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

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

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Faculty of Law, Sultan Agung Islamic University

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

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"*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. AnisMashdurohatun, 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 abdolute 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)" wich was held by Faculty of Law Sultan AgungIslamic 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,

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

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THE GOVERNOR GENERAL OF THE NETHERLANDS 'POLITICS OF LAW TO APPLY EUROPEAN LAWS TO PRIVATE PEOPLE (TOEPASSELIJK VERKLARING)

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ABSTRACT

The Dutch East Indies government based on Article 5 AB divides into two groups, this article states that the inhabitants of the Netherlands Indies are differentiated into European Groups (along with those who are equated) and Indigenous Groups (along with those who are equated with them). The legal politics of the colonial government which regulated the implementation of the government legal system in the Dutch East Indies were included in Article 75 RR, which in principle was as stated in Article 11 AB. The entry into force of IS by itself has eliminated the entry into force of the RR. The Law Politics of the Dutch Indies Government at the time of the implementation of IS can be seen in Articles 163 IS and 131 IS. Article 163 IS regulates the division of groups, which in essence all of its contents are quoted from Article 109 RR (new). Toepasselijk verklaring is the authority of the Governor-General to apply certain European legislation (if deemed necessary) to indigenous groups. So, with the issuance of these two policies, the original law of the indigenous people will only be used by judges as long as the law does not conflict with existing regulations. This is a form of compromise in carrying out unification on the one hand and maintaining legal dualism on the other. But in the end these two policies were the embryo for implementing legal unification for certain laws such as the labor and land sector. For liberal politicians, progress in statutory regulations is good news because the realization of the ideals of legal unification is in sight. However,

Keywords: European Law, Indigenous People, Toepasselijk Verklaring

A. INTRODUCTION

Since long time ago, the nations of the world have been interested in controlling Indonesia, especially the Western geese. This is due to the very strategic location of Indonesia and its abundant natural wealth. It is said to be strategic because Indonesia is at the junction of two oceans and two continents. In addition, Indonesia is also located in the world trade route. Apart from its very fertile land, Indonesia also has a lot of natural content, such as oil. gold, and copper.[1]

In the XVI century, the Government of the Kingdom of the Netherlands sent the VOC (Vereenigde Oostindische Compagnie) as a trade delegation to the archipelago with the main task of obtaining agricultural products, especially spices. in 1596 the VOC landed in Banten, with the aim of obtaining merchandise which at that time was much sought after by Europeans because of its high price, namely spices. The motivation for the arrival of the VOC in Indonesia was not solely driven to trade, but had other objectives, namely politics and religion.[2]Politically, the arrival of the Dutch was an extension of colonialism, namely controlling the archipelago as a colony to extract its wealth and make it a market for industrial products. Meanwhile, the religious mission being carried out is to spread Christianity to Indonesia.

[1] Dri Santoso, *Politik Hukum Pemerintah Kolonial Terhadap Peradilan Agama*, STAIN Jurai Siwo Metro, Jurnal Hukum, Vol.4 No.1, Januari-Juni 2014, page 78
[2] Abdul Halim, *Peradilan Agama dalam Politik Hukum di Indonesia*, Jakarta, Raja Grafindo Persada, 2000, p. 46

After a century of experience in Indonesia, in 1799 the VOC was dissolved. The reasons for the fall of the VOC were among others the rampant corruption among its employees. In addition, many employees are incompetent. This causes the control of the trade monopoly to not work properly.[3]Another reason was that the VOC had a lot of debt. This debt was due to wars waged both with the Indonesian people and with the British in the struggle for power in the trade sector. In addition, there has been a decline in morale among employees due to the financial system which is considered to be less transparent. After the VOC dissolved, Indonesia was handed over to the Dutch government (Bataaf Republic). VOC employees became employees of the Dutch government. The debt of the VOC was also borne by the Netherlands. Thus, since January 1, 1800, Indonesia was directly colonized by the Netherlands. Since then Indonesia has been called the Dutch East Indies. Since then in Indonesia there has been a period of colonialism.[4]

The years 1840-1860 were an important period, which marked the change in colonial government policy towards colonies in the Dutch East Indies. The exploitation of the colony that was not based on humanity was first carried out by a trade union called Vereenigde Oost-Indische Compagnie (VOC), then by the colonial government through the Cultuurstelsel project created a new awareness in the political sphere in the Netherlands. This new awareness manifested itself in liberals who strived for a conscious colonial legal arrangement based on the principles of freedom (liberté), equality (egalité) and brotherhood (fraternité) as fought for in the French Revolution (1889).[5]

The existence of Dutch East Indies legal politics can be seen based on the application of 3 main Dutch regulations, namely the validity period of Algemeene Bepalingen (AB), Regeringsreglement (RR) and Indische Staatsregeling (IS). During the period of the legal politics of AB, the Dutch East Indies colonial government could be seen in the division of groups and the enactment of laws for each of these groups. The Dutch East Indies government based on Article 5 AB divides into two groups, this article states that the inhabitants of the Netherlands Indies are differentiated into European Groups (along with those who are equated) and Indigenous Groups (along with those who are equated with them).[6]

B. Problem Formulation

Based on the background above, the following problems are formulated:

1) How is the existence of the law politics of the Netherlands Indies based on the 3 main rules of the Algemeene Bepalingen (AB), Regeringsreglement (RR) and Indische Staatsregeling (IS) regulations?
2) What was the legal politics of the Governor General of the Dutch East Indies in implementing toepasselijk verklaring?

C. DISCUSSION

1. The existence of the Law Politics of the Dutch East Indies Based on the 3 Principles of the Bepalingen Algemeene (AB), Regeringsreglement (RR) and Indische Staatsregeling (IS) Regulations

[3] Departemen Kehutanan RI, *Sejarah Kehutanan Indonesia*, Jakarta, 1986

[4] Sartono Kartodirdjo, *Pengantar Sejarah Indonesia Baru: 1500-1900 dari Emporium Sampai Imperium*, Jakarta, PT Gramedia, 1987 p. 291.

[5] Wirjono Prodjodikoro, *Hukum Antar-Golongan di Indonesia*, Bandung, Vorkink-van Hoeve, 1962, p. 15

[6] Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional-Suatu Kajian Tentang Dinamika Sosial Politik dalam Perkembangan Hukum Selama Satu Setengah Abad di Indonesia (1840-1990)*, PT Raja Grafindo Persada: Jakarta, 1994, p. 54

During the period of the legal politics of AB, the Dutch East Indies colonial government could be seen in the division of groups and the enactment of laws for each of these groups. The Dutch East Indies government based on Article 5 AB divides into two groups, this article states that the inhabitants of the Netherlands Indies are differentiated into European Groups (along with those who are equated) and Indigenous Groups (along with those who are equated with them).[7]

While the laws that apply to each of these groups are regulated in Article 9 AB and Article 11 AB. As for what is regulated in the two articles are (below is not the sound of the article but the conclusion of the article's sound):

Article 9 AB

"It states that the Civil Code and the Code of Trade Law (which is enforced in the Dutch East Indies) will only apply to Europeans and to those who are equated with them".

Article 11 AB

Declare that for indigenous groups the judges will apply religious law, the institutions and customs of the indigenous people themselves, as long as these laws, institutions and customs do not contradict the principles of appropriateness and justice that are generally recognized and also when it is against people Indigenous people themselves are subject to European law or the indigenous people concerned have submitted themselves to European law ".

Based on the provisions of this article, the Dutch colonial government implemented its legal politics in written and unwritten legal forms. Written forms of civil law exist which are codified and contained in the Burgerlijk Wetboek (BW) and Wetboek van Koophandel (WvK); which is not codified in the laws and other regulations that are made intentionally for that. Meanwhile, what is not written is customary civil law and applies to everyone outside the European group. The legal style is implemented in a dualistic manner, namely a civil law system applicable to European groups and another civil law system applicable to Indonesian groups.[8]

The legal politics of the colonial government which regulated the implementation of the government legal system in the Dutch East Indies were included in Article 75 RR, which in principle was as stated in Article 11 AB. Meanwhile, the division of the occupants remains into two groups, it's just not based on religious differences anymore but on the position of "colonizing" and "colonized". And the provisions for this division of groups are stated in Article 109 Regerings Reglement. As for what is regulated in the two articles are (below is not the sound of the article but the conclusion of the sound of the article):

Article 109 RR

"In essence it is the same as Article 5 AB but Indigenous people who are Christian are still considered indigenous people and for Chinese, Arab and Indian people are equated with Bumi Putera".

Article 75 RR

"Declared still apply European law for Europeans and customary law for other groups".

In 1920 the RR underwent changes to certain articles and then after being changed it was known as RR (new) and was valid from January 1, 1920 to 1926. Therefore, during its validity period from 1855 to 1926 it was called the Period of Regerings Reglement. Meanwhile, the legal politics in Article 75 RR (new) underwent a change in the principle of determining the occupants to be "migrants" and "those who were visited". While the classification is divided into three groups, namely the European, Indonesian and Foreign Eastern groups.

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[7] John Ball, Indonesian Legal History, Sydney, 1982

[8] Soetandjo Wignjosoebroto, *Desentralisasi Dalam Tata Pemerintahan Kolonial-Kebijakan dan Upaya Sepanjang Babak Akhir Kekuasaan Kolonial di Indonesia (1900-1940),* Bayumedia Publishing: Malang, 2004, p. 8

The entry into force of IS by itself has eliminated the entry into force of the RR. The Law Politics of the Dutch Indies Government at the time of the implementation of IS can be seen in Articles 163 IS and 131 IS. Article 163 IS regulates the division of groups, which in essence all of its contents are quoted from Article 109 RR (new). Meanwhile, Article 131 IS regulates the laws that apply to each of these groups. As for what is regulated in the two articles are (below is not the sound of the article but the conclusion of the sound of the article):

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Article 163 IS

The population of the Dutch East Indies is divided into three groups, namely:

1) European group;
2) Putra Bumi Group;
3) East Asian Group.

Article 131 IS states several things, namely:

1) Want that law to be written in the ordinance;
2) Enforce Dutch law for Dutch citizens who live in the Dutch colonialism based on the concordance principle;
3) Opening the possibility for legal unification, namely requiring the submission of foreign native and eastern groups to submit to European law;
4) Enforce and respect customary law for the sons of the earth group if the community so wishes.

The division of groups of residents based on Article 163 IS is actually to determine the legal systems applicable to each group as stated in Article 131 IS.

2.The Legal Politics of the Governor General of the Dutch East Indies in Implementing Toepasselijk Verklaring

The birth of Grondwet 1848 (the constitution of the Netherlands) and Regeringsreglement 1854 (the constitution for the Dutch East Indies) further paved the way for liberal groups to uphold the supremacy of law (the supreme law of state / rechtsstaat) in the Dutch East Indies. With the existence of these two products of law, on the one hand, executive power in the colony was increasingly limited, while on the other hand, the freedom of the people living in the colony was guaranteed legal guarantees. In principle, Grondwet 1848 stipulates that the legal regulations required for colonial administration must be made in the form of laws (wet); it is not sufficient if these regulations are only regulated in the form of a King's Decree (Koninklijk Besluit / KB). Regeringsreglement 1854 (hereinafter abbreviated as RR) has three important articles which greatly determine the direction of legal development in the Dutch East Indies, namely Article 79, Article 88, and Article 89. Article 79 RR contains the trias-politica principle which requires judicial power to be handed over to the judge which is free; Article 88 RR requires the implementation of the legality principle in every criminal proceeding; Article 89 RR prohibits punishment which causes a person to lose his civil rights. These three articles of the RR are normative symbols for resistance to the arbitrariness of the executive branch in colonial lands. Article 88 RR requires the implementation of the legality principle in every criminal proceeding; Article 89 RR prohibits punishment which causes a person to lose his civil rights. These three articles of the RR are

normative symbols for resistance to the arbitrariness of the executive branch in colonial lands. Article 88 RR requires the implementation of the legality principle in every criminal proceeding; Article 89 RR prohibits punishment which causes a person to lose his civil rights. These three articles of the RR are normative symbols for resistance to the arbitrariness of the executive branch in colonial lands.

The issue of legal unification as aspired by liberals cannot be applied easily. The pluralistic society situation and the consideration of the large costs to be paid by the colonial government, became an obstacle to the enforcement of the Dutch codification law in colonies. Dualism of law still exists in society. On the one hand, Dutch law still applies to European groups, while on the other hand, most local people are still subject to their own laws. The dualism of law in effect in the Dutch East Indies did not dampen the struggle of liberal politicians to fight for legal unification.

Furthermore, on the basis of Algemeene Bepalingen (with the power of KB) Article 9 jo. Article 75 paragraph 3 RR, strive for what is called vrijwillige onderweping and toepasselijk verklaring. Vrijwillige onderweping is a legal effort given to indigenous groups to submit themselves to the laws and regulations applicable to European groups. Meanwhile, toepasselijk verklaring is the authority of the Governor General to apply certain European laws and regulations (if deemed necessary) to indigenous groups.[9]So, with the issuance of these two policies, the original law of the indigenous people will only be used by judges as long as the law does not conflict with existing regulations. This is a form of compromise in carrying out unification on the one hand and maintaining legal dualism on the other. But in the end these two policies were the embryo for implementing legal unification for certain laws such as the labor and land sector. For liberal politicians, progress in statutory regulations is good news because the realization of the ideal of legal unification is in sight. However, this is a scourge for the law of the indigenous people because its destruction is in sight.

The development of colonial legal politics in the period 1860-1890 was marked by two things, namely a) concrete steps by liberals to enforce European law in the Dutch East Indies through legislation products to advance the Dutch East Indies economy, and b) problems surrounding cultural conflicts (and also legal life) between European and indigenous groups as a result of differences in minds in various aspects of life, especially economics, government and law.[10]

It is believed that the legal principles that have been positivated through Grondwet 1848 and RR 1854 have helped liberalists to immediately realize the legal unification project they carry. Nevertheless, it took about three decades since the promulgation of RR 1854 in order to realize the ideas of constitutional administration in the colonies. In an effort to realize these ideas, a liberal figure emerged, namely Fransen Van de Putte, who pressured the government to immediately stop state plantation businesses and provide the greatest possible opportunity for private enterprises to take over the field. Of course Van de Putte did not agree that the government was directly involved in the world of commerce. Van de Putte, who managed to occupy the post of Minister of Colonies in the Liberal party cabinet with Prime Minister Thorbecke,[11]

The Cultuurwet draft that Van de Putte tried to create sparked a lot of debate when it was brought to parliamentary sessions in 1865. The Cultuurwet draft itself deals with the problem of how private enterprises can acquire land. The solution provided by Cultuurwet's plan to address this problem was by a) giving indigenous peoples eigendom rights, b) allowing indigenous people to lease their land, and c) land controlled by the state could be leased by people who wanted it (accompanied by erfpacht rights / business rights), are considered inadequate. Van de Putte himself

[9]Clive Day, The Dutch in Java, Kuala Lumpur, Oxford University Press, 1966, p. 193.

[10] Ahmad Roestandi dan Muchyidin Efendi, *Komentar Atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama* , p. 88

[11] Mochammad Tauchid, *Masalah Agraria Sebagai Masalah Penghidupan dan Kemakmuran Rakyat Indonesia*, Jakarta, 1952

was indirectly opposed by Thorbecke through Poortman, who considered Van de Putte too broad in interpreting Article 75 RR 1854. Van de Putte's efforts failed, after the conservative cabinet returned to power. On April 19, 1870, the Agrarisch Wet in Ind. Stb. 1870 No. 55.

D. CLOSING

Conclusion

1) The Dutch East Indies government based on Article 5 AB divides into two groups, this article states that the inhabitants of the Netherlands Indies are differentiated into European Groups (along with those who are equated) and Indigenous Groups (along with those who are equated with them). The legal politics of the colonial government which governed the implementation of the government legal system in the Dutch East Indies were included in Article 75 RR which in principle was as stated in Article 11 AB. The entry into force of IS by itself has eliminated the entry into force of the RR. The Law Politics of the Dutch Indies Government at the time of the implementation of IS can be seen in Articles 163 IS and 131 IS. Article 163 IS regulates the division of groups, which in essence all of its contents are quoted from Article 109 RR (new).
2) *Toepasselijk verklaring*is the authority of the Governor-General to apply certain European laws and regulations (if deemed necessary) to indigenous groups. So, with the issuance of these two policies, the original law of the indigenous people will only be used by judges as long as the law does not conflict with existing regulations. This is a form of compromise in carrying out unification on the one hand and maintaining legal dualism on the other. But in the end these two policies were the embryo for implementing legal unification for certain laws such as the labor and land sector. For liberal politicians, progress in statutory regulations is good news because the realization of the ideal of legal unification is in sight. However,

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