LEGAL PROFESSION AND THE EMERGING ISSUES

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ABSTRACT

Sejak kemerdekaan Indonesia 62 tahun yang lalu, perkembangan sistem hukum Indonesia belum menghasilkan kesadaran masyarakat bahwa hukum Indonesia yang merupakan warisan Belanda, dalam berbagai bidang hukum telah ketinggalan dengan hukum yang berkembang saat ini. Hukum bisnis seperti hukum persaingan usaha, hukum anti monopoli dan sebagainya telah masuk ke dalam sistem hukum Indonesia. Berdasarkan pengalaman sebagai seorang advokat, penulis mencoba menguraikan perkembangan hukum bisnis Indonesia serta peran profesi advokat ASEAN khususnya Indonesia dalam menyikapi perkembangan hukum bisnis ini sebagai dampak dari era globalisasi pada saat ini.

Kata kunci: Sistem Hukum, Hukum Bisnis, Advokat, Indonesia.

I. INTRODUCTION

The writer has been a legal practitioner for years, and is aware with developments in legal profession and both its' negative and positive effects. Ever since Indonesia's independence 62 years ago, the development of the legal system has not created a community which is fully aware and informed on the law. In general, Indonesia's legal system is not organized well enough. The criminal and torts law is still a legacy of the colonialization. Other laws which are specifically related to business, such as the Bankruptcy law, Laws on Capital Market, Anti-trust law, Consumer Protection Law and Intellectual Property Law adopts provisions of international standards on such matter. Other laws such as land law still adopt traditional customary law.

Indonesian Community condition also shows a contrast differrence in law appreciation. People

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who are fortunate enough to obtain education in big cities have access to proper legal education, compared to people in small cities. As an example, on 1998, Six Business Courts were established in Indonesia to handle cases related to bankruptcy and intellectual property e.g.: Business Court established in Medan (North Sumatera), Padang (West Sumatera), Jakarta, Semarang (Mid-Java), Surabaya (East Java), and Makassar (South Sulawesi). Until this moment, only the Business Courts of Jakarta, Semarang and Surabaya have exercised their functions in trying cases related to bankruptcy and intellectual property. The other Business Courts have never tried a single case.

This writing is part of the author's personal view as well as part of Author's experience This writing is not intended to judge the legal profession in Indonesia and in other countries in ASEAN. Author sincerely hopes that this writing can be useful for colleagues from countries in ASEAN.

II. PROBLEMS FACED BY LEGAL PROFESSIONALS

There are numerous problems faced by legal professionals nowadays and ultimately, it is impossible to elaborate all the problems in one writing. This concern is the Author's reason for writing this article. In this writing there are 2 (two) problems that will be elaborated; which are as follows:

1. What kind of problems are being faced due to the nature of globalization and how should this be faced?
2. Would a specification of law be needed or should the general application of law be resurfacing? Furthermore, what should be done by lawyers residing in South East Asia such as Indonesian lawyers?

III. LEGAL PROFESSION IN THE INTERNATIONAL SCOPE

1. Legal Profession

Profession could be defined as a job that involves people with special skills and is intellectual in its nature (Black, 2004: 1375). Encyclopedia Britannica defines legal profession as a vocation that is based on expertise in the law and in its applications. This definition encompasses a very wide scope of legal profession. Different countries, based on their very own national legislation and specific common and/or civil law, gives varied definition of legal profession.

John Henry Merryman explained that in the jurisdiction of the Civil law system or the European Continental, the distinction of the

legal professions within the path of profession, is chosen in an early stage by the graduates of the law faculties. They may choose to be a judge, district attorney, defense attorney, notary, legal consultant or to work in companies. Theoritically, a change of legal profession can be done however, such change rarely happens (Merryman, 1990: 109). As an example, after retiring from one's career as a judge or police, the retiree tends to provide service as a legal consultant. On the other hand, it is very rare for an advocate, not to mention a notary, to change his profession as a judge or district attorney. In the past, a person can be an advocatee if he has passed the exam held by the High Court. The jurisdiction of such advocatee is only within the jurisdiction of the high court appointing the advocatee. However, in practice it is found that judges after retiring can be an advocatee without any exams. This does not happen anymore since the year 2003. In the year of 2003, Law No. 18 of 2003 was legalized. This law governs the role of legal profession, particularly advocatees, as a part of a bigger legal structure in Indonesia. This Law gives further requirement such as nationality and educational requirement to practice legal profession in Indonesia.

I would like to draw your attention to M. Trapman's opinion which gives a good description about 3 (three) legal professions in daily lives:

> Het standpunt van de verdachte karakteriseerde hij aals de subjecttieve beoordeling van een subjectieve positie, dat van de raadsman als de objectieve beoordeling van een subjecttieve positie, dan van de openbare ministerie als de subjectieve beoordeling van een objectieve positie, dat van de rechter als de objecttieve beoordeling van een objectieve positie" (Bemmelen, unyear: 132). [a defendant has a subjective point of view and is in a subjective position; a legal advisor has an objective point of view and is in a subjective position; a prosecutor has a subjective point of view and is in an objective position, while the judge has objective point of view and position].

M. Trapman's opinion shows how people who went to the same university and school will eventually develop their point of view in accordance with profession they have chosen. These professions have been separated since the beginning. Each profession will develop itself and would be considered as different from each other. Each profession will develop its own specialty, career image, and

their exclusive profession association (Bemmelen, unyear: 110).

Currently, there is a tendency to make profession in the legal world to become very distinctive. A problem that arises is the occurrence of different opinions. This made us ask a question how these differences can occur while the law is being uniformed.

Such tendency makes the legal professions unequal before the law. As an example, in performing their duty, an advocate is still restricted in defending the rights of the defendants. This shouldn't have happened because Indonesia has adopted international law that protects human rights including the rights of the defendant. Advocates tend to be in a weak position. If the district attorney or police failed to conduct a violation during the investigation, no clear mechanism is provided to recover the violated rights of the defendant.

The Author is in the view that the weakness of the legal profession is caused by failure of policies in recovering the holes of the legal education. The legal professions have tendency to be exclusive without allowing the possibility of a change from one legal profession to another. Therefore, the possibilities for a graduate to master the basic matters in the profession are small.

Ali Said, Indonesian's General Attorney in early 60s, on October 6, 1966 stated that: "Although our path are different, we are walking together in the same rhytm". He also admits the importance of legal profession organization in the development and maintance of a legal state. In its essence, both advocates and prosecutors are similar and the difference is only in each of its form of duty. Although advocates and prosecutor has different places in the system, they both have the same aim, the aim for justice.

Soetandyo suggested that legal profession objectives 'are not a process that is autonomous,' but rather was more forceful in stating that:

> "a process that claims in a functional manner to follow the steps of political developments, particularly the politics that are closely connected with policy and the efforts of government to efficiently use the law to achieve objectives that are not forever in the legal domain and/or the justice domain" (Wignjosoebroto, 2007: 2).

Simply, this means that legal profession objectives are not a neutral product but ones that are colored by the intentions of the government. Consequently, these objectives are unlikely to prevail for indefinite periods of time.

2. Aspects of Legal Profession

Legal profession as a part of social studies has a lot of aspect such as social, financial, political and educational aspects. Human being is a social being, and it is in human's nature to live with another human being and amidst the society at large. There is an old adage which states that "Man is a political being and also a social being". This wide scope makes legal profession as a very demanding type of profession and in its natural selection, only the chosen people behold this profession.

IV. HISTORY OF LEGAL PROFESSION IN INDONESIA

1. Foundation of the Legal Profession in Indonesia

Indonesia has been an object of legal research since the Dutch colonialization era. Van Vollenhoven, a Dutch noted scholar, divided Indonesia into 23 customary law regions. Such division shows that despite of such differences, Indonesia could still stand united. With this example, I am confident that although we come from different countries, together we can stand united in facing the challenges that comes with this era of globalization.

Following this division, under the Dutch colonization, Legal Profession in Indonesia was regulated with Dutch Law, as could be found in *Reglement op de Rechterlijke Organisatie en het Beleid der Justitie in Indonesie* (Staatsblad, 1847: 23; jo. Staatblad, 1848: 57). Articles 185 until 192 with all its later revision and addition, *Bepalingen betreffende het kostuum der Rechterlijke Ambtenaren dat der Advokaten, procureurs en Deuwaarders* (Staatsblad,1848:8). *Bevoegdheid departement hoofd in burgelijke zaken van land* (Staatsblad, 1910: 446; jo. Staatsblad, 1922: 523), and *Vertegenwoordiging van de land in rechten.* Dutch law regulates that only specific person may be allowed to be in the legal profession, such as Europeans a limited number of Chinese, Middle East and Indonesian aristocrats - as could be found in the civil law proceedings. The Colonial Dutch government introduced legal education in Indonesia to fill an administrative need; namely, to fill legal bureaucratic positions from the ranks of indigenous citizens (Khadafi, 2001: 6). It was hoped that graduates of this newly introduced legal education would become judges of the *landraad* or legal officers in the offices of the Dutch Colonial government. (Khadafi, 2001: 4). Legal education objectives in this period were to create legal bureaucrats or *rechtsambtenaren.* The curriculum for legal education at that time was designed with a primary

objective of ensuring that once students graduated they had a thorough knowledge of certain legal principles—especially those molded as legislations. (Juwana, 2006: 4).

In fact there was an inclination that successful graduates of this curriculum were very legalistic in that their knowledge of the law and did not touch upon the empirical realities experienced by those in the field. (Juwana, 2006: 4). The Law during this era did not provide the chance to Indonesians to enjoy legal education and to conduct legal profession. The Law during this era only governed on matters related to Notarial profession.

After the independence, legal professions mainly were not regulated within one particular law. President Soekarno proclaimed a need to create a legal revolution to overthrow all aspects of colonial law that up to that point according to formal principles must still be viewed as the prevailing law. President Soekarno openly criticized legal experts and the hold of formal law as conservative powers that will serve to obstruct the wheels of revolution. The experts who have always been bound together legalistically to this formal law—with the pretext of legal certainty—are always inclined to hold onto old systems and orders, which in reality were exceedingly colonial. (Juwana, 2006: 3). The only regulation that applies to a legal profession was the law regarding public notary in 1948. During these years, legal profession was highly supervised by the government, particularly during President Soeharto regime. Indonesia's first bar organization (PERADIN) was established in 1964. PERADIN dealt with a lot of cases involving the Old Order such as the G30S PKI in 1966. (Kaligis, 1989: 8). PERADINs existence as the only united legal advocatees is Soeharto's statement on May 3, 1966. The aim is clear, to defend the persons accused in the contra G30S revolution at the Special Military Court. Among people who were defended are Soebandrio, Larited and the President of Indonesian Islamic Republic, Ada Djaeleni and also PERADIN's member such as the late Yap Thiam Hien or Soemarno P. Wiryanto. In all PERADIN's activity, government officials also participated. In the 5th Congress that was conducted in Yogyakarta, the head of the Indonesian Supreme Court, Prof. Oemar Seno Adji, confirms PERADINs existence as the only organixed legal profession and therefore PERADIN has the independence to carry out its own activity. The Minister of Justice, Mochtar Kusumaatmadja, also confirms PERADIN's existence in its relation to legal pro-

fessions maintenance, principles and the essence of Ethical Conducts all of which are PERADIN's trait. PERADIN's philosophy is:

> "To fight for law enforcement, that would mean to enforce justice and thruth in accordance with the trait of Der Kampf ums Recht living, as stated by a law philosopher called Rudolf von Jehring, 'ist das Charakter des Lebens' (Kusumaatmadja, 2002: 42).

This would mean that there would be a never ending struggle in order to enforce law, as long as human being exists then the struggle for law would exist.

During the infiltration of communism movement to Indonesia in the 1966, legal profession was also being scrutinized closely. The authoritarian regime ensures that legal profession would not grow large enough that it would be a threat. It is during these times where legal professionals have to take oath under the supervision of both the executive (Executive Department of Ministry of Justice) and judiciary branch of the state (Supreme Court). These conditions however, changed in the 1990's.

After PERADIN, there were a lot of Advocates Organization that was established in the era of Reformation (1998, post Soeharto's era). Currently, the bar association is renewed and is independent. It is called PERADI, and the bar association has given bar requirements and courses to develop legal professionals ability. It is this organization that holds the exams, which become the requirement of an advocate.

2. Law No. 18 of 2003 on Advocates

In the year of 2003, Law No. 18 of 2003 was legalized. This law governs the role of legal profession, particularly advocates, as a part of a bigger legal structure in Indonesia. This Law gives further requirement such as nationality and educational requirement to practice legal profession in Indonesia.

Although the Advocate Society has been accomodated by the Law, the right of advocates is still at a minimum par. As an example: In Due Process law, advocates may only accompany the suspect and are not allowed to speak or provide consultations during the investigation of the accused and/or the witness.

In the Commission of the Eradication of Corruption / *Komite Pemberantasan Korupsi* (KPK), we can find restrictions on the right of the advocate to call experts and witnesses that are in favor of the defendant. Advocates do not have the luxury to accom-

pany the witness' examination; advocates also do not have the right to obtain all of the documenttation related to the case. Specifically in relation to the District Attorney, the clients are invited with no clear object and purpose and no clarifcation on whether the clients are summoned as a witness or as a suspect; these summons are not based on justice (*pro justitia*).

V. EMERGING ISSUES IN LEGAL PROFESSION

1. The Globalization of Legal Practice

I would like to introduce the term "Legal Globalization". I am using the term "Legal Globalization" by borrowing another well known term, "Economics Globalization". This term shows how economics system no longer recognizes state barrier. A state economics system is not independent on its own state, but rather dependent on other state's policy and economics system. The usage of Euro to compete with US Dollar is an example on how different states economics system is united with the same concept of economics development.

Economics globalization would have legal impacts. Consequently, the law and regulations in economy adopted by states would also have to have a uniform material and implementation standard. Accordingly, a legal regulation that is international in its nature (that once was only a guideline), is not adopted as a positive law that could be directly implemented and applied in domestic cases. As and example is the application of the Paris Convention in the protection of intellectual property rights.

The questions that arise are whether our legal profession is ready to face such challenges? This challenge is not exclusively owned by Indonesia, as most Asian countries are not used to using the international standard of law (Shin-ichi, 2005: 1). This is despite of the fact that some of the courts decision has adopted international standard, either directly or indirectly. As an example is the Ad-Hoc trial of Human Rights with Jose Abilio Soares as the accused. In its consideration of decision, the panel of judges implementted the law contained in the Rome Statute and used it directly to examine the defendant. This is despite of the fact that when the case was examined in the year of 2000, Indonesia hasn't ratified the Rome Statute. (Kaligis, 2002: 20).

Public international law (hereinafter "international law") is a legal scheme principally governing international relations. It is obvious that the main subjects of international law are states. As the

great majority of national legal issues is concerning relationships between subjects of national laws, law students are not particularly interested in international law. This tendency seems to be universal (Shin-ichi, 2005: 1).

Many professional judges do not know much about international law and they are reluctant to apply international law in their judgments (Shin-ichi, 2005: 3). For the great majority of law school students become practicing advocates and only a handful of them enter into the government service, the Foreign Service, in particular, which requires full knowledge of international law. However, an increasing number of national litigations today refer to international law. A large number of human rights cases refer to one of the international human rights instruments. International Labor Organization (ILO) Conventions have been frequently chosen by one of the parties in supporting their claims (Bemmelen, unyear: 110).

Shinichi Ago states that studying international law in law faculty is not that attractive, therefore, basic understanding on how and what underlies behind international law and its process is needed, including philosophical thoughts. We have to admit that Law Philosophy course is not that interesting for students. The main reason is because one has to understand foreign language. These are the big challenges to face for all of us.

With advances in technology, globalization gives us new challenges in legal practices, services and delivery. Globalization brings a competitive market forces and as a result, it takes more than being sufficient and proficient in law to be a leader in our profession. Therefore, we shall continue to develop ourselves in conducting our profession. I am offering ways to develop ourselves, such as:

a. **Technological Advances**: That all persons involved in legal profession must be aware with the confidential and privileged communications issues with clients. This is because nowadays technological advances make it possible for irresponsible third parties to hack into our communications with our clients.
b. **Alternative Billing Method**: That our profession is included as a service, therefore we must increase our productivity, performance and compensation- and our value is not necessarily be viewed with an hourly rate. In Indonesia, advocate's fee has never been regulated- although State Gazette no. 1858 regulated the fees of another legal profe-

ssion, the Public Notary. My firm, as an example, has implemented this system of alternative billing methods which includes hourly rate, fixed fee, and result based alternatives. Our firm has litigation and non-litigation division, and the billing methods of each division differ. We give the hourly rate with the range of 300-500 USD for the non-litigation division, whereas for the litigation division, our billing method is 5 (five) percent of the total claim, operational cost and success fee.

2. Multi Disciplinary Practices in Legal Profession

This issue is inter-related with the previous issue. With globalizetion, clients expect more of advocates. Multi Disciplinary Practices provides "one-stop shops", where clients can have opinions from all aspects including social, financial, and legal implications from a firm. I have implemented such practices in my own firm.

One important thing that I would like to emphasize is how persons working as a legal professional should balance between the need for profit and the obligation to struggle for justice. Legal professionals should always remember their obligation, *Fiat Justitia Ruat Caelum*, to always struggle for law enforcement no matter what (Kaligis, 1987: 12). In order to help us to stay within this balance, ethical conducts is of main importance and is one of the basic tools. An advocate should always be respectful to their adversaries, colleagues, judges, prosecutors, fellow advocates and vice versa. A legal professional should also refrain him/herself from the temptation of conducting illegal acts such as corruption and defamation. Ethical conduct is very important because legal professional is one of the professions that derive its nature from the social system, including societal norms and values. Legal professionals are viewed and is set to be an example by the society at large, and as the carrier of the societal norm torch, we have a very large role in the society.

VI. CONCLUSION

1. Legal Profession is a very noble profession. In order to have a good formal education, it is necessary to consider the need for a legal society, without abandoning the basic philosophy and legal system which differs from state to state.
2. There is a tendency for law internationalization either in torts or in criminal law. There is no other way for legal profession but to adapt to those

changes. The basis of legal profession that must be maintained is the upholding of morality, ethics and integrity.

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