

December 9<sup>th</sup> 2016



# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



**IMAM AS SYAFEI BUILDING**  
Faculty of Law, Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

**UNISSULA PRESS**

ISBN. 978-602-1145-41-8

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Hak Publikasi pada penerbit UNISSULA PRESS

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Hal i-x, 1-391

**Cetakan Pertama Tahun 2017**

**Penerbit UNISSULA PRESS**

Jl. Raya Kaligawe Km. 4 Semarang 50112

PO BOX 1054/SM,

Telp. (024) 6583584, Fax. (024) 6594366

**ISBN : 978-602-1145-41-8**

# INFORMATION OF THE CONFERENCE AND CALL PAPER

**UNISSULA**  
FACULTY OF LAW  
Sultan Agung Islamic University

## International Conference and Call for Paper

"Indonesia Clean of Corruption in 2020"  
*Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe*

9 December 2016

**IMAM AS SYAFEI BUILDING**  
Faculty of Law  
Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4  
Semarang, Indonesia

**KEYNOTE SPEAKER:**  
**Ir. Agus Rahardjo, MSM**  
*Chairman of the Corruption Eradication Commission (KPK) Indonesia*

**SPEAKERS :**

1. **Prof. Simon Butt**  
*School of Law University of Sydney, Australia*
2. **Prof. Dr. Rohimi Shapiee**  
*The Dean of Faculty Undang-Undang Universiti Sains Islam Malaysia*
3. **Siti Malikh Melek Feer**  
*Vrije Universiteit, Amsterdam*
4. **Prof. Dr. Hikmahanto, S.H.,LLM**  
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5. **Dr. H. Jawade Hafidz, S.H., M.H**  
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**Moderator :**

1. **Dr. Drs. Munsharif Abdul Chalim, S.H.,M.H**
2. **Dr. Maryanto, S.H.,M.H**

**UNISSULA**  
FACULTY OF LAW  
Sultan Agung Islamic University

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*Dev Director Advokat Gadjah Mada University*

**Moderator :**

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day : THURSDAY  
Date : December 9<sup>th</sup> 2016  
Time : 08:00 - 15:00 pm  
Place : Imam As Syafei Building 3<sup>rd</sup> Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia  
Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584 Fax. (024) 6582455  
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## PREFACE

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**Assalamu'alaikum, Wr. Wb**

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can provide this handbook without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers : (Prof. Simon Butt School of Law University of Sydney, Australia, Prof. Dr. Hikmahanto.,S.H.,LLM Professor of Faculty of Law Indonesian University, Siti Malikah Melek Feer Vrije Universiteit, Amsterdam, Dr. H. Jawade Hafidz, S.H., M.H The Dean of Faculty of Law, Sultan Agung Islamic University, Laras Susanti.,S.H., LLM PUKAT Gadjahmada of University.

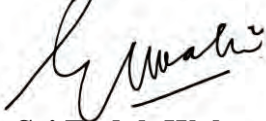
This is the second International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines for eradicating corruption in some countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in the Third International and call for paper next year.

**Wassalamualaikum, Wr. Wb**

**Chairman of the Committee,**



**Dr. Sri Endah Wahyuningsih, S.H., M.Hum**

**NIDN : 0628046401**

## **GREETING FROM THE DEAN OF FACULTY OF LAW**

---

*As-salamu'alaikum Wr. Wb.*

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on December 09<sup>th</sup> 2016.

On December 9, the world will commemorate the International Day against Corruption. Warning World Anti-Corruption Day is celebrated every year since the United Nations Convention against Corruption issued on October 31, 2003. The purpose of the Anti-Corruption Day is exactly why the issuance of this convention which is to promote anti-corruption strategies more efficiently and effectively, facilitate international cooperation and technical assistance in the prevention and the eradication of corruption, and enhancing integrity, accountability and good management of public affairs (United Nations Convention against corruption).

Corruption now spread in all sector in our country, including in procurement of goods and services. Since, promulgation of Law No. 5 of 1999 concerning on Prohibition of Monopolistic Practices and Unfair Business Competition was released and the purpose of establishment of Law No. 5, 1999 generally aims to maintain the climate of healthy competition among businesses, and prevent monopolistic practices.


In connection with the indication of monopoly practices, there is also an assumption that it could have an impact that is not good against the bureaucracy in the government, because in it there is a hidden corruption and abuse of power to protect it. The statement contains a meaning, which behind the efforts of monopolistic practices there is a partnership that can not be "opened" between private business groups and bureaucrats who have economic interests. Indonesia fights for corruption and unfairness in conducting procurement of goods and services.

Thus, in order to celebrate the International Day against Corruption and Warning World Anti-Corruption Day, Faculty of Law, Sultan Agung Islamic University (UNISSULA) held an International Seminar and Call for Paper focusing on Indonesia Clean of Corruption in 2020.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event ,so that this international seminar ran well.

*Was-salamu'alaikum Wr. Wb.*

Semarang, December 09<sup>th</sup> 2016  
Dean,



**Dr. H. Jawade Hafidz, S.H., M.H.**

NIDN.062004670



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# Islamic Law Values Transformation in the Reconstruction of the Legality Principle of Indonesian Criminal Code

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## ABSTRACT

Criminal code of Indonesia is still using Dutch colonial era with background values of individualistic and liberalistic, so it is not in accordance with the conditions—in which we had already been recognized as an independent nation. Therefore it is necessary to make reconstruction penal code with transformation of the values of Islamic law, because the sociological, political and philosophical position of Islamic law occupies an important position as a source of law. Policy transformation is done by formulating the universal values of Islamic law into the process of formulation of the principle of legality in criminal code of Indonesia, because the principle of legality in criminal code currently recognizes only source legal written (Act) as a legal basis to convict, and does not recognize the law source who live in the community (common law) as the legal basis to convict. As a result, enforcement of criminal law in Indonesia unfairly perceived by the public as many deeds by people regarded as disgraceful act but the offender can not subjected of criminal sanctions because of his actions not constitute a crime under the Criminal Code.

Keywords: Islamic law, legality principles, Criminal Code

## A. Introduction

Criminal code of Indonesia is still using the legacy of the Dutch era with background values of individualistic and liberal, so it does not comply with the conditions of the nation that has been independent. Therefore it is necessary to do reconstruction by transforming the values of Islamic law as the law that live and thrive in society, because of sociological, political and philosophical position of Islamic law occupies an important position as a source of law. Transformation policy carried out by formulating the universal values of Islamic law into the process formuli principle of legality in criminal law Indonesia, because the principle of legality in criminal law currently recognizes only legal source tertulis (Act) as a legal basis to convict, and did not acknowledge the source law who live in the community as a legal basis to convict. As a result, enforcement of criminal law in Indonesia felt unfairly by the public because it is only intended to enforce the rule of law only.

## B. Discussion

The principle of legality which is a principle of social, substantially present in Islamic law both in the Quran and the Sunnah of the Prophet Muhammad.

Islamic law states that in the determination of a criminal offense must exist *nas* which prohibit such acts and threatened penalties against him. Their passages prohibiting and threatening punishment to an act that is not enough to punish every act, but there are other terms for people who commit forbidden acts have in order to be punished, that the passage prohibiting it valid (valid) at the time the act was committed, valid according to the scene of the crime, and valid for the individual who does. If one of these conditions can not be met, the penalty could not be imposed on the offender.

However, in addition to basing on *nas* / predefined rules, the principle of legality in Islam is also based on the general principle that the common law rule in Islam. The general rules are:

1. "There is no punishment for the act of a reasonable person before *nas* (provision)".

That every act *mukallaf* can not be said to be forbidden before their passage (provision) is forbidden and the culprit has the freedom to do such act or leave it so that there are passages that forbid it.

2. "The basis of everything is permissible / permissible".

That is, all actions or attitudes are not allowed to do with the ability of the original (is not a skill that is expressed by the expressed by *syarak*). So, as long as there is no scripture that prohibits, there are no charges against the person who acts or omissions.

3. "According *syarak*, no imposition of a law except against a person *mukallaf* capable to understand the arguments of loading and to implement the law. Works are charged only work which may be carried out and is affordable as well known by *mukallaf* so as to encourage him".

Ground rules are equally leads to an understanding, "an act or gesture did not do should not be regarded as a criminal offense unless there *nas* (provision) clear and prohibited actions and attitudes do not do it. If there is no passage of such nature, no charges or punishment for the perpetrators.

Therefore, an act and attitude of not doing enough is not regarded as a criminal act simply because it is prohibited, but also must be stated sentence, either punishment or penalties had *takzir*. The conclusion of the statement that the basic principles of

Islamic law has established that there is no crime and no punishment except after the passage (provisions).

Based on this rule, the implicit meaning espoused the principle of legality in Islamic law. In line with the rules of the A. Hanafi in his book says:

That one of the basic rules are very important in Islamic law is a rule that says: "before there nas (provision) there is no law for the act of those sensible". In other words, the act of someone who ably impossible to say prohibited, unless there nas (provision) says so, and he has the freedom to do anything it or leave it, so there is a passage that forbids it<sup>1</sup>.

So according to Islamic law a deed or attitude does not should be viewed as jarimah (criminal offenses), except for their nas (provision) a clear and prohibiting actions and attitudes do not do it. If there is no such passage in nature then there is no demand or punishment for the perpetrators.

While H.A. Djazuli found that punishment must have a base, either from the Qur'an, hadits, or the legislative body has the authority to establish penalties for cases takzir<sup>2</sup>.

Based on the above provisions, it can be the sense that according to the norms of Islamic law "there is not a criminal offense without the prior nas broadcast or promulgated to the public".

In the Qur'an there are several verses that relate to the principle of legality. Allah does not impose a chastisement upon mankind unless it has no explanation and notification through His apostles, and load (liabilities) that are given to them, the case of affordable, as seen in the word of God as follows:

مَنْ أَهْتَدَىٰ فَإِنَّمَا يَهْتَدِي لِنَفْسِهِ ۗ وَمَنْ ضَلَّ فَإِنَّمَا  
يَضِلُّ عَلَيْهَا ۗ وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ ۗ وَمَا كُنَّا مُعَذِّبِينَ حَتَّىٰ نَبْعَثَ

رَسُولًا ﴿١٥﴾

<sup>1</sup> Hanafi, Ahmad, *Asas-Asas Hukum Pidana Islam*, Jilid I, Biro Kemahasiswaan IAIN Sunan Kalijaga, Jogjakarta, 1966. P.67

<sup>2</sup> Djazuli, H.A., *Fiqh Jinayah (Upaya menanggulangi Kejahatan Dalam Islam)*, Raja Grafindo Persada, Jakarta, 1997, p.23

Meaning: "Those who act in accordance with the guidance (of Allah), then indeed he did it for (safety) himself, and whoever is misguided then indeed he lost to (loss) himself. And a sinner can not bear sin others, and we are not going to punish until We sent a Messenger.

وَمَا كَانَ رَبُّكَ مُهْلِكَ الْقُرَىٰ حَتَّىٰ يَبْعَثَ فِي أُمِّهَا رَسُولًا  
يَتْلُوا عَلَيْهِمْ آيَاتِنَا وَمَا كُنَّا مُهْلِكِي الْقُرَىٰ إِلَّا وَأَهْلُهَا ظَالِمُونَ ﴿٥٩﴾

means: And your Lord would not destroy the cities, before he sent in the capital was a messenger reciting to them Our Signs and never (well) We destroy the towns unless its people in a state do injustice.

قُلْ أَيُّ شَيْءٍ أَكْبَرُ شَهَادَةً قُلِ اللَّهُ شَهِيدٌ بَيْنِي وَبَيْنَكُمْ وَأُوحِيَ إِلَيَّ  
هَذَا الْقُرْآنُ لِأُنذِرَكُمْ بِهِ وَمَنْ بَلَغَ أَيْنَكُمْ لَتَشْهَدُونَ أَنْ مَعَ اللَّهِ  
عَالِهَةٌ أُخْرَىٰ قُلْ لَا أَشْهَدُ قُلْ إِنَّمَا هُوَ إِلَهُ وَاحِدٌ وَإِنِّي بَرِيءٌ مِمَّا  
تُشْرِكُونَ ﴿١٩﴾

means: Say: "Who is more powerful, testimony ? "Say:" Allah ", He is witness between me and you. And this Qur'an revealed to me that with him I gave a warning to you and to those who till the Qur'an (him)"

Based on the verses of the Qur'an over the principle of legality is in accordance with the spirit of these verses. So according to Islamic law an act that no one can be punished except after explanation and notices contained in the rule of law first.

In Islamic law all legal provisions already contained in the Qur'an and the Sunnah of Rasul is valid until the end of time, therefore Islamic law has accommodated all the acts that are considered as immoral, even for crimes that would come (never happened future decline in the Qur'an and the future leadership of the Prophet Muhammad SAW).

The principle of legality as the basic principle in criminal law enforcement means got a very important place in Islamic law, because it is according to Anwar Haryono be a measure of justice and assurance of legal certainty.

However, the principle of legality according to Islamic law is not applied absolut / rigid evidenced by the traditions of the Prophet Muhammad:

1. Hadith Anas said: "It is not something in which case there is retribution posed to the Prophet Muhammad, but he SAW commanded to forgive".
2. In Tirmidhi Hadith of Aisha also narrated that the Prophet Muhammad, said: "avoid hadd punishment of the Muslims, as long as possible. If there are grounds to remove a person from punishment, then let him be liberated. A better judge erred in pardon rather than err in imposing punishments".
3. From Abu Hurairah from the Prophet Muhammad SAW said: "It is not forgiving someone from a tyranny, but Allah will add glory".

Based on the hadith above can be seen that the principle is not applied rigidly legaitas, it is also evident from the application of the principle of legality according to Islamic law which vary depending on the type of criminal acts, either in a criminal act hudud, retribution and takzir-blood money.

On the crime of hudud implementation of the principle of legality applied carefully and thoroughly. This can be clearly seen in seven kinds of criminal acts hudud, namely: the crime of adultery, qazaf (accusing others of committing adultery), drinking liquor, the crime of theft, criminal damage hirabah (security problems), the crime of apostasy, and criminal offenses uprising / subversion (al-Bagy).

Application of the principle of legality in criminal activities takzir different from the application of the principle of legality in criminal acts or criminal offenses hudud retribution and blood money. Application of the principle of legality in criminal acts takzir loosened to some extent. Leeway in this criminal act are both in terms of the form of the crime and the penalty (the penalty). Because of a criminal offense takzir forms of criminal acts that have certain properties do not require separate provisions stating as a crime, but quite put it nas and the way of a general nature. Takzir penalty imposed for acts that endanger the welfare of the individual, community, or public order.

In the Criminal Code as a positive Indonesian criminal law at this time, never explicitly formulated on "principles of criminal law" Given the principles of criminal law is generally only found in the lesson / criminalistics is usually inferred from the formulation of the norms contained in them.

The principle of legality as listed in the Criminal Code now emphasizes the value of the rule of law, as a source of law an act should be criminally, just based on written law (formal base) only and does not recognize the legal source of life (grounding material) as a source of law to criminalize deed. It is thus certainly not in accordance with the balance of wisdom religious values rooted in the values of Islamic law. From the results of the study of the legality principle in Islamic law, this principle is not rigid / absolud but there is flexibility for certain crimes. Fluidity principles are, among others, lies in:

In serious criminal acts and greatly affect the security and peace of the community, namely the crime of hudud (punishment stipulated limits by nas) and retribution (retribution in kind), the principle of legality are carefully formulated to include one by one penalty for each crime. Besides the types of crime and criminal threat already established with certainty in the law, so that for the crime of hudud and retribution judge will not create new types or criminal sanctions.

- On the criminal offense that is not so dangerous, that the criminal act takzir in general, syarak give no leeway to formulate each crime. For the crime of takzir syarak only gives a measure that the act is an act which according to the Shari'a is a disgraceful act, law only makes a nas (provision) general may include any acts that interfere with the interests and the peace of the community, in addition to those already defined in the crime of hudud and retribution. substantive formulated in the National Criminal Code.

Embodiments of the implementation of the idea of a balance based on the values of wisdom religious, in terms of the principle of legality is seen as a source of law in setting can dipidananya an act, then the formulation should be based on a balance between resources formal law / principle of legality formal (by the law) and the source of unwritten law / legality materiel is to give place to the law of the living / unwritten law. The principle of the legality of the material as a source of positive law limited. This means that there are signs / criteria that an act be regarded as a criminal act or not if it posed a "danger / dlarar" and against the "goodness / benefit" for human life.

It so because according to religious moral values that the principle of legality according to Islamic law does not rigidly defined only based on the written law alone, but also by the unwritten law.

According to Islamic law the receipt of legal source material, especially in offenses takzir is a form of implementation of the principle of "dlarar" and "beneficiaries". That is an act regarded as a criminal act or not, if such actions posed

"dlarar / danger" and contrary to "benefit" for the benefit of human life both individuals and communities.

In criminal act takzir measure to criminalize the act is the nature of "dlarar / danger / mafsadah" and "benefit", if indeed such act is an act which may be harmful and contrary to the values of benefit / good of the community, it can be used as a criminal act, and vice versa.

The criteria for the legal source material is placed on the basic principles "dafurdhorori makdamun 'ala jalbilmanfa'ah" meaning "Refuse vices must take precedence over bringing benefits".

The formulation of the principle of legality which accommodates the source of an unwritten law in the reconstruction of the Criminal Code / WvS, also delivered by Hans de Doelder a professor of criminal law from Erasmus University Rotterdam, the Netherlands, found the source of law or a foundation of legality to declare an act as a criminal offense should only based on statutory law alone, in order to ensure Human Rights especially for the perpetrator.

Indeed there while saying that that by recognizing the unwritten law as a source of law is a setback and is contrary to the principle of legality, which is a safeguard for the protection, respect and promotion of human rights, which calls for restrictions on condemnation against someone.

From the research, the authors do not agree if it is stated that the recognition of the legal sources of unwritten then deteriorates and there is no protection, respect and uphold human rights.

According to the authors that the law does not tertulisapun no legal certainty because when an act is considered as misconduct by the community and should be sanctioned, then surely the public opinion is correct because such actions are not in accordance with moral values and the value of common decency of a society. This means that it is society which constructs that such actions as misconduct and should be sanctioned. So in accordance with the values of philosophy, sociological values of a given society where the laws are made and will be implemented.

Based on the explanation above, in accordance with the opinion of Barda Nawawi Arief, that the reconstruction of the criminal law when viewed from the aspect of the value of the problem lies in "problem value concept or basic idea that animates / underlying norms of substantive criminal law itself.

### C. Conclusion

Based on the explanation above, in reconstructing the principle of legality in the Criminal Code, should be the basis for criminalizing the act or a source of legislation legalizing the act is not only derived from the written law, but also a source of unwritten law or law in the society as a foundation material in criminalizing acts. The cornerstone dijadikannya customary law / law who live in the community as a source of law in setting dipidananya actions can be based on assessment of the aspects of the values of religious wisdom, so that the principle of legality accommodate formal legal source and a source of law can dipidananya materiel to establish an action. The criteria for substantive legal sources according to the assessment of the value placed on the religious wisdom of the basic principles "Refused vices must take precedence over bringing benefits".

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