

Tracing the Performance of Law in Indonesia (A Perspective of Thomas Kuhn's "Normal Science")

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Abstract

The hustle and bustle of 'unique' legal decisions in Indonesia posed by the positivistic approach of law performance, this is because the approach has been in the phase of normal science of law paradigm. This assumption is quite reasonable considering the justification of legal reasoning has somehow negated human values, or justice. The continuum of legal positivism should be given an alternative through the Progressive Law approach, which focuses on the spirit to break, or to conduct a "Law Breaking". Moral awareness and soul conscience should be treated as the foundation for the Progressive Law since the approach is conducted holistically and comprehensively. The law is not only seen from the outside and on the surface level but also from the the substance of legal existence among the society, so that the law really meets the thirst of order of justice in the Indonesia today.

Keywords : Law Positivism, Normal Science, Progressive Law.

1. Reliability Impact of Positivistic Thinking in Law Dimension

Indonesia today is faced with a very "unique" problem of law performance regarding the formal truth treated as the most dominant consideration of legal decision embracing *reine Rechtslehre Kelsenian's* way of thinking. An approach that is still in further discussion through a more holistic alternative paradigm.

Cleansing or purifying the law from the non-legal elements, (epistemologically) is the basis of Kelsen's way of thinking. Many people call Hans Kelsen as the founder of such a theory of law which later becomes an independent discipline.¹ As Kelsen thought that "pure normative" lured many legal experts because it comes into existence when the philosophy of law (which is still dominated by the flows of Natural Law) is too busy on the mainstream of ontological discussion and speculative debate about what the meaning of justice, decency, and absolute law is, which is farther away from the concrete problem. Along with the setback of Natural Law, it needs a positive scientific law, so as at the right moment Hans Kelsen appears to do a "provocation" by issuing "International Perspectives on the Theory of Law" in 1926.²

Hans Kelsen's approach affects entirely the legal thinking of legal education in many parts of the world. In many ways, the legal perspective of Hans Kelsen begins to sharply corner into monistic. Hans Kelsen agrees with Austin that teaching should be separated from the moral law. Furthermore, Hans Kelsen also consistently refrains from discussing abstract legal philosophy, so that legal consequences should break away from all considerations of politics, economics, psychology, and so forth; "*The Pure Theory of Law is a theory of positive law It is called a "pure" theory of law, Because It only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements.*"³ This is described later by Hans Kelsen as he mentions, *a positive legal rule is to be equated with a pure norm, that is, with an ought or may meaning content, and a legal system is to be equated with a collection of pure interpreted by legal scientist as non-contradictory field of meaning-entailing such interpretation the logical postulate that legal norm must originate in a finite number of sources.*⁴ At some points, this of course completely negates the fact of law without having a logical relationship with the environment, the law should contain a real connection with political, social, economic, religious and geophysical aspects of society. The content of a legal system is actually derived from the underlying conditions, both physical and social, as derived from the author who created the law freely. Actually, the function of lawmakers (legislators) are supposed to measure the pulse of the community in order to discover what law would ensure people's prosperity and stability. Law makers (legislators) have to make a diagnosis with attention to things like essence and government rules and regulations, differences in climate and soil quality in a particular area, the country that faces the square

¹ Herman Bakir, *Kastil Teori Hukum*, (Jakarta : PT Indeks Kelompok Gramedia,2005).

² Widodo Dwi Putro, *Kritik terhadap Paradigma Positivisme Hukum*, (Yogyakarta : Genta Publishing, 2011),page.39. Stanley L. Paulson, *the Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, *Oxford Journal of Legal Studies*, 1992, Vol.12, pages.311-322. Budiono Kusumohamidjojo, *Filsafat Hukum Problematik Ketertiban yang Adil*, (Jakarta : Grasindo, 2004), page.118.

³ Hans Kelsen, *the Pure Theory of Law*, translated by Max Knight, University of California Press, 1976, page.1.

⁴ JW Harris, *Law and Legal Science : An Inquiry into the Concepts Legal Rule and Legal System*, (Oxford : Clarendon Press, 1982),page.24.

footage, the work of people in the country, the levels of freedom contained in the constitution, and religion adopted. All these diverse factors should be considered to produce the "spirit of law".¹

At this point further, jurisprudence epistemology of Hans Kelsen until now becomes the epistemological debate at the Faculty of Law and the law students in this country. The followers of legal positivism assumes that legal theory which the studies do not focus on the positive law, can not be studied academically in the Faculty of Law. Courses in Sociology of Law, Philosophy of Law, Legal Anthropology are not considered as a "pure" science of law. Interdisciplinary and multidisciplinary approach are sometimes not only regarded as non-study law, but also a rebellion against the legal formalism.² There is a very important part of what is raised by Hans Kelsen that may affect the legal approach that the law must be pure, the law should be separated from the non-legal elements. It should be separated from the moral, so the purpose of law is only for realizing the rule of law; *the Pure Theory of Law separates the concept of the legal completely from that of the moral norm and establishes the law as a specific system, independent even of the moral law.*³

The data in the following table is a matter of contemplation as if focus jurisprudence had been reduced to mere routine practice of a continuum on the pattern of *legal craftsmanship and legal mechanic.*⁴

Legal Cases Of Some Indonesian Elites:⁵

JULY 2008	MAY 2011	AUGUST 2011	OCTOBER 2011	OCTOBER 2011	OCTOBER 2011	OCTOBER 2011
Artalyta Suryani	Agusrin M Najamuddin (Bengkulu Governor)	Eep Hidayat (Subang Regent)	Mochtar Muhammad (Bekasi Mayor)	Andi Achmad Sampurna Jaya (Lampung Tengah Former Regent)	14 Local Parliament members of Kutai Kertanegara	Oei Sindhu Stefanus (President Director of PT Karunia Prima Sedjati)
Bribing prosecutors in BLBI cases involving owners of BDNI.	Corrupting revenue sharing property tax 2006-2007 worth Rp.21, 3 billion.	Corrupting land and building tax collection Rp.14 billion.	Bribing members of parliament Rp1, 6 billion; abuse refreshments money Rp.639million;	Corrupting Regional Budget Rp.28 miliar.	Corrupting Kukar 2005 local parliament activity funds Rp.2, 6 billion.	Corrupting Online Population Administration Information System (SIK) Cilacap District Rp.16, 7 billion.
5 years in prison Jakarta Corruption Court, free after 2/3 year sentence.	Acquitted by Central Jakarta District Court.	Acquitted by Bandung Corruption Court.	Bribing Adipura Cup 2010 and Rp 500 million bribe BPK Rp.400 million. Acquitted by Bandung Corruption Court	Acquitted by Tanjung Karang Corruption Court.	Acquitted by Samarinda Corruption Court.	Acquitted by Semarang Corruption Court.

¹ Montesquieu, *the Spirit of Laws*, University of California Press, 1977, pages.16-17.

² Widodo Dwi Putro, *Op.Cit*,page.40.

³ Hans Kelsen, *Op.Cit*,pages.348-394.

⁴ RA Posner, *Frontiers of Legal Theory*, Harvard University Press, 2001, page.1.

⁵ Resources Research and Development "Compass" / yoh, calculated from the news "Compass" and a variety of sources, reported back in Kompas. 06 Januari 2012.

Law Meshes Of The Weak:¹

OKTOBER 2009	FEBRUARY 2010	SEPTEMBER 2010	OCTOBER 2010	JULY 2011	JANUARY 2012
Aminah (55)	Manisih (39) Sri Suratmi (19) Juwono (16) Rustono(14)	Agus Budi Santoso (25)	Supriyadi (40)	Amirah	AAL (15)
Theft of three grains of cocoa for Rp.2.100 in Kradenan, Ajibarang, Banyumas.	Theft of a plastic bag of fruit cottonwoods Rp 12,000 in Batang, Central Java.	Theft of a rooster in Balen, Bojonegoro, East Java.	Theft of two cassava stems and a bamboo rod in Pasuruan, East Java.	Domestic workers accused of stealing used sarung for around Rp.3000 in Pamekasan, East Java.	Theft of sandal in, Central Sulawesi.
Sentenced to 1 month 15 days in Purwokerto District Court.	Sentenced 24 days Batang District Court.	Sentenced 4 months in Bojonegoro District Court.	Sentenced 1 months 20 days jail Bangil.	Sentenced 3 months 24 days.	Found guilty and returned to her parents in the Palu District Court.

Remark:

The cases exposure merely comparing the end of the trial not intended to indicate the levels of the criminal offense committed by the defendant in each case in the Court Corruption: Corruption Court; PN: District Court.

A lot of legal cases are not resolved at the level of truth and law justice, it is caused by merely textual understanding. Concepts and methods of approach used by the law are lack of sensitivity along with the modernization and the shift in the value system of more open life society due to the excesses of globalization. As pointed out by *Satjipto Rahardjo*² that it has a sterility of law and jurisprudence in Indonesia due to the law that developed in Indonesia until the 1980s, is incapable of supporting the direction of change in society. The law is not able to function to perform social engineering when people experience the process of change that constantly occurs, the result of the development process that carries enormous implications for the dynamics of the society.

It needs a courage (dare, as proposed in the progressivity of law) by the law in the effort to achieve the goal of happiness, social welfare. Without the courage, it is only a fantasy without meaning. At this point, it is clear that the approach needs a new paradigm in the discipline of law through the approach of Progressive Law.

By the time being, the positivism approach has raised many new issues in the realm of the legal dimension that essentially we have been aware of it, that it can not be effectively used to solve social problems that occur.

The positivism approach can only see the surface of law regardless of legal existence, that the existence of law is for the public. Positivism argues that all should be physically observable and able to be measured so that all objects of the science must be tested through the so-called laboratory, and all of this is not only to study but also about the essence of human social life that is clearly moving dynamically and progressively.

The rationality method used by the positivism³ since Francis Bacon (induction method) and Descartes (rational) or *Aufklarung*, the enlightenment century, became the starting point of science that continually seeks to understand the object by means of atomization, clustering, splitting apart, fragmentation, systematization. Positivism in the nineteenth century became the dominant principle even in the realm of the social sciences and humanities, including law, not to miss the positivistic methods.

It has a fundamental question, is it true that social problems that occur in the community, through the decisions of law as a reflection of inability of positivistic legal theory that is considered to the normal science phase; and is it true that progressive law becomes an alternative to overcome the impasse of legal positivism approach to social problem solving through law.

¹ Ibid, page.1.

² Satjipto Rahardjo, Professor of Law at Universitas Diponegoro, Semarang, Central Java

³ F.Budi Hardiman, *Melampaui Positivisme dan Modernitas Diskursus Filosofis tentang Metode Ilmiah dan Problem-Modernitas*, (Yogyakarta : Penerbit Kanisius, 2003), page.54.

2. Legal Meaning in continuum function

Indonesian national development requires a change in law and this will obviously also affect other areas of life for others and vice versa. The law is originally as tools to maintain order,¹ then the condition of developing society, changing society, the law is not enough just to have such a function, so that the law should also be used as a means to assist in the changes in society or the law as a tool of social engineering² that involves changing attitudes and/or behavior patterns of the community in giving meaning to the law. The concept was inspired by the thought of Roscoe Pound. Implementation of the law that emphasizing the medium of law to make changes in society that it should be implemented carefully so it does not make the society lost.³ Therefore the function of the law on the one hand can be used as a means to change society for the better and on the other hand to keep the existing social patterns and endorse the changes that have occurred in the past.⁴ The law itself has 4 (four) functions, namely:⁵

1. Law as a means of maintaining order and security;
2. Law as a means of development;
3. Law enforcement as a means of justice, and
4. Law as a means of learning for society

There are many terms that can be given to the law, and until now there is no agreement that is acceptable to all parties because each side has a perspective or a different view. At least there are three well-known legal concepts that can be used to study the law, namely:⁶

1. Law as ideas, moral values and justice;
2. Law as a norm, rule, regulations, laws that apply to a specific time and place as the product of certain powers of a sovereign state, and
3. Law as a social institution in the system of real and functional social life in the form of an institutionalized pattern of behavior.

On the other dimensions it can be concluded that the concept or understanding of law include:⁷

- a. Law as what ought to be in moral or ideal precepts (*ius constituendum*);
- b. Law as what it is written in the books (*ius constitutum*);
- c. Law as it is made by the judge in the court of law or judge-made law (*ius constitutum*);
- d. Law as it is in society; Law as regularities;
- e. Law as historical / virtual realities; Law as historically/ virtually understood or believed; Law as false consciousness or as falsely realised;
- f. Law as it is in human actions and interactions; Law as interpretations or processes of interpreting;
- g. Law as relative and contextual consensus; Law as mental construction; Law as experiential realities.

Each concept or understanding of law involves the following characteristics:

- a. The principle of universal moral value system and become an inherent part of natural law; Justice yet to be realized.
- b. Positive principles generally accepted in abstracto in a time / specific place, which appeared as an explicit product a particular source of legitimate political power; Law legislation national / state; explicit commands that positively have clear pattern to ensure certainty .
- c. Decisions made in concreto judges in the judicial process; Results thoughtful Copyright (judgment) of the magistrate court.
- d. Patterns of social behavior; Institutions real social and functional life of the community within the system, both in the process of restoration of order and dispute resolution, as well as in the process of directing and forming new patterns of behavior.
- e. A series of structures, as a virtual reality or historical, which is the result of a long process of crystallization of political values, economic, social, cultural, ethnic, gender and religion as an instrument of hegemony that tends to be dominant, discriminatory and exploitative; Every moment is open to criticism, revision and transformation, leading to emancipation.
- f. Meanings of symbols results interpretation (individual or collective) as in and out of the action and

¹ Mochtar Kusumaatmadja, *Fungsi dan Perkembangan Hukum dalam Pembangunan Nasional*, (Bandung : Binacipta, 1996), page. 11.

² Ibid, page.11-12.

³ Loc.Cit.

⁴ Satjipto Rahardjo, *Ilmu Hukum*, (Bandung : Penerbit Alumni, 2000), page.5-6.

⁵ CFG Sunaryati Hartono, *Hukum Ekonomi Pembangunan Indonesia*, (Bandung : Penerbit Binacipta, 1985), page.10.

⁶ Ronny Hanitijo Soemito, *Perspektif Sosial Dalam Pemahaman Masalah-Masalah Hukum*, (Semarang : CV Agung, 1989), page.1.

⁷ Soetandyo Wignjosoebroto, *Hukum Paradigma, Metode Dan Dinamika Masalahnya*, (Jakarta : ELSAM, 2002).

community interaction.

- g. Mental constructs that are relative, plural, diverse, intangible, local and specific (although similar elements can be found in individuals, communities and cultures) based social / experiential; reconstruction / revision changes occur continuously, along with the enrichment of information and if copyright sophistication or taste; were there all the time is relative consensus or agreement relating to the construction, in the context of space and time.

With power, law basically wants to provide certainty and fairness. Certainty refers to the behavior that should be done in accordance with the norms set out in positive law, while justice refers to positive norms that are considered fair by the public. Usually the values are represented as pairs, but sometimes at odds (spanning) between their respective legal value.

The main focus of this conflict lies in the question of how positive law can embody moral values, particularly justice upheld by society and form of justice or what is expected and should be a cornerstone in the man-made law (positive law). Ideally between the two values run in harmony. Lack of harmony, of course, would interfere with the purpose, the existence and operation of the law itself. However the rule of law is a very fundamental needs of society, while the expectations of law can only be fulfilled on the basis of legal certainty through a positive law. So certainty and justice is the essence of law in the sense that for the implementation of the law in both the positive law must be a realization of the principles of justice which are the foundation of human rights demands to be met. It seems to make good law, principle of fairness is something that must be met and the condition can not be abandoned and undeniable.

To understand the legal meaning of such phenomena, legal experts are considered only as artisans and mechanics of machine-law (legal craftsmanship; legal mechanic), alienated from the values that live and thrive in society, resulting in social problems, can not be resolved on the basis of truth. It is not justice or fairness legislation formality for justice in the law need to be found, there is the issue behind the legal values; that humanity values, essential justice that touches a lot of public interest, without exception, the value of honesty, law truth value. Justice itself can not be properly defined in the legislation, and the legislation that refers to the fairness is only business to aspire to justice. Justice itself is still to be sought in the legislation that still needed concrete efforts in that way.

The values of truth, justice, legal certainty is only applicable when the law is approached through the flesh and his body, the spirit of the law that is not the approach of *skeletons* (separated) requires an understanding of law as a whole unit (holistic) not in pieces, unknown legal atomization. In essence, the hunt for the truth of science so that the objects of science that has been reduced is important to be fully restored, solely in order to be more correct result.¹ It is true what is expressed by Paul Scholten that the legal system is open, "Het recht is er, *doch moet het worden gevonden*" (as it exists in the law, but still to be discovered),² so our tradition of law should have corresponded and greeted with other sciences disciplines outside the realm of law to be able to show a complete description of the law in the middle of the rapids change orders of value to society. In the end understanding of the law should be based on peculiar form of social life³ in the community where the law is working for the interests of fulfilling the need for a sense of fairness, certainty and truth. All components in the rule of law and affect the working of law must be able to understand the peculiar form of social life based on courage, honesty, conscience and humanity.

3. Progressivity of Law in Alternative Development Paradigm

Dynamic conditions of communities have law requiring science approach that is no longer fragmented (partial), but in the realm of holistic science to the truth, so it is by Edward O. Wilson who criticized exhausted nomenclature in science that made segregation in the natural sciences on the one hand and the social sciences and the humanities (humanities) on the other hand, as in his *Consilience: The Unity of Knowledge*. Or in another perspective, law should always look at its place in the forefront of the development of science in general. Thus, the law is projected onto the background to the changes and developments in modern science. Legal science cannot isolate ourselves from the state of the art in science.⁴ This means that the law must be able to be placed in the background, it is the reference to the changes and developments taking place. For that, the law should be able to say hello and look at other sciences such as non-legal social sciences, and even psychology for example, because the law contains full contains the value of the essence of community life, where his law continues to

¹ There are many scientists who provide a study on how to give attention back to aberational data (data is ignored) to hunt for the truth so that the truth be restored, see Edward O. Wilson, *Consilience The Unity of Knowledge*, Alfred A. Knopf, New York, 1998. Or Bonaventura De Sousa Santos, *Toward a New Common Sense-Law, Science and politics in the paradigmatic transition*, Routledge New York 1985, London. And Fritjof Capra, *The Turning Point (Turning Point of Civilization)*, (translation M.Thoyibi), Bantam Book, New York.

² Satjipto Rahardjo, *Hukum Untuk Penyelesaian Problem Sosial*, Doktor Undip, No.17, page.6.

³ Satjipto Rahardjo, *Senjakala Ilmu Hukum Tradisional dan Munculnya Ilmu Hukum Baru*, Doktor Undip, No.13, page.8.

⁴ Satjipto Rahardjo, *Ilmu Hukum dan Fisiologi Otak*, Doktor Undip, No.16, page.2.

experience dynamic development process of continuous relentless.

Legal paradigm must also undergo a change because as today we are faced with the possibility of Thomas Kuhn's normal science in the sense of legal positivism. Positivism as a theory aimed at the preparation of the facts observed, means "positive" as "factual", or what factual. In this regard, positivism would like to emphasize that knowledge should not go beyond the facts. In this assertion, the Comte rejects altogether metaphysics and other forms of knowledge, such as morals, ethics, theology, art beyond observable phenomena.¹

The first time the term paradigm suggested by Thomas Kuhn in his monumental *The Structure of Scientific Revolution*, essentially defines a paradigm as a fundamental outlook on what the subject matter. Kuhn's main idea provides a new alternative in an attempt exposes the assumptions that are generally accepted in the scientific community about development or progress of science occurs cumulatively, such as the myth of the view that should be eliminated, while Kuhn through his work stance developing science is not cumulative but the revolution.

Chart I: Development of science Model by Kuhn is :²

Paradigm I → Normal Science → Anomalies → Crisis → Revolution → Paradigm II

The above Normal Science description is the period of accumulation of knowledge, in which scientists work and develop a paradigm that is being affected (Paradigm I). Anomalies is a condition in which scientists can not evade contradictions and deviations occur in a process after the development paradigm. This occurs because of the inability of Paradigm I to give explanations to arising issues adequately. Crisis is a state in which the anomalies to be very serious, It started to doubt validity of paradigm I. And if the crisis had reached its peak, bare the revolution to a new paradigm, the paradigm II, it is expected to resolve the issues faced by the previous paradigm (Paradigm I). This revolution marks a major change in science, where the paradigm I was weakening even lost its influence and replaced by Paradigm II that will dominate science.

Kuhn saw that science at any given time is dominated by a particular paradigm. That is a fundamental view of what the subject matter of a branch of science.

George Ritzer formulated a more detailed and clear understanding of the paradigm, the fundamental view of scientists about what the subject matter that should be studied by a branch of science (dicipline). So something can be a subject matter in a single branch by a particular scientist's version. Paradigm helped formulate what should be learned, what issues should be addressed, how it should be answered, and what rules should be followed in interpreting the information gathered in order to answer these problems.³

In a matter of law, it has very many-faceted phenomena because of its structure which is antinomy. There are a lot of autonomies and heteronomies in it, ideal and real elements, stability and mobility (stability and mobility), and the order and creation, power and confidence, social needs and social ideals, experiences and preparation (construction) and logical ideas and moral values.⁴ While AAG Peters⁵ said, if the law is seen as a functional necessity, the focus tends to be on the order and control. And it is a kind of value. While Thomas Aquinas⁶ defines law as any other act that is an order of reason for the good common and promulgated by him who has the authority to build the community. Thomas Aquinas has given rise to the idea of Natural Law Theory which is a source of meaning for positive law, which underlies the positive law in terms of the concepts of justice, the correlation between virtue or morality and social justice as well as bridging the legal obligations with moral obligations.⁷

Based on the dynamics of the meaning of law, one thing is for sure, there must be a relationship in the working of law in the public mind to the issue of power that is a clue to understand the fundamental social problems, and the strength of mind born of spiritual intelligence approach using intelligence that is *our meaning-giving, contextualizing and transformative intelligence ... we have a kind of thinking that is creative, insightful and intuitive*⁸ as revealed by Zohar and Marshall, so that through this approach bare the sensitivity in thinking through the process of creativity, deep thinking and intuition, the touch does not stop the intellectual and emotional intelligence quotient but also at the level of spiritual intelligence.

¹ F.Budi Hardiman, *Filsafat Modern, dari Machiavelli sampai Nietzsche*, (Jakarta : Gramedia Pustaka Utama, 2004),page.204-205.

² George Ritzer, *Sosiologi Ilmu Pengetahuan Berparadigma Ganda* (terjemahan Alimandan), (Jakarta : Rajawali Press, 1992), page.4.

³ Ibid,page.8.

⁴ Georges Gurvitch, *Sosiologi Hukum*, (Jakarta : Penerbit Bhartara, 1996), page.43.

⁵ A.A.G Peters, *Hukum dan Perkembangan Sosial, Buku Teks Sosiologi Hukum : Buku III*, (Jakarta : Pustaka SinarHarapan, 1990), page.119.

⁶ E.Sumaryono, *Etika Hukum, Relevansi Teori Hukum Kodrat Thomas Aquinas*, (Yogyakarta : Kanisius, 2002), page.17.

⁷ Ibid, page.24.

⁸ Satjipto Rahardjo, *Ilmu Hukum Dan Fisiologi Otak*, Op.Cit,page.4.

Any attempt to formulate the law in words is difficult to be able to give us a perfect portrait of the law. There will always be legal sides which do not fit into a formula (Java "mrodjol"), which therefore appear as dark sides.¹

The alternative is offered by progressive law in light of the impasse faced by positivistic approach that has been done. Positivism solid walls in legal approach can be called a law of the breakdown direction in the midst of turmoil changes the order value. Progressive law ought to be a choice considering the character of law is open to change and melt, so that any changes happen, the law of progressive is able to capture and digest them. The characteristic is always process and no final in the quest for truths; truth about the meaning of justice, certainty, order, prosperity, security which is always in contact with the needs of the community.

Thus in this quality, progressive jurisprudence is the type which is always restless in searching and liberation.² Assumptions of progressive law is regarding views on the relationship between law and human. There is an affirmation of principle that "the law is for human being",³ not vice versa. Associated with it, so here we argue that the law does not exist for itself, but for something wider and larger. Whenever there is a problem in and with the law, it is reviewed and revised, and not men who pushed to fit in the scheme of the law. For this condition, the discussion Santos stated that it is priority to emancipation rather than regulation.⁴

Bids from the Progressive Law as a new paradigm is for anticipating the cessation or barren positivistic approach to the law, as the old paradigm that has shackled thinking of stakeholder actors that influence the operation of law, the consequences of truth and justice to be in the state pushed back positioned, until becomes less important to note.

Positivism in law gave birth to routine regulatory logic, has remained unfulfilled logic experience, when Oliver W.Holmes stated "*the life of the law has not been logic, but experience*" and the legal paradigm of progressive pressure on creativity through the logic of progressive experience.

In the area of experience is required to provide a live interpretation of law as a symbol laden with values found only in the order of values in society validity as something that exists only behind the law.

The Progressive Law as a science that contains its own risk is always changing. The risk borne by the progressive jurisprudence is as an unclear science, not concrete disciplines and other similar names. In the middle of the convention (the state of the art) world science that demands all disciplines of science become clear, the progressive jurisprudence could be an anomaly. That's the risk of a type of science that is consistent with the search for truth.⁵

4. The Discussion of Continuum Approach of The Progressive Law vs. Legal Positivism

Legal cases to a "unique" verdict becomes laughable mirror of the working of law. It makes agreement among the law students that *something has got to be done, now!* There should be a law that has the capacity to act decisively, with courage (dare) to break and rebel against the normal science positivistic approach in law.

The law which prioritize contextual values, ethical values and socio-cultural and religious force in society⁶ is the most essential requirement in investigating the workings of law in this country. The approach taken to the law and continues to envelop the discipline of law is a positivistic approach which often causes problems of the working of law. Through this legal approach, the law looks at the level of the surface, does not appear to be a legal substance that spirit of law in the process of realizing the objectives of law.

Positivism in the social sciences is a problem, not only for science, but also for humanity. The problem is not merely epistemological, but also social and practical. A group of philosophers who pioneered this effort in a program that continues to grow is what is known as the *Frankfurt School (Die Frankfurter Schule)*, whose characters to this day still actively develop methodological program, *Jurgen Habermas*. They conduct multidisciplinary approaches research using critical from various schools of philosophy such as phenomenology, hermeneutics, language analysis, vitalism and so on, also *Freud's psychoanalysis*.⁷

Level of positivism has delivered many ambiguities in the working of law. The law of "as if" to achieve

¹ Satjipto Rahardjo, *Hukum Progresif Sebagai Dasar Pembangunan Ilmu Hukum Indonesia*, dalam *Menggagas Hukum Progresif Indonesia* (editor: Ahmad Gunawan BS-Mu'ammam Ramadhan), (Semarang : Pustaka Pelajar IAIN Walisongo, 2006),page.5.

² Ibid,page.5.

³ Satjipto Rahardjo, *Hukum Progresif : Hukum Yang Membebaskan*, (Jurnal Hukum Progresif, PDIH Undip Semarang, Volume : 1 Nomor 1/ April 2005),page.5.

⁴ Bonaventura De Sousa Santos, *Toward A New Common Sense-Law, Science and politics in the paradigmatic transition*, Routledge New York 1995, London .

⁵ Satjipto Rahardjo, *Hukum Progresif Sebagai Dasar Pembangunan Ilmu Hukum Indonesia*, dalam *Menggagas Hukum Progresif Indonesia* (penyunting Ahmad Gunawan BS-Mu'ammam Ramadhan),Op.Cit, page.7.

⁶ Liek Wilardjo, *Menerawang di Kala Senggang : Kumpulan Tulisan Liek Wilardjo*, (Salatiga : Fak.Teknik Elektro & Program Pascasarjana Studi Pembangunan, Universitas Kristen Satya Wacana,2009),page.85.

⁷ Ibid, page.24.

justice when justice embodied statute or procedural justice, legal work is limited to the dimensions of the so-called rationality or intelligence. It is essentially separated from the foundation of the so-called spiritual intelligence that conscience is not the basis for formatting the law of the moral consciousness, it is finally going to be ignored and the law-free value is considered in the light of this normative but the actual law often influenced by other energies than the law.

The dominance of formal legalistic approach to law making is not able to complete legal purposes. All occurs in the realm of laws of the kingdom, so that when the law dealing with the social reality, it is not able to provide a complete picture of the truth-seeking process because it must be able to interpret the meaning contains the essence of existence of justice and the rule of law. This approach is mechanistic-reductionistic, so when it view the reality that is sole and independent values, all are in order flow although the reality is not value free.

Legal cases that occurred in the community as outlined in the tables above are excluded from the most substantial issue of justice, not justice formality that happens, and it is caused by the thick walls of positivist thinking in the realm of law. There is no trial to dig and search the content of the most essential value of what is hidden behind the law of value on truth, justice principle, certainty and function of the legal work for the community as a means to prosperity and order. It is a form of formal logic glorified, thinking that is bound to the rules (rule-bound thinking) but as said Karl Renner "*the development of the law Gradually works out what is socially reasonable,*" it means that it gives a small space place for that logic, so above all benchmark logic flow away unused and *works out* that we must believe in the law because it is clever, unnecessary to set, rationalized and make it logic and everything *gradually* not exact. So let the law establish itself, never once think of it without legislative force, it is sterile but it also has a socially reasonable legal expediency. For that we must remember the three as the legal basis as proposed by *Gustav Radbruch*,¹ legal certainty (*rechtsicherheit*), justice (*gerechtigkeit*) and benefit to the community (*zweckmaszigkeit*). Law stand on a three basic value pillars, the three basic values that are not in harmony each other but they have a relationship tendency of tense among them (*spannungsverhältnis*).

And finally, the purpose of the law itself is still sought in the law, it will not appear by itself. In this condition, according to what is cited by *Satjipto Rahardjo*² every time a thought will be poured into a sentence, it is always at risk of failure. That is, the mind becomes less whole again once formulated into the language. There are always nuances, meanings scattered or not embodied in written language. Therefore, academically, it is not true if there is a clear statute. It means that fairness and certainty is not fully capable embodied in legislation.

Exceptional condition handling by law requires logical thinking that is no longer based entirely just and abiding by the rules and logic, rational, logical but also the spiritual needs or spiritual intelligence quotient that can accommodate and face extraordinary circumstances because through a spiritual quotient approach or spiritual intelligence, this way of thinking is creative, insightful, rule-making, rule-breaking. So through this approach, it is absolutely no attachment to the rules, not *deterministic* because what is sought is the meaning of the stored behind the law, about the value is not just read the rules so that the process of spiritual quotient approach is able to jump and skip rules that lead to creative thinking. The process approach can be found in the paradigm of progressive law that is always trying to make the leap to think of creative rule breaking, which is not final so it still continues to proceed toward truth seeking.

The old paradigm based on legal positivism is no longer able to deal with problems in an environment constrained by rigid thought processes, so that offers of progressive law approach is intended to produce an "extra-ordinary science", meant to overcome big social problems such as corruption crime which has become a systemic extra-ordinary.

Progressive Law rests from moral strength and mind paradigm, so in the development of the law, it should also be noted the components that affect the operation of the legal system. Moral approach or new paradigm of conscience,³ interprets the law that reflects to the people side.

¹ Theo Huijbers, *Filsafat Hukum dalam Lintasan Sejarah*, (Yogyakarta : Penerbit Kanisius, 1982),page.163.

² Satjipto Rahardjo, *Hukum dalam Jagat Ketertiban*, (Jakarta : UKI Press 2006), page.82.

³ Selo Soemardjan (editor), *Menuju Tata Indonesia Baru*, (Jakarta,: PT Gramedia Pustaka Utama, 2000), page.331. Paper : *Reformasi Hukum Indonesia* oleh Satjipto Rahardjo.

Chart 1 : Differences of paradigms:

Old Paradigm (Power)	New Paradigm (Moral Reason)
Power-Strength	Moral – Reason
Monolitik	Pluralism
Centralism	Decentralism
Regimentation	Democracy
Absolutism	Civil society
Intolerance	AUTHENTICITY
Heterotelik	Ototelik
Otoritarian	Professionalism

Progressive Law gives confidence capable of resolving social problems that occur because it basically has the image of the legal function paradigm. The law is for human and not vice versa and the law does not exist for itself, but to something much larger, i.e, for happiness, prosperity, and human dignity.¹ The workings of law can not be separated from human existence as the most glorious creature that has a mind and conscience. The law is essentially used through interpretations of the meaning which contains the value of the symbol as outlined in the legal form. Interpretation is not only based on purely rational but also moral consciousness. This is the basis for the Progressive Law conducting a holistic approach and the whole. The law is not seen on the outside and the surface level but dived on the substance of legal presence in the midst of community life . To make changes to the format and legal praxis that currently practiced in Indonesia *Satjipto Rahardjo* recommends using finesse to reject the status quo and liberation progressively formulated into ideas and types of Progressive Law² conducted by changing rapidly with a fundamental reversal in the theory and practice of law, as well as perform a variety of breakthroughs. Optimistically, Progressive Law can be used in the way we arbitrate the social problems because this law paradigm perform jumps with thorough manner so that the law is not only limited to the domain of legislation, but also a dip in the level of the legal essence of existence to fulfill human need for happiness and prosperity, so that the working of law leads to liberation, not confined to the rigid formalism line. Progressive law does not accept the law as an absolute and final institution but is largely determined by its ability to serve mankind. In the context of such thoughts, the law is always in the process to continue to be. Law is an institution that is continuously building and turn her toward a better level of perfection (*law as a process, law in the making*).³

So the Progressive law has some characters with paradigms: a) law is created for human welfare, b) legal pluralism; c) the synergy between centre and local interests; d) coordination and e) legal harmonization. It is time for Progressive law to take roles in solving the messy legal cases in Indonesia that had been trapped by the thick walls of positivism that has clearly failed to deliver on a thorough understanding of the law, not pieces, until it can be understood in its basic substance. For as long as it is happening, it is understood that the laws in the realm of law is obviously very difficult to give the true meaning to the law.

5. Conclusion

1. Social problems that occur in the society are mingled with the performance of law, as the legal formalism is the final destination of public order when the order is actually like *searching order, finding disorder*;
2. Formal legalistic approach becomes an obstacle in law enforcement and impede the performance of the law in an effort to achieve the goal;
3. The sturdiness of positivism should be given an offer as the law settlement case because this approach has encountered failures in resolving legal cases to achieve the objectives of humanitarian, happiness and prosperity;
4. Progressive law as an exciting alternative is the best solution to the impasse of positivism approach, which is often fulfilling the formal justice, which is only the justice legislation;
5. Progressive law has a legal paradigm for humans and not vice versa, so the law is carrying humanitarian elements in solving social problems.

¹ Satjipto Rahardjo, *Membedah Hukum Progresif*, (Jakarta : Kompas, 2006), page.188.

² Satjipto Rahardjo, *Sosiologi Hukum Untuk Aceh Pasa Tsunami, Prosiding Seminar dan Lokakarya Nasional Solusi Permasalahan Hukum Pasca Bencana Gempa dan Tsunami di Provinsi Nanggroe Aceh Darussalam*, Yurisprudence doctoral program of UNDIP in cooperation with AusAID and Bappenas, Semarang 31 Mei – 02 Juni 2005, page.5.

³ Satjipto Rahardjo, *Hukum Progresif : Hukum Yang Membebaskan*, (Jurnal Hukum Progresif Pencarian Pembebasan Pencerahan, PDIH UNDIP Semarang, Volume : 1/ Nomor 1/ April 2005), page.6.

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