

Trans-Nationalization of Indonesian Law in the Era of Global Economy

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Abstract

The current globalization does not impact only on the politics, economy, social, and culture of a society but it also impacts on the law applied in the society. There are some changes in the law due to the adaptation of foreign law into the national law. This condition results from the ratification of a certain international agreement. On the other hand, Indonesia possesses various local laws which are applied in societies together with the national law. Since the ratification of an international law has an impact on the national law, it can cause problems to the application of the existing laws in the society. As a result, there are some conflicts between the local and foreign laws in Indonesia. Therefore, it is necessary that there are some solutions which provide protections to the local law in order that it can be applied together with the international law.

Keywords: Trans-nationalization of Law, Local Law, Globalization, Global Economy

Introduction

The 21st century globalization is encouraged by the rapid advancement of communication technology caused by various inventions and innovations in electronic media which lead to the changes in the form of communication in the society. According to Habermas, there is a change of the communication form in the society which is called public sphere. He asserts that it is a neutral area where individuals are free to discuss to identify social problems using its communication facilities and intense communication activities which will be able to influence public opinions and effectively influence any political step and actions at least those relevant with legal matters.

Generally, globalization is a process of rapid capitalism development, which is marked with market globalization and production process from Trans National Corporations (TNCs) supported by International Financial Institutions (IFIs) as governed by World Trade Organization (WTO)¹. LesleiSkclair shows three areas in globalization, they are the globalizations of economy, ideology and politics, and culture². The globalization itself is a vast world crossing the nations throughout the world which make them “borderless” when they are trying to contact one another. In the light of the definition, there are globally international connections either in the fields of trades, agricultures, education, social politics, laws, economy and many others. In the globalization era, the borders among the nations become diminished.

¹ Mansour Fakhri, 2004, *Neoliberalism and Globalization of Political Economy*. Digital Journal of Al-Manar Edition I/2004, page 5.

² LesleiSkclair, *Sociology of The System Social Change in Global Perspective*, (Baltimore, The John Hopkins University Press, 1991), pages 1 – 5.

Therefore, the national historical borders change to artificial ones. According to Kenichi Ohmae there are 4 (four) causes³ of these changes in the countries' borders, they are:

1. the global investment which is marked by the mechanism of capital/investment transfers crossing the nation's borders where the government of a certain nation fails to fully control over the flow of the transfer;
2. industries which are globally oriented in which the strategies of multi-national companies are not conditioned on the motives which are national but solely more to gain profits as they are projected to fulfil the needs and demands of the global market;
3. global information which results from the advancement of communication technology which lead to the decrease or inability of the government's monopoly control over the flow of information received by its citizens;
4. globally oriented individual consumers (consumers that are individual). This can be done because every human can access directly to the global information network to obtain information on lifestyles around the world. This global individual consumer has a tendency to forget the principle of nationalism in economics, because they no longer question the origin of any product. The new principle that they use is to want the best products at a low price and not to question the country where the product came from.

The emergence of globalization led to a never-ending debate among experts. David Held⁴ divides the views of the experts in terms of globalization into 3 (three) groups:

1. Hyper globalization Group

For this group, the notion of globalization is a new history for human life that states that the traditional state is irrelevant in the business units of a global economy. The group believes that economic globalization brings with it the phenomenon of trade and financial "denationalization" (transnational network) in a borderless world.

2. Skeptical Group toward Globalization

Hist and Shompson as the advocates of the skeptical group harshly attacked the regime brought by the hyperglobalist group who underestimated the role of national government power in regulating international activities. The group considers that globalization is a myth and states that global forces are heavily dependent on the governing powers to ensure that economic liberalization continues, saying that the process of globalization only takes place in Japan, the United States and Europe, while the role of nation states in national economic activity and regional is still very prominent and is a separate characteristic that cannot be easily deleted.

3. Transformation list Group

This group is in the middle between the two groups above. The group believes that at the beginning of the new millennium, globalization is the first force behind social, economic and political change that is proving modern society and the new world order. The advocates of this group believe that the process of globalization is going on historically unprecedented and soon the differences between international and domestic, international and external relations are no longer clear. Nevertheless, they acknowledge that the process of the globalization has long roots of history. The previous globalization is much different from the now globalization because of three things, namely velocity, intensity and extensity. Because of these three things, the globalization is now having a more tremendous impact than the previous globalization. Based on a group of experts' opinions mentioned above, in its implementation, globalization depends on the conception of each nation in responding to the globalization which resulted in the dilemma for a country, whether the nation will participate in the globalization or not? Globalization for Indonesia becomes a challenge in order that it can 'survive' in the flow of globalization. The globalization has altered the barriers of the life of the nation and the state that has become the identity and characteristics of the nation.

³ Kenichi Ohmae, *The End of the Nation State: The rise of Regional Economies*, (New York/London, The Free Press, 1995), pages. 2 – 5.

⁴ Ai Siti Farida, *Sistem Ekonomi Indonesia* (The Economics System in Indonesia), (Bandung, PustakaSetia, 2011), pages. 300 - 301

Indonesia will inevitably enter the era of the global economy marked by the conclusion of international agreements, both bilateral and multilateral, which regulate the trades with its peak when the Indonesian government participates in the World Trade Organization by ratifying the Marakesh Agreement and signing the AFTA (ASEAN Free Trade Agreement) and others.

Challenges of Legal Pluralism of the State of Indonesia in the Era of the Global Economy

The economy globalization era leads to several legal problems in which there are legal frictions or impacts.

The legal impacts results from the difficulties in harmonizing between the international and national laws to work together. These impacts occur since the respective laws possess their own specific characteristics in each nation they are applied. Indonesia that inherited a pluralistic legal system as the impact of the application of the law in the colonial era that recognized the existence of European law, the Far East and Indigenous Laws, which were then supplemented with the national law created by the Indonesian government after the era of independence and coupled with the international instrument components increase the complexity of the existing and applicable laws in Indonesia. A key challenge in facing the changes in the global era is to maintain consistency between the three levels of legal products. Anticipatory efforts and responses in the field of law can be done in the areas of:

1. The Legal Structure, that is through efforts to empower the people's institutions such as the provision of facilities and capital assistance.
2. The Substance of the law, that is through efforts to harmonize the law. Harmonization of the law is an adaptation form to the global change, where the harmonization of law can be done under some conditions like maintaining the consistency of the legal system of Indonesia. In this context, the involvement of Indonesian legal experts in various international forums is increasingly important, as they are useful in reviewing, studying, and understanding of the foreign laws.
3. The Legal Culture, it can presumably be done through efforts to synchronize the vision, perception and attitude of all supra, infra structural institutions and the wider community to make law supremacy in the life of society, nation and state. It is necessary to comply with principle, when acting and behaving in all walks of life and to have exemplary of the authorities at all levels of the law.

In the pluralized economy globalization era, the Indonesian law must be well maintained in order not to create frictions which can lead to disorder in law and economy. In this global era, we can find some law adoptions and transplantations in order not only to harmonize the law but also to put forward the legal pluralism approach.

The legal pluralism approach in the global perspective can be seen as an old approach which is no longer in use. The new paradigm of legal pluralism is closely related with the globalization phenomenon in which law from various levels enter to borderless zones which create strong frictions and adoptions among the international, transnational, national, and local laws. Under no circumstances can a mapping be made as if a particular law (international, national, local) is a clear entity with clear borders and is separate from other legal systems⁵.

Law consists of different rules and they embody the contents of the rules of law. The Lawmakers formulate the legal rules in the Laws and Regulations. Judges present these rules in courts. This is an ongoing process and the law is always in motion. Lawmakers continue to ratify the legal rules in the Laws and Regulations where there are overlapping legislation, or regulations established regardless to the needs of the existing society. The law is subject to change and to some extent raises the question of which legal rules should be held by the society.

It is understood to simplify the law in order for the success of world trade. It is the impacts that have led to the emergence of injustices in law enforcement and regulation in the global era. These rising conflicts results from the differences in legal norms and morals as the basic ingredients of law-making. In one hand, local laws are formed and made based on norms and morals prevailing in the society. On the other hand, there is an attempt to uniform laws based on norms and morals prevailing in other parts of the world. The existence of this globalization resulted in the loss of norms and morals that have existed and developed in the society.

Trans-nationalization of Law in the Global Economy Era

⁵ Sulistyowati Irianto, presented in the Seminar on "Pluralism of Law and the Challenges for the Formulation of National Legal System", a cooperation with Badan Pembinaan Hukum Nasional of the Ministry of Law and Human Rights, FH Universitas Hasanuddin, and the offices of the Ministry of Law and Human Rights of Sulawesi Selatan, Makasar, 1-2 Mei 2007.

The ratifications can be considered as the necessity of a nation. It is also important, since⁶:

- a) The agreement generally deals with the interests of the people and binds the future of the nation and state in certain respects so that it must be ratified with the highest power of the state.
- b) There is a chance controversy between the messengers who join the negotiation with the government they represent.
- c) The relevant agency needs some time in order to be able to carefully study the agreed copy of the agreement.
- d) The influence of parliamentary regimes that has the authority to administer executive activities.

The ratification of international treaties is not only a matter of international law, but it is also a matter of national law. Where a nation ratifies an international treaty/convention⁷, it shall make such adjustments to its existing pre-existing laws (national law). The process of adjustment action is not easy and requires a struggle, because there are gaps between the binding method of "Civil Law system" and "Common Law System" into an international agreement. The "Civil Law" legal system suggests that signing an agreement does not guarantee that it becomes the source of national law prior to the non-self-implementing legislation. Whereas in the "Common Law" legal system, the signing of an agreement makes it immediately a source of national law (self-implementing legislation)⁸.

The implementation of the international law into the national law does not solely depend on the will of the nation during the ratification process only, but there are also provisions of international law which directly bind the nation without going through the process of approval or ratification. The provisions of international law are derived from customary international law, legal principles or principles of law that apply universally⁹. Article 14 of the Vienna Convention 1980 provides for when ratification requires consent to be binding. The authority to accept or reject the ratification is inherent in the sovereignty of the nation. The International law does not require a nation to ratify a treaty. However, if a nation has ratified the International Treaty, it shall be bound by that International Treaty. Consequently, the nation which has ratified the treaty shall be bound and abide by the signed international agreement, as long as the material or substance in the treaty is in accordance with the provisions of the national law. In connection with the ratification of international treaties, they need to be observed first. A nation may denounce the ratification of an international treaty if it relates to or endangers the sovereignty of the nation. In this era of globalization, trans-nationalization of law from international to national level is a common practice. The integration of the internal domestic interests of a nation, national and international interests, as well as the interests of the inter-sectoral national life, according to Santos¹⁰ can be done through localized globalism, the action of "how" global values are localized, or in other words managed according to values, interests and or needs that are locally-domestic. According to Santos, in this way, the trans-nationalization of the law-no longer means homogenization, uniformity or merely a protective measure of national identity. In responding to the changes and excesses of globalization, each nation applies different responses.

⁶ Syahmin AK., *Hukum Kontrak Internasional* (International Legal Contracts), (Jakarta: Rajawali Press, 2011), page 167.

⁷ The form and name of international treaties in practice are quite diverse, among others: treaty; convention, agreement, memorandum of understanding, protocol, charter, declaration, final act; arrangement, exchange of notes, agreed minutes, summary records, verbal process, vivendi mode, and letter of intent. In general, the form and name of the agreement indicates that the material regulated by the agreement has different levels of cooperation weight. However, by law, such distinction does not diminish the rights and obligations of the parties to the treaties contained in an international agreement. The use of certain forms and names for international treaties, basically indicates the wishes and intentions of the parties concerned and their political impact on such parties. As the most important part of the process of making the treaty, the ratification of the treaty needs to be deeply concerned considering that at that stage a State formally binds to the treaty. See the explanation of Act no. 24 of 2000 on the International Treaty.

⁸ Romli Atmasmita, *Pengaruh Hukum Internasional Terhadap Proses Legislasi* (The Effects of International Law towards the Legislation Process), A paper in National Legislation Seminar, Legislative Board of DPR RI, dated on 21 Mei 2008, page 3.

⁹ Dadang Siswanto, *Implementasi Hukum Internasional dalam Hukum Nasional* (The Implementation of the International Law in the National Law), A discussion paper in International Law Department of Law Faculty of UNIDIP, dated on 12 October 2001

¹⁰ Santos, Bonaventura De Sousa, *Toward A New Common Sense: Law, Science and Politics In Paradigmatic Transition*, New York: Routledge, 1995,

Especially in the field of law, Santos identifies four views underlying the responses of nations in the world, which are elaborated in accordance with the trends inherent in the trans-global nature of globalized localism; localized globalism; cosmopolitanism; common heritage of humankind¹¹.

Conclusions

In the global economic era, legal pluralism must be well guarded so that it will not cause impacts that can lead to disorder in law and economics. In the global era, we will often encounter the adoption of law, law transplantation, beside a harmonization of law. Here lies the challenge of legal pluralism. The differences of opinions in harmonizing the law from the international level to the national level are still debatable. This condition is also experienced by Indonesia when trying to harmonize international law into its national law. Indonesia has ratified various international instruments sometimes without seeing in detail the elements that exist in the society.

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Legislations

Act No. 24 of 2000 on International Agreement

¹¹ Santos states: "I tried to reconstruct these multiple tensions analytically by identifying the four major forms of trans-nationalization in which they are played out and the defined according to the specific dominant organizing principles underlying them: globalized localism; localized globalism; cosmopolitanism; common heritage of humankind". Santos, Bonaventura De Sousa, *Toward A New Common Sense: Law, Science and Politics In Paradigmatic Transition*, New York: Routledge, 1995, p., 375.