

Role of Supreme Court Justice as Agent of Change to Increase Quality of Ruling in Manifesting Law and Legal Reform

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I. PREFACE

Since Proclamation of Indonesian Independent dated August 17, 1945, at that's time national public figures (*the founding fathers*) had chosen and agreed to determine that Indonesia State is that based on laws. The laws which may be made as pijakan and life foundation of nation and state in order to manifest objective and ideals of independence.

In Constitution 1945, statement of Indonesia State as Law One it just had been specified in its elucidation, nevertheless, post reform era of 1998, ie, by third amendement of Constitution 1945, then, such statement had been affirmed in body of Constitution 1945 Chapter I (Form and Sovereignty) Article 1 paragraph 3 enunciated : "Negara Indonesia is Law One¹⁾

Of course, as law state, such law enactment in State is not released from law history had ever been applied in community of such nation previously. Law state applied in Indonesia is law system "*Civil Law*", i.e, *codification or written law system*.²⁾

Such national and state life of Indonesia proclaimed as law state had taken place in tide and ebb condition either consistently or inconsistently

In climate changes of global society community signed by extraordinary advance in science and technology, information technology specially, as culmination point which result in reform waves of Reform yang melanda unitary state by collaps of regime of New Order on May Mei 1998 by demanding to return format rightly and correctly (reform) in terms of national and state life in field politic, economic and law specially.³⁾

Speak on reform, unless aspect of right and correct restructuring (reforming) of national and state order, of course, by consequence to do transformation/changing against older order to manifest idealized order in accordance with objective of Independence Proclamation. In this case specially, the outhor will discuss in terms of law and in field of law enforcement by authority of

In field of law and that of law enforcement through authority of Judicial affairs (The Judge) more specially..

"Law role in development is to ensure that such changes occurred regularly. There is assumption which may be said near confidence that such regular change may be assisted by legislations or even court's award or combination of them"⁴⁾

Indonesia which follow Civil Law system, i.e, law in written or Codefication law, of course, such law codification will not be able to accommodate of all community aspiration.

Additionally, in reform and transformation era in which change and progress had occurred so speed, hence, although legislators who work so rapidly, but, problems arising in community requiring more faster regulation. Hence, frequently, in community occurred any problem which of legislation had not been passed or in oher word, there is law vacuum.

In this formal system, such law vacuum contention is conducted by Judge when to his/her presented any case being not regulated in prevailing legislations,impossibly, it may be applied although it had been interpreted.

Clause of Article 24 paragraph 1 of Laws No 4 of 2004 on Judicial affairs Authority as enunciated : " Judge as law and justice enforcer should exhume, follow and understand law values existing in community..

The word of exhume assumed that such law is exist, but it was still hidened, to bring it up the surface, it should be exhumed, discovered and forwarded, as not nothing, then, it is created. Scholten said that in any such human behavior there was law. Whereas, at anytime human had behaven or created, so that, it may be said that such law had existed, and human only exhume, seek out and find it.⁵⁾

Activities of Judge fo fulfil law vacuum in this law system is by conduct law creation. Such law creation may be conducted by discovering law (*rechtsvinding*) and law creation

¹⁾ General Secretariate of MPR-RI (People Consultative Assembly), 2005, Constitution of Indonesia State of 1945, page 59

²⁾ Drs. H. Abd. Page i, Syaram, SH.MH, www.pta.palangkaraya.net

³⁾ Supandi, Yuridical responsibility against discretion of governmental officials in perspective of State Adminstration Law and pertanggungjawaban yuridis terhadap diskresi pejabat pemerintah dalam perspektif Hukum Administrasi Negara dan AAUPB, Jakarta, 2008

⁴⁾ Mochtar Kusumaatmaja, Pembinaan Hukum dalam rangka pembangunan hukum Nasiona, LPH & Krimonologi Univ. Pajajaran, Bandung, 1979

⁵⁾ Sudikno Mertokusumo, Penemuan Hukum sebuah Pengantar, Liberty Yogyakarta, 2006, page 47

(rechtschepping), hence, none of case may not be judged and none of problem may not be legislated. Additionally, when such law discovery and law creation conducted by Supreme Court Justice, it's very benefit for law world.

Court Supreme as instrument for law and truth enforcement so as not get stumbled to being not up to date. Also as last instance of court, it is wished being able to bring about innovative judgement (jurisprudence) in accordance with justice taste of community. Supreme Court Justice as law and justice enforcer should should exhume, follow and understand law values existing in community. When any rules and provisions had not been obvious or regulated yet, the Judge should get action based on to settle case. In other word, to decide what is law, although rules and provisions had not assisted ¹⁾.

Based on description above, refer to the title of this minor paper, then, the author may pick two (2) variables contained therein to be discussed more details as follows:

1. Supreme Court Justice as Agent of Change.
2. Quality of Supreme Court Justice's ruling in law establishment and law reform.

II. PROBLEM IDENTIFICATION

From two (2) variables as had been described above by the author in preface chapter, subsequently, it may be identified problem to be solved more details as follows :

1. How role of Supreme Court Justice as Agent of Change/transformation in manifesting law and law reform is?
2. How to increase quality of ruling of Supreme court Justice to respond the wishing of law manifestation and law reform?

III. DISCUSSION

1. ROLE OF SUPREME COURT JUSTICE AS AGENT OF CHANGE IN MANIFESTING LAW REFORM.

Reform and transformation era is that of renewal and change occurred in community social life. In this era had occurred new and difficult events and progress, unfrequently, it had not been reached by law and prevailing rules provisions.

Reform and transformation is global consequences as result of science and technology world community had developed so rapidly, and it demands value prioritization : :

- a. Professionalism
- b. Transparency
- c. Accountability
- d. Efficiency

Clearly, in terms of transparency, accountability and efficiency, it may be manifested by establishment strong system with technology information support.

Nevertheless, to demonstrate professionalism values, then, any professionalism capability is demanded to develop characters existing therein, ie : ²⁾

- a. Competency (mastering knowledge discipline)
- b. Honestly and responsibly, such competency should be enforced against:
 - Professionalismme corp
 - Nation, state and community
 - Inner heart
 - God
- c. Such hones and responsible competency enforcement should not/may not be intervened.

The author had impressed with utterance of *Changing Management expert at Australia* named : Mrs. Aan Merry, Phd, in any discourse that in observing current global progress We should do the change/transformation..

When We implement transformation? The answer is rightnow! How We don't implement transformation? The answer is : by other person such change/ transformation will be implemented continuously, meanwhile, We had been attacked by such change/transpormation will be out of it. Such condition will bring about difficulty to us who delay respond change/transformation demand.

In such other opportunity, the author quoted the wise utterance from Prof. Dr. Paulus Effendi Lotulung,

¹⁾ M. Hatta Ali, peran Supreme Court Justice dalam penemuan hukum (Rechtsvinding) dan Penciptaan Hukum (Rechtschepping) pada Era Reformasi dan Transformasi, Bunga Rampai Komisi Yudisial dan Reformasi Peradilan, 2007, Page 86

²⁾ Supandi, mengembangkan nilai-nilai profesionalisme dan berfikir sistemik untuk mewujudkan Good Governance, minor paper, 2008

SH, as Head of Renewal Team in Court Supreme of RI by saying "change/transformation commenced by brave persons and wined by sincere persons.

Of course, position of Supreme Court Justice as top career from , the Judge contain very strategic and determinant role to implement such change/transformation to manifest idealized law and legal reform and reordering of correct/right law adhering to system having been built. And of course, such very strategic and dominant role related with top career position which will be respected by subordinate judges and ruling being judged has permanent legal power, Executorial values so called last fortress for law and justice enforcement;

In accordancw with Laws No.5 of 2004 on revision against Laws No. 14 of 1985 regarding Court Supreme, lastly, it was renewed by Laws No.3 of 2009, that Court Supreme (which of position personified by Supreme Court Justice) has some function, those are :

1. Trying function, it examines and judge appeal and judicial application to the Supreme Court.
2. Function of examining rules and provisions, ie, to evaluate is any rules contradicted with other one (for lower level)
3. Regulation function, ie, to fuifil law vacuum.
4. Function of giving adviser and law considerences, ie, to give law advice to President case of clemency and rehabilitation as well as giving law considerences to other high state institutions.
5. Function of builing and supervising judicature and subordinate Judge.
6. Administration function, ie, to manage self administration, financial and organization.

By position and functions as described above, it highly enabled and even very strategic for Supreme Court Justice to play role as *agent of change/transformation* within framework of manifesting *law and legal reform*. By *so doing of course*, the ideal Supreme Court Justice unless he/she should master law knowledge and adequate law enforcement practices, having high integrity, good behave, also in his/her self will appear spirit of responding change/transformation with characters : professionalism, transparency, accountability and efficiency.

The mastering of material law and formal law of Supreme Court Justice is not adequate yet. Whether or not in his/her service, at least from his/her selves will appear ambition to enforce main behave of Indonesia Judge as formulated in Mutual Decree between Court Supreme and Judicial Commission dated 8 April 2009 Number : 047/KMAISKIIV/2009 as follows : ¹⁾

1. To have just behavior
2. To have honest behaiour
3. To have wisdom behaviour
4. To have independent attude
5. To have high integrity
6. Responsible
7. To uphole self-esteem
8. High Discipline
9. Low Profilce Attitude
10. Proffesional behave

Essentially, the Judge with qufication of Supreme Court Justice additionally, he/she is complete human, Reasonalby, in his/her self there are three (3) intelligence types inherent to human self equally, those are : Spiritual Intelligence I (SQ), Emotional Intelligence (EQ) and Intellectual Intelligence (IQ).

By SQ (Spiritual Quotient) experience, it bring about us as creature is real complete intellectually, emotionally and spiritually. Those three base intelligencies bestowed by almighty God to His creatures (IQ, EQ dan SQ) is able to cooperate and support each other.²

Seven Spiritual Care Values derived from Asmaul Husna (Allah's names) to be as human dedication laid on central orbit God Spot) : 1. Honest; 2. Responsible; Discipline; Cooperation; 5. Fair; 6 . Visioner, and 7.Care.

Those seven values should be made as values, in which those will give "*meaning*" or *value for*

¹⁾ Mutual Decree between Court Supreme and Juidial Commission Number: 047/KMA/SK/IV/2009, 02/SKB/P.KY/IV/2009 dated 8 April 2009 on Judge Behavior Guidance

²⁾ Buya Mas Rahim Salaby, membangun Pengawasan di dalam Diri Pribadi, Harahap Amanah Bersama dan Ilham Media, Jakarta, 2008, XVII.

who implement those. Unless other value in numbers 99 as dedication resources.¹⁾

The author is very confident that based experience in site with such Spiritual Intelligence and Emotional Intelligence it may be felt by enforcing behavior guides. The Judge is not obligation, but also as necessary to give comfortness within soul..

2. To increase Rulling of Supreme Court Justice, hence, it may respond wishes to Manifest law and law reform.

To discuss it, the meaning of demand for increasing quality of Supreme Court Justice's ruling, it is related with reform atmosphere occurred in Indonesia occurred as result of global progress and sociality influence.

When restudy past policy related with Reform demand, it may be concluded that *nucleas* (such core demand), is to straighten again paradigm or basic criteria of such national life management sytem totally, while prioritizing policy and commitment paradigm in fields of politic, economy and law enforcement ².

Prof. Dr. H.M. Sally Lubis, SH. Proffessor of Constitutional Law from University of North Sumatera in his lectures said that law (more specifically) resulted from these conditions as follows :

- a. *Grounded Basicly*, it is researched, discussed and formulated basically, so that, it brought about aspirative laws in accordance with necessary and condition of regulated community psychology.
- b. Pragmatism, for urgent necessary fulfillment being passed hastily.
- c. Repressive, to legitimate governmental commitments contradicted or deviate from proclamation objective, so that, laws is created.

To solve attentively, the course of Indonesia constitution before occurrence of Reform and post Reform, indeed, mostly Laws passed pragmatically and/or represively. As we observe together, so many Laws should be revised prior to implement it in reality truly.

Really, anything being more apprehensive that, revision against such laws had been conducted, indeed, new constitution just had been revised. Actually, it had made dizziness of legislators face Reform dan transformation waves.

Of course, in such condition, it will highlyly changed tasks and existence of proffessional Judges of Supreme Court Justice in concrete case..

In product laws atmosphere passed refresively and pragmatically, of course, such laws may not be resulted as foothold for enforcing justice values in concrete case. To respond people crying the longer the harder in terms of justice. Since lower Judge through Supreme Court Justice by era is challenged to discover laws professionally. What should be conducted by Supreme Court Justice in such law life condition.

Law foundation for Judge in such condition, it may be observed from regulation of Article 28, paragraph 1 Laws No. 4 of 2004 on Authority of Judicial affairs stating "The Judge should excavate, follow, understand law values and sense of law and fairness existing in community.

"To excavate it means that directly, Judge stand in community for recognizing, feeling and able to penetrate sense of law and fairness existing in community..³

Court Supreme institution personified by Supreme Court Justice is instrument to enforce law and justice at last level and innovative which will not be glued to Laws requirements. Unless he is able to make fresh decisions to respond crying and justice demand of all people. Such decision will be followed by lower Judge as jurisprudence..

It is different with other authors assumed that since all laws are not complete, then, the author opinion on its is contradicted, ie, starting point from principles of civil law system (codification law), the author assumed that pirncipally, such law is complete to regulate all aspects in community life. But, laws formulator as human also has limitation, hence, he/she is not able to formulate such complete norms into codification, then, to be obligation of Judge to pick (discover) scattered norms to be applied in concrete case. So that, Judge function to discover/find by Judge in concrete case, wherea, law creation, is legislative function together executive.

The author has same opinion with Prof. Sudikno : "term of law creation is not precise seemingly, because it had impressed that entirely, law is not available, then, it is created from nothing to be anything. Law is whether or not written norm, but, also it may be behavior or event . in such behavior there is law to be

¹⁾ Ary Ginanjar Agustin, *Rahasia Sukses membangun Kecerdasan Emosi dan Spritual*, ESQ, Arga Publishing, 2007, page 90

²⁾ H.M. Sally Lubis, Prof. Dr. SH, *Refleksi Hukum dan Konstitusi di Era Reformasi*, Pustaka Bangsa Press, medan, 2002, page 17

³⁾ M. Hatta Ali, *peran Supreme Court Justice dalam penemuan hukum dan Penciptaan Hukum dalam Reformasi dan Transformasi makalah*, Bunga Rampai Komisi Yudisial dan Reformasi Peradilan, 2007, Page 85

any law or theorem. So that, the law discover is most precise term ¹

So that, is Judge free to discover law in concrete case? Although Judge has discretion to determine law and justice on dispute/conflict filed to his/here, but, in such law discovery process, Judge is engaged with resource, method and procedure to discover such law. Main source of law discovery in accordance with its level/hierarchy are :: Rules and provisions, common law, jurisprudence, International Treaty, and doctrine.

Here, there is 'nursing' and hierarchies. So that, if there is conflict from two resources, then, the highest source will supercede the lower one. ²⁾

Whereas, law discovery method in case of its rules and provisions is not real, then, there is interpretation method since the beginning it had been divided into four, those are : ³⁾

- a. Grammatica Interpretation
- b. Systematical Interpretation
- c. Historical Interpretation
- d. Theological Interpretation

Additionally, also it had been recognized comparative and Anticipative (Futurist) Interpretations. And some those Interpretations may be grouped into 2 section, those are :

- a. Restrictive Interpretation
- b. Extensive Interpretation

In case of not regulation, then, there is redenering, reasoning and argumentating. In this case, to discover law, Judge should fulfil such law vacuum with argumentation method per analogy of Contrario or law narrowing (rechtsverfijning ⁴⁾

Unless such law discovery methods there is other law discovery so called exposition method or law construction method is that clarify words or meanings not for clarifying object⁵⁾.

Further, law discovery process by Judge for sake of law and justice enforcement, community is guided with law resource from law discovery, discovery method.

Hence, the ideal Supreme Court Justice is mastering skill of enforcing material law or formal law based on prevailing rules and regulation. When in concrete case there is unabvious, incomplete or even no regulation then, undoubtly, The Judge should be skill and professional to discover right and correct law either from law resource side or even method or its procedure. So that, legal rulings judged by The Judge it should touch and in accordance with justice feeling of community really.

IV. CONCLUSION

From discussion as described in such discussion may be drawn conclusion. :

1. Supreme Court Justice in order to play role as agent of change in manifesting and law Reform, then, in self of such Supreme Court Justice should be found : following characters :
 - a. Mastering of Material Law and Formal Law as well skill for practices of adequate procedural practices.
 - b. To own spirit for responding change and transformation wave with characters of professional, transparency, accountability and efficiency..
 - c. To own spirit in appreciation and grounding of main behavior of Judge either internal or external service.

To make easier such achievement at such self of Supreme Court Justice, there should be quality balance of spiritual intelligence, emotional intelligence and Intellectual intelligence in his/her self. To increase ruling quality of Supreme Court Justice, hence, it may respond the manifestation of law and law Reform as follows:

- a. Adhere to principle within framework civil law. System maximally, it should respect to normative regulation existing in laws .
- b. Really, provided that it may not touch community justice in concrete case, then, professionally, The Judge should implement law process discovery from sides of resource, method and procedure correctly and rightly.

V. SUGGESTION

1. Position of Supreme Court Justice as top career The Judge, it should be trusted to sons/daughters of nation in which had developed professionalism values, it has spirit of change and

¹) Sudikno Mertokusumo, Penemuan Hukum suatu pengantar, Liberty Yogyakarta, 1996, page 37

²) Ibid, page 48

³) Ibid, page 57

⁴) Ibid, page 66

⁵) Bos, dalam Sudikno Mertokusumo, Penemuan Hukum Suatu Pengantar, page 73

- transformation, and it has quality balance of spiritual intelligence, emotional intelligence and Intellectual intelligence which will ground ground behavior of Indonesia Judges happily..
2. Law discovery instittution to be made as prima skill of Judge, so that, it may become bridge of coodification law lag with justice feeling of community to grow rapidly.

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