

Legal Transcendence: Fulfillment of Substantive Justice

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Abstract— Philosophy of law underlies various legal theories and ideas, one of which is progressive legal thought. This study aims to describe the substance of the fulfillment of justice from the legal transcendence perspective. The research approach was theoretical based on a legal transcendence paradigm with the principles of divinity, humanity, and justice. However, the progressive legal thought of Satjipto Rahardjo's teachings has not fully based the thoughts of Indonesian lawmakers so that the laws enforced in Indonesia are still partly a product of Dutch law. Moreover, laws created by Indonesia are still not based on progressive legal thought, but most of them are still based on positivistic-legalistic thought.

Keywords— Philosophy of law, progressive legal thought, positivistic-legalistic.

INTRODUCTION

Human life is inseparable from the law. Since they were still in the womb until they die, they are always regulated by law. The law regulates the relationship between humans and God as the Creator, the relationship among humans, the relationship between humans and the universe, and others. All aspects of human life cannot be separated from the law. Therefore, Van Apeldorn said that humans can be called legal humans or homo juridicus, humans who, in their lives, cannot be separated from the role of law [1].

The application of law to a pattern of actions or events that occur in human life aims to create security, order, and justice for humans to live in the society, nation, and state. However, realizing justice in people's lives is correlated with the legal thought applied and the authorized institutions to enforce the law.

The philosophy of law recognizes various legal theories that underlie legal thoughts in people's lives, including legal thought in Indonesia such as natural law, positivism, and utilitarianism legal theory, pure legal theory and ground norm, sociological theory of legal development, and others. One of the developments of the sociological theory of legal development is progressive legal thought, the teachings of Satjipto Rahardjo that can answer the needs of the Indonesian people [2].

On the other hand, law enforcement institutions in Indonesia consist of the police, prosecutors, lawyers, and judges. From these institutions, judges have a central role since they have the authority to decide cases, who is right and who is wrong. Even, they are considered as the personifications of the law, they must guarantee a sense of justice for every justice seeker through the legal process in court.

Efforts to guarantee a sense of justice to justice seekers are very much needed by judges who have good legal analysis skills, integrity, morals, and ethics. Judges may not side with one of the litigants in courts, such as prosecutors who must side with the interests of the state and try to prove the defendant's guilt on the grounds of upholding law and justice while lawyers who side with the interests of the client try to find weaknesses and leniency on prosecutor's evidence for the sake of upholding the law and justice.

The relationship between law and judges as the core of law enforcement as described above greatly influences the achievement of substantive justice following the values contained in Pancasila. In other words, the relationship between law, judges, and justice is the embodiment of substantive justice according to the values in Pancasila, which is very dependent on the legal thought applied by judges in court. In Indonesia, most law enforcers, including judges, in the law enforcement process are not based on progressive legal thought but positivistic-legalistic legal thought by viewing the law as a set of regulations solely to pursue legal certainty, compromising community social justice.

This scientific crisis phenomenon was then responded to with the idea of the need for an ethical dimension in the development of science. One paradigm with an ethical dimension is legal transcendence as part of prophetic law. In connection with the science of law, this paradigm is also often called prophetic legal paradigm. This study elaborates the values in the paradigm of legal transcendence as an alternative perspective to review the fulfillment of the substantive principle of justice in the judge's decision.

RESEARCH METHOD

The study of the construction of legal morality is included in the study of values which can be carried out

using conceptual approach with deductive analysis. In this study, the researchers showed some relevant cases as part of the process of analyzing the problem. This study aims to describe the substance of the fulfillment of justice from the legal transcendence perspective. The research approach was theoretical based on a legal transcendence paradigm with the principles of divinity, humanity, and justice. The author used a micro approach with qualitative, logical, and systematic analyses using qualitative methods.

DISCUSSION

Principles of Divinity, Humanity, and Justice in the Perspective of Legal Transcendence

In the perspective of prophetic law, the Indonesian transcendence, humanization, and liberalization follow with the nation's philosophy as contained in the five pillars of Pancasila. Transcendence centered on spiritual values can be elaborated in the first principle of "Belief in the One and Only God". Humanization which means humanity can then be matched with the second principle "Just and civilized humanity" while liberation is associated with the principle of justice so that humans are free from misery and get guaranteed legal certainty under the fifth principle "Social justice for the whole of the people of Indonesia".

Faith in God Almighty is also stated by the Indonesian people in the opening of the third paragraph of the 1945 Constitution which reads, "By the grace of Allah the Almighty and with the encouragement of a noble desire, to live a free national life, the Indonesian people hereby declare their independence." This opening sentence means that the independence that the Indonesian people have obtained is not just the result of the people's struggle; more than that, it is actually because of the grace of Allah the Almighty.

Justice is the attitude of the soul that is most pleasing to God because the sense of justice is closest to the realization of a view of life related to piety to God. Justice describes the concept of a State, which upholds the principle of equality by prioritizing honesty and sincerity. Therefore, divinity, humanity, and justice are interconnected [3].

Progressive Law and Legal Transcendence

The realization of social justice as the main goal of national law has not been realized. Even, various national plans made to develop the law in Indonesia for the realization of justice do not provide satisfactory results. People do not talk about a brighter but darker legal life.[4] The gloom of law in Indonesia encourages the development of the concept of progressive law starting from the basic assumption that law is an

institution that aims to deliver humans to a just, prosperous, and happy life; in other words, progressive law seeks to make liberation in the way of thinking and acting in the law to let the law flow only to complete its task of serving humans and humanity [5].

The characteristics of progressive law include: [6]

1. Progressive law is a type of responsive law that rejects legal autonomy which is final and inviolable;
2. Progressive law cares about meta-juridical matters and prioritizes the search for justice;
3. Progressive law also idealizes that the law is judged on the social purpose and consequences of the operation of the law;
4. Progressive law confronts completeness, adequacy, fact, actions, and powers. Therefore, progressive law seeks to dismantle the tradition of making judges' decisions based on mere construction. This needs to be done to make the law follow the real-life needs of the people;
5. Progressive law contains the substance of criticism of legal education, making, implementing, and enforcing the law;
6. Progressive law places the human factor more important and above the rules. Human elements such as compassion, empathy, sincerity, edification, commitment, dare, and determination are considered more decisive than existing regulations. Based on this view, progressive law agrees with the phrase "give me good prosecutors and judges, then even with bad regulations I can make good decisions";
7. Progressive law places the concept of progressivism to accommodate all aspects related to humans and the law, both now and in the ideal life in the future.

In the law enforcement process, law enforcers, including judges, do not at all apply progressive law to bring about justice for the community but only consider the law as a necessity or a black-and-white line of law or right or wrong according to the articles in the law, dogmas, and legal principles. Law enforcement only identifies law with legislation to guarantee legal certainty regardless of justice and its benefits to society. Legal conceptions adversely affect development in Indonesia because it is only seen as a mere norm system, with the development of the law oriented to the development of legal components that only relate to the system of norm formation or its application, whereas in reality, it is not enough to involve the concerned component [7].

Achmad Ali classifies the era of legal education in Indonesia into two eras, legal practice education (only

teaching pseudo-legal science or positive legal science) and legal practice education and legal science (teaching real legal science). The era of legal practice education, also known as legal skills, is taught at the level of Bachelor of Law Education in the major of law with material only about law as a rational system, namely legal education which is only at the level of the context of the legislation and positive law. As a result, the law is only understood as a mere law, and the goal to be achieved is legal certainty. On the other hand, legal practice education and legal science were taught only in 1980 when postgraduate programs, both masters and doctoral degrees, including the field of law, were opened and taught real law [8].

These professional programs emphasized skills education and scientific programs for the search for truth. Every science is always concerned about the truth. Therefore, the S1 (Strata 1 or bachelor degree) program that used to be the law faculty cannot be called scientific education in the true sense of the word, but it is merely practical science [9]. The relationship between the era of legal education as described above and the level of understanding of progressive legal thought is that progressive legal thought was then taught at the level of legal education at a higher level (master and doctoral) while, at the level of legal education undergraduate or strata one, this progressive legal education was not taught as it only taught practical education.

According to Phillip Clayton, the era of modern science has changed. It has accepted limitations in prediction (quantum mechanics), axiomatization, determinism, atomism, and law-based understanding of human behavior [10]. According to the emergency theory, nature is open upwards. The essence of consciousness is transcendental. This has provided a very strong model for the integration between self and spirit. It is the same as what is taught by religion, whether Judaism, Christianity, or Islam. It is further said that now we begin to see a renaissance, a metaphysical revival (transcendental) of systematic reflection on the nature and creativity of God. Modern positivists may declare that metaphysics (transcendental) is dead, but it seems that logical positivism is the one that died first [11].

Moral Links in the Formation and Enforcement of Law in Indonesia

Etymologically, the word moral comes from the Latin (Greek) *moralis*, *mos*, or *moris* which means customs, habits, ways, attitude, and behavior. It can also be interpreted as *mores*, a description of customs, behavior, character, morality, and way of life. According to the Great Dictionary of Indonesian Language, morals are generally accepted teachings about good and bad

regarding good attitude and character or mental conditions that affect a person to be enthusiastic, courageous, disciplined, and so on [12]. Thus, moral means all judgments, measures, character, behavior, and awareness related to what is good and bad or what is right and wrong under the applicable general principles based on human consciousness from feelings and probability calculations, instead of scientific evidence categories.

A very strong concept of morality is the notion of social morality with the characteristic of a sacred value as an eternal virtue that comes from human reason. However, when the good and holy moral element is operationalized, it will function properly if it is carried out efficiently and is useful for society [13].

If lawmakers and law enforcers carry out their functions and authorities properly and efficiently and the results provide the maximum benefit to the community, it means that they have good morals. On the other hand, they deviate from their actual duties and authorities, they do not have morals or at least have low morals. Having no morals also means that the formation and enforcement of law in Indonesia is not based on morals.

In this reform era, most Indonesian lawmakers and law enforcers carry out their duties and authorities inefficiently, which often results in losses for the state and society because they always deviate from the duties and authorities. These can be proven through reports in the mass media and the results of a survey by Transparency International Indonesia (TII) which places Indonesia as one of the five most corrupt countries in the world [14].

Corruption cases that once shocked Indonesia included the tragedy of corruption at the General Elections Commission involving former NGO and human rights activists as well as several professors who at the beginning of the reformation always spoke about eradicating corruption. Indonesia was also shocked when the Minister of Religion and one of its directors-general were sentenced to prison for being proven to have corrupted the People's Endowment Fund. Another case is that several members of the DPR were arrested by the Corruption Eradication Commission for allegedly committing corruption [15].

Political Influence on the Formation and Enforcement of Law

Another factor that causes progressive legal thought not yet as the basis for the formation and enforcement of laws in Indonesia is the political influence on the formation and enforcement in Indonesia. The author's

reason is based on the view of Moh. Mahfud MD argues that theoretically the relationship between law and politics can be divided into three models, namely, first, as *das sollen*, the legal determinant of politics because every political agenda must be subject to legal rules; second, as *das sein*, political determinants of law as a political product so that the existing law is the result or crystallization of interacting and/or competing for political wills; third, politics and law as a social sub-system in a position with a degree of determination and balance between one another because, even though the law is a product of political decisions, once it exists, all political activities must be subject to the rules of law or, in other words, politics without the law will be unjust while law without politics will be paralyzed [16].

Of the three models above, the second is related to the issue of political influence on the law as it proves that law is a political product so that, if the politics is not good, the law is not good and if it changes, the law will change. According to Mahfud MD, democratic politics will produce responsive laws while authoritarian politics will produce orthodox laws [17].

Substantive Justice in Core Values

Justice is one of the main objectives of the law, in addition to the benefits and legal certainty [18]. However, sometimes justice is only a subject of endless debate among intellectuals about what justice is, how justice looks like, where justice is, when to get justice, and many others. Even though apart from these questions, justice must be realized so that the rule of law is enforced because justice is the spirit of the law so that, if it is not realized, the law is considered dead. Thus, the law and justice are like humans without spirit and soul or corpses.

The issue of what justice is and how it looks like has been raised by experts even though it is still recognized that justice is subjective, namely what is considered fair by one person is not necessarily fair by another. According to Sudikno Mertokusumo, the question of what justice includes two aspects, the nature of justice and the content or norms to act concretely in certain circumstances. The nature of justice is an assessment of treatment or action by examining it through a norm that, according to a subjective view, exceeds other norms. For the content of justice, Aristotle distinguishes it into two types [19].

1. *Justitia distributiva*, namely justice that demands everyone to get what is their right or share (*sum cuique tribuere*). This share is not the same for everyone, depending on wealth, birth, education, ability, and so on, so it is considered fair if everyone

gets the right or share proportionally considering their education, position, ability, and so on. This distributive justice is the obligation of legislators to be considered in drafting laws.

2. *Justitia comutativa*, namely justice that gives everyone the same amount. *Justitia comutativa* demands equality, that is, what is fair is if everyone is treated equally regardless of their position and so on. *Justitia comutativa* is included in the task of judges in adjudicating cases submitted without distinguishing between people (equality before the law).

Regarding the content of justice, Thomas Aquinas distinguished justice into 2 (two), general justice (*justitia generalis*) and special justice. General justice is justice according to the will of the law, which must be carried out in the public interest, while special justice is justice based on equality or proportionality. There are 3 types of special justice [20].

1. Distributive justice (*justitia distributiva*) is justice that is proportionally applied in public law in general. For example, the state will only appoint a person to be a judge if he has the required skills;
2. Commutative justice is justice that equates achievement and counter-achievement;
3. Vindictive justice is justice in terms of imposing punishment or compensation in criminal acts. Justice means if a criminal is sentenced to corporal punishment or a fine under applicable law and regulations.

In addition, there are other types of justice proposed by Notohamidjojo, namely creative justice (*justitia creativa*) and protective justice (*justitia protectiva*). Creative justice is justice that gives everyone the freedom to create something according to their creativity while protective justice is justice that provides the protection needed in society to everyone. Furthermore, Roscoe Pound, one of the adherents of sociological jurisprudence views that justice can be carried out with or without the law. Justice without the law is carried out according to the will or intuition of a person who, in making decisions, has a broad scope of discretion and is not bound by certain sets of rules [21].

Based on the various notions of justice as described above, the next issue to be discussed is what kind of concept of justice is embraced by Indonesia. The answer to this question is very clear that justice adopted by the Indonesian people is according to Pancasila as the philosophy of the Indonesian nation. The word *just* in Pancasila is contained in the second and fifth principles [22].

It implies treating and giving the rights to oneself, fellow human beings, and God. To be just to oneself means to fulfill the demands of one's self humanely while justice to fellow human beings means to give something that is the right of others as it should be. On the other hand, being just to God means obeying God's demands or commands.

Furthermore, the word just in the fifth principle means being fair to fellow humans based on and inspired by being fair to oneself and God. A just act causes a person to get what is his right, and the basis of this right is the recognition of others as it should be. Thus, the implementation of justice is always related to the common life associated with other parties in social life. The concept of justice in the second and fifth principles of Pancasila is the notion of social justice mentioned by Soekarno on June 1, 1945, during the BPUPKI (Investigating Committee for Preparatory Work for Independence) trial as *sociale rechtvaardigheid*. Meanwhile, Moh. Yamin termed social justice with the welfare of the people by saying, "The welfare of the people which is the basis of an independent Indonesia is the idea of an integralist state that wants the state to carry out the realization of justice for the people."

The social justice adopted by Indonesia is based on the concept of Pancasila, which is further stipulated in the 4th paragraph of the Preamble to the 1945 Constitution and Law No. 48 of 2009 concerning Judicial Power. The fourth paragraph of the 1945 Constitution states that Indonesia's national goal is to form an Indonesian State Government that protects the entire Indonesian nation and all of Indonesia's bloodshed and to promote public welfare, educate the nation's life, and implement world order based on independence, eternal peace, and social justice. Then, the provision of Article 2 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power stipulates those judgments are carried out for the sake of justice based on the Almighty God and Article 5 paragraph (1) of the same law stipulates that judges and Constitutional Justices are obliged to explore, follow, and understand legal values and a sense of justice that live in society.

CONCLUSION

Low morality underlies the formation and enforcement of the law in Indonesia. A very strong concept of morality is the notion of social morality with the characteristic of a sacred value as an eternal virtue that comes from human reason. However, when the good and holy moral element is operationalized, it will function properly if it is carried out efficiently and is useful for society. The transcendental paradigm can be seen in a wider range in the form of religion, ethics, and

morality, which are no longer understood in only one aspect related to theology and desire, but more than that, the issue of values can be discussed with issues of scientific, social, cultural, economic, and legal development. In modern society, there has been a crisis in interpreting the meaning of life in the world (the crisis of meaning). Spiritual quotient is a tool for humans to build new perspectives in life, find broad horizons in a narrow world, and feel God's presence without meeting. This substantive justice reflects the perceived fairness of the decision-making results. Everyone can measure the court's decision by questioning whether it has fulfilled a sense of justice relating to the implementation of the law based on considerations of rationality, honesty, objectivity, impartiality, without discrimination, and based on conscience (the judge's belief), which is allocated using norms under legal values and principles.

REFERENCE

- [1] Van Apeldorn, 1986, *Pengantar Ilmu Hukum*, Jakarta: PT. Pradnya Paramita, page 18.
- [2] W. Friedmann, 1993, *Teori dan Filsafat Hukum*, Telaah Atas Teori-Teori Hukum, translated by Mohamad Arifin, Jakarta: PT. Rajagrafindo, page 33-200. Also see Satjipto Rahardjo, 2000, *Ilmu Hukum*, Bandung: PT. Citra Aditya Bakti, page 253-300
- [3] Nurcholis Majid, Islam, *Doktrin dan Peradaban*, (Jakarta: Paramadina, 1999), page 8.
- [4] Romli Atmasasmita, 2012, *Tiga Paradigma Hukum Dalam Pembangunan Nasional: In Jurnal Hukum Prioris*, Vol. 3, No. 1 2012, page 1
- [5] Sudjito, 2012, *Hukum Dalam Pelangi Kehidupan*, Yogyakarta: Gadjah Mada University Press, page 133 & 136
- [6] Sudjito, 2012, *Hukum Dalam Pelangi Kehidupan*, Yogyakarta: Gadjah Mada University Press, page 133 & 136.
- [7] Hangabei, Sinung M., Khudzaifah Dimiyati, and Natangsa Surbakti. "Oversee Investment and Indonesia Economic Regulatory Reform in the Era of Globalization and Industrial Revolution 4.0." *International Journal of Advanced Science and Technology* 29, no. 4 (2020): 5123-5138.
- [8] Achmad Ali, 2002, *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*, Jakarta: PT. Toko Gunung Agung.
- [9] Achmad Ali, 2001, *Keterpurukan Hukum Di Indonesia*, Jakarta: Ghalia Indonesia,
- [10] Philip Clayton is a professor and chair of the School of Philosophy at California State University Sonoma, USA: Principle Investigator, Science and the Spiritual Quees Project, artikelnya diberi judul *Membaca Tuhan dalam Keetarutaran Alam*,

Repleksi Ilmiah dan Religius, UGM, Yogyakarta, 2003, p.10.

- [11] Absori, 2015, Epistimologi Ilmu Hukum Transendental dan Implementasinya dalam Pengembangan Program Doktor Ilmu Hukum, Proceeding Seminar Nasional Pengembangan Epistemologi Ilmu Hukum, p. 34-49
- [12] Risa Agustin, tanpa tahun, Kamus Lengkap Bahasa Indonesia, Surabaya: Serba Jaya, page 429
- [13] Romli Atmasasmita, 2012, Tiga Paradigma Hukum Dalam Pembangunan Nasional: Dimuat dalam Jurnal Hukum Prioris, Vol. 3, No. 1 of 2012
- [14] Moh Mahfud MD, 2008, Hukum, Moral dan Politik, makalah, yang disampaikan pada: Studium Generale untuk Matrikulasi Program Doktor Di Universitas Diponegoro, Semarang, tanggal 23 Agustus 2008, page 6
- [15] Moh Mahfud MD, 2008, Hukum, Moral dan Politik, makalah, yang disampaikan pada: Studium Generale untuk Matrikulasi Program Doktor Di Universitas Diponegoro, Semarang, tanggal 23 Agustus 2008, page 6
- [16] Moh. Mahfud MD, 2001, Politik Hukum Di Indonesia, Jakarta: LP3ES, page 8
- [17] Moh. Mahfud MD, 2001, Politik Hukum Di Indonesia, Jakarta: LP3ES, page 8, page 12
- [18] Achmad Ali, 2002, Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis), Jakarta: PT Toko Gunung Agung, page 72-85
- [19] Sudikno Mertokusumo, 1988, Mengenal Hukum, Yogyakarta: Liberty, page 72-73
- [20] Darji Darmodihardjo & Sidharta, 1995, Pokok-Pokok Filsafat Hukum, Apa dan Bagaimana Filsafat Hukum Indonesia, Jakarta: PT. Gramedia Pustaka Utama, page 138-139
- [21] Darji Darmodihardjo & Sidharta, 1995, Pokok-Pokok Filsafat Hukum, Apa dan Bagaimana Filsafat Hukum Indonesia, Jakarta: PT. Gramedia Pustaka Utama, page 147
- [22] Sudjito, 2012, Hukum Dalam Pelangi Kehidupan, Yogyakarta: Gadjah Mada University Press, page 140.