How Judges use their Thinking Paradigm to find the Justice: Reviewing The Law Enforcement in Indonesia

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Abstract. The amendment of the 1945 Indonesian Constitution, particularly Article 1 (3) carries a very significant change in the field of law enforcement by a judge in Indonesia. In particular Article 1 (3) of the original stated that "Indonesia is a country based on law (*Rechtsstaat*) as a concept of Civil Law System" to or move on to the value of the rule of law on the Anglo-Saxon System (Common Law System). From that point, therefore "Indonesia is a country of Common Law System". This paper takes into consideration that since then, Indonesia can use Legal Positivism (Value *Rechtsstaat*) as well as Realism (Value Rule of Law). Legal Positivism depends entirely on how sentences found as written in the law, while the Legal Realism uses those written law as a reference only. Indonesia has mostly followed the Legal Positivism which has proven unable to meet the public's sense of justice. The discussion paper uses Normative and Empirical Juridical approach. The results have concluded that the Judges in Indonesia should have their Legal Positivism thinking paradigm in line with the Legal Realism or possibly to use and combine both of them - Legal Positivism and Realism - in order to conduct so called Law enforcement in Indonesia with the ultimate goal of law is to find the Justice.
Keywords: Justice, Law Enforcement, Legal Positivism, Legal Realism, Rechtsvinding[1]

1 Introduction

Paradigm Thinking of Judges for Law Enforcement in Indonesia is becoming an important issue to discuss recently. The Judges's thinking paradigm need to look at on how the Positivism goes to Realism paradigm. Indonesia today has valued more on legal positivism, but it has proved that it is unable to meet the justice as expected by the public.

The issues identified now are How the law enforcement can achieve the purpose of the law whose name justice. In the law enforcement, it is clearly considered how paradigm should put justice as a goal. Once the justice is achieved, therefore the benefits of law can be perceived.

[1] *Rechtsvinding:* To find the Law (in Dutch Language)

The amendment of the 1945 Constitution, particularly Article 1 (3) carries a very significant change in the field of law enforcement by a judge in Indonesia. In particular Article 1 (3) of the original stated that "Indonesia is a country based on law (*Rechtsstaat*) as a concept of Civil Law System" to or move on to the value of the rule of law on the Anglo-Saxon System (Common Law System). From that point, therefore "Indonesia is a country of law Common Law System". Indonesia since then, can use Legal Positivism (Value *Rechtsstaat*) as well as Realism (Value Rule of Law). It is also possible to use and combine both of them – Legal Positivism and Realism - in order to conduct so called Law enforcement in the country of Indonesia with the ultimate goal of law is to find the Justice. The constitutions used by the Judge as one personnel in charge for the Law enforcement can be Legal Positivism paradigm which depends entirely on how sounds sentences written in the law. This Legal Positivism can be applied once it is sufficient and possible as well as further and justice can be reached and perceived. However, it is also possible in the case of the constitutions found and perceived insufficient to cover all the issues which is numerous and complex, so then the Judge is recommended to ignore what it is written (constitution) or leave it the Positivism paradigm of thinking and furthermore to find the new law (*Rechtvinding*) to gain the ultimate goal of law so called Justice.

Legal Positivism has provenunable to meet the demands for social justice, as expected, because a lot of *du process of law* can not achieve the purpose of the law so-called "Justice" (Nurdin B., 2012). As mentioned earlier, the school of positivism depends on how the sound sentences are written in the law. Apart from fair or unfair, that's the law should be applied and implemented. Law enforcement in this way means that the law was created only for the law, though the law seems not made for humans. It is important to explore how the law enforcement can achieve the purpose of law so called justice. In the law enforcement, it should be found out how thinking paradigm should put justice as a goal that should be prioritized, therefore the benefits of law can be perceived, as the law was clearly created for man and not vice versa.

John Austin (1790-1861) argues that the law is a close logical system. It is legally separated from justice. Austin did not talk about justice due to justice from his opinion is outside and supposed to be separated from the law. If the law is a command, then the command has nothing to do with justice. Therefore, it is then defined that the criticism against Austin, in general, highlighted the views of law. Hans Kelsen (1881-1973) in his book: The Pure Theory of Law, makes the outlook Hart and Austin as a base to build his theory. In general, Kelsen's opinion on the Pure Theory of Law is based on Austin. In theoretical sense, the law does not require considerations other than the social science of jurisprudence. Kellen called this as a Pure Theory of Law because it only describes the law and attempts to eliminate from the object of

these all description that is not strictly law. Its aim is to free the science of law from alien elements.[2]

The school of positivism in Indonesia from period of independence to nowadays is still the majority of its adherent, because it is a logical consequence as a result because we choose the state construction law as in Article 1 (3) of the 1945 Constitution with the word *Rechtsstaat*. The issue identified now is how a law enforcement can achieve the purpose of the law called Justice that should prioritize it as a goal, so that the benefits of law is perceived due to a reason that the law was created for man and not vice versa.

Legal Realism thinking paradigm means that the law used as a reference only, as they realized from the initial philosophy that is not possible all the rules and regulations or written law can solve all the law problems exist in society with its various and complex issues. In this context, this paper does not discuss the issue of whether the Realism Paradigm is the schools of law or not? The important thing now is to see the extent to which benefits can be drawn from the ways of thinking of the Realists used for law enforcement in Indonesia in order to seek and redress issues and Justice is the found as expected and benefit to the wider community. Issues to be explored in the paper is that how paradigms of judges toward the law enforcement and how it can achieve the justice? It is also to confirm that once the Act is perceived "less-feasible," the Judge shall break the law.

2 Research Methods

Methods of Approach conducted for the research used Normative and Empirical Juridical Methods. The use of Normative Juridical Approach is to do research on Philosophical, sociological, historical value, including this the Law itself and its Norms as well those all are underlining the emerging the Law. In addition to that, the use of Empirical Juridical Approach is carried out and conducted by doing research and exploring the issues raised from the implementation of Normative Juridical Approach.

3 Theories and Discussion

Justice is one of the purposes of the law which is the most widely discussed throughout the course of the history of philosophy of law. The

[2] Hans Kelsen, The Pure Theory of Law (Berkeley: University of California Press, 1978), p. 1."He called Pure Theory of Law because it explains the law and get away from other objects that had nothing to do with the law. The goal is to free legal knowledge of foreign elements. This is the methodological foundation of the theory.

purpose of law is not only justice but also the legal certainty and expediency. Ideally, the law must accommodate that all three–Justice, Certainty, and Expediency. In fact, some have argued that purpose of Law is only a Justice.[3]

Radbruch (1973) states that justice should be considered as one component of the idea of law. Other components are the finality and certainty.[4] Law and Justice as two sides of the coin. If justice is described as a matter of law and as a form, then the value of justice should fill the legal form. While the law is a form that must protect the value of it. Thus, justice has a normative nature at the same time for the constitutive law. Justice is normative for the law because it serves as a prerequisite underlying transcendental dignity of each law. Justice is the moral foundation of law and at the same yardstick positive legal system. In other words, justice has always been the base of the law. Law is constitutively as justice must be an absolute element for the law that should be recognized legally. According to Bernard L. Tanya, Yoan Simanjuntak and Mark N.Y. Hage (2006, p.106), they said "Without justice, rules are an inappropriate called as the law". It is in line with Rawls (1999, p.3) who said that no matter how good and efficient the law is, but if it is not fair, then the law should be replaced.

A description of Justice further comes from John Rawls (1999) as written in Priyono H. (1993 p.35), which is seen as the most comprehensive theory of justice until today. Rawls theory can be classified departing from the idea of utilitarianism, although Rawls himself more often included in a group of Legal Realism. Rawls (1999) believes that A needs of balance between private interests and the common good. How is the balance given in the right way and portion, that is called justice. Justice is a value that can not be negotiable, because only with justice stability then human life is guaranteed. Furthermore, in order to avoid conflicts of personal interest and the common interest, it is required to create the rules. People in Indonesia needs the law as a referee, where as in the other hands - in a developed society - the new law will be obeyed when he was able to put the principles of justice.

Associated with some of the experts and specialists of justice, having done to find the meanings of justice and finding out various theories of justice, the authors are more likely to see the justice from the objectives and its purposes.

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[3] One judge Indonesia, Siregar Bismar in Darmodiharjo Darji Books & Shidarta (1999, p.153-154) said "When I was giving justice to uphold the rule of law, I'll sacrifice that law. Law is only a means, while the goal is justice. Why purposes sacrificed for the means? "

[4] According to Radbruch, justice aspect refers to the equal rights before the law. Aspects of finality refers to fairness promote good purpose in human life, while the rigidity refers to the assurance that the law (containing fairness and finality) should be able to function as the regulations were being met. Compare this with the opinion Radbruch view Bagir Manan as saying that a court judgment shall use equity considerations and benefits decisions. However, the judge still cut off by law. See Bagir Manan, An Overview Of Indonesia In the Judicial Power Act No. 4 of 2000, the Supreme Court, Jakarta, 2005, p. 60.

Therefore, this paper also explored the question on Justice according to many experts taken from various literature, including this is to look at the opinion of Utilitarianism. Following that, it is now discussing on the Perspectives of Experts – Utilitarianism toward Justice – so called Expediency. Utilitarianism is the sense of justice in the broad sense not to Individuals. Measurements of fair or unfair based on how its impact and its expedience on human well-being (human welfare). Individual welfare may be sacrificed for the greater for larger groups (general welfare). Principally, Utilitarianism uses the concept of expediency approach (the greater number as possible). As for what is considered useful and not useful, it supposed to be measured according to economic goals. For example, if it is calculated that construction of road through is found much more economically viable than not built that way, then in the eyes of Utilitarianism, the government should decide for it, although with development will take place later causing so many families had to be moved.

From the perspective of Sociological Jurisprudence, such as Roscoe Pound in the book written by Soerjono Soekanto (1985, p.31-32), said that the justice could be done with or without the law. Justice without law is implemented in accordance someone's intuition which in taking the decision to have a broad scope of discretion and no relations to a common set of rules. The first form of justice is judicial, while the second form of justice is the administrative characteristics. He, again suggests that there are two forms of justice in all legal systems. He argues that in the legal history appears the motion between the wide discretion with strict rules and detailed. Pound considers the problem in the future is to achieve a state of harmony between the elements with the administrative and judicial justice.

There are at least 3 (three) experts on this giving their opinions on Utiliarianism, such as given firstly by Jeremy Bentham (1748-1832) in Boy Nurdin's book (2015) who said that justice according to most people. The second expert namely John Rawl (1999) as written in Priyono H. (1993 p.35), which is seen as the most comprehensive theory of justice until today. He is one expert who has his theory departing from the idea of Utilitarianism and believes the balance between the private interest and common ones is needed so called as Justice. The Author's perspective on this Utilitarianism (Nurdin B., 2012) described: "Justice is given for many people as possible or the broadest community as possible". The Author's means by the community is that those have their public opinion and aware as well as understand, even more the community here means those experts with have no vested interest and brave enough to say loudly the true or wrong expressively, truthfully and objectively. This is therefore from author's perspective, finally preferred to be the reference for justice

There are also Judges' Paradigm of Thinking from experts' points of view like described by Satjipto Rahardjo, the Author (Boy Nurdin) and Tulius

marcus Cicero). Satjipto Rahardjo (2006) as the originator of the Progressive Law Theory said that Law was created for man and not vice versa. Therefore, the presence of humans (society), the law was created, and therefore do not imprisoned by statute (Nurdin B., 2015). On the other hand, Tulius Marcus Cicero (106-43 BC) said "*ubi societas ibi ius*": where society exists, then the law is there too (Hamzah et al, 1967; p.2).

Other that that, Moh. Mahfud MD (2007, P.51) argues that, as the State of Law, Indonesia accepts the principle of legal certainty in *Rechtsstaat*; the principle of fairness in the rule of law; and the spiritual value of the Religion Law. However, the Law is written with all the procedural; all should be placed in the context of justice. Therefore, the written provisions that may hinder the realization of justice can be abandoned. This sort of thinking paradigm is in line with pragmatic legal realism (although many experts and scholars of philosophy of Law in the world say that realism is not a school of law in the philosophy of law, but merely the movement of a way of thinking about the law). In the context of this paper, it does not discuss the issue of whether the realism is the schools of law or not, but the important thing now for people to understand the extent to which benefits can be drawn from the ways of thinking of the realists (Realism Paradigm) that further to be used for law enforcement in Indonesia.

Realists, led by Oliver Wendell Holmes (1841-1935) from the beginning was realized that there might not be legislation that is able to resolve all the legal issues which is numerous and complex in society. The main thing of Realism paradigm is simply taking into account that the law fairly used as a reference in solving the legal problems that exists in society. So in case the laws are already very decent or already perceived as fair, then it still can be used, but if the law is perceived unfair, it must be abandoned, particularly for judges. Furthermore, the judge must discover law called "*rechtsvinding*", as a result, and consequence of Article 22 AB.[5] In other words, Article 22 AB is the legal basis for the judges to *rechtsvinding*. Judges must be creative to find the law for justice by investigating, justifying and deciding a case by using Paradigm Legal Realism, still, refers to the Act involving conscience (to gain confidence).

According to Paul Scholten in the book of John Z. Laudoe (1085, p.5), Laws do exist in legislation, but it must be found. This can be interpreted as a sign that before the Law is used it must be firstly interpreted appropriately and correctly, not only to see how the sound of the sentence only as written, but

[5] Article 22 AB: "de regter, die Weigert REGT te spreken onder voorwendsel van stilzwijgen, duisterheid der wet right uit hoofed van rechtswijgering vervolgd worden" which means "The judge who refused to settle a case on the grounds that the legislation in question does not mention, unclear or incomplete, then he could be required to be punished for refusing to prosecute ".

the Law also must be interpreted to support the spirit and soul of the law itself, including this considering how the historical, philosophical and sociological of a Law that will use of it.

Law enforcement has already defined and done properly if it had managed to achieve a legal purpose for the name of justice, whereas a Law enforcement is concluded erroneous if it was found fails to achieve the purpose of the law (Justice) as Law without justice is nothing. The good Law applied should not only by juridical formal itself, but must also pay attention to the elements of the historical, philosophical and sociological to reach what is called "a good Law". The good law has been defined when the law by the values of justice that exist and live in the middle of the community or a legal living in the community. The Law is a Law that is by the will of the people. It therefore must not be ignored a fully understanding of Law enforcement that should not deviate from the purpose of law so called justice as a major achievement that should be prioritized. While justice is meant here is justice for the greatest number of people, or in other words the widest public with the achievements as much as possible to enjoy and feel the justice. Therefore, it is the time for Indonesian Judges currently to more over use not only Positivism Paradigm of thinking, but also looking at Paradigm thinking of Law to Legal Realism or even combined these two paradigm of thinking.

Paradigm of Legal Positivism means it depends entirely on how sounds sentences written in the Law. On the other hands, Paradigm of thinking of Legal Realism uses them (written sentences) as references only. The Paper focus on how Paradigm Thinking of Judges should be used in order to find justice and reach the Law Enforcement in Indonesia.

Moh. Mahfud MD (2007) is one of a very reputable well-known Expert Judges in Indonesia, a former Head Indonesian Justice Institution for Republic Indonesia (2008–2013), Former Indonesian Parliament Commission II–Law Section (2004–2008) and Former Minister of Defence of Republic Indonesia (2000–2001) said that the State of Law in Indonesia accepts: (1)The principle of legal certainty in *Rechtsstaat;* (2)The principle of fairness in the rule of law; and (3)The spiritual value of the Religion Law. However, the Law is written with all the procedural should or may be placed in the context of justice and the written provisions that may hinder the realization of justice can be abandoned (In similar to Pragmatic Legal Realism Thinking).

The first Realists, known as Oliver Wendell Holmes (1841-1935) said that: (1)There might not be legislation that is able to resolve all the legal issues which are numerous and complex that exists in society; (2)Realism Paradigm is simply taking into account that the law fairly used as a reference in solving the legal problems that exist in society. So in case the laws are already very decent or already perceived as fair, then it still can be used; (3)The emerging of Realism Paradigm is once the law is perceived unfair, the written law may be abandoned, particularly for judges; and (4)The Judge must discover law

called "*rechtsvinding*" (consequence of Article 22 AB implied that Judges must be creative to find the law for justice by investigating, justifying and deciding a case by using Paradigm Legal Realism)

Another Realist namely Paul Scholten in the book of John Z. Laudoe (1085), said that: (1)Laws do exist in legislation, but it must be found by firstly interpreted appropriately and correctly, not only to see how the sound of the sentence as written only, but the Law also must be interpreted to support the spirit and soul of the law itself; (2)The considerations on how the historical, philosophical and sociological of a law are also needed; (3)This is further called "A Good Law" which is also called "LAW with the JUSTICE"; (4)Law without Justice is nothing; (5)The good law means when the Law by the values of justice existed and live in the middle of the community or a legal living in the community; (6)Justice means here for the greatest number of people and the widest public and as much as possible to enjoy and feel the justice; (7)The Law is based on the will of the people, and therefore must not be ignored in the process to conduct a law enforcement; (8)Therefore, it is the time to think for the Judges to consider and develop the Realism Paradigm of thinking from the common use only in the Legal Positivism Paradigm.

4 Results and Contributions

There are 2 (two) Paradigm of thinking for the Judges which has its Significant both for Practice (Judges) and Academics. Significant for Practice (Judges) can be found that in the Law Enforcement. The Judges will understand, as follows: (1)Law is created for Humans and not vice versa. For this, in a process of law enforcement, judges must be clear and understand deeply that the objective of law so called "Justice" that should be always in priority. Once the justice is reached, then the Parties or the wider community are able to accept it and there will be no more "strife" again, which thus the next legal purpose or objective of law called "Expediency" has surely been obtained. It is due to the Law is real perceived and gain the benefits of which people are happy and comfortable. Furthermore, the legal purpose of "Certainty" has no longer need to be questioned, discussed or found out because it already exists once the Justice is done; (2)In practice, it is also to response on how does paradigms of judges toward law enforcement and how can the justice be achieved? The answer is once the Act perceived "less-feasible," the Judge shall break the law.

Significant for Academics can also be obtained, as follows: (1)People in Academic area (Lecturers & Students) should be aware of, realize and understand that since the existence of the 3rd Amendment of Institution of the 1945 Constitution Article 1 (3) in *a Du Process of Law* in Indonesia not only use Thinking Paradigm on Positivism (who are fully imprisoned with the

sentence in a Law), but may also use the Realism Thinking Paradigm or even combining these two thinking paradigm - Positivism & Realism - in order to achieve the ultimate Justice objective; (2)There is a process of enrichment & expansion of Legal Realism Theory. People in Academic needs to understand law enforcement process in the right way. Law Enforcers in this contexts are identified as Judge, Prosecutor, Police & Lawyer. They are now able to use Realism Thinking Paradigm or to combine between Realism & Positivism Thinking Paradigm in achieving ultimate prioritized goals of Law so called Justice.

5 Conclusion

This paper concludes that Thinking Paradigm of Judges influences the Law enforcement in Indonesia in order to achieve the purpose of Law so called "Justice". Justice means here for the greatest number of people and the widest public and as much as possible to enjoy and feel the justice. In case the Laws already very decent or already perceived as fair (just), then the Legal Positivism still can be used, but when the Law is perceived unfair, it can be abandoned and consider to use Legal Realism Paradigm. For this, the Judges must discover Law called "*rechtsvinding*". Judges must be creative to find the Law for justice by investigating, justifying and deciding a case by using Paradigm Legal Realism. It is the time to think for the Judges to consider and develop their Legal Realism Thinking Paradigm from the common use only in the Legal Positivism Paradigm. The Concept of Positivism & Realism have been known since along time ago. It is concluded that Legal Positivism Thinking Paradigm has been practiced since the days of Hans Kelsen (1881-1973) and John Austin (1790-1861). Legal Realism Thinking Paradigm has been practiced since the time immemorial with the main pioneer Oliver Wondell home (1841-1935). But, the Concept of Legal Realism, especially for law enforcement in Indonesia has less-considered so far. From the research conducted by Law Enforcement Research & Development/LERD in the year of 2014 towards the 8 (eight) big cities in Indonesia, it was found that until today only approximately 17% of total Judges in Indonesia uses this Legal Realism Thinking Paradigm. It is currently about 83% of the Judges in Indonesia applying the use of Thinking Paradigm on Legal Positivism. This is the consequence of the Indonesian nation's once choosing as a legal state as the construction of Article 1 (paragraph 3) of the 1945 Constitution which stated: The Republic of Indonesia is based on the Law *(Rechtstaat),* which takes Positivism. Judges in Indonesia currently should no longer use Positivism thinking Paradigm only, but since Post Amendment the Judges are also able to use Realism Thinking or they have combined Paradigm thinking Realism & Positivism to find and gain the law objective so called Justice.

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