SLEEI
Strengthening Legal Education in Eastern Indonesia

Working Paper 5

# Law in Local context

## *Why is it relevant in legal education to pay attention to the local context?*

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**Colophon**

This paper is part of a series of 5 original working papers of the project "Strengthening Legal Education in Eastern Indonesia" written as key reference material for training law lecturers in Eastern Indonesia. Each paper discusses one of the core themes of the SLEEI project and explains the issues that come up when enhancing law courses on content regarding the themes. The papers also contain practical suggestions on how to integrate the enhancements in existing courses. These five papers compose the core of what will become the SLEEI manual for strengthening legal education. They are co-authored by Indonesian and Dutch experts who cooperate in SLEEI. All the papers as well as more information on the project, events and updates can be found on the SLEEI websites in Bahasa[1] and English[2].

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Leaves of Eastern Indonesia's iconic lontar palm. Photo: J. Vel



[1] https://sleei.law.ugm.ac.id/
[2] https://www.universiteitleiden.nl/en/research/research-projects/law/strengthening-legal-education-in-eastern-indonesia
[3] https://www.nuffic.nl/en/subjects/institutional-collaboration-projects/

## Law in Local context : *Why is it relevant in legal education to pay attention to the local context?*

Although this question may sound self-evident, in Indonesian universities' Law Faculties it touches upon a sensitive debate between the proponents of legal positivism and those who prefer a socio-legal approach. The first group considers law as a science with its own legal research methods, while also in teaching no attention is paid to societal relevance of the legal issues discussed. Students are taught law in a way as if the law were a 'self-executing' machine: the positive law is supposed to govern each and every real life situation and to be perfectly logical and predictable, judges are always accessible and their judgments are always obeyed. The other side in this academic debate promotes socio-legal studies because 'in the context of Indonesia's plural legal system it is necessary for a complete and more solid understanding of how law operates in society'[4]. In this note we provide five different reasons why paying attention to local context is very relevant in legal education, and conclude with the consequences for teaching.

### 1. Inspiring examples

The first reason why it is relevant in teaching (in general) to pay attention to the local context is that teaching and attending the classes will be much more fun and effective. As has been explained in the note about interactive teaching methods, one way of making classes more inspiring is to include examples from local society that students find important. Abstract concepts, or general laws and rules receive meaning when applied to concrete situations that students know. Discussions about local cases are also an easy way to stimulate critical thinking when the teacher invites students to discuss or defend the arguments of the opponents in the case.

### 2. Critical thinking about what is 'just and fair"?

The second reason for paying attention to the local context is that it stimulates students to think about what locally is regarded as 'just and fair'. Laws and rules will only be effective in their implementation if they are socially accepted. In Indonesia local perceptions about 'just and fair' vary from island to island, from one local area to the other, because of the existence of specific local mixes of state law, customary law and religious law. Which rules apply most has been an age-old dilemma in dispute settlement specifically in situations of legal pluralism.

> Imagine, for example, a case of a dispute between an immigrant in Timor who borrowed land for cultivating food crops 20 years ago with a representative of the original land owning clan. The dispute arose after the immigrant received compensation payments from a plantation company that took the land from the immigrant. Who is entitled to receiving compensation?

[4] Herlambang Wiratraman (2019) "The challenges of teaching comparative law and socio-legal studies at Indonesia's Law Schools" Asian Journal of Comparative Law, 14, p 229-244. (p 235)

> Who has the strongest claims on the land, based on which arguments? What would be fair? Why?

In this case there is a gap between the historical arguments concerning communal land according to customary law, the use rights of the tiller according to local custom or state law, and the claims that the plantation company can make based on state law. What would be the basis for a judge in this situation for taking his decision? A case like this example could fit in a course on land law, and also in a course on customary law, or in a course on the legal aspects of regional economic development.

### 3. Dealing with legal pluralism

In eastern Indonesia customary law is particularly strong on all islands. Additionally, Islamic law is very important on Lombok and other islands with a majority Islamic population. Learning to deal with legal pluralism is therefore the third reason why paying attention to local context is so relevant in legal education. The core of that learning is understanding the relationship between the national legal system and the local norms and rules, and the difference in character and 'legal reasoning' of each of the legal systems that constitute the local mix. The national legal system is as an adapted version of a global law system that originally was introduced by the colonial rulers. The main principle is that the legal system is about the relationship between citizens and between citizens and the state. This means that the rights of individuals are central. By contrast, the main principle in adat is that people are regarded as members of a certain group or community (relational identity) and have duties that correspond with their positions in the system. Despite the fact that this, philosophically, is a large contradiction, there somehow always seems to be a solution available within this plural legal repertoire. Harding argues that the legal system in Indonesia as it applies in practice is not the coexistence of two or three conflicting normative orders, but instead a hybrid system (Harding 2002, 45)

All participants in the SLEEI program will be able to come up with examples of legal pluralism from their own areas. Many cases will concern family law because 'the more personal law is, the more it resists foreign influence'.[5] In eastern Indonesia for example, weddings, funerals and issues of inheritance are locally regulated by adat law. Also in the field of environmental and natural resource law, legal pluralism is prominent. Next is an example about legal pluralism concerning coastal areas.

> The local ethics, customs and culture of the Bajo people have always been an essential pillar for survival guiding them on how to live in harmony with the ocean as their main source of livelihood. The Bajo use traditional equipment that does not damage sea waters and coral reefs. They only catch mature fish, so that small fish are given the opportunity to mature and can breed. One of their customary rules implies a ban on throwing waste into the sea. For example, when out on the see they cook a meal, the water used for washing rice will be stored on the boat and discharged after landing. Likewise with charcoal from cooking wood, kitchen ash, orange peel, chili water and ginger water. Bajo fishermen honor these waste restrictions because they believe it will protect them from threats like strong winds, large waves and sea ghosts which in turn can affect the catch. Now their local laws are confronted with national

[5] Harding, A. (2002). Global doctrine and local knowledge: Law in South East Asia. International & Comparative Law Quarterly, 51(1), 35-53.

laws that allow the privatization of coastal and marine resources. Those project development companies damage coral reefs and coastal ecosystems, while polluting the oceans.

Fortunately, numerous national laws related to natural resources have adopted indigenous peoples laws, offering potential for both protecting the legal position of indigenous communities and their eco systems. With all the examples of legal pluralism that are locally available we need to consider: in which courses of the law curriculum would they fit? What does the case exemplify within the theme of the module?

### 4. Local legal consequences of increasing global connections

A fourth reason why it is important to pay attention to the local context is the increasing force and pace of globalization in Eastern Indonesia. Globalization affects the legal system in Indonesia by creating new types of problems that need a response from local legal actors. Two bodies of law are particularly prominent in this respect: investment law with its derived economic legislation, and international human rights law. What the two subjects have in common is that they turn Indonesia – and the local areas within Indonesia – into parts of the world, where universal mechanisms rule.

> An example of how the consequences of economic globalization reach eastern Indonesia is described in an article on human trafficking from the islands Sumba and Timor.[6] The article shows how international labour migration has turned women and children from eastern Indonesia into "vulnerable citizens who are treated as a commodity in a free-movement framework of the modern laissez-faire economics". While eastern Indonesia in the past was known as a source in slave trade the current developments indicate that 'the idea of slavery as commodification of the human being has managed to find a back entrance into modern-day Indonesian labour market' (D.E. Li 2018, 258-260).

If this example would be discussed in law courses at the Indonesian Law Schools, what would be the main legal questions to address? In which thematic course? What would be the skills that law graduates have to acquire to be able to act as legal adviser to the Ministry of Labour?

International Human Rights law is another field in which the tension between local and global law is particularly prominent, even in family law issues.

> Hoko Horii's article[7] examines how the existence of multiple legal orders can impact the defense of human rights, by discussing how state legal agents in Bali navigate state law through local concerns and adat (customary) law in cases dealing with teenage pregnancy outside of marriage. In such "emergencies" where the morality of the community is at stake, families, adat authorities and state agents collaborate to find a way to fit these emergency situations into the locally accepted normative system, resulting in what international institutions call "child marriage". In assessing the interaction between state law and customary law, this study offers a basis for discussing how legal pluralism should be addressed in the realization of human rights.

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[6] Dominggus Elcid Li (2018) 'Globalisation, the role of the state and the rule of law: human trafficking in eastern Indonesia', in Patunru, A. A., Pangestu, M., & Basri, M. C. (Eds.). *Indonesia in the New World: Globalisation, Nationalism and Sovereignty*. ISEAS-Yusof Ishak Institute. P 243-264.

[7] Horii, H. (2019). Pluralistic legal system, pluralistic human rights?: teenage pregnancy, child marriage and legal institutions in Bali. *The Journal of Legal Pluralism and Unofficial Law*, 51(3), 292-319.

Human rights implementation can only succeed if there is a way to come to terms with the variety in social structure, power relations and governance mechanisms that locally exists.[8]

### 5. Preparing students for legal practice

It is common that law students are shocked or seem not ready when they enter real legal practice. This situation is unsurprising, as practicing law is more complicated than theories which have been learned in legal education. They face not merely complex legal systems, but also will experience how politics, social and cultural contexts and powerful actors influence law practice. Moreover, increasing technological development, artificial intelligence and social media add factors that locally influence legal practice. Therefore, law clinics, problem based learning as a method, as well as allowing students to do internships would benefit increasing their critical thinking and prepare them for resolving complex legal problems.

## Four options for teaching law in context

The first is to integrate socio-legal aspects into legal analysis. Law uses concepts which require interpretation that is not only grounded in law, but also in assessments of practice. An example is how to determine what is in 'the best interest of the child'. Jurists can use their 'common sense' to interpret such norms, but to do this in a proper way they need to be able to analyze social considerations and be able to evaluate expert testimony.

The second is to have students analyze selected cases where judges do or do not take into account the context of the case, and discuss the difference. Above we already have included several examples of such cases. Discussions in class should center around well prepared good questions: Why did the judge take such a strange decision? How can we explain this? And what are the different interests involved here?

The third option is to have students think about a locally relevant societal problem and to draft a regional regulation to address it. This will require them to go through different steps that will ultimately define the effectiveness of the regulation in practice – in other words, it should be legally sound, but also consider enforcement, the relation with other normative systems, etc.

The fourth option for integrating attention local context into the law curriculum is by creating a separate course on socio-legal research, or to improve the one that already exists.

[8] Further reading in : Merry, Sally Engle (2009) Human Rights and Gender Violence: Translating International Law into Local Justice, Chicago and London: University of Chicago Press.