

Development of Positive Law in Indonesia

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ABSTRACT

Background. In the development of positive law today, especially after the reform in Indonesia, there are several laws that the author considers to have developed, especially in terms of child protection law, in addition to those that have existed previously in the Criminal Code and Criminal Procedure Code both material and formal.

Purpose. The blurring of the form of the rule of law caused by the lack of strengthening of the legal system implemented by the Indonesian state is one of the reasons for the many reasons for the need to establish an Indonesian Legal System.

Method. The transition to democracy as one of the triggers for changes in the national legal system inevitably demands changes to the national legal system in a better direction in an effort to establish a national legal system that is in accordance with the ideals of the Indonesian state.

Results. The development of national legal systems should remain long-term oriented in their application. Thoughts about the development of national law in the future have certainly been thought of from an early age in order to set the direction of national law development.

Conclusion. The development of Indonesian national law which is currently strongly influenced by external elements as much as possible to maintain material legal sources from Indonesian laws. The development of national law that emphasizes the spirit of Indonesia and the taste of Indonesia can only be done by consensus from all elements of the nation.

KEYWORDS

Legal Development, Legal Sources, KUHP

INTRODUCTION

In a rule of law, the law enforcement process is very important so that justice can be achieved (Hendra dkk., 2023), because the law enforcement process is a fulcrum in determining whether a legal product is running well and achieving the objectives for which it was created. In Indonesia (Hasan & Amor, 2022), there are two types of law that are known by the community, namely positive law and law that lives in society, namely customary law (Al Fathan & Arundina, 2019). Positive law is the applicable law in Indonesia which consists of a collection of written and unwritten legal principles and rules which are currently in effect and generally or specifically binding and enforced by or through the government or courts within the country of Indonesia (Hasan, 2020). In addition, there is what is known as customary law, customary law is a custom that has become a rule passed down from generation to

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generation that lives in society to this day, customary law is an unwritten law, the meaning of unwritten is that customary law is a law that is not made by parties who authority or government.

While in countries that are newly independent and are developing other problems as well (Hasan, 2021a). Here there are at least two factors that urge a progressive attitude to be taken regarding law and its role in society, namely:

1. The desire to quickly eradicate colonial legacies, and
2. Hope - the hope that is generated in society with the achievement of independence.

Based on the facts above, it is natural for a country to replace the conservative legal thinking inherited from the government and the colonial education system with a legal thinking that pays more attention to the needs of a developing society (Hasan, 2021b). Ehrlich's school gives a message to legislators to create laws that do not conflict with existing laws in society.

Sociologically, the existence of National Legal Politics became a necessity immediately after Indonesia became independent, because with independence, there was a very revolutionary change in the ideals and realities of Indonesian society (Hasan, 2022). If before independence the ideas and structure of life in Indonesian society were based on colonialism which was very exploitative (Heidari, 2022), after independence these ideas and structures changed completely to become an independent society.

Bearing in mind the development of the Indonesian National Legal System which is still trying to find a form or format that is in accordance with the soul and spirit of the Proclamation and the values contained in society and added to this by not denying the enormous influence of other legal systems both culturally and legally which has had its own consequences in formation of society in the development of national law (Hilton, 2021). In the context of national legal development which is currently in the midst of the vortex of other world legal systems, of course national legal development must remain independent and consistent in running in accordance with the spirit of Pancasila and unity in diversity (Ibhagui & Olawole, 2019). The inclusion of other values which intentionally or unintentionally become factors that influence or are influenced carefully must be seen as a whole whether or not they can have negative impacts on the development of national law. Development of national law of course remains

provide a separate space for "community laws" to be able to coexist with other modern legal systems.

Adherence to the above will only give a bad picture in the spirit of drafting national laws that have an Indonesian flavor. Indonesia as a developing country certainly really needs guidance and development of the National Legal System in order to encourage and support development in all fields (Deok-Ki Kim & Seo, 2003). Borrowing Roscoe Pound's term "as tool as social engineering" , in fact the guidance and development of national law should be able to provide direction and a way for law, society and the state to be interconnected with one another (Mustangimah dkk., 2021). Of course, this can be realized if the enthusiasm for fostering and developing national law is based on the spirit and values held in society without ignoring other developing values which are in accordance with the culture of Indonesian society.

In connection with the matters above, in order to see a deeper theoretical understanding in relation to legal development in Indonesia (Rioja dkk., 2014), the opinion of Philippe Nonet and Philip Selznick is interesting to examine the relationship between the level of state development and the type of legal product (Salendu, 2021). There are two types of legal products born from different levels of development of national integration in each country, namely the type of oppressive law and the type of autonomous law. National legal development.

Indonesia, which can be said to be a developing country, should be prepared and planned not to oppress the people, but on the contrary, to foster and develop national laws that can empower the wider community (Syahza & Asmit, 2019). On the other hand, it cannot be denied that the development of national law is closely related to the politics of national law.

What is the role of national legal politics in contributing to sketching and determining how the perspective format of the direction of national legal development and efforts to enforce its functions are carried out.

Seeing the face of Indonesian law which is still overshadowed by colonial law gives a distinct impression that Indonesian law is not independent because it is still interdependent with the Dutch legal system and the French legal system which form Indonesian law (Wahyuni & Kee Ng, 2012). For this reason, in order to realize the independence of Indonesian law, like it or not, development and the Indonesian legal system must be carried out as soon as possible.

The above is a radical first step provided that it is not too extreme by overhauling the existing system with passion, but rather with logic and positive reasoning in order to improve the legal system itself (Syahza dkk., 2018). The next stage is to carry out a program to improve human resources (HR) which is professional in the legal field and future oriented.

RESEARCH METHODOLOGY

The transition to democracy as one of the triggers for changes in the national legal system inevitably demands changes to the national legal system in a better direction in an effort to establish a national legal system that is in accordance with the ideals of the Indonesian state (Kaiser & Reisig, 2019). The blurring of the legal form of the state caused by the lack of strengthening of the legal system implemented by the Indonesian state is one of the many reasons for the need to establish the Indonesian legal system (Merendino & Melville, 2019). Departing from the various problems that have been explored in the background above raises a problem and questions related to the current development of the National Legal System.

RESULT AND DISCUSSION

The term system is most often used to refer to a method or method and a set of elements or components that are interconnected to each other to form a unified whole. Actually it uses more than that, but it is less well known (Dui dkk., 2020). As a set, the system is also defined in various ways.

The state is an organization of power that appears to consist of rules or legal provisions arranged in a legal order (Guo dkk., 2019), therefore, as stated above (Liu dkk., 2022), the founding of the state will coincide with the founding of the state legal system.

Law (the same as economics or politics or society) is a system, which consists of many elements that are interrelated and influence each other, in such a way that if one element does not function (work) as it should (Sheraz dkk., 2022). Likewise, if one part of it (for example the regulations) is changed, all other elements of the law must also be changed.

This proves why, with the birth of so many laws and regulations which often diametrically contradicted their values and philosophies to the legal regulations in the New Order, it seemed as if our entire legal system was not functioning or seemed to be "paralyzed". This is due to the institutions, organizational structure, officials, and work procedures, often the values that are firmly held are still the same as in the New Order, Old Order or even the mind (mindset) of officials, judges, or the public (Zhu & Shu, 2019). Law users are still the same as in the colonial era, or even still the same as in the era before the arrival of foreigners to the Indonesian archipelago (customary law)

The system is a unit consisting of parts that are interdependent with one another to achieve certain goals. many of which give a definition of the term this system. Some say that the system is a whole consisting of many parts or components that are intertwined in a relationship between one component and another on a regular basis (Jian dkk., 2021). Meanwhile, national law is a law or statutory regulation that is formed and implemented to achieve the goals, basis and legal ideals of a country (Zhang dkk., 2022). In this context, Indonesia's national law is a legal unit or statutory regulation that was built to achieve state objectives which originate from the Preamble and Articles of the 1945 Constitution. Indonesian state law (Dong dkk., 2021). Thus, the Indonesian national legal system is the legal system that applies throughout Indonesia which includes all elements of law (such as content, structure, culture, facilities, laws and regulations, and all of its sub-elements) which are interdependent on one another and sourced from the Preamble and Articles of the 1945 Constitution.

Starting from the definition of a legal system, it is an orderly arrangement of various elements that becomes a mutually reinforcing necessity to achieve goals. The legal system was created so that there is no overlap between the systems themselves. This legal system applies well if it is supported by good legal principles (Garofalo dkk., 2019). The legal system regulates all activities of human life from birth to death and even regulates people who are still in the womb with the condition that they be born alive.

With the proclamation of Indonesian independence, it automatically ended the Dutch and Japanese colonial legal regimes (Alam dkk., 2019). The presence of the proclamation of independence was the initial milestone in the establishment of the Indonesian legal system in the future. Although, it cannot be denied that post-independence Indonesia still uses colonial laws as long as they do not conflict with existing or new laws and regulations, this merely prevents the occurrence of a legal vacuum in Indonesia. It is also clear that both the legal system and the judicial system that existed in Indonesia before the independence of the Indonesian people were very complicated and very discriminatory against the Indonesian people/people themselves so that after the Proclamation of Independence in 1945, this judicial system was deemed necessary to be simplified into one system that is the same for all. Indonesian citizens and residents by carrying out legal unification. The need for adjustments between legal products and the notion of the structure of society is due to the fact that the law must function to serve the community, or because the law is not in a vacuum.

In connection with the above, quite a few legal experts believe that codification and unification should be used as a direction in legal development because codification and unification can provide benefits for the development of law and Indonesian society. Codification can provide guarantees of legal certainty, while unification is more in line with Pancasila because it accelerates the integration process (building unity and integrity) of the diverse Indonesian nation.

After the amendments to the 1945 Constitution from 1999 to 2002 brought a new color to the journey of the Indonesian legal system. Looking historically at the formation of the Indonesian legal system which started from the concept of customary law that lived in Indonesian society which was ultimately influenced by the Dutch legal system when the Dutch colonized Indonesia. The concordance process of the Dutch legal system colored the formation of the Indonesian legal system, which in fact cannot be denied still leaves residue in several parts of the Indonesian legal system. That the amended 1945 Constitution is better than the original 1945 Constitution cannot be disputed by anyone. After the 1945 Constitution was amended, it was clear that democratic life was growing better. Carrying out these changes in itself is a huge step forward for democracy because in the past any idea to change the 1945 Constitution was considered subversive.

In connection with the above, whatever characteristics are attached to a particular legal system, these characteristics are the same as those in any other system or process. First there are inputs, raw materials that enter one side of the system. However, based on the aspirations of the people to be achieved which are crystallized in the goals of the state, the basis of the state and the ideals of law, what is needed is a national legal system that can be used as a vessel or foothold and a framework for national legal politics.

The development of a national legal system should actually be the shared desire of all elements of government to create an orderly and systematic legal system that leads to the development of national law. The development of the national legal system is of course input from levels of society in looking at the implementation of the current legal system.

If we reflect on the system of state government which was emphasized in the 1945 Constitution before the amendment said that "Indonesian state is based on law (Rechtsstaat), not based on mere power (Machtsstaat)", then in fact the style of the Indonesian legal system is colored by the Dutch legal system which adheres to the Continental European legal system based on legal certainty (Rechtsstaat). Of course, this can be understood because Indonesia is a former Dutch colony. However, for certain matters after the independence of the Indonesian state has tried to build its own legal system that is in accordance with the ideals of the Indonesian state and the goals of the Indonesian state. The courage to get out of the influence of the Dutch legal system is certainly very much influenced by legal developments that are implemented in society. Furthermore, the affirmation above, based on the official perspective, Indonesia is a constitutional state so that law must play a decisive role or become central in the life of society, nation and state in Indonesia.

The development of the National Legal System should not leave material sources of law as the basis for establishing a legal system that reflects the Indonesian spirit. Material sources of law reflected in Pancasila, the ideals of the Indonesian people, values, norms, kinship, deliberation, mutual cooperation, tolerance and so on which characterize Indonesian society must be a priority scale in structuring the Indonesian legal system in the future. The Indonesian spirit must of course radiate from the development of the national legal system. In a sense, it is not justified to abandon the above spirit by using other concepts that are clearly contradictory so as to disrupt the national legal system.

This is particularly reflected in Article 24 F which determines that the state organizes and develops the national legal system by maintaining and respecting the diversity of legal values and legal sources that exist in society. Therefore, the development of the national legal system must be policy-oriented in the form of the choice of applicable law, the legal system to be adopted, the philosophical basis used in forming the law, including policies to base national law on applicable general principles.

Furthermore, the development of the Indonesian legal system should lead to the ideals of the Indonesian state (staatsidee) which as far as possible must be built in a unique way in the sense that it does not imitate the notions of individualism-liberalism which in fact gave rise to colonialism and imperialism which must be opposed, or the extremes of collectivism as shown in practice in the contemporary world. socialist-communist countries. In other words, the spirit that underlies the thoughts of the founding fathers of the Republic of Indonesia is the spirit of synthesis, the spirit of combining or the spirit of creating a new understanding.

It is also important to understand that the legal system is an abstract (conceptual) system because it consists of elements that are not concrete, which do not show a visible unity. The elements in the legal system have a special relationship with the elements of the environment. Apart

from that, it is also said that the legal system is an open system, because legal regulations, with their general terms, are open to different interpretations and to broad interpretations.

Therefore, the development of the Indonesian legal system, one of which is driven by the development of the order of social life, directs the development of the Indonesian legal system towards the development of laws that reflect the life of society itself. Indonesian legal sub-systems must of course not conflict with the spirit of the values that live in Indonesian society. On the other hand, the influence of other legal systems such as the Anglo Saxon legal system, continental European legal system, Islamic legal system and customary legal system must be used as comparison material for the creation of an even better Indonesian legal system. Adoption of a legal system without a filtering process will be contrary to the spirit of the country's ideals and will ultimately lead to prolonged social unrest as a result of the non-compliance with the application of the law in society. The desire to build a legal system that has a solid foundation must of course be rooted in the values and ideals of the Indonesian state itself.

Therefore, thinking about the role of law as a tool for change and development needs to be placed in a line of perception that is mutually agreed upon to understand its true nature and the consequences of accepting this concept. If law is given a role as a means of change and development, this thinking proves that there is awareness of the reciprocal influence between law and society and that (for one reason) it is desirable that the society concerned change more quickly and in a certain direction.

For this reason, the development of national law must be able to balance the interests of *das sein* and *das sollen*, between theory and reality. The development of national law is not only good on paper, but furthermore than that the output of the blueprint for development of national law must be implemented and applied as well as the goals of the Indonesian state which are stated in the fourth paragraph of the preamble of the 1945 Constitution.

In line with the above, because law is always made (passively) or created (actively) for a society, the Indonesian national law that must be formed must also be made for a society living in four waves of civilization at once²⁴. This means that even though all national laws must be sourced and inspired by the 1945 Constitution as the constitution of the Indonesian nation which is sheltered under the Unitary State of the Republic of Indonesia, differences in the needs of each and every generation must inevitably be taken into account. and given a channel and place.

In the Indonesian national legal system. The development of a national legal system is of course expected to encompass all groups, peoples, tribes, races and religions as a form of pluralism embedded in the concept of the Unitary State of the Republic of Indonesia. It is hoped that this summary in the development of a national legal system will be able to create a better legal system within the framework of diversity.

In building a good Indonesian legal system, it is first necessary to establish a consensus on the desired structure and culture so that in developing the legal system it can lead to what has been agreed upon and aspired to. And of course this must look at the most important aspects of society related to cultural and dynamic aspects. This is if we look at development in the development of our legal system in order to bring about transformational change in society both in thought, economically, culturally and structurally.

For the years to come, in order to make national law, which is truly based on the 1945 Constitution and realize the ideals (vision and mission) of the nation, as stated in the preamble to the 1945 Constitution, of course it is the responsibility of all elements nation and state.

Responding to the development of national law as explained above, it is necessary to be reminded again that the development of the national legal system within the framework of

developing the national legal system still takes into account the concept of legal thought regarding *ius constitutum* and *ius constituendum* so that in developing the national legal system the direction of legal development can be predicted in such a way. in the future by making the application of positive law now a consideration and reference for the development of legal aspects that will be developed in harmony with the development of society.

The development of the national legal system should remain oriented towards the long term in its implementation. Thoughts regarding the future development of national law have certainly been considered from an early age in order to determine the direction of development of national law. The spirit of "Indonesian taste" in every legal product produced must be maintained, a spirit of taste which certainly does not conflict with other values that are still firmly held and can be accepted by society. The dissolving of "Indonesian flavors" in the development of national law is avoided as much as possible so that the development of national law in the future is truly a law that is in accordance with Indonesian society.

Finally, there is no other choice apart from retracing the values of the legal norms of the Indonesian nation which were previously formed from the indigenous legal system and were formed with the Indonesian legal system which was patterned on the ideology of Pancasila and the 1945 Constitution. This is very ideal and focuses on social justice for all people of Indonesia.

CONCLUSION

The development of Indonesian national law is something that the government inevitably has to do in order to form a national law that is rooted in all levels of society. The development of Indonesian national law, which is currently heavily influenced by external elements, is to maintain, wherever possible, the material legal sources of Indonesian laws. The development of national laws that emphasize the Indonesian spirit and Indonesian taste can only be carried out with consensus from all elements of the nation.

The blue print for the development of national law is a direction for the development of positive law in Indonesia. Blue print that directs the development of national law towards state goals as stated in the preamble to the 1945 Constitution which continues to develop *ius constituendum* based on Pancasila and the 1945 Constitution.

AUTHORS' CONTRIBUTION

Author 1: Conceptualization; Project administration.

REFERENCES

- Al Fathan, R., & Arundina, T. (2019). Finance-growth nexus: Islamic finance development in Indonesia. *International Journal of Islamic and Middle Eastern Finance and Management*, 12(5), 698–711. <https://doi.org/10.1108/IMEFM-09-2018-0285>
- Alam, A., Uddin, M., & Yazdifar, H. (2019). Institutional determinants of R&D investment: Evidence from emerging markets. *Technological Forecasting and Social Change*, 138, 34–44. <https://doi.org/10.1016/j.techfore.2018.08.007>
- Deok-Ki Kim, D., & Seo, J. (2003). Does FDI inflow crowd out domestic investment in Korea? *Journal of Economic Studies*, 30(6), 605–622. <https://doi.org/10.1108/01443580310504462>
- Dong, F., Pan, Y., Li, Y., & Zhang, S. (2021). How public and government matter in industrial pollution mitigation performance: Evidence from China. *Journal of Cleaner Production*, 306, 127099. <https://doi.org/10.1016/j.jclepro.2021.127099>

- Dui, H., Meng, X., Xiao, H., & Guo, J. (2020). Analysis of the cascading failure for scale-free networks based on a multi-strategy evolutionary game. *Reliability Engineering & System Safety*, 199, 106919. <https://doi.org/10.1016/j.ress.2020.106919>
- Gnocchi, M., D'Alvano, T., Lattanzi, C., Messina, G., Petraroli, M., Patianna, V. D., Esposito, S., & Street, M. E. (2022). Current evidence on the impact of the COVID-19 pandemic on paediatric endocrine conditions. *Frontiers in Endocrinology*, 13, 913334. <https://doi.org/10.3389/fendo.2022.913334>
- Guo, M., Hu, Y., & Yu, J. (2019). The role of financial development in the process of climate change: Evidence from different panel models in China. *Atmospheric Pollution Research*, 10(5), 1375–1382. <https://doi.org/10.1016/j.apr.2019.03.006>
- Hasan, Z. (2020). Distribution Of Zakat Funds To Achieve SDGs Through Poverty Alleviation In Baznas Republic Of Indonesia. *AZKA International Journal of Zakat & Social Finance*, 25–43. <https://doi.org/10.51377/azjaf.vol1no01.7>
- Hasan, Z. (2021a). Analysis of Factors Affecting Community Interest in Bengkalis Regency Riau Province Indonesia in Using Sharia Banking. *European Journal of Islamic Finance*, 35-44 Pages. <https://doi.org/10.13135/2421-2172/6108>
- Hasan, Z. (2021b). Making Indonesia as Integrated Halal Zone and World Halal Sector Hub Through the Implementation of Halal Supply Chain. *Journal of Islamic Economic and Business Research*, 1(1), 1–14. <https://doi.org/10.18196/jiebr.v1i1.11529>
- Hasan, Z. (2022). The Effect of Human Development Index and Net Participation Rate on the Percentage of Poor Population: A Case Study in Riau Province, Indonesia. *International Journal of Islamic Economics and Finance Studies*. <https://doi.org/10.54427/ijisef.964861>
- Hasan, Z., & Amor, G. S. (2022). The Influence of Investment On The Economy In Riau Province Indonesia. *Journal of Entrepreneurship and Business*, 10(1), 32–43. <https://doi.org/10.17687/jeb.v10i1.843>
- Heidari, A. (2022). The regulations concerning the protection of the national security of the host country and the legitimate expectations of the foreign investments. *Journal of International Trade Law and Policy*, 21(2), 122–139. <https://doi.org/10.1108/JITLP-07-2021-0037>
- Hendra, R., Agustina, R., & Lestarini, R. (2023). The Effects of Conflict and Palm Oil Investment Between Investors and Communities in Indonesia. *International Journal of Environmental, Sustainability, and Social Science*, 4(1), 142–152. <https://doi.org/10.38142/ijesss.v4i1.491>
- Hilton, S. K. (2021). Public debt and economic growth: Contemporary evidence from a developing economy. *Asian Journal of Economics and Banking*, 5(2), 173–193. <https://doi.org/10.1108/AJEB-11-2020-0096>
- Ibhagui, O., & Olawole, K. (2019). Capital flows and domestic investment: New evidence from OPEC countries. *Journal of Financial Economic Policy*, 11(4), 505–532. <https://doi.org/10.1108/JFEP-06-2018-0090>
- Jian, L., Sohail, M. T., Ullah, S., & Majeed, M. T. (2021). Examining the role of non-economic factors in energy consumption and CO2 emissions in China: Policy options for the green economy. *Environmental Science and Pollution Research*, 28(47), 67667–67676. <https://doi.org/10.1007/s11356-021-15359-3>
- Kaiser, K., & Reisig, M. D. (2019). Legal Socialization and Self-Reported Criminal Offending: The Role of Procedural Justice and Legal Orientations. *Journal of Quantitative Criminology*, 35(1), 135–154. <https://doi.org/10.1007/s10940-017-9375-4>
- Merendino, A., & Melville, R. (2019). The board of directors and firm performance: Empirical evidence from listed companies. *Corporate Governance: The International Journal of Business in Society*, 19(3), 508–551. <https://doi.org/10.1108/CG-06-2018-0211>
- Mustangimah, M., Putera, P. B., Zulhamdani, M., Handoyo, S., & Rahayu, S. (2021). Evaluation of the Indonesia national strategic policy of science and technology development. *Journal of Science and Technology Policy Management*, 12(3), 421–442. <https://doi.org/10.1108/JSTPM-04-2020-0079>

- Rioja, F., Rios-Avila, F., & Valev, N. (2014). The persistent effect of banking crises on investment and the role of financial markets. *Journal of Financial Economic Policy*, 6(1), 64–77. <https://doi.org/10.1108/JFEP-08-2013-0035>
- Salendu, S. (2021). The productivity of the agricultural sector and industrial sector as a driving force of economic growth and community welfare in Indonesia. *Benchmarking: An International Journal*, 28(7), 2216–2231. <https://doi.org/10.1108/BIJ-07-2019-0349>
- Zhang, S.-N., Li, Y.-Q., Ruan, W.-Q., & Liu, C.-H. (2022). Would you enjoy virtual travel? The characteristics and causes of virtual tourists' sentiment under the influence of the COVID-19 pandemic. *Tourism Management*, 88, 104429. <https://doi.org/10.1016/j.tourman.2021.104429>
- Zhu, J., & Shu, C.-W. (2019). A new type of multi-resolution WENO schemes with increasingly higher order of accuracy on triangular meshes. *Journal of Computational Physics*, 392, 19–33. <https://doi.org/10.1016/j.jcp.2019.04.027>

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