

## **Legislation in the Development of Legal Traditions**

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### **ABSTRACT**

The development and development of law in Indonesia through legislation for now and in the future is a necessity. This was further strengthened by the issuance of the 2012 UUP3. Such legislation cannot be separated from the modern legal framework departing from the Civil Law Tradition. The question is, the Indonesian people who carry out customary law traditions, are they able to properly follow the traditions that are prevalent in modern law which is not the original tradition? At the same time, Indonesia's constitution also appears to have marginalized customary law. Within this framework, what is undoubtedly done is to try to systematically display parallel customary law in the legislation process. Or at least, the principles of customary law are appointed and used as a reference in every legislation in Indonesia. This paper has the aim to try to see and describe the problems that exist around Indonesian legislation related to the legal tradition with descriptive methods and literature studies from various references on existing law.

**KEYWORDS:** legislation, modern law, civil law tradition, customary law.

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### **I. INTRODUCTION**

Studies in law often object and focus on legal products (both in the form of written law /statutory law and unwritten law/customary law/customary law) along with their implementation and enforcement of these legal products. Therefore, the results of the study of law with such objects and focus have been done quite a lot by people. Meanwhile, legal studies that focus on the process of legal formation to date are not nonexistent but relatively rare that touches them. Even though this study orientation is no less important than a product-oriented legal study. Studying legal products will be richer and more meaningful if done together with studying legislation.

Legislation (the process of establishing a statutory law) certainly cannot be separated from the way the country's law is concerned. The method of law here refers to how the law lives and is lived by a nation. This discussion certainly cannot be separated from the discussion of the nation's legal traditions concerned. Then it becomes interesting to understand legislation from the perspective of the legal radicalization of a national society. The question arises, whether the legislation in Indonesia that has been taking place is indeed rooted in the original legal tradition of the Indonesian people or adopting legal traditions originating from other nations. To see how the legislation is related to the legal tradition, the following explanation will try to see and describe the problems that exist around Indonesian legislation that is related to the legal tradition. The method of discussion in this paper is to adopt some literature related to the topics discussed.

### **II. LITERATURE REVIEW**

#### **Ambiguity Definition of Legislation**

The legislation comes from English legislation. Literally and in the realm of jurisprudence, the legislation contains a dichotomous meaning, which can mean (1) the process of law formation (legislation) and can also mean (2) legal products. However, based on the reading and searching of various dictionaries, it turns out that each dictionary is not the same in providing an understanding of this legislation. Some feed double and some give single meaning. Martin and Law (2006), for example, interpret legislation as 1) the whole or any part of a country's written law, 2) the process of making written law. Likewise, Echols and Shadily (1995) translate legislation as (1) legislation, (2) making laws.

This is different from Subekti and Tjitrosoedibio (1980) who equate legislation with legislation only. This understanding is different from what Rahardjo, Satjipto (2002) put it, which equates legislation (wetgeving, legislation) as making laws. Meanwhile, according to Garner (1999), there are at least three definitions of legislation, namely: 1. The process of making or enacting a positive law in the written form, according to some types of formal procedures, by a branch of government constituted to perform this process - Also termed lawmaking; statute-making. 2. The law is so enacted. 3. The whole body of enacted laws. Two legal positivism

figures, namely Bentham, Jeremy, and Austin, John L. (in Asshiddiqie, 2006) associate the term legislation as any form of law-making. The definition of the legal positivism figure is different from Andreae (in Soeprapto, 2007) which states that legislation, *wetgeving* or *gesetzgebung* can mean (1) the process of forming state regulations, and (2) legislation as a result of the formation of regulations, both at the central level as well as at the regional level.

Lubis (1995) states that the legislation is the process of making state regulations. In other words, the procedures start from planning, discussion, endorsement, or stipulation, and finally the promulgation of the relevant regulations. Binawan (2005) states that legislation, like many absorption words that end in 'asi', refers to a process, to produce law (in the sense of law). Normatively, Article 1 number 1 of Law No. 12 of 2011 concerning the Formation of Legislation (UUP3) provides a limited understanding of legislation (the formation of legislation) as making legislation that includes the stages of planning, drafting, discussion, ratification or enactment, and enactment. Based on the limits of this understanding, it can be stated that the policy formulation of laws and regulations is only one part of the formation of legislation. Of the many notions about the legislation, this paper chooses the notion of legislation as a process of making laws in the context of giving birth to positive laws (in the sense of laws and regulations). This legislation starts with the planning stage of law-making, drafting, formulation, discussion, ratification, determination, until the invitation. This understanding becomes very relevant if it is based on the understanding given by Binawan that the absorption words ending in 'asi' refer to a process to produce a law.

### **The Meaning of Legislation**

The existence of law is for human life. Suppose the law is associated with other things such as to achieve justice, prosperity, order, support development, and so on, but it will eventually always be associated with the life together with these humans. Thus, in short, it can be said that the law functions to serve and at the same time regulate human life together. The means to regulate human life together is not only monopolized by law. This can be read from the opinion of Rahardjo (2006) as follows: if humans and community life take precedence, then it is not important to make law the only means of regulating society. Because often found evidence that the law intended as a means of regulating the community "... also save the potential for criminogenic". Because it is not the only means to regulate society, "On the other hand, there are non-legal methods, such as informal social control, which often show better performance than those shown by law".

Concerning the functionalization of law in human life, Rahardjo (1991) states that in carrying out its function as a regulator of human life together, the law must undergo a long process and involve a variety of activities with varying qualities. Broadly speaking, the process consists of the formation of law and law enforcement. The formation of law is the beginning of the whole process of regulating the community. It is a momentum that separates the state without law from the state governed by law. He is a divider between the "social world and the world of law". Based on SatjiptoRahardjo's view it can be put forward that the process of legal formation is a relatively very important process as well as the relative importance of seeing the process of implementation and enforcement of the law itself. Because, the processes that occur in the formation of law will also influence the implementation process and law enforcement. Mistakes in the process of legal formation can be fatal, because of the wrong legal formation process can give birth to criminal law products that are in association with the community (Rahardjo, 2003).

Koopmans stated that the function of the formation of law (legislation) for now increasingly feels important and very necessary. This is because in a state based on modern law the main purpose of legislation is not just to create a codification for the norms and values of life that have settled in society, but its broader purpose is to create modifications in people's lives (Soeprapto, 1998). Koopmans' view points to differences in the general characteristics of 19th and 20th century (modern law) statutory regulations. Modern 19th century law in general is a characteristic of codified liberal statutory laws, while the character of 20th century statutory regulation is more as a statutory regulation of social welfare states that are modified (Doludjawa, 2005). Certainly for this century, the characteristic of the modification of laws and regulations is still part of the purpose of the formation of law. Based on the opinion of T. Koopmans, it can be stated that currently legislation is very important for a country based on modern law in conducting experiments in the context of legal development. Legislation becomes a burden to be able to produce law that is not only a vehicle for positivation of norms and values that are taking place in society, but also loaded with a burden to carry out the law intended as a means of social engineering, as a means to support community development and national development, and realize social welfare.

### III. DISCUSSION

#### Pluralism in Legal Formation

In the perspective of jurisprudence, the legal formation of a country cannot be separated from the "how to judge" of the nation concerned. In the SatjiptoRahardjo constellation, the "way of judging" a nation shows that these nations have some kind of right to take their way in the law. Because it is a right, a nation can freely determine its own "way of law" without coercion from others. This is because, as stated by Rahardo (2007) "... based on an understanding, that we are dealing with pluralism in law in the world". Therefore it is a necessity that legislation as part of the way of law in a country is also approached from the optics of pluralism. Awareness of this pluralism in the future is increasingly becoming a world trend. This can be listened to for example from the words of Menski (2006) as follows: "It places legal pluralism more confidently into the mainstream study of comparative law, addressing some of the serious deficiencies of comparative law and legal theory in a global context". This understanding of legal pluralism cannot be separated from discussions about the decline of traditional law. What is meant by traditional law is the science that discusses law solely in the context of law itself. Meanwhile, the new law is not only about discussing the law, but it is related to the social habitat where the law is located. In line with these thoughts, Tamanaha (2006) discusses a major thesis on law by saying that law is nothing but a reflection of the community as well as functioning as an orderly maintainer of society - "the idea that law is a mirror of society and the idea that the function of law is to maintain legal order ". This framework of thought, which in Tamanaha's term, is called a mirror thesis. Tamanaha's big thesis certainly strengthens and concretizes Cicero's statement that *yam societatis* (where there is a community, where there is a law) which is still influential, and at the same time following the principle that the law is rooted in "a peculiar form of social life" (Rahardjo, 2006). Thus it can be said that the legal life of a nation is a reflection and at the same time is rooted in the legal traditions that exist in the nation concerned. There are at least three major traditions in "how to judge" (term from Rahardjo, 2007) the nations of the world. As Merryman (1969) states that in this world there are three main legal traditions, namely: the civil legal tradition, the customary legal tradition, and the socialist legal tradition. By citing Merryman, Cruz (1999) states as follows: "It has become established practice to classify the legal systems of the world into three main types of legal families or legal traditions: civil law, common law and socialist law. A legal tradition has been defined as a set of 'deeply rooted historically conditioned attitudes about the nature of law, the role of law in the society and the political ideology, the organization and operation of a legal system' ".

The legal traditions that emerged in the West, especially the Civil Law Tradition and the Common Law Tradition became very dominant in discourse and thought in other parts of the world (Rahardjo, 2007). This case was criticized by Rahardjo (2007). the following: "Indeed thousands of books and articles about ROL have been written by people. But if we look further, the information is almost entirely flowing from the West to the East and throughout the world. This makes ROL heavy towards unilateral understanding. From the flow of information, formed a thought, that by reading all the writings about the ROL we have read the legal journey in the world. I think such identification is not correct, because what we read is classified as one-sided information, namely the journey and development of law in a part of the world called the West. When discussing ROL's journey, what immediately appears is historical information or stories from Roman law, German law, Civil Law, Common Law and so on. With this kind of storytelling, the Western ROL version then becomes the world standard. In the history of the development of the law, how to judge or roll a nation had begun since before Christ. Aristotle and Plato from the Greeks had struggled with the ROL problem. Plato urged that the government be bound by law. The Romans also made their contribution to the ROL tradition. Cicero, a century before Christ, had dared to criticize the king that the king who did not obey the law was a despot. In the period of 529 to 534 Emperor Justinian made a codification consisting of three books, namely: Codex (a collection of royal legislation), Digest (written by jurists), and the Institute (legal teaching book) (Rahardjo, 2007).

After the collapse of the Roman empire which also meant the collapse of ROL with all its studies, it reappeared in the 16th century. Roman and German jurisprudence became the standard in the realm of jurisprudence that is still felt today. Progress in studying the law by van den Bergh (1980) is referred to as the progress of the regulation record (*scholl-rules law*). The word *geleerd* reflects how sophisticated legal scholarship was at that time. ROL in Germany appears as *Rechtsstaat*. Seen from a pure scientific perspective, every country is a *Rechtsstaat*, regardless of whether the country is democratic, totalitarian, fascist, Bolshevik, or an absolut kingdom. The essence of *Rechtsstaat* lies in the separation between the political structure of the state from its legal arrangements. Whereas the function of law is to guarantee independence and certainty. The functioning of such law is nothing but the work of the bourgeoisie who later gave birth to liberal law (Rahardjo, 2007). On a broader level, it can be argued that the law produced in the framework of *Rechtsstaat* is vertical, one-way, from the ruler of the state to its citizens. Related to the ROL, legislation - which is the theme in this paper - is departed from the civil law tradition that developed in mainland Europe like that. According to Manan (1992), in the history of modern law, France can be called a predecessor state in using this system. This civil law tradition prioritizes written law in the form of statutory regulations as the main joint of the legal system.

Therefore, in countries that are and follow the tradition of civil law will always try to arrange their laws in written form, even in a systematic that is as complete as possible in a book of laws (codification). However, not all countries in Europe follow the Civil Law Tradition. Even though they are in one European continent, the British state rejects the way to rule with the Civil Law Tradition. Britain lives happily with its tradition, which is based on the Common Law tradition. English law is commonly referred to as irrational, particular, vague, fluid, chaotic, common sense, pragmatic. In that country, law is a spontaneous continuous institution. By choosing the Common Law tradition, the applicable law is a law that is not made artificially, but rather is a people's law. So, English law is *lex non scripta* (Rahardjo, 2007). In connection with this discussion, the way of punishing the Indonesian people who continue to be consumers of thoughts about ROL with a Western perspective requires correction. With new optics - that is, discussing laws with the social habitat in which the laws are located - then Western-centric ways of law or ROL must be changed. The optics used are no longer normative, but rather more sociological. Such optics are no longer prescriptive but descriptive, namely: "how to understand the law itself and its various manifestations in a truly global context" (Rahardjo, 2007). For the Indonesian state that follows the Civil Law tradition, legislation that produces written legal products is important. However, according to SatjiptoRahardjo, at the same time it should be realized that the legislation could slip and be trapped in matters of a technical-formal nature. If this happens, then legislation in Indonesia forgets the need to "regulate society", whose context is broader than just those technical-procedural matters (Rahardjo, 2006).

### **Legal Forming Organs**

Related to this legislation, the existence of law-forming organs becomes very important for countries that follow the tradition of civil law. In its development, Indonesia, which was once under Dutch colonialism, eventually also interacted with this civil law tradition, so that the legislation and its constituent organs occupied an important position in the development and development of its law. Theoretically, laws and regulations can be made by: the government, the people, representatives of the people, or a combination thereof. In the Netherlands, laws are made by the government along with people's representatives. A slightly different matter is in Italy and Switzerland where some decisions are taken by the people through a referendum, while others are by people's representatives. While in a dictatorial state, the law is made by the government (Doludjawa, 2005). For the Unitary State of the Republic of Indonesia, since the 1945 Constitution was amended, normatively-constitutionally there has been a shift in the role and function of the legislation which is quite significant, namely from initially in the hands of the executive then shifted to the legislature. This can be seen from the provisions of Article 20A paragraph (1) of the 1945 Constitution resulting from the amendment which reads: "The House of Representatives has a legislative function, a budget function and a supervisory function". Thus, after the amendment to the 1945 Constitution, the institutions that formed the statutory law were the legislative institutions both in the center (the People's Representative Council) and those in the regions (the Regional People's Representative Council). UUP3 2011 explicitly determines that the legislation function is within the DPR and DPRD. However, this legislative function is not an independent function possessed by the Indonesian legislative body, but the institution must cooperate with executives both at the central and regional levels when implementing their legislative functions.

In a sociological perspective, the law-forming organ is not merely seen as a law factory, "but is a field where competing interests and forces exist in society". Based on such optics, the law-forming organs reflect the configuration of forces and interests that exist in that society (Rahardjo, 2002). In a country that adopts a democratic system, the channeling of various interests and forces is through a system of representation and elections. In the context of such a democratic system, "The tendency of thought, education, social origins and others of the members of the legislative body will also determine the laws made" (Rahardjo, 2002). It should be understood that in the formation of modern law it is not just formulating the material with all its juridical standards, but the process begins with making a political decision first. Furthermore Rahardjo (2002) elaborates as follows: "In formulating the decision, the configuration of power in the legislature is important. Unless determined by the composition of membership in the legislature, the interventions from outside the legislature cannot be ignored. This intervention can only be mainly carried out by groups who have power and power, both socially, politically and economically. Many people cannot approach or lobby like "The haves". The only language of intervention they know is violence. Sociologically there is no difference between subtle interventions by the elite and strong interventions by the people in the process of making laws.

Nusantara (1988) states that in the tradition of civil law (including the socialist legal tradition), the role of state organs (parliament and government) is so dominant and very monopolistic in determining the direction of legal development. Because of the strong role of these state organs, it is not uncommon to find that the strategy in the formation of law according to the tradition of civil law is to adopt a strategy of orthodox legal development. The law produced by this strategy will be positivist-instrumentalist, namely the law becomes a powerful tool for the implementation of state ideology and programs. With the dominance of the law-forming organs in a country that adheres to this tradition of civil law - although its political configuration is democratic it is not uncommon to find that in its legislation it reflects undemocratic indicators. This is because it depends on

how the political constellation of the law-forming organs involved in implementing and translating the legislative power gained through the democratic process. There is ambiguity in the democratic political configuration. On the one hand political configurations can lead to democratic-elitist political configurations, and on the other hand can lead to democratic-participatory political configurations. So, elitist or participatory in legislation depends on how the political configuration that holds the legislation in carrying out its legislative function (Ibrahim, 2008).

### **Legal Formation: A Process**

Following Satjipto Rahardjo's opinion, that the process of legal formation consists basically of two major groups, namely the sociological (socio-political) stage and the juridical stage. In the sociological stage processes take place to mature a problem which will then be brought to the juridical agenda. In the socio-political stage, the initial idea that something needs to be regulated in law is processed by the community itself, discussed, criticized, defended, through the exchange of opinions between various groups and forces in society. At this stage an idea undergoes an examination, whether it will be able to proceed as a public agenda that will be formatted legally or stop in the middle of the road (Rahardjo, 2003). If the idea is politically successfully carried on, then of course the form and contents will change, which is more sharpened than when it appeared. At this point, he will proceed to the juridical stage which is the work that involves the formulation or endorsement of a rule of law. This stage involves purely juridical intellectual activity that is undoubtedly handled by special personnel who are educated in law. In the description of Seidman et al (2001) - although the discussion is only specifically related to the formation of laws, but can be adopted for the legal legislation process in general - the legislation process should pay attention to 6 (six) things, namely: (1) the origin of the draft law laws, (2) concepts, (3) prioritization, (4) drafting the law, (5) research, and (6) who has access?

Thus, legislation should be able to answer 6 (six) questions as follows:

- (1) How do you arrange ideas about the laws included in a system - and from whom?
- (2) Who initially explained the idea - and how?
- (3) Who decides, with what criteria and procedures, in the effort to use the limited resources available when drafting some bills - and not to draft other bills?
- (4) Who ensures that the draft law uses procedures and meets official standards, and does not conflict with other laws?
- (5) Who researches the detailed details in a draft law? and finally,
- (6) How institutions provide input and feedback to the right people, not to the wrong party, the authority to provide information to those involved in drafting the law - facts, theories, and aspirations and demands of "various groups"?

In legislation in which there are conflicting values and interests, Schuyt points out that there are two possible legal positions, namely as follows: (1) as a means to dilute disputes and (2) as actions that reinforce further conflicts. This description shows that in a society that is not based on an agreement of values, the formation of law is always a kind of deposition of conflicts that exist in society. From this, it can be seen that the existence of conflicting values and interests in society will tend to encourage the formation of law by making a compromise between things that conflict. The compromise allows the opposing party to accept a solution that is confirmed through regulations so that it can be said that the regulation is an effort to end conflicts of values and interests. If in the future one of the parties feels cheated or realizes that the regulation is actually only a pseudo solution, then a conflict of values and interests will arise again which could be sharper by Chambliss and Seidman (1997).

### **The Future of Indonesian Legislation**

Legislation in the framework of producing statutory law cannot be separated from the modern legal framework that departs from the tradition of civil law. Since modern law has penetrated various parts of the world, then legislation is an effort prepared and formulated thoroughly by following certain rules in the process of its formation. Following the pattern of modern law that emerged in the Middle Ages, legislation was carried out by a particular institution or official, which had all the attributes of the state, which legally had formal authority for it. As recorded in history, the introduction of the Indonesian people with modern law occurred at the time the country was colonized by the Dutch colonial government. The Dutch legal system, which has a traditional civil law, was introduced and incorporated into Indonesia, which was mixed with traditional law traditions, through the principle of concordance and the principle of the oneness of law. This process of mixing by Wignjosoebroto (1995) is referred to as a legal transplant from a foreign (European) legal system into the middle of a typical colonial society's legal system. Such a transplant process often creates problems. Indonesian people with traditional law traditions, are they able to properly follow the traditions that are prevalent in modern law which is basically not the original tradition? Apart from these problems, certain legislation in Indonesia has become the mainstream in the discussion of national law development. This is reflected in the considerations of letters a and b of UUP3 2011 which states as follows:

- a. that in order to realize Indonesia as a state of law, the state is obliged to carry out the development of national law that is carried out in a planned, integrated and sustainable manner in the national legal system that guarantees the protection of the rights and obligations of all Indonesian people based on the 1945 Constitution of the Republic of Indonesia;
- b. that in order to meet the needs of the community for good laws and regulations, it is necessary to make regulations regarding the formation of laws and regulations which are implemented in a manner that is sure, standardized, and standard which binds all institutions authorized to form laws and regulations.

#### IV. CONCLUSION

The strong flow of legal development and development through legislation also has a constitutional justification. Article 20A paragraph (1) of the 1945 Constitution (the result of the amendment) reads: "The House of Representatives has a legislative function, a budget function, and a supervisory function". Of course, this legislation diction at the regional level is called "the enactment of regional regulations". This terminology also appears in Law No. 23 of 2014 concerning Regional Government, for example in Article 96 paragraph (1) letter a which reads "Provincial Regional Representative Council has: Establishment of Provincial Regulations". Thus, the development and development of law in Indonesia through legislation for now and in the future is a necessity. Moreover, with the issuance of UUP3, it seems that the development and development of law in Indonesia will all go through the "door" of legislation. With the strong current of legislation in the development and development of law in Indonesia, it could be that the future of customary law - as an indigenous law that grows in the lives of Indonesian people - is experiencing subsidence. The 1945 Constitution of the Republic of Indonesia (amendment) also seems to lack sympathy for customary law. refer to it as 'traditional community rights'. This can be listened to through Article I Transitional Rules which read "All existing legislation still applies as long as no new provisions have been made according to this Basic Law", increasingly clearly shows there is a systematic effort through the Constitution to marginalize the existence of customary law. Basically, it is unfortunate that there will be systematic sequencing of the future of adat law. If this condition happens, then the "way of judging" the Indonesian nation seems less enthusiastic in welcoming the world trend that values diversity in the implementation of the ROL. Certainly what is undoubtedly done is to try systematically to present customary law as equals in the legislation process. Or at least, the principles of customary law are appointed and used as a reference in every legislation in Indonesia.

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