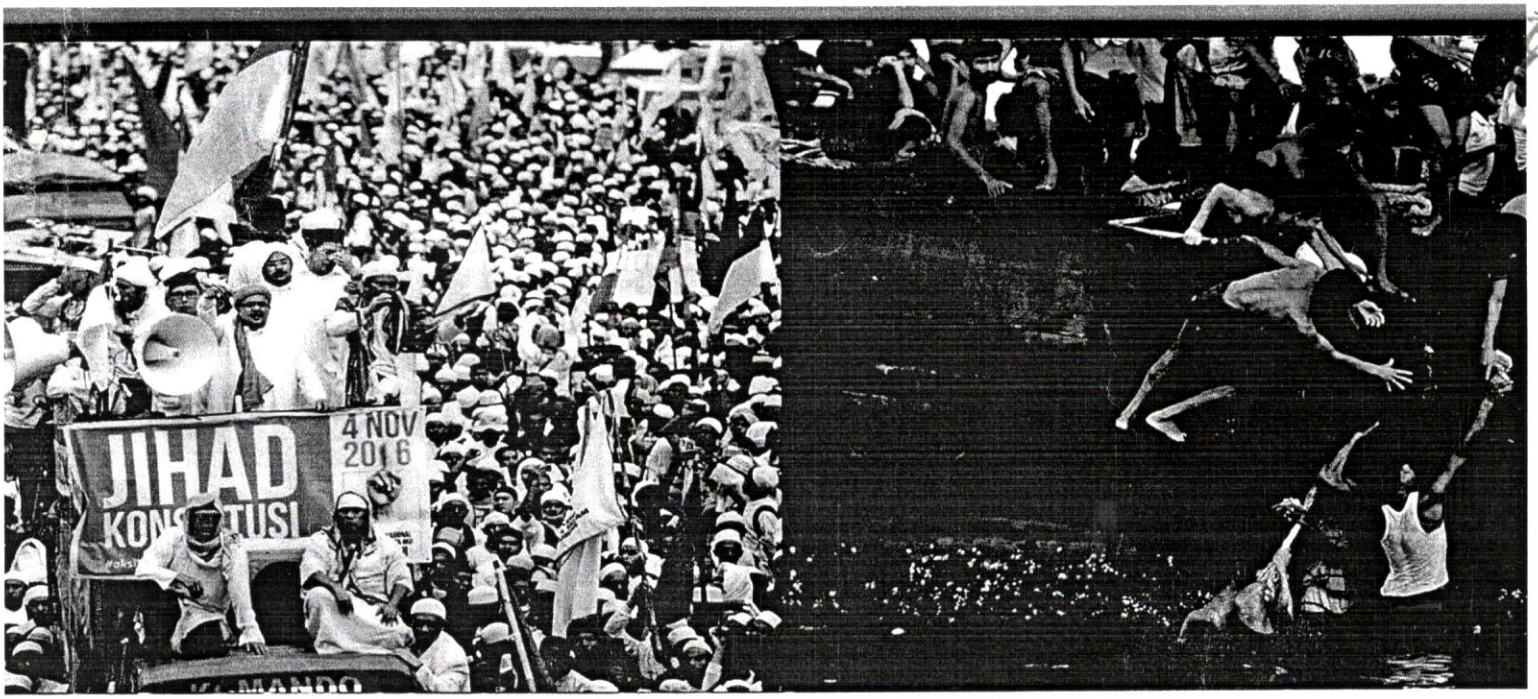
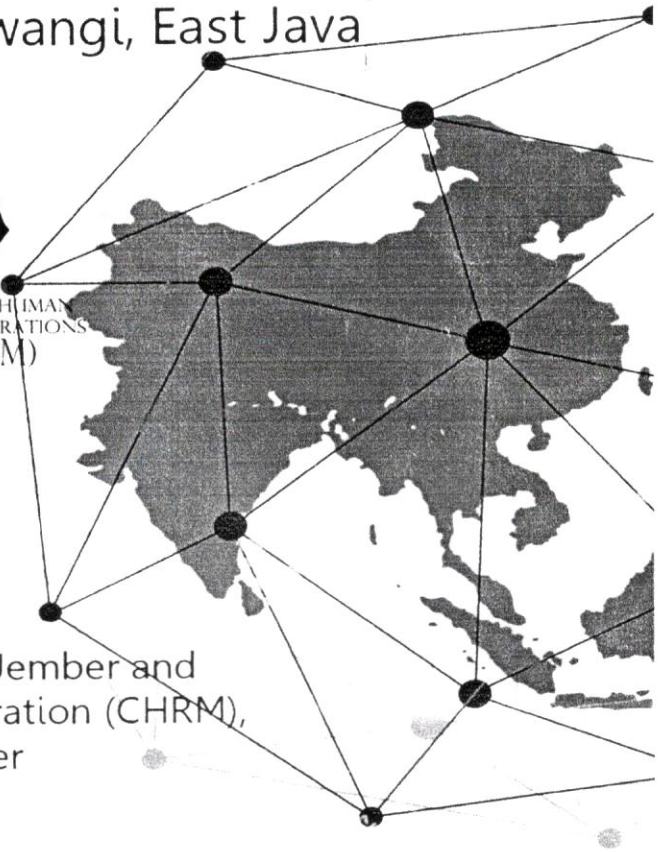


PROGRAM BOOK

State, Constitutionalism & Citizenship in Southeast Asia

18 - 20 November 2016

Kalibaru Cottage, Banyuwangi, East Java



CENTRE FOR HUMAN RIGHTS & MIGRATIONS (CHRM)

Organizeb by:

Faculty of Law, University of Jember and
Centre for Human Rights & Migration (CHRM),
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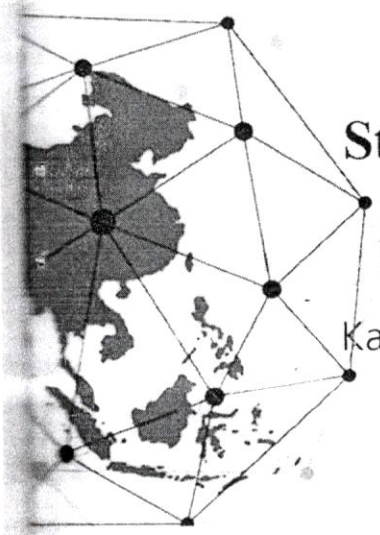

INTERNATIONAL WORKSHOP

State, Constitutionalism & Citizenship in Southeast Asia

18 - 20 November 2016

Kalibaru Cottage, Banyuwangi, East Java, Indonesia

CENTRE FOR HUMAN RIGHTS & MIGRATIONS (CHRM)

Greeting from Organizer

Selamat Datang!

It is our great pleasure to welcome you to the International Workshop, which will be held on 18 – 20 November 2016, in Kalibaru Cottage, Banyuwangi East Java. The international workshop is a forum for sharing ideas and research work in the continuously emerging topic of citizenship, state & constitutionalism. The purpose of this workshop is to bring together researchers, activists, and students related of human rights, social and law studies from academia.

We have about 19 papers which will be presanted in a set of plenary talks, and paralell discussion, and attended by participants deriving from different parts of Indonesia, several speakers from many countries of Southeast Asia.

As the head of the Centre for Human Rights & Migration (CHRM), I acknowledge that the organization of this workshop is indebted, directly, and indirectly, to many people, institutions who have contributed to providing a successful technical program and workshop materials for this event. First of all, we would love to thank Your Excellency the Rector or a head of University of Jember, Dr. Moh. Hassan and Dean of Law Faculty, Dr. Nurul Ghufron, for supporting this international workshop.

Especial thanks also go to all speakers Prof. Dr. Hasani Mohd Ali (University Kebangsaan Malaysia), Dr. Faishal Aminuddin (University of Brawijaya), Dr. Vishnu Juwono (University of Indonesia), Dr. Alicia Izharuddin (University of Malaya), Dr. Erwin Nur Rifah (University of Jember), Prof. Dr. Rohimi Saphiee (Univrsity Kebangsaan Malaysia), Haidar Adam (Airlangga University), Manunggal K Wardaya (University of Jenderal Soedirman), Rinda Amalia (Narotama University), Dr. Honest Dody Molassy (University of Jember), Dr. Dian A.H Shah (National University of Singapore), Muktiono (Brawijaya University), Dr. Rudy (University of Lampung), Ekawestri Pradwalita Widiati (Airlangga University), Prof. Dr. Yuzuru Shimada (Nagoya University), Dr. Nyi Nyi Kyaw-(National University of Singapore), Dr. Muhammad Siddiq Armia (Arraniry Islamic State University), Dr Mirza Satria Buana (University of Lambung Mangkurat), Anis Hidayah (Directorat & Founder of Migrant Care Indonesia), Ellena Sana (Centre for Migrant Advocacy Philiphines), Dr. Anisa Santoso (University of Indonesia, Dr. Devanto H Pratomo (Brawijaya University). Secondly, we would like to thank the Steering Committee, Organizing Committee for making this international workshop possible, particularly in the arrangement of the facilities for the workshop.

We are sure that this workshop will provide an existing venue and time to discuss state-ofthe-art knowledge of law and human rights in Indonesia and beyond in Southeast Asia. We wish you enjoy this workshop and have a great time in Kalibaru Banyuwangi, East Java.

Al Khanif, S.H., M.A., LL.M., Ph.D.

Head of International Workshop
"State, Constitutionalism, and Citizenship in Southeast Asia"

Head of Centre for Human Rights & Migration (CHRM)

3. *Integration of Social Religious Organization into Conflict Management: Role Model Evaluation of the Forum of Religious Harmony (FKUB) in Religious Conflict Management in Local Area*, Muktiono, Brawijaya University *Discussant:* Dr. Honest D. Molasy, University of Jember *Chair* : Dwi Rahayu Kristianti, M.A., University of Airlangga		
Fourth panel: ***State, Constitutionalism and Religion in Southeast Asia***	11.00.12.00	Conference Hall
1. *Muslim's Religious Freedom and Right to 'Madrasah' Education in Malaysia: Political and Legal Realism versus Islamic Idealism,* Prof. Dr. Rohimi Saphiee, University Kebangsaan Malaysia 2. *Constitution, Legal Non-egalitarianism, and Citizenship: The Case of Muslims in Myanmar* – Dr. Nyi Nyi Kyaw, National University of Singapore *Discussant:* Assoc. Prof. Johan Shamsuddin Sabaruddin, University of Malaya *Chair* : Haidar Adam, University of Airlangga		
Lunch	12.00-13.00	Hotel Restaurant
Fifth Panel: ***Constitutionalism, Human Rights Issues in Southeast Asia: Past and Pressent***	13.00-14.00	Conference Hall
1. *Pathways to Legislation Development: Past and Present, and Future Reconstruction* – Dr. Rudy, University of Lampung 2. *The Settlement of Gross Violations of Human Rights Through Truth and Reconciliation Commission in Indonesia; A Legal Perspective* – Manunggal K. Wardaya, University of Jenderal Soedirman *Discussant*: Assoc. Prof. Johan Shamsuddin Sabaruddin, University of Malaya *Chair* : Dwi Rahayu Kristianti, M.A., University of Airlangga		
Sixth panel: ***State, Constitutionalism, Business and the Rights of Workers in Southeast Asia***	14.00-15.30	Conference Hall
1. Citizenship and Constitutional Rights of Indonesian Migrant Workers, *Anis Hidayah, Director and Founder of Migrant Care Indonesia* 2. *Agreements of Trans Pacific Area and the Consequences for Human Rights in Economics for the Citizen Indonesia* – Rinda Amalia, Narotama University 3. Repositioning the Implementation of Village Governance to Protect Migrant Workers– *Hermanto Rohman, University of Jember* *Discussant* : Dr. Devanto H. Pratomo, University of Brawijaya *Chair* : Mohammad Bahrul Ulum, S.H., LL.M.		

Poster Presentation	15.30-15.45	Conference Hall
Special Discussion for 2nd Workshop 2017 Closing Remarks by Dr. Moh. Hasan, Rector University of Jember	15.45-16.00	Conference Hall
Short trip to Gumitir Kafe	16.00-16.15	
Short trip by lorry to Train Tunnel for about 30 minutes return from Gumitir Kafe[1]	16.15-17.45	
Dinner, Entertainment and Farewell Gathering	17.00-19.30	Gumitir Kafe

Sunday 20 November 2016

Program	Time	Venue
Breakfast	06.00-08.00	Restaurant
Departure	07.00-11.00	Lobby

[1] *Subject to availability and depends on the weather. As it is rainy season, it is very unlikely to have short trip to the*

PAPER CONTENTS

The Pathways of Legislation Development in Indonesia: Evaluation of Past and Present Construction

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ABSTRACT

The development of law has been believed as the important element for the life of the nation. This is trully the case for many of the developing countries in South East Asia, including Indonesia. As the country with the strong tradition of civil law, the legislation making and development are the core of the legal development in Indonesia. Within the broad theme, this paper is going to trace the path of law and development in the field of legislation development in Indonesia.

Using the normative historical approach, this paper is going to evaluate and analysis all the law which had been enacted in Indonesia. In this regard, development of legislation has been influenced by many factors such as market driven pressure for investment and economic development coupled with initiation of legal transplantation in many field of law. This has been problematic since those factors seldom to consider the sustainability of comprehensive development of legal system of Indonesia. Those factors then will be evaluated and analysed in each period of legislation development.

I argue that the past and present condition lack of the grand design on comprehensive legislation development. The paper conclude that the reconstruction of comprehensive legislation based on Indonesia characteristic of law and justice is urgently needed.

Keyword: Legislation, Development. Reconstruction, Evaluation

A. INTRODUCTION

The history of Indonesian legal system is closely related to the Netherland legal system, while Netherland had been inherited the legal system mostly from French. The legal development in Indonesia had been started from the VOC period. During the colonial period, the Netherlands-Indies Government implemented the concordantie principle in the legal system throughout the territory of Indonesia. On the basis of this principle, every law that was passed by the Netherlands parliament would take effect in the Indonesian territory directly, with slightly changes if necessary. Almost 100 years of Netherland occupation had made the process of reception of colonial law had happened in Indonesia, even before the Independence Day.

The history of Indonesia legal system had been written by several scholars.[383] Daniel S Lev gave very good material on the period of Old Order and New Order. One of Indonesia scholar, Soetandyo, divided the period of Indonesia legal development into three periods: 1840-1890, 1890-1940, 1940-1990.[384] Soetandyo work has been influential within Indonesia scholar circle. However, his work on Indonesia legal history did not include the period during the fall of New Order and Post New Order. Noer Fauzi Rahman is another Indonesian scholar who wrote Indonesia legal development in the field of land law.[385]

There are not so many scholars have been writing the legal development in Indonesia after the fall of new order. Many works emphasis on human rights, access to justice, or another policy paper as part of international funding projects. This paper, while discussing the legal development in Indonesia, is focusing on legislation development, considering the changing shape of state politic influencing the legal development itself. Legislation specifically has been chosen since the legislation is always the core of the legal system in a nation

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383 John Ball, Indonesian Legal History: 1602-1848 (Sydney: Oughtershaw Press, 1982); See also Clive Day, The Policy and Administration of the Dutch in Java, (New York Mcmillan), 1904; JS Furnivall, Netherlands India: Study of Plural Economy (Amsterdam Israel, 1976); see also A.D.A De Kat Angelino, Colonial Policy, Volume II The Dutch East Indies, The Hague Martinus Nijhoff, 1931; Thomas Stanford Raffless, The History of Java.

384 Soetandyo Wignjosoebroto, From Colonial Law to National Law, Dissertation Airlangga University, 1992, p. 5.

385 Noer Fauzi Rahman, Law Reform dari Masa ke Masa; See also his dissertation, The Resurgence of Land Reform Policy and Agrarian Movement in Indonesia, University of Berkeley California

with the tradition of civil law system. This is the case of Indonesia which was inherited the tradition from the colonial power.

To achieve its goal, the paper is tracing back the legal development from the colonial period to present. After that is trying to contruct the present condition of legislation development. Evaluation of construction is specifically conducted on the institutions of legislation powers, the number and classification of legislation ever formed, the main legal instrument as the foundation of formation of legislation, construction legislation procedural formation, and the last is political legislation. These components are the elements that influence the development of legislation.

B. LEGISLATION DEVELOPMENT IN COLONIAL PERIOD

1. VOC PERIOD

Starting from 20 March 1602, the VOC had been established and got octrooi right of trade monopoly in Indonesia by Staten Generaal. In addition, VOC also got the right to establish fortresses, made arrangements with the kings of Indonesia, created administrative structure, and the power of printing and circulating its own money. [386] V.O.C. developed a trading empire in the Indonesian archipelago from this city. The nature of this trading empire showed essentially the same characteristics with the empires of commerce and trade in Indonesia Kingdom.

In the field of legal administration, B. Schrieke as quoted by Supomo and Djokosutono, wrote in his essay *de Inlandse Hoofden* (heads of state) that VOC stayed as a foreign body that truly beyond the Dutch East Indies people, and both communities were not united in the government structure. [387] This condition was the result of the VOC organization nature. The VOC was a trading organisation and it always most frankly admitted its mercantile character. Its policy aimed at making as big and as quick profits as possible in order that it might pay large dividends to its shareholders. Therefore its organisation, even the High Government of Batavia, was first of all a trading organisation. Apart from sailors, military men, a few judges, clergymen and schoolmasters, its personnel consisted of trade agents who were at the same time entrusted with diplomatic, administrative, and judicial.[388]

The VOC legal system was aimed mainly at the coastal towns and suburbs under its direct control and rarely reached the rural hinterland. Thus, the records of legal development of the Dutch East Indies only came from the travel records of the Governor General at the time. This is due to the fact that VOC did not develop political power unless forced, especially when Old Dutch law (Oud-Vaderlands Recht) could not control law and order.[389] Legal needs were met by making special rules or adhoc. Regulations had been in the form placards.

In 1621, the XVII[390] ordered that the rights and laws, which were observed in Holland, should be proclaimed in the Indies. In 1625, GG De Carpentier obeyed this injunction, but in the proclamation announcing this, it was said "In so far as practicable in this country". It seem that GG in the Dutch East Indies had difficulty in making the uniform law. [391]

Even though little had been done upon the development of legal system, Governor General Van Diemen, in 1642, had instructed to collect and compile all placards of law. In 1642 the placards had been systematically compiled and published under the name "van Batavia Statutes" (statute batavia) and updated in 1766 with the name "Bataviase Niewe Statuten" (New Batavia statute).[392]

Statute of Batavia by some scientists is regarded as a codification of the law. The statute was applicable throughout the regions together with other legal rules of the People Natives and outsiders. According to the

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386 Soepomo dan Djokosutono, Sedjarah Politik Hukum Adat, Penerbit Djambatan, p. 1.; see also A.D.A De Kat Angelino, Colonial Policy, Volume II The Dutch East Indies, The Hague Martinus Nijhoff, 1931, p. 8; see also Drs. G.J. Wolhoff, introduction of Indonesia Constitutional Law.

387 Soepomo and Djokosutono, Ibid. p. 3

388 A.D.A De Kat Angelino, Colonial Policy, Volume II The Dutch East Indies, The Hague Martinus Nijhoff, 1931, p. 2

389 Soepomo dan Djokosutono, Sedjarah Politik Hukum Adat, Penerbit Djambatan, p. 1

390 XVII refers to directors of the central board in control of general affairs of VOC called " de Heeren XVII", the seventeen gentlemen.

391 A.D.A De Kat Angelino, Colonial Policy, Volume II The Dutch East Indies, The Hague Martinus Nijhoff, 1931, p. 10-11.

392 Soepomo dan Djokosutono, Sedjarah Politik Hukum Adat, Penerbit Djambatan, p. 1

law, European and indigenous populations remain in place under the rule of their own heads. The heads of the people were given the authority to punish its citizens. [393]

Thus, the law in force in the area controlled by the VOC is:

a. Legal Statutes;

b. Ancient Dutch law;

c. Principles of Roman Law

Meanwhile, set the applicable law for the indigenous people of Indonesia was adat law[394]. It should be pointed out that the VOC never managed to occupy the entire Indonesian archipelago. The power was limited to the city of Batavia, and a few other cities around the cities with direct control. Outside the direct control areas, the Indonesian kingdoms survive as a country that seeks to master trade base, trade routes and inland areas, together with merchants from Spanish, Portuguese, English, and French.[395]

Little was done in the way of jurisdiction for the indigenous population. In Ambon alone a tribunal (Landraad) on which native headmen also sat, was created. In Samarang a similar Landraad was established, as late as 1747, under the presidency of the governor. In Western Java, in the neighbourhood of Batavia a "Commissioner for and about native affairs" was entrusted with the administration of justice. Jurisdiction over Indonesians was guided mainly by native customs, conceptions, and prescriptions.[396] Typical for this system was that Indonesians could voluntarily subject them self to adat law.

In 1747, there was an initiative to start gathering legal materials by VOC. VOC this year issued an order to make a codification of Java criminal law for a new court in Semarang. The result of the command is Mogharrar Book (1750), which was an overview of Islamic law. [397] At about the same time, Boschennar Jan Dirk van Clootwijk (1752-1755) took the initiative to record customary law contained in the royal palace of Bone and Gowa. In 1760, DW Freijer made a short essay or a compendium of the laws of marriage and inheritance law of Islam. In 1768, on the initiative of resident Tjirebon, a book named "Tjerebons rechtboek" has been compiled. [398] At the end of the 18th century around the year 1783, there was book titled History of Sumatera that shows the reviewa and inspection on customary law was published by Marsden. In this book Marsden tried to investigate the structure of society, marriage law, inheritance law, and criminal acts. Marsden investigation center is Redjang, Pasemah, Lampung, Korintji, Minangkabau, Siak, Batak, and Aceh. [399]

In 1795, Nederland had been occupied by French revolutionary army. In Desember 25th 1795, Heren Zeventien replaced by State Committe (Committee tot de Zzaken van de Oost-Indische Handel en Bezitengen) who began work on March 1, 1796. According to Article 247 Staatsregeling (Constitution) in 1798, the charter of VOC should be ended and the country will take over all ownership, rights and obligations. Based on Article 248, the shareholders lost will be replaced. By this Article VOC Charter ends on January 1, 1800.

After the abolition of VOC, the Dutch government assumed control of the VOC's affairs and assets. But almost immediately there followed an interlude induced by the Napoleonic Wars during which the VOC's Indies possessions were administered for several years by a French governor general, Marshall Herman Willem Daendels, and then by the British lieutenant governor, Thomas Stamford Raffles, from 1811. Thus what the transfer from private company colony to state colony would mean had to await the establishment of a

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393 Soetandyo Wignjosoebroto, Dari hukum colonial ke hukum nasional, Dissertation Airlangga University, 1992 p. 47

394 The customary law is a living law in the Indonesian society with their respectively distinctive natives. Customary law is derived from customs. Customs is the set of social norms that has long existed and prevailing in the society. Van Vollenhoven states that customary law is custom with sanction. How to find the customary law? Ter Har, Van Vollenhoven student, asserted that customary law could be found in the decisions of the authorities. The development of Islam had also very related with the development of adat law. Snouck Hurgronye introduced the Receiption Theory, stating that the Islamic law only applies whenever the customary law has adopted it. This theory is opposed by, among others, Prof. Dr. Hazairin, SH and H. Sayuti Thalib, SH. Both lecturers of the Islamic law at the Faculty of Law, University of Indonesia, oppose the theory, reasoning that the Receiption Theory is against the Holy Koran and the Prophet's Deeds. Meanwhile, Sayuti Thalib has developed 'Theori Receptio a Contrario,' arguing that the customary law is applicable as long as it is not against the Islamic law. He takes the Minagkabau community in West Sumatra as an example where their customary law is also the Islamic law. Minangkabau society applies a principle that **"Adat bersendikan Syaria, Syaria bersendikan Kitabullah."**

395 GJ Wolhoff, Introduction to Indonesian Constitutional Law

396 A.D.A De Kat Angelino, Colonial Policy, Volume II The Dutch East Indies, The Hague Martinus Nijhoff, 1931, p. 10

397 Soekanto, Meninjau Hukum Adat Indonesia, Soerungan Perjenongan Jakarta, 1958, p. 5

398 Ibid. p. 6

399 Ibid. p. 6-7.

functioning Dutch colonial administration after the British returned the Indies to the Dutch in 1816.[400]

In the Dutch legal system, the codification and codification of laws was known at a time of Dutch annexasion as part of the French empire by Napoleon expansion. In 1810, the law code, known by the name of Code Napoleon in a civil law, code of commerce in commercial law, penal code for criminal law enacted in the Netherlands as one of France annexed country. [401] Although the napoleon code was in force in the Dutch, but it was not the case in the Dutch East Indies.

In May 16, 1811, the Dutch government replaced Marshall Daendels with Jan Willem Janssens. Meanwhile, the French influence in the Dutch make England worried, thus on August 4, 1811, sending the army to the island of Java, which then ended the rule GG Janssens on September 18 through capitulatie salatiga. Before the handover of power, on 11 September 1811, British announce proclamatie as the basis for the new government. In proclamatie be seen that the UK wants to eliminate the old system of Dutch. [402]

However, the British also took into account whether the construction of the new system would be destructive to the old establishment. It is therefore necessary to undertake investigations to obtain proper information. Meanwhile, the composition of the old will temporarily continue, with the possibility of changes. [403]

Raffles, before coming to Indonesia, had an interest in gathering data on the East Indies. On the island of Penang in 1805, Raffles, then the adjunct secretaries, collecting customary law and laws in the border country. In Java, in 1811, He began to investigate and to collect materials about the agrarian, and in 1814 published Raffless Substance of a Minute, which included the organization of the judiciary. In 1817 a phenomenal book the history of Java was completed and published. [404] Raffless laid the foundation of landrente where landowners have to pay taxes because the land is basically the government's land.

2. BRITISH OCCUPATION ERA 1811-1816

When the British came in 1811, the government's first concern was directed at the issue of governance. After seeing varieties of natural resource and its unproper processing, the British government was determined to improve the conditions and removed barriers that exist, as had been done in the area of the West Indies. British Governor General, Lord Minto, had been ordered to perform all corrective measures as quickly and effectively as possible, starting with gathering information about the farmers, the land, and all related information, before they can make something new legal improvement. Here are some new things that local government shall do based on the command from governor.[405]

Rice of cultivated land by farmers had been collected arbitrarily by the government. This was cruel system and should be abolished. Profit sharing system was not meant to harm anyone, but rather as a financial controller, or as market price regulator, and at the same time making it as a source of revenue for the government. I recommend that total reform of the system should be held and become the government's top priority. Ways to increase production and farmers' welfare is to change the rules for the lease of land and profit sharing system. [406]

Following up the governor-general's command, then a special commission was formed under the command of Colonel Mackenzie, to collect statistical data. Land rental system and crop profit sharing was applied in the form of taxes and rent, while the practice of repression carried out by employees of the Dutch, the native ruler, the regents and the Chinese people had been eliminated. All rights owned by each resident of each communities rank had been re-examined, population number, quantity, and value of material and various natural resources which are managed by the colonial government had been investigated and published.[407]

Farmers were the object of oppression and abuse of others. The goal of brithish government was to eliminate the practice of oppression, and also determine a fair revenue sharing system. The goal of law reform was to increase productivity by allowing farmers enjoyed the fruits of their own labor. No financial assistance and

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400 Steven Drakeley, the History of Indonesia.
401 Soetandyo, ibid. p. 61.
402 Soepomo dan Djokosutono, Sedjarah Politik Hukum Adat, Penerbit Djambatan, p. 61-65.
403 Ibid. p. 66
404 Soetandyo, op. cit. p 10-13.
405 Thomas Stamford Raffles, 2014, *The History Of Java*, Yogyakarta, Narasi, hlm. 97
406 Thomas, *ibid*, hlm 97
407 Thomas, *ibid*, hlm 97

skills in this area of reform, but with the freedom to work on their land and and chance to reap the rewards of the land for self and family, it was expected to arouse passion to work upon the land to the maximum. Land lease agreements or contracts that provide confidence in the farmers will be controlled as this will provide security for him to cultivate their land without fear of expulsion at any time as before. Farmers will be exempt from unnecessary tax and only paid a portion of the yields, and will make it to devote more time and energy to work the land.[408]

System changes which must be made were as follow: First, elimination of all Feudal services, and provided freedom for the farmer planting. Second, the government must oversee all existing farms, including the process for collecting the crops and land rent. Third, land rent should be calculated based on the actual conditions and how big was the land, with a fair calculated time. In the coming years (1814-15), this regulation would be set for the entire district under the authority of the government, based on the principle of ryotwar or in Java called as tiang alit.[409]

Principles of land rent and its application in detail is regulated in some simple rules. The management of the crop and the farmers shares shall be regulated under government control. The powers in the hands of a small ruler or other authorities should be removed to anticipate the various possibilities. Land, after surveyed and measured, will be distributed to farmers in fair proportion. The contract shall be made between the farmers in person and the government over the size and location of the land, conditions and period of validity of the lease contract, also other considerations regarding public revenues and welfare of tenants. If the case was not like that, then the land will be leased by another person with the lower rents, or based on a variety of system changes in accordance with the wishes of farmers without ignoring the interests of the government.[410]

The farmers will be benefited by reducing the tax burden and oppression upon them (reduction of rent, taxes and personal service). The rulers have nothing to lose because they are still receiving a salary from the government, they just have to reduce the attitude of oppression on their subordinates. The rulers should not be any longer collect fees from farmers, in addition to the salary provided in official income and official supervision over police duties. When farmers get fully their rights to cultivate the land without interference of businessmen, farmers will be easier to determine the times of planting and harvesting as well as what plants will be processed on land.[411]

The rules of each village should not be contested and the head of each village will be selected by its people to carry out the task of collecting the crop, supervising village police and reconciling small commotion among the population. The government will try not to interfere habits, customs and regulations of their village.[412]

Seeing the condition of the farmers, their needs, soil fertility, and the proportion of taxes previously paid, then it is more appropriate if the land rent counted regularly. Rent will be calculated based on the paddy rice production. While the dry land will be calculated based on the production of corn.[413]

The law during british occupation stated that, "the government find it necessary to give certainty of land rent and that it will not change in the future, and the government will not ask for more land than prescribed, so the farmers can find peace and quiet in nurturing their land, and thus expected farmer productivity will increase. They are convinced that the land would not be taken in from them, and they can enjoy generated profits.[414]

Government shares can be paid in cash or crop fields, but not for dry land. Although calculated based on the production of corn, but usually paid with money based on estimates of the lowest price in the market. This regulation did not burden the population because they usually have two kinds of this payment instrument.[415]

Revenue Act dated February 11, 1814 mentioned a few things on legal policy during Raffles, namely,[416]

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408 Thomas, *ibid*, hlm 98
409 Thomas, *ibid*, hlm 98
410 Thomas, *ibid*, hlm 98
411 Thomas, *ibid*, hlm 98-99
412 Thomas, *ibid*, hlm 99
413 Thomas, *ibid*, hlm 99
414 Thomas, *ibid*, hlm 99
415 Thomas, *ibid*, hlm 99

"land leasing throughout the island at this time was understandable. No more middlemen between farmers and the government. Intermediaries who have been enjoying the benefits of the system for these results will be appointed as special government employees and authorized to set up their own system of its land lease. So that the soil is fully controlled by the ruler or landlord. Government on the other hand will not interfere with the authority of these landlords. Therefore, part of which will be accepted by the government depends on the landlord. In addition, some of the land which in the past had been given to the landlord as at gift, will not affect the rights of tenant farmers. The government was only entitled to regulate the amount of income or profit for himself. This provision was made with full consideration and had been deemed satisfactory to all parties. "

3. NETHERLAND INDIES GOVERNMENT PERIOD

After the French power in the Netherlands ended, Kemper commission had been formed to make codification of law in accordance with the spirit of the Dutch nation. In 1830, the Kemper committee successfully complete the task except for the penal code. However, application of this codification can not be done immediately because of the political climate in the Netherlands is still hot since there was an intention of South Holland to secede. During 1830-1835, Hageman had been appointed to complete the task, but he could not complete the codification of the law. It was only after Scholten van Oud Harlem was given special duties as commission codification, codification task later completed in 1845. In 1847, Civil Code was formally enacted. [417]

When the codification of law was completed in Holland, many asked whether the Dutch legal doctrine, saying that custom gives rise to law only so far as referred to by the written law should not also apply to Indonesian adat law. But the question was not affirmatively answered, and the General Provisions of 1847 maintained the principle that, for reasons of fairness and good government, the (non-Christian) natives of the archipelago would as a rule was permitted to live according to their own laws and traditional institutions.[418]

In 1848, there was substantial changes occured with the formulation of Grondwet in Netherlands followed by the formation of Regering Reglement (RR) in 1854. [419] In this phase, the policy to develop the legal instrument had been started, which is often referred to as *de bewuste rechtpolitiek. De bewuste politiek* has two main purposes: the first was to control the power and authority of the king and the executive officers within colonial territory, second was to guarantee the legal protection for all people.[420]

Few of dutch scholar said that RR stands out as landmark in the constitutional development in Indonesia by its clear recognition of supremacy of law.[421] Article 79 RR set out the requirements for submitting judicial power into the hands of an independent judge. On this point it should be noted that Governor-General Rochussen (1845-1851) were concerned when western law used as procedural law for indigenous justice, then western officials who responsible for the court for indigenous people will require a lot of time to learn it new matters involved.[422]

Post-establishment of Grondwet and RR, there were two step of colonial legal arrangement. The first was done in the field of civil law codification, and the second set the structure and judicial procedures. However, the codification of the law at that time also colored by dualism even Legal pluralism. This was occurred because the period before Grondwet had been marked by neglecting the unification of the law.[423]

This situation was continued until the period of Grondwet and RR. Since 1846 until 1954, eventhough there had been a legal codification and structure of the judicial bodies, but the legal substance and the applicable law is the law of natives. [424] In addition, the establishment of the court for indigenous people was only

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[417] The Dutch colonialism on the Archipelago has transferred the Netherlands law derived from Napoleon Code, when Napoleon Bonaparte occupied Europe. Napoleon Code was mostly sourced the Roman Law. The Civil Law is characterized by its codification. Under the Concordance Principles, the law of the Netherlands has also applied to the citizens of the Netherlands' East Indies since 1848. During that time, the citizens of the Netherlands' East Indies were divided into three groups: Europeans, Orients and Natives. Non-European citizens might be subject to the European law both voluntarily and silently. The codification of the European law is consisted of Civil Code, Commercial Code and, Penal Code; see also Soetandyo Wignjosoebroto, op. cit. p. 6

[418] Van Vollenhoven, on Indonesia Adat Law, op. cit

[419] Soetandyo Wignjosoebroto, Ibid.

[420] Ibid. p. 29

[421] Furnivall, op. cit. p. 158

[422] Soetandyo, op. cit. p. 40

[423] Ibid. p 45-47

[424] Ibid. p. 48

laws, until amended by new laws in accordance with constitution.

Colonial law was chosen as the law of the transition on the one hand serves to prevent a legal vacuum during the process of unification of law, but on the other hand prevent the struggle for influence by various interest and political power such as islam and communist. Advocate of Islamic law and customary law has long been known to explore the possibility of raising the legal system of their choice as the basis of national legal systems.[430]

In addition, the process of acculturation Dutch legal tradition in the early decades of Indonesian independence had been on a massive scale, especially in the substantive aspects of criminal and civil law, including commercial law, so that the actual Netherland law has been mixed with Indonesian law. [431] At the time of the Dutch East Indies rule, colonial law which was secular and neutral can mediate and prevent any intention to impose Islamic law while it is able to co-opt the customary law as part of the colonial law. [432]

It is very important to quote Daniel S Lev[433] that the choice to use Transition Article of 1945 Constitution was not merely a matter of convenience nor was it simply because no one had any ideas but because the colonial law provided an available and apropriate framework and because colonial law was a secular neutrality between religious and social groups. The long conflict of religious and social groups had been evident in the formulation of new constitution in the post 1955 general election. The never ending conflict had given the chance for Soekarno to use the authoritarian power to settle the conflict and set the decree for 1945 constitution comeback.

After the relatively calm condition after the long struggle defending the independence, National Legal Development Agency (LPHN) was created in 1958 as the first state instution focusing on legal development in Indonesia. Its first task was to implement 1960 MPRS guidelines that national law should be coordinated with state policy and based on an adat law which would not impede the development of a just and prosperous society vide article 33 0f 1945 Constitution. LPHN in 1960 thus established that the development of national law must be built by accumulating specific areas of law within the legal codification. While the unwritten law is recognized to the extent not inhibit the formation of Indonesian socialism and the judge has the function of guiding towards the uniformity of the law through jurisprudence.

In 1962, the Minister of Justice and Wirjono Sahardjo Projodikoro became a figure who strongly opposed the applicability of Civil Code (BW). Sahardjo stated that BW and WvK supposed to only be viewed as the comments that have no binding force. Meanwhile, Wirjono indicate that the enactment of BAL 1960 had overrided the agrarian related provisions on BW in book II on Property. The next important development, was the circular-letter of Supreme Court Chief dated 5 September 1963 to the heads of state courts in Indonesia instructed to overlooked the Civil Code on judging the case. Policy considerations of this circular was that apprehension by the Chief Justice that colonial law was still applied on judgments. [434]

Sahardjo and Wirjono have the same opinion that the revolutionary interpretation that degrared BW as positive law and make it only as a set of comments will allow the judges to apply the undiscriminatory law, derived from the colonial era. That judgments would be more adjusted to the new conditions of a free country, where classification of the people should not to be established.[435]

After all, the dream for national law had been fade away as the struggle for political stability was become priority for Indonesia. The ascend of Soeharto post the failure of comunist party coup set the new direction for Indonesian law development.

D. DEVELOPMENTAL STATE AND THE FALLEN OF ADAT

With the advent of new order authoritarian regime since 1966, a basic understanding of the instrumentalism of the law had found its place. Customary law ideological victory primarily in 1960 BAL enactment finally stopped since customary law was rarely mentioned along with the economic development policy that opens the entry of

[430] Soetandyo, op. cit p. 304
[431] Ratno Lukito, Legal Tradition in Indonesia
[432] Daniel S Lev, Judicial Unification in Indonesia,
[433] Daniel S Lev, Judicial Unifification in Indonesia
[434] Soetandyo, op.cit, p.
[435] Soetandyo, op.cit, p.

foreign capital. In 1965-1970, other laws relating to land were enacted without considering the BAL, consequently some laws and regulations dealing with land are contradictory. Legal conflict and confusion produces problems and impacts on disparity of land holding, land ownership, land use and utilization, slow implementation of agrarian reform, land disputes and conflicts, abandoned land, etc.

The law and development strategy based on high economic growth gives implication in various areas of development that tends exploitative. The first of this period recorded the birth of Act No. 1/1967 on The Foreign Investment Law, Law No. 5/1967 on the Basic Forestry Law. Those set of laws designed by the Suharto government to facilitate the entry of foreign investment in Indonesia. Unlike the BAL, the BFL did not include provisions for the recognition of traditional rights. Instead, it created a system in which all forest areas would be under the management of the government. The government promptly entered into contracts with private companies whereby land concessions were granted for logging, agricultural, mining and other uses.

The new regime, in urgent need of foreign capital and technology, but inheriting a tarnished reputation among foreign investors, had little choice but to institute a radical change in direction. As the principal architect of the 1967 investment regime state:[436]

> "When we started out attracting foreign investment in 1967, everything and everyone was welcome. We did not dare to refuse; we did not even dare to ask for bonafidity of credentials. We needed a list of names and dollar figures of intended investments, to give credence to our drive. The first mining company virtually wrote its own ticket. Since we had no conception about mining contract we accepted the draft written by company, as the basis for negotiation and only common sense and the desire to bag the first contract were our guidelines"

During this period, the law was not regarded as the norm as living in the community, but as a means to achieve development goals. In this period, the law as a means of development into become the mainstream school of law development in Indonesia In this period, the school of law development appeared very famous in that era. During 1970-1990, the idea of law as a tool social engineering was used to serve development programs all over the country. [437] The school of law development was the result of the changing paradigm from supremacy of politic to supremacy of economy. The economic downturn in the old order became the basis for the justification of the school of law development. The choice of economic supremacy requires the specific law to accelerate the development of economic growth. Customary law got less attention, if any, it was more related to the practices of the court in the case of traditional inheritance. [438]

Throughout the New Order, 1960 BAL Principle State's right to control had been used to achieve the developmental goals. Using the BAL principle, authoritarian government took control of the country's resources and directs them towards his goal of "development." The authoritarian regyme using resources and development benefits in a manner that would bring stability to a country as an appeasement for the people. I would argue that domein verklaring or state domain from colonial rule had been survived in this period.

State Control Doctrine, taken from the provisions of Article 2 Paragraph (1) and (2) BAL, is essentially a reflection of the implementation of the values, norms and configuration of state law governing the acquisition and utilization of environment and natural resources, or an expression of ideology which gives the authority and legitimacy of the state to control and utilize the environment and natural resources including land tenure within its sovereign territory.

The shift of legal political development had been moved to the period of institutionalization of Islamic Law. Legal pluralism in Indonesia had been reduced by the incorporation of Islamic Law into National Law. To

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436 Rudy, Investment Laws and Policies in Indonesia Decentralization. Thesis, Kobe University, P. 54; Indonesia is endowed with an extensive tropical forest resource covering 143 million ha. It is the prevailing land cover on the large islands of Sumatra, Kalimantan, Sulawesi and Irian Jaya as well as the smaller, but less populated, islands. For centuries, however, commercial forest management concentrated on the island of Java, Indonesia's fifth biggest and most densely populated island (900 persons/km2). The vast forests of the outer islands had remained virtually untouched by the forestry sector due to lack of technical expertise and infrastructure. To utilize the forest resources of the outer islands for national economic development, the government created incentive systems for local and foreign forest harvesting operators. The Forestry Act of 1967, more commonly known as Undang-Undang (Law) No.5/1967, was particularly aimed at stimulating investment in forestry. Within five years of the promulgation of the act, annual log production from the outer islands increased sharply

437 Lihat GBHN 1970-1979

438 Lihat Achmad Sodiki, Politik Hukum Agraria, p. 103.

enforce Islamic law as formal law, the Indonesian government had made many legislation in the foundation of islam, such Law No. 1 of 1974 on the Marriage and Law No. 7 of 1989 on Religious Court. In 1991, government gathered groups of moslem scholar to create a Compilation of Islamic Law. The Compilation of Islamic Law contains law or regulations related to Islamic law, particularly private matters, as legal source to settle islamic dispute.

With the incorporation of Islamic Law into national law, national legal unification moved one step further leaving the problem of adat law within the legal pluralism. New Order government move to unfication agenda with the enactment of Law No. 5/1979 on Village. Village Law had big impact on the fallen of adat community and law. 1979 Village Law set out to establish uniform local administrative structures across Indonesia with the model of Java Regions. According to the explanatory notes appended to the legislation, the previously existing heterogeneous situation in which each region had its own style of local organisation constituted an obstacle to the "guidance and intensive direction" necessary to an improved standard of living and to the effective conduct of government. The Law become tools to create homogen structure accros the country, thus destroying the adat structure all over the country.

The fallen of adat structure was one structured movement by authoritarian government to achieve unification and homogenization in Indonesia. By the dissappearance of adat system and structure, the legal ground for claiming adat rights will be lost in front of the formal law. This condition is true in case of Indonesia where the adat community had been decreasing all over the time.

In the second period of law development paradigm 1990-2000, influenced by the IMF and World Bank coupled with the introduction of good resulted in the enactment of several more modern laws, such as the Mortgage Law, the Company Law, the Capital Market Law, the Bankruptcy Law, the Fiduciary Transfer Law, and the Arbitration Law as well as several Intellectual Property laws including laws on Copyrights, Patents, Marks, Industrial Designs, Integrated Circuits, and Plant Varieties. All these law had been projected to support the economic development. The scholar who studied at US had brought the influence of economic law from US. This generation of scholar had been connected with the school of law development.

E. POST REFORM OF LEGAL RUSH AND THE NEED OF FINDING BEST MODEL

The end of 20th century marked the huge changing of legal political system especially in Asia. Indonesia's authoritarian government finally broke down after the series of economic and political turn in the region. The condition reflected the changing of legal political situation from state sovereignty to people sovereignty in indonesia.[439]

The New Order's hot pursuit of economic development and stability had led the government to consider that human rights and the rule of law are dispensable in pursuit of economic development, thus putting aside the constitutionalism after the economic development and stability. Therefore during the New Order period, the existence of written constitution did not make the Indonesian people feel either a procedural or substantive sense of Constitutionalism. All those experiences and the weaknesses of the 1945 Constitution were the considerations that led to the 4th times amendment of 1945 Constitution during 1999-2002, regarded as one of the largest constitutional reforms in Indonesia after the fall of former President Soeharto in 1998[440].

Constitutional amendement after the fall of New Order have changed the face of legal political system of Indonesia. The constitutional amendment had been followed by the enactment of local government law, giving the federal-like institutional design to regions and the establishment of constitutional court. This new institutional setting had given rise to adat community and adat institution. With these huge developments, the end of 20th century for Indonesia may be illustrated, not only as the period of constitutional and democratic consolidation, but also the period of legal rush. There some construction of the legislation development in this

[439] In 2008, AusAID described three periods in the reform trajectory of the Indonesian law and justice sector: **Pre-1998** when little commitment was made to the rule of law and human rights; **1998-2004** when entirely new legal and institutional frameworks were established; and **2004-present** during which the focus of reform has begun to shift toward implementing the new frameworks. This present period can be seen as 'road testing' and consolidation of the new frameworks

[440] The situation during the fall of Soeharto was nearly the same with Philippine experiences when thousand of people were standing along the toll road of EDSA requesting Marcos to step down, See Valina Singka Subekti, 2008, Menyusun Konstitusi Transisi "Drafting Transition Constitution, Jakarta: Rajawali Press.

period such as the ambiguity of the legislation maker, the disharmony of law and the legal rush, the lack of political ideoolgy of legislation, and the problem within the process of legislation drafting itself.

1. AMBIGUITY OF LEGISLATION MAKER

The 1945 Constitution amendment has led Indonesia to a new constitutional system. New order executive led legislation making had been shifted to legislative led legislation making. The shift teoretically certainly will indirectly result in the changing of legislation making process.

In addition, regional autonomy is become one of the most prominent issue at the beginning of the reform era, and it became one of the aspects covered in the formulation of constitutional changes, as regulated in Article 18, Article 18A and Article 18B of the Constitution 1945. In line with the implementation of the regional autonomy, it is necessary to have a state institutions that can bridge the national and regional interests, and the interests and aspirations of the local community in the formation of national policy. Hence, 1945 constitutiona amendment then formed a new state high institute named DPD.

Thus, the basic idea of DPD formation is a desire to accommodate futher the regional aspirations and at the same time giving a bigger role to the region in political decision-making process, especially in the legislation power. The desire is departing from the idea that centralized decision-making in the past turned out to have resulted in dissatisfaction in the regions. Some of the regions had come to a dangerous level that can harm territorial integrity and national unity, even more than that, the birth of a desire to secede from the Unitary Republic of Indonesia is a major indicator of the dissatisfaction issues.

1945 expressly states that there are three institutions having legislative authority. It is as stated in Article 5 (1) of the 1945 Constitution (the President's authority to submit a bill), Article 20A of the 1945 Constitution (DPR has a legislative function), and Article 22D paragraph (1) and paragraph (2) (DPD can propose and participate discuss the bill relating to the area.

Although the 1945 Constitution has outlined the authority of legislation maker, but the Law on the Law Making as a special law on the formation of legislation in Indonesia is not set completely on the procedure of formation of the laws in each state institutions above -namely the President, the DPR and the DPD (particular bill). And the most fundamental weakness is that the unclear position and authority of DPD in formation or discussion of legislation in accordance with the mandate of the 1945 Constitution.

1945 Constitution provide the constitutional position of Regional Representative Council (DPD), which is equivalent to the House of Representatives (DPR) and the President, as stated in Article 22D paragraph (1), paragraph (2) and (3) the Constitution 1945. With such position, it is not surprising that the presence of DPD has raised expectations of the people in the area that the interests of the region and the problems facing the region can be raised and championed at national level. On the other hand DPD as the people's representative body that represents local representatives throughout Indonesia actually has only a weak quasi legislation. DPD authority weakness is that one of the causes that indonesia decentralizarion has been set back into recentralization with directed by Ministry of Home Affairs.

This imbalance power or as I call it constitutional ambiguity of legislation power of the Indonesian Parliament is causing some political channels becomes halted and not channeled, causing problems in the construction of a fair and constitutional law, espeacially for regions interest. Legally, the power of legislation making for DPD is in line with the Constitutional Court Decision No. 92 / PUU-X / 2012 which states that some of the provisions of Article in Law on Legislation Making regarding the process of establishing laws that are part of the scope of duties and constitutional authority of DPD contrary to the 1945 Constitution and not legally binding.

2. DISHARMONY AND PERIOD OF LEGAL RUSH

The absence of the grand design of legislation development makes the development of legislation is no where to go, instead of being a means to sustain the economic growth of the new order. The Reformation period at the end of the millennium is not much give a solution for the development of legislation. Development of legislation despite being instructed in the national legislation programme, is still do not have a real indicators.

Legislation development can be measured by two key indicators of the quantity and quality of legislation. From a quantity for example, the results of the national legislation of 2005-2009 resulted in the enactment of 165 Act of 265 bill, while the final result of the achievement of the national legislation of Law from 2009 to 2014 resulted in the enactment of 126 act of the 247 bills in the National Legislation Program 2009-2014. Thus it appears that quantitatively, the legislative process can only meet about 50% of the target of national legislation program.

Tabel 1. Legislation Enactment by Years

No	Year	Number
1	1945-1950	140 Law dan 30 Martial Law
2	1951-1960	133
4	1961-1965	10
5	1966-1970	85
6	1971-1977	43
7	1977-1982	55
8	1982-1987	45
9	1987-1992	55
10	1992-1997	45
11	1997-1999	75
12	2001-2005	151
13	2005-2010	192
14	2011-2015	127
15	2016	11

On the other hand, considerable amounts of the legislation can be seen that there are a lot of general norm within the national legislation. Viewed from the perspective that every sector has their own interests and as many as 126 of the Act is in the same hierarchical position, it can also be concluded that disharmony and overlap is very possible. This conclusion is reinforced by our study on Synchronization and Harmonization of Regulations on Land Registry in 2012 leading to the conclusion that there has been a massive development of legislation but not directed, causing overlapping arrangement and substance. In addition, our research on Identification and Evaluation of Local Law on Sunda Strait Special Region also produce a similar conclusion.

Overlapping state and disharmony is actually an anomaly for a country with continental European legal tradition that is very conscious systematization of legislation. [441] Systematization of this example can be seen with the codification system, which was then supported by law enforcement principles apply as lex specialis derogat lex generalis. Principles is an apparatus of legislation when there is a conflict between a rule and other regulations. Therefore, it should also be considered in development planning mechanism systematization of legislation so that the quantity of legislation to be weighted and avoid disharmony.

Disharmony, overlapping and high ego sectoral legislation resulting in poor quality of the construction. The low quality of legislation evidenced by the many laws that were tested in the Constitutional Court. During the

[441] John Henry Merryman, *The Civil Code Tradition*, Stanford University Press, 1977.

period 2003-2015, there were 370 laws in the Constitutional Court. This proves that the legislation was not based on a clear indicator constitutional. It is then compounded by the absence of indicators as a basis of justice and protection of legislation development Indonesia. Legislation development is influenced by sectoral interests and ego. In this context, history records that the development of the western version of the current legislation has failed to provide justice for the people, but the law is true for people.

The chaotic development of the legislation ignited researchers to think about the evaluation model and development model appropriate legislation to Indonesia. In addition to the measured quantity and systematic, the quality of legislation are also considered to meet the parameters of constitutionalism, justice and protection. Development of legislation in this study is defined as a strategy to improve the development of legislation, both in terms of process and substance. In the process, brought to its attention are planning a systematic and synchronous legislation, transparency and stakeholder involvement in the formulation of legislation, including formulation of norms and the implications for justice and protection. While the substance of the legislation is to ensure that the rules do not conflict with the constitution and principles of human rights, there is no overlap and disharmony with each other, and on justice and protection.

The condition of disharmony also happen in local region. It should be admitted that a conflict between the various sectoral legislation with decentralization and regional autonomy legislation has happened. No consolidation and no harmony in any kind of law occur either vertically or horizontally.

In addition to the disharmony, Legal development in the region is simply defined as the legal development of copy and paste from the national legislation. The regions then just wait and hesitate to undertake legal development in the area corresponding to the characteristics of the development of the regions. So that eventually the regions legislation development had been underdeveloped. Thus, cannot take advantage of the benefits provided by decentralization and regional autonomy. Legal product in the form of local regulations should be empowered to become one of the engines of development planning and implementation.

3. LACK OF POLITICAL IDEOLOGY OF LEGISLATION

Legislation is undoubtedly a political product. Legislation and local regulation are created by lawmakers who are politicians from political parties. However, many legal scholars conservatively believe that law is neutral and objective; arguing that law is an empty shell and contains no interest. Ever since the establishment of the Constitutional Court, dozens of legislations were petitioned for constitutional review. Similarly, more local regulations were brought to be examined by the Supreme Court. All of the phenomenon aforementioned above indicate that law is actually full of interest.

The question that is often disturbing, why farmers' protests land law? Why labor protests refuse employment law? Why do indigenous peoples reject the forestry law? Why have not been protests by entrepreneurs reject the rule of law? Debates in the parliament and the law firm are mostly dominated by juridical and technical issues. Act No.12 of 2011 focuses on the technical issues of judicial, but very little attention on how to give "nutrition" to the legislation. Indeed, technical matters are important in legislative drafting, however ignoring the "nutrients" is equal to worshiping the form but forget the content. Act No.12 of 2011 is likely to influence the designers of legislation preoccupied with technical matter jurisdiction, such as formatting, colon, comma, and so on.

Designer of regulations are assumed to be in a neutral position. The use of the word "pro-law" is polemical and triggering a never-ending debate. Legislative drafting process already assumed as neutral and objective activities. In fact, the neutral position is to cover a "mask". That in the formation of legislation, full conflict of interest.

Mask of neutrality can be revealed with the question: Do the parties involved in the formulation of legislation can be completely free of values and interests? Are legislators and legislation designer can really think new no starting point at all and without being influenced by economic interests, political, and historical consciousness?

Legislative drafting which claim value-free, neutral, and does not take sides in the middle of social inequality, in fact preserve the status quo behind the mask of objectivity? The questions that show, neutrality legislation is more of a "childish fiction" than reality. In fact, the formation of legislation, which looks quiet from the outside, was full with conflict of interest in it. The problem remain that the interest are not representing the will of the people instead the interest of the politician. It is evident in many election related legislation. In addition, the there is no political ideology brought by each legislation maker institution.

4. THE PROBLEM ON LEGISLATION DRAFTING

Law No.12 of 2012 concernintg the Establishment of legislation is an implementation of Article 22A of the Constitution of the Republic of Indonesia 1945, stating that "Further provisions on the procedure for the establishment of legislation further stipulated by the law "[442].

Law No. 12 of 2011 is an improvement of the weaknesses found in Act No.10 of 2004. Law No.12 of 2011 is better compared to Act 10 of 2004, requiring academic paper in the preparation of legislation draft. Thus the formation stages of legislation should involve researchers and experts (Article 99). However, Law No.12 of 2011 also contains several weaknesses. There are three fundamental problems of weaknesses Act No.12 of 2011 on Principle, Participation, and Language.

a. Principle

Every law made shall always be based on a number of principles or basic principles. The principle of law is the foundation of law. According to Satjipto Rahardjo the principle of law, not rule of law. However, there is no law that can be understood without knowing the principles of law within it. These legal principles give meaning to the ethical rules of law and the rule of law[443].

Sajtipto Rahardjo likens the legal principle as heart of the rule of law on the basis of two (2) reasons[444]: First, the principle of law is the basis of the most extensive for the birth of the rule of law. This means the application of legal regulations can be returned to the legal principle. Second, the legal principle as it contains ethical demands, the legal principles described as the bridge between the rule of law to the ideals of social and ethical views of society.

Article 5 Law No.12 of 2012 explain the principles of legislation includes: (a) clarity of purpose, (b) forming an institutional or official right; (c) synergy between the types, hierarchy, and material content; (d) could be implemented; (e) usability and usefulness; (f) clarity of formulation, and (g) openness.

How is good regulation, Article 6 Law No.12 of 2011 explain the substance of the legislation must reflect the principle of: (a) guardianship, (b) humanity, (c) nationality, (d) kinship; (e) archipelago; (f) diversity; (g) justice (h) equality before the law and government; (h) order and legal certainty, and/or balance, compatibility, and harmony. The principles of this law still abstract still need to be derived into a positive norm. On the principle of equality before the law and government, for example, raises questions. How is the principle of equality before the law and government realized if the social basis of law still covered social inequality.

On the principle of justice, for example, how to make the legislation with the justice closer? The social structure pyramid tubs legal footing; getting to the top of the pyramid, less number of people who live at the top of the pyramid; conversely, getting to the bottom of the pyramid, more people who are at the base of the pyramid.

As we know, majority of people in Indonesia are located at the base of the pyramid are a lower class, workers, small farmers, fishermen, motorcycle drivers, vegetable vendors around. Despite their large number, but they fight over small cake prosperity. Accommodate the interests of the legislation in each of two different conditions, just like unfair to treat differently two similar conditions. Justice can only be understood if it is positioned as a state to be realized by the law. If the principle is the foundation for the birth of law, what juridical consequences if any legislation contrary to those principles, for example, legislation is against the principles of humanity, justice, diversity, and equality before the law?

Test material laws in Indonesia can only be granted if it proved to be contrary to the system of higher regulatory hierarchy (Article 7 and 9 Law No.12 of 2011). But we can't ask a judicial review of legislation as opposed to those principles. Law No.12 of 2011 supposed to regulate the consequences of legislation to the

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[442] The scope of the substance legislation is expanded not only the law but also includes other legislation, in addition to the Constitution of the Republic of Indonesia Year 1945 and the People's Consultative Assembly. Law No. 12 of 2012 became the Qibla guide formation of legislation in Indonesia.

[443] Satjipto Rahardjo, 1980, *Hukum dan Masyarakat*, Angkasa, p. 87

[444] *Ibid*.,

contrary, especially with relatively universal principles such as humanity, diversity, and justice (*lex non est lex iniusta*).

b. Participation

Normatively, Article 96 governs the Public Participation. Society is entitled to oral or written input in the formation of legislation through: (a) public hearing, (b) working visit; (c) socialization, and/or seminars, workshops, and/or discussion.

Participation spaces such as seminars, workshops, and discussions are still exclusive for educated class. While working visit to the area or with other languages, absorbs the aspirations, still a patron-client relationships. Unequal relationships tend to distort communication. Especially when coupled weak capacity in public political bargaining with the official and formal political institutions.

Only public hearings that allow grassroots can participate and that's only responsive nature. Public hearing is usually only realized when grassroots do demonstrations because the channels to articulate their interests clogged. It means, the grassroots participation itself doesn't have space to say what is fair or unfair for them. Laws are still made in which farmers, fishermen; workers can't speak up and get involved.

Other participation canals need to be opened. Our societies actually have social capital within civic participation such as chat, discussion, and mutual assistance. The citizen participation is the opposite of democratic representation. While a representative democracy assumed power entrusted to the elected representatives of the electoral process in order to fight the aspirations, then how citizen participation in civic decision-making affecting the public. The democratic citizen can participate through chatting people up in the form of deliberation. Act 12 of 2012 hasn't been explicitly set the form of citizen participation affects societies on how to enable the formation of legislation.

Then how is the process of agreeing the legal product? This question is the essence of 'citizen participation'. When we want to achieve a product of certain laws and regulations, there is a principle which reads: decision/agreement/products or valid legal claims to the validity of the law that's only the product is approved by any subject or person affected by the legislation.

For example, when the local government wanted to regulate pedicabs free area, then before the Act was decided, there are principles that can't be denied: to involve parties who are subject to it. They are pedicab drivers, pedicab owners, pedicab user society, road users, people who care pedicab and all are affected by the rules it should be assumed as citizens who will be affected by the regulations. Thus, the subject of the weakest and Poorest in the forum is able to express their opinion, because the most foolish ones also have the right.

c. Language

Language is the house of thinking. Language plays an important role in how we arbitrate. Law with all its dynamics is mediated by language. We cannot avoid law as a matter of language. Legislation therefore is highly dependent on the language. Without language, how to communicate the legislation? Because it is built on language construction; only through language, people understand and comply with the intent, purpose, and formulating rules.

Inside the language there are narrative and meaning so does on the law, which according to Cover: '*no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning*'[445]. Law as text, of course not only involves syntactic[446], but also semantic[447], and pragmatic. In Appendix Act 12 of 2011 describes a variety of language legislation as follows:

> "Language Legislation is basically subject to the rules of grammar Indonesian, both the formation of the word, sentence formulation, technical writing, and spelling. But the language of legislation has its own style characterized by clarity of understanding, candor, standard, harmony, and obedience in accordance with the principle of legal requirements in both the formulation and writing".

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445 R. Cover, 1983, '*Foreword: Nomos and Narrative*', Harvard Law Review, 97, p. 4

446 Syntactic study the docking between one sign with another. Central concern in syntactic is form or structure of language sign, so it is closely related to grammar

447 Semantic study the docking between the signs and the meaning. Focus on the semantic is language signs

According to appendix Law Act 12 of 2011, the characteristics of language legislation and regulations include:

a. straight forward and certain to avoid similarity of meaning or ambiguity;
b. patterned sparing only the necessary words were used;
c. objective and pressing subjective taste (not emotion, in expressing the purpose or intent);
d. standardize the meaning of words, phrases or terms are used consistently;
e. provide a definition or limited definitions carefully;
f. writing words that are singular or plural is always formulated in the singular.

The characteristics of the language legislation and regulations that emphasized on Act 12 of 2011 was so mechanistic; as if the subject of regulation is not human, and if it was going to be treated as human beings, ignoring the particularities of each human being. Statutory language should be objective, standardize the meaning of words, writing words that are singular or plural is always formulated in the singular, causing the use of rigid legal language in the legislation because the law assumes that the text should not be contaminated with multiple interpretations and subjective sense. Is the legal language completely objective?

Various criticism actually addressed to the statutory language there are away from the context. To create certainty, the language-law rigidly enforced using exclusive sentences, grammatical structure imposed, the terminology is limited. Our legal language are difficult to understand and confusing the public, not friendly for grassroots society which stereotypically categorized as a layman, legal blindness.

Regarding to language, Act No.12 of 2011 should open space for public participation. Society as the target and the user of legal documents should ensure that legislation is composed by populist language, and easily understood by the people who are socially constructed as a layman.

F. CONCLUSION

The development of legislation in Indonesia has been influenced by many factors. The history shows that Indonesia itself is still finding the best model for the legislation making. The present construction is needed for rethinking and reshape the legislation development which is fit with Indonesia characteristic.

G. REFERENCE

Angelino, A.D.A De Kat. 1931. *Colonial Policy, Volume II The Dutch East Indies*, The Hague: Martinus Nijhoff.

Ball, John. 1982. *Indonesian Legal History: 1602-1848* .Sydney: Oughtershaw Press.

Cover, R. 1983. *'Foreword: Nomos and Narrative'*. Harvard Law Review.

Day, Clive. 1904. *The Policy and Administration of the Dutch in Java*. New York: Mcmillan.

De Gids, Maret 1921; "juridisch confectiewerk: Eenheidsprivaatrecht voor Indie" *kolonial student,* Th. I, 1925, No. 9

Djokosutono, Soepomo. *Sedjarah Politik Hukum Adat*. Penerbit Djambatan.

Drakeley, Steven. 2005. *the History of Indonesia*. Westport: ABC-CLIO.

Furnivall, JS. 1976. *Netherlands India: Study of Plural Economy*. Amsterdam: Israel.

GBHN 1970-1979

Geen Juristenrecht Voor De Inlander", *De Xxe Eeuw*, Maret 1905. De strijd om het Adatrech", *De Gids*, Mei 1914; "De Indonesier en zijn grond", Leiden: Brill, 1919; "Een accident in de Indische rechthervorming".

Hardiman, Budi. 2005. *Demokrasi Deliberatif: Teori, Prinsip, dan Praktik*, makalah: Yogyakarta.

Lev, Daniel S. *Judicial Unification in Indonesia*.

Lukito; Ratno. *Legal Tradition in Indonesia*. IMR.

Merryman, John Henry. 1977. *The Civil Code Tradition*. Stanford University Press.

Raffles, Thomas Stamford. 2014. *The History Of Java*. Yogyakarta: Narasi.

Rahardjo, Satjipto. 1980. *Hukum dan Masyarakat*. Angkasa.

Rahman, Noer Fauzi. *The Resurgence of Land Reform Policy and Agrarian Movement in Indonesia*. Dissertation: University of Berkeley California.

Rahman, Noer Fauzi.2012. *Law Reform dari Masa ke Masa*. Jakarta: Tanah Air Beta.

Rudy. *Investment Laws and Policies in Indonesia Decentralization*. Thesis: Kobe University.

Sodiki, Achmad. 2013. *Politik Hukum Agraria*. Jakarta: Konstitusi press.

Soekanto. 1958. *Meninjau Hukum Adat Indonesia*. Jakarta: Soerungan Petjenongan.

Subekti, Valina Singka. 2008. *Menyusun Konstitusi Transisi "Drafting Transition Constitution"*, Jakarta: Rajawali Press.

Termorhuizen-Art, Marjanne. *Indonesia and its people dalam Hukum Agraria dan masyarakat di Indonesia.*

Tubbs, Margot. 1993. "***Feminism and Legal Positivism***" in Eisberg, D. Kelly. ***Feminist Legal Theory : Foundations***. Philadelphia: Temple University Press.

Wignjosoebroto, Soetandyo. 1992. *From Colonial Law to National Law*, Dissertation: Airlangga University.

Wignjosoebroto, Soetandyo. 2011. *Untuk Apa Pluralisme Hukum?(Konsep, Regulasi, Negosiasi Dalam Konflik Agraria Di Indonesia)*. Jakarta: Epistema Institute.

Wolhoff, G.J. 1955. *introduction of Indonesia Constitutional Law*. Jakarta: Timun Mas.