



THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"



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

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INFORMATION OF THE CONFERENCE AND CALL PAPER

WORLD ISLAMIC UNIVERSITY
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Welcome to Participants on International Conference

“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”

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

KEYNOTE SPEAKER:
Prof. Henning Glaser
Thammasat University, Thailand

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

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

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Indonesia, September 05th 2017

WORLD ISLAMIC UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

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Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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

FACULTY OF LAW
Sultan Agung Islamic University

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

Day: Tuesday

Date : September 5th 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3rd Floor

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

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

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from SebelasMaret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

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

Wassalamualaikum, Wr. Wb

Semarang, September 5th 2017

Chairman of the Committee,



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

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

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

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


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

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

Wassalamu'alaikum Wr. Wb.

Semarang, September 5th 2017

Dean,



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

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COMPARATIVE RELIGIOUS APPROACH IN THE DEVELOPMENT OF NATIONAL CRIMINAL LAW SYSTEM

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A. Introduction

Based on the fact, there is the Criminal Code (WvS) that has existed almost a century. It is still used as the basis for law enforcement officers in solving criminal cases in Indonesia. Though it is realized that the legal product is less in harmony with the condition of Indonesian society which has different values of life background from values that underlie and give content to the normative and substantive content of the Criminal Code (WvS).

In order to realize the reconstruction of the National Criminal Law System, it needs support from comparative study of law, with a view to study other legal concepts/systems close to the characteristics of legal sources in Indonesia.

The importance of living values study in society in the effort of reconstructing the Criminal Code (WvS) according to Satjipto Rahardjo¹ is caused by the law is not only the building of regulations, but also the building of ideas, culture and ideals. People often allude to modern law as the rule of law, they do not see it as the rule of morality. The law is then only seen as rules, procedures, and they all have a neutral connotation. People ignore or forget that behind all these formal structures settles a certain value and idea, so that it becomes particular. In that context, the modern legal system is not neutral. Criminal Code applied in Indonesia by the Dutch², it is difficult to say that it is neutral. The doctrine of neutrality is less

¹ Satjipto Rahardjo, *Sisi-sisi Lain Hukum Di Indonesia*, op-cit, page.22-23.

² The birth of a modern state is essentially driven by a certain objective need. In the eighteenth and nineteenth centuries, the world made rapid advances in the development of science and technology. Within a century alone, the world underwent remarkable structural changes that had not been experienced in human civilization for hundreds of thousands of years before that. Such technological developments have implications for larger and larger changes, known as social change. Foucault's main thesis that from the twelfth century the power of the state he called 'the juridical or legal power' was gradually replaced by another form of power, called "disciplinary power". See Khudzaifah Dimiyati, *Teorisasi Hukum (Studi Tentang Perkembangan Pemikiran*

justifiable, seeing how for hundreds of years it was built through the Greco-Roman tradition, through renaissance and so on, which shows how the system has become full of social values, traditions and attitudes and thoughts. Then through the period of Dutch colonialism, such a legal system became a bastion that spread all the doctrines that exist within the legal system.

B. DISCUSSION

The vision and mission of renewal of the National Criminal Law has been emphasized in the Explanatory Draft of the Criminal Code directed to the "decolonization", "democratization", "consolidation", "adaptation" and "harmonization" mission of criminal law against various legal developments that occurred both as a result developments in the field of criminal law science and the development of values, standards and norms recognized by civilized nations in the international world.

Based on the above mission, the development effort of the National Criminal Law System cannot avoid the use of the concepts and legal principles derived from various legal systems that are now commonly accepted by the nations of the world, and to make it happen need to be supported with conduct comparative/legal comparison studies.³

Comparative study, among others, is done by digging the values of the living law in the society that is against customary law and religious law with the intention to study the concept/legal system closer to the characteristics of legal sources in Indonesia because it wants to achieve is the Pancasila Legal System.

The approach of legal thinking oriented to global/comparative insights according to Barda Nawawi Arief⁴ is generally required in the issue of "law reform", especially in the making of Law (legislative/formulation policy). Legal development has been often interpreted as a law-making. Satjipto Rahardjo sees law development as having two meanings. First as an attempt to renew the positive law (modernize law), secondly, in an attempt to function the law by means of social change in accordance with the needs of the developing community. So the development of the law is not limited to legislation but also the attempt to make law as a

Hukum Di Indonesia 1945-1990), Muhammadiyah University press, Universitas Muhammadiyah Surakarta, Surakarta, 2004, page.90.

³ Sri Endah Wahyuningsih, Prinsip-prinsip Individualisasi Pidana Dalam Hukum Islam dan Pembaharuan Hukum Pidana Indonesia, Badan Penerbit Universitas Diponegoro, Semarang, page.21.

⁴ Sri Endah Wahyuningsih, Prinsip-prinsip Individualisasi Pidana Dalam Hukum Islam dan Pembaharuan Hukum Pidana Indonesia, Badan Penerbit Universitas Diponegoro, Semarang, page.21.

means of social engineering⁵. According to Paton, the nature of legal development is legal counseling and legal reform. Legal coaching is the care of existing laws, not destructions, but letting them grow. The reform of law is to establish a new legal order.⁶

The importance of comparative approach in National Legal System Development according to Barda Nawawi Arief⁷ also caused by:

- The existence of an active national principle in the Criminal Code, namely Article 5 paragraph 1 to 2, that "the criminal code in Indonesian legislation applies to citizens overseas to do one of the acts which by criminal code in Indonesian legislation is seen as a crime, whereas according to the state legislation in which the act is committed, it is threatened with a criminal".
- There are provisions in the Law outside the Criminal Code that extend territorial jurisdiction outside Indonesian territory (Article 97 of Narcotics Law, Article 16 of the TPK Law, Article 3 (1) and Article 4 of Terrorism Law, Article 7 of Money Laundering Law, Article 2 of the Law on EIT No.11 / 2008)
- The number of laws that have ratified various international provisions/documents (al. Law No.27 / 1997 authorizes the United Nations Convention Against Illicit Traffic in Narcotic Drugs and psychotropic Substances, 1998; Law No.5 / 1998 authorizes Convention Agents Torture and Other Cruel, Inhuman or Degrading treatment or Punishment; Act No.11 / 2005 ratified the International Covenant on Economic, Social and Cultural Rights; Law No.12 / 2005 ratified the ICCPR; Law No.5 / 2006 ratified the International Convention for the Suppression of Terrorist Bombings, 1997; Law No. 6/2006 ratified the United Nations Convention Against Corruption, 2003);
- The existence of various laws on bilateral agreements, and mutual agreement on criminal matters or the Treaty on Mutual Legal Assistance in Criminal Matters (a.l Law No.1 / 2006, UU.No.8 / 2006)
- The existence of Cybercrime development which is "trans-border/transnational crime".

The importance of comparative study with national and global perspective in the effort of National Legal System Development is derived from the values of law living in society,

⁵ Satjipto Rahardjo, *Hukum dan Perubahan Sosial: Suatu Tinjauan Teoretis serta Pengalaman-pengalaman di Indonesia*, Genta Publishing, Yogyakarta, 1979. page.34.

⁶ Muhamad Ichsan, "Pembangunan Hukum Indonesia: Studi Terhadap Pengaruh Tradisi Hukum Adat Dalam pembangunan Hukum di Indonesia", *Ilmu Hukum*, Vol 6, No. 1 Maret 2003, page. 45.

⁷ *Ibid.* page.31-32.

among others, is affirmed by Barda Nawawi Arief: "The National Law System besides should be able to support national development and international social needs, must also be sourced and not ignore the values and aspirations that live and thrive in society. The values of the laws living in the community can be sourced or extracted from customary law values and religious law values ".⁸

It is also mentioned by Laica Marzuki⁹ in a paper submitted at the National Law Seminar VI, on Legal Reform Towards Civil Society, "... that the unification of the ideal national law is to compile the codification of the law but still pay attention to various rules of law that live in society ".

The idea of extracting customary law/law is not written in the development of law in Indonesia, contained and seen by the Act No. 1 Drt. 1951, in particular Article 5 (3) sub-b which states, among other things: "That an act which according to living law should be considered a criminal act, but unequal in the Criminal Code, shall be deemed punishable by no more than three months imprisonment or fine of five hundred rupiahs, ie as a substitute punishment if the customary punishment handed down is not followed by the convicted party and the substitution is deemed to be commensurate by the judge with the greatest error of the convict "; and "An act which, according to living law, be regarded as a criminal offense and its contents in the Criminal Code shall be presumed to be threatened with the same penalty as its most similar penalty to the criminal act."¹⁰

Acknowledgment of the provision of a place to living law or unwritten law, even affirmed also in general rules, namely in the Law on Judicial Power No.48 / 2009 (revoking Law No. 4/2004 jo.14 / 1970 jo. No. 35/1999), namely:

- Article 5 (1) "Constitutional justices and judges shall explore, follow, and understand the legal values and sense of justice living in the community".
- Article 50 (1) "The court's decision other than to contain the reasons and grounds of the decision, also contains certain articles of the relevant legislation or source of the unwritten law as the basis for judging".

⁸ Barda Nawawi Arief, *Beberapa Aspek Kebijakan dan Pengembangan Hukum Pidana*, Op-cit., 1998, page. 117.

⁹ Laica Marzuki, "Masalah Kebhinekaan Sosial Budaya dalam Reformasi Hukum Nasional Menuju Masyarakat Madani", this paper was presented in Seventh National Law Seminar, Jakarta, 12-15 October 1999, page. 13.

¹⁰ Barda Nawawi Arief, "Perkembangan Asas-Asas Hukum Pidana Dalam Konsep KUHP (Perspektif Hukum Perbandingan Hukum Pidana)", Paper in the Regional Upgrading of Criminal Law and Criminology, UNDIP, April 2006, page.5.

From the above description, it is known that the tendency to explore values that live in society is not only a national message but also an international trend. In the 10th International Congress on Criminology (10th International Congress on Criminology) on 4-9 September 1988 in Hamburg for example, featured speakers from Saudi Arabia and from China. From Saudi Arabia (Riyad), the speaker, M.Aref presented about "Criminality and Crime Prevention in Developing Countries" which, among others, put forward "Islamic Perspective for Crime Prevention"; and the speaker M.Zeid (Riyad) presented the "Crisis of Penal Sanction in Contemporary Societies" in which, among other things, revitalization of Islamic Societies. Next speaker Xiang Guo (from Beijing, China) talked about "The Present Violent and Preventive Strategic in China". "The Present Violent and Preventive Strategic in China".¹¹

C. CONCLUSION.

The renewal of the National Criminal Law System must begin with the reconstruction of the basic idea/basic concept of thinking that departs from the philosophical foundation of the National Law System, namely Pancasila as the values of the aspired national life. Efforts to renew the criminal law are conducted by conducting comparative studies, both derived from the legal values that live in society and from various legal systems in the world, in order to create a criminal law in accordance with the development of national and global society.

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