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The Responsive Law Thinking Atmosphere: From the United States to Indonesia

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Abstract

Responsive law discourse is influenced by law conditions and situations. Responsive law was initiated in the United States and it was influenced by the atmosphere of law discourse in Indonesia. The purpose of this research is; describing responsive law theory, mapping law thinking in Indonesia, analyzing the workings of law theory responsive to the atmosphere of law discourse in Indonesia. This type of research is normative law research, the approach to law theory, using secondary data, and using data analysis methods of interpretation-conceptualization. The results of this study indicate that responsive law theory is a theory that views law no longer seen as a stand-alone entity. Law must be able to interact with other entities adopting existing interests in society. Responsive law theory was initiated in the United States in the 1970s. The development of law thought in Indonesia began in the post-Independence, transition, New Order and Reformation periods. The beginning of the entry of responsive law theory into the atmosphere of law discourse in Indonesia is at the beginning of the New Order and Reformation periods. Responsive law is termed different but it is the same type.

Keywords; *thinking, responsive law, United States, Nonet and Selznick, Indonesia.*

Introduction

Discussing responsive law theory will not be separated from the law situation and the background scope, both the conditions in which this theory was born, namely in the United States and the conditions when other countries adopted it. The United States, which experienced a law crisis in the 1970s, became the beginning of responsive law thinking. Conditions that are relatively similar to what is happening in Indonesia today. The law crisis that occurs in Indonesia is not only technical, how to apply and enforce the law, or the malfunctioning of the law as it should, but it is far more fundamental. One of the most basic law crises in Indonesia is the problem of justice. Law decisions are often far from a sense of justice. Cases that involve marginal communities in the settlement process are so fast, while cases involving elites become giddy. This is clearly seen in cases of human rights violations and corruption cases. Even more alarming, there is always juridical justification.

This phenomenon is not a good thing because it can hurt the sense of justice. Justice should be a priority for law purposes because the law plays a role in regulating various interests political, economic and socio-cultural in society (Kabalmay, 2010). One of the causes is because the existing law is only understood as rules that are rigid, and emphasizes the legitimacy aspect. Understanding the law is more dominant in the aspect of the law system without seeing the law connection with the "sense of justice" as expected by society. Law studies need to be carried out by incorporating other elements. The law must not be ignorant of social consequences and influence. Responsive law studies are relevant to seeing the atmosphere of law discourse in Indonesia. The problem that the writer raised was; how is the responsive law theory proposed by Nonet and Selznick and how does the theory work in the development of law in Indonesia.

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Problems of the Study

Based on the background above, problems can be formulated, namely; What are the responsive law theories proposed by Nonet and Selznick? What is the law thinking in Indonesia? How does the responsive law theory work in the atmosphere of law thought in Indonesia?

Research Methodology

This research is included in the type of normative law research, because what is examined is the theoretical aspect of law. The approach is also normative by using law theory. The data used is secondary data in the form of written documents obtained through literature search. The analytical method used is the conceptualization-interpretation using interactive models.

Discussions

Responsive Law Theory Philippe Nonet and Philip Selznick

Responsive law theory was first conceived in the United States in the 1970s. The law crisis in the United States when it became the beginning of responsive law thinking. In the United States society is divided by competing views on the ideal social order and places the search for law in the center of a greater battle (Zumbansen, 2008). Philippe Nonet and Philip Selznick were figures who first brought responsive law theory through his Law and Society in Transition; Toward Responsive Law (Seters, 2010). There is a need for a law and social theory called, affirm the worth of law and citizens must take the law into their own hands to reach consensus towards social order (Zumbansen, 2008).

Nonet and Selznick (1978) chose a broad and diverse law definition without merging it into the concept of law as social control. Because law is a mechanism of social control and rewards lawly and punishes unapproved behavior (Abel, 2017). Nonet and Selznick (1978) began the discussion by dividing the law into three categories; repressive, autonomous and responsive. All three are evolutionary stages in law relations with socio-political order.

The first is repressive law. Repressive law is a law that serves repressive power and is oriented to repressive social order. The ruling power is repressive, not paying attention to the interests of the people ordered (Nonet and Selznick, 1978). Repressive law often takes the form of oppression and coercion and is subordinated to politics(Hendley, 2015). In other words, the law is used only to support the political interests of the ruler only so that people's aspirations are not distributed proportionally.

The purpose of repressive law is order. Legislation is hard and detailed, but the level of application to law makers is very weak. Repressive law often violates moral constitutionalism whose management is in the hands of government officials and is used as a law instrument to guarantee the integrity and effectiveness of power based on coercive sanctions. Repressive law types rely heavily on the use of coercion without thinking of the interests that exist on the part of the people. The most important concern of repressive law is the maintenance or implementation of rules, public calm, and defense of authority and settlement of disputes (Nonet and Selznick, 1978).

General characteristics of repressive law: 1) Law institutions are directly open to political power; the law is identified with the state and subject to raison d'etat. 2) The official perspective of the government dominates, and the authorities tend to identify their interests with the interests of society. 3) The opportunity for people to get justice is very limited. 4) Special supervisory bodies such as the police are the center of free power. 5) Law enforcers institutionalize justice by validating social subordination patterns (Nonet and Selznick, 1978).

The second is autonomous law. Autonomous law is oriented towards overseeing repressive power. Autonomous law is an antithesis of repressive law. Law as a means to govern and the government system

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is run based on the rule of law. Autonomous law focuses its attention on the empirical social conditions of power based on the law of institutional reality (Nonet and Selznick, 1978).

The most important characteristics of autonomous law are: 1) The law is separate from politics. Typically this law system states the independence of judicial power, making a clear line between the legislative and judicial functions. 2) Law order supports the "regulatory model". Focusing on regulations helps to apply measures for accountability of the fighters; at the same time limiting the creativity of law institutions and the risk of interference with law institutions in political areas. 3) The procedure is the heart of the law. Justice is understood as order, not substantive justice. 4) The state of law is understood as perfect compliance with positive law regulations (Nonet and Selznick, 1978).

Legislation is made broad and detailed and binds the authorities and those who are controlled. The objective of autonomous law is legitimacy. The characteristics of autonomous law are the emphasis on the rule of law as the main effort to oversee official power, as well as the manipulation of political and economic power (Nonet and Selznick, 1978). In other words, that in autonomous law loyalty to the law is understood as strict compliance with positive law.

The third is responsive law. Responsive law is a law to meet social demands and needs while still maintaining institutional results. Opportunity to participate is openly. The law arena becomes a political forum, and law participation contains a political dimension. Law action is a vehicle for groups or organizations to participate in determining public policy. The results of the process are law products that are responsive to all interests, both the public and the government. A prominent characteristic of responsive law concepts is the shift in the rules of emphasis from rules to principles and goals, as well as the importance of popularity both as goals and ways to achieve them. Responsive law can reflect a sense of justice and fulfill people's expectations (Nonet and Selznick, 1978). Because of the law on the one hand it carries a representation of the accumulation of people's desires and on the other hand the law carries out the function of controlling various people's desires so that the achievement of these desires does not harm the interests of other communities.

Law is no longer seen as a stand-alone entity, but must be able to interact with other entities with the ultimate goal of adopting the interests that exist in society. Law can also interact with politics. The law is better able to interpret disobedience and irregularities that occur in society. The space for dialogue is wide open to provide discourse and provide a space for plurality of ideas (Nonet and Selznick, 1978).

Responsive law is no longer based on mere juridical considerations, but looks at a problem from various perspectives in the pursuit of "substantive justice". Law enforcers in carrying out their profession address the law as "the law, like the traveler, must be ready for the morrow, it must have a principle". Law is only a means. Justice must be a goal even though it does not always use a law perspective (Rahardjo, 2006). Discretion is often used positively to achieve substantive justice. Responsive law flexibility is very high against other matters outside the law. It is because responsive law is capable of being an effective instrument for the creation of civil society goals (Muchtar, 2012).

The birth of a responsive law theory is inseparable from the influence of the two first born law theories, namely law realism and sociological jurisprudence. According to Jerome Frank, the main objective of law realism is to make the law more responsive to social needs. Expansion of related fields is encouraged so that law reasoning can include knowledge in a social context and have an influence on the official actions of law enforcement officers. Even according to Harry W. Jones (1961) in America, law realism is not a systematic law philosophy, but it is a way of seeing the rule of law and the law process to fit the needs.

Likewise the purpose of sociological jurisprudence adherents gives the ability of law institutions to more thoroughly and intelligently consider social facts in which the law is processed and applied. Responsive law is found in a society that upholds the spirit of democracy. As stated by David T. Johnson and Richard A. Leo (1993) that if democratic law must be responsive. The law reveals traits not for the sake of law,

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not for the benefit of law practitioners, nor for making the government happy, but the law is in the interest of the people in society (Nonet and Selznick, 1978).

Responsive law theory positions law as a way of achieving goals. Law is not only rules, but also other logic. Not merely law as a set of primary and secondary rules made by humans, including recognition of basic rules (Massoud, 2016). So applying jurisprudence is not enough, but law enforcement must be enriched with other sciences. Responsive law provides space for all parties involved in the law enforcement process, ranging from the police, prosecutors, judges and advocates to be able to free themselves from the rigid and analytical rigors of pure law (Nonet and Selznick, 1978).

Law Thinking in Indonesia

The existence of law thinking in Indonesia is also inseparable from the stages of developments that are the background of the socio-political conditions surrounding it. Khudzaifah Dimyati (2004) divided the developmental stages of law thought in Indonesia into three periods.

1. Post-Independence Period

Period of law thinking in Indonesia post-independence was around 1945-1960. After the proclamation of Indonesia's independence the Indonesian founding fathers were actually eager to escape the influence and ideas of the colonialists. This moment is very appropriate to bring the law substance of the people who have been colonized, towards the law that originates in the conscience of the Indonesian people. Every effort is made to realize new regulations to escape the influence of colonial law. One of them is by exploring the source of customary law.

The typology of thought in this period directs thought to customary law. This is implied in Soepomo's thoughts on law concepts that contain the spirit of fighting for customary law and tend to be resistant to Western law. There was an affirmation of law ideology which led to customary law as an embryo of national law to replace colonial law. By breaking away from the influence of Western law Indonesia will be able to make internal improvements through the strengthening of law culture. This of course can only be found in customary law as an Indonesian identity (Dimyati, 2004).

Other law thinkers who contributed a lot of law concepts in this period were Soekanto. According to him customary law must be studied and must be found, and does not need to highlight the good or bad of customary law. Soekanto acknowledged that the existence and articulation of the values of customary law extracted from Indonesian cultural treasures were intrinsic, more important and very adequate to develop law thinking in order to get the same treatment with modern law developed by other countries (Dimyati, 2004).

Efforts to make customary law a source of national law formation continue to be carried out even though it is less successful. The reality is that it is difficult to release the law influence of Dutch colonial relics. This difficulty, according to Soetandyo Wignyosoebroto, is partly due to the fact that the process of realization of the idea of customary law as the soul of national law is not simple. Difficulties arise not only because of the diversity of the living law which is generally not explicitly stated. Modern law management systems that include organizational arrangements, procedures and principles of procurement and enforcement doctrine have been fully created as colonial inheritance is not easily overhauled in a short time. Building a national law starting from zero, especially from a new configuration that still has to be discovered first is very difficult (Wignjosoebroto, 2001). This period shows the spirit of nationalism that is strong and influences law thinking to break away from colonial law by exploring laws rooted in customary law but without success.

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2. *Transition Period*

The period of law thinking in Indonesia during the transition period was around 1960-1970. After a thick initial period with the spirit of reviving customary law, the direction of law thinking emerged that tended to be formalistic which prioritized affirmation on strict principles in the format of law postulates. This can be seen in the law thinking conveyed by Djokosoetono with his opinion that a constitutional bureau needs to be established which has the task of collecting law materials from political parties that describe their ideals. Djokosoetono also proposed improving the Provisional Constitution (Dimyati, 2004).

Another figure who contributed his thoughts was Hazairin who delivered his formalistic carving with new law jargon. Hazairin views that law unity is essentially in line with the ideals and spirit of the Indonesian people by taking the nation's cultural treasures with law reality and its diversity in each region. The development of national law needs to be based on law that lives in the community in accordance with the development of the consciousness of the Indonesian people and does not hamper the creation of a just and prosperous society (Dimyati, 2004).

This period shows the direction of law thought that is more formalistic by prioritizing the interests of the Indonesian people as in the context of the state whose sovereignty is recognized. As a sovereign country which requires a constitution that is lawly recognized by countries in the world.

3. *Period of the New Order and Reform Era*

The period of law thinking in the New Order and Reformation Indonesia began in 1970 until now. Law thinking trends in this period can be seen as transformative thinking. Law thinking not only touches normative and doctrinal aspects, but tries to transform from the empirical domain to philosophical theoretical levels.

The person who conveyed his thoughts about the law in this period was Mochtar Kusumaatmadja. According to Mochtar Kusumatmaja (1996), in recent decades there has been a change as a result of major changes in society and pressures caused by population growth. Law is one of the tools of community renewal. This thought seems inspired by Roscoe Pound's thought that introduces that law as a tool of social engineering which in the West is known as the pragmatic law realism. The law must be sensitive to the development of society so that it must be adjusted or adapted to the changing conditions. Because quoting the term Tony Hanore the law is human construction and what humans need as law is law.

The law substance in its form as a statutory regulation is accepted as an official instrument that has aspirations to be developed and oriented pragmatically to deal with contemporary social problems. The law serves as a means to help change society (Kusumaatmadja, 1996). Law is conditioned as a set of instruments to achieve certain social goals. The character of the law alignment referred to by Mochtar Kusumaatmadja as an emancipatory law (Hanore, 2002).

According to Mochtar Kusumaatmadja (1996), an emancipatory law indicates a democratic and egalitarian nature which pays attention to efforts to provide human rights protection. Emancipative law also provides greater opportunities for people who are weak socially, economically and politically (Amarini and Lena, 2015). The community can take a participatory role in all fields of community life, nation and state (Kusumaatmadja, 1976).

Another figure who conveyed his thoughts in this period was Satjipto Rahardjo who formulated a law concept that was different from mainstream understanding. Law in Indonesia has not been able to accommodate social and development changes that continue to go hand in hand with Indonesia's relationship as a sovereign country with countries in the world. The form of law powerlessness is reflected in the pattern of law-taking originating from the West without criticizing it and accepting it as an

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absolute normative model for assessing law life in Indonesia. Acts like this will have an adverse effect on the Indonesian people, especially related to the development of law (Rahardjo, 1983).

Satjipto Rahardjo (1977) initiated the need for a radical change in law thinking towards a socially oriented, not juridical and socially oriented thinking. Satjipto Rahardjo uses a sociological approach in constructing law, an approach that has not been widely used by law thinkers in Indonesia.

Law enforcement needs to move from the positivist paradigm to the substantive paradigm. The positivist paradigm is only able to explain the situation and normal processes of positive law. Whereas to explain the atmosphere of chaos and shock that occurred in Indonesia positive law still has limitations. This can be seen in the inability of the law to reach new issues that continue to grow. (Rahardjo, 2009) Therefore, according to Sajtipto Rahardjo, this method is a way of law that is still dominated by "rule by law" rather than "law with common sense" is a minimalist way of law, which is simply to run the law by applying what is written in the text outright (Samekto, 2013).

This period shows the tendency of thinking towards the law that does not only touch the normative aspects of doctrinaire. Law thinking has shifted to more substantive law. The law is more sensitive to community development, oriented and social based, not just juridical.

The Work of Responsive Law Theory in the Atmosphere Discourse of Law in Indonesia

When looking at three categories of law; repressive, autonomous and responsive as stated by Nonet and Seznick, all three also occurred in Indonesia. Repressive law existed in Indonesia at the beginning of independence until 1960. Autonomous law was also felt by the Indonesian people in the era of the end of the Old Order to the New Order. Both are used by authorities to maintain the credibility of each government. Since the reformation, it seems that the law is being responsive, which in terms of discourse has actually been initiated long before the reformation of the period 1970-1990s.

The beginning of the inclusion of responsive law theory initiated by Nonet and Selznick to Indonesia since the 1970s was discourse by Muchtar Kusumaatmadja and Satjipto Rahardjo. They give different terms, but the same type. Muchtar Kusumaatmadja was with an emancipatory law, Satjipto Rahardjo with progressive law.

Implicitly, both Mochtar Kusumaatmadja and Satjipto Rahardjo tried to convey the theorization of law in Indonesia cannot be separated from the social origins as the basis for the discovery of law theories that have values, traditions that are typical of Indonesia. Indonesian law theory is a reflection of what, how, and where the objectives of Indonesian law are. The law has never operated in a vacuum and there will always be mutual entry between the law and its environment.

From the law conception conveyed by these two law thinkers it can be seen that the responsive law conception is constructed. Mochtar Kusumaatmadja's thoughts with the emancipatory law concept and Satjipto Rahardjo with the concept of progressive law view that the law should be able to keep up with the times, be able to answer changes with all the basics in it, and be able to serve the community by relying on the morality aspect of the human resources of law enforcement itself. His belief in law sociology as a tool in deconstructing law thought increasingly crystallizes the idea that the emancipatory and responsive law conceptions of law are supported by the sociological jurisprudence school. With this support can provide the ability for law institutions to more thoroughly and intelligently consider the social facts in which the law is processed and applied.

The idea of emancipatory and progressive law is the crystallization of thought while examining the dynamics of the development of law in Indonesia. Both of these ideas are not new, but are more of a crystallization of thought in quite a long period of time. Emancipatory and progressive law favor the flow of law realism and use sociological optics in carrying out the law. The analytical way of working in the

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realm of positive law will not help much to bring the law in Indonesia out of its downturn (Rahardjo, 2006).

Ideally practitioners dare to get out of the tradition of law enforcement that only relies on an-sich legislation. The law is not a sterile vacuum from non-law concepts. Law must be seen from a social perspective, actual behavior and can be accepted by and for all people in it. Law is not only business (rules), but also behavior (matter of behavior). Law is for humans and not vice versa. The law does not exist for itself, but for something broader, namely for human dignity (Rahardjo, 2006), happiness, prosperity, and human glory and guaranteeing their basic rights and freedoms (Smith, 2004).Lawpositivist and rule-based law understanding will not be able to capture the truth. This is because as Rechel E. Stern said the law is flexible, political, and potentially unstable because the interpretation of the court offers a way to change the substance of the law itself (Stern, 2010). Consequently, law as a complex arrangement has been reduced to something simple, linear, mechanistic, and deterministic, especially for the benefit of the profession, and still dominant in Indonesia (Rahardjo, 2009).Law logic is still in the realm of law, which is the decision of the competent bodies, but it is not considered law (Ridwan, et.al., 2016). The law turns into an alien world (esoteric), has its own "grammar" (private language) which is difficult to understand by the extra-law world (Rahardjo, 2015).

To arrive at the level of responsive law enforcement, several supporting devices are needed. The first is the factor of law structure (law enforcement). Ideally they consist of new generations (judges, prosecutors, lawyers, etc.) who have a vision and philosophy that underlies law enforcement. Law philosophy is not liberal, but is more inclined to communal vision. Nation's interests and needs are more concerned than playing with articles, doctrines, and procedures. The second is the need for awareness among academics, intellectuals, and Indonesian law scientists and theorists.

Good law must always be parallel with justice. The component of justice includes all including human rights. Human rights represent the core of justice, while justice is more than just human rights. Every human rights violation is unfair, and every injustice is a violation of human rights (Alexy, 2012). Law enforcement must recognize the wishes of the public and have a commitment to achieving substantive justice. Law enforcers in law enforcement efforts must be more careful in understanding the law broadly and deeply for the sake of achieving justice. The main idea of progressive law is to free man from the shackles of law. The law has the function of giving guidance rather than shackling, and law enforcement is the one who plays a more important role.

Conclusion

Based on the discussion above, it can be concluded that the responsive law theory proposed by Nonet and Selznick is a theory that views law to meet social demands and needs but still maintains institutional outcomes. Law is no longer seen as a stand-alone entity, but must be able to interact with other entities with the ultimate goal of adopting the interests that exist in society. Responsive law theory was initiated in the United States in the 1970s. Law crisis conditions in the United States became the beginning of responsive law thinking. The development of law thought in Indonesia began in the post-independence period, the transition period and the New Order period and reform. The beginning of the entry of responsive law theory was into the atmosphere of law discourse in Indonesia at the beginning of the New Order and Reformation periods. Two influential law thinkers are Mochtar Kusumaatmadja and Satjipto Rahardjo. Both provide different terms, but are of the same type. Muchtar Kusumaatmatdja was with the term emancipatory law, Satjipto Rahardjo with the term progressive law.

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