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Paradigm of Justice in Law Enforcement in the Philosophical Dimensions of Legal Positivism and Legal Realism

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Abstract. Legal positivism is widely embraced in modern law in almost all jurisdictions in the world, including in Southeast Asia and Central Asia. Legal positivism fully depends on how the sentence is written in the law, while legal realism uses the law only as a reference, and in principle, formal law should not hinder material justice. The methodology used is normative juridical and sociological juridical. The outline of the conclusion is that law enforcement must use the paradigm of thinking with the formulation of laws coupled with conscience in order to achieve the goal of law, namely justice, and schools of law or schools of law that are more appropriate for law enforcement in Indonesia today. is legal realism in addition to positivism. Adequate education and training are needed to change the paradigm of thinking from positivism to realism in order to achieve justice.

Keywords: Law Enforcement, Legal Positivism, Legal Realism, Justice

Abstrak. *Positivisme hukum dipeluk secara luas dalam hukum modern di hampir seluruh yurisdiksi di dunia, termasuk di wilayah Asia Tenggara dan Asia Tengah. Positivisme hukum sepenuhnya bergantung kepada bagaimana bunyi kalimat yang tertulis dalam undang-undang, sementara realisme hukum menggunakan undangundang hanya sebagai acuan saja, dan secara prinsip hukum formil tidak boleh menghalang-halangi keadilan materil. Metodologi yang digunakan adalah yuridis normatif dan yuridis sosiologis. Garis besar kesimpulan adalah bahwa penegakan hukum harus menggunakan paradigma berpikir dengan rumusan undang-undang yang dibarengi dengan hati nurani agar tercapai tujuan dari hukum yaitu keadilan (justice), dan mazhab atau aliran hukum yang lebih tepat digunakan ke dalam sebuah penegakan hukum di Indonesia saat ini adalah realisme hukum selain postivisme. Pendidikan dan pelatihan yang memadai sangat diperlukan untuk mengubah paradigma berpikir dari postivisme ke realisme dalam rangka menggapai keadilan.*

Kata kunci: *Penegakan Hukum, Positivisme Hukum, Realisme Hukum, Keadilan*

1. Introduction

Within the framework of a state based on law, it should and should be the commander in chief so that all actions are always based on applicable legal provisions. This principle applies to legal states in either Indonesia or Uzbekistan, where both of these countries adhere to a modern democracy with a republican form of government. Good law enforcement does not discriminate or show favoritism. Who is the perpetrator of breaking the law must be tried and decided according to the principle of "equality before the law." This must be used as a basis for every human being who enforces the law in Indonesia or Uzbekistan without exception. The only problem is what kind of concept is a rule of law state related to policies in implementing and enforcing the law. Legal politics in the field of law enforcement can be interpreted as a very basic policy/policy in the field of law enforcement. In general, talking about legal politics (or what is called r*echts politiek*) has two meanings. First, the law is a product of politics,[1] and the second is legal politics as belief/policy. The policy in question is a very basic policy in the field of law.

Three elements determine law and law enforcement: legal substance, structure, and culture. In both Indonesia and Uzbekistan, legal politics in the context of law enforcement is basically closely related to the legal politics of legal development, which includes the fields of legal material, the field of institutions and law enforcement, the field of public and apparatus legal awareness, and the field of legal services.

Specifically in Indonesia, related to the field of institutions and law enforcement in legal politics of legal development, especially in the field of law enforcement according to the national long-term development plan (RPJPN 20052025). It has been outlined that law enforcement must be carried out in a firm, straightforward, professional manner and not discriminatory while still based on respect for human rights, justice, and truth. Then law enforcement must be applied to the process of investigation, investigation, and prosecution at police law enforcement agencies, prosecutors, and corruption eradication commissions, and involve advocates from the start. Legal politics in court institutions is a transparent, open trial and determination/decision that reflects a sense of justice.

[1] Moh. Mahfud MD. *Politik Hukum di Indonesia*. Jakarta: Pustaka LP3ES Indonesia, 1998.

Legal politics, in the second meaning, as described earlier, is a very basic policy/policy in law enforcement, in principle, how law enforcement can achieve the goal of the law, namely justice—related to this, in Indonesia and Uzbekistan, adherents of legal positivism. The core problem of this principle for law enforcement is how justice can be applied substantially. The issues that are critically examined in the article are how law enforcement can achieve legal goals called justice and whether schools of law or schools of law are more appropriately incorporated into the agenda of law enforcement and legal justice in Indonesia.

2. Justice is the Main Purpose of Law

Justice is one of the most widely discussed legal goals throughout the history of legal philosophy. The law's purpose is justice, legal certainty, and expediency. Ideally, the law should accommodate all three. Even so, justice is the most important goal among the three legal objectives. Some even argue that it is the only legal goal: consideration of justice (*gerechtigkeit*) is one of the main legal objectives in addition to legal certainty (*rechtssicherheit*) and benefit (*Zweckmassigkeit*).[2]

Radbruch states that justice must be considered one of the components of the legal idea.[3] The other components are finality and certainty – law and justice as two sides of one coin.[4] If justice is described as material and law as form, then the value of justice is material that must fill the form of law, while the law is a form that must protect the value of justice. Thus, justice has both normative and constitutive characteristics for law. Justice is normative for law because it is a transcendental prerequisite that underlies every dignified law. Justice is the moral basis of law and, at the same time, a benchmark for a positive legal system. In other words, justice is

[2] Darji Darmodiharjo and Shidarta. *Pokok-pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia*. Jakarta: P.T. Gramedia Pustaka Utama, 1999.

[3] Gustav Radbruch. *Rechtphilosophie*. Stutgart: Kochler, 1973.

[4] Bagir Manan. *Suatu Tinjauan Terhadap Kekuasaan Kehakiman Indonesia Dalam Undang-Undang Nomor 4 Tahun 2000*. Jakarta: Mahkamah Agung RI, 2005.

always the basis of law. Law is constitutive because justice must be an absolute element to be recognized as law. Without justice, a rule does not deserve to be

called law.[5] In line with Rawls, who said no matter how good and efficient a law is, if it is unfair, then the law must be replaced.[6]

According to Thomas Aquinas, laws compiled by humans can be fair or unjust. If it is fair because it is derived from the eternal law, the law can oblige man through his consciousness. Judging from its purpose, the law is called fair if its rules are meant for the public good; seen from its formers, the law does not merely display the powers of its formers; Judging from its form, the law imposes a burden on subjects according to proportional equality with the intention of the common good. The law can be called unjust in two ways. First, if the law is contrary to the public good, seen from its purpose. For example, a ruler imposes law on subjects without considering aspects of public use but rather leads to his own will or honor, seen by the legislator (ruler). For example, a ruler imposes law beyond his authority which is handed over to him, seen from the aspect of the form, if the law is not directed at the general good, then it will burden everyone unequally.

If natural law is based on the existence of a supreme law that is beyond human reason, then this is not the case with justice. The views of the early natural law school had separated the notion of natural law from the notion of justice. Thrasymachus said, "*Laws are nothing but the interests of those who are strong.*" This view later became the basis of Marx's view of the law. This statement was expressed in the context of the debate with Socrates on the issue of justice written by Plato in The Republic. Thrasymachus argued that justice is what benefits the stronger. This view starts from the notion of "fair," which is in accordance with the law or in accordance with what is recommended by customs and laws in the polis (city-state). If what is just is equated with what is legal, then the source of justice is the will of

[5] Bernard L. Tanya, Simanjuntak, Yoan N. and Hage, Markus Y. *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi*. Surabaya: CV. Kita, 2006.

[6] John Rawls. *A Theory of Justice, Revised Edition*. Oxford: Oxford University Press, 1999.

the legislator. Whereas every regime, according to Thrasymachus, makes laws to maintain its power and for its benefit.[7]

For Plato, justice is not directly related to law. Plato's thinking, which takes Socrates' thoughts, rejects the notion of justice that comes from understanding the world of commerce, namely that justice is honesty: not cheating and paying all

debts to gods and to fellow human beings.[8] In the world of commerce, there is no justice. Justice is nothing but the gain for the strong.[9] State justice, for Plato, is based on economic analysis, not historical. Therefore, for other human beings to fulfill their life needs, every human being has the talents, areas of expertise, and skills of each of its citizens. The division of labor that applies to the three classes in the country is justice that will make the country fair.

The view of utilitarianism towards justice is the notion of justice in a broad sense, not for individuals or just the distribution of goods, as in Aristotle's opinion. The only measure to measure whether something is fair or not is how big the impact is on human welfare (human welfare). Individual welfare may be sacrificed for greater benefits for larger groups (general welfare). As for what is considered useful and not useful, it is measured from an economic perspective. For example, if it is calculated that building access roads is far more profitable economically than not building them, then from the point of view of utilitarianism, the government should decide to build them, even though with this construction, several families must be relocated.

From the perspective of adherents of sociological jurisprudence, such as Roscoe Pound, justice can be carried out with or without law. Justice without the law is carried out according to the wishes or intuition of someone who in making decisions has a wide scope of discretion and has no attachment to certain sets of general rules. The first form of justice is judicial, while the second has administrative characteristics. Pound advocates that both forms of justice exist in

[7] Samuel Enoch Stumpf. *Philosophy: History & Problem*. London: McGraw Hill Inc., 1999.

[8] Rouse William Henry Denham. *The Complete Texts of Great Dialogue of Plato*. New York: New American Library, 1970.

[9] Ibid.,

all legal systems. He argues that in the history of law, there appears to be a movement between broad discretion and strict and detailed rules. Pound considers that the problem in the future is to achieve harmony between the judicial and administrative elements as well as with justice.[10]

The following description of justice comes from John Rawls, who is seen as the most comprehensive theory of justice to date.[11] Rawls' own theory can be said to depart from utilitarianism, although Rawls himself is more often included in the

legal realist group. Rawls argues that there needs to be a balance between personal interests and common interests. How the measure of the balance must be given is what is called justice. Justice is a value that cannot be negotiable because only with justice can there be a guarantee for the stability of human life. So that there are no conflicts between personal and shared interests, it is necessary to have rules. It is where the law is needed as the arbiter. In an advanced society, new laws will be obeyed if they are able to lay down the principles of justice.

Related to some of the opinions of the experts and experts above about justice, the arguments put forward further look at justice seen from its purpose and designation. In many kinds of literature, including the opinion of Jeremy Bentham (1748-1832) from the utilitarian school, it is said that justice is according to the people. Then many experts and experts argue that justice is relative in nature. Justice in the context of law enforcement is justice for as many people or society as possible.

3. Justice and Equality Before the Law

The 3rd amendment, dated November 10, 2001, to the 1945 Constitution, not only brought changes to the Indonesian constitution but also had an impact and brought about changes in the field of law enforcement in Indonesia. Since the beginning of its independence, the Indonesian people have chosen a legal state with the construction as stated in Article 1 paragraph (3) of the 1945 Constitution, which states explicitly that the State of Indonesia is based on the law (*rechtsstaat*), but now

[10] Soerjono Soekanto. *Perspektif Teoritis Studi Hukum dalam Masyarakat*. Jakarta: Rajawali, 1985.
[11] Herry Priyono. "Teori Keadilan John Rawls." *Majalah Driyarkara XI* 4 (1984).

after being amended four times, especially in the third amendment -3 which was passed on November 10, 2001, Article 1 paragraph (3) of the 1945 Constitution reads "Indonesia is a state based on law", there is no longer the word "*rechtsstaat*" as an affirmation and explanation.

Referring to the formulation of Article 1 paragraph (3) of the 1945 Constitution, which has now been amended, it states that Indonesia is a legal state. Indonesia adheres to the concept of a western European Continental law state based on civil law called rechtsstaat, combined with customary and Islamic law. Likewise, Uzbekistan applies civil law. It is different from the western concept of the rule of law as taught in Anglo-Saxon countries based on the common law system. [12]

The change from Article 1 paragraph (3) of the 1945 Constitution should be a breath of fresh air for legal politics in the field of law enforcement in Indonesia because the impact of the amendment to Article 1 paragraph (3) is very large and brings very significant influences and changes in law enforcement. Law in Indonesia. The Indonesian people should have been much better and more advanced in the field of law enforcement in order to achieve the people's sense of justice as expected.

The amendment to Article 1 paragraph (3) of the constitution, from which there was originally the word "*rechtsstaat*" in the explanation, then removing the word *rechtsstaat* means that it must be interpreted as follows: *Rechtsstaat* is a legal concept in the civil law system. It is synonymous with codification and legal unification, and all existing legal regulations are collected/compiled/unified and then recorded and/or published in a book. It legally has implications for the emergence of the Criminal Code (KUHP), the Civil Code (KUHPer), the Criminal Procedure Code (KUHAP), the Civil Procedure Code (KUHPer), the Criminal Procedure Code (KUHPer), and the Commercial Law (KUHD).

John Austin (1790-1861) argued that law is a logical system, fixed and closed (close logical system). Law is separated from justice. Before the birth of the school of "positive law," even in the Middle Ages, the school of "legism" had developed, which identified law with statutes. There is no law outside the law; the only source

[12] Boy Nurdin. *Kedudukan dan Fungsi Hakim dalam Penegakan Hukum di Indonesia*. Bandung: PT Alumni, 2012.

of law is the law.[13] Austin does not talk about justice because justice is a value outside the law, so it must be separated. If the law is an order (command), then the order has nothing to do with justice. For this reason, critics of Austin generally focus on his view of law as an order.

Hans Kelsen (1881-1973) made Hart and Austin's views the basis for building his theory through his book The Pure Theory of Law. Kelsen's opinion of Pure Law Theory is based on Austin's opinion. If in giving a theoretical understanding, the law must be cleaned from considerations of other social sciences outside the science of law, "*It is called a pure theory of law because it only describes the law and attempts to eliminate everything that is not strictly law from the object of this description. Its aim is to free the science of law from alien elements. It is the methodological basis of the theory.*"[14]

4. Positivism Versus Realism Paradigm

Satjipto Rahardjo revealed that laws were created for humans because there are humans (society) then laws were created, and therefore do not be imprisoned by laws. On the other hand, Marcus Tullius Cicero (106-43 BC) said *ubi societas ibi ius* (where there is society, there is law).[15] Moh. Mahfud MD stated that formal law should not hinder material justice. This paradigm of thinking is in line with legal realism/pragmatic legal realism (although many experts and legal philosophers in the world say that realism/realism is not a school or school of law within legal philosophy but only a movement in the way of thinking about the law).

In connection with the demand to achieve justice in law enforcement, the realists pioneered by Oliver Wendell Holmes (1841-1935) realized from the start that existing laws couldn't solve all of the numerous and complex legal issues that existed in society. In simple terms, the essence of the teachings of realism is that laws are sufficiently used as a reference in solving legal problems in society. So if

[13] Boy Nurdin. *Filsafat Hukum (Tokoh-tokoh Penting Filsafat: Sejarah dan Intisari Pemikiran*. Bandung: Litera AntarNusa, 2014.

[14] Hans Kelsen. *The Pure Theory of Law*. Berkeley: University of California Press, 1978.

[15] Hamzah Andi and Senjun Manulang. *Lembaga Fiducia dan Penerapannya di Indonesia*. Jakarta: IND. HILL CO., 1967.

the existing law is very appropriate or feels fair, then it is still used or used, but if the law is felt to be unfair or far from a sense of justice, it must be abandoned, especially for judges. Furthermore, the judge must make legal discoveries, or what is called *rechtsvinding*, as a result, and consequence of Article 22 AB, or, in other words, Article 22 AB is the legal basis for judges to *rechtsvinding*. Judges must be creative in finding laws for justice in examining, hearing, and deciding a case.

The law does exist in the law but must be found (by Prof. Paul Scholten). This can be interpreted as a sign that before a law is used, it must first be interpreted correctly and correctly, not only by looking at how the sentence sounds (only written), but must be interpreted to the spirit and soul of the law, how historical it is, philosophically and sociologically from a law that will be used.

Law enforcement is said to be appropriate if it has succeeded in achieving a legal goal called justice, and vice versa; law enforcement is said to be wrong or

wrong if it fails to achieve a legal goal called justice. Law without justice is nothing. The application of good law should not only be based on its formal juridical but must also pay attention to its historical, philosophical, and sociological elements. To achieve good law, namely, the law that is in accordance with the values of justice that exist and live in the midst of society or as living law in society (the living law). Such a law is a law that is in accordance with the will of the community. Therefore it cannot be ignored in law enforcement, so it needs to be fully understood that law enforcement must not deviate from the purpose of the law, which is called justice as the main achievement that must be prioritized.

5. Conclusion

Law enforcement is required to achieve the highest legal goal of justice by using the value *rechtsstaat* from the civil law system and can also use the value rule of law from the Anglo-Saxon (common law) system. Most importantly, law enforcement must use the following paradigm of thinking: law + conscience ❼ Justice. As a legal reconstruction, efforts are needed to explore the philosophical values embodied in legal realism as an important supplement to legal positivism.

As a recommendation, efforts are needed to increase the human resources of law enforcement officials through adequate education and training as well as other efforts, including changing the recruitment system and so on. So that they become more professional and qualified (especially quality in terms of morality) and become law enforcers with better integrity and credibility. In addition, society and all other elements of the nation must be made more intelligent through education in the broadest sense to improve society's legal culture, which includes understanding, intellect, and habits in perceiving, understanding, and responding to the rule of law.

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