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Influential Flows of Legal Philosophy to Jurists Thoughts

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Abstract

This paper analyzes several flows of legal philosophy that predispose the thinking of jurists/lawyers. The legal flows include law of nature, classical to modern, legal positivism, sociological jurisprudence and flow American legal realism. In detail, it can be concluded that thus far in Indonesia the dominance of the flow of legal positivism is still quite influential on the thinking of the jurists and legal practice. This study was conducted using normative legal research method. Conceptual approach and statute approach to law were used in collecting and analyzing data of this research. In the data analysis results, it was found that there are various flows of law that significantly influence the thinking of jurists and lawyers, namely Sociological Jurisprudence, Realistic Legal Realism, The Critical Jurisprudence. Thoughts of the jurists are still developing, on the one, hand in relation to the National Law Development debates whether our choice is from the political side of law, codification, modification or unification by prioritizing customary law materials or retaining the patterns of Western law, including legal justice concepts and social justice.

Keywords: Influence; Flows of Legal Philosophy; Jurists

I. INTRODUCTION

Experience, as it occurs, is chaotic and indistinct. We are able to single parts out in the shape of events and we can analyze those events into their constituent parts. A successful strategy for understanding the world around us consists in taking into account the components of an event as abstractly as possible and devising nomological generalizations to describe the behavior of such abstract elements. This is a traditional procedure of scientific investigation. It takes us away from experienced indistinctness towards differentiable abstract objects, the behavior of which can be known and predicted. Technological applications are only as successful as our ability to shield our predictions from the interference of the indistinctness out of which our objects of knowledge are abstracted (Cunha, 2018). Information systems have to be consistent and secure in presence of various kinds of security attacks and conflicting accesses to computation resources (Enokido, Barolli, & Takizawa, 2009).

Continental philosophy and applied ethics. Some of this work has had an impact well beyond philosophy, especially but not exclusively in other disciplines in the humanities and social sciences (Mackenzie, 2018). The impact of general philosophical commitments on scientists' interpretation of evidence is a central feature of anti-realist argument (Wright, 2017). Legal positivism believes in the strict separation of what is (analytical or expository jurispurdence) from what ought to be (normative or censorial jurisprudence) and considers the former the preoccupation of legal ''science'' (Gangolly & Hussein, 1996)

Conventional wisdom holds that analytic philosophers eschew the history of philosophy, show no interest in the ideas of their forebears, and see themselves as seeking timeless truths through logical analysis. Many analytic philosophers dismiss the history of their endeavors as irrelevant to those endeavors. Many historians find little to interest them in the technical arguments and scholastic disputes of analytic philosophy. Worse still, analytic political philosophy might appear to be even less promising a subject for historical inquiry than analytic philosophy more generally (Bevir, 2011). Just as philosophy

begins from everyday experience and investigates our concepts of space, time and matter, clarifying and changing them along the way, so too does physics (Brading, 2015). While scholars have examined shifting conceptions of the book of nature in the sixteenth and seventeenth centuries, and have devoted considerable attention to the linguistic thinking of natural philosophers in this era, their attitudes toward cryptography have rarely been a focus (Matthiessen, 2018).

Philosophy of Law is one branch of philosophy that reflects the fundamental and marginal problems of legal phenomena. In the development of legal thought since the days of Ancient Greece, flows of law transmitted to Europe through the medieval Romans under the Empire Byzantine and the Emperor Justinianus[1]. Histories also noted that the Codification of Roman Law, both codification of state law called *Ius Civilis* and the codification of Canonical law *Ius Canonici* (Church Law), has established the legal thoughts dominating the minds of European societies in the following centuries. Briefly, resonating Western thought until the millennium, the 21st century to the present lies in that "law is the machine of government and power that must be lawful according to the rule of rules concerning law enforcement. In those context governmental organizations including law enforcement organizations must fit rationally. Therefore law should be based on ratio (common sense). Law as a science requires the research of the foundation of existence (*grondslagen*) and methods of research from the Law Science, so the contribution of Philosophy of Law is essential[2].

The foundation of existence and methods of studies on Law Science was born from the flow of Philosophy of Law of nature (the oldest law) followed by other flows of law philosophy which predisposed the development of Law Science and juristic minds of jurists throughout the world. In the following section, the influence of the flows of law philosophy on the thinking of the jurists is analyzed, started from Law of nature up to Critical Legal Studies (CLS) growing and developing in the United States in three branches.

II. METHOD

The conceptual approach and statute approach to legislation were two approaches used in this study. Data were obtained from literature studies in the form of articles of law, theories of legal science relevant to the flow of legal philosophy, scientific studies that discuss the history of the development of the flow of philosophy law in Indonesia. Documentation was a technique used in collecting data. Qualitatively descriptive, data have been analyzed, i.e. by sorting data based on a sequence of flow of law philosophy predisposing the thinking of jurists and lawyers and by giving critical ideas to the enforcement of the philosophy of law for jurists. After data were presented, verifying or drawing conclusions was carried on.

III. DISCUSSION

The flow of the Law of Nature which rests on the mind gives birth to imperative prescriptions that law is conceptualized as moral principles and justice. The development of history records the philosophy of natural law in the middle age with its basic motive is the realm of reality and natural-human beings in the shoulders of God, which is called the pradigma of religiosity. At the beginning of the 19th century, Philosophy of Law of Nature was dominated by the natural and rational fictional flow of social contract theory with secular paradigms. Within the historical range of the paradigm of religiosity and secular rational fiction, the core of the flow of Natural Law can be summarized, namely: (i) laws based on God's and/or human rationale which is universally and eternally valid, irreversible; (ii) the law formed from rational fictions is a fundamental requirement for an orderly and just human life; and (iii) laws derived from superlative-sense rationales in terms of the laws of Natural Law (*lex naturalis*) are the source of the positive law (*lex humana*) and serve as a benchmark whether the applicable law is fair or not.

In that connection, Rosental (1940) mentions, "Law of the nature of means only an ideal of justice, an attitude of resolute faith that in the practical of law"[3] One of the weaknesses of the Law of Nature is (i) does not provide practical provisions, (ii) obedience to the law depends on the conscience of the

1. Alfred North Whitehead, *Sains & Dunia Moderen* (Alih Bahasa oleh O. Kamarudin), Nunsa, Bandung, 2005, p. 25
2. H. Ph. Visser t'Hooft, Filsafat Ilmu Hukum (terjemahan B. Arief Sidartha), UB Press, Malang, 2014, p.15
3. Samuel I. Shuman, *Legal Positivism It Scope and Limitation*, Wyne State University Press, Detroit, 1963, p. 21.

individual, and (iii) without coercion/sanction from state power[4]. The thought of the flow of the law of the nature is epistemologically viewed at the level of metaphysic-rational not scientific, unobjective but subjective and ideal-irrational, as claimed by Hans Kelsen, the follower of the Philosophy of Law of Positivism. The law must be objectively determined by a legitimate authority, ontologically in the form of norms/rules, positive law is represented in legislation. Adagium (scientific expression) asserts that no legislation without law is called "legism", the legalist-formalist view.

Legal thought of the flow of Legal Positivism had a major influence in the early 20th century. Even this flow was criticized by the study of social science, which views that there is a gap between the imperative prescriptions of the law and the social-empirical reality. The gap between law and social structure by Soetandyo Wignyo Soebroto is called "the legal gap." Criticism of Positivism of the law gave birth to a philosophical stream of law that has a sociological nuance especially in the United States shifting the legal positivymic paradigm.

At the beginning of the 20th century the doctrine of Continental European law influenced the thinking of American jurists or lawyers under the authority of Prof C. Langdell (1870) of Harvaard University. Conceptually, Lang Dell's idea is the same as the teachings of professional legalists (Reine Recthsleer) of Hans Kelsen, belonging to the flow of legal positivism. The essence of teaching with the concept of legal positivime C. Langdell called the flow Analytical/Mechanistic Jurisprudence can be abstracted, as follows:

Legal science belongs to the science of exact, having no difference from the physics that works on the basis of cuasality.

The lawyers should be able to utilize the law library, so ideally it can find a connection between legal acts as a cause that causes legal consequences. Like Kelsen, Langdel declared "justice must be excluded from the Law", because justice is ideal-irrational, its character is ideological.

The law is objective-rational because it is formed by legislators as a representation of the will of the people/citizens.

Thus the law is the norm of orders and restrictions in the back up with sanctions in legislation.

The paradigm of legal positivism is in line with the rational validity of liberallized constitutionalists. This is reflected from the adagium "every body is born to be free to pursuit its happiness"[5]. The perception of law also raises the idea of 'equality before the law, justice for all' and 'court and judges impartial' in reality is not always realized. The reason for this is the fact that in society real economic class structures can no longer be described ideally in a liberal-capitalistic society developing[6]. It turns out what is found in the field is precisely the emergence of discriminatory social life structure; the gap between the rich and the poor; the bourgeoisie and the proletariat. Even the adagium 'justice for all' actually happens contrarily, that is 'justice not for all'. Similarly, the principle of freedom of contract (freedom of cotract), it is not always able to preserve the validity of the values of freedom itself. What is found in business activities is precisely the emergence of the dominance of 'standard contracts' that position consumers in weak legal conditions.

The weakness of the flow of Legal Positivism is evident from: (i) applied law applicability that is mechanistic; (ii) neglect of social reality (das sein); and (iii) the incidence of disparities between *law in book* and *law in action*. The demand for bridging the legal gap between law in book and law in action creates an unrelenting polemic in legal discourse throughout the world including Indonesia.

Based on philosophical thought of pragmatism, American philosophers such as John Dewey sparked a reaction to legal Positivism. As a result, three main streams of the "new" Philosophy of Law flow emerged, namely the effectiveness of the workings of the law in its function as a means of social control and social engineering to the orderly management of society[7]. The three main currents of legal philosophical thought are sociologically nuanced in America, as described below.

4. E. Fernando Manulang, *Menggapai Hukum Berkeadilan: Tinjauan Hukum Kodrat dan Antinomi Nilai*, Kompas Book, Jakarta, 2007, p. 147.
5. Soetandyo Wignyosoebroto, *Pergeseran Paradigma dalam Kajian-kajian Sosial dan Hukum*, Setara Press, Malang, 2012, p. 123. Everyone is born free to pursue personal kebahgiaan
6. Ibid.
7. Ibid, p. 125

Sociological Jurisprudence

The originator of this philosophy of law is Dean of Harvard University, Roscou Pound, whose focus is on solving the gap problem between law in book and law in acaton. Accordingly, Goffery Sower states:

> "Sociological Jurisprudence is a speculation of jurists who examine in detail the structures of legal system as well as the law but the emphasis lies in the relationship of law and society, not in the metaphysics and formal logic of the law[8].

The flow of Sociological Jurisprudence is paralleled with the flow of Sociology of Law in Europe led by Eugen Ehrlich with his teaching on "living law". The difference between Sology of Law and Sociological Jurisprudence is only in the area of development. Sociology of Law develops in the realm of Sociology, while Sociological jurisprudence develops in the realm of Law Science. The core ideas of the Sociological Jurisprudence flow led by Roscoe Pound include:

> Legal Science to be able to update the legal theories so that laws that function as social engineering need to utilize the Social Sciences.
>
> The law drafted as a law in book is only a guide and a guide for judges to make decisions in any dispute, whose product is law in concreto, as a manifestation of law in action.
>
> Judges should be given wide space in any case settlement to establish just and unjust ones.
>
> Laws protect the interests of the public, the social and the individual. Therefore, a study of judicial methods is required.
>
> In the formation of nondoktrinal research law is necessary for the Act to be effective[9].

Thus, for Roscoe Pound the function of law, as a tool of social engineering, is determined by the creativity of judges rather than legislators through the instruments of the law. The indicator of the success of the legal function referred to the judge's decision can guarantee the protection of the interests of both individuals and social groups; because the theory of interest is the heart of Sociological Jurisprudence[10] the heart of interest theory lies in the Science of Sociology Law). The continuation of the Sociological Jurisprudence thought triggers a new movement in Law Science in the US known as The Realistic Jurisprudence, which in the Legal Philosophy literature is also known as the Realistic Legal Realism.

Realistic Legal Realism

There is a scientific concept of a Realistic Legal Realism exponent named Wandel Holmes known as "the live of laws as not logic but experience". This adage means that "law is not the result of the logic of the Act, but it is a prediction of what the judge determines as a judgment. In English, H. L. A. Hart, quoting from Llewellyn and Holmes saying "what the official do about dispute is the law itself. The prophecies of will the courts will do what I mean by the law"[11.]

From the point of view of Llellewyn and Holmes, the core of Regalistic Legal Realism is:

> The law is no longer relevant to be based on the Law as the original legislative authority, the "lawmakers are dead", "the judges persist throughout the ages".
>
> The judge has a very strong position based on the authority of judicial review and the interpreter of the Constitution.
>
> The judge can fulfill a judge made law function in deciding on cases if he masters the sophisticated and complex legal aspects.
>
> In the judicial process, judges use decision-making methods for disputes that include: (i) philosophical methods that have an emphasis on the principles of justice, moral principles, and

8. Geoffery Sower, *Law in Society,* Oxford at the Clarendon Press, 1973, p. 16. See I Dewa Gede Atmadja, Filsafat Hukum Dimensi Tematis & Historis, Setara Press, Malang, 2013, p.155
9. L.B. Curzon, *Jurisprudence M&E Handbooks*, Madonald & Evan Ltd, Estower, Playmouth, Great Britain, 1979, p.149
10. Alan Hunt. *The Sociological Movement in Law,* the Macmillan Press Ltd., London and Batingstoke, 1978, p. 52.
11. H. L .A Hart, The concept of Law, Oxford University Press, Great Britain, Reprinted 1986, p. 1. Free and bold translations from the author

precedent analogies; (ii) an evolutionary method emphasized in historical development; (iii) traditional methods that have an emphasis on customs and judges' experience[12].

Thus, in that space difference between Sociological Jurisprudence and Realistic Legal Realism is visible, though not a principal. Realistic Legal Realism interprets the Law as a law in abstract which prioritizes the judge's decision, while its predecessor, Sociological Jurisprudence, continues to accept the law as a guide for judges in deciding a case. In the 1970s there was a heightened resumption of the Vietnam War, the emergence of a new movement against the policies of the US Government that remained standing on the foundation of posivism-formalism. Although legally the policy is justified by formal law, the critical jurists see it as incompatible with the socio-political reality. The movement in the 1980s was known as The Critical Legal Studies, also called The Critical Jurisprudence, abbreviated CLS[13].

Critical Jurisprudence

The literature noted that there are three stages of the development of the "The Critical Jurisprudence" thought concerning practice and theory in law, through three stages: (i) in the first half of the 1970s, the CSL movement was still an early attack with criticism of classical practice and doctrine of the formalist-positivist; (ii) the second half of the 1970s, CSL movements have begun to criticize cases through the analysis of concepts and theories; and (iii) the continuity of concepts and theories are packaged in new method of legal study.

Although their thought was not yet solid, it can be observed that the core of CLS thought that is critical to the classical practice and doctrine of legal positivism is as follows: The positivist-formal paradigm on the basis that the law acts on the authority of neutral or free from political interests is not true; Idealization of law as a result of positivization of norms that have been agreed upon and must be obeyed by anyone also including by the unbelievable lawmaker (skeptic view) CLS; The law of the outcome of the agreement, whether in the public domain in the form of law or in the private realm of "contract" is neutral and can not be established by deductive syllogistic reasoning by the judicial body; Judicial bodies/judges idealized as independent and impartial independent personal institutions are myths and not reality; and Formalization of law including the doctrine of Rule of Law is only utilized to influence people's awareness to always obey a regime of power.

Furthermore, Kreuish in his book "Jurisprudence as Ideology" (1991) states that the study of CLS exponents notes the classical theories of formalist-positivist with the essence of an ideology that legitimizes the law through the process of reification and hegemony. The process of reification serves to harass legal subjects to believe in the legitimacy that the actions of the rulers are in accordance with the principle of rule of law, whereas "rule of law" is merely a concept and theory which does not manifest in practice. The hegemonic process, on the other hand, works on a legal doctrine that is used to establish an autocratic regime of power that can rule freely over the agreement of the oppressed people, yet they feel as if they have never been oppressed[14].

No matter how hard critics of CLS exponents of the legal and doctrinal practices held by formalist-positivists, they do not intend to destroy the national legal system that has been built up. On the contrary, the CLS exponent only intends to deconstruct to continue reconstructing efforts[15]. Among the prominent CLS exponents of critical thinking, Roberto M. Unger developed the critical theory in the deconstruction and reconstruction effort that was introduced as the originator of The Feminist Jurisprudence theory.

The workings of "deconstruction" take place on the basis of a reversal of hierarchy which in the original language is called the reversal of hierarchies which constructs the fact that every legal prescription always poses two opposing norms, one being preferred and displayed, while the other is not shown and not discussed. Thus "deconstruction" works to display the norms/rules of parties whose interests are unseen and unspoken[16]. As an example, the deconstruction of marriage law, if it is to be

12. L.B. Curzon, *op.cit* p. 186-188. Beryl Harold Levy, *Cardozo and Fronteir Legal Thinking with Selected Opinion*
13. Sutandyo Wignyo Soebroto, *op. cit*., p. 133
14. Soetandyo Wignyo Soebroto, *op. cit.* p. 135.
15. Roberto M. Unger, *False Necessity*, Cambridge University Press, New York, 1987.
16. J.M. Balkin, "Deconstructive Practice" and Legal Theory, Yale *Law Journa*l Th. 1987 no.4 p. 743-786, quoted from Soetandyo Wignyosoebroto, *op.cit*., p. 137.

upheld, what should be presented and put forward not only the rights of the husband but also the rights of wife "are aligned". Therefore, it must be reorganized (reconstructed) that the positions of women and men are seen as two interdependent entities, no "positions" or one governing above the other.

In fact, in 2005, Shierly Robin Letwin in the 1980s mentioned that the CLS who helped The Feminist Jurisprudence more aggressively criticized legal norms and legal structures for overthrowing patriarchal culture (male domination "over" women). Affirmed: "statute and norms that sexual discrimination should be discard[17]" This feminist movement developed globally and became a legal study of gender whose focus of study lies on "gender equity". In Indonesia, according to Agnes Widarti (2005), there are three main factors for patriarchy culture to remain strong so that gender equity is still far from women's struggle. These three factors include: The strong root of patriarchy culture is seen in its existence in custom which is still strong especially on patrilineal kinship; Religious interpretations are still colored by the nuances of meaning in the dominant position of men in social interaction, although social change has taken place in the era of globalization; and A paradoxical legal culture breeds gender inequality, primarily in the wages of female laborers[18].

Apart from that factor, in terms of jurisprudence factor, justice over gender is actually biased; there is no "fixed" jurisprudence in the field of "inheritance" in positioning women as heirs. This seems to be the case because the courts are still adopting the values of justice of indigenous communities which are a problem of particularistic justice. Next, the second CLS branch, the Critical of Race Theory with CRT's initials pioneered by the Black Movement under Martin Luther King, criticized the race issue of discrimination experienced by the black race in the field of law. The core in the CRT's point of view is as follows: Legislation and regulations that place a black minority under the subordination of white domination are contrary to human rights (civil and political rights); The law should guarantee substantive justice for minority races, not procedural justice from the doctrine of positivist-formalists; and For the sake of achieving substantive justice, the CRT is subjected to the neglect of the Rule of Law which prioritizes procedural justice.

The Critical Legal Studies Movement, which embodies the Feminist Theory of Jurisprudence and the Critical Race Theory of Jurisprudence, principally principally "sues" the validity of the hegemony of the Legal Positivism which is the foundation of Legal Sciences by formalist-positivists. Mend Ifdhal Kasim there are three main exponents representing the flow of thought of the Critical legal Studies Movement[19], that is:

First, the flow is represented by Roberto M. Unger, through his scientific work "Law in Modern Society" (1975); "The Critical Legal Studies Movement" (1986); and "the False Necessity" (1987). Unger criticized the paradigm of liberalist Positivism Law, creating dualism between conflict and consensus, generating an ontological-epistemological harmony by interpreting law as positive norms in a legislative system established only by state authorities by disregarding the law outside the law. The current orientation of Unger's thinking tends to the "radical liberalism" through the deconstruction and restructuring of positive legal norms. The process is to restore the hierarchy of women's rights dominated by men's rights to be aligned as two interdependent entities.

Second, the flow of thought represented by David Kairys inherited the tradition of Marxist criticism of the liberal law inherent in the Positivism of Law. Hence, his political view deconstructs a system of capitalism that subordinates the legal rights of the brutal (proletarian). This stream of thought is referred to as "Socialism-Humanistic", as in David Kairys's famous paper The Politic of Law: A Progressive Critique (1982).

Third is the flow of thought that Duncan Kenedy represents using the method of "eclitis" that blends structuralist, phenomenological, and neo-Marxist perspectives. This political orientation of the third currents of thought is identical to the second stream of thought: "Humanistic Socialism", inspired by Duncan Kenedy's scientific work entitled Form and Substance in Privat Law Adjudication (1979).

In the history of legal thought in Indonesia, since the colonial legacy of the Netherlands has been

17. I Dewa Gede Atmadja, *Filsafat Hukum Dimensi Tematis & Historis*, Setara Press, Malang, 2013, p. 185.
18. Agnes Widarti, Hukum Berkeadilan Gender: *Aksi-Interaksi Kelompok Buruh Perempuan dalam Perubahan Sosial*, PT. Kompas Media Nusantara, Jakarta, 2005, p. 75.
19. Ifdhal Kasim, *Jurnal Hukum Wacana*, No. 1 vol. VI/ Tahun 2000, p. 24.

deeply immersed in the dominance of the civil law system that belongs to the flow of legal positivism, state authorities form a very dominant law, both through legislation and regulation. In fact, historical background is reinforced by the 1945 Constitution, which recognizes and respects unwritten law (customary law) and religious law. In the colonial era, the Indonesian nation experienced discrimination including in the field of law with the enactment of classification of people under the provisions of Article 163 IS and Article 131 IS *(Indische Staat Regeling* = The Dutch East Indies). The provisions of the IS stipulate that there are three classes of people who each submit to a different law, namely: (i) the European class, including Japan subject to Dutch law; (ii) The customary law of the Chinese Foreign Eastern Class, not the Chinese, and the BW is applicable; and (iii) For the Indigenous (Indigenous) Indigenous and Tribal Groups within which the elements of religious law apply.

Proclamation of independence of Indonesia, August 17, 1945 as the period of NKRI formation as outlined in the 1945 Constitution, bringing fundamental changes including the implementation of law. Implicit implicitly is the change in the contents of the ideals of Indonesia law that has occurred namely Pancasila as 'basic guiding principle' in the implementation of law in Indonesia[20]. From this great leap, major changes in the administration of law affecting Indonesian juristic thought occurred, although the legal philosophy as well as the theoretical framework or approach used varied. The flow of thought can be sorted out like the analysis below.

A. After post-Independence (1945-1960), the influence of formalistic thinking is still strong despite the orientation of legal politics towards the formation of national law oriented towards the emphasis of ideologization based on the symbolization of customary law. Prominent figures are represented by Soepomo and Soekanto. The core idea of the two figures is summarized that for legal reform, it is necessary to realize that some of the colonial legacy laws that give rise to legal pluralism remain in force so that we are still a consumer of Western law including its thoughts. Therefore, a transformative approach needs to be adopted, namely the need for reform of the legal system based on the oldest law, but adapted to all the legal needs arising from modern life. He proposed the need for an intellectual and reflection response, as follows: The development of the Indonesian State Constitution must be based on nationality, humanity or internationalism, democracy and social justice; The new law shall have a quality parallel to the law of civilized countries, for which the codification and legal unification is necessary; Customary law in the new legal system has a function as a law as long as the rule has not been established by the legislator; and In creating a modern national law, the comparative effort of adat law with other laws is required[21].

B. In the transition period (1960-1970) there are two figures whose views need to be put forward, such as Djosutono (an expert of constitutional law) and Djojodigoeno (customary law expert). Their core idea of law can be as described below:

   1. The focus of Djokosutono's thinking is oriented on the situation faced by Indonesia at that time, namely the amendment of the Constitution to replace the 1950 UUDS. The approach is empirical, influenced by the understanding of modern constitutionalism related to the formation of the constitution. In his ideas and opinions there are two important things: (i) the Constitutional Bureau in charge of collecting the necessary legal materials need to be established. The establishment of the Bureau of the Constitution is intended to accommodate the wishes of political parties and the people (such as polls/surveys) and (ii) the 1950 Constitution needs to be amended in view of its lack of regulation on such an army position, the relationship of President and Vice President, and the post of minister of state[22].
   2. The focus of Djojodigoeno's thoughts lies in the legal reality that lives among the people of Indonesia, therefore, the approach is empirical and oriented to customary law influenced by a very strong legal anthropology. He states:

      "The word of adat law means: first, unwritten law, in that sense customary law is the opposite of

20. B. Arief Sidharta, Paradigma Ilmu Hukum Indonesia dalam Perspektif Positivis, Makalah dalam Simposium Nasional Ilmu Hukum di Universitas Diponogoro, 1998, p. 26.
21. Khudzaifah Dimyati, Teoritisasi Hukum Studi Tentang Perkembangan Pemikiran Hukum Di Indonesia 1945-1990, Muhamadiyah University Press, Surakarta, 2005, p. 179-181.
22. Djokosutono, HUkum Tata Negara, Dihimpun oleh Harun Al Rasid, Ghalia Indonesia, Jakarta, 1982, p. 10 dan p. 11.

the law of the law; second, the meaning of firmly in the word of Indonesian customary law, is as original material of Indonesian law, in that sense the indigenous law we are opposed to foreign legal material. What we call foreign law such as legal materials contained in the codification now in effect in Indonesia, such as: WvS/KUHPBW/KUHPerd and WvK/KUHD"[23].

The core ideas and opinions of Djojodigoeno on the reform of the national law are: (i) Indonesian law must be based on the legal reality living among the people (substantial customary law) because of its dynamic and plasticity giving the possibility to cultivate courts and justice, so that the value is very high; and (ii) development of law based on customary law firmly chooses to focus on legal justice[24].

C. In the New Order (1970-1990's), the orientation toward transformative law thought, there were two prominent legal thinkers, namely academic jurisprudence Moh. Koesnoe and Satjipto Rahardjo, and academic jurists as well as statesman Mochtar Kusumaatmadja. Their ideas are parsed as follows:

1. Moh. Koesnoe, a legal thinker who introduced the legal doctrine of "Pancasila Juridism", refers to the four main ideas of the Preamble to the 1945 Constitution which essentially is the Pancasila as Rechtside (legal ideology) which holds both written and non-standard written law (customary law). Relying on the legal doctrine of "Pancasila Juridism", Moh. Koesnoe put forward two fundamental views, namely: (i) from the point of view of the practical practicing rechtsbeoeffening that Pancasila as the ideals of law is the foundation that the legal practitioners in upholding the law should interpret the laws and regulations specifically derived from the "colonial law" to be returned on the basic values of the National Law of Pancasila; and (ii) from the point of view of theoretical law, it is argued that the basic values of the National Law Procedures are viewed from their legitimate juridical grounds, including:

   First, pengayoman in the sense of the rule of law creates a cool, safe, and peaceful atmosphere.

   Second, social justice, in the sense of the rule of law is the operational value of both written law and customary law in realizing prosperity for all Indonesian people.

   Third, populist, in the sense that the rule of law is a common will that is upheld by the community with the spirit of consensus-mufakat.

   Fourth, the Godhead on the basis of a just and civilized humanity, in the sense of the rule of law is a statement of high moral and morality both in the rules and in the implementation as taught in the religion and custom of our people[25].

The construction of theoretical thinking according to Moh Koesnoe identity identity The Indonesian legal system of customary law related to the people's life view generally concerns the position of the individual in the society, what a figure is, and how the individual stands for the universe. The worldview is also reflected in the established law (written law) or law formed in society; customary law purely without interference/coercion of other nations.

2. Satjipto Rahardjo, known as a figure in the Sociology of Indonesian Law, the flow of Sociology, Law is very thick in his theoretical thoughts. The core idea is:

   State by Law is a social concept, not just a juridical concept. There are several factors that show the social concept: (i) the amendment of the 1945 Constitution, social change, the foundation of Pancasila kerokhanian, developing concepts and doctrines, international factors, and geography/ demography factors; (ii) legal theorization in Indonesia can not be separated by social origin as the basis of the discovery of legal theories that have values, traditions typical of Indonesia; (iii) Sociology of the Law greatly helps to deconstruct formal-positivist legal thoughts by bringing the law into the realm of everyday reality; and (iv) The sociology of law is seen as one of the entrances to what he calls "the scientific study of the law[26].

23. Djojodigoeno, *Harapan Hukum Adat Indonesia*, Yayasan Badan Penerbit Gajah Mada, Jogyakarta (tt).

24. Vide Khudzaifah Dimyati, *op. cit*., p. 185

25. See Mohammad Koesnoe, "Nilai-nilai Dasar Tata Hukum Nasional Kita", paper for Pre-Seminar of Naional Identity Law, organized by the Faculty of Law of UII, Jogyakarta, 19-21 Oktober 1987, p. 4, compare I Dewa Gede Atmadja, *Refleksi Tentang Pancasila Dalam Memahami Konstitusi*, Speech of Purna Bakti Professor of Law Faculty Universitas Udayana, September 2014, p.34.

26. Khudzaifan Dimyati, *op.cit*., p. 186.

Among the followers of Satjipto Rahardjo, Mashab calls the legal thought of Progressive Law which is essentially a deconstruction of the hierarchy reversal of the Philosophical Flow of Positivism Law supported by formalist-positivists, which put forward procedural justice. Progressive law teaches that the law that makes people happy through progressive law enforcement requires progressive justice or substantive justice, for which MA plays an important role[27]. A progressive legal echo can be attributed to considerable attention when discussed by jurists, academics and practicing jurists.

3. Mochtar Kusumaatmadja's thoughts are influenced by the Sociological Jurisprudence (Pragmatic Legal Realism) Reflections, especially on the function of the law rather than as a status-oriented social control tool, but a development-oriented law as a tool of social engineering. Mochtar Kusumaatmadja concept of thought that gave birth to "Theory of Development Law". The essence of his view is legal reform, primarily through the Act, adapted to the values or aspirations that live in society. As the situation has changed globally, International Law needs to be given attention to the development of Law Science in Indonesia[28].

   It should be noted that the Legal Theory of Development Law has conceptually been used as the foundation of "Development of National Law" as outlined in the Guidelines of State Policy (GBHN 1973) and Repelita I (Five-Year Development Plan) which thus far governed by Law No. 25 of 2000 on National Development System, course is in the field of legal development. It should also be understood that the view of community renewal is through the Law of Development Law Theory inspired by the flow of Sociological Jurisprudence (and Pragmatic Legal Realism). This is in contrast to that in the United States where renewal of its society does not pass through the Act, but through jurisprudence (inconcreto law). The role of Supreme Court in the United States is very significant through the judicial review authority.

IV. CONCLUSION

The thinking of jurists of academic law analyzed above is only a brief description, as there are still a large number of jurisdictions of academics and legal practitioners that have not been revealed. The thinking of the jurists is still growing in Indonesia. On the one hand it deals with the National Law Development. The debate lies in whether the choice of the people from the political side of law, codification, modification or unification by prioritizing customary law materials or maintaining the pattern of Western law, including the concept of legal justice and social justice. On the other hand, in the field of problem theory we are the foundation of Indonesian Law Science which is still dominated or hegemonized by the flow of Legal Positivism that do dekontruksi with the foundation of Pancasila philosophy. This is necessary because the modern science paradigm has changed or shifted to legal studies and social studies.

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27. Satjipto Rahardjo, *Membedah Hukum Progresif* (ed. I Gede A.B. Wiranata, dkk., Buku Kompas, 2008, p.269.

28. Mochtar Kusumaatmadja, Hukum, *Masyarakat dan Pembinaan Hukum Nasional: Suatu Uraian tentang Landasan Pikiran, Pola dan Mekanisme Pembaharuan Hukum di Indonesia*, Lembaga Penelitian Hukum dan Kriminologi Fakultas Hukum Universitas Pajajaran, 1975, p. 12. The thought of Mochtar Kusumaatmadja, called Mashab Hukum Unpad.

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