

## **Law and Public Relations in Indonesia: Viewed from the Theory of John Henry Merryman on Strategies of Legal Development**

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### **Abstract**

Pembangunan hukum pada hakikatnya merupakan pembangunan yang berkelanjutan (sustainable development), fungsinya sebagai perlindungan kepentingan manusia, hukum mempunyai tujuan yang hendak dicapai yakni menciptakan ketertiban dan keseimbangan. Dengan tercapainya ketertiban di dalam masyarakat diharapkan kepentingan manusia akan terlindungi. Walaupun pembangunan hukum diarahkan pada terwujudnya hukum yang dapat menciptakan tata tertib dalam kehidupan masyarakat, yang berarti hukum dan masyarakat saling berhubungan, tetapi dalam kenyataannya masih banyak produk hukum dalam arti perundang-undangan yang tidak dapat menciptakan ketertiban dalam kehidupan masyarakat, salah satu perundang-undangan yang di judicial review adalah Undang-Undang Nomor 19 Tahun 2013 tentang Perlindungan dan Pemberdayaan Petani. Dengan adanya judicial review terhadap UU No. 19 Tahun 2013, jelas undang-undang ini tidak mencerminkan faktor kemasyarakatan. Hal ini menunjukkan tidak terdapat hubungan keselarasan dan kemanfaatan antara UU No. 19 Tahun 2013 sebagai hukum tertulis dengan masyarakat. Fenomena itu kemudian



dilihat dari teori John Henry Merryman tentang strategi pembangunan hukum (ortodoks dan responsif). Produk hukum yang bersifat responsif, proses pembuatannya bersifat partisipatif, yakni mengundang sebanyak-banyaknya partisipasi masyarakat melalui kelompok-kelompok sosial dan individu di dalam masyarakat. Adapun proses pembuatan hukum yang berkarakter ortodoks bersifat sentralistis dalam arti lebih dominannya lembaga negara terutama pemegang kekuasaan eksekutif.

**Keywords:** positivisme hukum; subjektivitas; filsafat hukum; paradigma

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Principally, legal development is a sustainable development, its function as human interest protection, legal aims to reach an order and balance. Order in society guarantees the protection on human interest. Even though, the development on law is directed to create order in society, meaning law and society are interconnected, there are still plenty of legal products that are not able to meet people needs, and one of them is the judicial review on the Act no. 19 year 2013 on Protection and Enforcement to Farmers. This reflects that the Act does not represent social factors. This shows no harmony and benefit connections between the Act no.19 year 2013 as written legal product and society. This phenomenon, then, is analyzed from Theory of John Henry Merryman on Legal Development Strategy (Orthodox and Responsive). The process of making a responsive legal product is a participative one meaning that the process involves greatly the participation of society through social groups and individual in community. Reversely, orthodox legal product is characterized by its centralistic process in which state institutions dominate the process, especially the authority of executives.

**Keywords:** legal positivism; subjectivity; philosophy of law; paradigm

## Introduction

Indonesia as a developing country keeps doing development in all sectors, including legal development. One thing to consider in developing legal system is that law should be understood and developed as one united



system containing elements of institution, legal material, and culture (Ramli 2008, 6: 12). The development in legal sector means an effort to develop an Indonesian original law that produces national legal system. National law is a united law directed to reach state objectives originating from state constitution and philosophy. In these two resources, there are objective, base, and idea of Indonesian state law (Ramli 2008: 6-12).

Legal development is a part of Indonesian legal politics. According to Otong Rosadi and Andi Desmon, legal politics is a process of making and implementing a legal system and management that regulates nationally the life of citizen in a state (Rosadi and Desmon 2013: 6). It makes rules of determining how citizens should behave. It also seeks for the change that the existing legal system should do to make it go along with social facts (*sociale werkelijkheid*). Somehow, it sometimes functions to make a gap between legal management and social facts, that is, legal politics that is used by the ruling class willing to manipulate without considering social facts (Latif and Ali 2011: 21).

National legal politics covers following items, they are:

- a. Consistent implementation to the existing legal system;
- b. Legal development, that is, the renewal to the existing legal system that is considered out of date and the creating of a new legal system to meet the demands in society;
- c. Function confirmation of legal enforcement institution or legal execution, and staff establishment; and
- d. The improvement on legal awareness of society based on the perception of policy maker (Latif and Ali 2011: 27).

In this case, legal politics covers issues on legal development, ending in the efforts of renewal to the existing legal system that is consider out of date, and of the creation of a new legal system needed to meet the demands growing up in society. Since the development of legal is included in legal politic, its implementation begins with determining the direction; where Indonesian legal renewal and creation are leading to. Legal development, basically, is a sustainable development. It always deals with developing a



sustainable society, scientific activities, philosophical thoughts, basic ideas and intellectual conceptions (Arief 2012: 2-3).

In addition, there is a connection between legal development and society. Legal and society have a very tight relation, since they need each other. Legal without society is meaningless, in turn society without legal will not run well and orderly. There is a proverb “*ubi society ibi ius*” meaning “no society without law representing its situation” . People change during the time. The change is caused by the advance on science and technology. When a society is experiencing a change, the law should take an action as well.

Related to the condition in Indonesia, Sabian Utsman said that if society changes, the law should change as well. As Indonesia has got its liberty, the existing legal system should go along with that change (Utsman 2010: 4). Considering to the relation between law and society, Leopold Pospisil in Hasan’s said:

“...no law without society or no society without law. Law, even, exists in a very simple society. Since law is considered to be able to manage society life, people are in agreement to make a set of norms, habits, or values, even rules that can be used as guidance or underlies behavior and act.” (Utsman, 2011: 18).

Functioning as human interest protection, law has objectives. It has targets to achieve. The main target of law is creating a harmonious, orderly, and balanced society. The order in society guarantees the protection of human interest. In reaching the objectives, law functions to divide the right and responsibility, distributing authorities, and managing the way to solve legal problems and to maintain law certainty (Mertokusumo 2008: 77).

Referring to the objective of law to create an orderly ruled society, law certainly has connection with society. Logically, developing legal system should be oriented to reach the objectives. It means the development of law including law renewal should be directed to reach an orderly ruled society.

Law is a product of politics, since it is a result of agreement among politicians. According to Mahfud MD, law is a product of politics that considers law as formulation or crystallization of inter-interacted and inter-



competed political will (Mahfud MD 2006: 7). Referring to these facts, political elites should consider society as a social fact.

Even though legal development is directed to the realization of law that is able to create order in society, meaning law and society relates each other, there are still legal products or acts that are not able to create order and balance in society. Even, the newest legal products result in disorder in society. It is not surprising, if the newly legalized and regulated legal products are proposed to get judicial review by the Constitution Court.

One of them is judicial review on the Act no. 19 year 2013 on Protection and Enforcement to Farmers. The judicial review was conducted to article 59, article 70 paragraph (1), and article 71. These articles were confirmed with Constitution (UUD 1945). This judicial review shows that this Act does not reflect social factors. It means there is no harmony and benefit between the Act no. 19 year 2013 as written law and society. If there is a correlation between harmony and benefit, society will not propose a judicial review to the Constitution Court. This makes the writer interested in studying the phenomenon of correlation between law and society and this will be analyzed using the theory of John Henry Merryman's *Strategy of Legal Development*.

From the above explanation, the writer will discuss the problem questions as follow. First, what does John Henry Merryman say about *Strategy of Legal Development*. Second, how is the phenomenon of law and society correlation analyzed by theory of John Henry Merryman's *Strategy of Legal Development* in Indonesia.

## **John Henry Merryman's Theory on Strategy of Legal Development**

John Henry Merryman in his book entitled *The Civil Law Tradition* said that there are three traditions in contemporary era (Merryman 1969, 1). Referring to the Merryman's opinion, Abdul Hakim Nusantara said that there are three law traditions related to strategy of law development (Mahfud 2006: 22). According to him, law tradition is:



“... a set of attitudes on law characteristics and law role in society and government, organizations and operational law system, and the way the law is made, implemented, studied, completed, and thought in which all are rooted deeply and conditioned by the history of society”.

Merryman said law tradition is a deeply rooted unity, a conditioned historical attitude on law characteristics, role of law in society and government, suitable organization and the operation of legal system, and the way the law is made, implemented, studied, and completed. Legal tradition relates to legal system and culture that represents partial expression, placing a legal system on cultural perspective (Merryman 1969: 2).

According to Mahfud MD, there two types of legal development strategy that implicate to the character of legal products; they are orthodox and responsive legal developments. In strategy of orthodox legal development, the role of state institutions or government and parliament is greatly dominant in determining the direction of legal development. Meanwhile in responsive strategy, the judicial institutions and extensive participation of social group and individuals have a big role in developing legal system (Mahfud 2006: 22).

According to Merryman, legislative representing people and operating in practical politics has very different responsibility. They must be able to realize economical and social demands in the process of legislative and to produce responsive acts to demand and social will in implementing the acts. On the other hand, legislator should not forget the basic truth provided by legal experts (Merryman 1969: 87).

Both strategies give different implication to their legal products. The orthodox strategy is characterized by its positivistic-instrumental approach, that is, it is the best apparatus to ideology and state program executor. Law is the real implementation of social vision of the ruler. Responsive strategy, in contrast, produces responsive legal to the demands coming from various social group and individual in society (Mahfud 2006: 22-23).

To qualify whether a legal product is responsive or conservative, indicators of process of legal making, legal function, and possibility of



interpretation can be applied. A responsive legal product is made by inviting the participation of society as much as possible via social groups and individuals. Meanwhile, an orthodox product is made dominantly by central power, executive elites (Latif and Ali 2011: 30).

From its function perspective, a responsive legal product accommodates commonly situated materials to the aspiration and society's will. In contrast, orthodox is characterized by its positivistic-instrumental approach in which its materials reflect mostly social and political vision of the ruler or materials is no more than apparatuses to realize the government's programs (Latif and Ali 2011: 30).

From interpretation perspective, a responsive legal product usually gives the government a little chance to make their own interpretation through various operation rules and its chance is only limited to technical operation. An orthodox legal product, in contrast, gives an extensive chance to government to make interpretation via advanced rules situated with government's vision, including technical and non technical operation (Latif and Ali 2011: 30-31).

A responsive legal product usually accommodates important stipulations in detail so the government will not be able to make their own interpretation. While an orthodox one tends to accommodate short and prime materials that make the government be able to manage the issues based on their vision and political power (Latif and Ali 2011: 30).

According to the above explanation, John Henry Merryman introduces two strategies of legal development, namely orthodox and responsive. Both of them produce two different legal products; the first will produce a positivistic-instrumental legal development and the later will produce a responsive legal development.

## **Law and Society in Indonesia in the Perspective John Henry Merryman's Theory**

As explained in previous pages, law and society have a tight relationship. Law can be used as a tool to create order in society. If law in term of acts



does not contain social factors; it will result in problems, the acts will be proposed to get review to the Constitution Court. The connection between law and society has become a phenomenon in Indonesia, meaning law and society relates one to another.

Referring to the theory *Strategy of Legal Development* by John Henry Merryman, the phenomenon of law and society connection belongs to responsive legal development strategy. It means that the created legal products consider still demand and need of society. The given law reflects social factors or society and law connection.

Satjipto Rahardjo stated if law is called a rule system, the rules are about human behavior or relation among members of society. By the rules, law implements criterions, either prohibition or suggestion, leading to relation order in society (Rahardjo 2010: 144). The more extensive intervention of law to the social life causes more intensive relation with social problem. It is the reason that the study of law should consider the relation between social and legal order more extensively society (Rahardjo 2010: 16-17).

On the one hand, law is concerned with impact of the rule and it must understand deeply the rules. On the other hand, it has to realize that factors and power out of law will give burden to the law and its working process. In this reversal relation, it is necessary to have an approach to non-one side law, which focuses only its attention to the logical harmony of legal system society (Rahardjo 2010: 144).

According to Soetandyo Wignjosoebroto, state law in Indonesia is made, built, and developed to manage the life and society in Indonesia with no exception. National law is empowered to engineer people life that is used to be not in touch with state legal system, except there is only a certain important reason (Wignjosubroto 2002: 285).

Legal development managed to find out the most appropriate tool to build society is based on the consideration that a good national law, in term of good contents and implementation power, will be able to push citizen to behave as the state laws, such as: acts, government regulation, decree, and or executive instruction ask them to. It is not the law if it does not have well-organized efforts and law enforcer and push the citizen to obey the rules (Wignjosubroto 2002: 285-286).





The law system that will be established in Indonesia is based on Pancasila, which orientates to three principles of Pancasila, namely: (Arief 2006: 12-13).

- a. Value of Religiousness;
- b. Value of Humanity;
- c. Value of Society (Nationalism, Democracy, and Social Justice).

Pancasila is well known as a filter to legal development contained in preamble of the 1945 Constitution paragraph 4 stating:

“Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and all independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace, and social justice, therefore the independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a sovereign state based on a belief in the One and Only God, just and civilized humanity, the unity of Indonesia, and democratic life directed by wisdom of thoughts in deliberation amongst representatives of the people , and achieving social justice for all the people of Indonesia.”

The 1945 Constitution does not contain legal politics in Indonesia, but it is used as guidance to government in implementing legal development in Indonesia (Rosadi and Desmon 2013: 62-63). According to Satjipto Rahardjo, the content of the 1945 Constitution reflects the will to give a great chance to the process and social dynamics in Indonesia as a developing state to seek an appropriate shape, coordinating institution, and structure. Therefore, metaphorically it is said that legal politics in Indonesia does not want to give the shape to the societal dynamics in short (Rosadi and Desmon 2013: 63).

The development of law in Indonesia shall be based on Pancasila and is manifested in preamble of the 1945 Constitution. Recently, the problem of legal politic of Indonesia can be seen in Long-Term Development Plan (RPJP) as manifested in the Acts No. 17 year 2007 article 3 on the Long-



Term Development Plan Year 2005-2025 (Government of Indonesia, 2007).

In this plan, national legal development covers legal substance and structure, which leads to:

- a. Legal development to support the realization of continuous economic growth; to manage economical issues, especially business and industrial world; and to create certainty in investment, especially legal enforcement and protection. Legal development is also directed to remove corruption, to handle and to finish completely the problems on collusion, corruption, and nepotism. Legal development starts with legal material renewal but still considers the variously existing legal management and global influence as an effort to increase law certainty and protection, law enforcement and human rights, law awareness, and legal service based on justice and truth, order and welfare for the sake of more orderly, regulated, fluently and globally competitive state implementation (The Long Term Development Plan, 2005-2025).
- b. The development of state apparatus is executed via bureaucracy reform to improve state apparatus professionalism and to realize good and clean government, either central or regional, in case to support the success of development in other sectors (The Long Term Development Plan, 2005-2025).

Referring to the preamble of the 1945 Constitution paragraph 4, national legal development is aimed to improve public welfare based on social justice. In addition, based on RPJP the national legal development is directed to form law that accommodate societal aspiration and bureaucracy reform. It is in line with the theory of John Henry Merryman stating if the strategy of legal development is responsive, the legal products must be responsive as well. It means national legal development reflects relation between law and society.

Even though, national legal development is directed to reach responsive law, the fact shows that the product is not responsive one but orthodox since the substance of its legal does not reflect societal aspiration. One of the examples is the Act No. 19 article 59, 70 paragraph (1), and article 71.



Regarding to the three articles in the Act no. 19 year 2013, the Constitution Court in Decree no. 87/PUU-XI/201 states:

- a. The regulation in article 59, the Act no. 19 year 2013 can be understood that state or government has rights of renting out, license of exertion, license of processing, and license of exploitation to state land to farmers freely. This means government is permitted to rent out state land to farmers. According to the Court, this is against the principles of farmer empowerment as stated in UUPA that prohibits renting land between state and farmer (citizen). Even though according to the president, the rent transaction happens among farmers, but constitution court considers that it shall not be regulated in an Act. This practice has to do with common civil law that is usually executed by UUPA. In short, rental business as regulated in the Act no. 19 year 2013 article 59 is against the principles of water and land management, and natural wealthy contained within is under the authority of the state and is used maximally to public welfare as cited in article 33 paragraph 3 of the 1945 Constitution (The Government of Indonesia, 2013: 108-109).
- b. The regulation in the Act no. 19 year 2013 article 70 paragraph (1) prevents the right of applicant as guaranteed by article 28 E paragraph (3) the 1945 Constitution to form allied coordinating organization in form of farmer institution. The Constitution Court finds out the correlation between article 70 paragraph (1) act *a quo* and the broken rights of the applicant to express thought and attitude in line with his/her inner self, especially the establishment of farmer institution originating from the farmers themselves. Therefore, article 70 paragraph (1) act *a quo* should be decided against the constitution (The Government of Indonesia, 2013: 113).
- c. The purpose and objective of farmer institution as mentioned in article 70 paragraph (1) the Act no. 19 year 2013 are to ease an accountability to governmental facilities to make it right to target, to prevent conflict among farmers in making use the facilities provided by government and to make farmer establishment effective. This spirit does mean to prevent farmer to form farmer group that is in



line with farmers' will. According to the Constitution Court, phrase of having responsibility in article 71 means as an obligatory that ties farmers' freedom to gather and ally. Phrase "responsibility" cannot be isolated from the obligatory to obey, adhere, and follow, so farmers that are not willing to join the organization established by government will be discriminated from government's protection. The phrase "obligatory" in the regulation of article 71 the Act no. 19 year 2013 is against the 1945 Constitution (The Government of Indonesia, 2013: 113).

If the act was proposed to have judicial review, it means that the act does not represent societal aspiration. In other word, the making of act was not based on societal demand and need. Therefore, the product of this legal is orthodox, so it is not in line with the strategy of legal development which is characterized by its responsiveness. The decision made by the Constitution Court is in line with responsive legal development, since their opinion concerns with the aspiration of society, farmers.

## **Conclusion**

It can be concluded that the theory of John Henry Merryman says there are two strategies of legal development, namely orthodox and responsive legal development strategy. In the first strategy, the development is centralized and dominated by government, especially executive elites. In contrast, responsive legal development always asks societal participation as much via social groups and individuals. Related to the phenomenon of law and society connection, it is said that the legal development in Indonesia is a responsive legal development strategy.

The law makers as the executor of national legal development in Indonesia have to pay attention to the phenomenon of law and society connection. Since law manages societal life, law and society relates one to another. Law manages society and society wants order by law resulting in harmony in life. This is in line with the guidance as contained in Pancasila,



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the 1945 Constitution, and national development strategy in the Act no.17  
year 2007. [w]



**Noted:**

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The Article 3 Act No. 17 Year 2007 says: “National RPJP is the description of objectives of the establishment of Indonesian Government contained in Preamble of the 1945 Constitution, that is to protect all the people of Indonesia and all independence and the land that has been strugdirected for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace, and social justice, in the formulation of vision, mission, and direction of National Development.”

The Long Term Development Plan Part IV. 1 On the policy of The Long Term Development Plan Part Year 2005–2025 Point IV.1.2 on realizing a competitive nation Alphabet E Number 34, attachment of The Act No. 17 Year 2007 on The Long Term Development Plan Part Year 2005–2025.



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