

Chapter II

CHANGING ROLE OF LAWS IN INDONESIA

I. SOCIO-ECONOMIC DEVELOPMENT ASPECT AND THE POSITIVE ROLE OF LAW; TASKS/OBSTACLE TO BE OVERCOME

I would like to start discussion about the socio-economic development, by quoting sentence from the of David D. Friedman (2000) be entitled: "Law's Order: What Economics Has to Do with Law and It Matters" that discussed about relationship between legal and economic sector, that:

"What does economic have to do with law? Suppose legislators propose that armed robbers receive life imprisonment. Editorial pages applaud them for getting thought on crime. Constitutional lawyers raise the issue of cruel and unusual punishment. Legal philosophers ponder questions of justness. An economist, on the other hand, observes that making the punishment for armed robbery the same as that for murder encourages muggers to kill their victims. This is the cut-to-the-chase quality that makes economics not only applicable to the interpretation of law, but beneficial to its Grafting. This book clarifies the relationship between law and economics in lucid prose that is friendly to students, lawyers, and law readers without sacrificing the intellectual heft of the ideas presented...."

When we want to discuss topic about socio-economic development aspect and the positive role of law, beside unique thought as David D. Friedman's thought above, there are still available many sufficient of theories about the role or function of law,

which are relevant to the role of law, included legislation in supporting socio-economic development.

First of all, Dragon Milovanovic (1994: 8-14) explains about the role of law, that:

" Law has repressive, facilitative, and ideological dimensions. Any given system of laws will probably have aspects of all three within them. However, one may be dominant. The repressive function of law addresses the question of coercion in law. Thus legal repression is variable. Law can be more or less coercive. By repressive functions we mean the degree of mobilization of physical force in the service of social control.... The facilitative function in law can be defined as the degree to which law aids in assuring predictability and certainty in behavioural expectations ... Law, in its facilitative function allows coordination, planning, and the expectation that certain behaviours will normally follow other behaviours. So long as there is congruency between us concerning our expectations we both can plan, participate, respond and carry project forward with a minimum of difficulty ... The third function of law is ideological. Ideological as a belief system is always present in law. In other words, law systematically embodies the value of some people, but disregards some values of others. Accordingly, the question of gender, race, class, sexual preference, etc, becomes a central issue in discussions of ideology...."

In relation to development in socio-economic field, in my opinion, from three functions mentioned above, the most important is **facilitative function**, especially how the law has a role to fulfill socio-economic need of community members.

The sorts of law function whose economic nuance is very conspicuous are presented by Vilhelm Aubert (1983) as follows:

- a. **Governance:** law shapes, influences or steers behavior into desirable direction by way of negative or positive sanction.
- b. **Distribution:** law helps in the distribution of resources such as retirement pensions, social security, employment compensation and so forth. Resources are distributed to reduce burdens in society.
- c. **Safeguarding expectations:** law promotes predictability between

subjects by securing expectations.

- d. **Conflict regulation:** law helps to resolve disputes between subjects.
- e. **Expression of values and ideals:** law functions so as to promote certain ideals in a society. Tax exemptions, for example, can be positive incentive for subjects to contribute to some overall ideal.

The sorts of law function which are presented by Adam Podgorecki (1974: 274-78) likewise, namely:

- a. **Integration:** law stabilizes mutual expectations. That is, duties and rights are specified and brought into accord with the overall values of a given system.
- b. **Petrification:** law selects, through trial and error, those patterns of behavior that are functional in satisfying social needs. Those behaviors that have been tested and found useful, acceptable and just between parties are given legal recognition. Non-adaptive patterns are not given force in law.
- c. **Reduction:** law selects out of the many diverse behaviors in a complex society those that are acceptable. Thus, law simplifies. It reduces complexity. It makes decision-making manageable. It provides a framework within a complex society in which subjects may plan within a predictable, stable order.
- d. **Motivation:** law regulates individuals attitudes so that they will select behaviors that are in accord with the values of a society.
- e. **Educational:** law not only punishes and motivates but also educates and socializes. This is done by rewards which reinforce desirable performances. The goal is to instill habitual performance.

From the various of law functions mentioned above, relationship between the role of law and social economic sector even though is not stated explicitly, but implicitly to be in each function.

The more concrete relationship between legal factor and non-legal factor, included socio-politic described in **Structural Functional Theory of Talcott Parsons**. From Parson's concept, will be seen clearly how the relationship among various socio-economic aspects and legal aspect. How reciprocal influences exist among economic,

politic, social, and culture aspects. As known, Talcott Parsons tried to build on and synthesise the 'holistic' theories of social action associated with Durkheim and the 'individualistic' theories associated with Weber, while conveniently steering clear of the work of Marx. Parsons viewed social theory as a tool to organise logically and make sense of a confusing world, and to organise general ideas into a systematic framework of abstract concepts, or generalisation.

Parsons identified a number of levels of systems and subsystems. The highest level was all living systems, the second level was the systems of action, and the third level (dealing with status roles) was the subsystems of action: the personality (the actor aiming for maximum gratification); the cultural system (a system of wider values giving coherence to the difference norms attached to the different status roles); the biological system (the physical environment to which society must adapt); and the social system. These four subsystems developed through a process of institutionalisation. At the fourth level were the subsystems of the social system, the political system, the socialisation system, the economy and the 'societal community' (Richard Johnstone, in Rosemary Hunter, et. al editor, 1995: 81).

According to Parsons, any system or subsystem had to satisfy four requirements, needs or functional prerequisites if it were to survive; and in each instance a separate specialist subsystem had to be developed to meet each requirement (see. Table 1).

Firstly, each system had to adapt to its environment (adaptation). Within the social system this function was performed by the economy. Secondly, each system had to have a means of mobilizing its resources to attain its goals and to keep the system moving towards its goals (goal attainment). This function was performed by the political system. Thirdly, each system had to keep itself together, by maintaining internal coordination of its parts and dealing with deviance (integration). This function was concerned with citizenship and social solidarity and was performed by the societal community, the institutions of social control, which include the legal system, and informal rules of conduct. Finally, each system must, as far as possible, maintain itself in a state of equilibrium, by creating, preserving and replenishing the energies and values of members of the society (pattern maintenance). This function was performed by the socialisation process, which educated people into the cultural values and societal norms of the system. It ensured that the overall pattern of activities within the system was reproduced. The family and the education system were particularly important

aspects of this process, and played an important part in shaping the attitudes and outlook of individuals so that they conformed to the established expectations and values of society (Richard Johnstone, in Rosemary Hunter, et. al editor, 1995: 82).

Table 1: A Summary of Parson’s Theory

	Normative Structure	Sub-System	Functional Requisites	
	Values	Family, Education	Pattern Maintenance	
Stability	Norms	Legal System	Integration	Change
	Collectivities	Polity, Institutions Economy	Goal Attainment	
	Roles	Environmental Conditions	Adaptation	

* From Rosemary Hunter et. al, (ed), 1995:83).

In other words, law's role was to integrate the system, to hold together the different, interdependent subsystems by promoting those interdependent ties according to Richard Johstone, as many commentators have pointed out. Parsons developed Durkheim's notion of law's part in social integration by articulating the role of law in systems integratio (in Rosemary Hunter, et. al, editor, 1995: 84). Reciprocal relationship among legal, economic, politic, social and culture aspects, more developed by Harry C. Bredemeier. Bredemeier recognizes that:

"The framework I employ is that developed by Talcott Parsons and his colleagues, particularly as stated in *Economy and Society* (Parsons and Smelser, 1956). This framework posits four major functional processes to be observed in a social system: adaptation, goal pursuance, pattern maintenance, and integration. Parsons and Smelser have identified adaptation with economic processes, and goal pursuance with political processes. Pattern maintenance processes may very roughly, but adequately for present

purpose, be identified with what we ordinarily refer to as socialization. Integrative processes are not so neatly identified with familiar patterns; but I propose to identify them in part with "the law," that is, with legal processes."

Either based on Talcott Parsons' s concept or Harry C. Bredmeier's concept, it was clear how close reciprocal relationship among legal and another sectors, including socio-economic sector.

However, classic concepts, including Talcott Parsons' s and Harry C. Bredemeier's theory above, still think that the function of the law is the orderly resolution of conflicts. As this implies, the law is brought into operation after there has been a conflict. In relation to that, classic concept think that if someone claims that his interests have been violated by someone else, it is the right time that the court's task is to render a decision that will prevent the conflict and all potential conflicts like it, from disrupting productive cooperation.

Of course, in this postmodernism era, the classic concept that only placed law in "waiting" function, could not be followed anymore. Therefore, nowadays had been happened the changing of law function, from only passive previously, nowadays have a more active role. It was begun by Roscoe Pound, professor of law of Harvard University Law School, sparked new concept that place **law as a tool of social engineering**. Or specially for development in economic field, **the law function as an instrument of economic policy** constitute reality that might not to be denied. As stated by Terence Daintith (1988: 3-4) that:

"... Law is a powerful social guidance mechanism: those government enjoy, at the least, a highly privileged position in their State's law-making process, and may often have independent if constitutionally circumscribed law-making powers of their own. It would be surprising, therefore, if such governments did not deliberately set out to use law as a means to the achievement of their ends in the economic policy field- and indeed, in all other policy fields..."

I myself argued that the role of law changed as societies developed. I assumed that there are **three phases of the development of the development of law and society** (see, Table 2).

Table 2: Three Phases of the Development Law and Society

	Type of society	Type of energy	Type of power	Type of law
Premodernism:				
a. Primitive Phase	Primitive society	Muscle	Brute, physical	Jungle law
b. First Wave	Traditional-society	Water, wind, fire land, etc	Land and food	Traditional-customary law
Modernism:				
a. Second Wave	Industrial society	Coal, Natural	Entrepreneur skill	Civil law or common law
b. Third Wave	Information society	Machine, electricity, laser, solar, energy, etc.	Money	International Law
Post Modernism :				
Fourth Wave	Science & Technology	Products, science and technology	Knowledge and revitalization of religious life	Alternative dispute resolution , delegalization, modern customary law

From the phases I stated above, it is clearer that when nowadays we live in postmodernism phase, then law function must be truly active and progressive so that not only to be able to catch society change up, but also to be able to activate society change.

Moreover, nowadays there is tendency that, especially in business law field, the choice of parties much more to Alternative Dispute Resolution, either in mediation or arbitration form.

The tendency to choose Alternative Dispute Resolution, partly caused by inability of law in implementing its responsive function. This matter is related to **Nonet & Selznick** concept about the existence of three kinds of types of law, namely:

- a. type of repressive law,
- b. type of autonomous law,
- c. type of responsive law.

The type of *repressive law* is not able to produce justice, and type of *autonomous law* is only able to produce *procedural justice*. Only the type of *responsive law* is able to produce *substantial justice*. However, in reality in Indonesia, types of repressive and autonomous law are still conspicuous. Should be recognized that in our phase of life in "postmodernism" era at this moment, only type of responsive law that able to has a positive and active role of socio-economic and political development.

After we realized that law truly has a positive role of economic aspect, then furthermore it is also important to know Daintith' opinion (1988 : 5-6) stating that our questions about the problematic relationship between law and economic policy have been three.

- (1) What forms of law are used for the implementation of economic policy?
- (2) What factors determine whether law is invoked for the resolution of policy problems and, if invoked, the forms of law that are used? In particular, are the characteristic and demands of the national legal system as important, in shaping such choices, as the nature of the problem or of the policy field concerned?
- (3) Can one differentiate between countries in terms of the quality or intensity of legal implementation of policy, so as to explain some of the varied reactions to the law/policy relationship to which I referred at the beginning of this chapter? To explain this choice of questions I begin by looking at the kinds of problems which others have identified in the relationship; in particular, in the use of law as an instrument of policy. Such an examination forms the object of this section. By way of preliminary, however, it will be helpful to explain exactly what I mean by "economyc policy".

The first obstacle to functioning laws in encouraging socio-economic development is that even though there are many new legislation which regulate socio-economic sector, however, some of the laws and regulations in economic field are still old laws which are not suitable anymore with the current need of socio-economic development.

The tendency of some lawyers circle is not to change soon the old laws with the new laws, guessed by Daniel S. Lev (1999) as follows :

" One is evident precisely in the retention of most colonial law. It is quite true, of course, that there was little time to rethink the law, but I want to suggest that in addition no one in the political elite had a clear notion of the appropriate direction of reform. Keeping the colonial legislation in fact was not merely a matter of convenience, pending better opportunities; it was also a preference, for the colonial law was known to many educated leaders, particularly the lawyers among them, who might have been slightly uncomfortable with it but not altogether out of sorts..."

Though it is recognized the role of laws is to facilitate development in socio-economic field, but especially in Indonesia, the biggest obstacle to overcome the ruining of law, actually lies in "legal thought" of Indonesia legal practitioners which are very positivistist-formal-procedural. Law to be considered identical with merely "formal procedural" and often not suitable with the feeling of justice of community members.

By still considering the weakness of laws as described above, I can accept the role of laws in economic as described by **Koesnady Hardjasoemantri** and **Naoyuki Sakumoto** (1999 : 1) that:

"Establishing new basic rules to cope with the increasing economic activities is most needed in Indonesia, which means to consolidate the fundamental infrastructures of the society through law. Such areas of law relate to land, mortgage, company, negotiable instruments, banking, investment, accounting, anti-monopoly, bankruptcy, taxation, dispute settlement, and so forth. In 1999, in order to maintain fair and free competition in economic transactions,

the Anti-monopoly Act was promulgated followed by the Insolvency Act. This Anti-monopoly Act intends to avoid extreme concentration of economic powers by setting certain standards".

In addition to the Anti-Monopoly Act as described by Koesnadi Hardjasoemantri and Naoyuki Sakumoto, not less important the birth of the **Anti-Corruption Act** (Act No.3 of 1999) that expected can become an instrument to combat "KKN" (Corruption, Collusion and Nepotism). As known that "KKN" constitutes the biggest obstacle faced by Indonesia to recover it's economy.

In my opinion, the main role most needed by law sector to economic sector, is how to take back foreign belief in Indonesia. Not only "foreign" in terms of "state or foreign government", but also "foreign private".

It is should be recognized, nowadays, the foreigners worry over investing their capital in Indonesia is still big enough. Instability of banking, politic, including riot that happening in several province such as Maluku, Central Sulawesi, Aceh, and so on, causing "foreign party" think it is very risky to invest their capital in Indonesia.

Therefore, I think, the role of law and legislation in Indonesia should be concentrated on turning back stability in various fields in Indonesia, especially in economic and politic field.

II. POLITICAL DEVELOPMENT AND THE POSITIVE ROLE OF LAW

One of questions that is important and in which people are interested concerning the relation between law and politics is, which one is predominant, rule of law or rule of politics? The answer for such a question, in my opinion, depends on our own perception about what we mean by **law**, and what we mean by **politics**.

Suppose we have a non-dogmatic view and look at law as not merely rules created by **the political power**, of course the further issue about the relation between rule of law and rule of politic will still be prolonged. However, if we stick to the positivists view, considering law as merely a product of the political power, then, it feels that the question about the relation between rule of law and rule of politics is no more relevant, because they identify law as politics. If we *identify* law merely with "legislation" produced by the House of People's Representatives of the Republic of

Indonesia (DPR-RI), then, it is clear that the product of the House of People's Representative of the Republic of Indonesia as a political institution is also merely a product of politics.

However, on the contrary, the dogmatist consider law as not merely legislation. We can find such a view in what has been suggested by Eugen Ehrlich (Paton, 1951:21) that:

" ... law depends on popular acceptance and that each group creates its own living law which alone has creative force ".

What meant by term **politics**? In the following I quote a definition of **politics** (Roger Scruton, 1996:424):

" ... Sometimes used as a plural noun, sometimes and now more usually as a singular, 'politics' began its career in English as a term of abuse for the activities of those engaged in faction, and gradually became respectable as modern forms of representation evolved. Definitions are many and varied, ranging from the conciliatory ('the art of the possible'- Lord Butler), through the cynical ('the art of governing mankind through deceiving them' - Isaac D'Israeli), to the wolfily assertive ('the art of carrying out the life struggle of a nation for its earthly existence' - Hitler). As now used 'politics' denotes a kind of activity associated with government, but there are conflicting views as to what this activity amounts to..."

In sum, I myself define politics as everything linked to the legitimate power of a state government. Perhaps, nowadays, all countries in the world , whatever their forms (monarchy or republic, liberal or socialist; adopting democratic or autocratic systems) always declare that their states are states **of rule of law**. Accordingly, a question always appears; which is predominant , rule of law or rule of politics? And it is also natural that a question about the relation between "**political development and the positive role of law**" comes to the surface.

I am of the opinion that, concerning rule of law, law may be distinguished into two types. The first, law that is above the political power, and; the second, law constituting a political product and consequently under the political power.

The only "law" residing above the political power is **the constitution**, meanwhile, all other kinds of law are situated under the political power. I am of the same opinion with Donald Black (1976:2) that :

"Law is governmental social control...It is, in other words, the normative life of a state and its citizens, such as legislation, litigation and adjudication..."

It is undeniable that there are relations between law and politics, between legal principles and legal institutions, and between political ideologies and administrative institutions. Or, according to Harry C. Bredemeier's terminology, there are reciprocal relations in form of "input" and "output" processes between legal systems and other systems existing within the community, including the political system. Bredemeier (Aubert, 1979:66) that :

" ... the legal system be viewed as an integrative mechanism, contributing 'co-ordination' to the society. This contribution takes the form of certain 'outputs' to other sectors of the society, in exchange for certain 'inputs'... From the political system, goals and enforcement, in exchange for interpretation and legitimation."

What is the role of law in political development? Firstly, I quote what suggested by Bredemeier (Aubert,1979:66) that:

"The legal system's effectiveness in contributing to integration is a function of the stability of these interchanges. Some factors making for instability have been tentatively suggested:

1. The possible development inside the law of goal-conceptions inconsistent with the polity.
2. The responsiveness of legislatures to short-run fluctuations in private interests.
3. The lack of communication of accurate knowledge to courts.

4. The lack of facilities for turning litigation into a learning experience.
5. The development in the pattern-maintenance system of values resistant to justice.
6. The lack of channels by which demand for court facilities might lead to an increase in supply.

Among the six points stated by Bredemeier, the highly relevant one to the discussion of "**political development and the positive role of law**" is the point 1.

The positive role expected to be assumed by law in political development in Indonesia is how law is capable of integrating political interests, which tend to be in contradiction each other. In my opinion, for the time being, Indonesia badly needs political stabilization of the drastic changes in the post-Suharto political life. The "closed era" going on for 32 years under Suharto is, now, changing drastically to become an "open era"; however, it seems that such drastic change lead to the phenomena of "**overdoing.**" The disappointing behavior of political elite in "the eyes of Indonesian peoples" constitutes one factor aggravating the present political instability.

III. TASKS/OBSTACLES TO BE OVERCOME

As I have mentioned above, the visible phenomena of the present Indonesian political life is terribly alarming. Whereas at the general community level "brawls" (group altercation) frequently occur, at the political elite level "brawls of political interests" occur, frequently displaying less ethical phenomena, and leaving many people at large in increasingly unrest.

What is visible up to now is the lack of a serious commitment to lift law out of its immersion. What exists is confined to slogans of "lip service" nature. On the contrary, the "political will" to truthfully materialize "the supremacy of law" does not exist yet, at all.

One of concrete examples was "the case of the former President Suharto" terminating in his acquittal and the suspension of the judicial process of the Number One figure in the Republic of Indonesia. "The acquittal decision" of the judge of the South Jakarta District Court led to the furious anger of students in such Indonesian

major cities as Jakarta, Bandung, Makassar, Yogyakarta, and so on. The suspension of the Suharto case constitutes a reflection of the lack of seriousness of "the law enforcement institutions" in Indonesia to respond to the public demands wanting Suharto to be tried throughly and to be sentenced from crimes he made together with his family and cronies during the New Order rule. President Abdurrahman 'Gus Dur' Wahid even said he wanted to find a new politically free judge. The judges failed to take into account society's sense of justice.

For me, the role of law needed presently to restore the political condition in Indonesia is a mechanism to reintegrate conflicts likely threatening the integration of whole Indonesian peoples. In another word, the function of law as "a mechanism of integration" should be optimized.

The initial thing to do is replacing all law enforcement apparatus falling within the category of "*sosok-sosok sapu kotor*" (dirty broom figures), starting from the Supreme Court and the General Attorney Office. It is after the Supreme Court and the General Attorney Office being clean that the clearance is continued to the lower levels, including: Higher Courts, Higher Attorney Offices, District Courts, and District Attorney Offices.

It is clear that such an idea will face a sufficiently great obstacle to realize, namely, "**who will clean, and who will be cleaned?**"

Next, a major problem facing Indonesia is how to create an established political order, after Indonesia frees itself from the closed system during the New Order regime. Without firstly settling fundamental issues in this field, it is impossible to create political and legal orders, themselves assuming the "higher" stratum.

In this regard, I need to restate three types of law according to Nonet & Selznick (1978), as I have mentioned at glimpse in a previous discussion, namely: repressive law, autonomous law, and responsive law. To be clear, I describe the three types of law in Table 3 below :

Table 3: Three Types of Law

	REPRESSIVE LAW	AUTONOMOUS LAW	RESPONSIVE LAW
ENDS OF LAW	Order	Legitimation	Competence
LEGITIMACY	Social defense and	Procedural fairness	Substantive justice.
RULES	Crude and detailed but only Weakly binding on rule makers	Elaborate; held to bind rulers as well as ruled	Subordinated to principle and policy
REASONING	Ad hoc; expedient and particularistic	strict adherence to legal authority; vulnerable to formalism and legalism	purposive; enlargement of cognitive competence.
DISCRETION	Pervasive; opportunistic	Confined by rules; Narrow delegation	expanded, but accountable to purpose.
COERCION	Extensive; weakly restrained	Controlled by legal- restraints	Positive search for alternatives, e.g. incentives, self sustaining systems of obligations.
MORALITY	Communal morality; Legal moralism; "morality of constraint".	Institutional morality; i.e, preoccupied with the integrity of legal process.	Civil morality "morality of cooperation".
POLITICS	Law subordinated to power politics	Law "independent" of politics; separation of powers	Legal and political aspirations integrated; blending of powers.
EXPECTATION	Unconditional; Disobedience Perse punished as Defiance	Legally justified rule departures, e.g., to test Validity of Statutes or orders	Disobedience assessed in light of substantive harms; perceived as raising issues of legitimacy
PARTICIPATION	Submissive compliance Criticism as Disloyalty	Access limited by established procedures; Emergence of legal Criticism	Access enlarged by integration of legal and social advocacy

When such nation or state as contemporary Indonesia—who newly freed itself out of the cuff of an authoritarian regime—still has to settle fundamental problems, it appears that political autonomy is greater the legal autonomy. Theoretically, this real phenomenon may be supported by Talcott Parsons' cybernetic concept (1951) stating that the political subsystem has greater energy than law. If it is known that the function of politics is to determine goals desired by the people and, then, to mobilize them to fulfil the goals, therefore, it is imaginable that in the situation under which the business is at a stage of fundamentally straightening out the political order, then, legal autonomy will be put aside. Table 3 above presents us a better illustration about law, and, thus,

about "law enforcement", within such a society as contemporary Indonesia, who is occupied with fixing up fundamental political problems.

According to Nonet and Selznick, law of any state experiences such development as illustrated in an order form in Table 3. It means that, one type should be passed through before reaching the next type. And of course, what expected to the Indonesian case is how **the responsive type of law** can be promptly materialized, because it is only with the responsive type of law that development of politics, law, and democracy is able to run harmoniously.

It appears that the people of Indonesia now have an increasingly weak confidence in law enforcers and the process of law enforcement. Such a situation inevitably leads to various actions of "**tindakan main hakim sendiri**" (to exercise unlawful actions toward someone else guilty of something or "eigenrichting") termed sociologically, by Donald Black (1998) as "**self-help**".

Thus, the only solution for such a problem is just replacing all law enforcement apparatus falling into the category of "**dirty broom figures**" with new law enforcers through a recruitment process enable of screening to find law enforcer candidates (police, prosecutors, lawyers and judges) who are intelligent, honest, and having firm commitment to materialize the supremacy of law.