

# Indonesian Law Enforcement; between the Lady and Banyan TreeE

*By Ahmad Irzal Fardiansyah, Sigid Suseno*

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**Abstract**— Indonesian law enforcement had a different characteristic. Usually, we know the lady symbol for justice and law enforcement. Actually, Indonesia have another symbol for justice, is a banyan tree. The different is, the lady symbol said justice is a right or wrong, and law make the punishment. The banyan tree symbol said, justice is to looking for how to bringing back the balances. Indonesia should be use the Pengayoman. It's mean, how to make the legal problem is finished with win-win solution, not who is right or who is wrong. This characteristic is growth from Indonesian genuine law (adat law/custom law). This model (pengayoman), can minimize conflict after law enforcement and pengayoman want to make the legal problem is fixed by them.

**Index Terms**— Indonesian Law Enforcement, Banyan Tree, Pengayoman.

## I. INTRODUCTION

As a country that continues to grow in the globalization, Indonesia must also prepare themselves against the waves of this progress. One of which must be noted is the development of the law. The political<sup>4</sup> direction of national law is an important part in another in the development of national law [1].

The face<sup>4</sup> of the era of openness in the field of the economy is influenced by the freedom of the market that will also be held by Indonesia, may also need to think about the protection of the economy in Indonesia itself [2]. Remember that the national development will always bump into between economic development and the enforcement of the law, therefore should think about the relationship of the ideal relationship between the development of the law and economic development, carried out by the government and law enforcement agencies as institutions that run the development.

In line with the thought of the above, Justice K. Subba Rao<sup>7</sup> warned that for every business development generally, economic development especially, required design (*Planning*) through the legislation. So planning is done in both countries and democracy in the totalitarian countries [3]. Relationships of this is that is needed in order in the development process including economic development, not happen negative impact on its implementation, so that the trouble with the law and can

be harmful to the development of itself.

## II. THE POSITION OF INDONESIA

Romli Atmasasmita said, interaction and relevance between the sciences of the law with the science of the economy in the national development, has been ma<sup>10</sup>ted in the 1945 Constitution. This can be seen in the Article 1 paragraph (3) of the 1945 Constitution, which stated that "the Indonesian sta<sup>4</sup> is the state of the Law". About the economy is found in the Article 33 paragraph (1), which states that "the economy compiled as a joint effort based on the basis of a family, and verse (2) branches of production vital for the state that involving the lives of th<sup>5</sup> people possessed by the State , and verse (4) refers to the "national economy held based on the economic democracy with the principle of to<sup>5</sup> herness, efficiency equitable sustainable, ...maintain the balance of progress and unity of the national economy."

Nothing<sup>14</sup> do with this very important think sewn laws that are made in order to support the developme<sup>7</sup> of is the act in accordance with the values of the people of Indonesia based on Pancasila and the Constitution. The Constitution and does not cause bad effect to the development itself. The product of legislation should be appeared the philosophy and mission that aims to create order, legal certainty and justice and the benefit [4], including the consequences due to social, economic and political formation of legislation. This is a benchmark the development of the law which integrates with economic development.

In relation to this *Guiding Principles* that produced the 7th UN Congress never states:

Remember relation between the prevention of evil with development and international economic governance of the new changes in the social and economic structure must be coupled with the reforms in the field of the criminal justice system in such a way to ensure responsive nature of the system of crimes against the core values and objectives of the society and the aspirations of the international community [5].

The terms above should be able to guide the formation of legislation in national development, pro-again on economic development. But until this time, legislation built related to economic development is still limited to the interests of law enforcement alone. For example, to realize its eradication of corruption has been done four times changes the act which contains the mission of judgment (retributive philosophy) and save the state finances (uses utilitarianism philosophy) simultaneously .Mission embracing the act was so that the perpetrators of the deterrent effect and the state is not wronged. But in the practice of the philosophy and the mission is often ignored among others only aimed at

Manuscript received June 21, 2017; revised March 1, 2018.  
Ahmad Irzal Fardiansyah and Sigid Suseno are with University of Padjadjaran, Bandung, Indonesia (e-mail : ahmad.irzal@fh.unila.ac.id)

punishment bosses without considering the increased revenue to the state finances or even a deterrent effect not more increased from before the effectiveness of four times the changes the act [6]. In other writings, Romli Atmasasmita also reminded that the activities in the field of the economy requires the law as the foundation and as well as the legitimacy of the policy to achieve the goal of statehood so that is a prerequisite if the two disciplines, economic and legal, seen cannot be allied To promote the welfare of the people of Indonesia.

In same meaning with the Romli Atmasasmita, the relationship of the law with the economy is not the one-way relationship, but mutual relationship and mutual influence. Economic activity that is not supported by the law will result in chaos occurs because when the perpetrators of the economy in pursue profit not arises with legal norms and will cause a loss of one of the parties in the conduct of economic activities. While the law says that the law is always behind economic activity, each economic activities done by someone must be the activity that is followed by the legal norms that become beacon provided. The law that followed this economic activity is a set of norms that regulate the relationship of economic activities and is always influenced by the economic system that is held by a state. For Indonesia economic law activities base was located on Article 33 of the 1945 Constitution and several other derivative rule

Should be regrettably if this time in Indonesia, in the practice of the law and the economy running each, so that no one strengthening in the development process. The impact is appears obstacles in development for the welfare of the people of the result of the presence of an error in the policy or action in the economy, so that the impact of the law to the disadvantage. The impact of the other is the attitude that too careful because of fears of offenses against the rule of law from policy makers (government institutions) in determining the attitudes in the development, to cause inefficient development budget, which ultimately also impact on the welfare of the community.

For example, since the specified act on the eradication of corruption and act on Money Laundering, success level, from aspects of the discipline and integrity and prudence in the state financial management has not changed significantly. On the contrary increased state officials involved in corruption cases, finance and banking. This raises serious questions about the empowerment of the function and the role of criminal law in supporting the strengthening of the economic sector, finance and banking as the backbone of improving the welfare of the people of Indonesia in the era of globalization.

The example above shows that there is one in the development of our legal system, especially crimes, where should be in the era of globalization can be in accordance with the development and economic development. The spirit of the criminal law enforcement should be returned again on the principle of *Ultimum Remidium* or last efforts.

The character of development in Indonesia that should be built is characters protection (pengayoman), as said Daniel S Lev, In 1960 the blindfolded lady with scales bothered replaced the United States Indonesia's symbol of justice by a stylized banyan tree, inscribed with the Indonesian word Pengajoman-protection and succor development must be

able to embrace both the development of the law and economic development. When both in line, hence development will be better, forward and not be contradiction between them. Romli Atmasasmita give some thought, namely required reorienting the direction of the policy of criminal law politics criminal) Indonesia in anticipation of ideology globalization and the worst impacts of globalization. The Indonesian Constitution itself has mandated in Article 18 B Paragraph (2), "The State acknowledges and respects the unity of indigenous and tribal peoples along with their traditional rights as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, law." It can be argued that the development of Indonesian criminal law should promote the living values of Indonesian society. The ideals of law enforcement that are often considered irrelevant, where if just apply what is mentioned in the law or that are ex ante alone, it is difficult to judge that the objectives of the law has been fulfilled. Of course that can be derived from the values that live in Indonesian society is the principle, that the law is enforced with principles that can be accepted by the Indonesian nation. Various opinions on this principle emerged as an alternative, among them the restoration (repair), and peace.

If we look at these two principles, at first glance almost the same. But if experienced again have differences. Improvements are more likely to solve or repair damaged circumstances, but conflicts remain, while peace is an undertaken effort without conflict. Of course both can complement. For example in law enforcement of crimes committed by children. This principle of improvement and peace can be applied together, namely by applying Restorative Justice. But in the case of criminal acts included in the extraordinary category, there may be a peace of both parties but the crime is still executed, or can be done to the damages that occur and the crime is also executed

The first lesson is, perform thorough and comprehensive review of all government planning especially those in legislation including the origins of the initiative of the Legislative in various sectors and the by laws that regulate the natural resources including oil and gas. The second lesson, especially for criminal law experts examine closely together with the rapid changes of the development and trends in the development of the criminal law in western countries (the United States and the European Union member countries) in completing the cases related to finance, banks capital markets etc. Why devoted to the three sectors? This caused has been recognized in various countries that these sectors are the backbone of the State in achieving the ideals of the welfare of the people. The study crimes against the three sectors and some examples of cases in Indonesia such as the case of Monsanto of late is thus very important to be done by the experts criminal law and the law of the economy together. The third lesson, refer the political map of the law that is still controlled by two legal system, the Civil Law System and the Common Law System and the fact has occurred a shift in the domination of the legal system "Civil Law" by the legal system "Common Law" and the development of the map of political power the developed and developing countries in the era of globalization. During this criminal law expert, have not had the attention of the context of the situation as I mention

above. They more often polemic about aware retributive with premise positivism law without considering specifically that the criminal law system is a part of social policy today demanding increasing economic prosperity of the people.

### III. DISCUSSION

Indonesia, as an independent country more than 75 years ago, after being in Dutch colonialism until now still use the law applied by the colonist. Of course this is something that cannot be trusted, because the founders of the nation have ordered that the law inherited by the Dutch only to be used temporarily after independence, after that the Indonesian nation must make its own rule of law. In principle the Indonesian nation has its own legal source, which comes from various tribes who live in Indonesia and still live to this day even though not made as a positive law. This potential has actually been given space in the state constitution but has not been realized to date.

Bringing together principles such as mutual cooperation, kinship, humanitarian tolerance, anti-colonialism and feudalism, and the principle of unification, national law deriving from the customary (cultural) values of Indonesia will be developed. From some principles it can be seen that the customary law of Indonesia is different from the law that comes from the west, which was brought by the Dutch when colonizing Indonesia

In order to develop or renew the law in Indonesia should not be separated from the legal history of the Indonesian nation. According to Romli Atmasasmita, the history of the development of Indonesian law is in line with the development of Indonesia's struggle to achieve Indonesia's independence in 1945 and thereafter. Nevertheless, the establishment of Indonesian law does not reflect the characteristics of Indonesian nation that have cultural, religious and ethnic diversity. Two important points to be found from Romli Atmasasmita's opinion are that the reform of Indonesia's criminal law requires history, and that history is not only an adoption of the Netherlands but must also consider the cultural, religious and ethnic diversity present in Indonesian society.

Regarding the Indonesian Nation, it would not be denied if it was stated that Indonesian customary law is a statement of "the content of the immersed soul; customary law in its entirety is a manifestation of the legal consciousness and therefore the soul of the Indonesian nation ". If this idea can be justified and thus the belief of this author then customary law can be used as a measuring tool of the mind or content that we want to give to Pancasila. [8]

As a source of law derived from a law that lives in a traditional society or often referred to as living law, has a different identity with the law that has been applied in Indonesia. Whenever the positive law in Indonesia today is a colonial inheritance law that identifies the civil law system in which norms become the benchmark, then the laws that live in Indonesian society have a legal identity that comes from customs. Of course this can lead to conflicts in its application if not adjusted from the theory side.

If returning the legal objectives to Pancasila and the 1945 Constitution, of course, one of which must be considered is the customs and culture of the Indonesian nation itself. In the Indonesian society itself many values are still alive and are recognized as the norm to be followed. This is what needs to be synergized, between the values of Indonesian society is complex and diverse with the ideal of positive law enforcement. Need to find a relationship that can combine the customs and culture of the Indonesian nation with the need for legal development in Indonesia today. In many cases, law enforcement objectives based solely on law enforcement, with the perspective of a deterrent effect, have proven to be less effective in reducing crime, nor can it lead to a sense of justice for the community. Giving a deterrent effect or creating a sense of justice, it is still too far to be a goal.

Therefore, it should be noted how order can be created in society. If linked with the customs and culture of the Indonesian nation, the effort to achieve order is also the goal of the existence of indigenous peoples who uphold the values of customs and culture. In other words, the often-sighted custodial sentence is the principal aim of criminal law enforcement, when it is developed toward accepting customary and cultural values in Indonesia as a means of enforcing the law, where the achievement of order is the main thing that wants achieved, then the criminal imposition of custodial sentence will be very careful to be given. This is in accordance with the concept that criminal is *ultimum remedium* (last resort), while the remedial premium (principal effort) is to find solutions in accordance with customary and cultural values acceptable to society.

Taking the values of Indonesia's rich customs and culture in the framework of Indonesian law development is an appropriate step and should be an important alternative in the development of Indonesian law. Peace which in Romli Atmasasmita's view is the ideal goal of law enforcement in Indonesia, can be created by applying the law in accordance with the customs and culture of the Indonesian nation. Many of Indonesia's cultural and customary values are more of a priority for peace. Sanctions are given in a simple form, but usually do not only involve people who commit criminal acts, but also families and indigenous peoples. The completion of this model is not only in the civil sphere, but the criminal sphere as well. For example, when a person commits a crime, in some customary laws and culture of society in Indonesia, the offender's family will automatically participate in taking care of the members of his or her family. Peace can occur after communication between families or customary groups of perpetrators, against families or customary groups of victims. This communication that enforces law enforcement towards is not a conflict and more in line with the personality of the nation.

As a legal identity, Indonesia has legal characteristics that are defined as laws that must solve the problem by finding the best solution. Resolve legal issues without causing any new problems. What exists today is, where Indonesia still uses the legacy of colonial law, solve legal problems by causing conflict. Please note, almost all types of crimes committed in Indonesia, settlement with imprisonment. So now there is a problem where prison becomes over capacity. People who have been released from prison also often bring new problems, namely by getting accustomed to crime (recidivist). Of course

the negative impacts are not desirable, but in fact that's what happened. Legal issues solved by only sanctioning the perpetrators of crime, have a new impact on law enforcement. Symbol goddess of justice (the lady), who sees justice by simply sanctioning the guilty, narrows the concept of law enforcement in the context of Indonesia which has a philosophy of seeking win-win solutions in law enforcement. The living law philosophy in Indonesia emphasizes how every person who is in conflict with the law, both criminals and victims, is able to resolve his legal conflicts with both conditional and unconditional peace.

The point is, Indonesian law enforcement had a different characteristic. Usually, we know the lady symbol for justice and law enforcement. Actually, Indonesia has another symbol for justice, is a banyan tree. The different is, the lady symbol said justice is a right or wrong, and law giving the punishment. The banyan tree symbol said, justice is to look for how to bringing back the balances. Law enforcement symbolized by the banyan tree provides shade for both parties to get justice. The concept of law enforcement that has been living for a long time in Indonesia is very similar to the concept of restorative justice that is growing all over the world today.

Another difference between the law that comes from Indonesian society and the positive law in Indonesia today is that the law derived from Indonesian society is more characterized by common law than the civil law as prevailing in Indonesia today. This is a dilemma in law enforcement in Indonesia, because as a genuine law, living law in Indonesia could be more accepted as a rule in the Indonesian people. For that, in the Indonesian law development should accommodate living law as a source of legal development. Indonesian Living law that is principled as common law system, already has differences starting from the principle of application of law (the principle of legality). Another different, common law system created by the people, based on precedent, custom and interpretation, and judge can interpret laws. Civil law system made by representative (legislative law). Based on Roman law, and judges only apply the law. So now Indonesia is actually on two different sides in terms of law enforcement. On the one hand it still uses the colonial inheritance law of civil law system as a positive law, but at the same time sees that the original law of Indonesia, characterized by common law system Because it comes from living law in society, it is time to be appointed as a positive law remembering in some indigenous groups in Indonesia which still revives the original law of the region, considers that customary law must be treated as a positive law, because in addition to feeling more acceptable as a regulatory tool, custom law in Indonesia is seen more as something fair.

Pancasila linkage as a source of law for the nation of Indonesia, explained by Sunarjati Hartono [9] that in fact none other than the original law of our nation, then by itself our national law which together we form must be rooted in customary law. This opinion asserts that our legal development must be guided by the values of our own nation, namely custom and culture. This assertion, gives an idea that the true values of the Indonesian nation itself that needs to be developed in the formation of Indonesian criminal law today. If peace becomes the goal of criminalization, then the mechanism of conflict in criminal law enforcement as it has

been done will decrease, which in turn may lead to a proportionate legal problem resolution, and perhaps more closely to justice itself. Furthermore, the cost that has been issued for a single law enforcement process from investigation to criminal implementation can be suppressed so that the State does not incur substantial costs just to deal with a criminal offender.

#### IV. CONCLUSION

That is the characteristic of law enforcement in Indonesia, which is on the two sides of the validity of different systems, between civil law system and common law system, to be studied further in order to produce laws or relevant regulations to the needs of the people of Indonesia. Taking the values of Indonesia's rich customs and culture in the framework of Indonesian law development is an appropriate step and should be an important alternative in the development of Indonesian law

#### REFERENCE

- [1] R. Atmasasmita, "Characters and political direction of the Law in the national development," Retired Speech, University of Padjadjaran Bandung, 2014
- [2] *Loebby Loqman Capita Selecta Crimes in the Economy*, Detacom, p. 1, Jakarta, 2001
- [3] S. Tasrif, Response to Mochtar Kusumastmadja about the construction of the Law in the context of the National Development, contained in the Law Concepts In Development Group of the paper Mochtar Kusumastmadja, Center for the Study of insights Nusantara, law and development in cooperation with the Alumni, Bandung, 2006.
- [4] Intent of the law repeatedly in invented by many modern law expert. In Indonesia includes Satijpto Rahardjo, Mochtar Kusumastmadja, Romli Atmasasmita, Barda Nawawi Arief, who agrees that the law is only can be seen from the side of legal certainty solely.
- [5] *United Nations, Guiding Principles for Crime Prevention and Criminal Justice In The onet of Development and a New International Economic Order* (U 11 the UN Department of Public Information, 1988) p. 4. (See the Muladi and Barda Nawawi Arief, *Criminal law, Alumni, Bandung*, p. 167, 1992).
- [6] R. Atmasasmita, Political Crimes in national development, paper in the National Seminar, "Build Indonesia through the Development of National Law"; held the Indonesia cooperation of society criminal law and Criminology (MAHUPIKI) and Indonesian Advocate Association (F-UI); Dharmawangsa Hotel, December, 8 2011
- [7] D. S. Lev, The Lady and Banyan Tree: Civil Law Change in Indonesia, the American Journal Of Comparative Law, vol. 14, no. 2, p. 282-307, 1965.
- [8] Soediman Kartohadiprojo, Pancasila and Law, Bandung, 1963
- [9] S. Hartono, "From inter groups law to inter adat law," Alumni, Bandung, 1979



**Ahmad Irzal Fardiansyah** was born in Bandar Lampung, May 6, 1979. He got bachelor of law (criminal law, University of Lampung, Lampung, Indonesia, 2003); master of law (criminal law, Diponegoro University, Semarang, Central Java, Indonesia, 2010); And he is in doctoral of law, (Law Science, Padjadjaran University, Bandung, West Java, Indonesia.

Ahmad Irzal Fardiansyah (Doctoral Candidate), is affiliated with Indonesian Association of Lecturer (academic Professional) (ASASI), Lampung Chapter

**Sigid Suseno** got his bachelor of law in criminal law from Padjadjaran University, Bandung, Indonesia, a master of law, criminal law from Diponegoro University, Semarang, and Central Java, Indonesia. And he got his doctoral of law, law science from Padjadjaran University, Bandung, West Java, Indonesia.

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