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Social Transformation toward Sustainable Society

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Harmonization of Unwritten Laws as The Cornerstone for Justice Court Judge's Decision Based on One Supreme Divinity

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Abstract

The unwritten law order living law until now are still embraced by many countries in the world. One of the countries still considered living law as the original law is Indonesia. Constitutionally, Indonesia as the state law of Pancasila is embraced mixed law system, beside prevail the written laws also unwritten laws. It is clearly stipulated in the Constitutional Law of the Republic of Indonesia in 1945, which said that Indonesia as a state law, beside prevail the written law also unwritten laws. And the law is written down into organic law, as in paragraph 5 of Law No.48 2009 about Judicial Power. Living law in society is a type of the oldest law in the world in the tradition of the fabric of social relationships between human civilization in all aspects of life. Since the Earth is populated by the descendants of Prophet Adam, since that's the unwritten laws tradition began to take place which is marked by the first criminal event, namely two brothers brawls between Kabil (brother) and Qabil (younger brother) who resulted the young brother killed. The incident occurred because of jealousy of his brother against brother. Jealousy, which forms the implications of the legal provisions on crossbreeding implied by Prophet Adam. This matter was not accepted by Kabil, until the murder occurred. This is the first time the offenses occurred in the history of human life from the Earth habitable where there were no written laws yet. In the context of the lawless life, even now there are still many phenomena that we see the application of the law with the minimalist idea's alias as speaker of legislation. That event wants to say that the law requires a description progressively. In the reality, based on approach of progressive law, the two forms of that law - the written law and unwritten law - turned out to be necessary to achieve sustainability complementary legal justice. Because after all, the law is living in a society that is an unwritten law in no way constitute an interim addition to the purpose of justice.

Keywords: Harmonization of Living Law, Decision Judge, Justice, Legal Progressive

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Introduction

Each State must be a law called the native state. However, each state because the influence of the relationship between the life of the nation, then the State also can be ascertained affected by the legal system of other countries. This is caused by two things. First, because of the influence of relations bilateral or multilateral cooperation and secondly because of colonial law. Influence legal developments that mentioned above, in the present context called modern law. Characteristic of most major modern law is "the law should be written form, rational". What about the law in Indonesia? Indonesia as a state law

before independence in 1945, ever colonized by Dutch for 3.5 centuries. Three and a half centuries has been a long time for the occupiers to fix all the will power in the Earth Indonesia, including applying the legal system imported from the country.

Turns Netherlands adheres to the Civil Law System (CLS). That means, Indonesia since colonization to independence in 1945, was forced to embrace the two legal systems, which in addition to the applicable legal systems of indigenous peoples in Indonesia itself that unwritten law (though there is also in the form of ancient texts such as Lontara), also applies to the Dutch legal system. Until now the law was imported by the colonists still valid, namely the draft Criminal Code (Criminal Code), Civil Law and Commercial Law are all in the form of codification. In fact, the influence of the written law is very strong in the life of Indonesian law. In the application of such a law that, especially in the criminal justice system (CJS) often carries an implication of injustice to society. This is mainly because the law is written is often stiff, which in Latin is called the *summum ius summa iniuria*. Too rigid laws tend not fair. If so, how to solve such problems? One way that can be achieved is through the Progressive approach of Law.

Discussion

First of all what exactly is introduced that the progressive laws. A progressive law is a legal theory which was initiated by Prof. Satjipto Rahardjo, Professor of Sociology of Law Diponegoro University (UNDIP) Semarang, Central Java, Indonesia in 2002. This legal theory as one of the critical therapeutic Indonesian law that the multi-dimensional crisis of 1997 emphasized, that the law is not limited to black and white. "The law is more of a human problem than the laws, procedures and others". Paul Scholten, a Dutch Professor of Law, that law does exist in the law, but it remains to be found. Then add a progressive law that the discovery of such a law must be based on the conscience of the man himself. Since man is not for the law, but the law was to humans. That means the law requires sustainable progressive in social life.

Also interesting what was raised by Hart, that "the law is the primary norm which outlines sanctions". Hart also said that 'an unjust law is not a law, have excessive tone and paradoxical, if not a mistake, as the law is not the law, not the law or the constitutional law'. Prof. Andi Zainal Abidin Farid said "The good deed and the right, it is better than a thousand words (laws, pen) is useless". Indonesia as a state law (nomocracy) and possibly other countries are not allergic to the arrival of modern law or the written law. However, in many cases the application of such a law, it is devastating for the people of the injustice. Either through court decisions or legislative system as a command authorities.

Justice in the legal text books has been often inversely related to justice in the legal context. Auerbach, J.S., in his book *Justice without Law* (1983) says "The notion of justice without law seems preposterous, if not terrifying" (Auerbach & Jerold S, 1983). South Sulawesi has long believed it turns out that way. South Sulawesi society believes that living in a society of law is one of the alternative ways to prevent and solve crimes. The results indicate the author in 2007 and thus it was raised again in this article (Ibid, 2011: 4). For example, on the Palu District Court decision in the case of a minor who was charged with stealing sandals. This event occurred in early 2012. Comment authors of the case are as follows below. In the case of AAL is a sample verdict decision can still be viewed as full of controversial decisions. May be called as a court decision does not arbitrate progressive.

A case of slippers theft with defendant a boy named AAL (15), finally the single judge Rommel F Tampubolong (RFT) decided on Wednesday, 04th January 12. Judge RFT decided AAL was found guilty of stealing sandals belonging to someone else. RFT judges agreed with the public prosecutor's description of the essence, that the indictment meets all the elements of the charged acts. The Hammers Court decision was so sharply downward, so that the consideration of the RFT judge said that AAL proven to have violated paragraph 362 of the Criminal Code. But, was it true if AAL proved found guilty by the court? "The verdict is not purely free for the boy..." (Harian Kompas, 5-1). That is, not for the boy AAL. But maybe acquittal only for them the-have and able to break down the walls of fairness in the criminal justice system so that acquittal was the case, as is true in some cases corruption lately. Different to the case of sandals theft that has been decided by the District Court Judge Palu, Central Sulawesi. This decision caused public unrests, especially AAL's parents and himself. Of course, this child's future will not, as bright as before anymore because he was found guilty by the judge in the case a quo. This is the kind of verdict law in black and white.

Problem Indictment Not Proven

In the Indonesian criminal justice system that adopts a due process of law, if the Public Prosecutor (Prosecutor) cannot prove the charges, the verdict must be separated from all charges. Meanwhile, if the prosecutor cannot prove the guilt of the accused, then the accused must be free from punishment. In the trial, charged with theft AAL sandal brand goal number 43 belonging to Brigadier Ahmad Rusdi Harahap. But the fact of the trial, the evidence submitted disband sandals And number 9.5. This means that there is a difference between the evidence which the accused by the trial prosecutor with the facts. That is, that the evidence at trial did not conform to the prosecutor's indictment, especially regarding evidence allegedly stolen goods. Judge RFT in its decision "not to mention the AAL guilty of stealing sandals belonging to Brigadier Ahmad Rusdi, but AAL convicted for taking someone else's". Then, whose stuff taken and how the evidence. This is a very controversial logic in that decision. That is, the decision to AAL unfair and contrary to human conscience.

Supposedly the ruling reads "The defendant free from any and all claims", because materially prosecutor's indictment cannot prove the defendant before the trial court. It is true that one of the elements of the offense of Section 362 of the Penal Code is "taking the property of others..." Nevertheless, the phrase "Property of others" does not mean the sentence was to be seen and interpreted literally. So the decision was prettier than formulation such that the elements of the offense intended. The formulation of the offense remains to be seen about the meaning of the phrase "Property of others", it should be mentioned that the other person is "who?" That is why the lawmakers did not mention the name because it remains to be seen who the person who is the victim as the owner of the stolen property is referred to as "others". If so, who's the victim? When examined closely formulations offense in the Criminal Code, not only about the theft of any article that requires the meaning behind the words or the words in each chapter. But almost all of chapter it was. For example word "whoever". The word is still to be proven about anyone or anyone who is involved in a criminal act. The word 'whoever' dexterity requires logical thinking to prove the involvement of a person suspected or charged with a crime. This is where the progressive model of legal reasoning must be present.

In case of AAL, Judge RFT inconsideration of the sentence, that "AAL innocent because stealing sandals belonging to Brigadier Ahmad Rusdi, but AAL convicted for taking the property of others", and to whom the act of AAL must be accounted? Taking someone else, Judge RFT did not mention who the victim. Though paragraph 362 is referred to as theft article, there must be a victim of theft. When someone is referred as the perpetrator, then the next premise that must be proven is the victim. If the victim does not clear the prosecutor's indictment cannot be proven. That is, there is no theft. AAL recognition on the show "Law for Sandals" which was broadcast live TVOne 10th January 2012, that in the event dated May 27th, 2011 after returning from school, he is given a stop in front of the boarding house of the police officers. At the time he was accused of stealing sandals. Rusdi recognition as victims that he robbed sandals for three (3) times the number 43 branded Eigel. The three of them were forced to admit the offense, and AAL self does not admit the allegations. Then at that moment AAL persecuted by the police on the basis of mere suspicion. This means there is an act of vigilantism (eigenrichting).

In such circumstances, the police officers who mistreat AAL have forgotten two things. First, that he is a law enforcer, protector, and the protector of society, including AAL and members as citizens who need legal protection. Legal protection should not be interpreted only when a person becomes a victim or conflict with the law. But it also must be understood that when a person or society that requires respect for their rights, then his rights under the law must be given when it is also proportionally. Secondly, the police need to fulfill obligations under the law, then the obligation is distributed to whom it must be fulfilled obligations. This also is a law enforcement context. Never mind that someone (especially children) are still in unexpected / suspect, defendant even though he still has the right to receive distributions from the protection of a person who has the obligation to implement the enforcement of the so-called presumption of innocence. The compulsion to confess is an unprofessional form of intimidation. In the past, we've reminded how real police professionalism was required (Kamri, Harian Fajar, 02nd December 2010).

Conclusion

To achieve a harmonization of law with the goal of justice, between the written laws and unwritten laws (living law), should not be ignored by judges. Though unwritten laws are more flexible and consistent with the laws and values on Indonesian culture. Therefore, court judge in making the decision need to synergize the two forms of the law. Because in fact, the court decision tends black and white not fair. In this paper is recommended that to synergize the two forms of the law to achieve a harmonization in order to use a progressive approach of a law theory.

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Social transformation and sustainable community provides challenge for conceptual and empirical research. While such prior research has likely focus on singular transformation factor as key driver for sustainable community, this book takes consideration that that conventional research has fail to inspire leaders and to stimulate society and organization transformation.

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