

# NATIONAL LEGAL DEVELOPMENT: CHALLENGES AND OPPORTUNITIES IN THE ERA OF GLOBALISATION

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## Abstract

This paper focuses on the role of national legal development plays in the process of reduction of negative influence of globalisation on the national legal system. However, the globalisation has increased the way of doing trade between several countries which had different legal systems and has forced countries to develop programs that can ensure for their systems to be compatible to enable a viable business environment. In this paper, main approaching in the national legal development must put Pancasila as a screening board which will have implication in the formation of legal regulations in Indonesia. The main purpose of the study is to describe change and new issues on national legal system when influenced by globalisation processes, and summarise the goals and prospects of national legal development under the globalisation by introducing respective conclusions.

**Keywords:** Globalisation, Indonesia Legal System, National Legal Development

### A. Introduction

Globalisation has intensified international competition and has given rise to the need for an increasingly integrated and evolving legal system. A number of trends have contributed to the accelerated globalisation of industry and the integration of international economies. For instance, the growing similarity in available infrastructure, distribution channels and marketing approaches has enabled companies to introduce products and brands to a universal market place.

Globalisation has resulted in harmonization of national legal systems. It has forced countries that wish to become members of the international global community to establish compatible laws. This has been especially evident in

areas such as banking law, competition law, bankruptcy law, copyright law, patent law, and arbitration law, among others.<sup>2</sup>

### B. National Legal System Development

Indonesia is a state based on law (*rechtsstaat*) and not merely on power (*machtsstaat*).<sup>3</sup> As a consequence, laws serve as guidance for the nation's affairs and thus the government, its state apparatus and its citizens should be subject to the supremacy of law.

The rule of law is designed to protect citizens against the arbitrary exercise of power by the state and to protect citizen property, liberty and lives from infringements or action by fellow citizens or by the state itself. In addition, the law shall also be deemed as a

fundamental basis for society through unified implementation and an integrated national legal system. Such national legal system shall be based on the principle of a unified archipelago while acknowledging that the diversity and heterogeneity of law remains a priority (the living law).

In the modern *rechtsstaat*, the function of legislation is not only to enshrine prevailing values and norms in society as well as laws and the regulatory will of the state. Legislation is a legal instrument to regulate and to standardize social interactions as expressed in the Indonesian ideology, *Pancasila*.

In relation to the development of law, *Pancasila* is the underlying framework of the National Legal System, whereby such legal system has several unique differences compared to other legal systems in other countries.

Satjipto Rahardjo, a renowned Indonesian legal scholar, is of the view that *Pancasila* principles reflect and are imbued with uniquely important Indonesian concepts and values, such as kinship and mutual assistance, unlike other national legal systems.<sup>4</sup> *Pancasila* has a legal perspective which differs from the European system which focuses on *legism* principles, civil law, administrative, legal certainty and written laws and is called *Rechtsstaat*; it also differs from the Anglo Saxon system which concentrates on judicial, common law and justice whose law is termed the Rule of Law.<sup>5</sup>

The development of law deals with certain actions or activities which are meant to establish a better and more conducive legal system. The development of law,

additionally, is not an independent activity but is integrated with the development of other sectors, and therefore the development of law is a continuous process that connects other developments in other sectors. The development of law is intended to establish the law itself in a broad sense which refers to a system that relates not only to the development of substantive law, but also to the development of legal and other governmental institutions and apparatus and the development of law enforcement, legal services and of an increased public awareness of the law. These various substantive, structural and institutional components influence and interplay with each other and therefore must be developed simultaneously in an organized, synchronized and integrated manner.

The development and reform of the legal process is closely related to (i) the process of establishing the rule of law, including laws, institutions and procedures, (ii) infrastructure (iii) human resource development, and (iv) the improvement and modernization of legal institutions that are necessary to improve the welfare of the state and society. Thus, legal development and reform should not only consist of changes in norms, but also of changes in the educational process of law, bureaucratic reform, improvement of the political and administrative system of the country as well as implementing improvements in law enforcement that result in a national legal system which has a practical function (the living law in action). The development of the law further requires dissemination of the law,

meaning the process of the formation and development of legal awareness of the public as well as of state officials and public authorities in order to foster broad societal support and acceptance of the law and the legal system (legal culture and legal awareness).

In other words, the development of law must be exercised systemically, and its success is inextricably tied to the development of:

- (a) substantive and procedural laws and regulations;
- (b) government agencies and institutions charged with the execution and enforcement of the law, including the personnel involved, the working mechanism of legal institutions, facilities and infrastructure needed and used by such agencies and institutions, and sufficient funding from the state budget needed to support the proper and efficient operation and performance of such agencies and institutions;
- (c) the legal awareness of the organizers of the development apparatus (bureaucracy) and good public services;
- (d) the legal culture of society which is the subject and object of the laws concerned; and
- (e) the legal education system that produces, and also determines the quality of, human resources working in legal professions and related occupations who carry out the development and reform of law. The development of legal education should also be seen as a systemic effort (since it consists not only of the philosophy of law, legal norms, but also of a number of

organizations/institutions of law whose function and performance are undertaken through the apparatus (human resources), facilities and infrastructure as well as various available procedures, including a budget to implement law development planning).

The aforesaid condition shows that the development of law requires planning to enable the participants in the process to formulate questions of what and how an activity may be carried out in a systematic and continuous manner. Such planning, in this matter, shall entail preparation that supports the performance of the subsequent actions. Furthermore, planning consists of identifying the objectives which guide and form the outlines of what issues need to be addressed and what steps need to be taken to achieve such goals and objectives.

Mochtar Kusumaatmadja developed a concept for law development and reform in Indonesia influenced by the works of Roscoe Pound and Eugene Ehrlich which incorporate pragmatic development goals. According to him, as was proposed by Roscoe Pound, the law is not merely deemed to be a facility, but also a means (instrument) to build the community. Mochtar Kusumaatmadja's view was that law and order in business development and legal reform is needed to achieve the national business and law. Law, in terms of feasible norms, is expected to lead the direction of development and integration. It requires written laws and unwritten laws (i.e. customs) that have to



exist in harmony with the laws of society.

He further maintained that the conceptual development of law as an instrument of reform in Indonesian society currently has a broader scope than it initially had for the following reasons:

- a) In Indonesia, statutory law is paramount in the legal reform process rather than jurisprudence as is the case in the United States;
- b) The concept of law as a mere a tool would lead to a result not much different from the application of "legism" under the colonial Dutch East Indies regime, which Indonesian society refused to comply with;
- c) If the law mentioned herein includes international law, then the concept of law as a means of societal reform had already been implemented well before the said concept was formally accepted as the basis of national law policy.<sup>6</sup>

Technological developments are conceived as the main facilitator and driving force of globalisation. Globalisation is, thus, the catalyst of fundamental changes to the rule of law nationally and internationally. Therefore, the role of law development is of the utmost importance in the course of globalisation.

### C. Impact of globalisation on the National Legal System

The third wave of globalisation predicted by Alvin Toffler is marked by increased economic integration and growing economic interdependence among all countries of the world. In this context, great attention must be paid to the role of national law.

The term globalisation started appearing in the 1980s, and the term was originally coined by Ronald Robertson of the University of Pittsburgh. The process of globalisation is not controlled by any individual, government or institution because globalisation is a social change that has been planned by industrialized countries for all the countries of the world to cooperate to form a single world society, a society characterized by dependence, homogenization, openness and integration. The present cycle of globalisation, however, focuses primarily on economic issues. Globalisation is, thus, the catalyst for fundamental change to the rule of law, nationally and internationally.

Globalisation has two aspects: first, in the context of the enactment of a legal system, globalisation refers to the force or influence of international law on the domestic law of a state; second, globalisation also means that national law may also affect the formation and content of international law, especially through international agreements.<sup>7</sup>

There are four main driving forces behind globalisation, namely (a) trade and investment liberalization; (b) technological innovation and the reduction of communication costs; (c)

entrepreneurship; and (d) global social networks. Although many believe that technological innovation and entrepreneurship are the main forces behind globalisation, these factors alone cannot explain the process of enhanced economic integration. Laws and regulations play a pivotal role in allowing greater economic globalisation of specific activities through the elaboration and adoption of market-oriented policies and regulations at both international and local levels.

With regard to the legal system, according to Lawrence M. Friedman, there are three elements in legal systems, i.e. legal structure, legal substance and legal culture. The Legal Structure is the skeletal framework; it is the permanent shape, the institutional body of the system, the tough, rigid bones that anchor the structure within certain bounds. We describe the structure of the judicial system when we talk about the number of judges, the jurisdiction of courts, the way higher courts are placed above lower ones, which persons are attached to various courts and what their roles are consisted. Legal Substance refers to the laws, both substantive and procedural rules. A legal system is the union of primary rules and secondary rules. Primary rules are norms of behavior; secondary rules are norms regarding those norms, how to decide whether they are valid, how to enforce them, etc. Both primary and secondary rules, of course, are products of the legal system. They are ways of describing the behavior of the legal system seen in a cross-section. Litigants act on the basis of the substance of the system,

creating certain expectations to which they react.<sup>8</sup> Legal culture refers to the 'attitudes, values, and opinions held in society. Legal culture, in other words, is the climate of social thought and social force which determines how the Law is used, avoided or abused. Without legal culture, the legal system is inert. A dead fish laying in the bustard not a living fish swimming in its sea."<sup>9</sup> Legal culture also means legal awareness of the legal subjects of the whole community.

The legal system as part of the social system must be able to respond to social demand. Thus, the output of law is what the legal system produces in response to social demand. There are 4 (four) elements inherent in the legal system:<sup>10</sup>

- 1) The general output and overall function of law is what society expects of the system.
- 2) A basic legal function is to offer a normative scheme and a forum where people can go to resolve their conflicts and their disputes. Of course, the legal system has no monopoly on this function.
- 3) The legal system is a social control. Essentially, the enforcement of the rule of correct conduct.
- 4) With regard to social control, social forces exert pressure; these demands sow the law, but the institutions of the legal system harvest the demand, crystallize it and turn it into rules, principles and instructions of civil servants and the general population. In so doing, the legal system may act as an instrument of orderly change of social engineering.

The Indonesian legal system is a national legal system shaped by religious law, customary law and western law. Religious Law is law based on religion and beliefs which living and developing in Indonesia before the arrival of colonialism. Customary or Adat law is an unwritten law based on the norms of the local community. The sources of Adat Law are traditions and customs that have been performed continuously and are obeyed as law in Indonesia. The realm of this customary law includes family law, such as inheritance, marriage and child adoption, land rights and commercial law. This customary law has developed in line with social development. In addition, Western law is a civil law legal system which is applied in Indonesia under the concordance principle.

Systemically, the Indonesian national legal system is a system of law based on Pancasila and the 1945 Constitution. Since legal pluralism may not be maintained, the elements of customary law and religious law became part of the National Legal System, which in the 21st century has evolved in the basic legal fields such as criminal law, civil law, administrative law, constitutional law, and has grown rapidly, especially regarding economic law, natural resources law, environmental law, health law, computer law (cyberlaw), etc.

The increase in international trade transactions as a result of globalisation in turn has led to the need for a device of international trade law that applies uniformly to all businesses from all over the

world. This is logical because international trade transactions involve more than one national legal system. Problems often arise, particularly in dispute resolution, related to enforcement and which national law will be applied to a dispute<sup>11</sup> Globalisation of law will cause the regulations of developing countries on investment, trade, service and other economic sectors to resemble those of industrialized countries (convergence). However, there is no guarantee that such regulations will provide the same results in all places. This is due to differences of political, economic and cultural backgrounds. As Friedman points out, the strength of legal regulations depends on the legal culture of the community. The legal culture of a community depends on its educational, environmental, and cultural backgrounds as well as on positions and interests.<sup>12</sup>

The elements implicit in the globalisation of law can be found in three merging waves of legal change, namely, the unification, convergence and harmonization of national legislative frameworks. Unification takes place when nation states approve a treaty or convention that invites the signatories to adopt the unchanged instrument as domestic law with full force and effect in their legal systems. The convergence of laws, on the other hand, takes place when nation states, beginning from different legal starting points, bring their laws by coordinated efforts closer together in terms of coverage, impact and administration. Harmonization of laws occurs when different nation states use the same templates or

sets of precedents as a basic foundation to which local adaptations are crafted to accommodate domestic cultural, economic and social considerations. Recently, the World Trade Organization (WTO) has been a driving force in the harmonization of national trade laws and administration through mandatory Uruguay Round side agreements on a range of matters.<sup>13</sup>

As an illustration, since Indonesia ratified The World Trade Organization (WTO) Agreement on Trade Related Intellectual Property Rights (TRIPS) and through Law No. 7 of 1994, Indonesia indicated its commitment to adjust its national law in the fields of the economy and trade to reflect the WTO Agreement. Under the terms of TRIPs, Indonesia must adopt and enforce strong and non-discriminatory minimum standards of protection for intellectual property rights.

On the other hand, globalisation has resulted in the significant growth of transnational crimes. It also provides high volume cross-border flows of people, commodities and money within which terrorists and criminals can camouflage their transnational transactions. The increasing internationalization of financial and banking systems and the advent of 'digital money' has increased the ability of illicit networks to transfer and launder money while making it harder for law enforcement agencies to track and control these activities.<sup>14</sup>

In addition to the harmonization of laws, globalisation has also had an impact on obliging Indonesia to

resolve various legal issues, not only with regard to the overall design (which is lacking) of national law but also with regard to a number of features in Indonesian law (the existing legal system) as follows:<sup>15</sup>

- a) In terms of the substance of the laws, at the present principles and rules, there are different legal system - a customary law, religious law, western law. The legal system is due to the colonial period. Negatively, political law is intended to let people continue to live in a traditional legal environment and very limited to entering the legal system is necessary for a modern society.
- b) In terms of form, the legal system applicable to rely more on other forms of written law. The executor of the law enforcement and legal minds in the course regulations written. The use of the rules of customary law or Islamic law is used only in cases prescribed by law which must be examined and decided upon according to the second law. Jurisprudence, in considering the use of a decision merely to support the laws written into the main pedestal
- c) There are still quite a few written laws that originate from the Government of the Dutch East Indies period. These laws are not only incompatible with our independent nature, but are also misguided and create a legal vacuum, both in terms of the needs and functions of law and in terms of the development of society.
- d) The law today has also given rise many policies (*beleidsregel*).



The rules are not only derived from the state administration but also from judicial bodies.

- e) Nowadays, the condition of our laws can be termed 'departmental centric'. The Law, specifically regulations, is frequently regarded as a matter of the department in question.
- f) Sometimes inconsistencies in the use of legal and theoretical principles occur.

Taking into account the actual situation and such tendency, the development of the law should aim to strengthen the national law while prioritizing national interests based on the values contained in the substance of Pancasila and the 1945 Constitution.

#### **D. Indonesia's policy to meet the challenges of globalisation**

In the era of globalisation, the development of law is indicated with the tendency of an increasingly global demand for market needs. In such a condition, the legal products which were created mostly rely on the market demands. The demands for economic needs have been able to cause most fundamental changes whether in terms of physical and socio-political and cultural, which are able to surpass the existing legal institutions. The existing legal products tend to point more towards efforts in providing directions in order to settle conflicts developing within economic living.<sup>16</sup>

The legal development which is directed to the current economy must be able to lead and focus on the legal rules that are expected to be able to facilitate the dynamic wheels of the economy and development which are not separated from the economic

democracy system with due observation to public access to achieve efficiency and protection of the minority communities. The legal development must be able to provide better opportunities to nation's people to develop in various areas of life.

In the Long Term Development Plan Year 2005-2025, the legal development is directed to support the realization of sustainable economic growth, organizing issues related to economy, particularly business and industrial worlds, as well as the establishment of certainty for investments, particularly the enforcement and protection of the law.

In order to anticipate economic globalisation, the legal development must be directed to the realization of a national legal system which is based on Pancasila and the 1945 Constitution of the Republic of Indonesia covering the development of legal material, legal structure including legal officer, legal infrastructure; the realization of a community having a high legal and cultural awareness in the framework of realizing a constitutional state; as well as the establishment of a fair and democracy community life.<sup>17</sup>

The development of legal material is directed to continue the reform of legal products to replace laws and regulations inherited from the colonial era. The reform of the legal system is expected to continue reflecting the social values and the interests of Indonesian people as well as to encourage the growth of creativity and to involve the communities to support the implementation of the government organization and national



development which are based on Pancasila and the 1945 Constitution of the Republic of Indonesia. This development of legal material covers legal planning, formation of law, research and development of law.<sup>18</sup>

The legal planning as a part of legal material development must be conducted with due observation to various influencing aspects, whether in the community itself or in international communities interaction which is carried out integrally and covers all areas of development so the legal products which are produced can fulfill the needs of lives for the communities, nation and state as well as be able to anticipate the development of era. Based on these aspects, a national legislation program is formed.

The National Legislation Program or referred to as Prolegnas is a portrait of legal politics that is structured according to plan, integrally and systematically that contains a priority scale for the medium term national legislation program (5 years) and the annual national legislation program in accordance with the national development program, and the development of needs in communities.

Prolegnas contains a list of Bills that are prepared in line with the objectives of national development which cannot be released from the formula for the achievement of the state's objectives as contained in the Preamble of the 1945 Constitution of the Republic of Indonesia, namely in order to protect the whole nation and the entire homeland of Indonesia; to develop the intellectual life of the

nation; to advance general prosperity; and to participate to the implementation of a world order. In a concrete level, the target of national legal politics shall refer to the National Long Term Development Plan (*Rencana Pembangunan Jangka Panjang Nasional* or RPJPN) as an overall direction and priority of development which is conducted gradually to realize a fair and prosperous community as mandated by the 1945 Constitution of the Republic of Indonesia.

The laws and regulations is one of the instruments to regulate and lead the community life towards the ideals to be achieved. In forming the laws and regulations, this should be conducted based on a principle of the good establishment of the laws and regulations which covers: a) clarity of purpose, b) made by proper agency or official; c) match between the types, hierarchy, and the contents; d) can be implemented; e) versatility and result; f) clear formulation ; and g) transparency.<sup>19</sup>

Meanwhile the content material for the laws and regulations must reflect the following principles: a) protection; b) humanity; c) nationality; d) family; e) archipelago; f) unity in diversity; g) fairness; h) equality of position in law and government; i) legal order and certainty; and/or j) balance, compatibility and harmony.<sup>20</sup>

Therefore, if such formation of the national law already accommodates the principles of the national law formation, there would be a possibility that the created laws will bring forth products of laws in accordance with the needs of the communities.

The process of the formation of laws leads and indicates in realizing the ideals of national life through the rules of law it creates. Additionally, the formation of laws is one of the important elements in the framework of developing the national law and is a dynamic process in accordance with the dynamics and development of the communities' legal needs and, comprehensively, must take into account 3 (three) matters, namely:

- a) The past period related to the adjustment of the colonially inherited law with national law;
- b) The present period related to objective condition and current legal needs; and
- c) The future period in accordance with the desired state objectives and global progress.

The directed formation of laws and regulations through Prolegnas is expected to be able to direct the development of the law, to realize consistency of the laws and regulations, as well as to negate conflicts among the existing laws and regulations (vertical and horizontal) that leads in the creation of fair national law. Additionally, through Prolegnas, it is expected to produce policies that are in accordance with public aspirations, contains protection and respect of human rights as well as having

effective behavior within the communities.

The challenges of globalisation requires Indonesian people having legal ideals to be a guideline in the formation of the law in Indonesia. Legal reform that is carried out in Indonesia must still take into account the interests of the nation. The concept of legal development must be based on the values of Pancasila and the 1945 Constitution.

#### **E. Conclusion & Recommendation**

Globalisation causes a broad implication to the law. Legal globalisation occurs through the existence of harmonization of international laws with national law. In the framework of facing such conditions, the national legal development must place Pancasila as a screening board which implies to the formation of legal regulations in Indonesia.

As anticipation in facing the progress of legal globalisation, the management of legal progress is very important. Legal planning should be the initial development of other sectors. National legal development should be able to realize the objective of the state being fair and prosperous community within the framework of the Republic of Indonesia.

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