

## Electoral Regulation in Indonesia: Is It Modern Law?

Sholahuddin Al-Fatih

Faculty of Law, Universitas Muhammadiyah Malang, Indonesia

Doctoral Student, Faculty of Law, Universitas Brawijaya, Malang

✉ sholahuddin.alfath@gmail.com



### ARTICLE INFORMATION

#### *History of Article*

Submitted : August 15, 2020

Revised : September 25, 2020

Accepted : October 10, 2020

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#### *Conflicting Interest Statement*

All authors declared that there is no potential conflict of interest on publishing this article.

#### *Funding*

None

#### *Publishing Ethical and Originality Statement*

All authors declared that this work is original and has never been published in any form and in any media, nor is it under consideration for publication in any journal, and all sources cited in this work refer to the basic standards of scientific citation.

#### *Cite this article as:*

Al-Fatih, S. (2020). Electoral Regulation in Indonesia: Is It Modern Law?. *Unnes Law Journal*, 6(2), 205-216. <https://doi.org/10.15294/ulj.v6i2.41627>

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**ABSTRACT.** This research tries to discuss modern law and its character which is elaborated through a review of Law No. 7 of 2017 on Elections. Through conceptual and statutory approaches, this research tries to examine the concept of modern law based on the benchmarks of ideas put forward by Max Webber, Marc Galanter and Charles Sampford.. The results of this study show that it is quite difficult to categorize the law in Indonesia as a modern law. Nevertheless, this research successfully shows that one of indonesia's legal products, Namely Law No. 7 of 2017 on Elections, has fulfilled elements of modern law. This research is expected to help academics and legal practitioners to be able to dig deeper into the concept of modern law so that it can be applied in law in Indonesia with some adaptation and adjustment.

**KEYWORDS.** Law; Modern; Elections

# Electoral Regulation in Indonesia: Is It Modern Law?

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## Introduction

The law is not static, but dynamic follows the development and needs of society. Such dynamic legal developments often contradict both positivistic and indigenous<sup>2</sup> jurists that judge the law to be static and should not be influenced by other elements outside the law. In fact, in practice, the law is often influenced by elements outside the law. Thus, there was a difference in the flow of the state of law among the experts. This condition also started a debate between adherents of the state theory of law in *rechstaat* and *the rule of law*.

As is known, the idea of *rechstaat* developed in civil law *countries or* European Kontinental.<sup>3</sup> The source of written law is characteristic of the state of law in this concept of *rechstaat*, thus making the law stiff because it glorifies the principle of legality. If there are no rules governing it in writing, then the act cannot be punished. Very different teachings are shown in the concept of a rule of *law* state that develops in common law or Anglo Saxon

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\* University of Muhammadiyah Malang, Indonesia. Corresponding email: sholahuddin.alfath@gmail.com This research developed from my doctoral degree paperwork at University of Brawijaya, Malang. I would like to thank to Prof. Moh. Fadli and Prof. Achmad Sodiki who constantly give me a lot of invaluable comments, suggestions, and inputs for my paper works.

<sup>2</sup> Enju Juanda, "Konstruksi Hukum dan Metode Interpretasi Hukum," *Jurnal Ilmiah Galuh Justisi* Vol. 4 No. 2, 2017, pp. 168-180. <https://doi.org/10.25157/jigj.v4i2.322>.

<sup>3</sup> Jeffry Alexander Ch. Likadja, "Memaknai "Hukum Negara (Law Through State)" dalam Bingkai "Negara Hukum (Rechtstaat)," *Hasanuddin Law Review* Vol. 1 No. 1, 2015, pp. 75-86. <http://dx.doi.org/10.20956/halrev.v1i1.41>

countries.<sup>4</sup> The law is defined as a dynamic based on a judge's ruling or jurisprudence. Thus, the nature of the state of the law is very dynamic and not rigid.

Looking at both concepts of the legal state, if brought into the context of Indonesia, this country tends to lead to the concept of *rechtstaat*, a rigid and static practice of legal state based on written regulations. The concept of *rechtstaat* also enable the idea juxtaposed with it, namely *machtstaat* or state of power. Thus, until this second, Indonesia is very attached to the practice of the state of law in the concept of *rechtstaat*. The struggle and choice of the concept of the state of the law, memantik many pros and cons among legal experts. They want a dynamic reform of the law in Indonesia and to let go of this very rigid idea of *rechtstaat*. Until the birth of some ideas from Indonesian legal experts, such as the idea of Progressive Law by Satjipto Rahardjo.

Ideas and legal reforms continue to be volatile in Indonesia. Through a long road, Indonesia can finally be practiced regardless of legal rigidity and at a crossroads. The intersection of roads in this legal practice in Indonesia, ultimately makes our country's pattern of law lead to a mixed pattern. This mixed law at the crossroads tries to accommodate the character in both the law and the *rule of law*. So that we can see today, both the written rule of law mapun jurisprudence becomes our main legal source. Harmonization and synchronization are key so that the two sources of law do not overlap with authority or regulation. Also, efforts to revise or improve existing legal resources.

Changes or revisions to the source of the law are very likely to be made, because the law was indeed created to accommodate the needs of the community. Changes or revisions to the source of the law are one of several elements or characteristics of modern law. Modern law is theoretically widely embraced by today's legal states. For modern law can be considered a necessity of the times. Indonesia itself, the idea of the concept of modern law also color the formation and renewal of existing laws. Some of our legal products, intentional or insanity reflect the characteristics of modern law. Included in the preparation and substance contained in the regulation on the implementation of elections (elections).

The dynamics of organizing elections become the main color in election regulation. Almost every election organizing and periodization, the

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<sup>4</sup> Made Hendra Wijaya, "Karakteristik Konsep Negara Hukum Pancasila," *Jurnal Advokasi*, Vol. 5 No. 2, 2015, pp. 199–214. <http://jurnal.unmas.ac.id/index.php/advokasi/article/view/158>

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government always makes new regulations, either in the form of Laws, Government Regulations or regulations technically regulated in the KPU Regulation (PKPU). Through this study, the authors tried to characterize the character of modern law contained in election regulations. Election regulation used as a measuring instrument is Law No. 7 of 2017 on elections. The law is the legal norm for the 2019 elections. This research tries to open up the thought of academics and legal pre-devotees, especially those involved in electoral law, that modern law can be applied in all aspects of national and state life, including in the implementation of elections. The contribution of this research is expected to benefit the preparation of election regulations in the coming period, which is expected to be the default regulation and not very often changed every election.

## Method

This research is a type of legal research with conceptual approach and statutory approach (*statute approach*).<sup>5</sup> Legal research is a study that examines norms, related to overlap, emptiness and blurring of existing norms. The norm that is being reviewed in this study is related to modern law. The concept used as a measuring instrument is the concept of modern law, while the legislation/regulation used in this study is Law No. 7 of 2017 on Elections. Through prescriptive analysis,<sup>6</sup> the authors try to find new arguments related to the concept of modern law based on previous ideas presented by Max Webber, Marc Galenter and Charles Sampfrod. Some of the thoughts of Indonesian legal experts were also used as study materials.

## Characteristic of Modern Law

Based on historical records, the idea of modern law was first conveyed in the 18th to 19th centuries AD.<sup>7</sup> Some ideas about the concept of modern law were presented by legal experts, such as Max Webber, Marc Galenter and Charles Sampfrod. In this sub-topic, some modern legal characteristics

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<sup>5</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta, Kencana Prenada Media Group, 2014, p. 57.

<sup>6</sup> Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Jakarta, Kencana, 2017, pp. 35-36

<sup>7</sup> Rupi'i Amri, *Hukum Modern dan Pemikiran Hukum di Indonesia*, Semarang, 2008.

of these legal experts will be explained. First, the concept of modern law in Max Weber's view that has the following characteristics:<sup>89</sup>

1. The rule of law has a common normative and more abstract quality;
2. Modern law is a positive law, the result of conscious decisions taken;
3. Modern law is strengthened by the coercive power of the state in the form of deliberately granted sanctions, associated with the rule of law that can apply through the courts, in the event of a violation of those rules;
4. Modern law is systematic, its rules, its principles, its concepts and its different doctrines. As well as various parts of procedural law and material law, it relates to each other in such a way that it is a logical, rational normative system of thought, on the basis that all practical problems that are legal, in principle can be solved according to the law; and
5. Modern law is secular, its substance completely separated from religious and ethical considerations, meaning validity no longer depends on its moral truth and its procedures are exempt from magical meanings and have become rational attempts to achieve rational intent.

More specific and broad characteristics are described by Marc Galanter. According to Marc Galanter, the characteristics of modern law include:<sup>10</sup>

1. *Uniform*, consists of uniform regulations and is no different from its application. The application of this law is more likely to be territorial than personal. It means that the same rules can be applied to people of all religions, citizens of all ethnic groups, caste regions and factions;
2. *Transactional*; this legal system is more likely to divide the rights and obligations arising from transactions (agreements, crimes, errors, etc.) from the parties concerned than to collect them in an unchanged set caused by decisive things outside of certain transactions. The set of status rights and obligations as they exist, is based more on earthly functions or conditions than on differences of propriety or inherent sacramental honor;
3. *Universal*; special ways of setting are made to provide examples of a valid *benchmark* for its application in general rather than to demonstrate its unique and intuitive nature;

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<sup>8</sup> Nasarudin Umar, "Konsep Hukum Modern: Suatu Perspektif Keindonesian, Integrasi Sistem Hukum Agama dan Hukum Nasional," *Walisono: Jurnal Penelitian Sosial Keagamaan*, Vol. 22 No. 1, 2014, pp. 157-180. <http://dx.doi.org/10.21580/ws.22.1.263>.

<sup>9</sup> Yesmin Anwar and Adang, *Sistem Peradilan Pidana: Konsep, Komponen dan Pelaksanaannya dalam Penegakan Hukum di Indonesia*, Bandung, Widya Padjajaran, 2009, pp. 65-67.

<sup>10</sup> Teguh Prasetyo, *Ilmu Hukum dan Filsafat Hukum: Studi Pemikiran Ahli Hukum Sepanjang Zaman*, Yogyakarta, Pustaka Pelajar, 2007, pp. 88-90.

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4. *Hierarchical*; there is an orderly network of appeals and re-studies to ensure that local actions are in line with national benchmarks. This allows the system to be uniform and valid. Hierarchies with active supervision of such subordinate bodies should be distinguished from hierarchical systems by the disposal of functions to subordinate bodies *that have full* discretion in their jurisdiction;
5. *Bureaucratic*; to ensure uniformity, the system must apply impersonally by following the written procedures for each case and deciding each case in line with the written rules as well;
6. *Rational*; rules and procedures can be ascertained from written sources in ways that can be learned and conveyed in the absence of non-rational special talents;
7. *Professionalism*; the system is managed by people selected through requirements, who can be tested for this work. They are full professionals, instead of people who deal with it in the past;
8. *Intermediaries*; as the system becomes more technical and more complex, then there is a special professional intermediary (which is different from just a regular professional) between the court and the people who must deal with it;
9. *It can be revised*; there is no dead decree in the system of procedure. The system contains regular code for revising rules and procedures, to meet changing needs or to express fickle tendencies;
10. *Political oversight*; such a system is strongly associated with a country that has a monopoly over disputes in its region; and
11. *Distinction*; the task of obtaining the law and applying it to concrete cases is distinguished from other government functions in terms of personnel and engineering.

Unlike Weber and Galanter, Charles Sampford instead gave character or elements of modern law in outline only, namely laws whose substance conforms to the values of community justice.<sup>11</sup> From the 3 views on the characteristics of modern law, the author takes a common thread regarding the character of modern law which includes:

1. General and applicable to all;
2. Professionally made and coercive;
3. Systematic, structured and tiered;

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<sup>11</sup> Nasarudin Umar, *Op.Cit.*, pp. 67-68; Safik Faozi, "Hukum Modern di Tengah Perubahan Sosial di Era Global," In *Proceedings Seminar Nasional Multi Disiplin Ilmu, UNISBANK*, 2018, pp. 309-401, ISBN: 978-979-3649-99-3. <https://sendi.unisbank.ac.id/download/SENDIU-BUKU-2.pdf>

4. Changeable;
5. In accordance with the needs of the community.

## **Electoral Regulation in the Perspective of Modern Law**

Election regulations as stipulated in Law No. 7 of 2017, it is necessary to conduct in-depth research to determine whether or not to enter the category of modern law. Based on the meters of modern law that form the basis of the above thinking, the author wants to analyze the characterization of modern law in Law No. 7 of 2017 as explained on Table 1.

**Table 1. Characteristics of Modern Law in Law Number 7 of 2017**

No.	Modern Law Characters	Article or Paragraph
1.	applicable to all (universal)	Article 1 number 1 on the principle of organizing elections, namely LUBER and JURDIL (also contained in Article 2 and Article 3 on the general nature and open ity of elections)
2.	professionally made and coercive	Article 13 letter j on administrative sanctions imposed by the KPU (provisions on sanctions and the coercive nature of the Electoral Law are also contained in Article 99, Article 103, Article 106, Article 159 and more)
3.	systematic, structured and tiered	General explanation of the fifth paragraph
4.	changeable or amended	Article 414 on parliamentary thresholds, CHAPTER VII on election campaigns, Article 186 on the number of House seats and quite a lot more legal norms that can be changed
5.	in accordance with the needs of the community	Second book on election organizers

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Based on the findings of the above data, the regulatory character of the election has fulfilled the character of modern law, both the definition stipulated by the author and previously initiated by Max Weber, Marc Galanter and Charles Sampford. The character of election regulation, which is universal and for all, is reflected in Article 1 number 1 which is the principle of the election,<sup>12</sup> namely the principle of direct, general, free, secret, honest and fair. That is, Law No. 7 of 2017 is designed to apply to the public. Anyone has the right to vote and be elected. Thus, the first point regarding universality or general validity has been fulfilled in Law No. 7 of 2017.

The second character is professionally created, which is reflected in Law No. 7 of 2017 through a long process between the government and the House of Representatives in formulating it.<sup>13</sup> The professional definition here refers not to expertise, but to the seriousness in shaping the product of the law. A professionally formed modern legal product means that the legal product is made not while past or as a side job. If we look at the context of Indonesia, then the national legislation and program, can at least be a guarantee that the resulting legal product is indeed managed by them professionally. Similarly, the coercive nature of Law No. 7 of 2017, which has many articles, paragraphs, numbers or letters governing sanctions. The shape and variety of sanctions are also quite different types and ways of resolving them. The sanctions imposed in the implementation of elections also continue to increase from year to year of election organizing.<sup>14</sup>

Systematic, structured and tiered into the third character of modern law. The character is reflected textually in the general explanation of the fifth paragraph stating that the election was held smoothly, systematically and democratically. While related content in Law No. 7 of 2017, in order and structure has been created systematically, structured and tiered. The fourth character is changeable. The legal norms in Act No. 7 of 2017 are still open to amendments, especially regarding the size of the parliamentary

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<sup>12</sup> Akhmad Syhran, "Urgensi Kampanye Partai Politik Sebagai Sarana Pendidikan Politik dalam Perspektif Undang-Undang Pemilihan Umum", *Borneo Law Review* Vol. 3 No. 2, 2019, pp. 136–154. <https://doi.org/10.35334/bolrev.v3i2.1079>

<sup>13</sup> Eko Supriyanto, "Kedudukan Naskah Akademik dalam Penafsiran Ketentuan-Ketentuan dalam Undang-Undang", *Yuridika: Jurnal Ilmu Hukum*, Vol. 31 No. 3, 2017, pp. 384-400, <https://doi.org/10.20473/ydk.v31i3.4822>.

<sup>14</sup> Tengku Erwinsyahbana, "Pelanggaran Kode Etik dan Sanksi dalam Penyelenggaraan Pemilihan Umum", INA-Rxiv. February 4, 2018. doi: 10.31227/osf.io/gu59k.

threshold,<sup>1516</sup> campaign model,<sup>17</sup> conversion of votes to seats<sup>1819</sup> and so on. the latter character is in accordance with the needs of the community. In this context, the regulation on elections in Law No. 7 of 2017 has at least been in accordance with the needs of the public for the implementation of elections in 2019.

Based on the above description and explanation, in general Law No. 7 of 2017 can be categorized as modern law. However, there are some records related to the character of modern law that is less aligned with the national and state life in Indonesia, such as secular characters as well as common characters. Secularism is not in a state of sublime values of the nation's culture. While generally applicable, factually Law No. 7 of 2017 has restrictions in terms of contesting candidates, such as former convicted corruption cases prohibited from running, restrictions such as thresholds and so on. These restrictions are constitutionally unconstitutional for logical reasons and accountable. Thus, it is necessary to see that the character of modern law actually adjusts the condition of each legal society and cannot be made universally.

## Conclusion

In closing, based on the above descriptions and discussions, our legal product, in this case law No. 7 of 2017 on Elections, makes it possible to be referred to as a product of modern law. This is due to the characteristics of modern law that have been mentioned by legal experts such as Max Webber, Marc Galenter and Charles Sampford, the majority can already be fulfilled in Law No. 7 of 2017 on Elections.

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<sup>15</sup> Sholahuddin Al-Fatih, "Akibat Hukum Regulasi Tentang Threshold dalam Pemilihan Umum Legislatif dan Pemilihan Presiden," *Jurnal Yudisial*, Vol. 12 No. 1, 2019, pp. 17–38, <https://doi.org/10.29123/jy.v12i1.258>.

<sup>16</sup> Sholahuddin Al-Fatih, "Implementasi Parliametary Threshold dalam Pemilihan Anggota DPRD Provinsi dan DPRD Kabupaten/Kota," *Ahkam: Jurnal Hukum Islam*, Vol. 6 No. 2, 2018, pp. 363-338. <https://doi.org/10.21274/ahkam.2018.6.2.363-388>.

<sup>17</sup> Akhmad Syahrani, *Loc.Cit.*

<sup>18</sup> Zennis Helen, "Problematika Pembentukan Regulasi Pemilu dalam Mewujudkan Pemilu Serentak Yang Demokratis," *Ensiklopedia Social Review*, Vol. 2 No. 3, 2020, pp. 208–219. <https://doi.org/10.33559/esr.v2i3.562>

<sup>19</sup> Mouliza Kristhopher Donna Sweinstani, "Formula Konversi Suara Sainte Lague dan Dampaknya pada Sistem Kepartaian: Evaluasi Pemilu Serentak 2019," *Jurnal Penelitian Politik*, Vol. 16 No. 2, 2019, pp. 111–124. <https://doi.org/10.14203/jpp.v16i2.812>

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**About the Author(s)**

Sholahuddin Al Fatih is a lecturer at Faculty of Law, University of Muhammadiyah Malang, Indonesia. His main area of research is on Constitutional Law, Electoral Law, and Human Rights. Author also serving as Editor in Chief *Legality Jurnal Hukum* at Faculty of Law, Universitas Muhammadiyah Malang Indonesia. He obtained his Bachelor of Law degree from Universitas Brawijaya and Master of Law degree from Universitas Airlangga. Currently the author is pursuing a doctoral education at Doctoral Program Faculty of Law Universitas Brawijaya, Malang, Indonesia.