

# The Changing Paradigm of Legal Thought: Case of Indonesia

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This article aims to explain legal thought in Indonesia. It is important to understand the existing legal thought to obtain a comprehensive understanding of legal science. A literature study and philosophical data are analysed in accordance with the theories of natural law, legal positivism and legal realism. The results show that there are various patterns and models of legal thought paradigms in Indonesia in accordance with the regime of the ruling government and the influence of the development of law and society. The government at the time of reform had a paradigm of legal thought oriented towards public policy to improve the moral ethics of the behaviour of the state apparatus and the public policy of the government to strengthen Sharia law (Islam). The various paradigms of legal thought are an important area of study by legal experts to explain changes in the paradigm of legal thought of the various government regimes in Indonesia.

**Key words:** *Thought, Legal, Regime of Rulers, Government, Indonesia.*

## Introduction

The study of Indonesian law cannot be separated from its history because legal studies in Indonesia are the study of the law and legal practice in Indonesia. Throughout their development, legal studies have influenced and have been affected by legal practices. Legal studies examine legal systems and result in the study of legal practice. The development of legal studies is expected to produce various policies for legal practice in Indonesia. Those various legal studies in Indonesia, considered as philosophy, show dimensions of ontology, epistemology and axiology. Therefore, the validity of legal studies may be perceived

differently. If this issue is not acknowledged, problems can arise in the development of legal studies in Indonesia (Zulfadli Barus, 2013, p. 309).

In legal practice, although there are some differences in the reasoning method, there is a tendency to use positivistic normative legal studies that involves rational logic as the mainstream (Kelik Wardiono & Khudzaifah Dimiyati, 2014, pp. 370-371). The positivism paradigm is understanding law as a normative law. The background of Indonesian law is the civil law system, which is a relic of Dutch colonist influences. That helped form the law of the country (Shadi A. Alshadaifat, 2017, p. 54). The teachings of all faculties of law in Indonesia focus on educating legal workers who demand professional work in a national legal system that supports this (Tonny Rompis, 2015, pp. 166-167). According to Rahardjo in Dimiyati, legal education in Indonesia is producing "builders" because it only involves studying ready-made legal studies in the form of legislation, so scientific reasoning in legal studies remains low (Khudzaifah Dimiyati & Kelik Wardiono, 2007, p. 17-19). This paradigm certainly affects jurisprudence as legal study remains dominated by legislation (Agus Riwanto, 2016, p. 267-268).

This condition is difficult to change to a new concept of jurisprudence that ignores the existing laws, as idealists wish, because jurisprudence has been incorporated into the prevailing legal system in Indonesia for decades. In this situation, jurisprudence is often disputed, tested and vulnerable to the misuse of its truth (Edy Rifai, 2010, p. 49). Although in certain circumstances, it must be admitted that the truth of law is contradictory and difficult to accept (Bernard Arief Sidharta, 2008, p. 7-11).

This phenomenon is due to inaccurate jurisprudence practice as well as the role of jurisprudence. Because the development of legal studies is influenced by and affects legal practices, there is a plurality of interpretations of law in legal practice. Legal studies also have a tendency to comply with applied legal practices. Legal practice is necessary as a method to acquire proper legal study, and it determines the position of legal studies in scientific studies. It plays a vital role in establishing and developing law in Indonesia now and in the future. Legal studies that have good value can only be obtained in accordance with procedural mechanisms that are not based only on legislation (Susi Dwi Harijanti, 2015, p. 77).

### **Research Methodology**

This study employed library research and philosophical approaches as research methodologies (Anton Bakker & Achmad Charris Zubair, 1990, p. 94). The study provides an overview of legal thought in Indonesia by examining government legal orientation, legal studies and politics. The research frameworks used to analyse the data were natural law

theory, legal positivism theory and legal realism theory supported by the distinctive features of some of the prevailing legal thought in Indonesia. Data was obtained from reviews of literature on legal studies in Indonesia, including dissertations, journals, articles, papers and books. The process of data analysis began by examining the prevailing legal thinking in Indonesia, such as legal sociology, normative positivistic law, legal conscience, prophetic law and integrative law. The research was conducted in accordance with a theoretical framework focusing on legal thought.

## **Results and Discussion**

### ***Legal Thought of the Old Order Regime (Soekarno Era)***

#### ***a. Government Legal Orientation***

Indonesian post-independence legal study in the period of 1945-1965 (the regime of Soekarno's old order) was oriented towards customary law, although the normative law of the Dutch colonial still existed to regulate general public affairs. The spirit of independence affects the desire for the enactment of Indonesian national law derived from the culture of the nation itself. Customary law has the same perspective as the sociology of law in interpreting law as the behaviour of society.

Customary law is seen as law that is regulated and developed to impact society. As time goes by, customary law in society has changed and adjusted. The traditional values of customary law mingle and interact with new legal values, especially the development of modern law, which is more likely to be normatively positivistic. Therefore, there is the development of a sociology of law. Furthermore, there is an effort to transform law, viewed from philosophical theory, into the phenomenon of society because of the dominance of the normative legal system practice. Indonesian jurists study the ideas of the sociology of modern transformative law to view the law empirically (Justin Murray, 2017, p. 1791).

#### ***b. The Development of Legal Studies***

Djojodigono views customary law as an indigenous law that comes from within the country and has been practiced by Indonesians for hundreds of years. According to him, customary law is the legal heritage of the ancestors of the nation and must be preserved by future generations (Soepomo, 1948, p. 3-4). Soekanto states that the Indonesian legal ideology is based on community socio-cultural life. Customary law is a social law that has long been established in Indonesian society. It has an important role in the study of Indonesian law. Positivistic normative national law must provide a place for the development of customary law so that people do not lose their own legal identity, as in the Dutch colonial period (Soekanto, 1966, p. 6-7).

Understanding the law as a form of community behaviour when interacting with norms in a positive system can be used to determine the effectiveness of legal work in society. Some social aspects affect the behaviour of people when interacting with laws and regulations, including political, economic, cultural, religious, educational, gender, demographic, environmental and other general social aspects. Justice can be achieved without the existence of many laws and regulations (Frank Pasquale & Glyn Cashwell, 2015, p. 28-29). The specific legal aspects that affect the behaviour of the community when interacting with the legislation are textual legislation, regulatory procedures, values and regulated public interest, such as examining the effect of the educational level and legal compliance of the community in paying taxes.

### *c. The Product of Legal Politics*

This is reflected in the formulation of Pancasila as the philosophical basis of the country and the 1945 Constitution as the foundation of the constitution of the Republic of Indonesia. Pancasila is the crystallisation of the values of community life in Indonesia (Derita Prapti Rahayu, 2015, p. 190). The 1945 Constitution is a basic explanation of the state of Pancasila, which is a form of Indonesian rule of law to regulate and manage the life of the nation in accordance with the values of life of Indonesian society. That is, the state recognises customary law as local law, which is part of the constituent elements of Indonesia's national legal system.

Another strong influence of customary law in shaping state policy is the issuance of Law No. 5 of 1960 on agrarian subjects. This policy covers the restoration of land ownership and management rights to the state, indigenous peoples and individuals. With this wisdom, customary law has an important role in determining the development and progress of the nation (Agus Suryono, 2014, p. 101-102).

Customary law is similar to legal sociology. If one wants to understand the law, one must see how the law is practiced as a form of community behaviour. Soerjono Soekanto claims that law must closely relate to society because law is made for society. Its main purpose is also for society, so the law must provide values that are useful in maintaining the existing system within the social scope to work in accordance with society's purposes (Soerjono Soekanto, 2005, p. 184). According to Wignjosebroto, in developing Indonesian law, it is necessary to represent Indonesian native society. This belief is based on the fact that the law used to regulate Indonesian society must be a law developed from the values from the Indonesian homeland, not a foreign law.

Satjipto Rahardjo, proposing strong criticism of a normative positivistic law, claims that law is not only statutory law; it is also an attitude and behaviour of a steady and institutional

society to preserve values (Satjipto Rahardjo, 2002, p. 9-10). It is an overly narrow perspective to interpret law as what has been written in legislation. Beyond written legislation, many rules of human life regulate how people socialise with other. According to Tanya, law is the study of humanity because it is closely related to human life. Therefore, if one wants to understand the concept of law appropriately, one should know how society lives (Bernard L. Tanya, 2000, p. 2-5).

### ***Legal Thought of the New Order Regime (Soeharto)***

#### ***a. Government Legal Orientation***

Legal understanding during the regime of Soeharto new order government in 1966-1998 was oriented towards normative-positivist legal thought, even though during 1970-1990, the orientation was directed towards modern transformative sociological law. The normative thought of the legal positivism of law is symbolised by the character of legal thought that emphasises the rigid principles of the positive legal form of law in the constitution. This thought became the main flow of legal practices and legal theories. In this case, legislation is used as a means to control the state's life, and it must be formed by an authorised institution. Making a law is supposed to be done through several procedural mechanisms in accordance with the legislation. Normative-positivist legal thought is similar to legal positivism, which clearly and decisively perceives law in formal procedures based on rigid legislation (Urai Willy Mulyadi, 2017, p. 5).

During the early reform era, in 1990-1998, law in Indonesia was oriented towards normative-positivist legal thought. This period is represented by the ideas of the development of national law based on the reinforcement of ideological principles of Pancasila and the 1945 Constitution of The Republic of Indonesia. Therefore, the role of legal positivist law is important. During this era, the slogan "Indonesia is a legal state" was developed, which suggested that law is the basic principle of all aspects of ruling the state (Heriyono Tardjono, 2016, p. 62-63). Policy consistently influenced law and political culture (such as the case of pilgrims in the holy land) (Assaf Meydani, 2015, p. 207).

The regulation of country and state citizenship in Indonesia requires a law that is formally stated in the form of legislation. In this case, law becomes the regulation that should be written with legal positivism. Normative-positivist law is oriented towards legal adjustments that are clearly and decisively established as the basis of national policy. A law is supposed to be made by an authorised institution. In making this law, some formal procedural mechanisms of legislation should be adopted to produce positive law in the form of written legislation, which is called legal positivism (Hari Chand, 1994, p. 65-66).

Jurisprudence of normative-positivist law is a formal study that is managed and conducted by legal institutions and this law should be obeyed by all citizens. As described by Philipus M. Hadjon, such opinions are not merely based on an empty law but are always started by current applicable positive laws. Therefore, legal reasoning is closely related to procedural requirements containing rational arguments. This interpretation, however, should be based on the sentence of law as what is written in the positive law of the state (Aditya Bamzai, 2017, p. 1000-1001).

### ***b. Thought on Developing Legal Studies***

Normative-positivist law, as the main flow of law in Indonesia was rigid and was formally arranged in the legislation that was formed for the interests of sovereignty. The implementation of normative legal positivism in Indonesia is greatly influenced by the civil law system, in which law is perceived as written legislation (Soediman Kartohadiprodjo, 1955, p. 5-6). In reviewing the normative legal positivism of law, Djokosutono emphasises the aspects of the institutional and constitutional state. These two aspects become the main reason for deciding law (Djoko sutono, 1982, p. 9-10). By doing so, the legislation can support the expected national development.

Mamudji argued that studies concerning legal principles, legal systems, legal synchronisations, legal comparisons and legal histories are important so that the normative legal positivism of law does not lose its philosophical meaning. By conducting these studies, the legislation of law is able to maintain its significant role in legal systems to achieve national goals (Sri Mamudji, 2003, p. 12-14). The normative legal positivism of law sometimes restricts itself from external influences, such as society's interests to retain values. In accordance with this statement, Marzuki remarks that law is not the behaviour of society; instead, it is a normative-positivist regulation or legislation that rules society's behavior (Peter Mahmud Marzuki, 2005, p. 87). This is the legal positivism discussed by Hart (Ronald Dworkin, 2017, p. 2096).

### ***c. The Product of Legal Politics***

This is reflected in the legal product as a form of public policy of the resulting state oriented to the legal interests of the authorities. Formal legislation serves as an inherent requirement in realising the jargon of the "state of development". Pancasila, which should be the basis of the state has been converted to a closed ideology and has narrowed its meaning, even though Pancasila is sacred as a pillar of government power. Pancasila is understood to be formal and merely ceremonial, so its meaning becomes superficial in value.

In the new order era, the 1945 Constitution was also understood to be very rigid and overly normative, although it was believed that the 1945 Constitution was considered to be perfect with no need for any changes. The amendment of the 1945 Constitution was believed to disturb the political stability of the government, so after almost 32 years, Indonesia has not changed the 1945 Constitution. The role of government as an executive institution, if overly dominant, can affect the judiciary (Erica Newland, 2015, p. 2026).

Pancasila as an ideology and the 1945 Constitution became law that has been designed to support all state policies. This program of "guidance, appreciation, practice of Pancasila" (P4) became a symbol of a very strong government policy to maintain the stability of power. Another form of strong formal legal influence during the reign of the new order was the issuance of legislation No. 3 of 1975 on political parties and golongan karya. In the law, there are restrictions on two political parties and one golongan karya in Indonesia, all of which are intended to maintain the political stability of the new order government. Political parties have been organised to support the goals of government. With this political life of democracy, Indonesia does not experience movement in the status quo, as desired by the ruling government (Ryan Muthiara Wastil, 2015, p. 96). It is like grasping the energy of democracy (Shelley Welton, 2018, p. 581-52).

Legal justification for a particular legal event is related to wrong or right based on the applicable law. This judgment is like a judge's ruling imposed on the basis of legal considerations extracted from the text of legislation. Therefore, in this case, the principle of legality becomes an important role. All legal matters must first be regulated in legislation to have legal force (legality). Any decision that has no legal basis or is not regulated in legislation is not a correct decision, so it can be referred to as a legal error. It is necessary to maintain consistency in a positive norm system for the law to run in accordance with the hierarchical structure that has been determined by the state as the supreme authority holder of the positive law (Kartono, 2011, p. 15).

### ***Legal Thought of the Reform Period***

#### ***a. Government Legal Orientation***

From the reform period of 1998 to the present, normative law has had a positive impact on the development of a more democratic state administration (Suryo Gilang Romadlon, 2016, p. 869-870). However, the law has also experienced moral-ethical degradation since the law is only understood as a particular interest arranged in legal and procedural legislation. Therefore, the outside of the law seems to be good, but the inside has been damaged by the distortion of systematic interest in formal law. Legislation during the Reform period seems to be democratic and good but the law has been used systematically to protect the interests of some people. Law as public policy influences the process of democratic change [54]. Many

Indonesian law enforcement members and officers are involved in legal cases, such as the legal mafia, corruption, (Budi Setiyono, 2017, p. 28) drugs, abuse of office and various other cases.

The blurry picture of legal morals in Indonesia is similar to that suggested by Francis Fukuyama with regard to "moral miniaturisation" (Francis Fukuyama, 1999, p. 281-282). Ethics, as a manifestation of law enforcement and bureaucracy officers' behaviour that are getting serious attention from the public amid the efforts of law reform in Indonesia (Jimly Asshiddiqie, 1998, p. 141). In the current reform era, the law that should be used to improve the state condition is used as a tool to legalise certain interests (Imam Yudhi Prasetya, 2011, p. 40). Consequently, a multi-dimensional crisis destroys the entire value of life with corrupt and cunning officials as well as society, which experiences apathy, scepticism and pragmatism in social life (Endang Komara, 2015, p 117-124). In addressing the problem, the law is also not free from moral considerations (Mark Greenberg, 2014, p. 1341).

The law at this stage becomes completely separated from its moral spirit. When the law is used only as a tool to achieve a certain goal, then the value of the law ceases to exist. It is difficult to imagine the disappointing situation of Indonesian law. The law not only loses its ethics in practice but also becomes tyrannical (Surya Prakash Sinha, 1993, p. 189). From the perspective of anti-legal positivism, morals have an important role in determining legal decisions (Scott Hershovitz, 2015, p. 1160).

Although normative-positivist law, as mainstream and sociological law, as downstream, have been commonly used, there is also a law in Indonesia that comes from conscience and morals. The culture of local wisdom that is deeply mixed with religion in society affects the spiritual and mental life so that conscience becomes an instrument for judgment in certain circumstances. People have used conscience and morality as instruments or ways to discover the truth of the law, although when they explain the role of conscience scientifically, it is inferred with the deductive sense.

### ***b. Thought on the Development of Legal Studies***

According to Warasih, the law related to humans is never free from moral values, conscience and other non-legal factors. The utilisation of conscience as the basis of legal studies can provide a breakthrough in understanding the law that cannot be achieved by the logic of rational reasoning. Therefore, this should be a worthy area of legal study as well as a separate issue in the science of law in Indonesia.

Siregar is a jurist who often makes legal breakthroughs by using conscience in legal decisions in certain situations and conditions. According to him, the conscience cannot deceive the

truth, so a legal decision made at the last stage must be adjusted to his conscience as a human being (Bismas Siregar, 2017). Alkostar is a supreme judge who is considered controversial because he often makes legal decisions by considering morals and feelings of conscience in dealing with corruption cases committed by officials in Indonesia. According to him, when Indonesia is intensively fighting corruption, many officials are exposed to corruption cases. The corrupt officials should be punished because they no longer have morals and have hurt the conscience of the community. This makes him a figure of justice who is quite feared and even considered insane by the corruptors in Indonesia (Artidjo Alkostar, 2011). Therefore, the ombudsman institution oversees the duty of state officials (Susi Dwi Harijanti, 2014, p. 37).

The jurisprudence of conscience has several benefits. First, the legal truth obtained from the conscience is closer to the true truth because the conscience, through intuition, is able to extract the hidden truths in the human mind. Second, the righteousness produced by the conscience is born of human experience both outwardly and inwardly, so the result of the truth is more meaningful and not limited by interests that can hold the human understanding of the essence of true truth. Third, an understanding of jurisprudence based on conscience can be developed in accordance with the will and the personal ability of each person because it is self-objective or self-object-knowledge. The truth resulting from jurisprudence based on conscience has value that is not only objective and logical but that can also establish a feeling of tranquillity and comfort in human life. Fourth, through the conscience, man will be led to the path of God's favour. Therefore, the dimension of deity in the conscience is more likely to build a life of spirituality as a counterweight to the empirical reality and rational logic of life.

### *c. The Product of Legal Politics*

This is reflected in the legal product as a form of public policy of the government it produces. It includes the draft legal ethics that regulate the behaviour and moral apparatus of state officials. In the period of general law reforms, it was no longer possible to overcome the problems of morality and ethics in the broken state apparatus because many behaviours of the state apparatus not only violated the law but also offended the morality and conscience of the community.

Cases of corruption in congregations, narcotics, immoral acts and abuses of office are mostly carried out by the apparatus of state officials, who should be an example for their people. State officials no longer have a sense of shame and guilt due to corruption. Their actions have injured the morality and conscience of society.

Therefore, ethical laws are required. The philosophical basis of the issuance of the country's policy on ethical laws is to address the morality and conscience of the state apparatus to have

good integrity. Such ethical laws become urgent because the rules governing the ethics of each profession in Indonesia are no longer capable of forming moral and conscientious human beings. The human senses can still be deceived because what appears is not congruent with the inside.

### ***The Direction of thought and the Paradigm of Indonesian Law in the Future***

#### ***a. Government Legal Orientation***

In the reform era, ethical moral issues and legal conscience have not been resolved properly. Morality and conscience can no longer cope with the legal issues in the transactions of interests made to achieve a goal. Life feels farther from God and materialistic worldly interests are preferred. Therefore, it is necessary to have a divine spiritual dimension (Sugit S. Arjon, 2018, p. 172-173). This is evident in the government's policy on the legal model of Islamic Sharia to improve and build a more religious life. An example is the issuance of legislation No.21 of 2008 on Sharia banking and Regulations OJK No.47/POJK.03/2017 on the obligation to provide education and training for the human resource development of rural banks and Sharia financing banks. The law provides an alternative for the people to implement a financial law that has a spiritual dimension close to God's values. This is the principle of muamalah, which was honoured by God to be the air conditioning amid the aridity of life of Indonesian society. This situation demonstrates the importance of religious values as the basis of the legal system (Jeremy Waldron, 2014, p. 1207).

This is in accordance with the reality that the majority of the Indonesian population is Muslim so the al-Quran, which Muslims believe to be a revelation from God, becomes part of the law to regulate the life of the community. Legal thought based on religion is in line with the postmodern era, which involves changes in human civilisation.

The God's law, which is often refracted by the postulates of manmade law, shows its truth. As explained in the revelation that God knows what is best for the people, it has become a necessity that humans must believe in and have piety for Him. The existence and benefit of revelation-based law has become the study of ontological and axiological law in Indonesia. Religion can be used as a basis for shaping legal political policy, as noted by Schwartzman (Micah Schwartzman, 2014, p. 1321-1322).

#### ***b. Thought of Developing Legal Studies***

The science of law based on revelation in Indonesia can be seen in the science of prophetic law, which has three important values, namely humanisation, liberation and transcendence. According to Kuntowijoyo, transcendence, taken from the understanding of Al-Quran Surah Al Imron verse 110, is the basis of humanisation and liberation in the prophetic law. The

dominance and role of religious revelation (al-Quran) as the value of transcendence in prophetic jurisprudence is very strong when it is associated with elements of humanisation and liberation (Syamsudin, et. all, 2013, p. 1-7). The science of prophetic law is presented as an alternative legal science. In addition to being theological, it attempts to give critical correction to the existing law, especially normative positivistic law (Absori et. all, 2015, p. 285). Thus, prophetic jurisprudence appears with the main basis of the revelation of al-Qur'an.

The epistemology of prophetic jurisprudence is specifically discussed by Wardiono by using the concept of Kuntowijoyo. In his view, al-Qur'an is a revelation that can be transformed into jurisprudence, such as: Zohar and Marshal on the importance of spiritual intelligence (Danah Zohar & Ian Marshal, 2000, p. 1-3); Al-Jabiri about bayani-burhani-irfani as a typical Islamic reason in Arab countries, (Muhammad Abed al-Jabiri, 1986, p. 421); and Al-Attas about the Islamisation of science (Al-Attas, Syed Muhammad Naquib, 1985, p. 3).

### *c. The Product of Legal Politics*

In adopting godly values in the normative legal positivistic paradigm and the process of formulating legislation in Indonesia, there are studies and religious considerations (Abdus Salam, 2015, p. 119-120). These became the legal politics of politicians and political parties in Indonesia based on Islam to fight for their vision. Many laws and regulations in Indonesia are formally regulated by Islamic Sharia law, which has been passed by the state, such as: regulations on the Islamic education system; Islamic marriage; Islamic inheritance; zakat; waqaf; finance; and Islamic economics.

All such legal products are a form of government public policy that cannot be separated from the reality that the Indonesia is a country that has the largest majority of Muslims. The Islamic legal system has been acculturated with cultural values. The government provides recognition and establishes the legality of Islamic law in synergy with the national legal system and local culture, which has been institutionalised in the social system of state administration. It is the balance of the state with its people (Jephias Mapuva, 2014, p. 192). Legislation No. 21 of 2008 on Sharia banking is one example of a phenomenal policy related to the issue that "bank interest is forbidden" and that offers a "profit sharing" system. This programme involves a national plan to form an Islamic economic community in Indonesia.



## **Conclusion**

The results of this study show that in Indonesia, there are various models and patterns of legal science in accordance with the practice of law in the different regimes and governments. Each of these types of legal jurisprudence has different backgrounds and motives. Understanding of legal science follows the way the law is implemented in the life of the nation, state and society. The civil law system that Indonesia inherited from colonial invaders greatly influenced the development of law. The values of local wisdom on customary law, socio-cultural and religious law can have a significant effect on the establishment of law in Indonesia.

The variety of models of legal thought should be understood to avoid a narrow-minded view in assessing the truth of the law. Law in Indonesia is complex and plural based on the diversity of society. This attitude of recognising, appreciating and respecting the existence of legal thought, including the Islamic law, is needed because there are different methodologies for exploring and understanding the truth of law. Understanding the strengths and weaknesses of each type of legal thought is an attempt to adapt. It is most important for the application and implementation of the law to be suitable to the mechanisms of procedure to avoid unilateral claims of the understanding ability of legal truth. The variety of legal thought should be understood as an asset to legal studies. It can be the basis for alternative choices to resolve legal issues in society. Therefore, the function of legal studies for legal practice has clear and real benefits in social life.

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