

Disputes between Law and Justice

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Abstract

The consequence of identifying justice with law is that seeking justice becomes constrained and it becomes limited only to the formulation of law. Although it is possible to approach justice from the 'legal-formal' aspect, justice cannot be reduced to law. Once justice is reduced to law, seeking justice outside the legal system ceases. The assumption that justice is identical to law is misleading, as justice is assumed to be inherent in the law itself. On the other hand, it is dangerous to make a distinct separation between law and justice. Law obtains its validity through its positive form, which is derived from the sovereign authority. The implication of this is that law is the law itself, altogether separate from justice, whereby an emphasis is placed only on its formal manifestation. However, law is not justice. Law is a calculable element, while justice is incalculable in concrete terms. Law is a tool for approaching justice. Therefore, law cannot possibly surpass justice, because assuming that law surpasses justice would be as stating that the tool colonizes its objective.

Keywords: law, justice, tools, goals.

I. Introduction

1.1 Background

There is interesting anecdote, the conversation between High Justice Learned Hand and High Justice Oliver Wendell Holmes. After lunch together and Holmes get up with the dog car. From random opportunity and background, Hand run and come afterward with the spirit, he shouts: "Do justice, Sir, do justice!" Holmes asks the coachman to stop and answer from the window: "That's not my job. It's my job to apply the law"¹.

In Latin glossary/vocabulary, was known the difference between term "ius" (justice) and "lex" (law); but often identically justice with law, whereas law not identical with justice. Special laboratory to show that law not identical with justice is the family of Indra Azwan which along 19 years tortured because he saw the collider of his child free from law trap. On the verdict of High Court Military Surabaya, the collider whom also policeman officer free from charge because the case was claimed expired² which went through 12 years since hit and run case in 1993 until the court was opened in 2008. Whereas on the court, the policeman officer proven to be judicature valid and convince, did a crime "that caused by default, gave occasion to someone be dead".

In hit and run case, the judge must not be the funnel of the law. The expired concept must not be implemented on the case that full with manipulation. Of course all the people know status and position influence the maintenance of the law. Especially if involved the policeman officer that must be investigating officer on that case. Law always has "the lack of gape" and need interpretation to get closer into justice. It reminds us on the profile of "Goddess of Themis" who like to coquet and deceitful like describable by Francis Bacon on "Essays of Counsels Civil and Moral: of Judicature".

*"Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue. Cursed (saith the law) is he that removeth the landmark. The mislayer of a mere-stone is to blame. But it is the unjust judge that is the capital remover of the landmarks, when he defineth amiss of lands and property. One foul sentence doth more hurt than many foul examples. For these do but corrupt the stream, the other corrupteth the fountain. So saith Solomon, 'Fons turbatus, et vena corrupta, est justus cadens in causa sua coram adversario.' (A righteous man losing his case is like a troubled fountain or a corrupt spring.) There is no worse torture than the torture of laws."*³

In a juridical-formal, the victim family can't bring lawsuit to the court because of the expired case and also the adjudication has the force of permanent law. But for Indra Azwan who never experienced law high education, it being strange and sprag. Imagine, along 19 years the justice that he wants never realized. Indra

¹ Harry T. Edwards, *Judicial Norms: A Judge's Perspectives*, in John N. Drobak (ed.), *Norms and the Law*, New York: Cambridge University Press, 2006, p. 236

² Expired break time are: (a) infraction (after past/over 1 year); (b) crime that has been threatened by fine punishment, prison under 3 years (after past/over 6 years); (c) crime that has been threatened by prison above 3 years (after past/over 12 years); (d) crime that has been threatened deadly punishment or lifelong imprisonment (after past/over 18 years). In hit and run case, judge verdict give priority to certainty, but sacrifice justice

³ Louis Jacques Blom Cooper, *The Language of The Law: an Anthology of Legal Prose*, London : Bodley Head, 1965, p. 3-4. Acces from dari <http://www.authorama.com/essays-of-francis-bacon-56.html>

walks on foot from Malang to Jakarta to find justice. This paper wants to submit two problems: Why does law not identical with justice? How is the connection between law and justice?

1.2 Theory Study

The dispute between law and justice get the justification from two theories that contradiction namely Natural Law and Positivism Law. According to Natural Law, the entire of law and rules must be based on moral-justice principle. The implication is Positive law that across with moral-justice can't be called law because of law decomposition. On the contrary, Positivism Law say that law can't be mingle with non-law element include moral-justice. Law only occurs so that law gets positive shape from the state. The implication is law occurs not because of justice but because of formal shape. Both of those theories propose their position with the argument that exacerbates the dispute between law and justice. To discuss deeply, this paper want to make dialogues with Derrida thinking that critical the connection between law and justice.

1.3 Research Methods

This research use law philosophy in the same manner as law philosophy research, the methods have the characteristics like critical, speculative and self evident¹. The aggregation technique and data analysis is carry out 'thought above thought study' with literature research about law theory dispute, especially the discourse about the connection between law and justice.

II. Discussion

2.1 Absolute Justice Searching: String up the Dream above the Cloud

More than 2000 years, the philosopher has been always try to find the standard of absolute justice that can be used to rate the good and the bad of law. On the history of law thoughts, Natural Law has been connected with Socrates, Plato, Aristoteles and especially Zeno who has taught Natural Law in Athena and was given the name 'stoa' or porch where he taught. Stoa community/clan teaches harmony between human as microcosm and nature as macrocosm. Logos take over the universe and human only have to control their desire in order to live harmony with nature and its law.²

Even though Natural Law is a concept that has a lot of theories and opinions, there's a principle which unite that's an effort of human to find justice and believe that law happen to the universe. In the middle century, the criteria of truth inside Natural Law were viewed as the guidance from God, as being manuscript inside the holy book³. The reason is "we ought to obey God rather than men."⁴

In *renaissance*, Natural Law has been sinking but after that appears with the different approach, there's a secular approach. Secular approach not like Aquinas that based on vision from God to man, but rather as normative argumentation that being deduction by ratio. According to Grotius, law sources are human ratio because the characteristic that differentiate human with another creature is intellect ability so that the intellect ability guide human went through the life. Ratio according to Grotius is a mind sovereignty that begins and source of thinking. He concludes that Natural Law still exists even though no God, it's because human ratio include to Natural Law. In short, Grotius intends to free the law from theological (*to emancipate jurisprudence from theology*).⁵

Even though two approach from Natural Law (Theological and Secular) in some ways have different approach, but both of them believe that laws occur to the universe. Positive law justifiable based on value from the rules; whether the contents of it appropriate with ideal law where's the position being supposed above Positive law. The consequences, when Positive law opposite with Natural Law principle or the law is injustice/unfair, Positive law unworthy to call law because it has experienced law decomposition (*lex iniusta non est lex*). As Augustine said "A law that is unjust seems not to be a law".⁶ Because of that, when the judge make decision about lawsuit must be consider justice in its verdict.

The powers of Natural Law demand that positive law that was made by human always accountable its validity on moral principle. So that, Natural Law theory is a "transcendental control" toward the possibility to manipulate law for the sake of the ruling class. Validity of Positive law not only based on the authority of the maker, but also must be seen which the contents appropriate with the principle inside Natural Law. Actually, the strength of Natural Law is also the weakness.

There are any objection towards Natural Law theory, all the standards and criteria of the truth inside

¹ Soetandyo Wigjosoebroto, *Konsep Hukum, Tipe dan Metode Penelitiannya*, p. 3.

² The thinking of Natural Law that's not tight actually has been long time pioneering, long time ago before Socrates era, such as Anaximander, Phytagoras, Heraclitus, etc. look, Howard P. Kainz, *Natural Law: An Introduction and Re-examination*, Carus Publishing Company, 2004, p. 1-12.

³ Look, Theo Huijbers, *Filsafat Hukum Dalam Lintasan Sejarah*, Yogyakarta : Kanisius, 2008, p. 39-40.

⁴ Look further, Thomas Aquinas, *Summa Theologiae*, translated by R.J. Henle, University of Notre Dame Press, 1985.

⁵ Brian Tamanaha, *General Jurisprudence of Law and Society*, Oxford University Press, 2006, p. 21.

⁶ *Ibid*, p. 17.

Natural Law is abstract, because it can't be proven right or wrong in an empirical way, so Natural Law theory always find the justification from intuition, idea, or dreams that being held by certain philosopher. Hang up the validity of positive law on abstract principle of course can blur out the certainty of law. If judge, attorney and advocate dissent about justice, how's the solution? Who has the authority to decide which right opinion is or appropriate with moral-justice principle?

2.2 Bid up the Certainty, Leave the Justice

The weaknesses of Natural Law then open the gate to another law trend to critical. Law Positivism then had born as antithesis towards Natural Law. On the development, Law Positivism theory grow up especially on the glory era of natural knowledge, the law scientist need law knowledge has character as natural knowledge that can be predicted and make sure.

The viewpoint of Law Positivism that formalistic disappear the possibility to ask whether the norms that being law (positive law) fair or not. However is bad as long as that norm has become positive law, judge and the people dependent on it. Law Positivism in the progress has been used by fascist regime. The basic weakness of Law Positivism is separated law with moral. The problem is how if law that should be protecting the people towards the crime precisely used to legitimate the crimes? How if positive law has been used by the ruling class to legitimate the action that contradictive with the concept of fair and human basic dignity? Whether the judges still take the position as funnel of rules/laws?

Law Positivism that give priority to the rule of law compare to justice, disappear the possibility to ask whether norms that being rules (positive law) is fair or not. The judge whom character is positivist-formalist doesn't need think too hard to find the basic law because there's been a norm of law that exist and ready to use as a major premise. The judges only need to collect the rules, to sort or to organize positive law that will be conforming to the facts.

In syllogism, norms are being categorical as major premise and facts being considered as minor premise; because norms being positioned as major premise, so the norms considered wider than the facts. Major premise positioning as "orthodox concept" that in an axiomatic way can cover, included even anticipated all people problems. All the facts are accommodated inside norms, so that norms inside major premise tied up and absorbs the facts whatever the problems are.

On the other way, fact (minor premise) that considered smaller than norm can't influence the existence of major premise because major premise (norm) don't need explanation outside itself. Minor premise (fact) must be following the rules (major premise). So that the fact will be ignored if don't logical/reasonable and can't fulfill the element inside norm of law. On this point, major premise feels "enough to itself". The facts that can't be verified on major premise considered as "anomaly"; the fact that considered as "anomaly" then being reduction.

Even though syllogism important and needed, law logical reasoning is not as simple and as linear as that; the rules that considered as major premise always need interpretation inside concrete factual context. Besides that, the dynamics of life always bring up new situation that towards them never occur explicit rules which can be implemented. That's why rules of law always experience the formation and re-formation (with interpretation). Minor premise is juridical fact, the fact from law case, it's also unclear, must given perception and qualification inside relevant rules of law context, after that being selected and being classified based on law categorical; so juridical fact isn't "raw material", but the fact that has been interpreted and evaluated.¹

If we read the rules, the first thing to read is regulation, the section. The problem is when we stop to read the rules as regulation it can be bring up the mistake because of principle, spirit, and purpose that underlay the regulation is being forgotten.

What does it mean? Law must be inside the condition that can be read again (interpretation). Constitution, rules, etc must have to be read again, it can't be absolute meaning towards that. The problem is, interpretation inside syllogism just like inside an iron cage because the silent (conclusion) actually "has been there" inside major premise. The court construction that seated the side whom contradictive, as if the side dispute on finding truth, but actually they don't dispute at all because they must be adapt the truth concept, major premise. Initially like logical dispute but major premise always affirmation itself so the one that call "logical" change to "ideological"; when its change to ideological, it tend to mix the declaration, fact and truth. If so, is it worthy Law Positivism considered the truth of law as objective truth?

2.3 Law and Justice: Calculable and Incalculable

Hit and run case above is a special laboratory that law not identical with justice. We can't pull clear and certain limit between law and justice, but we can describe that justice is a concept that pass by law so justice can't be sure inside law formula. Law without justice isn't worthy called law but justice without law is still

¹Look, B. Arief Sidharta, Struktur Ilmu Hukum Indonesia, Fakultas Hukum Universitas Katolik Parahyangan, 2008.

justice, even though “deficit”¹ justice. So justice is unlimited, it can’t be limited on any definition or being reduction on any law, or being derivation on something certain.

Gustav Radbruch said that good law is when law loads certainty, benefit and justice. Even though the three of all is a law aspiration (*Rechtsidee*), but each value has substantial demand that different between one and another, so that the three of all has potential to be in conflict².

In the middle of stressful between law and justice, Gustav Radbruch gives basic contribution about law aspiration: certainty, benefit and justice. Radbruch thinking about three law aspiration has been accepted by law circle; but between certainty, benefit and justice never compatible, face to face, contradictive, so how’s the solution? Radbruch session about law aspiration must be understood critically with put it on the background of modern law. Modern law cause rationalization in law, law must be predicted and counted, open the gate to the problem entry that never been exist before, rule of law³.

Justice values have been talked traditionally before modern law era, even since thousands years ago; whereas law certainty since modern law appears, especially since law has been positive⁴. In other words, law certainty connects with law problem itself, not about justice. About the connection between law and justice, Derrida in “*Force of Law: The “Mystical Foundation of Authority”*” questioning whether fair is legal or across with legal? For Derrida, justices play in legal area and also across legal area. “...deconstruction takes place in the interval that separates the underconstructibility of justice from the deconstructibility of droit...”⁵.

“Law (*droit*),” said Derrida, “not justice, law is calculation element, whereas justice is *incalculable*”⁶. Law always limited itself inside syllogism calculation, exactly makes justice far away because justice isn’t logical and can’t calculate. Its beggar description, law is a ‘*differential force*’, an expression from authority relations. But not with justice, justice is meta-judicial problem that can be understood with refer to *self* and *the other*. Nothing absolute definition about justice, there’s only “unbroken/continuity” from particular justice in every situation and connection between individual.

That’s why Derrida questioning justice as a *virtue*, just like Natural Law, if justice as an *ultimate virtue*, as a highest kindness, so the justice is definitive; it’s like universe, whereas fair and unfair always exclusive in every situation and individual. Fair (and unfair) is a delivery process (*address*) in one process that being language mediation inside certain moment; whereas law was operated as general principle, “a delivery (talk)” said Derrida, “always singular (particular), idiomatic, and justice as law (*droit*) always refer to *generality* from rule, norm or imperative-universe”⁷.

According to Derrida, justice as an experience from the impossible; the questions appear: how can the experiences that impossible is being suffered? Derrida said, “*It is possible as an experience of the impossible, there where, even if it does not exist (or does not yet exist, or never does exist), there is justice*”⁸. The meaning is justice as an impossible experience, whether the justice exist or not exist, or isn’t experienced yet. Justice according to Derrida is a continuity finding experience that need new and fresh interpretation and also continuity postponement as a characteristic of “unbroken/continuity”.

*To be just, the decision of a judge, for example, must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case. No exercise of justice as law can be just unless there is a “fresh judgment”*⁹.

Justice is always in front of (pass by) law and provokes law to get closer. To get closer with justice, the judge isn’t enough with only follow the sound of rules, but rather to do “*fresh judgment*” or postpone (*suspend*) one meaning or *reinvent* law on certain moment.

III. Conclusion

Modern law always reaches certain tendency. Law certainty already becomes ideology inside law of live. Since law certainty as a final purpose, so law duties are finish if they found the certainty. Law can’t get closer to the purpose (justice), law go away because law certainty become its purpose.

¹Therefore, in order to justice isn’t “deficit”, it needed law as a “bridge” to “get closer” to justice. Between justice and law occurs relevance/dependent, event both of them not identical.

²Gustav Radbruch, *Five Minutes of Legal Philosophy* (1945), translated by Paulson dan Stanley L. Paulson, Oxford Journal of Legal Studies, Vol. 26, No. 1, 2006 p. 13–15.

³Look, James Bernard Murphy, *The Philosophy Positive Law* (Foundations of Jurisprudence), Yale University Press, 2005.

⁴Jacques Derrida, *Force of Law: The Mystical Foundation of Authority, in Deconstruction and The Possibility of Justice* (edited by Drucilla Cornell et.all) Routledge, 2002, p. 15 –16.

⁵ Ibid

⁶ Ibid, p. 16-22.

⁷ Ibid, p. 17

⁸ Ibid, p. 15

⁹ Ibid, p. 23

Justice is an experience; experience is a journey, journey belongs to particular people, not for all people so that it can't be generalized. All the people in the world are impossible to do the journey together, although it can't be "*incommensurable*".

Searching of the truth as a scientist activity and searching of the truth inside law practice, contained certain different that can't be ignored. Law philosopher for example, can philosophize unlimited about all the possibility of theoretical solution towards certain law problem, whereas in law practice, the judge must give law verdict over a particular period. At last, in law practice, justice searching "limited" when all formal procedure go through because all the parties can't submit law effort again. But of course we can't shrug the shoulders while say "that's law". The procedure shouldn't be bear down the effort to find the truth and justice. Isn't truth as a *fallible* that can be criticized, tested, reconstructed, even being mistaken with new possibility that can't be predictable before?

This point make us aware that law isn't identical with justice, even maybe the justice can be "approached" from legal side. If the law is assumed same with the justice, so it contained the consequences of justice finding/searching outside law will be stooped. Instrument (law) can't permit to occupy the purpose (justice).

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