

INTELLECTUAL AWARENESS IN JUDEX JURIS CONTRADICTION AGAINST THE IRREGULARITY OF IUS CONSTITUTUM AND IUS CONSTITUENDUM

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Abstract: *This research will unmask the essence of a more comprehensive legal context by reviewing a Supreme Court (MA) ruling, Cassation Decision Number 1555 K/PID.SUS / 2019. The verdict is contradicted by ius contitutum and ius constituendum. The case that appealed against the alleged corruption with the issuance of the issuance of the BLBI Declaration Letter to the Indonesian National Trade Bank conducted by Syafruddin Arsyad Temenggung was acquitted by the judges of the Supreme Court, who had previously been sentenced to a high court criminal sentence of 13 years in prison and a fine of Rp. 700 million and 3-month confinement, which later sentenced Syafruddin to be increased to 15 years in prison and a fine of Rp.1 billion with 3 months subsidiary confinement on appeal. This research is classified as normative legal research, by inventorying primary and secondary legal materials as well as approaching legal concepts which are then drawn conclusions and presented theoretically. In this study it is more interesting that the Supreme Court judges are more likely to protect public officials from the bondage of the law.*

Keywords: *Supreme Court, Bank Indonesia Liquidity Assistance, Contradiction, ius contitutum, ius constituendum.*

1. INTRODUCTION

The rule of law as a discipline of rules or rules has a general nature and tends to be normative. In the Dutch legal literature, law is called "objectief recht" and in Dutch legal language it is also divided into two, namely "objectief recht" which means law and "subjectief recht" which means rights and obligations. (W, 2014) Thomas Hobbes sees law as a basic need for individual security. (Bernard L. Tanya, 2013) Is this the case, special attention to ethics in the court of first instance, appeal, cassation feels increasingly relevant and urgent to be able to achieve a legal system that can provide security for each individual. There, it is not only the fate of one's "prisoner" humanity at stake. But also, the quality of humanity of a law enforcer is at stake. (M. Sholehuddin, 2014) That is because in carrying out and obeying the rules of legal discipline as an important matter to note. Fundamentally the norms and rules of law that form the basis for the fate and the spirit of the law itself, the community, law enforcement officers, prosecutors, judges,

lawyers and the government itself must understand the legal domains that act as instruments of the path of good.

The occurrence of ethical irregularities in the trial of the legal method which includes exceptions and fraud. Against fraud, legal actions can be held 1) Juridical, which includes (a) civil action; (b) criminal action; (c) enforcement of the state administration; (d) enforcement of the state system; 2) Extra-juridical, as stated by supporters of the theory of "social defense" which states, that in certain incidents of misappropriation the community is guilty. (Soerjono Soekanto, no date) It is clear that in the deviation of the rule of law a claim can be held in accordance with the applicable legal domain. In the struggle law enforcement, the court arena is certainly not as easy as understanding the study of existing theories, it is far more severe than its application which is still colored by cheating in bribery, playing political law, bargaining over decisions with a number of enforcers law, etc. Of course all of that is considered bad for the image of the law itself in the eyes of the public so far.

In 2019 a contradiction in the *Judex juris* (appeal) Decision issued by the Supreme Court, the Cassation Decision numbered 1555 K / PID.SUS / 2019 dated July 9, 2019 was decided by the Panel of Justices chaired by Salman Luthan and consisted of Supreme Court Judge Syamsul Rakan Chaniago and Mohamad Aski. (Aida Mardatillah, 2019) Being a concern of academics and legal practitioners who had previously been convicted of this case by the Corruption Court, chaired by a panel of judges Yanto, with a sentence of 13 years imprisonment and a fine of Rp. 700 million and 3 months confinement confinement. Not stopping there then on January 2, 2019, Syafruddin's sentence was increased to 15 years in prison and a fine of Rp. 1 billion with a 3-month confinement in appeals.

The contradiction of dissenting opinion begins to be seen with the judges' decision at the *judex facti* level, each of which has a different perspective, meaning that this decision is still not fully ended in the first level verdict, it can be seen from one of the panel of judges who wants an effort to submit an appeal. . Not only that, interestingly the contradiction in seeing this case from legal experts considers that this case is not a criminal act of corruption, but in the scope of civil law, some also say that this case falls within the scope of state administrative law.

When viewed from the standpoint of the legal system schematically, three different systems of law enforcement can be distinguished, namely: the system of civil law enforcement, the criminal law system, and the administrative law enforcement system. (Sudarto, 2006) In line with that, there is a series of sanction systems that have a different scope for both civil law, criminal sanction systems and administrative legal sanctions (state administration) systems. Of the three legal systems, each of which is supported and implemented by a state apparatus or law enforcement apparatus that has its own rules and domains.

The problem that is currently faced by us, especially with academics, researchers and legal practitioners, is that ironically a verdict handed down by a judge, why is that? A ruling without regard to justice, is the same as eliminating the human future and legal image. Even more than that can cause greater chaos. Hugo de Groot, a Dutch philosopher once warned that "*vbi iudicia devicivnt incipit bellvm*", meaning "when a ruling does not

provide justice, then the war begins. (Tumpa, 2015) To collaborate this statement, this section is ideal to be studied more deeply, so that the discussion can focus on the independence of judicial power can be seen and felt more comprehensively.

In a paternalistic culture, a judge can become "uncomfortable" and "feel uncivilized" if he has to defeat the government or his officials in a case. (MD, 2017) Meaning: judges domiciled as public servants find it difficult to be neutral and independent in cases involving the government as one of the parties. This is marked by the existence of a paternalistic culture that is familiar with the term understand fatherhood.

2. MATERIALS AND METHODS

To note that in the literature of jurisprudence approach to problems is determined and limited by the scientific traditions that developed in this era. This research is a normative legal research carried out by examining various legal literature review materials (commonly called secondary data). The approach taken in this research is normative (dogmatic) including the approaching statutory or legislation-regulation approach, conceptual approach, history approach, and comparative approach. The conceptual approach is carried out by examining the overall legal framework that applies to be reflected and theoretically argued based on the basic concepts of law. To complement the above approach, it can also be used to study non-legal science. (Prasetijo Rijadi, 2017)

3. RESULTS AND DISCUSSION

a. Economic Policy Instruments

In the economy there is a strong correlation between economic growth and inflation. High growth is usually accompanied by high inflation. Conversely, low inflation growth is followed by low inflation. This shows the trade-off between economic growth and inflation, and this relationship is often illustrated through the Philips Curve.

1) Fiscal policy

Fiscal policy is an instrument owned by the government to influence and control the economy by regulating government spending, regulating the amount of subsidies given to the public, or by regulating the amount of tax imposed on society. This can occur because physical policies affect various economic activities in society related to the allocation of various resources between the public and private sectors which greatly affect the stability and economic growth.

2) Fiscal Policy Implementation

Physical policies are implemented by the government directly at various levels of government consisting of provincial, district / city governments, as well as through various public business entities at every level of government. On the

demand side, physical policies can encourage economic growth through a "pump priming" policy that encourages public consumption through the "multiplier" effect, which through the "accelerator" effect can drain investment spending from the business world.

The general conclusion of the description is that in the implementation of physical policies which are basically "counter-cyclical", it is necessary to have a variety of rules that are transparent and avoid the implementation of "discretionary" policies. The implementation of physical policies based on "rules" will reduce the direction of uncertain policies so that the business climate that is less conducive due to uncertain policies can be corrected immediately.

Some rules that need to be considered so that the implementation of fiscal policy is always transparent, disciplined and prudential are as follows:

- a. Revenue follows functions. An illustration of this rule if applied in reverse is if the regional government which has been autonomous in advance demands an increase in revenue without being able to clearly define what tasks will be carried out.
- b. Fiscal sustainability. To assess this sustainability, the rule that applies is: growth in the ratio of the country's debt stock to GDP is set in such a way as to achieve maintenance of low nominal interest rates and low inflation rates (or low real interest rates) along with high GDP growth.
- c. Tax productivity. Taxation system that has high revenue productivity. This rule is known as the Tanzi Diagnostic Test. A taxation system must be structured in such a way that it has a high index number for the following: a) Concentration Index; b) Dispersion Index; c) Erosion Index; d) Collection Delay Index; e) Objectivity Index; f) Enforcement Index; g) Collection Fee Index;
- d. Tax elasticity. Types of taxes that are elastic, in the sense that the taxation system should have types of taxes whose growth is higher than GDP growth (tax elasticity of more than one GDP).
- e. High tax buoyancy. In this taxation system there can be an increase in tax revenue due to the improvement of tax administration in spite of an increase due to GDP growth.
- f. Balance. A balance must be maintained between state expenditures that are routine (current expenditures) with expenditures for investment (capital expenditures). The proportion of routine expenditure will sacrifice the state's function to provide development infrastructure so that it can increase business overhead costs, which in turn will weaken the ability of the economy to grow.

b. State / Regional Owned Enterprises Management Principles

In order for BUMN / D to be able to cultivate profits and continue to exist, and to be able to maintain its social presence and function, the BUMN / D manager must prioritize and apply the principles of good corporate governance, such as: 1) Accountable; 2) Transparent; 3) Competent; 4) Competitive; 5) Building a corporate

culture both internal and external; 6) away from unhealthy practices; 7) Independent. (Negara, 2003)

c. Justice Theory

The issue of justice, is not a new problem that was later discussed by experts, but furthermore the discussion about justice has begun since the time of Aristoteles until now. Aristoteles also divides justice into two types, namely:

- 1) Distributive justice;
- 2) Corrective justice;

Distributive justice is carried out in distributing honor, prosperity, and other assets that are considered important and can be distributed to the community and its worshipers equally or unevenly by the legislator. The principle of distributive justice places more emphasis on proportional equality.

Corrective justice, is justice that provides corrective principles in private transactions. Corrective justice is carried out by a judge in resolving disputes and providing penalties for the perpetrators of crime. (H. Salim HS, 2017) So in the role of a judge deciding a case, more emphasis is placed on corrective justice that is based on the independence of a judge's freedom in finding law that is equivalent to the form of crime committed by a criminal irrespective of that the judge's decision must be able to provide legal certainty and not neglect the rights of the accused.

d. Legal ideal

To realize the aspired law enforcement (*ius constituendum*), the judge in examining, adjudicating, and deciding a case is protected and given free and free power by the state from various interventions from any party even in the form of any intervention, as a manifestation of guarantees and ensure the impartiality of a judge except the priority of law and justice for the implementation of the rule of law in Indonesia. (Maggalatung, 2014) Can be found in Article 24 of the 1945 Constitution concerning Judicial Power. Although it is still found in practice there is a general tendency (mainstream) of judges to follow the legal positivism mindset and it is still rare to find judges who follow non-positivistic ways of thinking in deciding cases. (Syamsudin, 2011) So in that context, the legal system is needed to make a positive contribution in delivering the dynamics of a nation's legal system towards the renewal of a legal product by adjusting the changing times.

The embodiment of *Ius Constituendum* includes three things: First, reform the old law into a new law. Second, legal changes to the applicable law. Third, the formation of law. Change the old law into new law, especially when it is cooled down by all the people of Indonesia. Whereas legal changes are made by always reviewing positive laws / laws and regulations in force. The formation of law occurs when legal experts, lawyers, judges, legislators, or law teachers can understand and describe precisely the positive law itself (*Ius Constitutum*). Through legal discovery (*rechtsvinding*) the judge can also play a role in efforts to realize the *Ius Constituendum*.

Satjipto Rahardjo in "Teaching Order to Find Disorder" (Teaching Order Finding Disorder) states that the type of law arises and changes from time to time. Who's positive law or lawyer's occupy only one small corner of the map in the whole and large order. Next Soeharjo Sastrosoehardjo stated that the process of the *Ius Constitutum* (positive law) to become *Ius Constituendum* must be comprehensive, both its institutions, institutions, and their implementation / implementation. (Maemoenah, 2003)

e. Difference between *Lijdelijke Rol* and *Leidende Rol*

With *lijdelijke roll* the judge only accepts and gives decisions based on what is recognized or not and is proven or not by the parties who carry out an active role. *Leidende roll* rather than the judge who acts to lead the judicial process is the basis of H.I.R in criminal and civil cases. Closely related to the difference in the role of the judge is the difference in understanding "*materiele waarheid*" and "*formele waarheid*" although it can be said that the two differences are in pairs "*lijdelijke rol: formele waarheid*" and "*leidende rol: materiele waarheid*". The judge found the law to fill the void by using analytical thinking methods, legal constriction methods and a *contrario* method. (Hidayat, 2013)

Based on the history of the recruitment mechanism of justices there is still no one that can guarantee that the justices are truly reliable and satisfying. In the first system, the Chief Justice is proposed by the Supreme Court to the President. Although the quality of Supreme Court justices is quite good, there are weaknesses that lie in the mechanism, namely judges known by the Supreme Court who can be captured. The second system, the Supreme Court proposed by the Supreme Court to the DPR, the weakness lies in the very high political nuance. The interests of political parties are sometimes very prominent. The third system, the same as the second system, political approach has more role than individual ability. The fourth system, namely the Judicial Commission proposes to the DPR then the DPR continues to the President. If the candidate is rejected by the House of Representatives, it will give more power to the Judicial Commission and thus require more supervision of Judicial Commission. What will be the result, history will speak. (Binsar M. Gultom, 2014)

f. Upholding of the Eetic Code of Conduct and Judge Guidelines

Various kinds of legal regulations that normatively regulate the entire judicial process which in the end is still very difficult to overcome judicial corruption. According to the International commission of Jurists, Judicial corruption is the highest type of corruption because it destroys part of the pillars of a democratic government. (Hormati, 2017) That is because the markers in the courtroom are still fertile, especially in the integrity of a judge who is seen as a representative of God in determining one's fate so that the need for upholding KEPPH is still a discussion that is still ideal for researchers, academics, and the community at large. Although there is an institution that oversees the behavior of judges, namely the Judicial Commission, it is still not enough without self-awareness for a judge who carries out his duties and responsibilities.

What was revealed by Lord Denning, it appears that to achieve justice is a matter of quality from a judge who decides and is very decisive. In criminal law, the achievement of obtaining a fair verdict requires a long struggle and a process, namely through the legal process. In the process the essence that will be achieved is to find material truth, which is a legal basis in the imposition of criminal sanctions for the achievement of a sense of justice. A fair decision can be obtained if it is handled by a judge who not only has a high personality / scientific integrity, but must also be based on the soul of ahlakul karimah. But we also need to realize that in this world there is no essential justice (only belongs to God), but rather relative justice/relative. (Indonesia, 2014)

g. Analysis of Case Verdict and Position

For the Judicial Commission, the judge's decision is not just a string of words and sentences that summarizes the process of examining, adjudicating and deciding a case, but also a picture of the personal quality, the quality of the assembly, and the quality of the trial process itself. Judges' decisions are living documents that can talk and explain many things, which can be interpreted with various interpretations. The verdict illustrates the legal paradigm, commitment, impartiality of the judge, accuracy, accuracy; it even illustrates the struggle of the humanity of the judge as a court in a case. (Komisi Yudisial Republik Indonesia, 2014) It is very clear what was conveyed by the Judicial Commission that the entire set of criminal, civil, and administrative cases of judges play a vital role as a determinant of one's fate.

1) Brief Chronology of Case Position

Decision of the Supreme Court No.1555 / K / PID.SUS / 2019 who released Syafruddin Arsyad Temenggung as the Head of IBRA (Indonesian Bank Restructuring Agency). It was the main legal consideration that stood out from the Supreme Court when granting Syafruddin Arsyad Temenggung's appeal because of the issuance of the BLBI Payment Certificate (SKL) to the Indonesian National Trade Bank (BDNI) owned by Sjamsul Nursalim which was qualified as administrative or civil error because the settlement could not be resolved. done with criminal punishment. Based on the decision, it is felt that there are many irregularities which become the main attraction to be studied more deeply in the scientific space to be described more comprehensively.

(1) Judex Facti Perspective

The perspective illustrates that the consideration of the Supreme Court which states that judex factie does not consider the aspects of emergency and occasional demand that encourage the chronology of the birth and formation of IBRA as delegated legislation based on Article 37A of Law No. 10 of 1998, which then has reason to be accepted as one of the solutions that cannot be avoided by the Government to solve the BLBI problem.

(2) *Judex Juris's perspective*

That the *judex juris* consideration above is seen from the value (value) wanting to place criminal sanctions as a final instrument (*ultimum remedium*) and not vice versa (*premium remedium*). In terms of utility, the *judex juris* consideration provides legal protection to public officials whose duty is to carry out banking economic recovery to take concrete steps that are urgent so that the monetary crisis does not penetrate into other economic pillars. (Isman, 2019) The Supreme Court believes that the legal policy model through banking restructuring from the perspective of positive claims is an efficient policy so it should be maintained as a basis for all parties related to IBRA to comply with.

4. CONCLUSIONS

That the position of a judge is aware in deciding a case is a determination of one's fate in showing the legal authority itself, and in teaching order to better understand the complex legal reality of the embodiment of *ius constitutum* and *ius constituendum*. The judge's reasoning in finding the law is demanded to be able to create a balance between the act and the punishment. The jurisprudence that should be the source of reference for the next judges in deciding a case will be a path that misleads the next judges when in a ruling not in accordance with current law will also be far from the law that has been aspired so far.

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