

THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES

Protection against Women from the Perspective of Working of Law in Society

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Abstract:

Violence against women in Indonesia, which was recorded by the National Commission on Violence against Women is increasing every year. There are various possibilities that affect the increasing levels of violence against women, such as increased due to increased insight into women's reports of their rights, the higher understanding of law enforcement on violence against women or ineffective laws provide protection to women as victims.

The existence of the legal system in the context of the social environment is one of the sub-systems among other social subsystems, such as social, cultural, political and economic. This means, the existence of a legal system can not be removed separated by society as a base workings. In this context, the enforcement and operation of the legal system will be strongly influenced by the social system components are interlinked with each other.

Each component of each influences to enter values or norms that exist in an environment laden with the influence of non-legal factors other. The components of the legal system and the influence of the mutual influence, namely the law-making institutions, the holder of the role (role occupant) as well as societal strength of personal (personal societal force), the culture of law (legal culture) as well as the elements of feedback of the workings of the ongoing legal.

Keywords: law making institution, role occupant, legal culture

1. Introduction

Violence against women as a global problem, already worried about every country in the world, not just the countries which are developing but also including developed countries are said to be very appreciate and care for human rights such as the United States. Indonesia as a developing country, the predicate is bad in human rights violations. Human rights violations are one of these women's human rights violations. Violations of women's human rights can be classified as acts of violence against women.¹

The existence of women who are often classified as second-class citizens getting worse lately with the chaos that creates new female victims in considerable amounts, either physically (eg rape, lewd acts), psikologis (eg, harassment, terror) and economically (eg dismissal of the employment relationship).² In that regard Harkristuti Harkrisnowo revealed, the phenomenon of concern is that violence against women has been appointed as a global issue, not a long enough attention in Indonesia. Public indifference towards this problem because of the social structure, the public perception of women and violence against women, as well as the value of the community who always want to look harmonious so difficult to admit that there is a problem in any household risks, the underlying three main things.³

2. Influence Culture in Law Reform

Facing the era of globalization and the information age are increasingly sophisticated, it is increasingly difficult to determine which way the new world order which will be formed. In some parts of the world there has been a cultural transformation accelerated, but in some places it occurs cultural gap (cultural lag). In the end, almost all countries realize, that if such a drift in the current, undoubtedly live without a definite direction and purpose. Then it is developing the concept of back to basics, which means digging and re familiar with both the cultural identity of each.⁴

Starting from such a state is quite important and interesting when discussing the law in the context of culture. Culture as a normative structure that contains the intent and purpose of human life, so that by Ralph Linton culture referred to as design for living. With so

¹Fathul Djannah, 2002, Kekerasan Terhadap Isteri, LKIS, Yogyakarta, p.1

²Wila Chandrawila Supriadi, 2001, Kumpulan Tulisan Perempuan dan Kekerasan Dalam Perkawinan, CV Mandar Maju, Bandung, p. 32.

³Harkristuti Harkrisnowo, 2001, Tindak Kekerasan Terhadap Perempuan Dalam Perspektif Sosio Yuridis, Jurnal Hukum, Fakultas Hukum Universitas Islam Indonesia, Yogyakarta, p. 157.

⁴Soedjatmoko, 1986, Pembangunan sebagai Proses Belajar dalam Masalah Sosial Budaya Tahun 2000, Tiara Wacana, Yogyakarta, p. 4 - 7.

culture gives guidelines or blueprint for human behavior.⁵ The entry of the cultural element in the substance of the law, will give a particular color in accordance with the cultural characteristics possessed by every nation.

Law and culture are two variables that relate correlative. This means that the law of the interplay of culture can influence. Looking at the relationship between the two will give birth to two studies perspective. In the first perspective can be placed law affect the culture. Through the study of culture is placed as the dependent variable, meaning that the law can provide direction in the development of culture, so the culture is bound to the pattern laid down by law. In contrast to the perspective of both the law is placed in the position of the dependent variable, in this cultural studies thus set the direction of the law. Law here tied to the format outlined by culture. Therefore, the law is born is an incarnation of the culture. Culture that is the embodiment of the human mind activity. Activities in the form of natural assessment about which encircle man himself. Thus the so-called culture that is the embodiment of the human mind are always arranged in a pattern or configuration values.⁶

On sound legal culture in the 18th century Friedrich Karl von Savigny stated law is an expression of the common consciousness or spirit of a people (*volkgeist*). With this statement, Savigny want to explain that the law is a manifestation of public awareness. He argues that all laws derived from customs and beliefs, not from the legislators. This Savigny outlook stem from the assumption that in the world there are various nations that each nation has the "*volkgeist*" (*psyche*). This soul vary both by time and by place. Reflection of their different life is evident in the culture of the nation was different. This expression appears also in law is certainly different also. Therefore no sense if there is a universal law and at all times. Law depends on the soul of the people was, and that the content of the law is determined by the interaction of human life from time to time.

According to Edwin M.Schur, through the eyes above, Savigny wanted to show the importance of law connected with the structure supporting community and cultural value system contained in society. In other words sociologically Savigny want to place a legal system as part of a broader social order, so let *volkgeist* term is defined as a system of cultural values in society.⁷

Savigny view of this has been proven in the British colonies in the African region, where the British wanted to apply the legal system in the colonies. However aground in the middle of the road, because the people of Africa are still using its own law which consists of a blend of the original law, religion and tradition. The application of the law is based on natural justice and humanity.⁸

The views were similar to Savigny, presented by an expert Austrian law, Eugen Ehrlich who believes the law is a relative factor bound to the social forces wider. He stated that "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in a judicial decision, but in society itself. The positive law could only be effective if it was in line with the living law ". The concept of living law according to Ehrlich defined as living law in a society that is based on regularities that are in the community alliances. Of the view that such Ehrlich there is an opinion stating that the concept of living law or social law is the same as "orderly in a social group" that the anthropological concept is identical to the patterns of culture (culture pattern). So understand sociological jurisprudence of Ehrlich describes as Anthropological understand jurisprudence.⁹ Two of the above notion in history which has given strong foundations for growth and development of customary law as the law of Indonesia's cultural heritage which is the embodiment of legal values that live in the community.¹⁰

Next the concept of culture that will be put forward here is the concept of culture as developed by the humanities. In the humanities, the term culture is defined as the universal human values that have always fought for the upholding of human as civilized beings.¹¹ By studying the humanities would mean looking man on top position of the animals, under the gods.¹² If it is associated with the law, then through the concept of the law is expected to remain relying on human values such as: the value of inner and outer balance; values of justice, propriety, decency; truth value; similarity values; priority value of public interest; the value of cooperation; value of devotion; value of order and tranquility.

In connection with these values Neil Mac Cormick writing, the law should contain the values embodied in the statement of general principles of law. The values included in the law solely in terms of expanding human justification for the law that they have. And it would get public support because it has been deemed fair and good.¹³ Is oriented to the human values that the law would be born "even-handed" in the sense that the law does not give priority to class / specific groups, as well as the law does not cause friction in society. If so, then the law of peace as the goal has been achieved. Peace is a sense that contain outward and inward aspects of human life. Outward aspect concerns the order of living together and spiritual aspects associated with peace of soul.¹⁴

Based on the above, reveals that the insight in the legal culture is very important, namely:

- a. The law will be effective because the law has been in accordance with the cultural values that live in the community and law placed as part of a broader social order. So that the law can satisfy the justice, truth and decency in society.

⁵ Soerjono Soekanto, 1995, *Beberapa Permasalahan Hukum dalam Kerangka Pembangunan di Indonesia*, Yayasan Penerbit UI, Jakarta, p. 25.

⁶ Sutan Takdir Alisjahbana, 1986, *Indonesia di Tengah Bangkitnya Dunia Baru, Transformasi Masyarakat Indonesia*, Kerjasama Kelompok Studi Proklamasi dengan The Asia Foundation, Jakarta, p. 7.

⁷ Edwin M.Schur, 1968, *Law and Society a Sociological View*, Random House, New York, p. 7.

⁸ Huntington Cairns, 1969, *Law and The Social Sciences*, Rothman Reprints Inc, New York, p. 30-31.

⁹ Edwin M. Schur, *Op. Cit.*, hlm. 37.

¹⁰ Lili Rasjidi, 2002, *Dasar-Dasar Filsafat Hukum*, Alumni, Bandung, p. 40.

¹¹ Habib Mustopo, 1983, *Manusia dan Budaya Kumpulan Essay Ilmu Budaya Dasar*, Usaha Nasional, Surabaya, p. 16.

¹² Roy Niblett, 1975, *The Sciences, the Humanities and the Technological Threat*, University of London Press Ltd., p. 80.

¹³ Neil Mac Cormick, 1978, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, p. 34.

¹⁴ Purnadi Purbacaraka dan Soerjono Soekanto, 2001, *Perihal Kaedah Hukum*, Alumni, Bandung, p. 68.

- b. The law will be directed to maintain and enhance human dignity, nurturing personality and morals of the nation, the law has been in line with universal human values which is the embodiment of human virtues as civilized beings.

Thus benchmarks to determine how much a matter of law has had a cultural insight, it can be seen on the substantive aspects of the rule of law and the adjective. On two aspects that can be observed in substantive, have according to the prevailing cultural values in society and the legal Has integrated with other means of social control. In the aspect of adjectives can be seen whether the law has been in accordance with the procedures and principles of the creation of good law, justice and truth.

The inclusion of cultural insight in strategy formation of the law, at least have two meanings, namely:

- a. Can be avoided dekulturnisasi process. Law as a means of social control is the most formal means of control devices other communities (such as religion, morality, customs). As a means of most official cause the most decisive in terms of directing the behavior of citizens. So for example, if the law regardless of cultural elements absorbed in it, then the behavior will occur silting community culture that ultimately arise dekulturnisasi. To avoid this it is proper strategy for the establishment of national law interwoven with cultural development strategies. Dekulturnisasi process is the beginning of the waning of human values or dehumanization.
- b. Creating a typical Indonesian law. Indonesian nation has a historical background, social structure, and the environment are different from other nations. The condition of the people of Indonesia have cultural value system, a typical Indonesian way of life that distinguishes itself with other nations.

In keeping with the adage *ubi societas ibi ius* (where there are people there is no law) means the laws are created / born is a reflection of the community of supporters, so aptly remarks Paul Bohannan, quoting a proverb from Gola tribe in Liberia who said that the law as a chameleon or The law is like a chameleon, the law was found in various places or communities and it takes the form and content to the needs of the community in which it applies.¹⁵

More specifically stated by Morris L. Cohen that although countries in the world mostly follow the model of the common law system and civil law system, but both form and content of the two legal systems have undergone many changes in line with the historical growth in each country . Furthermore written, Reviews These variations have been shaped by the geography, economy, culture and history of the particular countries and are reflected in differences between the striking the resulting national versions of the larger system.¹⁶

From the foregoing description it would seem that any legal system of a country has its own characteristics. Indonesia as a country that is growing on its own history and culture of the law who was born to be conformed to the image of the history and culture. That way the law has formed a distinctive characteristics and fitting to Indonesia or Indonesian legal personality.

If you want to create sound legal culture then towards the establishment of legal and cultural development strategies should be integrated (integrated). Where the position of customary law/common law, not as a separate element in the formation of the national legal framework. That is because customary law has been included in the definition of legal materials. Values/ principles of customary law such as the principle of universal religion, kinship, mutual help, human and social functions belonging in society, as the basis for approval of a general rule, representation and deliberation in the government system is parallel to the principles of Pancasila and span the 'hierarchy into the body of UUD 1945, so that national law which is based on Pancasila and UUD 1945 also in accordance with the values/principles of customary law.

In this case the right term coined by Soeripto that Pancasila as konkritisasi Indonesian cultural values are welbron or source of the birth of customary law, and customary law itself is kenbron or source identifier of Pancasila in legal terms.¹⁷ Norms and institutions of customary law which is a local form of customary law, still take part or absorbed in the cultural development in line with the development of Indonesian society to the modern society. Through research and development of law, norms and institutions of customary law are identified and inventoried and analyzed, which subsequently selected for a national law-making process to get a new shape or form in accordance with the demands of modern society of today.

3. Bureaucracy and Law Enforcement

Bureaucracy according to Peter and Meyer is a great organization that is a very powerful institution that has the ability to do good or to do evil. Understanding bureaucracy delivered Blow and Meyer is in accordance with the bureaucratic reality today with three key words are: (1) a large organization that is very powerful; (2) to do good; and (3) or do evil. Organizations large and very powerful, because the bureaucracy has the personnel to the millions of people who are very large amount for an organization and wherever bureaucracy can always impose the passage of an ordinance. To do good, visible from the state budget allocated to the state social security and accommodating the aspirations of its people. But there are also countries that have done evil to make people as an elite group goals.¹⁸

Mac Weber, known as the father of optimistic that bureaucratic red tape containing the positive things that are known as the ideal bureaucracy, namely: (1) the distribution of tasks (specialization); (2) The principle of hierarchical bureaucracy; (3) The rule of law

¹⁵ Paul Bohannan, Anthropology and the Law, The Voice of America Forum Lectures, Anthropology, Series 15, p 1.

¹⁶ Morris L. Cohen, 1976, How to Find the Law, St. Paul Minn, West Publishing Co., p. 391-392.

¹⁷ Ibid., p. 114.

¹⁸ Ibid., p. 114.

that is consistently implemented; (4) No personal or formal; (5) Development of a career based on seniority and achievement; (6) The experience was awarded in addition to the achievements and services.¹⁹

Strong and neutral bureaucracy can guarantee a stable government as Atmosoedirdjo said, that the role of the bureaucracy that so determines, among others, can be seen in Western Europe that the bureaucracy has developed since the mid-17th century is relatively quiet and stable against internal and external turmoil that swept like a change political cabinet, changes in legislation and so on, this is due to the ability of the bureaucratic machine that can bear and neutralize them.²⁰

The researchers in the field of modern organizations can discuss freely about three models of bureaucracy, namely: pre-bureaucracy, bureaucratic and post-bureaucratic. The character of each model is presented in Table 1. The model presents in general a large number of historical findings and put these findings in a unified framework. This model states that under certain conditions the process which appears likely to transform the pre-bureaucratic decision-making tentative become more systematic decision-making. More systematic decision-making is, in turn, depends on the pressure that is pulled to move towards a post-bureaucratic models more flexible.²¹

	Pre- Bureaucracy	Bureaucracy	Post-Bureaucracy
The purpose	particularistic, mixed between personal interests and public responsibility.	Explicit, certainly, public, identified with the specified jurisdiction.	Mission-oriented, flexible.
Authority	Traditional, charismatic, unstructured.	Areas of competence divided hierarchical, communication through the channel of formal rationality.	Team organization and group, open the Radio Communication task, the diffusion of authority, substantive rationality.
Regulation	No systematic.	Codified, a blueprint for action, focusing on administrative regularity.	Subordinate to the goal, the rejection of attachment to the rules.
Decision Making	Characteristically ad hoc, subject to the whims of the people and uncontrolled acts committed by subordinates.	Systematic, regular, limited delegation, there is an assumption about a stable social environment that consists of elements that have been classified and made to obey the rules.	Participatory, centered on the issue, broad delegation, there are assumptions about the environment with the demands and opportunities of changing.
Career	Unstable, not professional, position can sold and buy or as a side income elite.	Acting as a full-time professionals who are committed to the organization, there is no personal constituency, appointment based on ability, emphasis on seniority and position.	Affiliate duplicate and temporary, engagement through subcontracting, experts have autonomous professional foundation.

Table 1: Three Development Models of Bureaucracy.²²

Bureaucratic development model is a theory of constraints and institutional responses, whose function is to identify potential changes in a series of specific situations. This developmental model states that under certain conditions a system will bear certain forces that drive change. Bureaucratic model that is appropriate for the protection of victims of domestic violence is a post-bureaucratic, because this model is more concerned with initiatives that intensified than that regulate behavior and is more flexible than other bureaucratic models.

In the modern era of increasingly complex can not be denied the significance and role of the bureaucracy which Henry is political pluralism, the hypothesis removal/concentration and tekhnobirokrasi.²³ Political pluralism, where the presence of heterogeneity of the society makes the rivalries that give rise to a conflict of interest. In different interests, the government places itself as a counterweight wise with a win win solution. Unexpected emergencies which previously appeared as natural disasters or outbreaks of disease and others that require a specific budget, then it is the responsibility of the government called the displacement hypothesis. Tekhnobirokrasi, in technology and social change is so rapid, the bureaucracy which consists of professionals in all fields and sectors have an obligation to inform and interpret the changes that are being and will happen. Furthermore bureaucracy expected to act as change agents (pioneers of change), an agent of development (a pioneer of development) and the agent of stability (stability pioneer).²⁴ Bureaucracy sometimes be an unhealthy body, which are difficult to produce the expected optimal performance, this thing called bureaucracy affected by the disease or pathology. While on the other hand of bureaucracy is expected to face a tough challenge of

¹⁹ David Osborne, and Ted Gabler, 1995, *Mewirusahakan Birokrasi (Reinventing Government) How the Interpreneursial Spirit is Transforming The Public Sector*, A Plume Book USA, terjemahan Abdul Roshid, Pustaka Binaman Presindo, Jakarta, p. 52.

²⁰ K. Suhendra, 2006, *Peranan Birokrasi Dalam Pemberdayaan Masyarakat*, Penerbit Alfabeta, Bandung, p. 35.

²¹ Philippe Nonet & Philip Selznick, 2007, *Hukum Responsif*, diterjemahkan dari: *Law and Society in Transition: Toward Responsive Law*, Harper & Row, 1978, oleh Raisul Muttaqien, Penerbit Nusamedia, Bandung, p. 25-26.

²² *Ibid.*, p. 27.

²³ Nicholas Henry, 1998, *Administrasi Negara dan Masalah-Masalah Kenegaraan*, terjemahan Lusiana D. Lontoh, Rajawali Press, Jakarta, p. 5.

²⁴ *Ibid.*, p. 7-9.

global competition as well as various internal problems. These challenges include all aspects of life such as political, economic, social, cultural, defense and security, science and technology.

In connection with the pathology of bureaucracy, Siagian states that: no bureaucracy completely free from bureaucratic pathologies, otherwise there is no red tape bureaucracy suffering from any disease as well. Furthermore Siagian classify 5 (five) pathology groups as follows: (1) perception and managerial style; (2) lack of knowledge and skills; (3) violations of laws and regulations; (4) negative dysfunctional behavior; (5) due to the internal situation in the agency.²⁵

Bureaucracy is a major force capable of carrying out a revolutionary social change but also at the same time a large force to maintain the existing institutional structure through various statements such as law enforcement. Law enforcement according to Black's Law Dictionary is: (1) The detection and punishment of violations of the law. The term is not limited to the enforcement of criminal laws, for example: the Freedom of Information Act contains an exemption for law-enforcement purposes and furnished in confidence. That exemption is valid for the enforcement of a variety of non-criminal laws (Reviews such as national-security laws) as well as criminal laws; (2) Criminal justice; (3) Police officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law.²⁶

Law enforcement is a social sub-system, in which enforcement is influenced very complex environment such as the development of political, economic, social, cultural, defense, science, education and others. Law enforcement must be based on the rule of law as to which there in UUD 1945 and the principles of law applicable in the civilized nations, so that law enforcement can avoid negative practices as a result of environmental influences on the surrounding complex.²⁷

Soerjono Soekarno expressed conceptually, core and meaning of the rule of law lies in harmonizing relations activities that span the hierarchy of values in the steady norms and attitudes manifest and acts as a series of translation of the final stage, to create, maintain, and sustain peace social life . Basically, humans have certain views about what is good and what is bad, that terwujud in pairs of values. In the law enforcement, pairs of these values need to be harmonized.²⁸

Satjipto Rahardjo states law enforcement is a process for law mewujudkan desires become reality. Desires thoughts law is the law making body that is defined in the rules of law. Law enforcement starts from the manufacturing to the implementation of the law. Desires of law made by man, so the man who runs the rule of law actually occupies an important position and decisive.²⁹

Relevant to the matter B.M. Taverne stated: geef me geodes rechter, geodes rechter commissarissen, geodes officieren van justitieen, geodes politie ambtenaren, en ik zal met een slecht strafproesrecht wetboek van het geodes beruken (give me judges, prosecutors, police and lawyers are good, then I will eradicate crime even without any piece of legislation). In other words: give me a good judge and prosecutor, then with a bad law I can bring justice.³⁰ That is, however, complete a formulation of laws, without the support of law enforcement agencies are good, have a high morality and integrity, then the result will be bad.

Discuss law enforcement without offending people who run their enforcement, a sterile discussion nature. So law enforcement must always be associated with the implementation of concrete by humans, do not just look at the provisions of the law. Successful implementation of the legislation depends on many factors, these factors include: primary norms that govern them, the demands of society and social forces personnel (including legal culture).³¹

In law enforcement, the most important aspect is the element of law enforcement officers. Law enforcement officers are the police, prosecutors, judges and lawyers must be really professional and starting from scratch pembenahannya that of recruitment. Recruitment must be integrated and tight if you want to get a qualified law enforcement officers and dedicated to the rule of law. They were taken from a graduate law degree with a certain grade potential academic (GPA), and through a variety of tests such as psikologi tests, tests of academic potential and are given special education or training together, in order to have the same perception and outlook in terms of law enforcement. Also important is to develop the role of ethics of the legal profession.³²

Finally, the most important thing in law enforcement is based on conscience. By conscience we can judge whether our actions are honest, fair, decent and humane. As submitted by the closing FX Adji Samekto scientific speech, that the moral law is a human institution and not the technology that no conscience. Laws are for people, not to the law itself. So empathy and concern should be the spirit of the implementation of the law, because the benefit of man kind into the final destination point and the orientation of the law.³³

In making changes, renewal or reconstruction should be aware and pay attention to the socio-cultural values and the fact that living in the community. Culture should not be uprooted from the roots, causing a shock. Eugen Ehrlich, pioneer of Sociological Jurisprudence, suggested that positive law is good and can be effective is a positive law in accordance with the living law, namely as the inner order

²⁵ Sondang P. Siagian, 1994, *Patologi Birokrasi, Analisis Identifikasi dan Tercapainya*, Ghalia Indonesia, Jakarta, p. 35-36.

²⁶ Bryan A. Garner (editor in chief), 2004, *Black's Law Dictionary, Eight Edition*, West Publishing, St. Paul Minesota USA, p. 891.

²⁷ Muladi, 1997, *HAM, Politik dan Sistem Peradilan Pidana, Cetakan Pertama*, Badan Penerbit Universitas Diponegoro, Semarang., p. 70.

²⁸ Soerjono Soekanto, 2008, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, PT Raja Grafindo Persada, Jakarta, p. 5-6.

²⁹ Satjipto Rahardjo, 2009, *Penegakan Hukum Suatu Tinjauan Sosiologis*, Genta Publishing, Yogyakarta, p. 1-2, 24.

³⁰ Satjipto Rahardjo, 2007, *Membedah Hukum Progresif*, Penerbit Buku Kompas, Jakarta, p. 6.

³¹ Idem, p. 26. Lihat juga Suteki, 2007, *Hukum Dalam Transformasi Global*, Penerbit Pustaka Magister, Semarang, p. 8-10.

³² Nyoman Serikat Putra Jaya, 2001, *Penegakan Hukum dalam Era Reformasi Hukum, dalam Kapita Selekta Hukum Pidana*, Badan Penerbit Universitas Diponegoro, Semarang, p. 57.

³³ Fx. Adji Samekto, 2008, "Justice (Not) For All Dalam Perubahan Tatanan Global", Pidato Pengukuhan, Disampaikan pada Upacara Penerimaan Jabatan Guru Besar dalam Bidang Ilmu Hukum Internasional pada Fakultas Hukum Universitas Diponegoro, Semarang, 15 Maret 2008, p. 37-38.

of society that reflects the values that live in it.³⁴ Additionally Sinzheimer stated that the law does not move in the vacuum chamber and dealing with things that are abstract, but the law is always in a certain social order and human beings live.³⁵

The state's role is very important in legal mewujudkan capable of happy people, the law that are always in a certain social order. In the Indonesian context of the law in question is the law to accommodate the social order based on the values of Pancasila. Indonesia as the country does not take the law schools of the state law of western legal culture, but understand the state of law based on the philosophy of the Indonesian nation itself, namely Pancasila legal system which is based on the principle of harmony, harmony and balance.³⁶

The above is similar to that conveyed by Arief Hidayat, that the rule of law adopted by the Republic of Indonesia is a State of Law Pancasila which is prismatic and integrative. State laws that integrate or unify elements both in rechtsstaat, the rule of law, the concept of formal and substantive law of the state and rated keindonesiaan (kinship, harmony, balance and deliberation which is at the root of the legal culture of Indonesia) as a specific value. The principle of legal certainty in rechtsstaat combined with the principle of fairness in the rule of law. Legal certainty must be enforced to ensure that justice in society as well upright.³⁷

4. Workings of Law in Society

The existence of the legal system in the context of the social environment is one of the sub-systems among other social subsystems, such as social, cultural, political and economic. This means, the existence of a legal system can not be removed separated by society as a base workings.³⁸ In this context, the enforcement and operation of the legal system will be strongly influenced by the social system components are interlinked with each other. Each component of each influences to enter values or norms that exist in an environment laden with the influence of non-legal factors other. The components of the legal system and the influence of the mutual influence, namely the law-making institutions, role occupant as well as personal societal force, the legal culture as well as the elements of feedback of the workings of the ongoing legal.³⁹

The complexity of factors that affect the operation of the legal process can be illustrated in the following chart:⁴⁰

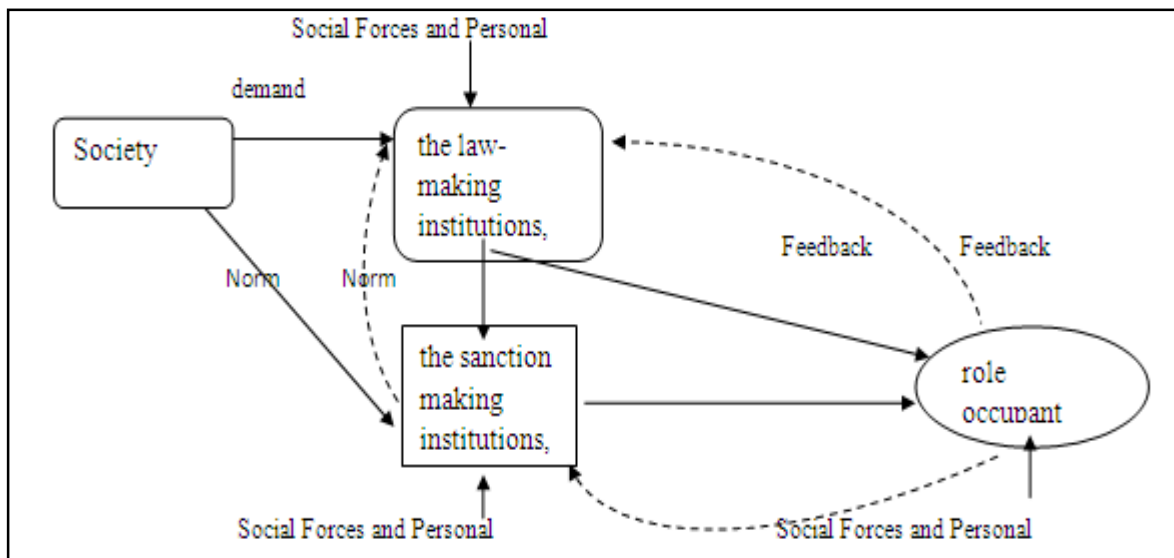


Figure 1: The working of Law in Society

³⁴ C.F.G. Sunaryati Hartono, 2006, *Bhinneka Tunggal Ika Sebagai Asas Hukum Bagi Pembangunan Hukum Nasional*, Citra Aditya Bakti, Bandung, p. 34. Bandingkan dengan Theo Huijbers, 1999, *Filsafat Hukum Dalam Lintasan Sejarah*, Kanisius, Yogyakarta, p. 213-214.

³⁵ Esmi Warassih, 2009, *Hukum Progresif Jawaban Alternati Menuju Pembangunan Hukum Indonesia Menghadapi Mafia Peradilan*, Makalah dalam Seminar Nasional Fak. Hukum Universitas Diponegoro, Semarang.

³⁶ Ismail Saleh, 2007, *Faham Negara Hukum yang Dianut di Indonesia*, dalam *Ilmu Negara, Konstitusi dan Keadilan*, Fakultas Hukum Universitas Indonesia, Jakarta, p. 6-9.

³⁷ Arief Hidayat, 2010, "Bernegara Itu Tidak Mudah (Dalam Perspektif Politik dan Hukum)", Pidato Pengukuhan, Disampaikan pada Upacara Penerimaan Jabatan Guru Besar Dalam Ilmu Hukum pada Fakultas Hukum Universitas Diponegoro, Semarang, 4 Februari 2010, p. 31-32.

³⁸ Esmi Warassih, 2005, *Pranata Hukum, Sebuah Telaah Sosiologis*, Penerbit PT Suryandaru Utama, Semarang, p. 12.

³⁹ William J. Chambliss and Robert B. Seidman, 1971, *Law, Order and Power*, Reading, Mass: Addison-Wesly, p. 12.

⁴⁰ Suteki, 2010, *Rekonstruksi Politik Hukum Hak Atas Air Pro Rakyat*, Surya Pena Gemilang, Malang, p. 293, 297. Lihat Satjipto Rahardjo, 2009, *Penegakan Hukum Suatu Tinjauan Sosiologis*, Genta Publishing, Yogyakarta, p. 28-29, Lihat W.J.Chambliss & R.B. Seidman, 1971, *Law, Order ...*, Ibid. Lihat Esmi Warassih, *Pranata Hukum*, Loc.Cit. Lihat juga: Satjipto Rahardjo, 2006, *Ilmu Hukum*, Penerbit Citra Aditya Bakti, Bandung, hlm. 20, Bandingkan Aan Seidman dan Robert B. Seidman dan Nalin Abeyeskere, 2002, *Penyusunan Rancangan Undang-undang Dalam Perubahan Masyarakat Yang Demokratis*, Edisi Kedua, Terjemahan Johannes Ufuan dkk., Elips, p. 20.

By using the model of Chambliss and Seidman mentioned above can be explained influence factors or social forces in the stage of making and law enforcement as well as the expected role of each component present in the legal system. This explanation shows that the law is a social process which in itself is a variable that is independent (autonomous) and not independent (not autonomous) as well. At this stage of legislation, social forces have started to work. Social forces that will continue to try to get in and affect every legislative process effectively and efficiently. Product legislation produced an accumulation of conflict and resultant dominant interest groups that influence the legislators.

The influence of social forces also affect the phase of implementation or enforcement. Gustav Radbruch⁴¹ suggests that there are three basic values to be achieved and needs serious attention from the executor or law enforcement, namely the values of justice, rule of law and expediency. Especially this kemanfaatan basic values will lead to the consideration of the needs of the legal community.

Furthermore, the expected role of citizens, is also determined and limited by the social forces, especially the culture system. What is meant by the stakeholders here are all the good citizen judges, police, and so on. A regulation made or issued must contain hopes to be carried out by legal subjects as stakeholders. However, the operation of the hope that is not determined only by the presence of the legislation itself, but also influenced by other factors. Factors that help determine how the response will be given by the stakeholders, among others: (1) the sanctions contained in it, (2) the activity of law enforcement agencies, (3) the whole socio-political forces and so on other work on the role of self-holder. Changes itself also caused by a variety of reactions caused by the holder of the role of the legislator and the bureaucracy. Vice versa, the bureaucratic component also provides feedback to lawmakers as well as the role holder.⁴²

The chart above also shows that each of the parties involved in the process of legislation that lawmakers agencies, implementing agencies and stakeholders each have a choice with regard to the interests they represent (interest representation). The fundamental problem that occurred in Indonesia is the feedback process is often jammed and can not be implemented, especially the feedback from stakeholders to the law-making bodies and law enforcement agencies.

Based on the concept of the operation of the law in the society, can be expressed workings of the law relating to domestic violence, as follows: Institute of regulators, has issued various types of regulations that provide legal protection for victims of domestic violence. Every legal system influence, encourage, or insist that an activity carried out by regulatory agencies and legislative power of the state institutions (police, prosecutor, judge, etc.). So the proposed model depicting the demands put forward by various groups in the community (community organizations, political organizations and others). Held state power by using the law as a means to encourage or enforce the desired behavior does from stakeholders. Response to the demands of stakeholders and pressure directed against him in the form of compliance or feedback of objections, proposals and others. Behavior of stakeholders is the sum of all the forces that are derived from individuals and from the community, for example, the legal culture. This also applies to regulatory agencies (Parliament, the President and other authorities) and institutions implementers sanctions (judges, prosecutors and others). Both institutions are also under the influence of social and personal strength.

So the influence of environment on law enforcement as an institution can not be circumvented. Talking about the working of the law is related to the need to use the law to build people's lives as desired, including doing social changes. Problem which is a central theme in order to use the law as a means of social engineering systematically leveled by the flow of sociological jurisprudence, as pioneered by Roscoe Pound.⁴³ This flow gives a correction to view this law as a system of abstract rules, which do not want to deal with the social objectives to be achieved by the law. Talking about the jurisdiction, in the frame of mind that is framed by the concept of legal pluralism is now believed to be the determining force of the law will no longer be determined by the strength of sanctions central authorities but by individual human choice. Individuals are increasingly gaining freedom and the ability to cross the border territory (the body) and culturally (with imagination) that will appear as a sovereign constituent voters in the middle of an increasingly pluralistic life.⁴⁴

Man in his life always have needs or interests to be fulfilled. However, not all people have the same needs or interests, but sometimes different, and not infrequently even contradict each other. On the other hand, realize also that the fulfillment of a human needs is very dependent on other people. In fact, the fulfillment of human needs can be held in an orderly and safe society.

Hoebel, concluded that there were four basic functions of law, namely: first, establish the relationship between the members of the community, to show the types of behavior what is allowed and what is also prohibited; second, to determine the distribution of power and detailing anyone who may commit coercion and who must obey them and also choose the sanctions are appropriate and effective; Third, resolve disputes; and fourth, maintaining the community's ability to adapt to the conditions of life are changing, that is by reformulating the essential relationships between members of the community.⁴⁵

Anthony Giddens said that with the rapid advancement of science and technology, the world is now out of control, so the development of the world today is far from the original estimate, instead of becoming more stable, orderly and predictable, as predicted by the

⁴¹ Gustav Radbruch, sebagaimana dikutip dalam Satjipto Rahardjo, 2006, Ilmu.. Op. Cit., p. 19-21. Juga dalam Esmi Warassih, 2005, Op. Cit., p. 13

⁴² Esmi Warassih, Pranata..., Op. Cit., p. 15-16.

⁴³ Satjipto Rahardjo, 1983, Hukum dan Perubahan Sosial, Penerbit Alumni, Bandung, p.152.

⁴⁴ Soetandyo Wignjosebroto, 2008, Hukum dalam Masyarakat, Perkembangan dan Masalah, Sebuah Pengantar ke Arah Kajian Sosiologi Hukum, Bayumedia Publishing, Malang, p. 252.

⁴⁵ Edwin M. Schur, 1968, Law and Society: A Sociological View, New York: Random House, hlm. 79-82. Bandingkan dengan Esmi Warassih, 2005, Op. Cit., p. 26-27.

medieval West optimism, but the world even more out of control. One of the key words that cause this condition is the advancement of science and technology that drives globalization. In turn the tsunami wave of globalization has led to a variety of risks and uncertainties beyond the ability to anticipate new us. This mighty change has revolutionized even religious traditions that have been the basis for a lot of people. Do not stop there, the process of transforming the new values in the family and also the state.⁴⁶

As part of the international community, in addition to having the obligation to implement international treaties that have been ratified (the principle of *pacta sunt servanda*), then it is the duty of the government to harmonize and synchronize between domestic law with international standards and regulations. Harmonization and synchronization between national law with international law this must be done while trying to accommodate the international trend (international trend) in addition to pay attention to domestic aspirations.⁴⁷

In relation to the condition of Indonesia, it should be understood that the development of law in Indonesia should be accommodating to the provisions of international law that is more universal. According Muladi to establish a national law in the modern era of globalization, it is in addition to the need to contain the local characteristic such as the ideology of the nation, the conditions of man, nature and traditions of the nation, it also must contain the international trends that are recognized by the civilized world community.⁴⁸ This means that without ignoring the elements of the dominant particularistic, various global trends should be seen as part of a national trend.⁴⁹ This means that while relying on a national culture that upholds the ideology of the nation, the nation of Indonesia should still strive to be able to adapt to global developments.

Global insistence that there now a days, it must be addressed, coordinated and integrated into national law of Indonesia. According Muladi, the adoption of the positive things that happen in the international environment is not done immediately, but must be adapted to the values rooted in the ideology of the nation, Pancasila.⁵⁰

Legal issues which are demanded is about enforcement and implementation, or law enforcement. Indeed, the law serves to deliver people to the welfare of his life, which by Jeremy Bentham called happiness. Furthermore, it is said that the law would be beneficial to society if bring happiness, which is most appropriate to the benefit or the benefit of an individual is likely to multiply the amount of happiness. While most suited to benefit or the benefit of society is likely to increase the number of individuals that make up the happiness of the community.⁵¹

A legal philosopher named Wilhelm Lundsted realism says that the law was not anything (law is nothing).⁵² Opinion was quite reasonable for Indonesia because it proved that the number of rules, it is also more and more demands. A complete Wilhelm Lundsted later confirmed that the new law has meaning after enforced. Without enforcement, laws are nothing.⁵³ According Satjipto Rahardjo as stated by Alan Hunt, modern law which started since the Aufklarung given a special place as a guard boundary between people and countries and among individuals who poured into legal rights.⁵⁴

Barriers that arise from the operation of legalistic law can be overcome if, as said by Karl Renner, we are willing to open the valves so that the law is able to accommodate the dynamics of the community. He said that the law is allowed to seek and find his own way progressively. So the law should not always have to make a new law, as without making any new, progressive law practice could be channeling the dynamics of society.⁵⁵

Similarly, on the various laws and regulations concerning human rights, particularly those related to violence against women, also never be separated from the force. This is because, as stated by Charles Samford that the social base of the law is actually filled with relationships that are not balanced, because what the surface looks regular, orderly, clear and definite fact is irregularity/disorder.⁵⁶

⁴⁶Anthony Giddens, 2001, *Runway World, Bagaimana Globalisasi Merombak Kehidupan Kita*, Gramedia, Jakarta, p. 54.

⁴⁷Muladi, *Harmonisasi dan Sinkronisasi Perundang-undangan tentang Pemberantasan Korupsi*, Makalah disampaikan pada Lokakarya Pembentukan Pengadilan Korupsi, diselenggarakan oleh Kelompok Kerja AI KHN dari Undip di BPHN Jakarta pada tanggal 30 Juli 2002, p. 1

⁴⁸Muladi, 2002, *HAM, Politik dan Sistem Peradilan Pidana*, Cetakan Kedua, Badan Penerbit Universitas Diponegoro, Semarang., p. 65.

⁴⁹Muladi, 2000, *Pengadilan Pidana bagi Pelanggar HAM Berat di Era Demokratisasi*, Jurnal Demokrasi dan HAM, diterbitkan oleh The Habibie Centre, p. 39.

⁵⁰Muladi, 1990, *Proyeksi Hukum Pidana Materiil Indonesia di Masa Mendatang*, Pidato Pengukuhan Guru Besar Hukum Pidana pada Fakultas Hukum Universitas Diponegoro, p. 4.

⁵¹Jeremy Bentham, 2006, *Teori Perundang-undangan (Prinsip-prinsip Legalisasi, Hukum Perdata dan Hukum Pidana)*, Nuansa, Bandung, p. 26.

⁵²Antonius Sujata, 2000, *Reformasi dalam Penegakan Hukum*, Penerbit Djambatan, Jakarta, p. 6.

⁵³*Ibid.*, p. 7, lihat juga Satjipto Rahardjo, 2008, *Membedah Hukum Progresif*, Penerbit Buku Kompas, Jakarta, p. 6.

⁵⁴Satjipto Rahardjo, 2006, *Hukum dalam Jagat Ketertiban*, Penerbit Uki Press, Jakarta, p. 50.

⁵⁵Satjipto Rahardjo, 2007, *Biarkan Hukum Mengalir*, Catatan Kritis tentang Pergulatan Manusia dan Hukum, Penerbit Buku Kompas, Jakarta, p. 47.

⁵⁶Charles Samford, *The Disorder of Law: A Critique of Legal Theory*, Oxford: Basil Blackwell, 1989, p. 267-269.

5. Conclusion

Considered homogeneous society, has the autonomy and equal rights, then the law must be able to be objective and neutral to every individual in the society, but forgotten by their logical consequence of the above is the process of formulating a neutral and objective law is carried out by a group of people who has a uniform mindset, ie patriarchal mindset. The resulting law, will eventually photographing mindset into the formulation and implementation realities which turned out to bring injustice to the other groups (in this case a group of women) who do not dominate the making of laws.

For women is an issue that is very difficult to go in the public space. In this regard they need legal assistance that leads to structural reformative struggle to bring forth legislation to ensure the rights of a powerful addition to protecting the interests of their group. By entering the political or legislative process, then there is an opportunity to influence the decision in order to correct grammar structured life is not fair. Thus, if the rules can be corrected from the upper reaches of the struggle against inequality in the downstream will be easier.

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