

The Effect of Political Configuration on Legal Products: A Critical Study of Responsive Legal Concepts and Orthodox Conservative Law

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Article	Abstract
<p>How to cite: Uul Fathur Rahmah, 'The Effect of Political Configuration on Legal Products: A Critical Study of Responsive Legal Concepts and Orthodox Conservative Law' (2023) Vol. 4 No. 2 Rechtenstudent Journal Sharia Faculty of KH Achmad Siddiq Jember State Islamic University.</p> <p>DOI: 10.35719/rch.v4i2.266</p> <p>Article History: Submitted: 18/07/2023 Reviewed: 08/08/2023 Revised: 15/08/2023 Accepted: 26/08/2023</p> <p>ISSN: 2723-0406 (printed) E-ISSN: 2775-5304 (online)</p>	<p>This research discusses the political implications of the birth of legal products, focusing on the concept of responsive and orthodox conservative law. Discusses in depth both the political configuration and the legal character of the state system. This research uses a normative or doctrinal type of research which uses two approaches, namely a statutory approach and a conceptual approach. Consists of two problem formulations, namely 1) What is meant by the concept of responsive law and the resulting legal products? 2) What is meant by the concept of orthodox conservative law and the resulting legal products?. This research results that 1) Legal products (legislation) are greatly influenced by the political configuration in power, so that law is a political product which is a necessity in a country's system. Characteristics of responsive legal products include, participative creation, the content is aspirational and the content is limitative; 2) on the issue of the concept of orthodox conservative law, it has a centralistic-domestic character, its content is positivist-instrumental, its detailed content is open interpretive.</p> <p>Keywords: <i>Politic, Responsive, Orthodox.</i></p> <p>Abstrak Penelitian ini membahas tentang implikasi politik terhadap lahirnya produk hukum, berfokus pada konsep hukum responsif dan konservatif ortodoks. Membahas secara mendalam baik dalam konfigurasi politik hingga pada karakter hukum di sistem negara. Penelitian ini menggunakan tipe penelitian normatif atau doktrinal yang menggunakan dua pendekatan yaitu pendekatan perundang-undangan (<i>statute approach</i>) dan pendekatan konseptual (<i>conceptual approach</i>). Terdiri dari dua rumusan masalah yakni 1) Apa yang dimaksud dengan konsep hukum responsive dan produk undang-undang yang dilahirkan?; 2) Apa yang dimaksud dengan konsep hukum konservatif ortodoks dan produk undang-undang yang dilahirkan?. Penelitian ini menghasilkan bahwa 1) Produk hukum (peraturan perundang-undangan) sangat dipengaruhi oleh konfigurasi politik yang sedang berkuasa, sehingga hukum adalah produk politik merupakan keniscayaan dalam sistem suatu negara. Karakter produk hukum responsive diantaranya, Pembuatan partisipatif, muatannya aspiratif dan isinya limitatif; 2) pada persoalan konsep hukum konservatif ortodoks memiliki karakter pembuatannya sentralistik-domestik, Muatannya positivist-instrumental, Rincian isinya open interpretative.</p> <p>Kata Kunci: <i>Politik, Responsif, Ortodoks.</i></p>

Introduction

Legislation is the main cornerstone of the national legal system in Indonesia. Legislation is a very effective instrument in law reform because of its binding and coercive legal power. A state based on modern law (*verzorgingsstaat*), the main purpose of establishing laws is no longer creating codification of the norms and values of life that have settled in society.

However, the main purpose of forming laws is to create modifications or changes in people's lives.¹

Legal politics has a very important role in the formation of Indonesian national legislation and law. Legal politics is used as a basic guideline in the process of determining values, establishing, forming and developing national law in Indonesia. Legal politics is a statement of the will of state authorities regarding the direction of the development of applicable law in an area to achieve state goals, which is studied in the perspective of political, economic, social, cultural backgrounds both in the formation of legal products and their enforcement.²

Mahfud MD expressed his opinion that, "law as a product of politics", in the layman's view could be questioned. Because the statement positions law as a social subsystem determined by politics. Moreover, at the level of ideas or ideals of law, especially in countries that adhere to the rule of law, it is politics that must be positioned as a variable that is affected by law.³ Which of the two statements is true, is law a determinant of politics or is politics a determinant of law. The statement that "law is a political product" is true if it is based on "das sein" by conceptualizing law as a law.

In fact, if law is conceptualized as laws made by the legislature, then no one can argue that law is a political product because it is the crystallization, formalization or legalization of competing political wills either through political compromise or through dominance by greatest political power. It is in this concept and context that the truth of the statement that "law is a product of politics" lies.⁴ This opinion is in line with the expression, that "politics and law are interdeterminant", because "politics without law is unjust, while law without politics is paralyzed".⁵ Mochtar Kusumaatmadja and B. Arief Sidharta expressed their opinion that law requires power (politics) for its implementation, on the other hand politics is determined by law. Popularly this statement is known as the slogan "law without politics is wishful thinking, politics without law is despotism".⁶ This opinion indicates that law and politics have a very close relationship.

In Indonesia, empirical facts show that a very prominent phenomenon is the legal instrument as a means of dominant political power which is more pronounced when compared to other functions, it can even be seen from the growth of legal institutions, values and procedures, legislation, and law enforcement bureaucracy that is not only reflects the law as a condition of the development process as well as a strong pillar of political, economic and social structures.⁷ In a newly independent country, such a legal position seems very prominent because political activity there is an agenda that grabs attention in the context of organizing and mobilizing various resources to achieve goals in society.⁸

¹ Maria Farida Indrawati S, *Ilmu Perundang-undangan jenis fungsi dan materi muatan*, (Yogyakarta: Kanisius, 2020), 3.

² Widodo, *Aplikasi Metodologi Penelitian Hukum-Doktrinal, dan Politik Hukum di Indonesia*, (Yogyakarta: Aswaja Pressindo, 2020), 168.

³ Moh. Mahfud, *Politik Hukum di Indonesia*, (Depok: Raja Grafindo Persada, 2019), 4.

⁴ Ibid

⁵ Ibid

⁶ Mochtar Kusumaatmadja dan B. Arief Sidharta, *Pengantar Ilmu Hukum Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum*, (Bandung: Alumni, 2009), 33-35.

⁷ Mulyana W. Kusuma, *Perspektif, teori, dan Kebijakan Hukum*, (Jakarta: Rajawali, 1986), 19-20.

⁸ Satjipto Raharjo, *Beberapa Pemikiran Tentang Ancanngan Antar Disiplin Pembinaan Hukum Nasional*, (Bandung: Sinar Baru, 1985), 71.

Mahfud MD developed a hypothesis that certain political configurations will also give birth to certain legal product characteristics. In his research describes⁹ independent variables (political configuration) and affected variables (character of legal products) are divided into two dichotomous ends. The political configuration variable is divided into democratic and authoritarian configurations, while the legal product character variable is divided into responsive or autonomous legal products and orthodox/conservative or oppressive legal products. Political system indicator scheme:¹⁰

Democratic Political Configuration	Authoritarian Political Configuration
Political parties and parliament are strong, determining the direction or state policy.	Political parties and parliament are weak, under executive control.
The executive (government) agency is neutral.	Interventionist executive (government) agency.
Independent press, without censorship and restrictions	The press is shackled, threatened with censorship and banning.

Legal product character indicators:¹¹

Responsive legal product character	Orthodox law product character
Participatory production	Making it centralized-dominative
The content is aspirational	The content is positivist-instrumentalistic
Details of the contents are limited	The details of the contents are open interpretative

By splitting these two variables into dichotomous concepts, the hypothesis above is stated in more detail that a democratic political configuration will produce legal products that are responsive or autonomous in character, while an authoritarian political configuration will produce legal products that are conservative/orthodox or oppress. Democratic and authoritarian concepts are identified based on three indicators, namely the party system and the role of representative bodies, the role of the executive, and freedom of the press. While the concept of responsive/autonomous law is identified based on the law-making process, the granting of legal functions, and the authority to interpret the law.

By using the basic assumption that law is a product of politics, politics will be very decisive in the discussion of this writing. In a country with a democratic political configuration, the legal products are responsive/populist in character. Meanwhile, in a country

⁹ Mahfud MD, *Hukum dan Pilar-pilar Demokrasi*, (Yogyakarta: Gama Media, 1999), 6.

¹⁰ Moh. Mahfud, *Politik Hukum di Indonesia*, 7

¹¹ Ibid

with an authoritarian political configuration, the legal products are orthodox/conservative/elitist in character. Changes in political configuration from authoritarian to democratic or vice versa have implications for changes in the character of legal products.

Nonet and Selznick, in their book entitled *Law and Society in Transition, Toward Responsive Law* quoted by Henry Ariyanto revealed that there is a significant relationship between a country's government system and the laws it adheres to. In an authoritarian government system, law becomes the subordination of politics. That is, law follows politics. In other words, the law is used only to support the politics of the ruler. On the other hand, in a democratic system of government, law is diametrically separated from politics. That is, the law is not part of politics, but the law becomes a political reference for a nation.¹²

From the description above, it is interesting to study further with regard to responsive legal theory and examples of statutory products. Likewise with legal theory regarding orthodox and examples of laws that were born therein. Based on this thought, it becomes important and studied more deeply with regard to the differences in the concept of responsive law and orthodox law in this paper.

Research Methods

The type of legal research used is normative legal research or also known as doctrinal legal research. Doctrinal legal research is research that has the object of study of statutory regulatory documents and library materials.¹³ Legal research is conducted to solve the legal issues at hand.¹⁴ The problem approach used by researchers in this paper uses a statutory approach (statute approach) and a conceptual approach (conceptual approach). The statutory approach (statute approach) is an approach that is carried out by discussing in a holistic manner the laws and regulations either laws or other regulations that have implications for the legal issues to be resolved or handled.¹⁵ The second approach, which uses a conceptual approach, is carried out by not departing from existing legal regulations, on the basis that there are no regulations that specifically regulate the topic of the problem being researched. In this approach, researchers also refer to legal principles, legal concepts and legal principles contained in the views of legal scholars or the doctrines that have developed in legal science, which are relevant to legal issues.¹⁶

Result and Discussion

Responsive Legal Concepts and Legislative Products That Are Born

Responsive Law Theory

Responsive law is a model or theory initiated by Nonet-Selznick in the midst of Neo-Marxist scathing criticism of liberal legalism which relies on law as an independent institution with an objective, impartial, and truly autonomous system of rules and procedures.¹⁷

¹² Henry Ariyanto, "Hukum Responsif dan Penegakan Hukum di Indonesia" *Lex Jurnalica* Volume 7 Nomor 2, April (2010), 116.

¹³ Soejono dan Abdurrahman, *Metode Penelitian Hukum*, (Jakarta: Rineka Cipta, 2003), 56.

¹⁴ Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, (Jakarta Timur: Kencana, 2019), 60.

¹⁵ *Ibid*, 93.

¹⁶ Dyah Ochtorina Susanti dan A'an Efendi, *Penelitian Hukum, (Legal Research)*, (Jakarta: Sinar Grafika, 2018), 115.

¹⁷ Sulaiman, *Hukum Responsif: Hukum Sebagai Institusi Sosial Melayani Kebutuhan Sosial Dalam Masa Transisi*, diakses di <https://repository.unimal.ac.id/1744/1/Hukum%20Responsif%20Sulaiman.pdf>

Responsiveness can be interpreted as serving social needs and interests that are experienced and found not by officials but by the people. The condition for presenting it authentically requires special efforts that will enable this to be done. Thus, new pathways are needed for participation.¹⁸

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In its development responsive law is used as a reference as a legal product. Responsive/populistic legal products are legal products that reflect a sense of justice and fulfill people's expectations. In the process of making it gives a big role and full participation of social groups or individuals in society. The results are responsive to the demands of social groups or individuals in society. The indicators used in analyzing a statutory regulation created in a responsive/populistic legal system are as follows:²⁰

- a. The law-making process is participatory, namely inviting as much public participation as possible through social groups and individuals in society.
- b. The nature of the function of law is aspirational, meaning that it contains materials that are generally in accordance with the aspirations or wishes of the people it serves.

Interpretation of legal products provides little opportunity for the government to make its own interpretation through various implementing regulations and this narrow opportunity only applies to matters of a technical nature.

Responsive Legal Products

The product of legislation that was born from responsive system law was the President's instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI). The reason why KHI was born out of a responsive legal system is proven by the facts and legal basis for compiling KHI as follows:

- a. The law-making process is participatory

A good Legislation is a Legislation that is a reflection of the will of society. Therefore, in its formation, community participation is needed so that these laws and regulations can be implemented properly. Community participation is not only in terms of supervision, but the community can participate directly in every stage, from planning to promulgation.²¹

This is in line with the KHI preparation process. At that time, Islamic law political activists wanted the resulting legal product to be far from being exclusive by involving all levels of Muslim society. Of course, it is not an easy thing to realize a responsive lawmaking process in an authoritarian government. KHI also answered that

¹⁸ Ibid

¹⁹ Philippe Nonet dan Philip Selznick, *Hukum Responsif Pilihan di Masa Transisi*, Terjemahan Rafael Edy Bosco, Ford Foundation-HuMa, Jakarta, 2023.

²⁰ Ibid, 32.

²¹ Wisnu Indaryanto (Tenaga Perancang Peraturan Perundang-undangan Kantor Wilayah Kementerian Hukum dan Hak Asasi Manusia RI Propinsi Daerah Istimewa Yogyakarta), *Keterlibatan Masyarakat Dalam Proses Pembentukan Peraturan Perundang-Undangan*, Jurnal Legislasi Volume 10 Nomor 3 Tahun 2013, 231.

the formation process involved layers of society. This was coupled with interviews with scholars and workshops on making KHI a legal product of the New Order.²²

In terms of legal formation, Mochmad Muslim said that the legal material contained in the KHI was very aspirational and tended to be accommodative to Muslims because it involved many prominent figures, scholars, Islamic scholars. This KHI was born from a democratic political configuration because the New Order government carried out accommodative politics towards Muslims, so its legal character was responsive. From the perspective of government legal material that is autonomous and responsive, this legal product reflects the expectations of society.²³

b. The nature of the legal function is aspirational

Responsive or autonomous legal products are the characteristics of legal products that reflect the fulfillment of the aspirations of society, both individuals and various social groups, so that they are better able to reflect a sense of justice in society. The process is done by openly inviting community participation and aspirations. Judicial institutions and legal regulations function as implementing instruments for the will of society, while their formulations are usually sufficiently detailed so that they are not too open to arbitrary interpretation and interpretation based on the will and vision of the authorities/government.²⁴

The emergence of the idea of forming the KHI, it appears that the idea came from a circle of political elites holding political power, both executive and judicial power through cooperation between the Supreme Court and the Ministry of Religion. However, it still provides space to voice aspirations by involving Islamic community leaders.²⁵ So that KHI fulfills the requirements to be said to be aspirational in the process of its preparation.

c. Interpretation of legal products

The formation of KHI was carried out by a project implementing team appointed by the Joint Decree of the head of the Supreme Court and the Minister of Religion Number 07/KMA/1985 and Number 25 of 1985 on March 25, 1985. One of the functions of the elaboration in the considerations of the Joint Decree (SKB) is holding KHI which has been the material law in the Religious Courts. The influence of the New Order's legal politics on KHI is that KHI can be said to be Indonesian fiqh with Pancasila insight. This is based on the substance of KHI which has Islamic values with various acculturation, language, legal logic along with its formal material basis which always refers to Pancasila values which are institutionalized in national legal politics and leads to the politics of legal codification and unification.

The purpose of compiling KHI is to "positive" Islamic law in Indonesia. By formulating and systematically positing Islamic law in the "book of laws", there are several main objectives to be achieved and aimed at, namely:²⁶

1. Complete the pillars of religious justice,

²² Nasrulloh Ali Munif, "KHI dan Konfigurasi Politik Hukum Orde Baru (Vis a Vis Antara Hukum Islam dan Sistem Pemerintahan Otoriter)", *Jurnal AHKAM*, Volume 3, Nomor 2, November (2015), 283.

²³ Mochammad Muslim, "Pengaruh Konfigurasi Politik Hukum Orde Baru Terhadap Kompilasi Hukum Islam (KHI) di Indonesia", *Al-Daulah: Jurnal Hukum dan Perundangan Islam* Volume 4, Nomor 1, April (2014), 34.

²⁴ Hanry Ariyanto, *Op.Cit*, 117

²⁵ *Ibid*, 235

²⁶ Mochammad Muslim, *Op. Cit*, 23

2. Equate the perception of the application of the law,
3. Get rid of the notion of private affair
4. Accelerating the process of Taqribi Baina Ummah.

Based on the purpose of compiling the KHI as described above, it turns out to be able to answer the needs of the community with regard to material law in the Religious courts. Against this, the government is not bothered with implementing regulations to regulate further with regard to the application of law in KHI norms.

The Concept of Orthodox Conservative Law and the Legislative Products

Orthodox Conservative Law Theory

The theory of orthodox conservative law cannot be separated from responsive law.²⁷ This is based on the theory put forward by John Henry Merryman introducing two legal development strategies, namely responsive and orthodox. Both produce two different legal products.

Conservative/ orthodox legal products are legal products whose contents better reflect the social vision of the political elite, reflect more the wishes of the government, are positivist-instrumentalist, namely, become tools for implementing ideology and state programs. Orthodox law is more closed to the demands of groups and individuals in society.²⁸ In its manufacture, the role and participation of the community is relatively small.

The indicators used in analyzing a statutory regulation created in an orthodox conservative legal system are as follows:²⁹

- a. The law-making process is centralized in the sense that it is more dominated by state institutions, especially the holders of legislative power.
- b. The nature of the function of law is positivist-instrumentalist, meaning that it contains material that reflects more on the social and political vision of the holders of power or contains material that is more of a tool for realizing the will and interests of government programs.
- c. Interpretation of legal products provides wide opportunities for the government to make various interpretations with various follow-up regulations based on the government's unilateral vision.

Legislative Products in the Orthodox Conservative Legal System

In this discussion, the author provides an example of a law product resulting from an orthodox conservative legal system, namely Law Number 13 of 2003 concerning Manpower. To ensure that the drafting of the Labor Law has the character of orthodox law, indicators are used to determine the character of the Labor Law. The indicators are as follows:

a. The Law-Making Process

When Law Number 13 of 2003 was still in the form of a draft text in the discussion stage in the DPR, labor unions joined labor observer groups to actively express their aspirations. From mid-2000 to 2003 they continued to reject the draft Law Number 13 of 2003. The main rejection was aimed at issues related to relaxing the rules

²⁷ Wahyu Prijo Djatmiko, "Law an Public Relations in Indonesia: Viewed from the Theory of John Henry Merryman on Stategies of Legal Development", *Walisono Law Review (Walrev)*, Vol 1 No. 1, (2019), 7.

²⁸ Moh. Mahmud MD, *Op.Cit*, 32

²⁹ *Ibid*, 32

for terminating employment relations, tightening the right to strike, and regulations on the legalization of contract work systems and outsourcing. Various labor unions express their aspirations in various ways, from organizing joint actions to conducting political lobbying with government institutions and the DPR-RI. But unfortunately, the government and the DPR ignored the aspirations of the workers who rejected the 13 drafts of Law Number 13 of 2003, and insisted on ratifying Law Number 13 of 2003 in March 2003.³⁰

From the description above, it can be summarized that the process of forming Law Number 13 of 2004 was not participatory in nature, that is, it did not invite as much public participation through social groups and individuals in society, especially trade unions, which conveyed the aspirations of workers in general.

b. The Nature of Legal Function

Law with an orthodox character is positivist-instrumentalist. This means that it contains material that better reflects the social and political vision of those in power or contains material that is more a tool for realizing the will and interests of government programs. From the point of view of the workers, the contents of the Manpower Law are not aspirational, because they are not in accordance with the wishes of the workers served.³¹ It can be seen from the reasons the workers rejected the law. On the other hand, the contents of the Manpower Law are seen by workers as regulations that reflect the social and political vision of those in power, so that these regulations are tools for realizing the will and interests of government programs. This can be felt from the birth of Law Number 13 of 2003. With the birth of this law, various kinds of coercion were made by international donor agencies against the Indonesian government, as a consequence of the agreements that had been made between the Indonesian government and these international institutions.³²

c. Possible Interpretation

Legal products with an orthodox character provide wide opportunities for the government to make various interpretations with various follow-up regulations based on the unilateral vision of the government and not just technical issues. Orthodox legal products tend to contain brief material and only the main points to then provide broad opportunities for the government to regulate based on its vision and political strength.³³ The content of Law Number 13 of 2003 concerning Manpower consists of 17 chapters, 193 articles. Of the 193 articles, only 77 articles have explanations or there are 116 articles which were stated quite clearly by the legislators.³⁴ Thus, only approximately 40% of the entire articles were explained or as many as 60% of the articles had no explanation or were considered clear enough. As many as 60% of the articles are considered clear enough according to the political arguments of the legislators. The number is quite large in the view of the workers, because as many as 116 of these articles can have multiple

³⁰ S. Charda Ujang, "Karakteristik Undang-Undang Ketenagakerjaan Dalam Perlindungan Hukum Terhadap Tenaga Kerja", *Jurnal Wawasan Hukum*, Vol. 32, No. 1, Februari (2015), 13.

³¹ Ibid

³² Ibid

³³ Moh. Mahmud MD, *Op.Cit*, 32

³⁴ For details, see Law No. 13 of 2003 concerning Employment.

interpretations, so that different interpretations can occur either by the government, workers or employers or other parties.³⁵

Law Number 13 of 2003, in fact, provides a great opportunity for the government to make various interpretations with various follow-up regulations based on the unilateral vision of the government and not just technical issues. This can be seen from the many implementing regulations of the Manpower Law and non-implementing regulations.

Conclusion

Legal products which are more broadly interpreted as laws and regulations are strongly influenced by political configurations. This is in line with the expression that law is a product of politics. Political configuration will give birth to the character of Responsive and Orthodox legal products. On the other hand, the two legal products are also interpreted as the result of a legal development strategy. The characteristics of a responsive legal product include: namely: in its preparation it requires community participation either through social groups or individuals, the content is aspirational, the detailed content is limitative (does not give the government room to interpret). An example of a regulation born from a responsive legal product is Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law. Meanwhile, the characteristics of Orthodox conservative legal products include: The production is centralistic-domestic and dominated by the government, especially the legislative and/or executive elites, the content is positivist-instrumental, the details of the content are open interpretative (giving large space for the government to interpret). An example of a regulation that was born from an orthodox conservative legal product is Law Number 13 of 2003 concerning Manpower.

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³⁵ S. Charda Ujang, Op. Cit, 15

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