

# The Handling of Cases of Forest Fire Using the Model of Progressive Interpretation of Law

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**Abstract**—The ruling of Palembang District Court that released PT Bumi Mekar Hijau on the case of forest fire surprised many groups. From the law and legislation perspective, the government has no comprehensive effort of law enforcement. Moreover, there are norm conflicts between Law No. 32 of 2009 on Environmental Protection and Management serving as the “umbrella law” and other laws, such as Law No. 19 of 1999 on Forestry. The license to clear forest by means of burning governed by the Environmental Management and Protection Law is supposed to accommodate local wisdom, particularly “Simboer Tjahaya”, the local regulation prevailing in Palembang. However, its implementation triggers regular fire in many areas. Obviously, this condition proves the powerlessness of law. Hence, as a mean of “social engineering” laws are expected to be capable of resolving those problems. Using the legislation approach, the purpose of the present study was to seek the ways to prevent and resolve the issue of forest fire by means of the model of progressive legal interpretation

**Keywords**—Forest fire, model, interpretation, progressive law

## I. INTRODUCTION

During February to August 2015 people lived under siege of haze in some regions, such as Batam, Riau and Lampung. Among the forest fire cases one preoccupying our mind was the Palembang District Court’s ruling that discharged PT Bumi Mekar Hijau from the charge of “causing” the forest fire. Most surprisingly, the panel of judges stated that “the burning of forests is not damaging to the environment since re-planting can be done” [1].

The purpose of the present study was to examine from the normative aspects the policy for the prevention and its mechanism of “forest burning” or forest fire. In order to realize a powerful law in its function as a tool of social engineering, the present study would examine which models of legal interpretation could be used by judges in handling forest fire cases.

## II. RESEARCH METHODS

As a literature review, the present study used the legislation and conceptual approaches. The former was used since the legal issue raised derived from the conflict of norms

among some of laws governing forest fire. The latter was used as a basis for developing an argument with regard to preventing and handling forest fire cases in Indonesia.

## III. RESULTS AND DISCUSSION

Several laws and regulations to be used as the analytical knives of forest fire issues are: (1) Law No. 32 of 2009 on Environmental Protection and Management (hereinafter referred to as PPLH Law); (2) Regulation of the State Minister of the Environment No. 10 of 2010 on Prevention of Pollution and/or Environmental Damage Related to Forest and/or Land Fire (hereinafter referred to as Permen 10/2010). The Permen 10/2010 governs permits of forest burning for clearing private forests and easily convertible forests by means of burning, for the purposes of farming or conversion. Meanwhile, Article 69 (2) of PPLH Law stipulates that land clearing by means of burning forests is allowed by taking into account the local wisdom of each area.

Based on the provision of Article 69 paragraph (2) of the PPLH Law, which should be the reference for legislation beneath it, it is difficult to prevent the practice of land clearing by means of burning since it constitutes the justification for local authorities to make similar legislation. The provision is apparently aimed at recognizing local wisdoms in environmental conservation. On the contrary, a conflict of norms emerges. The norm to be protected by the PPLH Law is environmental preservation, while the PPLH Law itself allows the burning of forests as a way to clear land. In addition, the provision of land clearing by means of burning is in conflict with the “spirit” of the PPLH Law itself. The “spirit” of legislation is the academic text since an academic text constitutes the findings of legal assessment and other studies of a specific issue that can be scientifically justified with regard to the regulation of the issue (Article 1 paragraph 11 of Law No. 12 of 2011 on Formulation of Legislation, hereinafter referred to as the P3H Law). Results of the study showed that burning forests damaged biological environment and ecosystems. Along this line of reasoning, law is powerless; instead of recognizing local wisdom, it is seemingly “powerless” in the face of annual forest fire when, in fact, it is

the time for law to appear to serve its social engineering function. However, it should be realized that serving the function should be done carefully so as not to cause social unrest counter-productive to the desired goal.

The present study departed from looking at the emergence of netizen's strong reaction of the acquittal given by the Palembang District Court to PT BumiMekarHijau and some legislation relating to the "burning of forests". There was a conflict of norms that would be protected by the legislation. Some relevant theories would be used to analyze the issue.

In general, environmental and forestry legislation governs the ban on burning of forests, but there are exceptions under certain conditions allowing the burning. It seems that such legislation is about to reinforce "local wisdom".

Results of the present study would be important since the model of judges' interpretation is expected to be capable of preventing the phenomenon of "forest fire".

Law in its social engineering function is therefore used to achieve certain goals (in this case, environmental preservation). Roscoe Pound stated that "law should be a viable instrument of social engineering and progressive societal change [2].

SatjiptoRahardjo stated that law as a tool of social engineering and innovation is not only used to establish patterns of behavior and attitude found in communities, but also to direct the desired goals, to eliminate habits considered no longer required, to create new patterns of behavior and so on [3]. Law in its function as a tool of social engineering needs to be applied extra carefully so as not to produce negative impacts.

Literature review showed that the provisions of clearing land by burning in Law No. 32 of 2009, serving as the "umbrella law", and Law No. 41 of 1999 in conjunction with Law No. 18 of 2013, as the sectoral law, and Decree of Director General of Forest Protection and Nature Conservation No. 152/Kpts/DJ-VI/1997, Decree of Minister of Forestry No. 107/Kpts-II/1999, Government Regulation No. 4 of 2001 concerning Control of Environmental Degradation and Pollution in Correlation with Forest and Land Fire, Regulation of State Minister of Environment No. 10 of 2010, need to be reviewed against Law No. 12 of 2011 on Formulation of Legislation.

Based on the relevant concepts and theories, including the theory of law as a tool of social engineering, local wisdom and theory of legal interpretation, with regard to handling cases requiring legal interpretation, it is essentially the judges that play the role for "formulating" the law by means of progressive legal interpretation. Judges must dare to seek and provide justice by violating the law since it cannot be fair all the time.

To address the issue of the legal interpretation model which can be used by judges in handling forest fire cases, the following analyses were conducted.

#### *A. Local Wisdom as Set Out in Legislation Relating to Forest Fire*

"Simboer Tjahaja" was a written customary law in the Palembang Darussalam Sultanate in force until the beginning of independence. It represented a reflection of the local wisdom of South Sumatra in the past that governed various matters, one of which being the procedures for controlled burning of land in the lowlands ranging from the point of burning, licensing and reporting, as well as sanctions. Articles 53 and 54 of Simboer Tjahaja mentioned the permit to clear land by burning but under condition that it must be carried out seven fathoms from the road and permitted by the authorities; it would be free of fines, despite the burnt field. Sanction was listed in Article 55: "When burning the field and then the fire jump to the forest due to lack of control, the burner shall be fined up to 12 ringgit" [4] (It is this rule of Simboer Tjahaja that is acknowledged in the PPLH Law of 2009 and Regulation of Minister of Environment of 2010.

Furthermore, results of the study showed that for low-income earners fire was the only simple, cheap and fast option to use in a variety of life-supporting activities. The study also revealed the use of fire in the traditional rice planting in wetlands called 'sonor'. Fire was used in land preparation. Wetland areas were burnt as much as possible without any attempt to control burning and rice were planted by sowing and without fertilization[5].

Based on the foregoing, "Simboer Tjahaja" that stipulates the procedures for clearing land by burning, followed by planting rice without fertilization, is no longer in line with the current developments of agricultural technology. Statement above along with the statement of Hilman that local wisdom that exist nowadays is facing challenge that threaten its preservation, so that it begins to erode by the development of technology, which has innovation adoption process and the diffusion of technology adoption. The other factor is the quantity of inhabitant, poverty, and social gap[6].

#### *B. Functions of Law as a Tool of Social Engineering*

Law in its social engineering function is intended to make changes in communities. A close scrutiny of some legislation allowing clearing land by burning and the resulting economic, social and health impacts shows the important role of law in its social engineering function. Hence, there is no doubt that the government officials, especially law enforcement officers, remain formal legalistic-minded, so that the acquittal given by the Palembang District Court to PT Bumi Mekar Hijau from the charge of forest burning can be understood.

In fact, the view that law can shape and change societal conditions has long been promoted by Rescoe Pound's well-known theory of "law as a tool of social engineering". In Indonesia, the theory was developed by Soerjono S., as quoted

by Matnuh that Soerjono S. with the concept of law which views the law as a tool of community renewal in addition to suggestions to ensure the order and legal certainty. The conception and definition of law put forward by Soerjono S. on a practical level requires the initiation of the legislators to conduct legal discovery. While Muhtar Kusuma Atmadja measures taken in social engineering are systematic starting order to direct and anticipate the negative impacts of social engineering that occurred in Indonesia [7]. from identifying the problems to finding the solutions.

Within the framework of law as a tool of social engineering, it is the community that is influenced by law to form a desired community. Thus, there is a need for planning the desired form of community. The desired form of community is realized by means of the direction of policy determined by the rule of law.

Satjipto [3] warned that in using law in its function as a tool of social engineering the issue at hand should be identified as well as possible, including recognizing the targeted community for arrangement and the values that exist within the community. In the case of forest fire, the local communities prepare land by performing sonor, namely burning the wetlands without any attempt to control the fire, followed by sowing the rice, without any maintenance, such as fertilization and so forth. Law can be used as an instrument used to consciously achieve certain goals. The process will last long enough and the effects could be the chain ones. Regulations made are expected to produce an effect of changes in rice cultivation patterns by the community using agricultural technology. Additionally, it is also expected to increase the community's income and welfare. Indeed, the role of the various parties, such as agricultural and other related agencies, is required here to provide assistance.

### *C. Role of Judges in Applying the Model of Progressive Legal Interpretation in Handling Forest Fire Cases*

Indonesian government policy adopts the principle of legality in the application of laws and regulations. It is a logical consequence for countries embracing the codification system, which is a colonial heritage of the past, despite the fact that there is no country that strictly adheres to the system of codification or common law today [8].

In legal practice, it is not uncommon for law enforcement officials and academics to be formal legalistic-minded. And so does the majority of judges in Indonesia. In fact, laws serving as the basis for judges in handling cases are expected to "explore" laws for the society as provided for in Article 5 (1) of Law No. 48 of 2009 that judged shall explore and understand the legal values and sense of justice within the society.

In the context of a Nation of Laws, as understood in terms of formal legality, the rule is the core of formal legality. Using the concept of responsive law proposed by Nonet and Selznick, Satjipto Rahardjo warned that they do not

recommend a Country emulate any Country, but rather base their legal construction on the realities of internal dynamics of the nation itself. In fact, Nonet and Selznick would like to argue that the development of each Country is distinctive or unique [9].

It is against the backdrop of the issues of pluralism and anxiety related to poor practice of law enforcement in Indonesia that Satjipto raises the idea of a progressive law. As an expert in law pioneering progressive legal thought in Indonesia, he acknowledged that the discourse of progressive law only began in Indonesia in 2002. His core idea is to place humans in the most central position in law since law is born to serve the interests of humanity, not vice versa [10]

This type of progressive laws in association with the existence of the existing and future legislation can be realized by means deconstruction of law. Deconstruction of law can be carried out by restoring the legal development strategy as mandated by the founders of the Republic of Indonesia, which was to make the pluralist living law a major source of law. One of the characters of progressive law is to give freedom to the judges to find and make law in deciding a case on the basis of the effort to reach a substantial, not formal, truth as taught by the school of positivism, and, if necessary, the judges may declare that a legislation is not applicable when it would produce disastrous law [11].

In adjudicating a case, a judge gives a ruling by means a process called legal interpretation. The "Entrance" given by the Judicial Power Law that requires that judges not only explore laws living within the community can also be interpreted as "displacing" laws living within the community. Therefore, it is possible that local wisdom prevailing within a given community no longer correspond to the current developments of science and technology and, importantly, it does not bring the maximum benefit to the community.

According to Van Apeldoorn, the one function of interpretation of laws is to connect a fact of law to the rule of law [12]. Thus, judges should match the relevant legislation to social changes in order to keep the rules of law actual capable of meeting needs in accordance with changes in communities. This is because several regulation is contrary to the norms to be protected by the Forestry Law.

The Palembang District Court's Ruling No. 24/Pdt.G/2015/PN.Plg states the entire lawsuit of the plaintiff cannot be proved with regard to either in the form of loss or damage to biodiversity. The defendant has been providing fire extinguishers in the surroundings of the plantation. Additionally, the judges also maintained that the fire on the plantation were not caused by the defendant, but the third party; thus, the defendant cannot be subject to legal sanctions. The Chairman of the Panel of Judges Parlas Nababan mentioned that the burning of forests was not damaging to the environment since re-planting can be done. The Palembang District Court's Ruling reflects that the judges as law

enforcement officers adhere to a legal positivist tenet irrespective of the conditions on the scene.

One of the uses of law in its function as a tool of social engineering may be through the judges' ruling made by means of progressive interpretation. The judges can ignore the laws and regulations that cause harm to the state, in particular the people. By means of progressive interpretation judges may negate the local behaviors and local wisdom in the event that it can be exploited by certain parties that would lead to disaster. This is in accordance with one of the characters of progressive law.

Judges, as one of the elements of law enforcement, have certainly the power not only in terms of law enforcement but also in the "making of" law. Hence, the statement of Mahfud M. D. during the Symposium on Progressive Law in Semarang on 29-30 November 2013 is true that judges should dare seek and deliver justice by violating laws. Moreover, laws are not always fair.

#### IV. CONCLUSION

The model of progressive interpretation of law should be used by judges to handle cases of forest fire. It is due to the fact that there is a conflict of norms among several laws and regulations relating to forest fire. In addition to applying laws, judges should also make laws despite the violation of law (including local wisdom), when it is disastrous from the aspect of health, ecology, and economy for the people of Indonesia and inter-state relations.

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#### REFERENCES

- [1] "The Petition Against the Palembang District Court's Decision on Forest Fire was Launched," 2007. .
- [2] R. Omote, "Law : A Strategic Tool for Social Engineering," Africa, 2015.
- [3] S. Rahardjo, *Law Rahardjo*. Bandung: Citra Aditya Bakti, 2000.
- [4] S. Widagdo, "The Culture of Managing Land with Burning Already Exists in South Sumatra," 2014. .
- [5] U. Chokkalingam, "Fire, Livelihoods, and Environmental Change in The Middle Mahakam Peatland, East Kalimantan." .
- [6] I. Hilman, "Revitalization of Local Wisdom in Environmental Education," *Adv. Soc. Sci. Educ. Humanit. Res.*, vol. 79, 2016.
- [7] H. Matnuh, "Law as a Tool of Social Engineering," *Adv. Soc. Sci. Educ. Humanit. Res.*, vol. 147, 2017.
- [8] S. Hartono, *Legal Politics Leads to a National Legal System*. Bandung: Alumni, 1991.
- [9] S. Rahardjo, *Dissecting Progressive Law*. Jakarta: Penerbit Buku Kompas, 2007.
- [10] Ildan, "Development of Progressive Law in Indonesia." .
- [11] S. Rahardjo, *A Nation of Laws Making its People Happy*. Yogyakarta: Genta Publishing, 2009.
- [12] B. Manan, "Notes on Interpretation," *Varia Peradilan*, Jakarta, pp. 10–111, 2009.