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# Legis Corruption in Contemporary Indonesia: Learning from Legal History of Adolf Hitler's Regime in Germany 1941-1944

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**ABSTRACT**

Law is made with the purpose of creating justice in common life. To materialize this purpose, law-making bodies strive to adopt the principles of justice into state legislations, in principle the law in this sense is positive law. this article aims to analyst positive law can bring about justice in human life. The results showed that legal history in Germany when Adolf Hitler came to power shows that power can create laws in order to achieve its political. The same case occurs in contemporary Indonesia, where law without justice continues to be made because lawmakers are deceived by extralegal factors, whether it is due to evil intentions, being trapped in the past or certain political compromises.



## Introduction

Since the law entered the era of written law, being one of the characteristics of modern law, the legal stage then changed into one of the written laws. Furthermore, the written law went hand in hand with modern state domination emerging in the 18th century. Ever since, all institutions, including legal institutions, were dominated by the state. This state domination made all the institutions have the quality of a state (Mustaghfirin, 2011). This is also the case with law-making, as only government institutions such as DPR (People's Legislative Assembly) and the government have competence to make written law. The issue is that DPR and the government (the president and the ministers) is a group of people with the background of politicians having personal or group interest which may lead to the law-making which is in conflict with the objectives, goals and event constitution of the state. Facts suggest that the encounter of interests in DPR has more frequently created laws which are not in line with the constitution. This type of positive law has declined in its function serving merely as the servant of politics with all its follow-up consequences. The law is perceived merely as a line of rigid and cold articles, being the works of the political elite rich with rigid procedures, giving the impression as the required single justification for all law-related activities. The law has been directed more towards materialization of the

interest of the national elite making the state not to go in line with its goals as set out in the preamble to the constitution.

Since Indonesian independence, one *de facto* ruler to another only created some legal apparatuses to legalize the power-based actions which actually violated the principles of justice, democracy, human rights and also the environment. With one of the slogans "for the sake of development" people's land could also be seized without prior dialog or fair compensation. Citizens' liberty has been restricted with excuse that it was not in line with Pancasila democracy. A number of laws or presidential decrees were issued to seize, maintain and expand power.

In the history of law practice in the states, *legis corruptio* (corruption of law) as described above is not something new. Nazi in Germany, for example, created law to loot riches and to kill the Jews. The law practices in Germany under Nazi were indeed contrary to the principles of justice, but they were still complied with since they had been stipulated by the ruler according to legitimate procedures.

It is clear that the experience in German Nazi can no longer be accommodated in the framework of contemporary legal positivism. If the laws serve as a means of oppression legitimizing injustice and crime, then the legal principle will be that what is made as a law negates the purpose of the law itself. However, the way of practicing law in German Nazi needs to be presented as law history and it also serves as a comparison to review the contemporary Indonesian legal politics.

# Results and Discussion

## Legal Politics Experience under Adolf Hitler 1941-1944

According to the sub-heading, the object of research as a comparison with Indonesian contemporary legal politics is the law practice experience in Germany, specifically the legal products created by Adolf Hitler's regime to legalize the acts of massacre or deprivation of rights of the Jews. Just like fascist power in general, political decisions of Adolf Hitler in this case have legitimacy in making legal norm with forcing power to be complied with. In this context, the substance of law is politically determined, thus in turn forcing the targetted parties to do or not to do something according to the arbitrary will. This law is then intended for those becoming the objects that agree or disagree with the law rather than those creating or translating such provisions.

The mode applied by Adolf Hitler's regime filled the history with it various forms. The law practice history of a state like Germany under the rule of Adolf Hitler can be studied by the collected statutes, declarations, legal opinions and legal experts' arguments as well as documents and speeches related to how the ruler at that time handled or faced the circles or groups whose actions or thoughts were deemed inconsistent with their politics.

Under the German Nazi rule, principles of justice were faked by creating slogans extracted from the people's spirit of life. Hence, the slogan *Blut und Boden* (blood and land) from Nazi in Germany was arranged to legalize the massacre of six million Jews. The slogan was just a way to change the meaning of any unfair act so that it could be considered fair. That was

legalization of crime. The events gave rise to an awareness among legal experts in Post-World War II Germany that although *deutscher Rechtspositivismus* (German legal positivism) guaranteed legal certainty (*Rechtssicherheit*), which was important to the state, it also had strategic weakness (Jegalus, 2011).

Adolf Hitler's regime used law to legitimize all its actions which the people might think evil and criminal. This was why, for example, an act was passed allowing for the state to seize the property of Jews just like that. Not only was this act unfair but it also constituted a criminal act. However, since the act was passed by the authorities and was stipuled according to the applicable legal procedures, the anti-Jew act was still perceived as an applicable act no matter how evil it really was. This legal characteristic is in line with legal positivism requiring that the mandatory nature of law is determined by whether or not it has been legally stipulated according to the applicable legal regulations, regardless of its substance. Therefore, for legal positivism, fairness is merely a regulatory element rather than a constitutive element of law so that an unfair regulation is still legal despite its evil substance (Sudiyana & Suswoto, 2018).

A serious issue during the post-World War II period. This took place during the trial of ex-German Nazi military. The most famous case was Adolf Eichmann's trial in 1961. Eichmann was called "M*aster of Death*" by millions of Jews in 1944 at concentration camps. After the war, he fleed to Argentine but he was then captured and abducted to Israel for trial on his cruelty during the war. In the trial, Eichmann was charged with committing "crimes agaist humanity". Eichmann pleaded: "How can I be blamed for committing a crime when at that time the applicable law (positive law) required me to do all of it?" (Kleden, 2020).

Philosophically, Eichmann questioned the autonomy of law. This question was also upheld by H.L.A Hart when debating Lon Fuller on the trial of Eichmann, cs. The Hart and Lon Fuller debat focused on a number of cases of Nazi collaborators in Germany after the World War II. The central issue in the post-war German courts was whether they could accept the pleadings based on legal sovereignty such as Eichmann's pleading? For Hart, holding the opinion that compliance with legal certainty meant that the law applicable during Hitler's regime before the war was still valid. The earlier written law, even if it was immoral, still had legal force and had to be followed by the courts thereafter until it was replaced. The positivist postition presented by Hart claimed that the principle of legal sovereignty applicable during the transitional decision-making had to continue just like in normal times with full force of the existing written law (Parera & Tanya, 2018).

Hart's position was challenged by Lon Fuller. For Fuller, legal sovereignty did not lie in the virtue of legality but, rather, in the virtue of human dignity. Thus, according to Fuller, compliance with legal sovereignty meant breaking awai from the old legal regime of Hitler. Therefore, the Nazi collaborators in Germany had to be punished based on a new legal regime, namely, respect for humanity. Fuller tried to get rid of contrasting concepts between law and justice by offering a procedural view of substantive law.

## German Nazi and Legal Autonomy

In the domain of philosophy, the legal autonomy defended by Hart and questioned by Lon Fuller above is found in discourse of Legal Positivism. In summary, Legal Positivism

adheres to two basic principles, namely: first, only positive law is law; second, although the substance of law is rejected, for example, for being against moral principles, the law is still applicable. In other words, any statute formed in accordance with the provisions of law shall be in force and valid, regardless of its substance. Therefore, whether or not a norm is applicable as law does not depend on the substance but rather, on the enactment of the norm in accordance with the applicable legislative procedures. As formulated by Hobbes: "Authority not truth makes law" (Suseno, 2016).

Hart's legal positivism emphasizes legal autonomy. Legal sovereignty is over human sovereignty, and it identifies law as statutes rather than justice. For Hart, absolute truth has been formulated by the legislative body in full in statutes so that implementing the statutes in strict terms is the same with realizing truth in an absolute manner. Based on such legal thought, legal interpretation becomes a taboo. There is no and there shall not be any interpretation; that which exists is the application of law (statutes). Indeed, Hart realized the natural weakness of human beings and their law, but he did not give space for law enforcement apparatuses to act beyond the framework of the laws and regulations, except when facing hard cases (Rahardjo, 2010). For Hart, interpretation is in the hands of the legislative because the law-making already has its interpretation in it. Here, certainty is so favored, namely that law can control repression and keep its own integrity.

The praxis of modern law is preoccupied more with positive forms, formats and it loses its substance as something valuable such as morals and truth. To describe modern law, we can depict it as something changing from the business of value into the business of form. The change from value, ideas into forms has a great impact on the way humans implements law in the world. The world of law bifurcates because talking about law no longer concerns only with justice and truth but with forms, formats, procedures, and so on.

For the interest of providing the guarantee of legal certainty, Legal Positivism puts away philosophy from its speculative workings and identifies law with statutory legislations. Only by identifying law with statutory legislations will legal certainty be reached because people will know for sure what they may do and what they may not. This thought implies sharp separation between law and morals. Law is complied with not for being considered good or fair but because it has been stipulated by the legitimate ruler.

This position implies sharp separation between law and morality. Law is merely conceptualized as statutes factually stipulated by the state ruler through legitimate procedures. Also, its validity is not measured by whether the legal substance is good or bad but by whether or not it has been stipulated by the legitimate authorities. Karl Begbohm consistently claimed that the applicability of"even the most evil law, insofar as it is made in accordance with formal provisions" must be recognized (Suseno, 2016).

## Legis Corruption in Contemporary Indonesia and Its Impacts

The history of law practices in Germany during Adolf Hitler's era gives a description that justice does not always become the substance of law. The making of positive law may have stipulated the interests of certain groups as the substance of law. In Indonesia, a number of legislative products are found to have in certain terms substantial similarity with the law produced by Adolf Hitler regime in Germany.

According to Adrianus Meilala, the ruling regime creates subversion laws, emergency situation laws, state secret laws and other laws allowing for the monitoring of the political behaviours of non-government circles and the availability of space for the apparatuses to criminalize and process them in a (generally) extra-legal manner. Such sanctioning is fully based on the supposition that a political act has threatened the running of the state.

The lines of statutes mentioned by Adrianus above gives space to the ruler to do whatever fits their interests. In this respect, law is nothing than the means of crime for the regime to seize the rights of citizens arbitrarily without fair and transparent trial. The law with such characteristics is without the guidance of idealism and can be used for evil purposes and goals which injure human honor and dignity. Karl Marx stamps law as *an evil thing* precisely because it is managed in the emptiness of idealism and "chooses" to become the servant of capital (Tanya, 2011).

Regimes change, law minus justice continues to be produced by the legislative and the government. After Soekarno was overturned, the New Order regime issued the Forestry law for the purpose of evoking the application of the Land Reform Principles Law in a limited manner and to give concessions to certain chosen corporations to take over forest management. In this connection, Ward Berenschot stated that:

forestry law reintroduced the *domein verklaring* by designating 143 million hectares (almost 75 per cent of Indonesia's territory) as forest land. President Suharto decreed that this land was controlled by the state (via the Ministry of Forestry) and could not be owned by Indonesian citizens. Much like its colonial predecessor, the Indonesian state is using this control over land to award land concessions to companies. The government's data shows that until 2017, 95.76 per cent of forest concessions were allocated for corporations, while only 4.14 per cent were under community management. These concessions give companies the legal right to take the land away from local people living and working on that land (Kleden, 2020).

With the forestry law, the state had the legal basis for controlling people's land and was proven to give concessions to corporations for mining, oil palm or similar interests leading to deforestation and other ecosystem crises. It turned out that these corporate activities, in some study results, endangered a great variety of flora and fauna in Indonesia. It was reflected in various existing ecosystems: tropical forest, mangrove, swamp and peatland, freshwater lake and marine coral reef. Such variety is found in 54 national parks in Indonesia, each representing a characteristic ecosystem. In addition to national parks, Indonesia also has hundreds of nature and wildlife reserves as well as community forest parks. They are, however, threatened due to forest concessions including the food estate program launched by Joko Widodo administration. The "*food estate*" projects required about 770,000 hectares in Central Kalimantan, 2 million hectares in Papua and 32,000 hectares in North Sumatra. In addition, other similar plans have also been announced in South Sumatra and East Kalimantan as well as other regions. The implication will be relatively large deforestation (Greenpeace et al., 2021).

The impacts of deforestations are seizure of people's land in the name of laws, human rights violations, extinction of a variety of flora and fauna and even disembodiment of customary

communities from their sociological and anthropological roots leading to cultural genocide. In fact, external social forces have a great impact on the operation of the law which begins with the stage of law-making and its application. Social forces start working at the law-making stage and continue to penetrate and affect every stage of law enforcement.

The studies of the Research and Development (Litbang) department of the Corruption Eradication Commission (Komisi Pemberantasan Korupsi (KPK)) a number of Finance and Development Supervisory Agencies (BPKP) across Indonesia, the National Development Planning (Bappenas), Geospatial Information Agency (BIG), Directorate General of Taxation, Oil and Gas, Directorate General of Mineral and Coal, Directorate General of Spatial Layout Planning, National Land Agency (BPN), Ministry of Finance and pro-people activists from a number universities and NGOs on forest, oil and gas and mineral and coal have findings of the dirtiness of the state bureaucracy. In general, such dark potrait is the existence of *coruption by design*, through the making of laws and regulations or revision of laws, Amended State Budget/Regional Budget (APBN-P/APBD-P) as the means of committing criminal acts of corruption (TPK). The impacts are massive, systemic, structural and multidimentional (Muqoddas & Busro, 2015).

The ideal is that las must be made by competent people or entities responsible for collective life. They shall also act to be responsible for public welfare. Based on their position and duties, they are obliged to make law oriented toward public welfare. However, people having the position in such law-making entities create corrupt law (corruption of law) as described above so that the initially law made to serve human beings and humanity has become distorted.

When traced properly, we will find at least three fundamental issues in the law-making ultimately leading to injustice in its implementation and unresponsiveness to the needs of society. Nonet and Selznick call this an infertile law (Rahardjo, 2010). And like a myth, every day we see deception in it, so said Wiliam Chambliss and Robert Seidman. According to Mahfud MD, the three issues are, among other things, as follows (Sudiyana & Suswoto, 2018):

a. Incompetence of those making regulations. This is usually due to the failure in reading the relationships among laws and regulations. In this case, the failure of those making responsive regulations is purely due to their incompetence and lack or motivation or due to bad intention.
b. Exchanges of interests among the parties involved in drafting laws and regulations. These practices usually take place in the legislative bodies.
c. Bad intention trades Articles. These have happened in the drafting of both laws and regional regulations. As we know it, a number of regulation drafters have been found guilty by the court for cases of trading articles in regulations.

Referring to what was said by Mahfud MD above, the issues can be compressed into two issues. Firstly, unresponsive laws have been created purely due to the incompetence of the legislating body in reading the correlations between one legal principle and another leading to overlapings when applied. Secondly, bad intention of lawmakers. In a number of laws

as described above, the lawmakers have allegedly designed laws and regulations for their own or certain groups' interests.

## Legal Politics: Between Oligarchic Interests and Justice

The discussion above can answer the question why lawmakers create law which is not pro-people and justice. The efforts of creating just laws in important sectors such as the laws on the Corruption Eradication Commission, oil and gas, mineral and coal, land affairs and others have not been successful so far. We need to admit that there is a structural problem: the fundamental reason why extra-legal forces such as pragmatic political compromise and oligarchy smuggle their interest and succeed in influencing the lawmakers to include their interests into legal stipulations.

Many observers try to provide frameworks for analyzing Indonesian post-New Order politics. One of the most influential work of scholars is Robison & Hadiz' "Reorganizing Power" (Mangesti & Tanya, 2014). Both prominent scholars state that although Indonesia has been free from the snare of authoritarianism, it cannot be free from the snare of oligarchy which has indeed been woven in Indonesian political structure for so long. Oligarchy which lives on authoritarian government during democratic era transforms into an oligarchy of money politics, where networks of patronage and allocation of power and public wealth gain a new room in political parties and the parliament. In the beginning, they enter as reformers but then they are drowning into the union of predatory capitalism and democratic politics.

Hadiz further details this view not only in national politics but also in local politics. He is of the opinion that local oligarchy has hijacked democratic institutions such as parties, general elections and the parliament. They are able to maintain their power because they can control the sources of wealth of the state by which they buy votes in general elections. In addition, they also use violence by semi-formal armed forces allowing them to exercise physical intimidations against their opponents. Not only is the opinion on the existence of oligarchy during an era of authoritarian government popular but it is also dominant in the analysis of post-New Order politics (Luthan, 2000).

Jeffrey Winters suggests that oligarchy is a small number of people having power as they have flexible and versatile money. Money is useful to buy goods and services, but it also has a special status as a source of power. The formula is quite simple; people who have a lot of money also have much political power because political goods and service have their prices and costs. Wealth is not always used for political power, as it is up to the oligarchs possessing such wealth. Thus, money money has the capacity to direct or distort politics. In addition, such capacity can be used both in a democratic system and in a regime of military-dictactorship like the new order. The oligarchs are actors controlling the concentration of personal wealth in massive manner which can be used for purposes directly related to politics.

Oligarchy plays a role in making the laws related to the natural resource sectors such as oil, gas, coal, customary communities, forestry and other productive sectors related to the livelhood of the people at large which should have been managed by the state for the prosperity of the people. The encounter of oligarchy and power distorts law-making in the

wrong direction. During the New Order era, for example, the ruling elite accumulated their wealth by cooperating with domestic and foreign timber entrepreneurs. Since the fall of Soeharto, frequent corruption cases showed many political elites and bureaucrats who made use of state authority to grant concessions, in order to gain a lot of money. Not a few elect regents, governors or members of DPR use their influence to direct concessions for corporations belonging to family members or friends. Many surveys on the sources of wealth of the ruling elite represent the importance of the state's control of land for the elites in Indonesia: the wealth of many political elites come from corporations extracting natural resources and oil palm which depend on concessions granted by the state. For Thomas Aquinas, the model of cooperation between the ruler and oligarchs creating laws containing the substance which is contrary to justice like this is called legis corruptio.

Legis corruptio (corruption of the law) at the legislation level becomes the gateway to the legalization of crime as described above. Ethically, this is unjustifiable for any reason in a civilized state. The law must regulate (by drafting legislations) to make it difficult to control natural resources in an unbalanced manner. The first effective step is to create law for justice and people's welfare, which is the only reason for existing as an independent state. Therefore, the authorities are required to create just laws for citizens. For the legality of law to be in line with the principles of justice and propriety, the legality of power must also be supported by ethical legitimacy. Ethical legitimacy of power leans on the consent of the community to power. From the ethical perspective, power is stated to have legitimacy if it is used for the benefit of and justice among the community (Luthan, 2000). Indeed, that is what law is created for.

Law is created to realize people's welfare rather than the welfare of a group of people. Here, law is merely a means or instrument to create the grace of well-being of the people. In contemporary studies, a similar view is presented by the maestro of progressive law, Satjipto Rahardjo. The basic thesis of progressive law is that “law constitutes a part of human beings and is created for human beings. Since human beings are dynamic, ever-changing and developing, law shall also change. The construction of thoughts in progressive law beckons that “law shall not be viewed as something central in law practices but rather, human beings are at the central point around which the law rotates”. In other words, “the law rotates around human beings as its center”. Therefore, the law is solely for the well-being and goodness of human beings (Rahardjo, 2009). In this respect, Thomas Aquinas once proposed his teaching on law as the product of common sense rather than the arbitrary will (Bernard L. Tanya, 2011). This distinction is important for preventing the penetration of interests, taste and greed of the lawmakers into the legal domain. In Indonesia, the chance for such penetration is wide open since laws are political agreements between the People's Legislative Assembly (DPR) and the Government. Therefore, Aquinas' affirmation of law as the product of common sense is valuable for legal politics for DPR and the government for the purpose of stipulating laws and regulations, in order to make sure that the stipulations represent the interests of all the people and that the substance must be just for all the people as well. With common sense, we measure the quality of a regulation, justice of a law.

Disappearance of common sense in legal-political world has given rise to a lot of suffering when here and there instrumentation and manipulation of law are rampant-whether in the nuance of totalitarian law version of *Podgorecki* or repressive law version of Nonet-Selznick, or even law as an instrument of crime version of Roni Nitibaskara (Yovita A. Magesti et al., 2014). Legal closure to common sense gives rise to not only cries against injustice everywhere, but it also has indirectly conditioned the birth of cruel tragedy against humanity, such as Hitler's law ordering genocide of the Jews.

## Conclusion

In the history of law in Germany, Adolf Hitler once created law to slaughter the Jews. The experience of law practices in Germany bears a similarity with legal politics in contemporary Indonesia. A number of legislative products are alleged to have been the result of compromise between power and oligarchy which injures justice humanity. Positive law which constitutes the product of politics is indeed vulnerable to infiltration of certain interests of certain groups thus setting the condition for deprivation of human rights, environmental damage and inconsistency with the principles of a democratic rule-of-law state. This type of law is contrary to the principles of justice thus it is not law anymore but rather, a *legis corruptio* (corruption of law). Applying the law for desiring justice. In technical terms: justice is a constitutive element of any definition of law. Therefore, by losing the values of justice, law itself disappears. It is hereby clear that there is an absolute relationship between law and justice: When we name something law, at that time we think about justice as its consequence. Law is made for the interest of human beings, namely justice. Justice and truth become the symbol of humanity. Therefore, putting humanity as the start of law means the same with putting justice at the top of living with law. Humanity and justice become the ultimate purpose in living with law. Therefore, unjust law is considered not only as a bad law, but also not as a law at all.

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