Paradigm of universalistic particularism to reform the Indonesian economic law in the framework of establishing the 2015 ASEAN Economic Community[1]

Lecturer **S.H., M. Hum. TAUFIQURRAHMAN,** PhD[2]

Abstract

A reality that cannot be denied that the laws of Indonesia applicable today, especially regarding international trade transactions, are less conducive to the changes. This can be understood because the law that in fact is a legacy of the Dutch colonial government has not been changed at all, but the dynamics of the community continue to run endlessly. Changes in society increasingly run quickly along with the progress achieved in the field of Science and Technology, particularly Information and Communication. Such an objective conditions will in turn lead to new legal issues in the community, namely the absence of law and the emergence of the legal gap between what the law in book with what the law in action. The increasingly complex legal issues in related to be the establishment of an ASEAN Economic Community (AEC) of 2015. The theory used to analyze is the Jeremy Bentham's Legislation Theory and the Theory of Legal Development from Mochtar Kusumaatmadja. While the research method applied is normative legal research methods with the statute, and conceptual approaches. The analysis shows that the convergence paradigm namely universalistic particularism is appropriate used in law reform in Indonesia. In addition, in order to provide a clear direction of Indonesian economic law reform efforts in the context of the establishment of 2015 AEC, it is necessary to establish the Indonesian Economic System in the national legislation.

Keywords : *Paradigm, Particularism, Convergence, economic law, Indonesia.*

JEL Classification: K20, K22, K33

1. Introduction

In to the results of the 9th Summit Association South East Asian Nations (ASEAN) 2003 in Bali, the ASEAN Heads of State adopted the Declaration of ASEAN Concord II, which approved the establishment of the ASEAN Community in the frame of ASEAN Vision 2020, namely the ASEAN Political-Security Community (APSC), ASEAN Economy Community (AEC) and the ASEAN Socio-Culture Community (ASCC). Special AEC, the ASEAN Heads of State in

[1] This article had been presented at the International Conference on Law, Policing and Justice held by the World Academy of Science, Engineering and Technology in Paris – France on 29-30 August 2013.

[2] S.H., M. Hum. Taufiqurrahman - Law Faculty of University of Wijaya Putra, Surabaya, Indonesia. In addition, he is also an Advocate at the TNA Law Office. He is active in some profession's organizations, namely Indonesian Bar Association and Indonesian Advocate Association of Surabaya. Now, he takeholds of a member of the Honorary Board of the East Java Province Indonesian Advocates Association.

the 12th ASEAN Summit 2007 in Cebu, Manila agreed to speed up implementation, the original 2020 to 2015.

This means that there is no longer the time shift within the next two years the people of Indonesia and ASEAN member countries more integrated into one large house named AEC. This in turn will result in an increase in the volume of international trade, both performed by between the domestic consumers with the foreign business actors, between the foreign consumers with the domestic business actors, as well as between the foreign business actors with the domestic business actors. As a result, the potential for legal disputes between the parties in international trade transactions can not be avoided. In the settlement of a dispute, the businesses of Indonesia is very open to the possibility of the injured party against a decision rendered by a court or arbitration body because of the determination of the applicable law refers to the force of foreign law.

Applicability of foreign law in international trade transactions in which one party from Indonesia could be possible due to several circumstances: (1) both parties have determined the choice of law clause that the foreign law as the applicable law; (2) is based on application of the principles of International Private Law (some of them are *Lex Loci Contractus, Lex Loci Solutionis, The Proper Law of the Contract, The Most Characteristic Connection, The Vested Rights, and The Governmental Analysis)* which refers to the foreign law; and (3) based on the power of force of *the United Nations Convention on Contracts for the International Sale of Goods* (CISG) that accommodates the "*opting-out*" in the determination of the applicable law as stipulated at Clause 6 of CISG as follows : *"The Parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of provisions"*. Whereas a clause of *"sphere of application and general provision"* of the CISG is stipulated at Clause 1 of the Convention as follows:[3]

> "(1) This Convention applies to contract of sale of goods between parties whose place of business are in different states:
> (a) when the States are Contracting States, or;
> (b) when the rules of private international law lead to the application of the law of a Contracting State.
> (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;
> (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention".

[3] *See* Taufiqurrahman, *Karakter Pilihan Hukum, Kajian tentang Lingkup Penerapan United Nations Convention on Contracts Sale of Goods (CISG) 1980 (Character of Law Choice, Study on Application Scope of United Nations Convention on Contracts Sale of Goods [CISG] 1980)*, PT. Bayumedia, Malang, 2010, pp. 230-240.

With this approach, if the parties do not specify the rejection of the CISG expressly in the contract is made, it automatically CSIG will serve as the applicable law of the place of business where one party or both parties is a country that has ratified the CISG or by the application of the principle of the principle of International Law that refers to the enactment of the law of a country which has ratified the CISG.

Especially for Indonesia, this establishment of the 2015 AEC should be given serious consideration, both as regards to the quality of human resources, quality of production and the quality of the law, particularly with regard to international trade transactions. Reviewing to the existence of Indonesian laws in economics and international trade transaction can not be delayed. This is understandable because of the positive law of Indonesia, particularly relating to commercial transactions, both domestic and international, is largely a legacy of the Dutch government about 165 years old.

The existence of Indonesian economic law in the field of international trade is considered to be not in accordance with the development and advancement in the field of Information & Communication Technology (ICT). Especially with the various model laws and international conventions in the field of international trade generated by international organizations, the existence of the Indonesian economic law in the field of international trade will be increasingly marginalized in international trade traffic. Therefore, this is a quite naturally when the foreign businessmen have a tendency to shy to choose Indonesian law because they feel less comfortable when contracts are governed and construed in accordance with the Indonesian law[4]. The businessmen prefer to apply laws which they consider a more neutral that can accommodate the interests of all parties in a transaction.

Indonesian economic law reform must be done conceptually. He is not just patchwork and sporadic that only meet immediate needs, but actually based on the reality and needs, both internal and external dimensions of the long-term oriented. Therefore, the paradigm as a reference point in Indonesian economy law reform in which it responds to the current development and challenges facing in future have a very significant meaning.

Based on the objective conditions as described in previous, main issues from this research are focused to seek the significance for Indonesia to reform its economic law in the field of international trade in framework establishing the 2015 AEC and to analysis the Paradigm that can be used as a basis to perform it.

This type of research is a normative law research. While the approaches used in this study are a *statute approach* and a *conceptual approach*.

1.1 Theory framework

Through his work entitled "*Introduction to the Principles of Morals and Legislation"* (1780), Jeremy Bentham (1748-1832) introduced a theory about the

[4] Erman Radjagukguk, "*Hukum Kontrak Internasional dan Perdagangan Bebas* (International Contract Law and Free Trade)", "Journal of Business Law", vol. 2/1997, p. 27.

purpose of the law.[5] According to him, the aims of the law to realize what is beneficial or in accordance with the order. The man would have done in such a way that he gets the maximum enjoyment and hit as low as suffering. Benchmark made assessment is whether an act that produces happiness or not.

The final goal of the legislation is to serve the greatest happiness of the greatest number of people. The principle of the greatest happiness is rooted very firmly on the belief Bentham. Thus, the law is oriented on its usefulness, which give you the greatest happiness as his words *"the greatest happiness of the greatest number"*.[6] This Bentham's doctrine is known as utilitarianism. Theory developed based on understanding of usefulness of this theory known as *Utility* or also known as the *Theory of Legislation*. The essence of this legislation theory is that it is only in order everyone will get a chance to realize the highest happiness.

People only have to follow the law in either a good legal system. As Bentham's principle *"the greatest happiness of the greatest people"*, whether or not the law is measured by the benefits of the law to mankind. Principle of obedience to the law if the law is beneficial. Bentham at length declared: "... namely whether a whole given system of law is a good system. In one sense. I have a duty to obey only so far as utility allows, that is, that is as far as the law; in another sense I have a duty of obedience as soon as a law with sanctions exist at all. The point, then, of Bentham's codification proposals would be to ensure that only those laws which I have a duty to obey in the first sense should impose on me a duty of obedience..."[7].

According to Bentham, humans are subject to the law are because subject to the law they feel the need or benefit (utility). People follow the law not because the laws of nature. This view is evident in the following statement: "Rejecting natural law, then Bentham defined laws as commands backed up by sanctions, some of which would and some of which would not conform to the dictates of morality, the test here being the test of utility. Rejecting the original contract, he

---

[5] Teories used as a knife of analysis in this theory framework, specially *the Legislation Theory* from Jeremy Bentham and *the Law Development Theory* from Mochtar Kusumaatmadja, are always applied by writter to examine for efforts in Indonesian law reform. Some works of them are : (1) Taufiqurrahman, *Karakter Pilihan Hukum, Kajian tentang Lingkup Penerapan United Nations Convention on Contracts Sale of Goods (CISG) 1980 (Charracter of Law Choice, Study on Application Scope of United Nations Convention on Contracts Sale of Goods [CISG] 1980)*, PT. Bayumedia, 2010; (2) Taufiqurrahman, *Konvergensi Paradigma dalam Perubahan Karakter Pilihan Hukum di Bidang Kontrak Jual-Beli Barang Internasional* (*Convergence Paradigm of a Choice of Law Changing in Field of Contract for the International Sale of Goods*), "Jurnal Ilmiah Hukum Kenotariatan Repertorium", Volume 1, No. 1, 2010; (3) Taufiqurrahman, *The Significance of Accession to the United Nations Convention on Contracts for the International Sale of Goods 1980 for Indonesia*, "Juridical Tribune", Volume 2, Issue 2, December 2012 ; (4) Taufiqurrahman, *Regulatory on the Corporate Social Responsibility in the Context of Sustainable Development by Mandatory in the World Trade Organization Law Perspective (Case Study in Indonesia*), "Juridical Tribune", Volume 3, Issue 2, December 2013.

[6] Hilaire McCoubrey and Nigel D. White, *Textbook on Jurisprudence*, Blackstone Limited, London, 1996, p.240.

[7] John Stuart Mill, *Utilitarianism on Liberty Essay on Bentham*, New York, USA, The World Publishing Company, 1962, p.161.

saw both the origin of the laws and the obligation to obey them as derivable from the principle of utility". [8]

Axiological values developed by Bentham is the usefulness of law in society. The law should provide a great benefit to many people. Law is not solely oriented to achieve *a justice* by ignoring *a certainty* or otherwise it is oriented to achieve *a certainty* by ignoring *a justice*, but must consider both the contradictory aspects.

Establishing of the law in the form of legislation can not be separated from the existence of a state. It is accordance with the Jeremy Bentham's opinion stating that the law as commands backed by sanctions and John Austin's opinion stating that the law is the command of the sovereign political power of a country. Even in his work, John Austin stated that "The matter of jurisprudence is positive law: law simply and strictly so called: or law set by political superiors to political inferiors".[9] This means that in the economic development expressed in the legislation are also very much depends on the state. Of course, with a diversity of cultures and different historical backgrounds, state involvement in economic activity is not the same. There are countries that are involved in minimalism, the maximalist and measurable.[10]

Adherents of the flow a minimalist state involvement in economic activity is based on the premise that an individual activity or activities of business units should be given the freedom to take care of its own interests and improve its position in the field of economics. Economic activity in free competition would be far more beneficial to society as a whole than if everything was regulated by the state. They are Adam Smith, David Ricardo, Thomas Robert Malthus and others.[11]

Providing the broadest freedom to individuals and business units turned out in practice to improve the quality of life for the people's welfare. Precisely arise exploitation a strong group (in the case of mini-entrepreneurs) to vulnerable groups (in this case labor). Starting from this fact, they argued that the state should maximalist involvement in economic activities. This view is based on the premise that freedom without the intervention of the state will lead to capitalist liberalism in which the people, especially the workers have been squeezed in all-out in the cycle of the production process. Country ought to govern all aspects of the economic life of the country.[12]

These two views are contradictory sparked the birth of the views that are at the midpoint of them. The cornerstone of the adherents of this school of thinking is the principle of balance. In their view, the involvement of the state in economic activity should be measurable.[13] Measurable parameters that demands the

---

[8] *Ibid.*, p.14.

[9] J. Austin, *The Province of Jurisprudence Determined*, Weidenfeld & Nicholson, London, 1995, p. 9.

[10] Gunarto Suhardi, *Peranan Hukum Dalam Pembangunan Ekonomi (The Role of Law in Economic Development)*, Andi Offset, Yogyakarta, 2002, p. 12.

[11] *Ibid.*, pp. 13-14.

[12] *Ibid*., pp. 14-15.

[13] *Ibid*., pp. 16-20.

involvement of the state is based on the balance of the balance of market power, especially on the aggregate demand. Some prominent adherents of this thought are Kaynes and Samuelson.

In this perspective, W. Friedman introduce the concept of mixed-economy. This concept includes a variety of ways in which state power is used to control or monitor the country's economic system, even though the economy is run by private companies. According to Friedman, there are four functions of the state in the mixed-economy system.[14]

First, the function of the state as a Provider. This function is related to the concept of the welfare state. In this capacity the state is responsible to provide and deliver social services to guarantee minimum living standards and make allowances or economic power freedoms.

Second, the function of the state as Regulator. In this function, the state uses a variety of influences in particular control the power to regulate investment in the construction industry, the volume and type of export and import, through means such as exchange controls and import controls and industrial licensing.

Third, the function of the state as Entrepreneur. This function is an important function in a mixed economy. Activities of the state in economic activities can be conducted through semi-autonomous government department or through corporations owned by the state. State involvement in the entrepreneurial function may take the form of public or private.

Fourth, the state functions as the Umpire. State can function as a referee because the state has the legislative, administrative and judicial. In this case, the state must develop a standard of justice as the general economy by state firms. Therefore, the state must distinguish between its function as a referee to function as entrepreneurs.

Thought "*mixed-economy*" is actually heavily influenced by Hegel and Karl Marx. According to Hegel, the country is a manifestation of power. State is not only an organization or focus of power, but it is the highest manifestation of the human individual and social aspirations. Meanwhile, according to Karl Marx, the state is an administrative machinery, the executive and the law in which the ruling class control of the means of production and the exploitation of the working class. The state is an instrument of pressure.

Friedman sought to put on a position diametrically presents the concept of the backup function. He put the country both as a centralized state, which is the result of a balance between economic and social interests that conflict and as the embodiment of the ideals of justice and the public interest which includes society as a whole. In Friedman's view, in a democracy that's four state functions can be implemented.

In relation to the formation of law in perspective of Indonesian law reform, it is a relevant and interesting thing to study an legal thought on Law of Development Theory. This theory is the concept of legal thought developed by Mochtar Kusumaatmadja in response to the development of law in Indonesia.

---

[14] W. Friedman, *The State and the Rule of Law in Economy Mix*, Steven & Son, London, 1971, p. 3.

The concept of legal thought developed by Mochtar Kusumaatmadja is actually motivated by the objective conditions in which the Legal Positivism has a dominant influence in the legal mindset carrier in Indonesia. Therefore, the role of the establishment of the law (legislation) to be the main pedestal. He was highly influenced by the thought of Roscoe Pound and Eugen Ehrlich to incorporate pragmatic goals for development.[15] According to him, the law not merely as a means (tool) as proposed by Roscoe Pound, but as a means (instrument) to build the community. Mochtar Kusumaatmadja views that law and order in business development and legal reform is needed. Law in the sense of the norm of human activity is expected to lead to the desired direction by development and integration. It required a means of written laws and unwritten laws that have to live in harmony with the laws of society.

He understand the law as a means of understanding broader than the law as a tool. This is because: (1) in Indonesian statutory role in the process of legal reform is more prominent than the United States that put the jurisprudence on higher ground, (2) the concept of law as a "tool" will lead to results that are not much different from the application "legisme" as held at the time of the Dutch East Indies. In Indonesia, there is the attitude of the people who show sensitivity to reject the application of the concept, (3) if the "law" here as well as international law, the concept of law as a means of society reform already applied long before this concept was formally accepted as the basis of national law policy.[16]

Mochtar Kusumaatmadja view that the best way out for Indonesia to build its national law is a priority to the principles of native law or customary law are still valid and relevant to modern life. Colonial-policies style that preserve the original law which he considered as a policy does not bring any progress. Similarly, the introduction of Western law with these limited purposes in reality only a small impact on the process of modernization. Based on this, Mochtar Kusumaatmadja proposed that the development of national laws in Indonesia shall not make a hasty decision between continuing course of colonial legal tradition based on the patterns of Western thought or a priori to develop customary law as national law.[17]

---

[15] Roscoe Pound known as a pioneer of American law school of Sosiological Jurisprudence explores the concept of "law as a tool of social engineering". He stated, *"The task of the lawyer is as a 'social engineer' formulating a program of action, attempting to gear individual and social needs to the values of western democratic society"*. Consistent with this concept, Roscoe Pound put the law in front of reality.

[16] Mochtar Kusumaatmadja, *Hukum, Masyarakat dan Pembinaan Hukum Nasional: Suatu Uraian tentang Landasan Pokok Pikiran, Pola dan Mekanisme Pembaharuan Hukum di Indonesia (Law, Society and the National Law Development: A Description of Key Thought Foundation, Patterns and Mechanism of Legal Reform in Indonesia)*, Research Institute for Law and Criminologyof of Law Faculty of Padjadjaran University, Bandung, 1976, pp. 9-10.

[17] Wignjosoebroto Soetandyo, *Dari Hukum Kolonial ke Hukum Nasional: Suatu Kajian tentang Dinamika Sosial-Politik dalam Perkembangan Hukum Selama Satu Setengah Abad di Indonesia (1840-1990) (From Colonial Law into National Law: A Study of Socio-Political Dynamics in the Law Development for One and a Half Century in Indonesia (1840-1990)*, Raja Grafindo Persada, Jakarta, 1994, pp. 232-233.

2. Analysis

2.1. Globalization of trade law

A reality that cannot be avoided that the economic globalization that took place at this time is accelerated its movement by the progress achieved in the field of ICT. Through the use of ICT, the economic activities carried out by the parties that crossed national borders can be done quickly. The parties can communicate directly without having to physically meet *"face to face"*.

Globalization is a term used to describe a further process of "internationalization". This view was expressed by G.J. van Hoof stating *"If I understand it correctly, globalization seems to go a step beyond internationalization"*.[18] Somewhat different views expressed by Albrow stating that globalization refers to the overall process by which human beings on this earth incorporated into the one world, global society. It is understood that a such process is plural, then we also can look globalization into the diversity.[19]

In contrast to the "internationalization" which lies at the level of states, "globalization" refers to the process more directly across boundaries in relationships between people. In this regard, G.J. van Hoof stated as follows: [20]

> "The process of "internationalization" is primarily located at the level of States. Interdependence should be taken to mean here simply the fact that State have Become and still are becoming more dependent upon each other in a growing number of respects. Certainly, interdependence does not necessarily imply equilibrium or balance. It needs no explaining that some States are more powerful than others. However, the point is that as a result of the increasing interdependence Increased and even for the most powerful States the capability to manage affairs on their own has been quite a dismissing to a considerable extent.
>
> As Compared to "internationalization" the concept of "globalization" seems to add an extra dimension, even though its ramifications are hard to pinpoint exactly. Tentatively, I would like to suggest the following characteristics. While "internationalization" was said to be located on the level of States, "globalization" seems to refer rather to a more direct process of across the border relations between people. Of course, like States private persons and private entities have been affected by the Increased and increasing interdependence of "internationalization". But the effects come about more or less indirectly through the mediation of the State. In the framework of the era of "globalization", room mates may be seen as the extension of "internationalization", people seem to more frequently Able, or sometimes even forced, to ignore or disregard

[18] G.J.H. van Hoof, *Globalization and Its Impact on the Legal Profession* in CFG Sunaryati Hartono (ed.), *The Business and the Legal Profession in an Age of Computerization*, Foundation for Human Rights, Democracy and Rule of Law, Jakarta, 2000, p. 48.

[19] M. Albrow, *Globalization and Knowledge Society*, London, Sage Publications, 1990.

[20] G.J.H. van Hoof, *op. cit.*, pp. 49-50.

State borders directly in order to Participate in the life of what in this respect has been fittingly termed the 'global village'".

Globalization has two sides or two-way. *First*, in the context of the enactment of a legal system, globalization refers to the influence of international law on domestic law of a State, or the force of international law in the national fabric. *Second*, globalization also means that national law may also affect the formation and content of international law, especially through international agreements.

Globalization, especially in economics and trade actually is not new, because it has already happened some two hundred years ago when the Industrial Revolution in the 19th century. The difference may only lie on the speed and type of technology as a trigger. In the current era of globalization, the speed of the process is very fast, because it is supported by the use of ICT, such as computer and Internet. In connection with this, Franco Ferrari stated that *"Indeed, it is in this century that the globalization of most national economics has resulted in a dramatic increase of in transnational commerce".*[21]

Economic globalization is characterized by the depletion of the geographical boundaries of economic activity or a national or regional market and an increasingly globalized be "one" process involving many countries. Economic globalization is usually associated with the process of internationalization of production, trade and financial markets. Economic globalization is a process that is beyond the reach of government control or influence, because the process is primarily driven by global market forces, not by policy or regulation issued by a government on an individual basis.

The flow of products and factors of production or regional cross country at the high level of globalization will be surfing across the city within a country. At this level, a businessman who had a factory in East Java at any time could move its operations into Vietnam without a hitch, both in logistics and bureaucracy related to administrative matters, such as business licenses and so on.

The depletion of the geographic boundaries of economic activity nationally and regionally that coincided with the waning sovereignty of a state government caused by many things, among them the communication and transportation are increasingly sophisticated and cheap, foreign exchange flows more freely, which is the country's economic open, full use of the comparative advantages and competitive advantages of each country, production and assembly method with a more efficient management of the organization, and the rapid development of multinational companies in the entire globe. In addition, other causes are more and more industries are footloose due to advances in technology (which reduces the use of natural resources), the more advanced level of the world of public education, the

[21] Saul Perloff, *The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration*, 13 U. PA. J. INT'L BUS. L. 1992, pp. 323-324.

development of science and technology and the increasing number of the world's population.[22]

The increasing international trade transactions in this globalization in turn led to a need for a device of international trade law applies uniformly to all businesses from all over the world. This is very logical because in international trade transactions involving more than one national legal system. Problems often arise particularly in dispute resolution that occurs is related to law enforcement, the national law of the country which will be applied to the dispute.

When the effect is the national legal system of the State A as one of the contracting parties, it is very possible the legal interests of B as another contracting parties cannot be accommodated to the maximum imposed by the legal system. Of course, it will be detrimental to the B or one of the parties to contract. Especially in the contract, they did not mention a choice of law clause. Even if in the end based on the rules of HPI refers to the legal system of the country one of the parties, the legal designation remains detrimental to either party. The parties or at least one of the parties cannot predict what law will apply to the contract.

The diversity of the legal system in force in the field of international trade will continue to incur losses for the parties or at least one of the contracting parties. This means, the legal instrument that applies uniformly for businessmen from various countries is an absolute necessity that cannot be avoided due to the presence of both economic globalization has implications for the field of international trade law. This phenomenon is also explicitly recognized by Sieg Eiselent stating:[23]

> "The need for a unified law of international sales in the first place arises from the fact that its law is territorial in nature. It only has the force of law specified within national boundaries, and in principle no other state is bound to acknowledge or apply it. This is also the reason why choice of law or conflict rules have developed in order that the legal relationships that have ensued within one legal jurisdiction may be acknowledge and enforced by the courts of another jurisdiction. Invariably this leads to the situation where at least one of the contracting parties is faced with the application of a foreign legal system of roommates it may have no knowledge, and it may even be uncertain roomates legal system will apply to the relationship of the parties because of uncertainties in the conflicts rules. The proper-law approach is flexible but also notorisusly unpredictable in determining the applicable legal system."

The existence of a legal system that applies uniformly in international trade transactions is needed by businessmen in order to solve problems that arise during

---

[22]Tulus T.H. Tambunan, *Globalisasi dan Perdagangan Internasional (Globalization and International Trade)*, Ghalia Indonesia, Jakarta, 2004, p. 2.

[23] Sieg Eiselent, *Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa*, "South African Law Journal", 116/1996, Part II, p. 326.

involving a clash of the legal system. It is also recognized by Allan D. Roos is stated explicitly as follows:[24]

> "Achieving some uniformity of national private laws, Including conflict of laws rules, if not broad acceptance of universal legal norms, seemed to some to hold out promise for overcoming cross border conflicts. Other Notions, extending as far as proposals for world government, were advanced as solutions by conceptual and theoretical thinkers and private law essentially approaches were practical and pragmatic. "

International trade law expected would apply uniformly is not a new legal instrument entirely or different to the existing law in each country. He is the result of a comparison of the various systems of laws and customs applicable in international trade in each country. A uniform set of laws as a result of the efforts of unification and harmonization of international trade law in such areas is more acceptable to countries that basically has its own legal system.

Unification in an international trade law perspective is the acceptance of a set of rules, standards or guidelines agreed to the implementation of transnational transactions. This notion was given by George A. Zaphiriou which expressly states: "International Unification means adoption of an agreed set of rules, standards or guidelines for application to transnational transactions. In international trade, this was achieved by custom, practice or by international agreement within the framework of a professional organization or between states by an international convention".[25]

Unification can be achieved through custom, international practice or international agreements within the framework of a professional organization or among countries through international conventions. In contrast to unification, harmonization does not lead to a set of agreed rules that have been set. It directs a change in the rules, standards or processes in order to avoid conflicts and generate balance.

Harmonization can be achieved through international agreements between countries or through the mandate of supranational institutions.[26] Moreover, harmonization can also be achieved through the efforts of unification with closer coordination rules and policies. This is consistent with the view of George A. Zaphiriou which expressly states:[27]

> "Harmonization is short of unification and consist in the approximation of rules and coordination of policies. Systemic harmonization is widespread within the same Civil and Family Law within the Common Law. It is achieved by legislative reform, the practice of the courts and academic teaching and writing. It is not so widespread between Civil and

---

[24] Alan D. Rose A.O., *The Challenge for the Uniform Law in the Twenty-First Century*, "Uniform Law Review", NS-Vol.1/1996, pp. 9-25.

25 George A. Zaphiriou, Unification and Harmonization of Law Relating to Global and Regional Trading, "Northern Illinois University Law Review", 14 N. Ill. U.L., 1994, Rev. 407.

26 Ibid.

27 George A. Zaphiriou, 1990. Harmonization of Private Rules between Civil and Common Law Jurisdiction, "The American Journal of Comparative Law", No. 38, 1990, p. 96.

> Common Law Jurisdictions. The Civil Law and the Common Law System traditions and take pride in having successfully regulated human relationships for many centuries and wish to preserve their integrity ".

Although the two efforts, unification and harmonization, will produce the same end result, namely the existence of a uniform legal substance, but there is a fundamental difference between the two. Through the efforts of unification, equalization rules done formally. Meanwhile, through harmonization, equalization rules formed in practice. Similar views were expressed by Marc Ancel stated: "In this way that the word "Harmonization" assumes its full meaning. In the most favorable cases it can lead to a uniformation that is still different from the formal Unification of the written law *(lex scripta),* and roommates might be called a practical Unification, not bound by the rigorous formalism of the old uniform law".[28]

Unification and harmonization of international trade law is expected to be able to overcome the technical problems caused by the diversity of the legal system. The businessmen that have been faced with technical problems related to the legal barriers because there are a variety of legal systems at least be reduced even if not totally eliminate technical obstacles they face. Thus it can be said that the unification and harmonization of international trade law will serve as a bridge to varying legal system which in turn will bring uniformity in international trade law. Unification and harmonization of international trade law are more acceptable to businessmen from various countries for trying to accommodate the interests of all involved, particularly in international sale of goods transaction are interests of the seller and the buyer.

2.2. A role of International Organizations

In addition to countries, international organizations have a considerable role in the harmonization and unification of International Trade Law. The presence of international organizations in the midst of the ever-growing international community is not in doubt. Even presence is necessary in order to manage and resolve international problems. Associated with the presence of international organizations, Inis L. Claude, Jr. expressly states: "International Organization is a distinctive modern phase of world policy, it is a recent growth, but it has become an established trend. International Organization may come and go, but the International Organization is here to stay".[29]

Along with the development of the international community, international organizations have sprung up, both engaged in the social, religious, political, legal and other areas of life. From the existing international organizations, international organizations involved in International Trade Law can be classified into three (3) major groups, namely: International organizations that are United Nations bodies

---

[28] Marc Ancel, *From the Unification of Law to its Harmonization*, "Tulane Law Review", No. 51, 1976, p. 108.

[29] Inis L. Claude, Jr., *Swords into Plowshare*s, Random Housen New York, 1956, p. 6.

and specialized, intergovernmental organizations and international non-governmental organizations.

International organizations that are specialized UN agencies include: (1) International Telecommunication Union (ITU), (2) United Nations Economic Commission for Europe (UNECE), (3) United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), (4) United Nations Conference on Trade and Development (UNCTAD), (5) United Nations Commission on International Trade Law (UNCITRAL), and (6) World Intellectual Property Organizations (WIPO).

Intergovernmental Organizations are international organization established by the states. Some international intergovernmental organization which acts in the field of International Trade Law, namely: (1) Asian Development Bank (ADB), (2) Asia Pacific Economic Cooperation Commonwealth Secretariat (APEC), (3) Council for Mutual Economic Assistance (CMEA); (4) the European Bank for Reconstruction and Development, European Commission (EBRD), (5) the European Commission (EC), (6) Hague Conference on Private International Law (Hague Conference), (7) the Intergovernmental Organization for International Carriage by Rail (OTIF); (8) Organization for Economic Cooperation and Development (OECED); (9) International Institute for the Unification of Private Law (UNIDROIT), (10) the International Bank for Reconstruction and Development (World Bank); (11) World Customs Organization (WCO) and the World Trade Organization (WTO).

International Non-Government Organization is an international organization which is not established by states, but by the international business community and international legal experts. International organizations are included in this group include: (1) the Commonwealth Telecommunications Organization (CTO), (2) the International Association of Restructuring, Insolvency and Bankruptcy Professionals (insol), (3) the International Bar Association (IBA); (4) International Chamber of Commerce (ICC), (5) International Insolvency Institute (III), (6) the International Maritime Committee (IMC), and (7) International Law Association (ILA).

Globalization through the unification and harmonization of International Trade Law which started in the 1930s by organizations like UNIDROIT and the Hague Conference finally found its momentum with the signing of the General Agreement on Tariffs and Trade (GATT) by 125 countries in the Uruguay Round on December 15, 1993. In addition to the GATT, the Uruguay Round also agreed on the new name of an international trade organization formerly known as *the Multilateral Trade Organization* (MTO) which its establishment based on *Agreement Establishing the Multilateral Trade Organization* become *the World Trade Organization* (WTO).

All member states agreed to pour their commitments in the Final Act document and its Annexes which consists of various agreements. Final Act document consisting of over 550 pages that contain the text of multilateral trade agreements involving the most complex of all member states and represents more

than 90% of world trade. Furthermore, the document Final Act was signed in Marrakesh, Morocco on April 15, 1994 as finalization.

With the approval of the GATT 1994, this means that the world has entered a new era in the trading system that is an era abandonment of protectionism and unilateralism to enter an open multilateral system. World expect that the results of the Uruguay Round will be able to improve some things like employment creation, development, investment, economic reform and the rule of law in addition to increase in other positive things in trade between nations. GATT 1994 itself is actually a refinement of the GATT 1947 is considered incomplete because it only regulates trade in goods and less obviously so that the interpretation of the articles dissatisfaction for aggrieved parties. Therefore, in addition to set trade in goods, the GATT 1994 also regulates services (Trade in Services / GATS), investment (Trade-Related Investment Measure/TRIM) and intellectual property (Trade-Related Intellectual Property Rights/TRIPS).

Some improvements to provisions of the GATT 1947 include: (1) Article II *(conception rates)*, (2) of Article XVII *(State Company)*, (3) of Article XXIV *(Free Trade Area and Customs Union)*, (4) Article XXV , (5) *(waivers)*, (6) of Article XVIII *(Amendment Concession)* and (7) of Article XXXV *(Non-Application Approval)*. While some refinement and approval of the establishment of the field of Non-Tariff which is concluded between: (i) Standards (Technical Barriers to Trade), (ii) Anti-Dumping; (iii) Customs Valuation; (iv) pre-shipment Inspection; (v) Rules of Origin; (vi) Import Licensing Procedures; (vii) Subsidy and Countervailing Measures; (viii) safeguards, (ix) the Dispute Settlement.

Indonesia itself is one of the participating countries to approach the Marrakesh Agreement. Parliament has ratified the Marrakesh agreement with the issuance of the Law No.7 of 1994 on *Ratification of Agreement on Establishing the World Trade Organization (WTO)*. Reason for the inclusion of Indonesia in the GATT / WTO based on the following considerations: (1) Because of multilateralism considered better than bilateralism, (2) international trade agreements will further ensure market access and protection for the participants of GATT 1994, and (3) Indonesia wants to participate active part in activities aimed at creating an honest and fair trade as well as want to participate in efforts to improve the welfare of mankind.

By signing the GATT 1994, meaning Indonesia is legally bound to abide by the rules that have been agreed, and made repairs or adjustment and harmonization of various laws and regulations regarding trade, investment, respect for intellectual property rights and other matters, as set out in GATT 1994. Adjustment or alignment of national legislation with the principles or rules of GATT / WTO for Indonesia, no longer as an option, but it has become imperative.

There are many principles that are accommodated in the GATT / WTO. Nevertheless, there are at least four principles that need to be given serious consideration in an effort to reform the Indonesian economic law, namely: (1) the Most Favored Nation (MFN) Treatment Principle, (2) National Treatment Principle; (3) Anti-Non Tariff Barrier Principle; and (4) Principle of Transparency.

MFN Treatment Principle set out in Part I Article I of GATT 1947, entitled General Most Favored Nation Treatment Annex IB In the legal text of GATT 1994 governing the General Agreement on Trade in Service, the principle of MFN Treatment more emphasized in Part II General Obligation and Disciplines in article II Most Favored Nation Treatment.

This principle implies that *trade in the world to do without discrimination* (non-discrimination). Each member country must immediately and unconditionally, giving the same treatment for any merchandise other members, no less than the treatment accorded to the merchandise or product suppliers of any other country as well. All require the same treatment, with the aim that all barriers to trade (trade barriers) for the creation of fair trade abolished. State-owned companies though, have to ensure that both exports and imports must be done without any distinction.

The principle of National Treatment Principle contained in GATT Article 1947 (1-9) and TRIPS Article 3. This principle implies that *if a product has been allowed to enter the domestic market of a country, then the product should get equal treatment with domestic products*. This means that the principle of National Treatment is one of the means of the WTO to ensure that any products, services, and respect for intellectual property, obtaining proper treatment and be treated the same in each member state.

These principles, MFN Treatment and National Treatment, are regarded as a principle of Non-Discrimination. In simple terms, the MFN treatment obligation prohibits a country from discriminating between countries, whereas the national treatment obligation prohibits a country from discriminating against other countries. Non-discrimination itself is a key concept in WTO law and policy.[30]

Principle of non-discrimination is an important principle in international trade traffic, hence it is accommodated in WTO. It can be understood because discrimination between, as well as against, other countries was an important characteristic of the protectionist trade policies pursued by many countries during the economic crisis of the 1930s. These discriminatory policies are regarded by historian as an important contributing cause of the economic and political crises that resulted in the Second World War.[31] It is recognized that discrimination in trade matters breeds resentment among the countries, manufactures, traders and workers discriminated against. Such resentment poisons international relations and they lead to economic and political confrontation and conflict. In addition, it is believed that discrimination makes scant economic sense, generally speaking, since it distorts the market in favor of products and services that are more expensive and/or of lesser quality. Eventually, it is the citizens of the discriminating country that end up 'paying the bill' for the discriminatory trade policies pursued.

In relation to negative impact created from such discriminatory policies, the Preamble to the WTO Agreement highlight the importance of eliminating

[30] Peter Van den Bossche, *The Law and Policy of the World Trade Organization, Text, Cases and Materials*, Cambridge University Press, 2006, p. 308.
[31] *Ibid*.

discrimination, where the elimination of discriminatory treatment in international trade relations is identified as one of the two main means by which the objectives of the WTO may be attained.

The next principle is an *Anti of Non-Tariff Barrier*. This principle is accompanied with *Tariff Concession Principle*. These principles govern that *any country wishing to become members of the WTO, must file a schedule of tariff reductions and the termination of restrictions on trade (trade restrictions) based on non-tariff policy*. Previous tariff reductions had to be negotiated in advance with the WTO member states concerned. This has set in Article XXVIII bis of GATT 1947, which set the Tariff Negotiation. While Schedule of Concession regulated in Article II, which is one of the main basic system governed world trade liberalization in the GATT 1947.

Furthermore as a consequence of the principle of Anti-Non Tariff Barrier, then GATT 1947 also set up what is called the Anti-Dumping and Countervailing Duties as set forth in Article VI of GATT 1947. Interpretation of this provision in the GATT 1994 more specifically regulated in Agreement On Implementation of Article VI of GATT 1994. The main goal setting is to prevent unfair competition in world trade, and to protect the member states by giving the right to take necessary measures to protect the industry from unfair competition in the form of price dumping.

Principle of Transparency contained in the General Agreement on Trade in Services (GATS) which in Article III (Transparency). Based on this principle that *each member shall promptly publish, not later than the time entered into force, all acts relating to or affecting the GATS'*. This provision also requires each member state should be transparent to other members. In this connection, each member shall promptly and at least annually inform the Council for Trade in Services of the issuance of laws that exist that significantly affect trade in services, specifically the trade has been a commitment under the GATS.

For Indonesia, adaptation or alignment of national legislation with the principles and rules of GATT / WTO is not an easy matter. This can be understood as the principles and rules of GATT / WTO further absorb the liberalization spirit of Western countries that in fact further accentuates freedom and individual rights, while national legislation must be based on Pancasila (Five Basic Principles) which emphasizes the public interests. Article 33 paragraph (1) of the Constitution of 1945 clearly states that *the Indonesian economy is structured as a joint venture based on the principle of family. In the family principle, public interests preferred*. Indeed, Indonesia's participation in the GATT / WTO would not have to sacrifice the national interest and violates the principle set out in the Constitution of 1945.

2.3. Indonesian law reform economic paradigm

The word *paradigm* means a model, pattern, or example. The Big Dictionary of Indonesian Language defines paradigm as a benchmark. Paradigm can also be interpreted as *a cluster of thinking systems*. This means that paradigm contains an understanding connotation as source of value, frame of mind, the basic

orientation, source of principle, as well as the direction and purpose of a development, change, reform, and in education.

According to Thomas S. Kuhn, a paradigm is the theoretical assumptions which are a common source of value. He is also a source of law, methods, and applications in science and knowledge. That is why, a paradigm largely determine the nature, characteristics and the character of science and knowledge.

From a such meaning, it can be defined simply that a paradigm is an attempt to find answers to change a new condition that is seen as revolutionary process. Paradigm are aimed at the two major senses : first, at the totality of the constellation of ideas, beliefs, values, perceptions, and techniques espoused by academics and secondly set by practitioners of particular disciplines that affect their perspective of reality. Second, a paradigm is a human effort to solve the secret knowledge that can overturn all of the assumptions and rules.

By the way, referring to the meaning of the above paradigm, the paradigm of Indonesian economic reform law is used as a frame of reference point or ground to make economic law reform in Indonesia. With the paradigm, then Indonesian economic law reform has a clear direction and purpose. It is not just a patchwork meet immediate needs, but in a focused and planned response to the challenges and needs in this time and future in the long dimension. The problem is what the Indonesian economic law reform itself? The following will be described briefly on the notion of economic law reform in Indonesia.

According to Indonesian Dictionary Complete, reform is a noun that means the process, how to act, how to update.[32] To update or renew their own means to make like new, looks new repair order, repeat once more.[33] This means that the update is the process or how to make something like new, fix something that looks new or repeat something again.

This means that Indonesian law reform in the title of this study can be defined as a process or a way to shape Indonesian law entirely new, improve existing Indonesian law so that it looks new or repeat existing Indonesian laws in line with the objectives and national interests as embodiment ideals of the independence proclamation of the Republic of Indonesia. Because of the existence of such laws in line with the objectives and national interests, the economic law of Indonesia also be referred to as the law of the Indonesian national economy.

Based on the definition above it can be seen that efforts of the Indonesian (national) economic law reform can be done in three ways, namely: (1) *create an entirely new substance*, (2) *improve existing substance with something new*, and (3*) repeat of substance that already exist*.

This is consistent with the notion of legal thought from Sunaryati Hartono stating that the meaning of the law include the construction of four businesses, namely: (1) improve (make something better), (2) change to make it better and modern; (3), which had previously held a not exist, or (4) negate anything

[32] Tim Media, *Kamus Bahasa Indonesia Lengkap (Complete Dictionary Indonesian),* Media Center, p. 91.
[33] *Ibid.*

contained in the old system, because it is not needed and do not fit with the new system.[34]

The term of Indonesian economic law is the national law in economics. T. Mulya Lubis in his book defines as the overall regulatory, common law, court decisions relating to economic activity, both legal entities concerning economic actors, economic actors transactions, transactions where the perpetrator economy, through government intervention to support economic activity, and the dispute settlement mechanism of economic agents.[35] Another view expressed by C.F.G. Sunaryati Hartono, Economic Law in its broadest sense is the overall policies and laws that are not only limited to the State Administrative Law, but also regulate matters including substance Criminal Law, Civil Law, Commercial Law, International Law, Criminal Procedure Law, and even civil.[36]

This means that the actual national law is not only related to economic issues, but also regulate other areas of life, such as political, social, cultural and others. Therefore, a more substantive sense to be understood is the term national law.

National law is *the law applicable to the people of Indonesia are aligned with the goals and ideals of the proclamation of Indonesian independence*. This understanding is consistent with the notion put forward by Satjipto Rahardjo stating that *national law* is *a new legal order which was born as a result of the Indonesian independence with the Act of 1945 as its core*.[37]

Another understanding put forward by Muhammad Hidjazi Kertawidjaja which provides formulation of national law as follows:[38]

> "National Law" is a form of law in our country that has the characteristics and conditions as below:

---

[34] Djuhaendah Hasan, Lembaga Jaminan Kebendaan Bagi Tanah Dan Benda Lain Yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Pemisahan Horisontal (Security Institution Materially For Land And Other Objects Attached On Land In Implementation Conception of the Principle Separation Horizontal Separation), Aditya Citra Bhakti, Bandung, 1996, p.2, quoted from Sukarmi, Tanggung-Jawab Pelaku Usaha Atas Kerugian Konsumen Yang Disebabkan Oleh Perjanjian Baku (Standard Contract) Dalam Transaksi Elektronik (Responsibilities Consumer Entrepreneur For Loss Caused By Raw Agreement (Standard Contract) Electronic Transactions), Dissertation,, Graduate School of the University of Padjadjaran, 2005, p. 34.

35 T. Mulya Lubis, Hukum dan Ekonomi (Law and Economics), Pustaka Sinar Harapan, Jakarta, 1997.

36 C.F.G. Sunaryati Hartono, Efforts to Develop Indonesia after the Economic Law 2003, Papers in National Development Seminar VIII, Theme on Law Enforcement in Sustainable Development, Organized by National Law Development Agency of Ministry of Law and Human Rights, Denpasar, July 14-18, 2003.

37 Satjipto Rahardjo, Pengertian Hukum Adat, Hukum yang hidup dalam masyarakat (living law) dan Hukum Nasional (Understanding the Customary Law, Law of living in the community (living law) and the National Law), in BPHN, Seminar Hukum Adat dan Pembinaan Hukum Nasional, Binacipta, Bandung, 1975, p. 23.

38 Mohammad Hidjazie Kertawidjaja, Pembentukan Hukum Nasional (Establishment of the National Law), LIPI, Jakarta, 1973, *quoted from Abdurrahman, Perkembangan Pemikiran Tentang Pembinaan Hukum Nasional Di Indonesia (Developing Thoughts on the National Legal Development in Indonesia*, Akademika Pressindo, Jakarta, 1989, pp. 14-15.

1. Has its own personality, which is in accordance with the Indonesian national identity;
2. Priority to the unity and integrity of law;
3. Its contents should match or soul or consciousness in tune with the law as well as the livelihood of the Indonesian nation;
4. Must be based on and must not conflict with the basic philosophy of our country Pancasila and the Constitution of 1945".

Understanding of the diversity of national law, as noted above is a natural thing. This is because there is no national legislation which imposes limits on national legal standards. However, the understanding of such diverse rope can be pulled thread that national law is the applicable law in Indonesia in line with the national interests of Indonesia as an actualization of the ideals of the proclamation of independence of the Republic of Indonesia.

As we know that the positive law in force in Indonesia until now, most of them which are a product of Dutch colonial government.[39] When Indonesia proclaimed its independence on August 17, 1945, pursuant to Article II of the Transitory Provisions of the 1945 Constitution, Burgerlijk Wetboek (BW) or the Netherlands-India Civil Code and other other existing laws in the Netherlands-India are declared valid before the newly created under the 1945 Constitution.[40] Even if the applicable law in Indonesia currently is the same as the law in force in the Dutch colonial government before the proclamation of independence of the Republic of Indonesia (RI) on August 17, 1945, but it does not mean that the positive law of Indonesia is the law of colonial. The substance of the law of the Dutch colonial products should be aligned with the goals and ideals of the proclamation of Indonesian independence. The Indonesian national goals and interests should color to substance of the positive law. Substance of the law as opposed to the national goal should be revoked.

Proclamation of independence of RI on August 17, 1945 is an inroad to the colonial law order. That is, the colonial legal order declared void since at that time. In other words, the colonial legal order have no right to live again in Indonesia

[39] By Royal Decree of May 16, 1847, laws that effected in Netherland were applied in Dutch colonial region based on concordance principle *(concordansi beginsel)* as follows :
1. *Algemene Bepalingen van Wetgeving voor Nederlandsch Indie* (General Provision of Legislation for Netherland-India) commonly abbreviated as AB;
2. *Burgerlijk Wetboek* (Civil Code), referred to as BW;
3. *Wetboek van Koophandel* (Commercial Code), commonly called WvK
4. *Reglement op de Rechterlijk Organisastie en het Beleid der justitie* (Regulation of Judiciary and the Police of Justice), abbreviated as RO;
5. *Enige Bepalingen betreffende Misdrijven began ter gelegenheid van faillissement en bij Kennelijk Overmogen, mitsgaders bij Surseance van Betaling* (Provisions on Crimes Relating to Bankcruptcy and Insolvency).

[40] Article II of the Transitory Provision states that every law and regulation which were in power before the war, provided that they do not contradict the spirit of the 1945 Constitution, are applicable unless substitutes of the respective law and regulation have been passed the Indonesian government.

since the date of August 17, 1945.[41] [41] Colonial legal order had expired and was replaced by the existence of Indonesian national legal order on August 18, 1945 by Article II of the Transitory Provisions of the 1945 Constitution.

Statement of the proclamation of independence: "We are the Indonesian nation hereby declare Indonesian Independence" and the Preamble of 1945 Constitution means: (a) making Indonesia an independent and sovereign country; and (b) at that time also established an Indonesian Law Order.[42] A similar view was delivered by Bagir Manan in the National Workshop on Development of National Legal Systems After Changes of the 1945 Constitution in Surabaya on April 27, 2006. Since the Proclamation of Independence on 17 August 1945, the Dutch legal system is revoked and replaced by the Indonesian legal system through the Transitory Provisions of Article II of the 1945 Constitution.

Thus, even though the formulation of norms contained in the law books before and after the proclamation of independence of Indonesia there is no change at all, but it contains a very fundamental philosophical change. If the rule of law before the proclamation of independence based on the interests of the colonial government, the rule of law after the proclamation of independence based on national goals and interests are aligned with the ideals of the proclamation itself. This means that some law books as a legacy of the Dutch no longer be regarded as a colonial law, but the Indonesian (National) Law.

The whole of legal order in current and future must embody the ideals of the proclamation, the Pancasila and the Constitution of 1945.[43] Therefore, such a law is more accurately referred to as the National Law, the law that is oriented for the establishment and implementation of national importance as the embodiment of the ideals of the proclamation of independence of Indonesia based on Pancasila and the 1945 Constitution. In such sense, the National Law is not only a *jus constitutum* (positive law in force), but also a *jus constituendum* (legal aspired).

In the perspective of the Indonesian (national) legal reform, law occupies a strategic position not only as a means to maintain public order, but more than that as a means to change society. Changes that occur in the community are not allowed to appear by the community itself, but the change is driven by the law. Law

---

[41] According to Peter Mahmud Marzuki, the significance of the Proclamation of Independence to Indonesian Law is that it discontinued colonial legal order set up by colonial ruler and a the same time established a national legal order. In fact, the test of Proclamation of Independence itself is not a legal document. Rather, it is a political document by which a state comes into existence. *See* Peter Mahmud Marzuki, 2011, *An Introduction to Indonesian Law,* Setara Press, Malang, 2011, p. 1.

[42] CST Kansil and Cristine S.T. Kansil, *Pengantar Hukum Indonesia (Introduction to Indonesian Law)*, Balai Pustaka, Jakarta, 2003, p. 4.

[43] In related to the existence of the 1945 Constitution, Peter Mahmud Marzuki stated that a day after the Proclamation of Independence was pronounced, the Preparatory Committee for the Indonesian Independence set to adopt the 1945 Constitution and to elect President and Vice President of the Republic Indonesia. The 1945 Constitution is a basic law upon which every law and regulation should be based. Since the 1945 Constitution is supreme, all laws and regulations should be in accordance with it. Consequently, all laws and regulations produced by colonial rulers should not be in power because they contravened the constitution.

consciously and deliberately is oriented to drive and steer society to changes as desired.

The view laying the law at strategic places in the dimensions of societal change is actually spearheaded by Jeremy Bentham.[44] The view initially opposed hard by FC von Savigny in progress gets support from legal experts. One of the legal experts who support the view that his view is also widely influential in Indonesia is Roscoe Pound.[45]

The views are linked the law with changes in above show that the existence of law in society is seen mainly in the aspect of its function. The law has a function not only as a means of public order as custodian firmly held by FC von Savigny, but also as a means of social change, as presented by Jeremy Bentham, Roscoe Pound and others.

The Indonesian law reform efforts do not only form a new law to replace the old law made by the Dutch colonial government, but the substance of the new law made should reflect the national interests of Indonesia. Notions, concepts and theories of law that is built should reflect the characteristics of "Indonesia".

This is consistent with the view of Daniel S. Lev, an observer of Indonesian law, which states that: "The real transformation of the legal system of former colonies largely depends on the formation of new ideals room mates Impel the law in fundamentally different direction from those of the colony".[46] The statement can be interpreted freely that the real transformation of the colonial legal system is primarily dependent on the formation of new ideas that will push the law to the form entirely different from what was in the colonial period.

The Indonesian law reform efforts oriented towards the establishment of a new legal substance to replace or enhance existing substantive law consistent with national goal and interest of Indonesia in the era of globalization is not an easy matter. The existence of the Transitional Provisions of Article II of the 1945 Constitution re-enacting the legislation in force in the colonial period before the newly created implies that the drafters of the 1945 Constitution have realized how difficult it is to form legislation that reflects the national goals and interests of Indonesia.[47]

About the direction in which Indonesian law reform will be developed in the future, Sunaryati Hartono explicitly stated that it is need immediately to develop a Science of National Law based on Insights of Nationality and Archipelago, which is the insights stand on the meaning of" the people "or" nation

---

[44] W. Friedman, Law In A Changing Society, Penguin Books, 1964, p. 19.

45 Bernard Arief Sidhartha, Refleksi Tentang Struktur Ilmu Hukum, Sebuah penelitian tentang fundasi kefilsafatan dan sifat keilmuan Ilmu Hukum sebagai landasan pengembangan Ilmu Hukum Nasional Indonesia (Reflections On Structure of Legal Science, A research of the philosophical foundation and the nature of science of Legal Science as the basis for the development of the National Legal Science of Indonesia, Mandar Maju, Bandung, 1999, p. 27.

46 Daniel S. Lev, "The Lady and The Banyan Tree: Civil Law Change in Indonesia", The American Journal of Comparative Law, Vol.XIV, 1965, p. 306.

47 C.F.G. Sunaryati Hartono, *Politik Hukum Menuju Satu Sistem Hukum Nasional (Political of Law Towards A National Legal System)*, Alumni, Bandung, 1991, p. 55

"of modern Indonesia. Knowledge and reasoning about it is fundamental to the development of the Indonesian National Law. [46]

In the perspective of the national legal reform, Mochtar Kusumaatmadja focus on the development efforts of national law. In his view, national law reform in Indonesia should be directed to efforts planned include *"to update rules including the creation of a new law conforming to the demands of the times without losing sight of the legal awareness in the society"*.

Aligned with the second view above, Bernard Sidhartha argued that teaching of Indonesian national law should refer to the Pancasila (Five Basic Principles) idea of law. Sidhartha at length declared as follows:[48]

> "Developing Indonesian National Science of Law in effect means that trying to develop a new paradigm that is national, which stems in accordance with the way of life and social reality as well as the needs of the Indonesian nation today and in the future, as it has been carried out by, among others, the Indonesian legal experts above. Because the Declaration of Independence and the establishment of the Republic of Indonesia as a nation state, indeed paradigmatic Science of Law in Indonesia has changed due to changes in his study objects, which change its application field (from the colonial law into national law), and with the fundamental problems in the field of law should be handled, and how to handle it should be changed ".
>
> "Law and order that operates in a society basically is the embodiment of law espoused ideals of the community into the various rules of positive law, legal institutions and processes (the behavior of the government bureaucracy and citizens)."
>
> "Law idea of the Indonesian people rooted in Pancasila that by the founding fathers of the Republic of Indonesia established as a philosophical grounding in managing the framework and the organizational basic structure of the state as defined in the 1945 Constitution".

From the above, it is understood that the Indonesian economic law is the law in economics that apply to the people of Indonesia which aligned with the goals and ideals of the proclamation of Indonesian independence, stems to the way of life and in accordance with the social reality as well as the needs of the Indonesian nation today and in future. In this context, the economic paradigm of Indonesian law reform should be based on law idea of Pancasila. This means that the paradigm to be developed in its efforts to reform the Indonesian economic law must be rooted in Pancasila as law idea of the Indonesian people. Reformation itself must be in harmony with the social reality and the needs of the Indonesian nation today and in the future.

Establishment of new legal substance in the perspective of Indonesian economic law reform paradigmatic rooted in Pancasila that in accordance with the social reality and the needs of the Indonesian people today and in the future should

[48] *Ibid.*

be directed to the view to inside *(inward looking)* and the view to outside *(outward looking)*. In the middle of the swift of globalization today, making new legislation is not only based on the internal interests and needs of, but also to the external interests and needs. This can be understood as the fulfillment of the interests and needs of a nation can not only be satisfied by the nation or the state itself, but sometimes met by other nations or countries. Each nation or country has the potential of each. Sociologically, the dependence of a nation or a country with one another is a reasonable and rational. This condition not only as a necessity, but it as a need.

Even if the existence of the nation and the state of Indonesia can not be separated from the other nation and state in the climate of this interdependence, it does not mean there is no barrier at all that differentiates one another. Which serves as a filter limiting the legal relations that occur is national interests as the embodiment of the spirit of the Proclamation of Independence of RI. Pancasila and the 1945 Constitution is the main filter for the nation and state of Indonesia in the implementation of the legal relationship with the nation and other countries. Legal, cultural and other foreign values can be absorbed and become part of wealth of the Indonesian state insofar they does not contradict with the Pancasila and the 1945 Constitution.

National interest as a reflection of the spirit and ideals of the proclamation of independence should be the main reference in the formation of a new legal substance in economics in Indonesia. Patterns of thinking that is more about the national interest in Indonesia's economic reform law is what the author called a "*paradigm of particularism*". In this paradigm, the view is more geared to *inside* (inward looking), which explore the richness and potential that is in Indonesia. The values that live in the community may be appointed as a legal norm in national laws and regulations insofar they do not conflict with the national interests.

Philosophically, particularism paradigm strongly influenced by the legal minds of adherents of the flow of positive law that put the state's sovereignty as a starting point in looking at the law. All law comes from state sources. John Austin in his work "The Province of Jurisprudence Determined" (1932) states: "The matter of jurisprudence is positive law: law simply and strictly so called: or law set by political superiors to political inferiors". In his view, the law is the command of the sovereign political power of a country. Austin's view actually gets stronger influence of Jeremy Bentham that confirms there are 3 main elements that make up the law, namely: command, sovereignty and sanctions, as disclosed in his statement:

> An assembled of sign declarative of a volition conceive of adopted by the sovereign in a state, concerning the conduct to be observed ... by ... persons, who ... are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events ... the prospect of which it is intended should act as a motive upon those whose conduct is in question.

In consistent with the view Austin, Sieg Eiselent stated: "... that law is territorial in its nature. It only has the force of law specified within national

boundaries, and in principle no other state is bound to acknowledge or apply it".[49] Each sovereign state has jurisdiction for the whole population in its territory. Sovereignty itself is the ultimate power held by a country to freely perform various activities in accordance interests provided that such activities are not contrary to international law.[50]

However, as part of the international community, moreover in the current globalization era, the interaction with the legal norms and values of other foreign inevitable. Effort sealed the things from the foreign is not a wise settlement on the phenomenon exists. If this is done, then Indonesia will be increasingly marginalized in the international traffic arena. Therefore, Indonesia must open up the entry of legal norms and the other values from foreign. The views are directed *outside* (outward looking), which explore the legal norms and foreign values in order to enrich and improving the quality of national legislation by the author is referred to as "*paradigm of universalistic*". Attention and the view to the outside rather than as the primary reference that is "ism", but rather complementary or supporting references. Therefore, as well as any legal norms and values of other foreigners during the conflict with the national interest, then the rule of law and foreign values cannot be absorbed and applied in Indonesia as part of national law. Conversely, if it is not contrary to the national interest, then the rule of law and foreign values can be absorbed and appointed as legal norms in the national legislation.

In contrast to the paradigm of particularism, universalism paradigm philosophically get strengthen from the flow of natural law adherents. The naturalists argued that the principles of law in all legal systems not derived from man-made, but it comes from the principles that apply universally, all time and met with common sense. The law must be sought and not made. Naturalist groups to formulate the principles of natural law based on the teachings of the Lord Bersumberkan. Based on natural law, states should behave in relation to one another for the sake of safety and survival of the international community.

Growing view in the Naturalist is the views that are universal. The Universalist view of international law as the law of the world. The world law conceived as a world state covering all countries in the world (sort of federal state). Hierarchically, the world state stands on national states.[49] Idealistic notion from Universalists puts the law world as the single law subordinating all law of the

---

[49] *Sieg Eiselent, loc.cit.*

50 In the concept of international law, sovereignty has three main aspects, namely: external, internal and territorial. External aspect of sovereignty is the right of every country to freely determine their relationship with various countries or other groups without restraints, pressure or oversight of other countries. While the internal aspect of sovereignty is the right of a country and the exclusive authority to determine the form of its institutions, the workings of these institutions and the right to make laws it wants and actions to comply. Furthermore, aspects of territorial sovereignty means the full and exclusive power possessed by the state over individuals and the objects contained in the region. See Boer Mauna, Hukum Internasional, Pengertian Peranan dan Fungsi Dalam Era Dinamika Global (International Law. Understanding of the Role and the Function in Global Dynamics Era), Edisi ke-2, Alumni, Bandung, 2005, p. 24. and Nikambo Mugerwa, Subject of International Law, Edited by Max Sorensen, Mac Millan, New York, 1968, p. 253.

national states. The law order of the world according to this concept is the law order subordinated. Leading figures of this genre is Hugo de Groot or Grotius (1583-1645), Francisco de Vitoria (1480-1546), Francisco Suarez (1548-1617), Alberico Gentilis (1552-1602) and others.[51]

According to the author, both paradigm, namely *particularism* and *universalistic* does not deny one another. On the contrary, they reinforce mutually each other. Especially today, where *one side* the values of nationalism in Indonesian society is reduced [52] and on the other side of foreign values enter unceasingly to go through media of ICT are difficult to stop, then using both paradigm is the right solution. Merging or convergence of these two paradigms is what the author called a "*paradigm of universalistic particularism*".

Substantively, this paradigm is really in line with the view of Soekarno (former the First President of Indonesia) delivered in his speech on June 1, 1945. He stated that Indonesian nationalism thrives in the garden of internationalism. Of this statement suggests that the issue between nationalism and internationalism (in the present context is globalization) is not only the issues that arise at this time, but has become part of the consideration in the formulation of the basic state of the Republic of Indonesia. Spirit of Indonesian nationalism it is expected to establish the existence of Indonesia in the dynamics of the international community. In realizing common goals expected, the Founding Fathers hoped it would be a balanced local between nationalism and internationalism.

A similar view was given by Adi Sulistyono who states that the establishment of the Indonesian economic law faces two big tug, the pull from the top and pull down. The pull of the above points to the globalization of law, while the pull from the bottom point to the realities that exist in society, namely the diversity of living law (including Islamic law and customary law).[53]

Paradigm of universalistic particularism should be a pattern of reference for policy makers, legislators in particular, within the framework of national economic law reform. The national economic law reform is not solely create new economic laws, but more than that as a reflection of the efforts to realize national goals and interests aligned with the ideals and spirit of the Proclamation of Independence of the Republic of Indonesia based on Pancasila and the 1945 Constitution.

---

[51] *Mochtar Kusumaatmadja and Etty R. Agoes, Pengantar Hukum Internasional (Introduction to International Law), Alumni, Bandung, 2003, p. 10.*

52 Love of the homeland (nationalism), the spirit of togetherness and unity among the people of Indonesia experienced a drastic decline in the current era of reform. If in the New Order era, altercation between villagers one another, squabble between the army force and the police, fights between students, between youth, between students, between religious communities are rare, are now in the era of reform is not a taboo thing happened.

53 Adi Sulistiyono, Pembangunan Hukum Ekonomi Untuk Mendukung Pencapaian Visi Indonesia 2020 (Development of Economic Law in Support of Achieving the Indonesian Vision of 2020), Inauguration Speech of Professor in Economy at the Law Faculty, University of Sebelas Maret, Delivered in an Open Senate Meeting of University of Sebelas Maret, Surakarta, November 17, *2007,* p. 27 <eprints.uns.ac.id/940/1/pengukuhan_adi_sulistyono.pdf>, visited on 6 December 2013.

In the context of the implementation of the paradigm of universalistic-particularism to reform the national economic law, then an understanding of Indonesia's economic system is a necessity. Between legal systems and economic systems are intimately connected. Therefore, the determination explicitly of what the economic system will be developed in Indonesia in future should be agreed nationally. This meant that efforts to reform national laws not to drift off, remains in framework of the economic constitutional that has been agreed nationally.

A fact that cannot be denied that up to the present Indonesia does not have the Indonesian economic system agreed nationally. [54] This does not mean that Indonesia has no direction at all about organizing of economic life. This can be observed in Article 33 UUD 1945 which states: "The economy is structured as a joint venture based on the principle of kinship". In addition, one of the obligations of the state in the field of economy also been strictly regulated as mandated in Article 34 UUD 1945, which reads: "The poor and neglected children who are maintained by the state".

Even though the general direction of the organization of economic life is set firmly in the 1945 Constitution, does not automatically mean that Indonesia has system of national economy agreed nationally. Organization of economic life which are not continuous between the old order with a new order on the one side and to order reforms on the other side shows that Indonesia does not have a national economic system as well as creating an economic crisis of 1998. As a result, the problems of poverty, hunger and unemployment continue to be the actual issue at every government regime. Similarly, the number of laws promulgated by the House of Representatives that ultimately foundered because its entry violated the constitution so that the enforceability canceled by the Constitutional Court[55] reinforced the view that Indonesia does not have a national economic system. So perfectly natural in every process of making laws concerning economics there is the tug between liberal thoughts with the social thoughts, and even that is not strictly between those thoughts.

---

[54] Referring to understanding the system in general, Indonesian economic system is defined as "an entity that is composed of elements which interact with each other so that -to a certain extent - to form a consistent network in economic life in Indonesia".

[55] Mahfud MD (at that time as the Chairman of the Constitutional Court) said in a press conference at the Court House on January 2, 2013 that during 2012, the Constitutional Court case dealing with the test material (judicial review) to a number of 169. Of these, as many as 97 cases have been decided upon constitutional judges. From this figure, an increase in errors by 31 percent compared to the Act in 2011, which is just the range of 22.3 percent. Additionally, Mahfud said that the overall case that goes to the Court in 2012 as many as 287. Comparison of the number granted and the petition is not to test the laws of the cut-off average of the last five years or the period of 2008-2012 cases were granted as much as 20.44 percent, while 79.56 per cent is rejected and not accepted or withdrawn. *See* http://www.beritadewan.com/banyak-dibatalkan-mk-kualitas-pembuatan-uu-makin-menurun/ visited 10 December 2013. Several substances of laws were set in invalid due to conflict with Article 33 UUD 1945 are Law No. 22/2001 on Oil and Gas (by Decision No. PUU:002/PUU-I/2003) <www.mahkamahkonstitusi.go.id/ putusan/putusan_sidang _eng_PUTUSAN>, visited on 10 December 2013 and Law No. 20/2002 on Electricity (by Decision No. PUU: 001/PUU-(/2002) <www.mahkamahkonstitusi.go.id/ putusan/putusan_sidang_eng_PUTUSAN>, visited on 10 December 2013.

Indonesia does not have an operational guidelines related how to carry out economic development in accordance with that outlined in the 1945 Constitution up to the present. Even if there are only formulas about the national economy put forward by economists and even then it is limited to the ideas and discourses of science, has not been agreed nationally.[56]

Some scholars who have conveyed their critical thinking about the Indonesian economic system are Wilopo (former Prime Minister and Chairman of the Constituent Assembly in the Old Order), Widjojo Nitisastro (former Minister of the Economy in the New Order), Emil Salim (former Minister of Population and the Environment in New Order), Sri Edi Swasono, Mubyarto and the Indonesian Economists Association.[57] Difference with Wilopo who emphasis on business form (refer to "joint ventures" and "private enterprise), Widjojo more emphasis on the workings of economic activity. In his view, the workings of Indonesian Economic System as an integrated unit describes the properties of family relationships. Emil Salim was the first to introduce the term Pancasila economy. The term was later used extensively by both the Sri Edi Swasono and Mubyarto in developing Indonesia's Economic System through his works.

Functionally, each governmental regime actually has an Indonesian economic system. Nevertheless, substantial economic systems of each regime there is a significant difference. Therefore, it is rational that the economic system is built on a regime of government cannot be continued by the next administration regime. For example, the economic system that was built in the Old Order has a different style to the economic system that was built during the New Order.

The economic system is built on the Old Order is socialism Indonesia.[58] As the embodiment of Indonesian socialism is just and prosperous society, based on values of justice, nationalism, democracy, prosperity and divinity. These values are contained in *the principles of kinship* and *mutual assistance* that is essential personality traits of Indonesia as defined in the Pancasila. The main characteristic of Indonesian socialism is blend elements of socialism, namely *social justice* and *welfare*, and the element of personality Indonesia, namely *kinship* and *mutual assistance*.

Tools used to realize socialism of Indonesia is the National Development Plan, which is a development that has three elements, namely: (1) development across the country to develop the Indonesian nation *(the National)*, (2) the development in all the life and livelihood of the Indonesian people *(the Universe)*, and (3) development according to a certain plan *(Plan)*. Furthermore, to design a fair and prosperous society of Indonesia socialism established the National Planning Council *(The Council)*.

---

[56] Adi Sulistyono, *loc.cit.*

[57] Munawar Ismail, Dwi Budi Santoso and Ahmad Erani Yustika, *Sistem Ekonomi Indonesia, Penafsiran Pancasila dan UUD 1945 (Indonesian Economic System, Interpretation to the Pancasila and the 1945 Constitution)*, a Cooperation : the Nusantara Institute of Jakarta in cooperation and the Center for Democracy Economic Studies, Faculty of Economics and Business of Brawijaya University, 2013, pp. 5-13.

[58] *Ibid.*, pp. 40-45.

The concept of economic development is not integrated with the political development. They do not seem to form a holistic structure. *Economic Declaration* is an implementation guideline outlines for the development in economy, while *the National Leadership Indonesian Socialism Revolution* and *Year of Victory* is an implementation guideline for Indonesian Political Manifesto.

Unlike the Old Order, the economic system that was built by the New Order regime based on economic democracy.[59] Economic democracy functioned as a guide in formulating economic policy. Implementation of economic democracy should be avoided following matters: (1) System of free fight liberalism, (2) System of etatism; (3) Unfair competition and economic concentration in one group in various forms of monopoly (single buyer) are detrimental to society and contrary with the ideals of justice.

In order to realize a just and prosperous society, economic policy must be based on *the trilogy of development* strategies, namely: (1) the distribution of development and its results, (2) economic growth, (3) health and dynamic national stability

Economic development does not stand alone, but integrated with other fields, namely religion, politics, social, cultural, legal and defense. All of which form the building holistically in terms of the Guidelines of State Policy. These guidelines are the substantive patterns of national development.

Both economic systems of both the government regime led to different results. Implementation of economic development in the Old Order in practice did not show significant results. At this regime, the dynamics of political life are more prominent. In contrast, economic development implemented under the New Order actually showed encouraging results. Even in this period, Indonesia had become producing country in rice. Unfortunately, the national economic growth which significantly increased the apparently less offset by distribution elements. It appeared conglomeration practice in all sectors of the economy. In the process of conglomeration, there is an unhealthy relationship between the power with conglomerates. At the same time, the practice of corruption, collusion and nepotism (KKN) thrives in the New Order era, the emergence of the threat of disintegration due to a sharp distinction between the rich and the poor, and eventually resulted in the fall of the New Order regime.

As a form of concern and response as well as the absence of Indonesian economic system as an operational guideline to provide direction of economic development now and in the future, the Nusantara Institute of Jakarta in cooperation with the Center for Democracy Economic Studies, Faculty of Economics and Business of Brawijaya University introduced the concept of building "Indonesia's economic system". Indonesian Economic System building can be expressed as follows:[60]

> "1. Indonesian Economic system formed by four components, namely: ownership, resource, participants or actors, mechanism of

[59] *Ibid*., pp. 45-51.
[60] *Ibid*., p. 184.

action, and purpose. Linkage of the four components that form a holistic unity of the work of Indonesian Economic System.

2. Position in the ideological value of Indonesia's Economic System is fundamental. Therefore, the values of the Indonesian people's way of life will animate the whole existing order in the Indonesian Economic System. The ideological foundation also arguably the most fundamental distinguishing element between the Indonesian economy system with other economic systems".

Foundation of Indonesia's Economic System mapped into three hierarchical layers, namely the basic, pillar and the principle of implementation. Basic is the bottom layer, which serves as an animating spirit and color the whole concept of building Indonesia's Economic System. Pillar stand on the basic, where it serves as a normative reference how the building is formulated and implemented. While principle of implementation is more operational guidelines how the Indonesian Economy System held in real life.

Indonesian Economic System building is composed by its components, namely resource ownership component, the component actors, components of mechanism, and welfare components. Each component has the form of activities and different working procedures with the spirit of togetherness

Normatively, all thinking about Indonesian economic system constantly refers to Article 33 of the 1945 Constitution. This means that Article 33 UUD 1945 occupies a central position in economic development in Indonesia. In the context of legal reform Indonesian economy with the "paradigm of universalistic particularism", the article has become the meeting point between the legal system to the economic system. Indonesian economic law reform efforts carried out by exploring and absorbing the values of the people who live in Indonesia and the evolving dynamics in the international community based on the values of economic democracy as contained in the article, namely:

(1) The economy is structured as a joint venture based on the principle of the family.
(2) The branches of production which are important for the country and serving the people should be controlled by the state.
(3) The Earth's water and the natural riches contained therein shall be controlled by the State and used for the welfare of the people.
(4) The national economy shall be conducted in accordance with the principle of economic democracy, equitable efficiency, sustainability, environment, independence, and balancing economic progress and national unity.
(5) Further provisions on the implementation of this Article shall be regulated by law.

Referring to the above provisions, the establishment of national legislation in the field of economics is not solely focused on economic recovery, but also simultaneously laying the groundwork for sustainable economic growth, more

efficient and more equitable in order to realize the welfare of society.[61] Establishment of the new law is not only beneficial for a group of people or a certain group, but must provide benefits to all Indonesian people, both in the dimensions of the present and future.

Orientation of the benefits in the establishment of national legislation in the field of economics is consistent with the view of Jeremy Bentham, which states: *"the greatest happiness to the greatest number"*. The establishment of the law should be oriented towards usefulness, providing maximum happiness for many people.[62]

Development of economic law should favor the interests of the people based on the principle of kinship with the values of divinity, humanity, unity, democracy (democracy) and grounded in the values of justice, expediency and certainty. Development of economic law should be oriented on improving the welfare of society, namely the realization of Indonesian society, prosperous and orderly.

Along with the planned establishment of the 2015 AEC, efforts of the Indonesian economy law reform in the field of international trade with *the paradigm of universalistic particularism* has strategic significance. This is due to the absorption of the foreign legal norms and values is very open as far as not contrary to the national interest as the embodiment of the ideals of the Proclamation of Independence of RI, Pancasila and the 1945 Constitution. National interest remain become the main reference in the formation of the Indonesian economy in the law of international trade in the era of globalization is increasingly competitive.

As we know that the AEC is a form of economic integration is more real and meaningful in the ASEAN region. Formation is oriented to improve the overall regional competitiveness in the world market, promote economic growth, reduce poverty and improve the living standard of the ASEAN Member States.

To be more effective in its implementation, the Leaders of ASEAN Countries in the 13th ASEAN Summit in Singapore in November 2007 agreed *the Declaration on the AEC Blueprint* as a reference for the ASEAN countries in realizing *the 2015 AEC*. The AEC Blueprint includes strategic schedule for each pillar with a target in four phases, namely between the years 2008-2009, 2010-2011, 2012-2013 and 2014-2015.[63]

There are four (4) pillars are accommodated in the AEC Blueprint. One of them is the ASEAN as a single market and single production-based elements are supported by the free flow of goods, services, investment, skilled labor and freer flow of capital. This means that in the framework of realization of the AEC, all ASEAN member countries should liberalize trade in goods, services, investment and labor freely educated and freer flow of capital.

---

61 *C.F.G. Sunaryati Hartono, loc. cit.*

62 Hilaire McCoubrey, loc. cit.

63 Association of Southeast Asian Nations (ASEAN), ASEAN Selayang Pandang (Overview ASEAN), 9th Edition, Jakarta, 2010, pp. 3-6, 20-29, 54-121.

In accordance with the AEC Blueprint, free trade of goods flow components include reduction and elimination of tariffs and the elimination of significant non-tariff barriers in accordance scheme ASEAN Free Trade Agreement (AFTA). In addition, the facility in order to smooth the flow of goods also increased free trade, including the implementation of the ASEAN Single Window (ASW), the scheme of the Common Effective Preferential Tariff (CEPT), Rules of Origin (ROR) and the harmonization of standard and conformance. To realize the free flow of trade goods, ASEAN Member Countries agreed ASEAN Trade in Goods Agreement (ATIGA) at the 14th ASEAN Summit on February 27, 2009 at Cha-Am Hua Hin, Thailand.[64]

ATIGA expected effect 180 days after the date of signing accommodates general principles of international trade, namely *the most favored nation treatment* and *the national treatment*. Based on these principles, Indonesia must give equal treatment to businesses from ASEAN member countries, as well as to domestic businesses. Along with the swift imported goods in the domestic market in Indonesia, negligence in the implementation of these principles in turn will destroy the existence of domestic businesses.

It is undeniable that the AEC formation can theoretically provide a great advantage for Indonesia. Some of the advantages include a more open market access for goods of Indonesian products in the ASEAN member countries. This in turn will encourage an increase in the volume of Indonesian exports, job creation, decrease the amount of unemployment and social inequality. That could happen if all the potential of Indonesian society are moved in that direction, including and not limited to the national economic law reform efforts in the field of international trade.

Unfortunately, the fact that until recently the executive and the legislative has not done much in the national economic law reform efforts in the field of international trade. Ten years since the approval of the establishment of the AEC in 2003 passed without any meaningful action. If it may not be said no, dissemination of information to public on the establishment of the 2015 AEC is very less time. Apparently, Indonesia is not ready to enter into the 2015 AEC which is none other than his own clever ideas through proposal "ASEAN Community" received by the ASEAN countries.

If this situation goes on without a fundamental change in an effort to raise awareness of all components of the significance for the formation of AEC Indonesia, ASEAN's mansion would likely backfire. Not profits earned on AEC formation, but calamity. Domestic businessmen would only be a spectator in their own stable. Not the Indonesian goods of production that flooded markets in ASEAN member countries, but rather the domestic Indonesian market is flooded with imported goods. AEC formation will only add to the long list of sources of Indonesia's economic downturn in the future.

The notion of Indonesian economic law reform in international trade paradigmatically, in this case of the paradigm of universalistic particularism seems

[64] *Ibid*., p.6 *See* also ASEAN Secretariat, 2008, *ASEAN Community Blueprint*, Jakarta, paras. 9-19.

a rational solution to be actualized. Implementation of the economic law reform, of course, would have to be able to bring people of Indonesia that is just and prosperous or social welfare.

3. Conclusion

Based on the previous analysis, it can be concluded that the Indonesian economic law reform in the field of international trade along with the establishment of the AEC in 2015 has a strategic significance in order to replace the laws of Indonesia as a legacy of the Dutch government which is not conducive to the dynamics of international trade today. Paradigm of universalistic-particularism that emphasizes goals and national interests without ignoring dynamics of the international community can be used as a framework of thinking in Indonesian economic law reform efforts in the field of international trade.

In order to provide a clear direction of Indonesian economic law reform efforts in the context of the establishment of 2015 AEC, it is necessary to establish the Indonesian Economic System in the national legislation.

Bibliography

1. A.O., Alan D. Rose, *The Challenge for the Uniform Law in the Twenty-First Century*, Uniform Law Review, NS-Vol.1, 1996
2. Albrow, M., *Globalization and Knowledge Society*, Sage Publications, London, 1990.
3. Ancel, Marc, From the Unification of Law to its Harmonization, *Tulane Law Review*, 51, 1976
4. Association of Southeast Asian Nations (ASEAN), ASEAN Selayang Pandang (Overview ASEAN), 9th Edition, Jakarta, 2010
5. Austin, J., *The Province of Jurisprudence Determined*, Weidenfeld & Nicholson, London, 1955
6. Bix, Brian, *Jurisprudence: Theory and Context*, Westview Press, Colorado, 1996
7. Bossche, Peter Van den, *The Law and Policy of the World Trade Organization, Text, Cases and Materials*, Cambridge University Press, 2006
8. Eiselent, Sieg, *Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa*, "South African Law Journal", 116, 1999, Part II, 323-370 <www.cisg.pace.edu/cisg/biblio/eiselen.html>, visited on 5 December 2013
9. Friedman, W., *The State and the Rule of Law in Economy Mix*, Steven & Son, London, 1971
10. Hart, H.L.A., *The Concept of Law*, Clarendon Press, Oxford, 1972
11. Hartono, C.F.G. Sunaryati (ed.), *Business and the Legal Profession in an Age of Computerization (Foundation for Human Rights, Democracy and Rule of Law,* Jakarta, 2000.
12. Inis L. Claude, Jr., *Swords into Plowshares*, Random Housen New York, 1956
13. Juwana, Hikmahanto, *Politik Hukum Undang-undang Bidang Ekonomi di Indonesia (Political Law Economic Law in Indonesia)*, "Journal of Business Law", Volume 23, No. 2, 2004.

14. Kansil, CST and Kansil, Cristine S.T., *Pengantar Hukum Indonesia (Introduction to Indonesian Law)*, Balai Pustaka, Jakarta, 2003.
15. Kusumaatmadja, Mochtar and Agoes, Etty R, *Pengantar Hukum Internasional (Introduction to International Law*, Alumni, Bandung, 2003.
16. Research Institute for Law and Criminology of Law Faculty of Padjadjaran University, *Hukum, Masyarakat dan Pembinaan Hukum Nasional: Suatu Uraian tentang Landasan Pokok Pikiran, Pola dan Mekanisme Pembaharuan Hukum di Indonesia (Law, Society and the National Law Development: A Description of Key Thought Foundation, Patterns and Mechanism of Legal Reform in Indonesia*, Bandung, 1976.
17. Kertawidjaja, Mohammad Hidjazie, *Pembentukan Hukum Nasional (Establishment of the National Law*, LIPI, Jakarta, 1973.
18. Lev, Daniel S., *The Lady and The Banyan Tree: Civil Law Change in Indonesia*, "The American Journal of Comparative Law", Vol.XIV, 1965.
19. Lubis, T. Mulya, *Hukum dan Ekonomi (Law and Economics)*, Pustaka Sinar Harapan, Jakarta, 1997.
20. Marzuki, Peter Mahmud, *An Introduction to Indonesian Law*, Setara Press, Malang, 2011
21. Rahardjo, Satjipto, *Ilmu Hukum (Legal Science)*, Citra Aditya Bakti, Bandung, 2000
22. Mauna, Boer, *Hukum Internasional, Pengertian Peranan dan Fungsi Dalam Era Dinamika Global (International Law, Understanding of the Role and the Function in Global Dynamics Era)",* 2ed., Alumni, Bandung, 2005
23. McCoubrey, Hilaire and White, Nigel D., *Textbook on Jurisprudence*, Blackstone Limited, London, 1996.
24. McLeod, Ian, *Legal Method*, Second Edition, Macmillan Press Ltd., London, 1996
25. Mill, John Stuart, *Utilitarianism on Liberty Essay on Bentham*, The World Publishing Company, New York, USA, 1962
26. Mugerwa, Nikambo, *Subject of International Law*, Edited by Max Sorensen, Mac Millan, New York, 1968
27. Munawar Ismail, Dwi Budi Santoso and Ahmad Erani Yustika, *Sistem Ekonomi Indonesia, Penafsiran Pancasila dan UUD 1945 (Indonesian Economic System , Interpretation to the Pancasila and the 1945 Constitution)*, a Cooperation : the Nusantara Institute of Jakarta in cooperation and the Center for Democracy Economic Studies, Faculty of Economics and Business of Brawijaya University, 2013
28. Perloff, Saul, *The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration*, 13 U. PA. *J. INT'L BUS. L*. 323, 1992
29. Radjagukguk, Erman, *Hukum Kontrak Internasional dan Perdagangan Bebas (International Contract Law and Free Trade)*, "Journal of Business Law", Vol. 2, 1997
30. Rahardjo, Satjipto, *Pengertian Hukum Adat, Hukum yang hidup dalam masyarakat (living law) dan Hukum Nasional (Understanding the Customary Law, Law of living in the community (living law) and the National Law)*, in BPHN, Seminar on the Customary Law and the National Law Development, Binacipta, Bandung, 1975
31. Rasjidi, Lili and Putera, I.B. Wyasa, *Hukum sebagai suatu Sistem (Law as a system)*, CV Mandar Maju, Bandung, 2003
32. Sidhartha, Bernard Arief, *Refleksi Tentang Struktur Ilmu Hukum, Sebuah penelitian tentang fundasi kefilsafatan dan sifat keilmuan Ilmu Hukum sebagai landasan pengembangan Ilmu Hukum Nasional Indonesia (Reflections On Structure of Legal Science, A research of the philosophical foundation and the nature of science of Legal*

Science as the basis for the development of the National Legal Science of Indonesia), Mandar Maju, Bandung, 1999

33. Suhardi, Gunarto, *Peranan Hukum Dalam Pembangunan Ekonomi (The Role of Law in Economic Development)*, Andi Offset, Yogyakarta, 2002
34. Sukarmi, *"Tanggung-Jawab Pelaku Usaha Atas Kerugian Konsumen Yang Disebabkan Oleh Perjanjian Baku (Standard Contract) Dalam Transaksi Elektronik (Responsibilities Consumer Entrepreneur For Loss Caused By Raw Agreement (Standard Contract) Electronic Transactions)*, Dissertation, Graduate School of the University of Padjadjaran, 2005
35. Sulistyono, Adi, *Pembangunan Hukum Ekonomi Untuk Mendukung Pencapaian Visi Indonesia 2020 (Development of Economic Law in Support of Achieving the Indonesian Vision of 2020)*, Inauguration Speech of Professor in Economy at the Law Faculty, University of Sebelas Maret, Delivered in an Open Senate Meeting of University of Sebelas Maret, Surakarta on November 17, 2007 <eprints.uns.ac.id/940/1/pengukuhan_adi_sulistyono.pdf>, visited on 6 December 2013
36. Tambunan, Tulus T.H., *Globalisasi dan Perdagangan Internasional (Globalization and International Trade)*, Ghalia Indonesia, Jakarta, 2004
37. Taufiqurrahman, *Karakter Pilihan Hukum, Kajian tentang Lingkup Penerapan United Nations Convention on Contracts Sale of Goods (CISG) 1980 (Character of Law Choice, Study on Application Scope of United Nations Convention on Contracts Sale of Goods [CISG] 1980)*, PT. Bayumedia, Malang, 2010
38. United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG] <www.cisg.law.pace.edu/cisg/text/teaty.html> visited on 26 December 2013
39. Wibisono, Koento, *Arti Perkembangan Menurut Filsafat Positivisme Comte (Meaning of Development According to Comte Positivism Philosophy)*, Gajah Mada University Press, 1983
40. Wignjosoebroto, Soetandyo, *Hukum, Paradigma, Metode dan Dinamika Masalahnya Law, (Law, Paradigm, Method and Dynamic of Their Problem)*, Elsam & Huma, Jakarta, 2002
41. Zaphiriou, George A., *Unification and Harmonization of Law Relating to Global and Regional Trading*, Northern Illionis University Law Reform, 14 N. III. U.1. Rev., 1994
42. Decision of The Constitutional Court of the Republic Indonesia, the Case No. PUU:002/PUU-I/2003, Petitioners (Indonesian Legal and Human Rights Consultants' Association, Indonesian Legal and Human Rights Association and others) filed a petition for judicial review of Law No. 22 Year 2001 on Oil and Gas *against* the 1945 Constitution <www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_PUTUSAN>, visited on 10 December 2013
43. Decision of The Constitutional Court of the Republic Indonesia, the Case No. PUU: 001/PUU-1/2003, Petitioners (Indonesian Legal and Human Rights Consultants' Association, Indonesian Legal and Human Rights Association and others) filed a petition for judicial review of Law No. 20/2002 on Electrical Power *against* the 1945 Constitution <www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_ PUTUSAN>, visited on 10 December 2013