Chapter IV: New Paradigm of Law & Development in Indonesia

Chapter IV

NEW PARADIGM OF LAW & DEVELOPMENT IN INDONESIA

In this Chapter IV, I will discuss issues relating to the question: ***"Can new paradigm of Law and Development theory be developed in place of the old Law and Development discussion?"; Targets or Goals; New methods and the theoretical framework to activate the role of law in Indonesia; and constraints and the limits of the new framework.*** However, in the first place, I need to insist that I use different approach and paradigm from those commonly adopted by other books of "Law and Development", which put more emphasis solely on "Law and economic" approaches. As an expert in Sociology of Law, I focus myself more on an approach that is sociological-empirical. Therefore, this approach may be hoped to enlarge the insights into studies of "Law and Development".

I could do nothing but to initiate the discussion of this chapter with an unhappy opinion about the present Indonesian condition. J.A.C. Mackie (in Chris Manning & Peter van Diermen, 2000: xxiii-xxiv) suggests the existence of " four separate crises" challenging Indonesia nowadays:

> " Indonesia is currently caught up in the toils of four major crises, not just one, which have separate but interlinked social and political dynamics. Briefly, these are:
>
> * the East Timor crisis, which is currently dominating the news headlines in Australia and elsewhere ,although it is by no means the most pressing concern of Indonesia's leaders;
> * a looming crisis of national unity or territorial fragmentation, in which the threat implicit in Aceh's demands for a referendum on separation, analogous to East Timor's, is likely to prove far more serious and difficult to resolve than the loss of East Timor;

* the crisis of democratisation and completion of the transition from the autocratic Suharto regime to one which will be more responsive and accountable to the people ,in which the wealthy power brokers of the old regime (the now discredited 'New Order') will not be able to make a comeback in some other guise,and stymie the drive for effective political and social reform; and
* the economic crisis of 1997-98, from which there has been little sign of a lasting recovery so far, and some alarming indications of a possible turn for the worse."

In fact, beside the four problems mentioned above, a problem that is no less critical and that leads to a turbid climate to carry out development in Indonesia is "the threat of national disintegration", especially the lively demands of independence and to detach from the Republic of Indonesia, staged by both the peoples of Aceh and Irian Jaya (that they themselves call West Papua).

Despite my agreement with the four problems suggested above, in my opinion, however, there is a serious condition leading to increasingly difficult crises to overcome in Indonesia. What I mean is a condition termed as "transplacement", namely a combination between the new regime and figures of the previous authoritarian one. Despite the fact that Indonesia is not the only country with such a "transplacement" condition, it seems that Indonesia is one of countries or nations experiencing the worst of such "transplacement" Indonesia constitutes a country which had suffered through a brutal and repressive regime (Suharto's regime) been liberated, and was obliged to cope with the legacy of that ousted system. In such a bad condition, in my opinion, "a new paradigm of the concept of Law and Development" that is Indonesia specific is required in this transitional era. In this connection, it is inevitable that those who are involved as "development agents" in Indonesia should be able to formulating a kind of Indonesia-specific "transitional justice", and, subsequently,

translating it in a concrete manner in various sectors relating to "law and development".

It is necessary to know that the concept of "***transitional justice"*** came to surface in March 1992, when some fifty participants from twenty-one countries gathered in Salzburg, Austria for a two-day conference organized by the New York-based Charter Seventy-Seven Foundation.

What constitutes a complicated problem for a country experiencing the "transplacement" condition such as Indonesia presently ***was to strike the proper balance between a whitewash on the one hand and a witch-hunt on the other.*** Or, in other words, in countries undergoing the radical shift from repression to democracy, this question of transitional justice presents, in a very conspicuous manner, the first test for the establishment of real democracy and the rule of law, the very principles which will hopefully distinguish the new regime from the old. Especially for Indonesia, as I have suggested, how best to highlight the division between old and new government, so as to instill public confidence in the latter. This was a key issue to initiate a successful development in Indonesia. Without the recovery of public confidence in the government and "law enforcement", it is impossible for Indonesia to initiate its successful development, including the development of law.

Any new regime who defeats or ousts the old regime always adopt a new term for their regime in question, such as ***dejuntafication*** in Argentina, ***denazification*** in Germany after Hitler, ***defascistization*** in Italy, ***decommunization*** in post-communist Russia, and ***reformation era*** in Indonesia after Suharto and Habibie. According to Kritz (1995), they all express the same attempt of a liberated society to purge the remnants of its vilified recent past. It is in this connection that the strong political pressure for victor's justice in dealing with those who served the repressive regime, and the need to demonstrate a separation between the old and the new governments, may call for immediate and harsh retribution against a large number of individuals. In Indonesia, the trials of Suharto, his family members, and his cronies, constitute concrete examples. Gus Dur's government has appeared to use transitional ways in the settlement of the case of the former President Suharto, as expressed by Gus Dur's statements promising to give him "grasi" (clemency granted by head of state) after judicial decision of guilty, provided that Suharto hands over most part of his wealth (suspected to be obtained illicitly during in power, formerly) to the state. Efforts Gus Dur has expected to be in

accordance with the idea of "transitional justice": to strike the proper balance between a whitewash on the one hand and a witch-hunt on the other –have, due to the premature time of his promise of giving amnesty, ultimately, generated criticisms and protests among reformers truly desiring the supremacy of law to be materialized consistently, indiscriminately.

In my opinion, the first thing to do in legal education—in this case, law faculties in Indonesia, especially the postgraduate programs of legal science (S-2 and S-3) that serve as the ***"spearhead"*** ("**ujung tombak")** of legal development in Indonesia—is **"legal thought reform"** from the present thinking that is overly legal positivism to one that is (or will be) more sociologist-realist. This because in reality, positivism thoughts- ones that stick out the mere formal-procedural aspects—have broaden "the state's law" or "bureaucratic law" (or "positive law") from the sense of justice of people.

For example, Indonesia the world considers to be **the third most corrupt country**, in reality (in terms of positive law) has no corruptor, because in any corruption cases, the judges—who have no insight of their people "sense of justice of" –still always give acquittal decisions to the suspects of corruption cases. For the positivist, one can be labelled as a corruptor just after the decision of the judge states so. Although some one has "stolen" and "robbed" the money of the state and peoples, if the judge decide that the person is not guilty, according to the positivism paradigm the person is neither a robber nor corruptor. With such phenomena, all of us indeed understand how dilapidated has been the judicial world in Indonesia. Therefore, if the truth is to be based solely upon these corruptive courts considered by Indonesian peoples to be disrupted, it is certain that law ("positive law") would never been in touch with the genuine truth. If what occur are the above-mentioned phenomena, then, my question is: **Is man for law, or law for man? The right answer is, of course, law for man.** So, when law is incapable anymore of serving the community's sense of justice, then, such law should be abandoned and replaced by one that is more just and moralistic.

The Indonesia-specific concept of "Law and Development" for the present time is to replace the over-positivist paradigm with one that is more realistic and moralistic. It should be understood that the present condition of our law in Indonesia is already "abnormal," demanding an "abnormal" solution, too. In the positivist's view, "the world of law" is a world full of order, despite the fact that it is imply on the contrary, especially the real condition in Indonesia at present. For example, as lecturers at

faculties of law, we are actually, as termed by Satjipto Rahardjo (2000) in a dilemmatic position: ***teaching order finding disorder.***

The legal idea be getting *"legal positivism"* might not be separated from the emergence of modern states around the late eighteenth century and early nineteenth century. Before the birth if ***"legal positivism"***, societies used law called as **"interactional law"** or **"customary law"** (in Indonesia was called ***"Hukum Adat"***). On the contrary, positivism is laden with documentation and formalization of law in form of ***the statutory law*** and ***bureaucratic law*** (borrowing the terms of Roberto M. Unger, an exponent of "the Critical Legal Studies Movement" in USA). In the positivism legal science, law as a complex regulating institution has been reduced to something that is simple, linear, mechanistic, and deterministic. In other words, positivism has made quite excessive simplifications. I am of the opinion that law is built on human relations that, essentially, of ***"melee"*** nature (the term used by Charles Sampford 1989). For Charles Sampford (1989:223), there are three characteristics of law, namely :

> "First, it sees law as made from the same building blocks-social relations between individuals in all their variety and complexity and especially asymmetric tendencies. Many, especially persuasive, legitimate authority and value-effect relations involve rules which provide reasons for action at one or both 'ends'. But the rules will not necessarily be shared between those at the same ends of similar relations or at the two ends of a single relation. Second, it sees law as subject to the same forces and tendencies as other parts of society, showing the same centripetal tendency to become partially organized into institutions, the same centrifugal tendencies to conflict and disorder. Third, law, as part of the social melee, is both disordered by its conflicting relations with other institutions and adds to that disorder (where functionalists saw the legal sub-system as a microcosm of the larger social system, the legal melee is seen as a microcosm of the social melee). As such, it reinforces the image of law as disordered. It appears as evidence that a part of society is disordered—and also a further reason why the rest of society is likely to be disordered (because the effects of law will tend to make it so)."

We should never disregard the political context tainting the emergence of modern states in the nineteenth century. What I mean was the political atmosphere of liberalism. Because the focus of liberal thinking is individual freedoms, then, it is logical that positivism has been, historically, born into the liberal atmosphere; it has not been designed to think of and to provide broad justice to peoples. The legal system, in the positivist paradigm, is not made into being to provide justice to society, but simply to protect individual freedoms. Therefore, legal systems, that put their emphasis on individual freedoms rather than look for the truth and justice, have "claimed many casualties" both in their motherlands (the US and European countries) and, as I have just illustrated, in countries that relatively recent in adhering them – including Indonesia on the base of the "concordance principle" put into effect, formerly, by the Dutch colonial government. On the contrary, **customary law** and **Islamic law** were different; they stick out the aspect of concrete acts (behaviours). The ***Sunnah*** as the most accurate interpretation of the Al Qur'an (Moslem's Holy Book) is clearly the record of concrete behaviours exemplified by Mohammed SAW, and they were casuistic and contextual; non-rigid and non-formalist.

Therefore, in my opinion, ***new paradigm of law and development in Indonesia***, is that: law should be pulled off the "cuff of positivism" and should be returned back to its "morality, cultural and religious roots" of Indonesians. For me, Indonesian people are more suitable to take the Japanese legal concepts and philosophies as the example rather than those of the Western nations. Japanese peoples have been renowned to be tinted with Confucianism affecting their behaviour in form of their attitude to respect the effective social order. In other words, Indonesia is more suitable to adopt the "cultural approach" as performed by the Japanese society, rather than the "juridical-formal approach" as has been practiced so far.

Firstly, if Gus Dur's government is really willing to materialize the "supremacy of law", he should oust all (without exception) law enforcement officials I call "dirty broom figures". After that, the next step is revising long-standing laws and adapting them to the "living values" of society. Law enforcers (policemen, lawyers, attorneys and judges) should not use "legal positivism paradigm" on the cost of ignoring the "the sense of justice of people"; instead, they should put society's sense of justice as the priority than things of merely procedural-formal nature.