanto Maryanto	621
RECONSTRUCTION OF EFFECTIVE YEAR AUTOMATIC VEHICLE TAX PAYMENT TERMS	
Sami'an Sami'an	628

MORALITY AS A BASE IN POLITICS AND LEGAL ENFORCEMENT COMES FROM THE VALUES THAT LIVING IN THE SOCIETY (Reconstruction in Thinking and Behavior) Andi Aina Ilmih.....	634
LEGAL PROTECTION OF INDUSTRIAL DESIGNS BASED ON LAW NUMBER 31 OF 2000 CONCERNING INDUSTRIAL DESIGN Ali Ashadi.....	642
STUDY ON THE LEGAL PHILOSOPHY OF MARRIAGE LAW NUMBER 1 OF 1974 Bagus Gani Setiana.....	647
THE GOVERNOR GENERAL OF THE NETHERLANDS 'POLITICS OF LAW TO APPLY EUROPEAN LAWS TO PRIVATE PEOPLE (TOEPASSELIJK VERKLARING) Bambang Rudi Hartoko.....	653
THE LEGAL POLITICS OF THE RELIGIOUS JURISDICTION IN INDONESIA Bobby A. Rachman	659
ANALYSIS OF NOTARY OBLIGATIONS IN REPORTING TAX PAYMENTS AS TAXABLE ENTREPRENEURS Fani Pratama.....	663
THE ROLE OF THE CODE OF CONDUCT TO IMPROVE THE PROFESSIONALITY OF THE NOTARY Damar Dwi Kuncoro	667
THE LEGALITY OF MAKING NOTARY ACTIONS USING ELECTRONIC MEDIA Yodha Dhia Hogantara.....	671
EXISTENCE OF NOTARY DECTS RELATED TO THE PROCEDURE OF PAILIT PROPERTY RESERVATION Fikrina Setyo Rini.....	675
COMPARISON STUDY OF THE ROLE OF NOTARY IN THE PERSPECTIVE OF ISLAMIC LAW AND POSITIVE LAW IN RELATIONSHIP WITH SERVICE TO THE COMMUNITY Ardiansyah Alrawi.....	684
ROYA MECHANISM OF LAND RIGHTS AS COLLATERAL FOR BANKING BANKS BANNED BY AUCTION OFFICERS BECAUSE THEIR CREDITS ARE PROBLEMS Ade Alfriyan Rumrijono.....	689

THE ROLE OF LAND ASSET OFFICERS ON THE INSTALLATION OF LIABILITY RIGHTS WITH THE NAME OF THE DEAD OF THE WORLD OF DECLARATION OF DECLARATION OF DECLARATION PROCEDURES TO THE HERITAGE EXPERT	
Indana Fawaizah.....	694
ROLE OF NOTARY IN PROVIDING LEGAL PROTECTION AGAINST HOME OWNERSHIP CREDIT CONSUMERS THROUGH STANDARD AGREEMENTS	
Muhammad Muamal	699
IMPLEMENTATION OF PROPORTIONALITY PRINCIPLES IN MAKING NOTARY OF COLLABORATION AGREEMENT BY NOTARY	
Ahmad Tsekhudin	704
LEGAL ASPECTS OF AUCTION CONCERNS AS ASSETS AUTHENTIC IN THE EXECUTION AUCTION OF LIABILITY RIGHTS	
Etik Kuswanti	709
GOVERNMENT REGULATION IMPLICATIONS CONCERNING PPAT OFFICES TOWARD PPAT AREAS / WORKING AREAS	
Angga Wisnu Firmansyah	714
NORMATIVE STUDY OF DISTRIBUTION LAND STATUS FOR BUSINESS RIGHTS	
Daniel Budi Hardwianto.....	721

STUDY ON THE LEGAL PHILOSOPHY OF MARRIAGE LAW NUMBER 1 OF 1974

Bagus Gani Setiana

ganisetiana@gmail.com

Students of Master of Law, Faculty Of Law, UNISSULA, Semarang

Abstract

The enactment of the Marriage Law Number 1 of 1974 cannot be separated from the theological aspects of its formation. So it is not surprising that many of these positive laws conform to the provisions of the Scriptures. The aspects stipulated in the Act are ontological, epistemological and axiological aspects. With an understanding of these three aspects, it is hoped that peace and justice can be created. The provisions in this law are a means of regulating order in the lives of citizens. This article attempts to examine the Marriage Law Number 1 of 1974 in terms of legal philosophy

Key words: legal philosophy, marriage, positive law

A. INTRODUCTION

Humans are creatures of God who have various kinds of needs in their lives and every human being certainly wants to fulfill their needs appropriately to be able to live as a perfect human being, both individually and as part of society. Maslow said that humans will always be motivated to meet the needs of life and these needs have levels (hierarchy).¹

Based on Maslow's opinion as mentioned above, it can be said that one of the basic human needs is the need to channel his sexual desire, which is a physiological need. The channeling of sexual desire is carried out by humans in a variety of ways, some in unusual ways (for example same-sex relations) and in a common way (according to prevailing norms) which is known as marriage (marriage), but it also needs to be tolerated that marriage is not only for channeling human sexual needs, because marriage has a broader meaning or meaning. Through marriage, people will get offspring, so marriage is also included in the group that needs a sense of belonging and affection (the belongingness and love needs).

Meanwhile, one of the salient features of law in modern society is its conscious use by the community. Here the law is not only used to reinforce the patterns of habits and behavior that exist in society, but also to direct them to the desired goals, eliminate habits that are deemed unsuitable, create new patterns of behavior and so on. This is what is called a modern view of the law which leads to the use of law as an instrument.² In order for the purpose of interpreting law to be achieved, it is necessary to understand deeply about the existence of the law itself. So that it can be found the true nature of the law itself, its purpose and why people must obey the law. With a proper understanding of the meaning of law, it is hoped that there will be respect for the law and also generate enthusiasm for building a better constitutional state if it cannot be said to be a perfect law. By Theo Huijbers, a near-perfect understanding of the law itself is believed to be something that can shorten the gap between law and justice so that law is seen as an ideal that must be implemented.³

Today's life has many questions about the relevance of family life on the basis of marriage, this shows that there is doubt about family life that is built on the foundation of marriage. By considering these doubts, it is necessary to discuss two basic things, namely the meaning of the family and the meaning of marriage. In the positive legal system in Indonesia, family and marriage are regulated in Law Number 1 of 1974, so as to reduce doubts about the meaning of

¹ Abraham H. Maslow, *Motivation and Personality*, Harper & Row Publishers, New York, 1970, p. 35-47.

² Satjipto Rahardjo, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, 1991, p. 206

³ Theo Huijbers, *Filsafat Hukum*, Yogyakarta, Kanusius, 1995, p. 11

both of them need to be dissected the Law from its philosophical aspect. This is because the Law is a legal norm that is binding on all Indonesian citizens wherever they are.

In this paper will be explored how to study the philosophy of law on the nature of the meaning of family and marriage in the belief that a philosophical approach will be able to explore in depth the laws governing family and marriage. Several aspects of legal philosophy are presented in this paper, namely the ontology, epistemology and axiology of family life and marriage. With this study of legal philosophy, it is hoped that a better understanding will be obtained about the philosophical meaning of family and marriage.

On the basis of the background described above, the problems that can be raised in this paper are: How is the study of the Marriage Law Number 1 of 1974 viewed from legal philosophy?

B. DISCUSSION

1. Meaning of Marriage

Marriage or marriage is very important in human life because legal marriage results in the association between a man and a woman being honorable in accordance with the human position as an honorable being. The association of married life is cultivated in an atmosphere of peace, serenity and love between husband and wife. Meanwhile, children resulting from legal marriages that adorn household life are jewelry of household life as well as clean and respectful human survival.

Islamic law views sexual relations as something sacred, therefore marriage is not merely a sacrament but a contract made by both parties.⁴ So that in viewing the sexual relationship, the general principles of the agreement still apply, one of which is an agreement between the two parties.⁵ According to Imam Syafi'i, the meaning of marriage is a contract by which it becomes lawful for sexual relations between men and women. Meanwhile, according to the meaning of majazi (metaphoric) marriage means sexual relations.⁶ According to Sajuti Thalib, marriage is creating a family life between husband and wife and children and parents in order to achieve a life that is safe and secure (sakinah), a relationship that loves one another (mawaddah) and salin supports (rahmah).⁷

The purpose of marriage according to Allah's orders is to obtain legal offspring in society through the formation of a peaceful and orderly household.⁸ Meanwhile, the purpose of marriage in Islam is not only to fulfill the physical and spiritual needs of humans, but also to form a family and maintain and continue their descendants in living life in this world, apart from preventing adultery, in order to create peace and tranquility of the soul for the person concerned, peace of family and society.⁹

2. Marriage Arrangement by State

In Indonesia there is a positive law that regulates marriage, namely law number 1 of 1974. If you look closely at the articles of this law, it is hoped that human relations related to marriage can take place in an orderly manner. Thus, if humans implement the articles in the law, it means that humans carry out the ideal values of humanity. As stated in Article 1 of the Marriage Law regarding the definition of marriage, it is written that, Marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a family (household) that is eternally

⁴ Seyyed Hossein Nasr, *Islam: Agama Sejarah dan Peradaban*, Surabaya: Risalah Gusti, 2003, p. 80

⁵ Abdul Ghofur Anshori, *Pokok-Pokok Hukum Perjanjian Islam di Indonesia*, Yogyakarta: Citra Media, 2006, p. 26

⁶ Ibrahim Hosen, *Fiqh Perbandingan dalam Masalah Nikah dan Rujuk*, Jakarta: Ilya Ulumudin, 1971, p. 65

⁷ Sajuti Thalib, *Hukum Kekeluargaan Indonesia*, Jakarta: UI Press, 1974, p. 47

⁸ Mahmud Yunus, *Hukum Perkawinan dalam Islam*, Jakarta: CV Al-Hidayah, 1996, p. 1

⁹ Mohd Idris Ramulyo, *Hukum Perkawinan Islam: Suatu Analisis dari UU Nomor 1 Tahun 1974 dan Kompilasi Hukum Islam*, Bandung: Citra Aditya, 2004, p. 27

happy based on Almighty God '. The sound of this article indicates that marriage is not only seen as a civil bond but contains a religious dimension.

The provisions of the Marriage Law allow a man to marry more than one woman with severe conditions, namely:

- a. the wife cannot carry out her obligations as a wife;
- b. the wife has a disability or incurable disease;
- c. the wife cannot bear offspring.

Furthermore, to be able to submit an application to the court, the following cumulative requirements must be met:

- a. the consent of the wife or wives;
- b. there is certainty that the husband is able to ensure the necessities of life for their wives and children;
- c. There is a guarantee that the husband will treat his wives and children fairly.

This provision is ideal for a limitation, considering that the requirements given are very heavy. Allowances for polygamy can only be given when the wife is unable to carry out her duties as a wife, has a physical disability or an incurable disease or the wife is unable to bear offspring. This is because the purpose of marriage is to form a happy household, so these three things may be difficult for some people to achieve. Therefore, the Marriage Law provides an opportunity to have more than one wife.

Regarding the rights and obligations of husband and wife regulated in Article 31 of the Marriage Law. The rights and position of the wife are balanced with the rights and positions of the husbands in married life and in social life together in society. Each party has the right to carry out legal actions, in contrast to those stipulated in the Civil Code, which states that a married woman is generally not allowed to act alone in law, but must be assisted by her husband. (Article 108 of the Civil Code). He whom the law considers insufficient to act alone.¹⁰ Thus the Marriage Law is far more advanced than the Civil Code. Starting from this reason, the UUP removes the provisions for the enactment of the Civil Code based on the adage *lex posteriori derogate legi priori*.

Husband and wife are obliged to love each other, respect respect, be loyal and provide physical and mental assistance to one another. (Article 33 of the Marriage Law). The husband is the head of the family and the wife of the housewife (Article 31 UUP). Husbands are obliged by law to protect their wives and provide all the necessities of household life according to the husband's ability. Likewise, wives are required by law to regulate household affairs as well as possible. (Article 34 of the Marriage Law).

The wife's responsibility to manage household affairs as well as possible does not mean to standardize women's roles only in the domestic sphere, and men's in the public sphere. Likewise, the position of the husband as the head of the family does not mean that the position of women is under the position of men. As the most independent institution, the family has absolute authority in regulating the wheel travel of the household. There is no outside power even though the government has full authority to intervene against a family, except with the permission of the family concerned. Therefore, if Article 34 paragraph UUP only states that if the husband and wife neglect their respective obligations, they can file a lawsuit to the court because they are guilty of having committed a criminal act of neglecting these obligations.

The obligation to maintain and educate their children as well as possible is the obligation of husband and wife (Article 45 UUP). This obligation is valid until the child is married or can stand alone and this obligation continues to be their responsibility even though the marriage between the two people is broken. This is realized because the family is an educational institution that is very important in the formation and development of character, personality, ethics, morals and manners. The family is also an educational institution for social and religious values for each of its members.

¹⁰ Subekti, *Pokok-Pokok Hukum Perdata*, Jakarta: Intermedia, 1996, p. 20

From this it can be concluded that Law Number 1 of 1974 concerning Marriage contains good and universal values and is in accordance with the Scriptures. Therefore, these values should not only be reflected as moral and ethical values, but also as a religious legal obligation. So with Law Number 1 of 1974, the State means that it has played its role in regulating public order, one of which is marriage.

3. The Role of Legal Philosophy in Marriage Law

As it is known that the state already regulating marriage and family life, everyone needs to know the nature of both. To know the essence of the two, it can be seen from the aspect ontology, epistemology and axiology of marriage and family life.¹¹

The ontology aspect is the understanding of the nature of the relationship between humans and the values of a marriage and family carried out between men and women. In the Indonesian context, the basic essence of human ontology that underlies the meaning of family life and marriage is derived from the values of Pancasila as contained in the Preamble to the 1945 Constitution of the Republic of Indonesia which became the grundnorm of the Republic of Indonesia. In this connection, the ideal concept that is aspired to take place in a harmonious state that reflects the fulfillment of family and marital needs, namely needs related to personal or individual, social, God.

Meanwhile, the epistemological aspect is a philosophical effort to understand the nature of truth and knowledge that can be achieved by the human ratio of family and marriage law so that it can be properly preserved as a means for humans to carry out their life in the world.¹²

The axiological aspect seeks to determine the essence of the values contained in family law. The focus of values here is on good and bad from a moral and ethical standpoint and benefits. Starting from a family that is formed on the basis of marriage between a man and a woman, then it creates a family relationship, which is differentiated on the basis of blood descent and marital relationship. Likewise, an inheritance relationship is in the state's interest to regulate it in positive law. Aspects of axiology as part of philosophy are very important as a basis for human ontology which has implications for the order of knowledge it produces.

In Law Number 1 of 1974, the definition of marriage (Article 1) and the legality of marriage (Article 2) regulates the truth of correspondence with the philosophical monopluralist nature of human ontology. As expressed by the late Notonagoro, the monopluralist ontological basis of man is the foundation for Pancasila, which becomes a philosophical system, animating all the laws and regulations in the Republic of Indonesia. This means that the human nature between men and women to form a happy family life has been adopted by Law No.1 of 1974. The definition of marriage by law which is based on the validity of marriage if it is carried out in accordance with the laws of each religion and belief shows that Indonesian family law is in accordance with the philosophical values of monopluralist human ontology which recognizes absolute religious values. So it can be interpreted that the philosophy of family law will play a positive role in building the laws that society needs through the formation of legislation.¹³ Apart from that, it also has an important task to develop a national legal system and provide a correct understanding of the meaning of each positive legal rule.

D. CONCLUSION

In Indonesia, the enactment of the Marriage Law No.1 / 1974 cannot be separated from the theological aspects of its formation. So it is not surprising that many of these positive laws conform to the provisions of the Scriptures. The aspects stipulated in the Act are ontological,

¹¹ Soetiksno, *Filsafat Hukum Bagian 1*, Jakarta: Pradnya Paramita, 2003, p. 17

¹² Samson Rahman, *Islam Moderat: Menebar Islam Rahmatan Lil Alamin*, Jakarta: Pustaka IKADI, 2007, p. 13.

¹³ Soetiksno, Op.Cit, p. 459

epistemological and axiological aspects. With an understanding of these three aspects, it is hoped that peace and justice can be created. The provisions in this law are a means of regulating order in the lives of citizens. Individual understanding of the philosophical values of marriage and family law will greatly determine the merits of family life formed on the basis of marriage. Family law values including the values of married life will provide good benefits when a man and woman in living their lives adhere to these values. Indonesia as a sovereign country has its own legal system, including its regulation in family and marriage matters. The basic essence of human ontology that underlies the meaning of family life and marriage is rooted in the values of Pancasila as contained in the preamble to the 1945 Constitution of the Republic of Indonesia which is the grundnorm of the Republic of Indonesia and is spelled out in the articles of the Marriage Law. So that understanding the law from a philosophical aspect is very necessary so that the goal of having a family through marriage can be achieved. Indonesia as a sovereign country has its own legal system, including its regulation in family and marriage matters. The basic essence of human ontology which underlies the meaning of family life and marriage is rooted in the values of Pancasila as contained in the preamble to the 1945 Constitution of the Republic of Indonesia which is the grundnorm of the Republic of Indonesia and is spelled out in the articles of the Marriage Law. So that understanding the law from a philosophical aspect is very necessary so that the goal of having a family through marriage can be achieved. Indonesia as a sovereign country has its own legal system, including its regulation in family and marriage matters. The basic essence of human ontology that underlies the meaning of family life and marriage is rooted in the values of Pancasila as contained in the preamble to the 1945 Constitution of the Republic of Indonesia which is the grundnorm of the Republic of Indonesia and is spelled out in the articles of the Marriage Law. So that understanding the law from a philosophical aspect is very necessary so that the goal of having a family through marriage can be achieved. The basic essence of human ontology that underlies the meaning of family life and marriage is rooted in the values of Pancasila as contained in the preamble to the 1945 Constitution of the Republic of Indonesia which is the grundnorm of the Republic of Indonesia and is spelled out in the articles of the Marriage Law. So that understanding the law from a philosophical aspect is very necessary so that the goal of having a family through marriage can be achieved. The basic essence of human ontology that underlies the meaning of family life and marriage is rooted in the values of Pancasila as contained in the preamble to the 1945 Constitution of the Republic of Indonesia which is the grundnorm of the Republic of Indonesia and is spelled out in the articles of the Marriage Law. So that understanding the law from a philosophical aspect is very necessary so that the goal of having a family through marriage can be achieved. The basic essence of human ontology that underlies the meaning of family life and marriage is rooted in the values of Pancasila as contained in the preamble to the 1945 Constitution of the Republic of Indonesia which is the grundnorm of the Republic of Indonesia and is spelled out in the articles of the Marriage Law. So that understanding the law from a philosophical aspect is very necessary so that the goal of having a family through marriage can be achieved.

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