

THE ROLES OF JUDGES FOR LEGAL REFORMATION IN INDONESIA

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ABSTRACT

The roles of judges for legal reformation in Indonesia can be seen from the decisions of the judges are able to fill the legal vacuum when it must resolve disputes that are difficult due to the dynamics of the fast growing community. The roles of judges in legal reforms carried out through a hearing function which resulted in the decision as disputes settlement. The concept of law as a social engineering tool should not stop the rule making written law, because the law is written as it always had limitations. Further impact, the judge in examining and deciding the dispute to face the fact that the written law is not always able to resolve the dispute. Therefore, judges should be able to find its own law (rechtsvinding) or create a law for the settlement of a dispute. This is where the roles of judges for legal reformation in Indonesia, which overcomes the limitations of the written law through a fair dispute resolution for justice seekers.

Keywords: the roles of judges, legal reformation, dispute.

Introduction

As for the motivation of the author in writing this paper is to improve the performance of judges in law enforcement in Indonesia. The fact proves that the law enforcement in Indonesia tends to old patterns is to decide dispute on the basis of legal certainty alone. Whereas the ideal law enforcement should include legal certainty, justice for the people and expediency. Therefore, important to update the law for the sake of better law enforcement by means judges attention to all three of the above.

Legal reformation can be done by the government executive power and legislative power can also be done by the judiciary especially judges. If the legal reforms at the level of the executive and legislative at the level of regulation, then a renewal of the law on the judicial level, namely the ability to fill a legal vacuum and discovered the law through its decisions. Given the dynamics of the faster development of society that have implications for a variety of legal issues, it is necessary that the law can always be up to date and especially the various issues in society.

So that the law can follow the development of society is not enough to rely on the executive and legislative, but also the most strategic is the judiciary which in this case is the judge. Is said to be positioned as a judge can change the face of law toward a more equitable laws and humanizing through its decisions are fair. For the law made by the government together with the legislature does not always reflect the values of justice can be addressed by the judge through the discovery and interpretation of the law which was then applied in an equitable decisions. Judgments of justice that can be realized if the judge is not only based on legal certainty and legal expediency but more important is the substantive fairness or substantial justice. Substantive fairness or substantial justice would be realized if the judges creatively explore the values of justice while hear the case.

Legal Reformation

According Satjipto Rahardjo, another term for legal reform is the development of law, change the law, legal guidance, or modernization of the law, even lately many are using the term law reform. Although a variety of terms used, Satjipto Rahardjo agree with Soetandyo Wignjosoebroto to use the term legal reforms, as that terms is closer to illustrate how to construct a legal system that can adapt to changes in society (Rahardjo, Satjipto, 2009).

Meanwhile, Soetandyo Wignjosoebroto distinguish legal reforms is terms of legal reform is for a society where the law only as a subsystem and serves as a tool of social engineering alone. The law only became part of the political process which many also be progressive and reformative. Legal reform here then just meant as an update legislation. As the political process Soetandyo Wignjosoebroto plainly stated law reform involves only the thoughts of politicians or too little of the elite professionals who have access to the lobby. Indonesia included in this category (Wignjosoebroto, Soetandyo, 2012).

This is in contrast to the legal reform in the sense of law reform. In this form, the law is not only the concern of the judges and other law enforcement agencies, but also public affairs in general. May have been made in the form of legislation, but the law is not sacred above all else. In this draft law is the product of political activity of the people are sovereign, which is driven by the interest of sovereign people who may be inspired by the need for economic, social norms, or ideals culture of the people themselves.

Definition of law reform proposed Soetandyo Wignjosoebroto, in accordance with the provisions of Article 5 (1) of Law Number 48 Year 2009 on Judicial Power. The article gives the mandate to the judge to explore, and understand the values of law and justice in the society. The phrase digging, follow and understand gives the sense that the in values of the law referred to is not visible on the surface. In other words, do not be accommodated in the legislation.

The formation process of law in Indonesia known as legal reform. Legal reform and the development of law, which is essence has the same meaning even some experts after the fall of the New Order have called for legal reform. Why does the law need to be updated? Because the law in the strict sense that the legislation always lags the development of society, birth defects and because of legal reform in the formation of legislation always ridden interest (hidden agenda). Therefore, it is appropriate if there is a saying that states "*het recht hink achter de feiten aan*", that the law is always there in the back and growing following the event or events in the community. So in fact, the law in its form as the norm and law enforcement infrastructure always lags behind social and technological developments. To overcome this, there needs to be legal thinking towards a more advanced integration of concepts that rule by social concepts and technologies, in particular leading to the ministry of justice seekers.

In connection with the legal reforms, Moh. Mahfud MD stated that the products and processes of law enforcement in Indonesia for nearly 40 last year has come out of the frame and the reference values or paradigms Pancasila. If traced the cause is the appearance of a political system that is not democratic, so that power is centralized in one hand. Therefore, law reform became one of the urgent need to do today (Mahfud MD, Moh, 2012).

Is the era of legal reform was not there before? Of course there are, but the focus of legal reform at the time only on the process, not the orientation on its foundation. Thus, the real law reform is a process that will never be completed as long as the existence of the Unitary Republic of Indonesia. Who is burdened with the obligation to update the law? Of course all the stakeholders related to the duties and functions of law. Legal reforms could be carried out by the People's Consultative Assembly (MPR), House of Representative (DPR), the Government, the Judiciary (judges), Officials from the State Administration even thinkers and legal experts.

Role of judge

Based on the duties and functions, of all the stakeholders, then the most strategic in reforming the law is a judge. Therefore, the daily judge dealing with the case of concrete, real cases filed by the litigants. Judges should be able to make a break through to resolve the dispute of the litigants. Decisions of the judges will bring major changes to the way lawless nation of Indonesia, particularly through the decisions on the legal basis has been missed. Decisions of judges should make a big difference from the usual way. The fundamental difference and significant question is the judge's decisions will later become jurisprudence for the next judge.

Supreme Court Justices and judges under the Supreme Court of the Supreme reforming environmental laws by way of legal discovery (*rechtsvinding*) and establish jurisprudence through the decision (verdict). Jurisprudence born can be a legal substance discovery laws, legal procedures and the legal authority. Officials of State Administration to reform the law because the authorities issued a regulation (*Regeling*) and put through discretionary action. Discretion is described as an independent authority attached to each position. Its use of course can not be arbitrary but because their particular circumstances such arrangements do not exist or are not clear, the law provides a choice, or to overcome the stagnation of government in order to solve the problems including the public interest.

In addition to judges, experts or legal experts also carry out legal reforms through thoughts enlightening and liberating. Flow (some call it a paradigm) progressive law as an example of a form of legal reform through the thinking in the field of law. Relevant to this, Abdul Manan explained that there are two dominant views related to the change (of course in the sense of renewal) the applicable law in the life of people in a country that is the traditional and modern outlook. In the traditional view, society must change first and the law comes set. In contrast to the modern view, so that the law can accommodate all the new developments, the law should always be concurrent with the events that occurred. Abdul Manan also explained that in the field of law, whereas in the field of private life law should serve as a means of social control in public life (Manan, Bagir, 2005).

Dividing the field of law into the field of law is neutral and non-neutral is also done by Mochtar Kusumaatmadja. Legal field neutral as law in the field of economy for the rule of law, to do an update in the form of unification, but in the field of the law of non-neutral as family law reform in the form of unification is not easy because it involves the culture and beliefs of society, especially in a society that is pluralistic as in Indonesia (Mochtar Kusumaatmadja, 2002). But in this case the Indonesian nation had a unique experience for the successful conduct of non-unification of the legal field that is neutral with the enactment of Law No. 1 of 1974 on Marriage. That's why Hazarin and then followed Lili Rasjidi call this law as unification is unique, because they tolerate the presence of legal pluralism (Rasjidi, I.B. Wyasa Lili & Son, 1993).

Judge at the forefront as the main actors in reforming national laws, so that judges often referred to as agents of national law reform. As said Bagir Manan, through the legal considerations that either by using appropriate methods of application of the law (the interpretation, construction, analogy, smoothing law) judges can eliminate inconsistencies and uncertainties legislation. Through the judge's ruling could create legal principles, the teachings of the law, and the meaning of a rule of law that is in accordance with the principles of common law and the development of society such as science and technology, economic, social, political) to deliver justice and righteousness in the present and in the future (Manan, Bagir, 2014).

In connection with the statement of Bagir Manan, Imam Soebechi, stated that the political reform laws in Indonesia not only by the law but also through court decisions. This is where the decisions of the judges and the Chief Justice of the Supreme Court has the meaning and status of its own as a means of legal reform (the verdict as a tool as law reform) or more broadly the judge's decision as a means of social engineering (the verdict as a tool as social engineering) , The Supreme Court as the highest judicial body in Indonesia play a role in the realization of jurisprudence as a source of law, followed by the next judge (Soebechi, Imam, 2014).

In the past, the role of judges in the development and legal reform in Indonesia has not run optimally. Legal reform is more dominated by the legislative and executive powers through legislation and regulations under it. However, if hindsight, since the first court decision has resulted in an important decision (landmark decision) as a form of legal discovery, though still few and have not been able to shift the dominance of the executive and legislature in the legal reform in Indonesia. It is important to point out is that not on who dominates the legal reforms, but rather how the law and justice can be enforced.

Furthermore it is said, to make the court decision as a means of reform, then there must be consistency of a court decision in this case is the judge's decision. The consistency of the judge's decision have an impact on the equalization of laws and minimize the difference (disparity), so that law enforcement can be expected legal settlement. Consistency of application of the law also encourages the growth of jurisprudence as one of the main sources of law in Indonesia. Making jurisprudence as a source of law is not only to read the verdict as to understand the ratio decidendi (obiter dicta) in previous decisions. Full understanding of the previous decision will encourage the development of thought, the sharpness of the analysis, problem solving clearly (Soebechi, Imam, 2014).

The role of the judge as a legal reformer done primarily through a hearing function that produces the verdict. Law-making process of which lasts through the judicial process that resulted in Jurisprudence (Sidharta, Bernard Arief, 2000). Therefore, from the hands of the judge is expected to create a quality decision, argumentative, and consistent jurisprudence that could be a source of law for the judge in legal matters the same characteristics. Besides characterized as jurisprudence, the judge's ruling is also expected to become a means of renewal of society, as stated by Roscoe Pound, that law can serve as a tool to engineer society (law as a tool of social engineering) that in Indonesia, the concept was developed by Mochtar Kusumaatmadja that the law does not quite a role as a tool, but also as a means of renewal of society whose meaning is broader than a tool (Kusumaatmadja, Mochtar, 1976).

According Darji Darmodiharjo, the concept of social engineering should not stop at the creation of legal rules written for the written law as it always had limitations. The judge in examining and deciding the case to face the fact that the written law is not always able to resolve the problems encountered. In fact, often the judge found that the law itself (*rechtsvinding*) and / or create legal (*rechtsschepping*) to complement the existing law, in deciding a case (Darmodiharjo, Darji & Sidharta, 1999). The judge on his own initiative must find the law in a number of existing legal discovery methods (Mertokusumo, Sudikno and A. Pitlo, 1993). Judges must be able to explore legal values that live in the community and then use values either in order to translate the legal provisions in force as mandated by Article 5 paragraph (1) of Law No. 48 of 2009, to realize a judge as an agent update legal life of this country (Wibowo, Edy, 2016).

Implementation of the role and function of judges to be part of the role and functions of the state. According to David Storey, the role and functions of the state are: (a) Set up the country's economy; (B) Provide the public interest, including health and transport; (C) Provide the law and justice and similar infrastructure in terms of giving directions behavior of the people; and (d) Defending territorial security of the country and its people from external aggression and international threats (Alkostar, Artidjo, 2017). For that, the judges are required to contribute their creative role in upholding justice and become a teacher giving directions on the behavior of the people. Thus the judge also has the function to organize efforts in the transformation of society through law.

Processes and ways of thinking judge to find the law can be grouped into 2 (two) streams, namely: (1) flow conservative; and (2) a progressive flow (Mertokusumo, Sudikno and A. Pitlo, 1993). Group of judges who prefer the written law as the main source for deciding the case is classified as a conservative stream. While progressive flow not only to defend the values that exist, but must be able to dynamically create new values, or manipulating the public in accordance with the times and technology community.

In addition to the purity of conscience in performing the function of judge, the judge should also participate actively in structuring and improving overall management of the judiciary, because the public demands more democratic Indonesia that requires judicial system more effective, efficient, professional, accountable and reliable.

In connection with the Accessibility to improve public access to justice, of which the judge must be able pioneered the utilization of information technology to facilitate public access to the judicial process, so that relevant information can be accessed anytime, anywhere and by anyone affordably, Through the utilization of information technology, the judge should also encourage the judiciary into a modern organization that is constantly connected to all courts. If the judge can revitalize its role in carrying out the functions hear, manage, management, administration, and other functions, the effort to create an independent judiciary and the net is not a utopian and will be closer to the vision of the Supreme Court 2010-2035 to "realize the Indonesian judicial body Supreme "that respond to the needs and satisfaction of users search and justice in the hope of growth and development of public trust.

The foregoing is further confirmed that the judge has a very important role in judicial reform. Of course their first prerequisite is a good judge. Ideal criteria for being a good judge is insightful, explore the science of law, a fair, independent fund clean. The judge should have is the selection of the best sons and daughters, who are educated through the educational process extra-tight and classy featured, and who continue to sharpen their skills honed. The judge shall also discussed multidimensional experience in a variety of field and undergo continuous spiritual process to be a person with integrity who can not be tempted by anything, good wealth, power, and other worldly pleasures. The judge is also expected to always sharpen policies, wisdom, and justice instinct to make it remain sensitive in deciding each case.

Observing the conditions of the development of society, followed by a variety of problems or disputes in the midst of society, it is not enough to rely on the legislature to reform national law but that more cultivate their realities are the judges. The judges in question are those that have the foresight (visionary), so that the decision can change society for the better situation. The judges' verdict is aligned with the development goals of national law that is the law to the public welfare.

Pancasila point Reject Law Reform

Judges should appear as progressive judges to create a ruling legal reform character responsive legal changes that accommodate the needs of society as well as guide on a better life, prosperous, just, and prosperous, for the purpose of justice in accordance with Article 1 (1) of the law No. 48 of 2009 is to implement and enforce the law and justice based on the five precepts of Pancasila social justice for all Indonesian people (Wibowo, Edy, 2016).

In connection with the foregoing, Satjipto Rahardjo states, viewed from the optical Pancasila is clear that for the Indonesian nation, the law serves as a tool that will deliver the Indonesian nation towards a just society and a prosperous based on Pancasila, namely a fair society and a prosperous a divine Yang Almighty; Fair humane and civilized, the Association of Indonesian container, with a government that is based on the value of Democracy led by wisdom wisdom in consultative / representative; in order to realize social justice for all Indonesian people. Also keep in mind that for all of these objectives must be based on the fact that Indonesia is a pluralist nation that a diversified "Tunggal Ika", but tied with the unity of Indonesia (not unitary Indonesia) (Rahardjo, Satjipto, 2007).

Based on the above, the legal character is actually needed by the people of Indonesia as a tool for achieving national goals is a law that can accommodate pluralism properties that are spread from Sabang to Merauke, and various ethnic groups with local traditional authorities are autonomous. Therefore, the main thing that must be done in the development of the law is to harmonize the laws and not do a unification or codification. In addition, the power of the government should be decentralized, not centralized as that has been practiced.

It is thus clear that, for the nation of Indonesia is the law that must be devoted to man, not man who must serve on the law, and not in place human sacrifices for the sake of law (jurisprudence and practice of lawless), by reason of statutory limitations in delivering justice as often put forward by the positivist conception of formal and procedural correctness.

Areas of law that requires the formation and renewal can be grouped according to the required fields, as follows: (a) the field of politics and government; (b) The field of economics and the business world; (c) The field of social welfare and culture; and (d) Sector reform the system and the legal apparatus.

Main ideas that can guide the direction of legal reform in Indonesia. There are at least four principles agreed upon by scholars as the ideal of Indonesian law, namely: (a) Protection against all elements of the nation for the sake of national integration; (b) The realization of social justice in the economy and society; (c) Delivering democracy and *nomokrasi* in statehood. *Nomos* (law) became ruler of rulers; and (d) Creating tolerance on humanity and civility in religious life (Prasetyo, Doddy Iskandar and Tanya L. Bernard, 2011).

Four principles that determine how the law of Indonesia should be, and should simultaneously charge. The four main ideas which, *mutatis mutandis*, the values of Pancasila is the general consciousness of this nation that can be used as the starting point of legal reform in Indonesia. That means, if there are laws in Indonesia are updated, but contrary to the values of Pancasila should be banned, halted and even declared null and void. As a sovereign nation and has the personality and noble values, then the laws prevailing in Indonesia to be legal based on the values of Pancasila included in administrative law (Prasetyo, Doddy Iskandar and Tanya L. Bernard, 2011).

Relevant to this, Jimly Assiddiqie stated that the administrative law at the beginning of the formation of this country has only a very small portion, but along with the collapse of the thought of the state as a night watchman (*nachtwatcherstaat*) switch to the welfare state the share of administrative law getting bigger. In the night watchman state (*Nachtwatcherstaat*), the state assessed *bersungsi* sufficient enough to protect its citizens alias serves as the minimal state, the idealized is the principle of "the best government in the least government" least intervention in the dynamics of community life. But non intervesionist state is to the detriment of the majority of citizens, giving rise to a new consciousness that is the welfare state (*welvarsstate*), in which it states is idealized to intervene in the affairs of people who can not afford competent people freely (Assiddiqie, Jimly, 2005).

Pancasila as the basis of legal reform, are permanent so long as there are countries Indonesia, should not be altered or can not be changed. The Constitution of the Republic of Indonesia Year 1945 as the basic law, is more semi-permanent, which means it can be changed but not easy and does not need too much changed. As for which is flexible is the legislation under the Constitution of the Republic of Indonesia Year 1945 who have to adjust to the changes that have been made against the Constitution of the Republic of Indonesia Year 1945.

If the law were to be established with regard to freedom of religion, the law is born should not be the law that gives freedom not to be religious because Indonesia adheres to the principle of supreme deity, meaningful freedom is only given to religious choice (theis) not to no religion (atheist). If the law were to be formed is the law concerning human Indonesia, it should reflect human values fair and civilized, not to be potentially degrading Indonesia, the laws established should uphold the values of unity, democracy and reflects the values of justice social for all Indonesian people. In the field of administrative law, too, that the law is

born should reflect fairness, participation, transparency, protection against humanity in the relationship between government and citizens.

Conclusion

The judge has a strategic role in conducting law reform in Indonesia, because in the hands of judge legislation can be implemented in public life. Through the decisions of judges to resolve various disputes in society, the law became evident. If at the level of the executive and legislative regulations is a mere document that is abstract, then when judges examine, decide and resolve disputes, the legislation became concrete with the interpreting and legal discovery to be applied in resolving disputes. Pancasila is the basis in law for the establishment enforcement reform law through the decisions of the judges are fair and prosperous society.

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