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THINKING PARADIGM OF JUDGES FOR LAW ENFORCEMENT IN INDONESIA: FROM POSITIVISM TO REALISM

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Abstract

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. The paper presented taking into consideration that Indonesia has mostly followed a Legal Positivism, which however was proved unable to meet the public's sense of justice. 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. The discussion paper uses Normative and Empirical Juridical approach. The results have concluded that the Judge in Indonesia should have their thinking paradigm in line with the Legal Realism and Legal Statements written in the Constitution used as the reference only so called Legal Positivism Paradigm of thinking. Alternatively, the Judges may use combined Paradigm of thinking both Legal Positivism and Realism. It basically should be understood that the law is a tool and the goal is Justice.

Keywords:
Law Enforcement, Justice, Legal Positivism, Legal Realism, *Rechtsvinding*,[1] Justice.

BACKGROUND

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, possible 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.

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

Legal Positivism has proved unable 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 one reason that the law was created for man and not vice versa.

Marcus Tullius Cicero's view in the period of 106-43 BC in the book A. Hamzah & Senjun Manulang (1967) said *societas ibi ius* (there is society there is law) while from perspective of Moh. Mahfud MD (2007, P.51) stating that "As the State of Law, Indonesia accepts the principle of legal certainty in *Rechtsstaat,* then it accepts 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 should be all placed in the context of justice. So that, the written provisions that may hinder the realization of it can be abandoned. The views and opinions of Cicero and Mahfud are in line with Satjipto Rahardjo's thought as a progressive legal theorist. He said that laws are created for people and society, then as the law was created, therefore it should not be imprisoned by itself. Paradigm of thinking like this in line with the flow of legal realism or pragmatic legal realism, although many experts and scholars of philosophy of law in the world have said that realism is not a sect or school of law in the philosophy of law, but merely the movement of a way of thinking about the law. Legal Realism thinking paradigm means that the law used as a reference

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[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.

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: 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.

DISCUSSION AND ANALYSIS

A. Justice is the Main Purpose of Law

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 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.

The views of utilitarianism toward a justice are the sense of justice in the broad sense, not to individuals or just distribution of goods such as Aristotle's opinion. The only measure for fairness is not only how big its impact on human well-being (human welfare), however, Individual welfare may be sacrificed for the greater good for larger groups (general welfare). As

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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.

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. Pound in the book by Soerjono Soekanto (1985, p.31-32) also 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.

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. Therefore, this paper will start the question on Justice according to whom then? From various literature, including the opinion of utilitarianism - Jeremy Bentham (1748-1832) said that justice according to most people. Many scholars and experts argue that justice is relative in nature. However, according to the Author - Boy Nurdin (2015) - said that justice in the context of the rule of law is justice for the people as many people as possible or the broadest community as possible (Nurdin B., 2015). After that, the question may arise again, which large number of people or the broadest community means by this? According to the Author - Boy Nurdin (2015) - Public opinion is prioritized to aware and understand, even further it is good to have preferred expert opinion. Then the question arises again, which experts are? It is only to assert that the experts meant here is the expert who has no vested interest (interested). The experts who are able to assert that right is true, that wrong is still wrong and the wrong remains wrong. Therefore, the experts who have no interest, explain and express truthfully and objectively is actually called experts.

B. Paradigm of Thinking: From Positivism to Realism

In line with perspective of Satjipto Rahardjo (2006) as the originator of the Progressive Law Theory, he 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). While 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 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 done properly if it had managed to achieve a legal purpose for the name of justice, whereas a law enforcement is concluded erroneous or wrong if it was found fails to achieve the purpose of the law so called justice. Law without justice is nothing.

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[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 ". 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 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.

SIGNIFICANTS & 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):
In the Law Enforcement, Judges will understand, as follows:

- Laws are created for Humans and not vice versa. For this, in a process of law enforcement, judges must remember and understand deeply that the objective of law so called JUSTICE should be prioritized. Because when the justice is reached, then the Parties or the wider community are able to accept it and there will be no more "strife" again. Thus the next legal purpose or objective of law called EXPEDIENCY has surely been obtained, due to the Law is real perceived to have benefits (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.
- 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:

- 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.
- There is a process of enrichment & expansion of Realism Theory. People in Academic area 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 and prioritized goals of Law namely JUSTICE.

CONCLUSION AND RECOMMENDATION

It is to **conclude** that Judges are able to use their preference for their thinking paradigm in order to conduct the law enforcement as long as it is done for the sake of achieving the purpose of the law called "Justice". Although there are 3 (three) purpose of law namely Justice, Certainty and Expediency, however, The Justice is primary and an ultimate objective.

There might not be legislation that can resolve all the legal issues which are numerous and complex exists in the 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 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.[6] 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). Judges must be ensured that the law is just a tool or a means, while the goal is to gain a justice. Therefore, Judge should not leave the goals of justice for the sake of maintaining the means only. It should also be realized that formal law are available but it should not obstruct justice.

The Concept of POSITIVISM & REALISM Thinking have been known since the past as described above.

- 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). However, 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, it was found that until today only approximately 17% of total Judges in Indonesia uses this Legal Realism Thinking Paradigm (Research conducted by Law Enforcement Research & Development/LERD, in the year of 2014 towards the 8 (eight) big cities in Indonesia). 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 the Paradigm of POSITIVISM thinking only, but since Post Amendment the Judges are also able to use REALISM Thinking Paradigm or it is possible also to have combined

[6] 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 ". 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 ".

Paradigm thinking REALISM & POSITIVISM to find and gain the law objective so called JUSTICE.

The **recommendations** are to be given for resulting high-qualified Human Resources (HR) of JUDGE in the future time, as follows:

1. Program for High-quality Recruitment Process for Judge Candidates.
2. Modify Law curriculum for Law bachelor degree Program in the University or School of Law, which can mold and produce Qualified of Professional Judges, in particular from the perspective of moral concerns.
3. Special Class for Potential Candidates for Supreme Court (Prospective career for Judges). The curriculum should be constructed since early stage in Law education in the University or School of Law (in Bachelor Degree Program)
    a. Selection and assessments for Potential and Psychological conditions
    b. Selection and verifications for Demographic & Family Background data (Religion, Social, Economic, Social Environment and Morality)
4. Enhancement the Judges' Capacity through the adequate program on training and education in order to obtain a comprehensively understanding that laws are created for man and not vice versa. This is the reason why Law enforcement must be prioritized to gain the objective of law so-called "Justice". Judges need to be constantly equipped and increased for their sharp knowledge and experience. Judges must be creative in finding the law to reach the real justice by investigating, judging and deciding the case by using Paradigm thought of Legal Realism, with an addition to this it refers to the Act and involving a conscience (to gain confidence). Judges must understand that the law is just a tool or a means, while the goal is to gain a justice. Therefore, Judge should not leave the goals of justice for the sake of maintaining the means. It should also be considered that a formal law should not obstruct justice.

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PAGE 1

PAGE 2

PAGE 3

PAGE 4

PAGE 5

PAGE 6

PAGE 7

PAGE 8

PAGE 9