

Critical Analysis of the Progressive Law Theory on the Constitutional Court Judges' Decisions in Indonesia Regarding Marriageable Age Limit

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ABSTRACT

This study aims to analyze the implementation of Progressive Legal Theory (PLT) indicators on the Constitutional Court judges' decision in Indonesia in decision No.30-74/PUU-XII/2014 concerning restrictions on marriageable age and reconstruction of PLT in the study of the operational legal system in Indonesia. This study is empirical with primary data in the form of free-guided interviews and secondary data by analyzing judges' decisions in content analysis. The results of this study showed that eight judges had implemented indicators of PLT, namely indicator 3, 5, 8, and 10. While indicators 1, 2, 4, 6, and 7 had not been implemented. One judge had a dissenting opinion with the reasons: The decision has progressivism values; The Court's decision implements 'the law as a tool of social engineering'; and the different regulations regarding the marriage age limit extend legal uncertainty. The implementation of PLT indicators on judges who had dissenting opinions in their entirety matched the PLT indicators. The findings showed that decision No. 30-74/PUU-XII/2014 had not fully used ten indicators of PLT. The reconstruction of the Progressive Legal Theory in the study of the operation of the legal system in Indonesia was formulated with 3 main indicators namely living law, legal system, and legal harmonization.

Keywords: Constitutional judge, marriageable age limit, progressive legal theory (PLT), verdict

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INTRODUCTION

Judicial review decision in article 7 of Law Number 1 of 1974 against the 1945 Constitution in case No.74 / PUU-XII / 2014, the Constitutional Court decided to reject all requests, especially the amendment of marriage age for women. The verdict

hearing readout on June 18, 2015, stated that the reason for the judges' refusal was based on a consideration that the minimum marriageable age limit of 18 years was not the most ideal in the future.

Of the eight judges who stated that they rejected the petition, only one judge had a different opinion. The difference in opinion illustrates the real condition of the issue of the marriageable age limit, especially at the age limit for women. It is essential to raise the age limit of marriage because of the age limit stated in article 7 of Law no. 1 of 1974 seen no longer able to adjust to the current socio-cultural conditions. This demand becomes very significant due to the impact that occurs on married women at that age. The period is a productive age for school. At that age, married women are very vulnerable to suffer from health problems such as early childbirth, eclampsia and anemia during labor, and a higher risk of mortality and morbidity for children born to young mothers. In addition, underage marriage for women leads to higher rates of violence physically and emotionally than marriage for women as adults (Arthur et al., 2018). Another study also indicates that early marriage perpetuates or extends the cycle of poverty and lack of education. Child brides are drawn out of school, losing their right to education and meaningful work (Roy, 2015). Poverty and low levels of education are two things that are always related. Most dropouts are caused by financial reasons. Child Rights Coalition Malaysia, for instance, reported that children from low-income families are

more likely to drop out of school to work to provide the needs of family and younger siblings (Makhtar et al., 2017).

In Indonesia, the age limit for marriage of 16 years for women as determined by Law No. 1 of 1974 contributes to the prevalence of underage marriage which was fatal to the sustainability of marital life. Mothers and children face problems due to unrecorded marriage at the Office of Religious Affairs, which lead to legal consequences for mothers and children resulting from informal weddings (Harahap, 2017).

Various attempts were made to prevent child marriages, including prohibitions and closing legal loopholes that allow underage marriages (Arthur et al., 2018). Other efforts are also made by providing premarital education programs. A study by Margaret showed that the catholic premarital education program carried out in the Arch-Diocese in Kisumu was relevant and able to overcome most of the challenges that arise in marriage (Buore, 2019).

Indonesian Constitutional Court judges are of the view that in various countries the restrictions on marital age are not the same, with ages ranging from 15 years to 22 years. The age limit of marriages that occur in Indonesia cannot be compared to other countries due to the different socio-cultural conditions.

Table 1 explains the age limit for marriages in several countries in Africa, America, Asia, Europe, and the Oceania regions (Wikipedia, 2019).

Table 1
Marriageable age limit in various countries

Country	Without parental or judicial consent		With Parental Consent		With Judicial Consent	
	Man	Woman	Man	Woman	Man	Woman
Algeria		19		19		-
Burkina Faso		20	20	17	18	15
Egypt and Tunisia		18		18		18
Argentina		18		16		-
Brazil		18		16		16
Mexico		16	16	14		-
Afghanistan	18	16	18	15	18	15
China	22	20	22	20		-
Lebanon	18	17	17	15	15	9
Italy		18		18		16
Netherlands		18		18		18
Turkey		18		17		16
United Kingdom	18 in most jurisdiction 16 in Scotland			16		16
Australia		18		18		16
Nauru	18	16	18	16		-
Samoa	21	19	18	16		-

In general, the marriageable age limit in this world does not differ greatly in the range of 17 to 20 years. This means that the age limit has become a general limit for marriage. Although it cannot be denied there is also a marriage age limit under 16 years, but the number of countries is not much. As a government decision in the regulation, this limit has certainly been carried out in-depth studies.

The impact that occurred after the ratification of the constitutional verdict was the community demand who felt disadvantaged by the various polemics that were increasingly happening. Community social institutions, health experts and psychologists assess that the differences of views between the government and the

community were inevitable as if the court did not listen to the expert testimony brought to trial. The decision delivered by the judges is controversial in the community, so it is vital to research by reviewing it from 10 indicators of PLT.

From this background, the issues raised in the study are: First, how is the implementation of PLT indicators in the judgment of the Indonesian Constitutional Court in case No.30-74 / PUU-XII / 2014 concerning marriageable age limits? Second, how is the reconstruction of PLT in the study of the operational legal system in Indonesia after the decision No.30-74 / PUU-XII / 2014? This problem emerged as a form of academic anxiety that was later analyzed in-depth using the perspective of PLT.

LITERATURE REVIEW

Satjipto Rahardjo's original idea about Progressive Legal Theory (PLT) revolves around discourse, writings in the mass media, seminars in forums, and learning in postgraduate studies (Azizy et al., 2006; Kusuma, 2009; Mahfud et al., 2011). Continual efforts continue to be rolled out so that the progressive legal mindset continues to develop. As of the inception in 2002 up to now, there have been hundreds of writings and researches that discuss legal issues using a progressive legal perspective. Understanding of PLT is also carried out on law enforcement officers through training centers and further studies conducted by law enforcement officers.

Sidharta concluded the indicators that were the keywords of PLT (Mahfud et al., 2011), namely: 1) Progressive law is aimed at humans, not vice versa. So that in a state of legal and human dialectics, the law must be adjusted based on the human condition at that time, not vice versa; 2) Allegiance to the people and justice is a reference of progressive law. The alignment of law with the people and justice must be the main priority in the regulation; 3) human well-being and happiness are the goals of progressive law; 4) progressive law is not an absolute or final institution, as the law is always in the process of becoming (law as a process, the law in the making); 5) Progressive law promotes strong moral values as a good legal basis for a good life; 6) The type of progressive law is responsive in the sense that law can be correlated with values outside the text; 7) Progressive

law mobilizes the autonomous power of society or promotes the role of the public; 8) Progressive Law aspires to build a 'state with a conscience' with a commitment to make people happy; 9) Progressive Law puts forward the value of spiritual intelligence; 10) Progressive law is tearing down, replacing, and liberating. Progressive law does not accept the doctrine that law is absolute to be carried out.

The indicators presented above are an illustration of the philosophical pillars developed as academic reviews. It is not easy to translate the mindset of PLT into an operational setting, especially for those who work daily in the field of law. This means that changes in mindset and in operational order with various translations require a long time. Efforts to change this mindset as an integral part of the legal culture process developed.

Thus, the theory of progressive law teaches Indonesian people that carrying out law enforcement must be done freely. Satjipto Rahardjo stated two things that were the object of the exemption (Mahfud et al., 2011). First, the exemption is carried out on the types, theories, principles, and ways of thinking that have been used so far. Second, the liberation should be free from previous ways of law enforcement which is not in line with the resolution of legal issues. This exemption arises along with the disappointment with the quality of applying the law which leaves the essence of the justice values. If the judicial method leaves the values of justice, that will lead to the emerging of anomalies that gather

strength in the injustice values felt by the community. Substantial justice values synergize with spiritual and moral values, all of which support progressive law in thought and behavior.

In the course of history, the development of PLT experienced ups and downs with various pros and cons responses. As a legitimate idea, it is very scientific if the time and circumstances will test the strength of this progressive law. As an idea, progressive law is inseparable from the falsification carried out by scientists and legal scholars, including legal practitioners who consciously all of them provide a progressive mode of law enforcement in the future (Sidharta, 2012).

The idea of progressive law is interesting to study as a coherent part of the dynamics of law in society. This indicates that the interpretation concept of the law also follows the development of the era, which is oriented to the progress itself. The values to be achieved and developed in progressive law all boil down to the justice values, moral and spiritual values, values of substantive justice or in other words the values grew in the life of society (living law) (Rahardjo, 2002).

Legal cases that arise and disappear are integral parts of the struggle for progressive legal thinking. During this time, the study of progressive law was born in the midst of anxiety that plagued academics who saw the way to judge in a society that was not qualified in upholding the values of justice. Because of this progressive legal thinking brought up by academics, the pattern of

communication and the translation of mindset need deep reflection along with its theoretical existence. This comprehensive view arises because all this time, what has been seen is a boundary between the campus on the one hand and the legal community on the other.

The existence of PLT initiated by Satjipto Rahardjo led to the law enforcement issue. It was seen to be decreasing in the quality of the way to do the law, which resulted in mere procedural justice. PLT has been developed and implemented since 2002 until now, of course, the factors that influence the pattern of progressive law enforcement both *das sein* and *das sollen* can be examined. The success of law enforcement certainly cannot be separated from the functioning of the legal system adopted by a country that has historically been influenced by countries that have colonized it. Lawrence M. Friedman saw that the success of law enforcement was always supported by all components of legal systems such as the component of the legal structure, the component of legal substance, and the component of legal culture (Friedman, 1975).

METHODS

This study is a kind of empirical juridical research with the statutory, conceptual, and case approach. The legal materials from this study came from primary, secondary, and tertiary data. Primary data derived from the free interview method guided by an open questionnaire. The 9 informants are Judges in the Indonesian Constitutional

Court. The secondary data were the verdict and minutes of the trial in case No.30-74 / PUU-XII / 2014, as well as several related laws and regulations including the relevant literature review and the overall data collected. The analytical method used was analyzed in accordance with the scope of the problem and assessed based on a conceptual foundation. The first problem was carried out with a content analysis study (Silverman, 1993). To analyze the second problem, we used a qualitative descriptive analysis. The qualitative data was described in words to get a conclusion.

RESULTS AND DISCUSSIONS

Differences in Opinion of Nine (9) Constitutional Court Judges regarding the Marriageable Age Limit

The Constitutional Court is a state institution authorized to exercise judicial review, or more specifically to conduct a constitutional review of the Law and the other specific tasks, namely the *privilegium* forum or the judiciary specifically to decide upon the opinion of the House of Representatives that the president has violated certain things mentioned in the Basic Law so that it can be dismissed (Mahfud, 2011).

Nine (9) Constitutional Court Judges stated in decision No. 30-74/PUU-XII/2014 that the marriageable age limit for women was not a matter of constitutionality. Determination of 16 years or 18 years is an open legal policy to lawmakers. According to the Constitutional Court Judges, in a quo case, the 1945 Constitution did not regulate the age limit of a person referred

to as a child (*Decision of the Constitutional Court Number 30-74/PUU-XII/2014, 105-106*). When the constitution does not restrict clearly, determining the age limit of marriage is the full authority of the legislators. Whatever the choice, lawmakers can change or maintain existing marriage age standards. Whatever their decision is not prohibited and as long as it does not conflict with the 1945 Constitution. As an open legal policy, the existence of a marriage age standard interrelated with the marriage age dispensation can certainly be considered the same. Amendment or stipulation of marriage age dispensation can be changed at any time by the legislators following the demands of existing development needs.

The current construction of Indonesian Marriage Law is considered irrelevant. The reconstruction of the legal formulation has become something very urgent because it is considered no longer appropriate to the needs, situations, and conditions of the times. The legislation governing the minimum age of marriage cannot resolve the complexity arising legal problems, especially the high number of child marriages that have many negative impacts, both for individuals and society, and the state in a broad sense.

The eight Constitutional Court Justices who refused the request to change the age limit for marriage gave their views as follows:

First, the Constitutional Court Judge adopted different understandings regarding marriageable age limits of religions and cultures prevailing in Indonesia. In various countries, the marriageable age limit for

women has not been changed. The need for age restrictions on marriage is not something urgent to avoid negative things. Those can all be prevented by a legal marriage according to religious teachings so that it will not cause the status of children out of wedlock. Thus, the court believes that the age limit for marriage in article 7 paragraph (1) of Law Number 1 of 1974 does not need to be revised.

Second, Article 7 paragraph (1) of Law Number 1 of 1974 which regulates marital age restrictions is a national constitutional agreement, so that article is an open legal policy for the House of Representatives. Thus, the House of Representatives can at any time change the age limit of marriage following the aspirations of the community. Therefore, the Court invited the legislators to carry out a legislative review of changes in marital age restrictions.

Third, in consideration of the Constitutional Court's decision to reject the judicial review of Law number 1 of 1974 concerning Marriage, namely article 7 paragraph (1). The Constitutional Justice said that no guarantee increasing the age limit for marriage from 16 years to 18 years for women would reduce the number of divorces, health, and social problems. "There is no guarantee that the increase of marriageable age limit for women from 16 to 18 years, will further reduce the number of divorces, tackle health problems, and minimize other social issues ". Limiting marriage age for women to 18 years is not ideal. The court believes that in several countries, the age limit for marriage is

varied from 17 to 20 years (*Minutes of the Constitutional Court hearing of the Republic of Indonesia Case Verdict No.30-74/PUU-XII/2014*).

Fourth, the Constitutional Court considered that the provision of Article 7 paragraph (2) of Law Number 1 of 1974 concerning marriage dispensation is still needed because it functions as an emergency exit when a marriage occurs as a result of the parents' wishes. The word "deviation" that wants to be added to the Article is refused for reasons outside marriage.

Fifth, the Constitutional Court recommends facilitating access to marriage dispensation outside the court such as the Office of Religious Affairs, Districts, Sub-Districts and even the Head of Village with the purpose to aid the community in applying for marriage dispensation. The view in consideration of the eight judges is a very juridical normative and philosophical at the beginning of the review. The flow of positivism is still clearly visible in this consideration. Efforts to make a breakthrough in the field of law are still not entirely made from the eight judges if we analyze it from 10 indicators of PLT.

One judge has a different view. The reasons stated were that marriage for children would harm children's physical development, mental, intellectual, and health aspects. Besides, the right to receive a 12-year compulsory education program could not be fulfilled because the marriage had an impact on hampering education. The marriage did not provide an opportunity for children to grow and develop towards

maturity, so it was very vulnerable to both sexual and non-sexual violence. Thus the regulation of marriage age settlement, as stated in Article 7 of Law Number 1 of 1974 had caused problems in its application in the community (*Minutes of the Constitutional Court hearing of the Republic of Indonesia Case Verdict No.30-74/PUU-XII/2014*).

The judge also believed that the marriageable age limit in Article 7 of Law No. 1 of 1974 should be connected with Article 6 paragraph (1) stipulating that a marriage is based on the consent of the two brides, while paragraph (2) states that a marriage of a person who has not reached 21 years must obtain permission from both parents. The provision of 16 years in Article 7 has created legal uncertainty and violates the rights of children following Article 1 paragraph (3), Article 28B paragraph (2), and Article 28C paragraph (1) of the 1945 Constitution.

Application of Progressive Legal Theory Indicators by Nine (9) Constitutional Court Judges

The view in consideration of 8 Constitutional Court judges is a very juridical normative and philosophical. Efforts to make a breakthrough in the field of law are still not entirely made from the 8 constitutional judges if we analyze it from 10 indicators of Progressive Legal Theory (PLT).

From the 9 Constitutional Justices that the author examined, there are several things analyzed:

1. From 10 indicators of PLT, researchers analyzed the eight

judges' opinions who carried out PLT in their decisions on indicators 3, 5, 8, and 10.

2. While indicators no 1,2,4 6 and 7 have not been implemented. This indicates that the judges' decision has not fully used the PLT indicators.
3. For the implementation of PLT on the Judge who has the dissenting opinion is bound entirely to the ten (10) indicators of the PLT. This interpretation can be seen implicitly and explicitly from the diction: the values of progressivism.

The determination of the progressivism values, in this case, is on the judges' considerations in the decision. In this case, the judges examined not only based on the Articles written in the Basic Law but also the legal considerations taken from 'the living law' or the law that lives in the community.

The opinions and considerations of the Judge who has the dissenting opinion are examined in the Perspective of PLT as follows:

- a. The verdict on this dissenting opinion is based on the overall reasons stated and following the ten postulates of PLT.
- b. The Court's decision is as a law through social engineering medium (law as a tool of social engineering). In a quo case, the decision will change into the adjustment forms in implementing the Marriage Law. This condition will also lead to

the culture and tradition changes regarding child marriage as applied so far in society. It justifies the use of 'law as a tool of social engineering'.

- c. The judge's consideration is agreeing with the PLT delivered on a normative juridical basis.
- d. The occurrence of different regulations regarding the marriage age limit extends legal uncertainty.

The Urgency of Reconstruction of Progressive Law Theory (PLT)

The process of forming this reconstruction theory is based on the implementation of the Constitutional Court judge's decision using PLT as the basis to view the formation of legal theory philosophically. The purpose is to complement some of the visible weaknesses of PLT. The theory experiences obstacles in its implementation. The Ten (10) indicators that serve as benchmarks for assessing the successful application of the Constitutional Court's decision concerning marital age restrictions are not fully used by the judges. With this reality, the reconstruction of PLT is needed.

There are three components in the reconstruction of PLT. These three components work together and are related to one another as follows:

1. Living law

The primary sources of social life are social and religious principles which provide a legal basis for the diversity of differences that exist in

society. The concept of living law really determines the continuity of community life because as a source 'living law' will never run out. Social rules that produce moral ethics and religious norms which bring life guidelines in the world and the hereafter provide inner peace for its adherents. Thus whatever is produced by the legal system must synergize with 'living law' so that the application of the legal system will be effective in law enforcement in the community.

2. Legal System

The result of living law is the legal system. Determination of the legal system adopted by a country is very dependent on three main elements which Lawrence M. Friedman called as legal institutions, regulations, and legal awareness. Those elements have a vital role in law supremacy. These three elements become an absolute requirement to provide an assessment of whether the law in a country is enforced. The elements which become the driving force for law enforcement in a country are inseparable from the influence of modernization. If there is one element that does not play a role, then the principle of justice will not be achieved in society. The running of the legal system in a country is inseparable from the influence of social changes in society. Thus social change causes changes in the law. A legal system that can adapt is the legal system that responds to social changes quickly to

minimize negative impacts in the future. Social changes originating from living law in the community can be carried out frequently by making changes to the law to create legal harmony.

3. Legal Harmonization

Community life can experience balance by upholding the principle of justice in various interactions of community members in all fields. Harmonization is the key to success in law enforcement. It is the goal desired by all humans. Harmonization will result from the synergy of 'living law' and 'legal system.' It is built on an ongoing basis in society so that people will feel patriotic life much better. Harmonization that occurs in the community is inseparable from the interaction among the community members who put forward values and norms that serve as guidelines for life. The values and norms in society, such as religion, social, and legal norms are the basis for harmonious survival among members of the community and

to face conflicts that lead to the national disintegration.

Disintegration arises due to differences in opinions that lead to unhealthy behavior triggered by injustice problems, discrimination, social inequality, and so on. In the end, disintegration never results in calm, comfort, and security of life as an essential source of harmonization of social life. Restoration of the social life of the community will be harmonious again if national and state awareness arises in each member of the citizens.

Awareness of the harmonization of life that influences the need for agreement among the community members carries the desire for universal agreement from an unwritten rule to a written one. Legal certainty approved by all parties becomes a social contract that is mutually agreed upon. This legislation process will be strengthened legally after being approved by a legal institution so that all members of the community will obey it.

The reconstruction of progressive legal theory is illustrated in Figure 1.

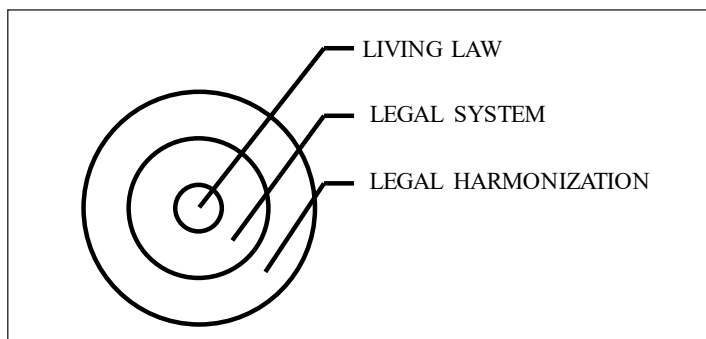


Figure 1. The scheme of progressive legal theory reconstruction

CONCLUSIONS

1. From nine (9) judges of the Indonesian Constitutional Court concerning the ten (10) indicators of the PLT, it can be concluded that there are eight (8) judges who have applied the indicator number 3, 5, 8, and 10. Indicator number 1, 2, 4, 6, and 7 have not been implemented in the decision. Meanwhile, one judge had a dissenting opinion with reasons: The decision has the value of progressivism, and agreeing ten indicators of PLT; The Court's decision applies the law as a tool of social engineering; Different regulations regarding marriage age limits extend legal uncertainty. From those nine judges, it can be concluded that the Constitutional Court's decision has not entirely used ten indicators of PLT.
2. As for the reconstruction of the Progressive Legal Theory in the study of the operation of the legal system in Indonesia after the decision on a case, No.30-74 / PUU-XII / 2014 was formulated with 3 main indicators namely living law, legal system, and legal harmonization.

Implications

1. Reviewing the existence and application of PLT, in the decision of the Constitutional Court, proves that most of the Judges in the

Constitutional Court in Indonesia still uses the view of positivism.

2. PLT Reconstruction is an initial concept as a theory finding that underlies the theory of law as a tool of social engineering development in Indonesia.
3. Depth studies need to be conducted on the judge's behaviour research in making decisions. Because study about the judges' views and opinions is inseparable from their behaviour and ways of thinking.

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