

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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INFORMATION OF THE CONFERENCE AND CALL PAPER

UNISSULA
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Welcome to Participants on

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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Semarang, 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

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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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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 right end, followed by a small, stylized mark.

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

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**MORALITY AS A BASE IN POLITICS
AND LEGAL ENFORCEMENT COMES FROM THE VALUES
THAT LIVING IN THE SOCIETY
(Reconstruction in Thinking and Behavior)**

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ABSTRACT

In carrying out the mandate and will of the people which takes place in a constitutional manner, the law must be in line with the conditions of society. The development of the community, including indigenous and global communities in politics and law enforcement, is not comparable to the decline in moral gradations that occur in the community. Decreasing moral gradations can lead to a variety of patterns of behavior that are without control, seem anarchic and harm others that affect the occurrence of legal violations or legal irregularities. Here, the need for awareness raising is to return to moral values as a religious and civilized nation to commit to making morality a cornerstone in politics and upholding laws that are derived from values that live in society.

Keywords: morality, politics, law enforcement, values that live in society.

A. Introduction

The law is needed to organize a clean government, and on the contrary clean government is a government that upholds the rule of law as a guideline in carrying out the mandate and will of the people which takes place in a constitutional manner. Therefore the law must be in line with the socio-cultural and economic conditions of the people in the country so that this is where the state has an interest in applying the law.

The development of society demands reform in all fields. Efforts to promote the development of the nation and state of Indonesia, one of which is with legal reform. This legal renewal is still influenced by Customary Law which is rich in the noble values and culture of the Indonesian people. These noble values are expressed in the form of Customary Law which is part of the culture of the Indonesian nation. Where there is society, there is a law (Ubi Ius), Cicero said 2000 years ago.

The law contained in society, how simple and small it is, the community remains a mirror. Because every community has its own culture with its own style and nature. Although in certain cultures, there are also many similarities, from the way of thinking geestestructuur itself, the law in society as one manifestation of the geestestructuuty of the community concerned, has its own style and nature so that the laws of each society are different. ¹As with all legal systems that exist on this earth, the customary law grows and is maintained by the indigenous peoples of Indonesia because it arises from a real life necessity, way of life and a view of life which is all the culture of the community where the customary law applies.

The importance of the role of the government as the implementer of the Law must be able to carry out the mandate of the constitution in order to create positive changes in development. This reform era has shown a significant change in the life of democracy and politics in Indonesia. Existing phenomena, in which the freedom to express the right to live as a citizen and convey political aspirations are so widespread by the citizens. It is only unfortunate,

¹ Bushar Muhammad, 1978, *Asas-asas Hukum Adat*, Jakarta, Pradnya Paramita, hlm.40.

sometimes it is done by bumping into existing legal and regulatory signs and apart from moral control, which should be adhered to and upheld, so that the expression of freedom is anarchic and detrimental to others. This is where the need for awareness to return to moral values as a religious and civilized nation for commitment to make morality a foundation in politics and uphold the law. Because enforcement of the rule of law cannot be negotiable, in developing Indonesia as a rule of law (Rechtstaat).

From the description above, the problem that arises is how the efforts made in making moral values as a foundation in politics and law enforcement in Indonesia are derived from the values that live in society.

B. Discussion

Mahfud MD argued that legal politics is "legal policy or official line of law that will be enforced either by making new laws or by replacing old laws, in order to achieve the goals of the state." Thus, legal politics is a choice of law - laws that will be revoked or not enforced, all of which are intended to achieve state objectives as stated in the Preamble of the 1945 Constitution.²

Padmo Wahjono in his book entitled "Indonesia Country Based on Law" defines legal politics as a basic policy that determines the direction, form and content of the law that will be formed. This definition is still abstract and then completed with an article in the Justice Forum magazine entitled "Disputing the Formation of Legislation". In the article Padmo Wahjono said that legal politics is the policy of state administrators about what is used as a criterion for punishing something. In this case the policy can be related to the formation of the law, the application of the law and its own enforcement.³

Satjipto Rahardjo defines the politics of law as an activity of choosing and the way to be used to achieve a social goal with a particular law in the community whose scope includes answers to fundamental questions, namely: 1) what goals are to be achieved; 2) what ways and which are the best in achieving these goals; 3) when is the time and through how the law needs to be changed; 4) can a standard and established pattern be formulated to help determine the process of selecting goals and ways to achieve these goals well.⁴

The judicial process often shows the escape of law enforcement orientation between enforcing the law and enforcing justice. The main goal in litigation lately is not to uphold the law or to uphold justice, but to win more cases. By winning the case as a goal, the principle of upholding the law or enforcing justice is so flexible. If a case can be won based on formal rules, then the defense or consideration is based on formal rules and with full support for legal certainty. However, if a case is estimated to be inferior to formal laws, then what is used as a proposition is unwritten laws that need to be carried out in the name of justice.⁵

In connection with the issues raised, there are 2 (two) main issues that will be explained, namely political aspects based on morality and law enforcement based on morality.

1. Politics Based on Morality

In today's political life in Indonesia, it can be observed clearly that it is still found in the community both individually and in groups or carried out by political elites, namely not making morality a cornerstone in politics, even tending to keep it away, so that the practice

² Moh.Mahfud MD. *Politik Hukum di Indonesia*. (Jakarta: PT Radja Grafindo Persada, 2012), hal.1

³ Padmo Wahjono, 1991, "Menyelisik Proses Terbentuknya Perundang-Undangan", artikel dalam majalah *Forum Keadilan* No. 29 April, hlm.65.

⁴ Moh.Mahfud MD., Op.Cit., hal.2

⁵ Moh.Mahfud MD. *Membangun Politik Hukum, Menegakkan Konstitusi*, cetakan ke-2. (Jakarta: Rajawali Pers, 2011). Hlm.102.

seems - the practice justifies any means for the personal or group interests. This will really have a negative impact on the life of the nation and state.

In reality, legal politics is often interpreted as narrow and biased. It is as if it only concerns the practical politics desired by a ruler, a group by imposing his own will in the process of making legal / legislative norms, so as to legitimize existing power.

In relation to legal politics, law must be understood not only as a law / law that is valid legally but also legally sociological, philosophical, and even moral. Good law is not merely the accuracy of the juridical aspect but is morally substantial, the law does not conflict with justice and has relevance to the actual condition of the community.

Good law is essential if it can bring justice to everyone. Without justice, law is only a tool of power to oppress.

1. There must be political openness to accommodate the aspirations of the people, both in the making of legal norms or the improvement of laws that are no longer relevant.
2. Reformation that gives everyone the same opportunity to improve their standard of living.
3. Legal politics must be focused on the conditions of a pluralistic society - plural.

Legal justification from a moral point of view is important, in order to avoid the abuse of rulers who use the law as a means of oppression. Including moral legitimacy of the law is the courage to change legal norms or legislation that are irrelevant, so that it is fair and certainly binding / obligatory.

Legal justice is not the justice of individuals or certain groups but justice for all people (Article 33 of the 1945 Constitution). Means that the politics of law must be open to the establishment of a legal system that is able to accommodate pluralism of diverse national interests, so as to create social order as a basic condition for the realization of national goals.

In connection with the above matter, Efendi Zarkasi⁶ stated that, at least there were 3 (three) indications as causes, namely: First, because they were actually anti-truth and justice, because if they politicized the truth and justice, then they would not gain personal gain and their groups, so that they commit deception, justifying any means to thwart the establishment of truth and justice. Refusing truth and justice is immoral and against religion. Second, because they consider only that way they can impose their political will, by refusing to use deliberation in democratic ways in achieving their goals. Third, because they are concerned with their own rights, do not care about the rights of others, sometimes they even exceed the limit in obtaining their rights so that the rights of others are released, furthermore they assume as if only they have rights, while others do not.

To realize a democratic, moral and dignified political life, each individual or group is also a political actor so as not to force coercion on another party, respect the rights of others and make religious values adopted as morality in politics. As long as politics is in moral control, politics becomes a tool for realizing justice, truth, prosperity, order and prosperity for society. But if politics is separated from moral control, then politics will be used as a tool of power, a means to achieve enjoyment and other things that are short-term. The political face turned dirty and dark. Elite power and political actors try to separate politics from moral values, then lead the political process towards only seeking profit and momentary enjoyment. Because of that many people assume negative and allergic to politics. Whereas according to Imam Ghazali⁷, between moral and political are twin brothers who cannot be separated. Moral is needed by the community to determine the good and bad or right and wrong of every action and desire of every person in society, then politics is needed to regulate the community, so

⁶ Effendi Zarkasi, *Khutbah Reformasi*, (Jakarta, Penerbit Inter Masa, 2000).

⁷ Zainal Abidin Ahmad, *Konsepsi negara Bermoral Menurut Imam Ghazali*, (Jakarta: Penerbit Bulan Bintang, 1975). Hlm.8

that it conforms to the moral rules received by members of the community. Politics based on the values of morality can be used as a vehicle to deliver people to a just and prosperous life.

In relation to the politics of law formation, the Indonesian constitution before the amendment was not expressly show us the recognition and use of the term customary law. However, if examined, it can be concluded that there are actually formulas contained in it containing noble values and the spirit of customary law. The opening of the 1945 Constitution, which contains the Pancasila life view, this reflects the personality of the nation that lives in values, mindset and customary law. Article 29 paragraph (1) the country is based on the One God Almighty, Article 33 paragraph (1) The economy is arranged as a joint effort based on the principle of family. At the practical level, it is based on the 1945 Constitution, the state introduces the right called the State Ownership Right (HMN), this is raised from the Ulayat Rights, Petuanan Rights, which are traditionally recognized in customary law. In the RIS constitution Article 146 paragraph (2) states that all judicial decisions must contain the reasons and in the case must mention the rules of the law and the rules of customary law that are used as the legal basis. Furthermore, in the Provisional Constitution, article 146 paragraph (1) is reloaded. Thus the judge must explore and follow the feelings of the law and justice of the people who are constantly developing. In Article 102 and taking into account the provisions of Article 25 of the 1945 Constitution, there is an order for the authorities to make a legal codification. So this is a big issue in customary law. The order of codification in a frugal manner also applies to customary law, and this codification order is the first time mentioned in the Law of the Republic of Indonesia which regulates the provisions of the codification of customary law, although in reality it cannot be implemented.⁸

2. Law Enforcement Based on Morality

Law enforcement in a broad sense encompasses the activities to implement and apply the law while carrying out legal actions against any legal violations or irregularities committed by legal subjects, either through judicial procedures or through arbitration procedures and other dispute resolution mechanisms. In a narrow sense, law enforcement involves acts of repression against any violations or deviations from laws and regulations, especially those that are narrower through the criminal justice process that involves the role of police officers, prosecutors, lawyers or lawyers, and judicial bodies.⁹

Law enforcement is intended, in order to create a legal order that is good for the community, or in other words so that the law functions as a protection for human interests. Law enforcement is an attempt to carry out the law as it should, oversee the implementation so that there is no violation and if there is a violation to restore the law that is violated, it is re-enforced (restitution in integrum). In law enforcement it contains at least 3 (three) elements that must always be considered, namely: Legal certainty (Rechtssicherheit), Benefit (Zweckmassigkeit) and Justice (Gerechtigkeit).¹⁰ In law enforcement, all three elements must be equally and proportionally considered. So conceptually, Soerjono Soekanto¹¹ said, the essence and meaning of law enforcement lies in harmonizing the relationship of values which are translated into solid rules and realizing and the act of acting as a series of elaboration of values that aims to create, maintain and maintain peace of life . Noble values that are important in law enforcement, namely humanity, justice, propriety and honesty.

⁸ Dewi C Wulansari., *Hukum Adat Indonesia Suatu Pengantar*, PT. Refika Aditama, Bandung, 2010, hal 108.

⁹ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme di Indonesia*, (Jakarta: Sinar Grafika, 2010). Hlm.311.

¹⁰ Theo Heijbers, *Filsafat Hukum*, (Yogyakarta: Penerbit Kanisius, 1995).

¹¹ Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum, Penerbit* . (Jakarta: PT. Raya Gratindo, 1988). Hlm.24.

The existence of law is to be obeyed, implemented and enforced. Law enforcement must be firm and consistent, full of dedication and responsibility. This will affect the improvement of community legal awareness. Because if law enforcement is weak, it will give birth to ignorance from the community and provide opportunities and incentives for violations of the law and vigilantism (eigenrichting). The achievement of legal objectives lies precisely in the implementation of the law itself. As stated by Syahrani (1999), that order and peace can only be realized if the law is implemented. Because if not, Sudikno¹² said, then the rule of law is only a composition of words that have no meaning in people's lives. Such legal regulations will die on their own. Therefore in any case the law must be enforced. To the extent that there is an adage "even though this sky collapsed the law must be enforced" (fiat justitia et pereat mundus). In this country there are so many laws issued by the Government, the aim is none other than to guarantee legal certainty, but from time to time, from the change of several times the government started from the Old Order regime, the New Order until now the Reform Order whose name truth and justice still feel very far away and are always the subject of questions that have never been answered completely. Until when can we witness the brutality and justice that come walking hand in hand with intimate decorate this country persada. In law enforcement must also be considered the usefulness or usefulness for the community. Because the law is made for the benefit of the community, the implementation and enforcement of the law must benefit the community. Do not let law enforcement actually cause unrest and chaos in people's lives. Law enforcement must also contain the values of justice, not violate human rights and be carried out democratically.

As an element of law enforcement, let's hurry to come forward as a hero of truth and justice. Heavy duties and responsibilities, but have a noble value before God. As law enforcers, strong commitment must be embedded, that the purpose of the law is the establishment of truth and justice on this earth.

The main principle of law enforcement is to seek justice. Because, people who are looking for justice will first pay attention to the law that is officially applicable to then just ignore the formal law if the formal law is deemed unfair. Therefore, one of the main keys to building a clean judiciary, in addition to the problem of unifying the structure of development, is the morality of law enforcement. To guard this morality, in addition to the need for recruitment that makes moral one of the basic requirements, it is also important to develop professional ethics lessons in every educational institution that will give birth to law enforcement from an early age.¹³

Law enforcement must be carried out firmly and indiscriminately against perpetrators of lawlessness. For this reason, the implementation is carried out with full dedication and a strong sense of responsibility and moral integrity. Because of the existing phenomena, due to lack of firmness or because of uncertainty in the face of violations of the law, many law-breakers escaped from the snares of the law or in other words separated from prosecution. How many complaints and reports from the public about the violation of the law, but there are still some who lack the response and satisfactory handling by law enforcement officials, especially the big cases that are in the public spotlight. So that there is a saying that, "the law applied at this time is like a spider web", meaning that those who commit criminal acts in the category of big fish get away from legal bondage, while those who are ensnared are only small. Recognized or not, the law enforcement process still faces obstacles. For this reason, law enforcement officers are responsible and consistent with moral values. Because law enforcement officers who are responsible and moral will not dare to manipulate the law, and will not dare to risk their pride by deceiving their conscience. Because it's the same as playing

¹² Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, (Yogyakarta, Penerbit Liberty, 1984). Hlm.19.

¹³ Moh.Mahfud.MD., *Op.Cit.*, Hlm.103.

cat and mouse with God, even though God knows what's hidden behind the human heart. Today's society is increasingly critical in assessing legal issues, especially against cases of lawlessness that are rife everywhere. If there is a discrepancy between what is expected with the reality in the application of law enforcement, then as a result the community lacks trust and lacks respect for the law. It would be even more tragic if the public would be less appreciative of the existence of law enforcement officials and the judiciary. Ignorance of moral values in politics was echoed by Nicola Machiavelli, who advocated the establishment of a slogan "Double moral and reality". will not be good ". Double moral and reality is interpreted, that in society moral is needed, but in politics is not the moral that is needed, but the reality, namely power. Even more ferocious is the establishment of Nietzsche, which was followed by Karl Marx and Lenin from the Communists who stated, that it was a hell of a struggle with morality, because it lowered the degree of people who wanted to be free, because it was made by feudalists and capitalists. This school teaches its adherents, that in politics is aimed at purely achieving power, therefore politics must be sterile from morals, politics must be released from moral values. If the above is applied, there will be a moral crisis that afflicts government elites, policy holders and structural members will be followed by officials and individuals below. Then there will be what is called abuse of power, misuse of authority.

State apparatuses that should exercise their power and authority for the benefit of the people, precisely harm and afflict the people. Power and authority are used to fulfill personal passions without regard to the interests of the people. If the apparatus at the upper level has done so, then the apparatus will be followed by it and so on. So that power is used as a tool to tell the people. Likewise, if the moral crisis engulfs law enforcement officers, then law enforcement officers easily reverse the rule of law and justify any means to manipulate and dispose of conscience, so that justice seekers who desire justice are getting injustice. The prolonged crisis that hit this country began with a moral crisis, both in politics and law enforcement. This crisis increasingly paralyzes the life of nation and state. If this is not realized, a catastrophic disaster will befall all the people. This has been reminded by Imam Al-Ghazali¹⁴ that, a major disaster will befall all people, if the people are seized by a dangerous disease, namely a moral crisis. In the not too distant future, he will threaten the collapse of the Ummah entirely into a multi-complex crisis, a crisis in all fields. So the need for indigenous and global communities and governments to improve as early as possible to prevent, reduce, and even eliminate diseases and the impact of the moral crisis in all aspects of life.

D. Conclusion

Efforts to realize a democratic, moral and dignified political life in order to support the renewal of law in all fields, then each individual or group also political actors make the values of morality as a basis for politics and uphold the law that originates from noble values and Indonesian culture. In this case, morals are needed by the community, both indigenous and global as well as the government to determine the good and bad or right and wrong of every action and desire of each person in the community itself so that politics is needed to regulate the community, in accordance with the rules morals accepted by community members. Politics based on the values of morality can be used as a vehicle to deliver people towards a just and prosperous life.

¹⁴ Zainal Abidin Ahmad, *Op.Cit.* Hlm.13.

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