

Transformation of Legal Discovery in Court Decision In Indonesia by using Guba And Lincoln Paradigm

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Article Info

Volume 83

Page Number: 5884 - 5889

Publication Issue:

March - April 2020

Abstract:

This study aims to describe the rechtsvinding transformation in Indonesia with the paradigmatic study of Guba and Lincoln. The transformation process containing the time and socio-cultural dimensions of society emerged through a long process. This transformation can be seen through the paradigmatic Guba and Lincoln. Ontology of positivism paradigm means that the judge reads the law as it is written transformation into the ontology of post-positivism paradigm is critical realism, meaning that the judge reads the law critically because the law can only be understood imperfectly because the phenomenon or development of society continues to change and is not can be limited. Moreover, the methodology of positivism paradigm, namely verification, means that the judge examines the object of the dispute by referring to the law as a basis for the transformation of truth into a methodology of post-positivism paradigm, namely the counterfeiting of verification, namely the abortion of the facts. Thus the judge's judgment in deciding a case in Indonesia starts from realizing formal justice towards substantive justice.

Article History

Article Received: 24 July 2019

Revised: 12 September 2019

Accepted: 15 February 2020

Publication: 30 March 2020

Keywords: transformation, rechtsvinding, guba and lincoln paradigm, legalism, Indonesia.

I. Introduction

The influence of the civil law system in Indonesia has led to the mindset of judges in examining, adjudicating, and deciding a case that is still bound by formal legality or formal justice, resulting in the justice that is created tends to be unjust which will harm the sense of justice of the community. The search for justice is limited to the law, even though a sense of justice can be found outside the law (Soeharno, 2009; Yi, 1999; Sarkar, 2011; Almqvist, 2015). Responding to these conditions, after

Indonesia's independence legislation leads to justice that is obtained through the search for values that live in the community not only through law alone, namely the Law of the Republic of Indonesia Number 14 of 1970 concerning the Basic Provisions of Judicial Power Article 27 paragraph (1) Judges as law enforcement and justice are required to explore, follow and understand the values of law that live in society. Has been revised into the Law on Judicial Power, namely Law Number 48 Year 2009 Regarding Judicial Power

Article 5 paragraph (1) stipulates that judges and constitutional judges must explore, follow, and understand the legal values and a sense of justice that lives in the community.

In addition, the Draft Penal Code from 1964 to the present year 2020, for a period of 56 years, the effort to reform the criminal law as a whole can be considered as an implementation of the mandate of the founding of the nation implicitly contained in Article II of the Transitional Rules. The purpose of these changes is to realize both certainty, fairness and usefulness in court decisions (Budihanto, 2017; Hoskins & Robinson, 2004). Justice is not always in the content or substance of the existing rules but can be found in the judge's conscience and common sense, so a judge must try to explore the values of justice that exist in society to get justice in his decision. Changes in regulations require a change in the paradigm of judges' judgment when deciding a case in Indonesia. The paradigm is a guideline that guides the mindset of judges to assist judges in every process of examining, judging and deciding. It is intended that the process be reviewed in depth and comprehensively so that a fair, wise and professional court decision is created and fulfills the community's sense of justice.

II. TRANSFORMATION OF JUDGE CONSIDERATIONS IN DECIDING A CASE IN INDONESIA

Transformation is a process of change that has characteristics including the difference is the most important aspect in the transformation process. It also refers to the existence of the concept of identity or identity as a reference for differences in a transformation process. If it is said that something is different or in other words there has been a process of transformation, then it must be clear what difference, for example: what social characteristics, certain concepts such as (include: thinking, economics or other ideas) or the characteristics of the application of a concept. Historically, the process of transformation always

illustrates the existence of historically different conditions (different conditions at different times) (Dewi, 2012; Joireman, 2004; Jaremba, 2013). Sources of law in the civil law system are statutes, regulations, and customs that are not contrary to the law (custom) (Merryman, 1985; Rahardjo, 2012). Legalism viewed that the only source of law is the law, the judiciary merely applies the law, the judge is only a mouthpiece of the law, the method used is juridical geometry, custom has legal force if appointed by law. Thus, according to the flow of legalism, there are no laws outside the law (Muwahid, 2017).

One function of the law is as a tool to bring about justice for all humanity. Once the law in the application of the legal vacuum can occur and also the law is contrary to the justice of society. Do not rule out the possibility of a judge's conscience even if someone violates the law but does not deserve to be penalized. In law enforcement practices in Indonesia, Indonesian judges realize formal justice so that there are still many people who are not satisfied. The judge has not really explored the values of justice that live in society on the grounds he is bound by formal legal rules. In addition to enforcing formal legal rules, judges also consider substantive justice. The regulation of judges in Indonesia in examining, adjudicating and adjudicating cannot be separated from the concept of the European Continental civil law system which embraces the teachings of legalism (Roccati, 2015; Ott & Schäfer, 1993). The doctrine states that legislation in the form of binding force is also called positive law. For the judges to uphold justice by carrying out the law as the only source of law, the judge does not need to look for sources of law outside the written law (Talli, 2014; Badriyah, 2011; Kelley, 1980; Jaya, 2016; Kusumawardhani et al., 2020).

Provisions of the Law of the Republic of Indonesia Number 14 of 1970 Regarding the Basic Provisions of Judicial Power Article 27 paragraph (1) states that judges as law enforcers and justice are obliged to explore, follow and understand the legal values

that live in society. Then these provisions will be maintained when the amendment to the Judicial Power Act, namely Law Number 48 of 2009 Concerning Judicial Power Article 5 paragraph (1) determines that: Judges and constitutional justices are obliged to explore, follow, and understand legal values and a sense of justice who live in society. Furthermore, in the explanation of the article, it is stated that this provision is intended so that the decisions of judges and constitutional judges are in accordance with the law and the sense of justice of the community. Thus there is a change in legal politics because judges are required to explore the legal values that live in society to create fair decisions.

In addition to the above regulations, currently in 2020 the provisions of the Criminal Code Draft await approval for later to be applied in Indonesia. The judge has been shackled in positivism or legism thinking. The Penal Code draft still accommodates the teachings of legism mentioned in Article 1 paragraph (1). No single act can be subject to criminal sanctions and / or actions except for the strength of criminal regulations in the laws and regulations that existed before the act was committed. However, the provisions of these rules are added Article 2 paragraph (1) determines that the provisions referred to in Article 1 paragraph (1) do not reduce the enactment of living laws in society which determine that a person should be convicted even though such acts are not regulated in this Law. Article 2 paragraph (2) states that the law living in the community as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and in accordance with the values contained in Pancasila, the Basic Law The Republic of Indonesia in 1945, human rights and general legal principles recognized by civilized society. Thus the amendment to the draft Penal Code aims to order that judges must explore the law that lives in the community.

The development of Indonesian criminal law is an effort to shape the aspired Indonesian society. One

of them is through structuring a comprehensive and integrated legal system by recognizing and respecting customary law. The Criminal Code Bill places customary law in fundamental principles. The source of law or the basis of legality to declare an act as a crime, is not only based on the law, but also based on the principle of material legality, namely by giving place to customary law. An active attitude of a judge is needed in the whole process of examining cases in a court of law with the aim of revealing and revealing the truth or inaccuracy of the statements or evidence presented by the parties (Bolifaar et al., 2019). It is in the hands of the judge that the authority to judge whether or not the arguments and evidence submitted by each party. This active attitude is based on at least two things. First, the judge in carrying out his duties has professional responsibilities. The responsibilities of this profession include three types, namely: moral responsibility, legal responsibility, and professional technical responsibility. Moral responsibility is responsibility in accordance with the values and norms that apply in the professional life environment of the judge, both personal and institutional. While the legal responsibility is the responsibility that becomes the burden of the judge to be able to carry out their duties properly and does not violate the legal guidelines. And as for the professional responsibility is a demand for judges to carry out their duties professionally in accordance with the technical criteria that apply in the technical field specified in the professional profession of the judge, both general and specific provisions in the institution. Secondly, the decision is made according to the judge's conviction. Because what they decide is not only accountable to the parties and laws and regulations, but more severe is the responsibility of the decision to God Almighty. That the judge's decision has binding and execution power. The judge's decision cannot be changed and sued, especially if the decision has permanent legal force. Therefore, it is very reasonable and proper a decision determined by a judge is based on the results of a serious

examination and on the judge's confidence in the truth of the decision made.

III. TRANSFORMATION OF JUDGE DECISION CONSIDERATION USING GUBA AND LINCOLN PARADIGM

The basic belief of judges in Indonesia is in accordance with the ontology of the positivism paradigm, because the Indonesian legal system, including its judges, has so far been influenced by the civil law legal system that judges must not make decisions other than those stipulated in the provisions of the law. If this is done by the judge then it can be assumed that the judge has committed arbitrariness, and the judge's actions are contrary to the legal certainty contained in the law itself. Then the judge adheres to the positivism paradigm which has its own perspective to see a rule. Ontology positivism is naive realism, so the Judge in realizing justice in the trial process by reading it as is and what is written or in other words is not interpreted. The epistemology of the positivism paradigm that judges place values outside, because judges are seen as free of values, the judge must be objective in the trial process. Positivism methodology is verification, in which the judge objectively adjusts a dispute object to the provisions of the law which is the only source of justice. Then the justice to be achieved in this flow is formal justice (Islamiyati, 2018).

Based on the explanation above, the paradigm of judges' thinking in Indonesia is the positivism paradigm. However, after Indonesia's independence, a law was set up that wanted judges to seriously explore the values of justice living in society, namely the Law of the Republic of Indonesia Number 14 of 1970 concerning Basic Provisions of Judicial Power Article 27 Paragraph (1) Judge as law enforcement and justice must explore, follow and understand the legal values that live in society. Then these provisions will be maintained when the amendment to the Judicial

Power Act, namely Law Number 48 of 2009 Concerning Judicial Power Article 5 paragraph (1) determines that judges and constitutional justices are obliged to explore, follow, and understand legal values and a sense of justice who live in society.

Ontology of post-positivism paradigm is critical realism. The ontology is labeled as critical realism (Cook & Campbell, 1979). Epistemology of post-positivism paradigm is modified dualist/objectivist (Guba & Lincoln, 1994). The Indonesian legal system, including judges who are affected by the civil law system, results in judges not being able to make decisions other than those specified in the law. Based on the provisions in the Law on Judicial Power and the Penal Code that the judge is obliged to explore the law that lives in the community. Then the judge's thoughts adhere to the post-positivism paradigm. Ontology paradigm post-positivism is critical realism, then the judge of post-positivism epistemology is Modified dualist / objectivist. Dualism is largely abandoned as not possible to maintain, but objectivity remains a "regulatory ideal". Dualism cannot be maintained because judges and the rule of law have diminished their role because they have limitations while conditions continue to evolve and change. The methodology of post-positivism paradigm is falsification, the opposite of verification where the judge remains objectively examining an object of dispute critically referring to the rule of law because justice may be outside the rule. So the justice to be achieved in this flow is substantive justice.

Based on the above explanation, there has been a shift from the paradigm of positivism to the thought of judges from formal justice to the post-positivism paradigm of substantive justice. The paradigm and philosophy of law have developed into a grand theory for positive law and legal theory. The paradigmatic study and philosophy of law can no longer be carried out by philosophers but also academics and legal practitioners. Included in this study the decision makers of the court / judge are required to realize the values of justice that lives in

the community. According to Ritzer et al. (2007), paradigms represent sets of foundational beliefs, they tend to persist over time in individuals as well as disciplines. They frequently represent both disciplinary commitments and the kinds of questions that adherents believe to be important for social science investigations. A plurality of paradigms is likeliest to provide the richest social science; the question is not which paradigm is best suited to science, but rather which paradigm exhibits the best fit with the kinds of questions being posed (Ritzer et al, 2007).

Thus, the change in paradigm is to bring about a good and just decision. Although there is a shift in paradigm thinking of judges as one of the law enforcers in exercising judicial power, it cannot necessarily do as they wish without basing it on the applicable laws and regulations. In accordance with the epistemology paradigm of post-positivism, the judge must remain objective, but the judge as the main actor in the justice process is required to have professionalism in upholding law and justice. Therefore, positivism and post-positivism have similar values. Thus the paradigm shift that occurred from post-positivism positivism did not change the objectivity of judges in Indonesia in the process of examining a court and deciding a case.

IV. CONCLUSION

Legal discovery (*rechtsvinding*) originated from the history of Indonesia which was colonized by the Dutch who brought a European continental civil law system which adopted the teachings of legalism. The teaching upholds justice by applying the law only as the only source of law. In other words the judge is a mouthpiece or mouth of the law. However, after Indonesia's independence there are provisions requiring judges to explore the law that lives in the community. Changes in the regulation of judges have led to judges' considerations when deciding a case to undergo transformation. The transformation in the paradigmatic study of Guba and Lincoln has been a

shift in the thinking of judges from the paradigm of positivism towards post-positivism. Ontology of positivism paradigm is naive realism, meaning that the judge reads the law as it is written, transformed into an ontology of post-positivism paradigm is a critical realism, meaning that the judge reads the law critically because the law can only be understood imperfectly because the phenomenon or development of society continues to change and cannot be limited. Epistemology of positivism paradigm is a dualist and objectivist meaning that the judge and the object under study (a case that is decided) are assumed to be an independent or objective entity transformed into an epistemology of post-positivism paradigm that is modified dualist / objectivist. Dualism cannot be sustained because the judge and the law have diminished their role because they have limitations while conditions continue to evolve and change, but the judge must remain objective. The methodology of positivism paradigm, namely verification, means that the judge examines the object of the dispute by referring to the law as a basis for the transformation of truth into a methodology of post-positivism paradigm, namely the counterfeiting of verification, namely the abortion of the facts. Thus, the judge's judgment in deciding a case in Indonesia begins with realizing formal justice in terms of positivism paradigm towards substantive justice in terms of post-positivism paradigm.

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