

# Prison of Legal Positivism Paradigm and Corruption Eradication in Indonesia

Muhammad Rustamaji\*

Prosedural Law Departement, Law Faculty, Sebelas Maret University, Ir Sutami Street No.36A,  
Surakarta, Central Java, Indonesia (Ph.D Student, Diponegoro University).

\* E-mail of the corresponding author: [hatchi\\_ajie@yahoo.com](mailto:hatchi_ajie@yahoo.com)

## Abstract

The never-terminated corruption is believed to be caused by incomprehensively legal enforcement. A sentence verdict for corruptor that is never frightening them is one of the examples. Consequently, blame is put to a judge who plays important role in the sentence decision. However, what is actually lying behind legal enforcement by judges causing never-terminated corruption? Undeniably, the answer is rooted in legal positivism paradigm that is imprisoning the judges. Act or entire ordinance is thought as a body containing complete laws, so that a judge is responsible only for application the acts mechanically and linearly in settling problems of society including corruption case according to what is said by the law. In this case, the legal positivism paradigm puts a judge as 'prisoner' of acts, and there is no room for court to be an institution encouraging development of society. Verdicts of judges are not considered having great contribution to the change of Indonesian people yet, even the reformation era at present. Moreover, the judges who are still implementing positivistic way of thought views that legal problems of society can still be settled as in stable normal condition. Consequently, legal paradigm experiences stagnation and put legal positivism as a paradigm that is never experiencing what Kuhn says as 'anomaly'. In other words, the paradigm of legal positivism still stands in a normal science from one generation to the next in legal practices. Incorrectness of way of thought about naïve reality is tried to dismantle by using progressive legal approach. Judges are encouraged to transform themselves to do a rule breaking bravely that needed prophetic intelligence (PI). The prophetic intelligence guides and provides holistic braveness to perform progressively breaking the prison of positivism paradigm.

**Keywords:** paradigm prison, legal positivism, corruption

*"The law is, indeed, presenting such normative-dogmatic side. But only provide information to the public, moreover students from the side, not helping them to gain a more complete and true picture about the law"*  
(Satjipto Rahardjo)<sup>1</sup>

## 1. Introduction

Kleptocracy<sup>2</sup> as a picture of corruption practices by elite bureaucrats closely linked (collaborating) with corporate is increasingly being hot issue recently. Recent corruption appears is, in fact, to have transformed into a white-collar crime<sup>3</sup> engaging greed of rulers and avarice of capital owners who frequently to use the law as an instrument to 'rob people's money' for the sake of personal as well as corporate entity's interests. Red-handed operation and crime control model<sup>4</sup>-based law enforcement characterized by Corruption Eradication Commission are thus increasingly showing to the public that more and more government officials and political authorities had committed the extra ordinary crime. The law enforcement<sup>5</sup> successfully revealing the power dimensions is,

<sup>1</sup> Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2012.Cet.7), p. 1

<sup>2</sup> Kleptocracy is a term used to indicate the increasingly serious level of corruption in a country. Green (2004) who referred to formulation of Weber's kleptocracy, namely, to make profit through corruption as the organization's goals, boundary between state's and ruler's interests becomes blurred, which was being a door to commit corruption. Kleptocracy is also called high-level corruption (heavy corruption). Muhammad Mustafa, "'Kleptokrasi: Permufakatan Korupsi Birokrasi dan Korporasi'", *Harian Suara Pembaruan*, Wednesday, June 4, 2008, p.10 col.4.

<sup>3</sup> The term white-collar crime as a concept of crimes committed by respectable people, was told in first time by E.H. Sutherland in his paper entitled *The White Collar Criminal* in his speech as a chairman of the American Society Sociological at the 34<sup>th</sup> Annual Meeting (1939).

Muhammad Mustafa, *Kleptokrasi*, (Jakarta: Golden Prenada Media Group, 2010), p. 16

<sup>4</sup> Romli Atmasasmita, *Sistem Peradilan Pidana Kontemporer*, (Jakarta: Kencana Prenada media Group, 2010), p. 9

<sup>5</sup> Mahfud MD suggested that law enforcement in actual field is one of scopes of legal political studies. Legal politics is a *legal policy* that official (policy) lines about the law that will be enforced or not to achieve the goal's state. Here the law is positioned as a means in achieving goal of the state. Moh. Mahfud MD, *Politik Hukum di Indonesia*, (Jakarta: King Grafindo

actually, a legal reality phenomenon which places the law as a tool of achieving state's goals.

However, the corruptors are not defenselessly accepting their fate and make no any counterattack over the law enforcement efforts. In addition to legal instrumentations<sup>1</sup> in order to bend the laws as often performed in the eras of Old Order and New Order that are still pursued now, attempts of questioning the existence and legality<sup>2</sup> of the Commission's authority are also used as an agenda. At a more fundamental stage, Mahfud M.D. provided a cautionary note that process of looking for a 'win' in court is often completed through manipulation of choice between rule of law and sense of justice. Dilemma over the accommodations of both principles is, in practice, not treated in an integrative way, but otherwise alternatively. Consequently, placement of these two principles leads to orientation concept ambiguity, which is frequently used to look for 'victory' only and not the 'truth' in court. It is the most vulnerable place for justice mob (judicial corruption) or legal mafia to occur. With the flexibility of choosing between rule of law or a sense of justice, then a possibility for the law enforcement to negotiate certain decision through transactional politics is open, either with money compensation or otherwise. Finally, if desire of sentencing a case has been determined through the transaction, then content of the verdict can be supported by choosing to use a principle of legal certainty or a justice principle that is fabricated at will<sup>3</sup>.

At this point of legal instrumentation, law enforcement officials are sharply criticized as a determinant of the uncompleted eradication of corruption in Indonesia. Albeit in the reform era at present, judges' decisions cannot be said to have a major contribution to the change in Indonesian society. Judges with positivistic way of thinking argued that legal issues found in society are still relevant to be handled as in stable normal conditions.

Such practice of law indicates that the law enforcers, especially judges, are in fact, co-opted by Montesquieu thought and Hans Kelsen who put existence of law in highest priority. Very strongly held-doctrine stating that a judge is a mouthpiece of the law (*bouches des lois*) is the evidence. Montesquieu's way of thinking adopted and developed by the teachings of Legal Positivism applies positive norms into structure of concrete cases. At a later stage, the judge's decision aims very strictly to maintain rule of law, legal predictability and stability. Judges are prohibited from creating law, so task of judges is only applying the provisions of law linear-mechanically to solve problems of people, according to contents of the legislation<sup>4</sup>.

Montesquieu's thought is invigorated by Hans Kelsen's Pure Theory of Law (*Reine Rechtslehre*). Therefore, when Kelsen's idea is viewed paradigmatically, it is inseparable with Positivism paradigm of law field. In positivism paradigm, statutes or entire legislation is considered contain complete law so that task of the judges is only to implement provisions of the law mechanically (like any machine). In this case, paradigm of Legal Positivism put the judges as 'captives' of the law, and it does not give the court an opportunity to be an institution that can encourage development of society<sup>5</sup>. As a result, the paradigm of law suffers stagnation putting the Legal Positivism as a paradigm that has never experienced what Kuhn referred to as 'anomalies'. In other words, the paradigm of Legal Positivism survives in sustainability (normal science) from generation to the next in the practice of law will.

Fallacy perspective on crime as such positivistic naïve realistic, will surely increasingly impact negatively when dealing with white collar crime such as corruption. Viewing carefully the importance of examining a paradigm infecting the mind of law enforcement in Indonesia, this paper finds its urgency. Author chose a progressive legal thought as an instrument to dismantle positivistic paradigm that has long been rooted. Based on views and thoughts of Satjipto Rahardjo about the Progressive Law, then some criticism on the premise that law enforcement officers are only practicing law within the positivist paradigm framework and backed by Pure Theory of Law (*Reine Rechtslehre*) is explained.

---

Persada, 2012. Cet.5), pp.1-4

<sup>1</sup> Instrumentation of law in era of the Old Order, the law as a tool of power, so that formation and enforcement of the law is always intervened as issuance of various Presidential Decree and permission for the President to intervene in the judicial process; whereas in days of the New Order, the same thing was occurred but by packaging (giving shape) the official regulations imposed. Moh. Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi* (Jakarta: Raja Grafindo Persada, 2012 3<sup>rd</sup> ed.), p.20

<sup>2</sup> Judicial petition to the Constitutional Court No. 12/PUU-IV/2006, 16/PUU-IV/2006 number, and number 19/PUU-IV/2006 which all of them were questioning the existence of the Corruption Eradication Commission.

<sup>3</sup> Moh. Mahfud MD, *Penegakan Hukum dalam Rangka Meningkatkan Daya Saing dan Keunggulan Bangsa*, Scientific Oration Speech in the 37<sup>th</sup> Anniversary of UNS, (Surakarta: UPT UNS Press, 2013), p.12

<sup>4</sup> M.D.A. Freeman, *Liyods's Introduction to Jurisprudence*, (London: Sweet&Maxwell, 2001) pp.1384-1386. Neil MacCormick, *Rhetoric and Rule of Law Theory of Legal Reasoning*, (Oxford: Oxford University Press), p.256

<sup>5</sup> Widodo Dwi Putranto, *Kritik Terhadap Paradigma Positivisme Hukum*, (Yogyakarta: Genta Publishing, 2011), p. 1,

## 2. Discussion

Observing Rahardjo's quote at the beginning of the paper, actually it is understood that study of law is a very broad discussion and, arguably, even barely edged<sup>1</sup>. Therefore, when Montesquieu and Kelsen had established their view of the law as *an sich* act, then this side is criticized by using the view of progressive law. Rahardjo with his progressive law views that a law is not only normative-legalistic. So, when the influence of positivism paradigm was perceived to be very massive in practicing the law in Indonesia, the progressive law emerged as a critique of such practice of law. Further, criticism leveled against positivistic law enforcers is meant as liberation from the narrow confines of law as limited as written legislation (*scripta*).

### 2.1. Criticism of Positivism -Reine Rechtslehre Kelsenian- Paradigm in the Establishment of Concept of Practicing Law

Progressive law according to Satjipto Rahardjo is the concept of practicing law. In order to provide a clear description of the progressive law, then the comparison is made by encountering it with Kelsen-styled positive legalistic way of practicing law. On the positive legalistic way of practicing the law is to apply rules of law. Such practice of law according to Rahardjo was seen as purely statutory (*binnen alles van de cadre de Wet*) or to 'spell legislation'. In this case, people do not think widely but just read the text and logic of its implementation. Practicing the law in such way is metaphorically drawing a straight line between two points. The first point is (article) of legislation and another point is the occurred fact. Everything runs linearly. Consequently, such practice of law has been like an automatic machine. Paul Scholten referred to it as '*hanteren van logische Figuren*' (Scholten, 1954), whereas OW Holmes said it is as 'a book of mathematics' (Holmes, 1963)<sup>2</sup>.

When facing with the positive legalistic way of practicing law, then progressive law works very differently. He did not stop at reading the text and apply it like a machine, but rather an action or effort. Ways of practicing law was actually started from the text, but it did not stop there, but process them further, and Rahardjo referred to it as a human action and effort. Therefore, the way of practicing law progressively is more energy draining, both mind and empathy and courage.

Non-linear progressive viewpoint of law, therefore, human action and effort factor involved in it are necessary. Involvement of human action and effort factor indicates that practice of law does not spell text, but it should be filled with creativity and options. Scholten said that in making legal decisions, there is always a leap (*een sprong*) and, therefore, it is non-linear. Thus, the law is not a mere logical process. Holmes formulated it with the words, '*the life of the law has not been logic; it has been experience*'<sup>3</sup>. The experience gives content to the legal texts, that a judge, for example, he will make verdict based on circumstances (*the felt necessities of the time*), although it starts with legal texts.

An active participation of human also means to involve actively empathy, courage, values and so forth. Ronald Dworkin called it "*the moral reading of the law*". Thus, to practice law is not performed by working on texts of the legislation and using logic, but with common sense and conscience. Not with the *logos* (logic), but *holos* (wholeness) or all existing potencies existing of humans<sup>4</sup>.

Idea of progressive law means that the law is for man, not vice versa. Therefore, although practicing law starts with texts, but further work of practicing the law was taken over by humans. That is, the people that are going to look for the deeper meaning of the legal texts and then make a decision.

Progressively practicing the law can also be interpreted as testing limits of the law. If it is said that to run the law is to create justice of society, then to practice the law is an attempt to realize the justice. Practice the law by using text only does not automatically create justice. Therefore, people distinguish between '*justice by the text*' (formal/legal justice) and '*justice by the fact*' (substantial justice). Paul Scholten said that justice does exist

---

<sup>1</sup> According to Rahardjo, a legal study's territorial is exploring regions up to areas of culture, economics, history, politics, philosophy, management and sociology. Satjipto Rahardjo, *Op. Cit.*, p. 1

<sup>2</sup> Satjipto Rahardjo, *Hukum Progresif: Aksi, Bukan Teks*, in kumpulan tulisan *Memahami Hukum 'dari Konstruksi Sampai Implementasi'* edited by Satya Arinanto dan Ninuk Triyanti, (Jakarta: Raja Grafindo Persada, 2009), p. 3

<sup>3</sup> Satjipto Rahardjo, *Ibid.*, hlm.4, also can be seen in Paul Scholten, *Algemeen deel dari Asser's inleiding tot de beoefening van het Nederlandsch burgerlijk recht*, (Zwolle: W.E.J Tjeenk Willink, 1954) and Oliver Wendell Holmes, *The Common Law*, (Boston: Little Brown and Company, 1963)

<sup>4</sup> *Ibid.*

in the law, but it remains to be found (*het recht is in de Wet, maar het moet nog gevonden warden*)<sup>1</sup>. Thus, to practice the law was not exactly the same as applying the law, but rather an attempt to bring justice stored in it to surface. That is the meaning of testing limits of the law.

## 2.2. Criticism of Positivism -Reine Rechtslehre Kelsenian- Paradigm in Development of the Concept Uniformity

Kelsen's thought sterilizing law from elements outside the law is paradigmatically agreeing with legal positivism. In this case, the positivistic paradigm emphasized the judge to uniformity, particularly in terms of interpreting 'monolithic' on meaning of norms. In the case, judge is relying more on the grammatical and lexical interpretation, and even tend to be classically textual. The interpretation is actually just one of legal discovery (*rechtsvinding*) methods. Although, in fact, other interpretation methods are also known such as construction or arguments, but judges generally prefer to play in a 'safe area', namely, a conventional interpretation method. A judge who is crossing to the construction method is very rare to find. Although the lens were directed at a criminal judge, what happened was, then, only 'prohibition' of using '*argumentum per analogiam*' because it is considered to be in contradiction to legality principles. This prohibition is not just being a doctrine, but it has been explicitly formulated in the principle of legality (*nullum poena sine delictum nulla lege previa poenali*) set forth in Article 1 paragraph (1) of the Criminal Code<sup>2</sup>.

Through such narrow interpretation, focus of the science of law is reduced to a routine practice merely, how to be 'legal craftsmanship' and 'legal mechanic' who is highly competent to apply a rule for a particular case, but unable to develop and improve the legal system<sup>3</sup>. Unbendingness and stagnation of legal science and practice of law in Indonesia should encourage people to reflect on urgency of the need for a legal theory that is able to liberate the law from being esoteric and, furthermore, it is able to describe holistically the law.

The narrowness of space for such interpretation is certainly very opposed to the role of judges in justice readings. Because the justice can only be achieved through creativity, because the justice has plural meaning (*keotik*) rather than a single and absolute one. Satjipto Rahardjo argued that since the law was traditionally established on papers (written law), then reading of the legal texts becomes a very important issue. Since the reading of the text is important, then interpretation of legal texts cannot be avoided. In fact, it is normal when we can say that interpretation of the law is the heart of the law. It is almost impossible to run law without opening the door for interpretation. Interpretation of the law is an activity that is absolutely open to do, since the form of the written law<sup>4</sup>. Therefore, limiting the interpretation of the text will, in turn, create a 'blind alley' for search and discovery of justice.

## 2.3. Criticism of Positivism -Reine Rechtslehre Kelsenian- Paradigm: Development of the Concept of Judge as a Mouthpiece of Act

When the principle of Legal Positivism places a judge only as a mouthpiece of rule (*bouches de lois*), then the judge is not provided with space to be a creative subject. Ideas of Legal Positivism are usually correct and they are able to survive in conditions of stable society. But at the time of a crisis, namely, when a law which is prepared to organize interaction process failed to function properly, assumptions of Legal Positivism about certainty and predictability start to question. Based on a research conducted by Widodo Dwi Putro (2011), since the beginning of crisis to date, the legal approaches performed by judges has been still using conventional means, while situation and quality of the society changed. The judges were still doing business by using methods of thinking which are commonly used to handle legal problems as in normal circumstances. Furthermore, they addressed calmly extraordinary problems such as corruption by using doctrine, principles, and logic of Legal Positivism principles. Consequently, law enforcements had difficulty to make legal breakthroughs; they were confined by dogmas, procedures and formalism. At the times of legal recently, courage of the judge is very important in order to take a progressive leap to go out of conventional principles, logics, and doctrines offers. Only then the court may act creatively and not submissive<sup>5</sup>.

---

<sup>1</sup> Paul Scholten, *Op.Cit*

<sup>2</sup> Shidarta, '*Postmodernisme dan Ilmu Hukum*' Paper was presented at the Seminar on Postmodernism and its Impact on Science, February 17, 2005

<sup>3</sup> Richard A. Posner, *Frontiers of Legal Theory*, (Harvard: Harvard University Press, 2001), pp.1-2

<sup>4</sup> Satjipto Rahardjo, "Penafsiran Hukum yang Progresif" Foreword to the book Anthon Freddy Susanto, *Semiotika Hukum (Dari Dekonstruksi Teks Menuju Progresivitas Makna)*, (Bandung: Refika Aditama, 2005), p. 1

<sup>5</sup> Satjipto Rahardjo argued that, an offer about idea of new progressive and creative judge who is not confined by the law must be addressed with a little caution. The idea pushed judge's creativity into a dilemma situation. On one side, at the time of legal crisis today, we need judge's courage to make the progressive leap out of principles, logics, and conventional

According to Satjipto Rahardjo, role of a judge is not placed as a legislator. It is asserted that he is not a legislator, because his job is to conduct adjudication or to examine and to judge. Task of making laws exists in legislation realm. Nevertheless, the judge is, finally, an individual who defines what is meant by the law. The judge must decide based on the law, but in fact he is not only spelling the text of legislation, but rather to decide what is contained in the text. As previously said by Dworkin, determining law is not performed by reading a text (textual reading), but exploring the underlying moral (moral reading). Thus, the judge is actually also 'making law' at a higher level.

#### 2.4. Criticism of Positivism -Reine Rechtslehre Kelsenian- Paradigm in Development of Concept of The Law and Moral Separation

Legal Positivism teachings are described as a sterile area, apart from the moral and ethical. In fact, Kelsenian doctrine denies the truth of the science of law contaminated by the elements of sociological, political, economic, historical, and so on. Jurisprudence is refined or, rather, reduced to the study of '*the command of law givers*'. In this teaching, a judge did not need to think creatively about the ideal law (*das sollen*), but he only applied the positive law norms (*ius constitutum*)<sup>1</sup>.

Such doctrine-minded of a judge is inseparable from 'skeleton' of legal disciplines<sup>2</sup>. Legal Positivism who wanted to purify the science of law by cleaning it from non-legal elements made the jurisprudence tended to reduce complex legal problems into something simple, linear, mechanical, and deterministic ones, thus weakening the power of the law to anticipate development of society.

This reductionism contains hazards, because a multi-faceted law with its relationship with economic, social, and cultural aspects is reduced to small parts, and consequently, the narrowing of the law will produces incomplete understanding of the law. Consciously or not, the linear and mechanical perspective impoverishes 'power of reason' of legal scholars of Indonesia and, in turn, it will keep law enforcement away of ethical light<sup>3</sup>. One example is, a stagnation of legal practice, such as only few decisions of judges that can be categorized as a landmark decision (a prominent decision so that it becomes a milestone) in order to enrich the treasury of jurisprudence.

Therefore, making a judge paradigm to be permanent in an approach of certain school of thought is certainly not in line with the nature of law as a practical, normologic, and authoritative science. Moreover, when Kelsen insisted that when law is sharply separated morals, then such a positive rule cannot be said as a law. Peter Mahmud Marzuki suggested that law should be based on morality. Despite any rule is made by any ruler, but when the rule cannot be accepted morally, it cannot be considered a rule of law. He pointed out that the laws had been made by the Nazi regime to exterminate the Jews was not law because it was in conflict with moral; also, provisions on apartheid in South Africa before Nelson Mandela became a leader of the country<sup>4</sup>.

Careful observing the Legal Positivism domination paradigm covering the principles and logics practiced to date, it is necessary to make reconsideration and open a dialogue with other approaches such as the Sociology of Law in order to open views of the judges about legal dimensions of living law, so that usefulness values become important thing to be accommodated into practices of the law<sup>5</sup>. Similarly, Legal History and Legal

---

doctrines bids. Nevertheless, on the other hand, integrity of majority judges is relatively still doubted, consequently if a freedom is provided, it is feared that they will abuse their authority. It means that in the future, in addition to requiring progressive and creative judges, their integrity is no longer negotiable (*as long as the dirty broom is not cleaned, any talk of justice will be empty talk*) Satjipto Rahardjo, 'Berantas Korupsi, Berpikirlah Luar Biasa', Kompas, 14/04/2005.

<sup>1</sup> Widodo Dwi Putranto, *Op.Cit.*, p. 4

<sup>2</sup> In the discipline of law, there are at least three levels of disciplines, namely Dogmatic of Law, Legal Theory, and Philosophy of Law. Jan Gijssels and Mark van Hoeke, *What is Rechtsteorie?* Translated by Arief Sidhartha, *Apakah Teori Hukum itu?* Irregular Publishing No 3, (Bandung: Law Laboratory of Law School, Parahyangan Catholic University, 2001), p.47

<sup>3</sup> Law enforcement at all stages/levels of examination must be explained morally-ethically to problems/cases of interest. As a vision of ethics, then measurement of the 'true', 'good', and 'right' about the law enforcement is highlighted through deontological ethics (universal objective-based ethics) perspective, teleological ethics (purpose-based ethics) perspective, and contextual or situation ethics (context-based ethics) perspective. Bernard L. Tanya, *Penegakan Hukum dalam Terang Etika*, (Yogyakarta: Genta Publishing, 2011), pp.12-22

<sup>4</sup> Peter Mahmud Marzuki, '*Normatif dan Positivis*', the paper was delivered in 3<sup>rd</sup> National Conference of Indonesian Legal Philosophy Association (Surabaya: UNAIR-Epistema Institute), on August 27–29 2013, p. 1

<sup>5</sup> Bernard Arief Sidhartha, *Ilmu Hukum Indonesia (Upaya Pengembangan Ilmu Hukum Sistematis yang Responsif Terhadap*

Anthropology also make contributions such as, among others, they add reference judge on alternative sources outside the law as well as an interdisciplinary approach that, in fact, enrich the law.

## 2.5. Criticism of Positivism -Reine Rechtslehre Kelsenian- Paradigm in the Development of Concept of Law As a Merely Written Rules

In tradition of Civil Law, government and parliament have dominant role in producing law in the form of written rules<sup>1</sup>. Meanwhile, the judge is simply a mouthpiece of legislation (*bouches de lois*) and forbidden to create law. Judges of the continental tradition are essentially located in the mainstream of thinking that the '*law as it is written in the book*'. It means that the judge must look at the act in settling cases firstly before to look for other sources of law. Place of a court in continental-tradition law system and domination of legal positivism paradigm does not give enough space for the court to be an institution with capability of exploring, following, and understanding the legal values living in the community.

In the history of Indonesian law through the principle of concordance, the continental system was, then, implanted into the law constellation of the Dutch-East Indies (Indonesia) by the Dutch to replace gradually previous local tradition-based legal system. As a result, influence of the Dutch thought and legal system lasting over a long time made top class of the Indonesian people was familiar with the written and codified legal system. Characteristics of the continental law tradition were, then, growing under influence of Legal Positivism teaching. Moreover, Legal Positivism was, eventually, being a 'main tree' housing the Indonesian legal system to date<sup>2</sup>.

Evidence of strong influence of Legal Positivism in Indonesian legal system is, among others, characterized by a pretension to make a unification (*eenheidsbeginself*) and codification of the law. However, the pretension of making a single law was not accepted for granted by Indonesia's pluralistic society as a cohesion. Unification of law for the sake of legal certainty for the entire archipelago, on the contrary, can lead to resistance. To some extent, the pluralistic society reduced dominance of Legal Positivism, especially in areas of law touching very closely to the culture (e.g., marriage and inheritance law)<sup>3</sup>. Therefore, ontologically, despite the interpretation of law in meaning of its positive norms in pluralistic society does become a main source, but clearly not the only one. It means in a pluralistic society, sense of justice can be provided not only by judge who is a mouthpiece of act, but also find information about desire of people before he make a verdict.

Rahardjo argued that law is not just texts of legislation, but it may also in form of behaviors. It was stated further that the human behavior or action can add and change the texts. At the empirical level, it was found that human role in the working of the law is too great to ignore. Law is not what is written and said by texts. Even Chambliss and Seidman (1971) said, '*the myth of the operation of law is given the lie daily*'. Therefore, to be able to see human behavior as a law, it would require a willingness to change our concept of law, which is not only a rule, but also behavior<sup>4</sup>.

## 2.6. Criticism of Positivism -Reine Rechtslehre Kelsenian- Paradigm in the Development of Concept of Judge Sticks Only With Norms

Doctrine of Legal Positivism gives understanding to a judge that law is merely dealing with norms. Rationale used in this case is, if the law only deals with the norm<sup>5</sup>, then why do we think hardly for what a fair

---

*Perubahan Masyarakat*), (Yogyakarta: Genta Publishing, 2013), p. 60

<sup>1</sup> Arthur T. Vanderbilt, *The Reconciliation of The Civil Law and Common Law, The Code Napoleon and The Common Law World*, (New York: New York University Press, 1956).

<sup>2</sup> Widodo Dwi Putranto, *Op.Cit*, p. 6

<sup>3</sup> Shidarta, *Karakteristik Penalaran Hukum dalam Konteks Keindonesiaan*, (Bandung: CV.Utomo, 2006), p. 526

<sup>4</sup> Satjipto Rahardjo, *Menegakan Hukum Progresif*, (Jakarta: Kompas, 2010), pp. 14-15.

<sup>5</sup> A notable criticism about Kelsen's thoughts that were expressed by Peter Mahmud Marzuki. Peter argued that associating the word "normative" with positivism's views is a mistake. The mistake stemmed from incorrect use of word 'Norm' used by Hans Kelsen (1881 - 1973). In his teachings, namely, *die Reine Rechtslehre* that was often erroneously translated to *the Pure Theory of Law*, he argued: "*Das Recht regelt Erzeugung und seine eigene zwar in der Weise, dass die das eine Rechtsnorm Verfahren, in dem wird eine andere Rechtsnorm erzeugt, regelt*". 4 Free translation: "the law establishes his own creation and as such, a legal norm established procedure, and other legal norms will be created through the procedures." From the quote it was revealed that Kelsen equated norms of law with the rule of law. *Lehre* in German language cannot be translated 'theory' in English because theory in German language is *Theorie*. Moreover, not even the right translates science because science is *Wissenschaft* German language. In Dutch, *Lehre* is *leer* meaning "teachings". Hence, in order to come close to what was written by Hans Kelsen, *die Reine Rechtslehre* should be called "*Pure Legal Doctrine*". Peter Mahmud Marzuki, *Op.Cit*, p. 2

verdict is, because ready to use-rules of law are available<sup>1</sup> and the only need is to practice them. Thus, principles of Legal Positivism were not considering about whether the substance is fair or not, and also did not question how the socio-juridical implications. With such a perspective means that Legal Positivism will notice problems in 'black and white' as said in texts of the law, whereas problems of society are too large to be included in the articles of legislation.

Principles of Legal Positivism put a judge merely as an instrument of law. This principle has been criticized for the established law tends to be rigid and difficult to change, while the social basis in which it puts its feet is always evolving, and these developments bring new legal issues. When the law was made, possibly it was perceived as fair at that time, but after a long time of its application, it might be felt unfair, because society has changed. Therefore, the judge is not static and value-free, but requires continuous dialogue and evaluation of the realities of the legal foothold<sup>2</sup>.

Furthermore, truly, role of the judge is required not only to be a legal instrument of written law. In a discussion at the Judicial Commission, Artidjo had portrayed a picture of progressive judge. Typology of a progressive judge was portrayed as inseparable from high qualifications including mastery of scientific competence, professional skills, and personal qualities. A judge as a subject of law enforcement was also demanded ethically to produce the judge's decision implying moral, intellectual, and emotional intelligences. The resulting verdict can provide spiritual enlightenment for the litigants, and strengthen social cohesion of the social interaction system<sup>3</sup>.

A progressive judge will use the best law in the worst circumstances. Judge as a state official shall enforce the law and not make 'conspiracy' with sleaze harming the people. Judge's verdict that is not loaded with justice will cause the death of common sense, especially in the case of 'high voltage' kleptocracy<sup>4</sup> involving authorities, officials, and conglomerate. It should be clarified that task of a judge is not only spelling the law, because enforcing the law is not the same thing as enforcing the act. More than that, the judge must explore common sense of content of the law and articulate spirit of fairness in complexity of social communities dynamic. Sensitivity of a judge to his verdict should be able to spiritualize skeleton of the act. This is where progressively law enforcement finds its form. As noted earlier by Rahardjo, human behavior or action (the judge) was able to add and change text.

The portray of a progressive judge as described by Artidjo emphasizes the human aspect as the focus of study. Ability of transforming themselves to be courage in breaking the rule requires what so-called prophetic intelligence (PI). This prophetic intelligence guides and provides holistic courage in making progressive action. Discipline of psychology develops prophetic intelligence as the overall approach of previously existing intelligence approach. The PI guides the cognitive intelligence, emotional intelligence, adversity intelligence, and spiritual intelligence<sup>5</sup>. PI implantation in the willingness and ability to transform themselves is what is meant by high qualification in the typology of progressive law enforcement.

Legal world is very concerned to 'borrow' concept of this prophetic intelligence in order to overcome existing legal crisis, especially when focus of the crisis is directed at morality of law enforcement. Prophetic intelligence is one's ability to transform himself in his interaction with, socialization with, and adaptation to the vertical and horizontal environment. Dualistic conception of outward and inward or worldly and *ukhrowi* life is taken to understand the benefits and lesson. In this aspect, the embodiment of slogan 'For Justice Based on God' finds its momentum to bear in mind again.

However, the question is: can any judge reach the intelligence prophetic? Basically, anyone can achieve this prophetic intelligence provided that he or she has willingness to transform himself/herself. The self-

---

<sup>1</sup> Kelsen argued the rule of law does not impose obligation because its content (aspect of material), but rather its formal terms. This is, then, a foundation for emergence of the formal justice conception, not the substantial one.

<sup>2</sup> As comparison, dynamics of Indonesian and Dutch laws that are equally following Continental tradition is that the Dutch judges are relatively more active following the legal developments, from analysis of cases to discourse debate. There is a law journal In the Netherlands, '*Nederlands Juristenblad*', which become 'bridge of thought meeting' of judges, lawyers, prosecutors and academics. Widodo Dwi Putro, *Op.Cit*, p. 9

<sup>3</sup> Artidjo Alkostar, "*Mencandra Hakim Agung Progresif dan Peran Komisi Yudisial*". A paper was delivered in Indonesian Judicial Commission .[www.komisiyudisial.go.id/berita-147](http://www.komisiyudisial.go.id/berita-147). Administrator, October 3 2006. p. 3

<sup>4</sup> Muhammad Mustofa, *Kleptokrasi (Persekongkolan Birokrat-Korporat Sebagai Pola White-Collar Crime di Indonesia)*, (Jakarta: Kencana Prenada Media Group, 2010), p. vii

<sup>5</sup> M. Syamsudin, *Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progresif*, (Jakarta: Kencana, 2012), p. 262

transformation of law enforcer includes awareness, discovery, and development of self by fully comprehending and practicing principles of honesty (*sidiq*), trustworthy (*amanah*), open (*tabliq*), and intelligent (*fatolah*).

When the transformation has been performed, then the rule breaking becomes explicit attitude and behavior. The progressive law is used as an offer of law enforcement approach, not merely emphasizing the legal text logocentrism. Logocentrism as a tendency of a thought system seeking legitimacy by referring to the arguments of universal truth or guarantee from central and original meaning<sup>1</sup>, is a major barrier that must begin to be abandoned in a series of self-transformation of the law enforcers.

### 3. Conclusion

Positivism paradigm reinforced by Hans Kelsen with his idea about pure law is, indeed, a moderator between Natural Law and Positivism Empirical. As a theory, Kelsen's idea is also strengthened with strong arguments and it is difficult to deny. But when such idea of Kelsen is encountered with Satjipto Rahardjo's legal sociology-based Progressive Law, it appears that of the positivism paradigm and pure law are, in fact, ignoring people dynamics inseparable from legal developments. Therefore, there are at least six criticisms that can be delivered as an effort to free law enforcers, especially judges, from prison of Legal Positivism underlying Kelsen's Pure Law. The six criticisms of liberation are actually emerging because the positivism paradigm contained in idea of Kelsenian's Pure law rests on assumptions he constructed as follows, 1) Assumption of concept of practicing law, 2) Assumption of the concept of uniformity, 3) Assumption of concept of a judge as mouthpiece of the law, 4) Assumption of concept of the separation of moral and law, 5) assumption of concept of the law as a merely written rule, and 6) Assumption of concept of the judge struggles only with norms.

### References

- Alkostar, Artidjo, (2006) "Mencandra Hakim Agung Progresif dan Peran Komisi Yudisial". A paper was delivered in Indonesian Judicial Commission. [www.komisiyudisial.go.id/berita-147](http://www.komisiyudisial.go.id/berita-147). Administrator, October 3 2006.
- Atmasasmita, Romli, (2010), *Sistem Peradilan Pidana Kontemporer*, Kencana Prenada Media Group, Jakarta.
- Freeman, M.D.A, (2001), *Liyods's Introduction to Jurisprudence*, Sweet&Maxwell, London.
- Gijssels, Jan and Hoeke, Mark van, (2001) *What is Rechtsteorie?* translated by Bernard Arief Sidharta, *Apakah Teori Hukum Itu?*, Not Periodical Publishing No.3, Laboratorium Hukum Fakultas Hukum Universitas Katolik Parahyangan, Bandung.
- Holmes, Oliver Wendell, (1963), *The Common Law*, Little Brown and Company, Boston.
- MacCormick, Neil. *Rhetoric and Rule of Law Theory of Legal Reasoning*, Oxford University Press, Oxford.
- Mustofa, Muhammad, (2008), "Kleptokrasi: Permufakatan Korupsi Birokrasi dan Korporasi", *Harian Suara Pembaruan*, Rabu 4 Juni 2008, hlm.10 kol.4.
- Mustofa, Muhammad, (2010), *Kleptokrasi (Persekongkolan Birokrat-Korporat Sebagai Pola White-Collar Crime di Indonesia)*, Kencana Prenada Media Group, Jakarta.
- Mahfud MD, Moh., (2012), *Politik Hukum di Indonesia*, Raja Grafindo Persada, Jakarta.

---

<sup>1</sup> Anthon F. Susanto, *Ilmu Hukum Nonsistematik (Fondasi Filsafat Pengembangan Ilmu Hukum Indonesia)*, (Yogyakarta: Genta Publishing, 2010), p. xii

Mahfud MD, Moh., (2012), *Membangun Politik Hukum, Menegakkan Konstitusi*, Raja Grafindo Persada, Jakarta.

Mahfud MD, Moh., (2013), *Penegakan Hukum dalam Rangka Meningkatkan Daya Saing dan Keunggulan Bangsa*, Scientific Oration Speech in the 37<sup>th</sup> Anniversary of UNS, UPT UNS Press, Surakarta.

Marzuki, Peter Mahmud, (2013), 'Normatif dan Positivis' the paper was delivered in 3<sup>rd</sup> National Conference of Indonesian Legal Philosophy Association, UNAIR-Epistema Institute, on August 27–29 2013, Surabaya.

Putranto, Widodo Dwi, (2011), *Kritik Terhadap Paradigma Positivisme Hukum*, Genta Publishing, Yogyakarta.

Permohonan Uji Materiil kepada Mahkamah Konstitusi Nomor 12/PUU-IV/2006, Nomor 16/PUU-IV/2006, dan Nomor 19/PUU-IV/2006.

Posner, Richard A. (2001), *Frontiers of Legal Theory*, Harvard University Press, Harvard.

Rahardjo, Satjipto, (2012), *Ilmu Hukum*, Citra Aditya Bakti, Bandung.

Rahardjo, Satjipto, (2005), "Penafsiran Hukum yang Progresif" Foreword to the book Anthon Freddy Susanto, *Semiotika Hukum (Dari Dekonstruksi Teks Menuju Progresivitas Makna)*, Refika Aditama, Bandung.

Rahardjo, Satjipto, (2009), *Hukum Progresif: Aksi, Bukan Teks*, in kumpulan tulisan *Memahami Hukum 'dari Konstruksi Sampai Implementasi'* edited by Satya Arinanto dan Ninuk Triyanti, Raja Grafindo Persada, Jakarta.

Rahardjo, Satjipto, (2005), 'Berantas Korupsi, Berpikirlah Luar Biasa', Kompas, 14/04/2005.

Rahardjo, Satjipto, (2010), *Menegakan Hukum Progresif*, Kompas, Jakarta.

Shidarta, (2006), *Karakteristik Penalaran Hukum dalam Konteks Keindonesiaan*, CV.Utomo, Bandung.

Shidarta, (2005), 'Postmodernisme dan Ilmu Hukum', Paper was presented at the Seminar on Postmodernism and its Impact on Science, February 17, 2005

Sidharta, Bernard Arief, (2013), *Ilmu Hukum Indonesia (Upaya Pengembangan Ilmu Hukum Sistematis yang Responsif Terhadap Perubahan Masyarakat)*, Genta Publishing, Yogyakarta.

Scholten, Paul, (1954), *Algemeen deel dari Asser's inleiding tot de beoefening van het Nederlandsch burgerlijk recht*, W.E.J Tjeenk Willink, Zwolle.

Sutherland, E.H., (1939), *The White Collar Criminal* in his speech as a chairman of the American Society Sociological at the 34<sup>th</sup> Annual Meeting.

Susanto, Anthon F., (2010), *Ilmu Hukum Nonsistematis (Fondasi Filsafat Pengembangan Ilmu Hukum Indonesia)*, Genta Publishing, Yogyakarta.

Syamsudin, (2012), M. *Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progresif*, Kencana, Jakarta.

Tanya, Bernard L., (2011), *Penegakan Hukum dalam Terang Etika*, Genta Publishing, Yogyakarta..

Vanderbilt, Arthur T., (1956), *The Reconciliation of The Civil Law and Common Law, The Code Napoleon and The Common Law World*, New York University Press, New York.

The IISTE is a pioneer in the Open-Access hosting service and academic event management. The aim of the firm is Accelerating Global Knowledge Sharing.

More information about the firm can be found on the homepage:

<http://www.iiste.org>

### CALL FOR JOURNAL PAPERS

There are more than 30 peer-reviewed academic journals hosted under the hosting platform.

**Prospective authors of journals can find the submission instruction on the following page:** <http://www.iiste.org/journals/> All the journals articles are available online to the readers all over the world without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. Paper version of the journals is also available upon request of readers and authors.

### MORE RESOURCES

Book publication information: <http://www.iiste.org/book/>

Academic conference: <http://www.iiste.org/conference/upcoming-conferences-call-for-paper/>

### IISTE Knowledge Sharing Partners

EBSCO, Index Copernicus, Ulrich's Periodicals Directory, JournalTOCS, PKP Open Archives Harvester, Bielefeld Academic Search Engine, Elektronische Zeitschriftenbibliothek EZB, Open J-Gate, OCLC WorldCat, Universe Digital Library, NewJour, Google Scholar

