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BUILDING A PANCASILA LAWS PARADIGM AS THE INDONESIAN CRIMINAL LAW SCIENCE PARADIGM

(Critical-Philosophical Study of Legal Positivism Paradigmes in Indonesia)

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ABSTRACT:

The issue of "paradigm" is always interesting to be discussed and debated. Differing views of jurists preceded by a paradigm that is used in building the argument juridical (legal reasoning). That difference, also under the influence of methods of learning in higher education law. This implies, that a scientist law will never probably be in the zero point in issuing his views and will always be subjective.

The issue becomes interesting, when Indonesia, was clearly an explicit through the fourth paragraph of the preamble NRI 1945 confirms Pancasila as a paradigm of the whole life of the state and society. Thus, Pancasila is the only paradigm (Philosophy) Law recognized and acknowledged in some legislation. So, again the problem is whether the law enforcement in Indonesia has been able to absorb the essence of Pancasila it self.

KEYWORDS: Pancasila, Paradigm, Philosophy, Human, Legal Studies

INTRODUCTION:

At the National Law Seminar I of 1963, Moe Ijatno made a scathing criticism in the form of a question through his paper , namely, " On what basis or principles should our criminal law be built? " (Barda Nawawi Arief, 2012: 8). The question, of course, when understood at this time, raises questions as well. What is meant by Moeljatno at that time related to the use of the phrase "principles" is to refer to the classification of a system of values (values)? Or what is meant by Moeljatno is the "basis" of the whole value system, namely the value itself? More explicitly, Bernard Arief Sidharta (2009: 9-10) explained, that in questioning a legal problem, the study should start from the scientific activities of the Law, namely by reflecting philosophical. A complete philosophical reflection on the Science of Law will question the aspects of ontology, epistemology and axiology aspects of Legal Studies. The study of these three aspects will determine the existence and scientific character of Legal Studies which will have implications for the way Legal Law is developed (theoretical legal development) and Legal Law (practical legal development) in the reality of social life. Therefore, the view of Legal Studies will influence the "form and way of education (higher) law", and "how to think" and "how to work" the jurists produced.

Against this, the author cites the opinion of Mochtar Kusuma-Atmadja were cited by Otje Salman (2010 : 28), the laws are made to be appropriate or notice of public awareness. As confirmed by Jan Gijssels and Mark van Hoecke (2001 : 16) , where the law is and must be a reflection of a civilization (beschaving). That is, the formation of criminal legislation should not

be individualistic, which is embraced and transmitted through colonialism, but social collective, because the law is a social phenomenon.

The development of a positivistic-legalistic rational paradigm entering Indonesia which is always opposed to the living law of the Indonesian Nation has often been questioned by legal experts in the past, until now. However, the root of the rational paradigm according to Khudzaifah Dimyati & Kelik Wardiono (2014: vi), R. Soepomo (2013: 1-2), and Bernard Arief Sidharta (2009: 4) caused by several factors, namely:

1. Domination and legal political hegemony of the Dutch East Indies colonial government;
2. Reduction of Islamic teachings and Islam from state life;
3. S structures are at the economy with a system of liberal-capitalist;
4. Consensus academics laws me up right in the legal system since the days of the Dutch East Indies colonial administration;
5. The need to prepare rechtsambtenar (judge or clerk)
6. The minimum number of competent law graduates and those who have legislative drafting skills is less than 200 people;
7. Behind the development of science and technology.

As a result of the influence of legal relations that have occurred widely, even across national borders, or better known as globalization, the influence of legal philosophy in shaping the legal politics and legal system of a country, can also be said to be one of the elements that influence mindset in the formation of law. As explained by CFG. Sunaryati Hartono (1991: 52), that there are legal philosophies that influence the development of national law both past and present.

Based on the descriptions above, what is interesting to study is what paradigm is applied in the process of law enforcement in Indonesia? This, in essence, is not clearly described, even some criminal law regulations expressly emerge Pancasila as the only paradigm in reading, understanding, interpreting and implementing these regulations. However, the influence of the Legal Positivism Paradigm taught and inherited by the colonial was so real based on its manifestation through the attitude of behavior of the state administrators.

So it is very appropriate when, Widodo Dwi Putro and Lili Rasjidi, who indirectly emphasized, the Legal Positivism Paradigm leads to low quality legal reasoning. Therefore, the Legal Positivism Paradigm overrides the nature and essence of a human being in his dynamic relationships.

Roeslan Saleh (1983: 7-8) who explained that the thought of criminal law is incomplete and intact if released from the philosophical view that should have been the basis. And the issue of criminal responsibility cannot be separated from 2 (two) aspects which are seen from the philosophical aspect, namely the aspect of justice and aspects of behavior. Aspects of justice, as the crown of philosophy, is an aspect that since Paradigm Rational or Legal Positivism has rested and removed, characterized by Pure Theory of Law by Hans Kelsen, although such efforts have been evident since the era of Rene Descartes and August Comte. While in the behavioral aspect, the Legal Positivism Paradigm uses the verification method of data and facts that are sensed an. The scientific construction of legal reasoning through the syllogism method is a behavior of verifying recognition of an action that is matched with elements that have been determined in advance of the truth (major premise), so that the existence of a minor premise is not possible to shift from that which has been determined. Therefore, a conclusion in the perspective of the Legal Positivism

Paradigm is there from the time the major premise was established.

PROBLEM FORMULATION:

Based on the description above, the author views the existence of a legal problem that would be very appropriate and deserves to be studied in depth, namely:

"Is the use of Pancasila as a Legal Paradigm (Philosophy), is it appropriate to shift the hegemony of the Legal Positivism Paradigm in the process of renewing criminal law in Indonesia ?"

ANALYSIS AND DISCUSSION:

1. Between Philosophy, Human and Legal Studies

Philosophy begins with a sense of wonder, curiosity, ask questions about anything and especially with speculation about the answers to all these questions. Speculation, if used philosophically, means determining the "subject" or idea and pondering it fundamentally. It was this particular aspect that caused people to become interested in philosophy. As long as humans always want to know, by asking questions such as what, why, how, where and how, then speculation becomes very interesting, and will be more interesting when expanding questions about the universe or at least questioning human nature (E. Sumaryono 1999 : 13).

The relationship between philosophy and human nature, as expressed by Jan Hendrik Rapar (2010 : 15) which explains that philosophy is a science that seeks to understand the nature of reality exists by relying on reason. Therefore, philosophy as a science tries to understand (verstehen) all forms of reality including including understanding humans as objects of study. The effort to understand humans, as objects of study of philosophy, not only examines the elements in human beings and their properties but is related to the search for reason about the relationships between human beings.

The concept of human life, as stated by St. Thomas Aquinas (1996 : 23) which is associated with the concept of justice as a manifestation of an ideal prototype of life, beginning with the expression Justice is about our doings in relation to ourselves as well as to others . The ideal life is described by Thomas Aquinas as a form of good relations based on the principles of doing good for others, and not expecting others to do good for him.

Thinking Philosophically a result of human effort with the power of his intellect to comprehend m i is a radical, integral and universal nature of sarwa there (the nature of God, nature and human nature), as well as human behavior, including as a consequence of understanding the (ES Ansari, 19, 84 : 12). Oleh therefore, humans are naturally question the essence of himself, even arguably it is a puzzle like himself, who the "I" of this? (Greetings , 1988: 12)

Based on this, in the context of human relations, in its development shifted the hegemony of private law, with the emergence of discussions about public law spearheaded by the Vienna Circle. Private law is considered to be no longer able to accommodate all aspects of human life. The philosophers then gave rise to a study of the aspects of constitutional law, administrative law and criminal law.

In a increasingly pluralistic modern society, there is also an increasing need to formulate the necessary legal norms into a variety of generally accepted legal rules (legislation). These written legal rules, among others, function to guarantee stability in legal relations between citizens. Therefore, predictability in its implementation is crucial for maintaining and maintaining the stability of legal relations. However, social life in the real reality of facets is very diverse so that it cannot be completely wholly poured into a network of

legal rules that concretely formulate legal rules in detail (Bernard Arief Sidharta, 2013 : 23) , so that they are always formed abstractly and are of an abstract nature. general.

That phenomenon, according to Paulus Hadisup rapto (2009 : 6-7), makes Law Science the oldest scientific discipline in the world, long before other sciences, such as engineering, economics, psychology, sociology and others. In its development in thousands of years it can be estimated that the study structure has also reached a level of establishment. The legal study is certainly inseparable from the study of the law itself. The legal phenomena faced today feels far different from the phenomena encountered thousands of years ago. A phenomenon that better reflects the characteristics of modern law. The development of substance, nature and legal phenomena since many years ago until now, surely will inevitably affect the patterns of study approaches applied in understanding the substance, nature and legal phenomena in people's lives.

Based on a deep historical search, Harold J. Berman asserted that in fact the science of law was the first modern science that was present in the Western World. Likewise, CFG. Sunaryati Hartono explained that there is no doubt that law is a very old field of science, even older than the natural sciences (Johnny Ibrahim, 2007:16).

2. Pancasila and Indonesian Humans

Returning to the statement from Moeljatno above, the interesting view expressed by Hotma P. Sibuea in her dissertation relates to what paradigm will be used in developing Indonesian Law. Hotma P. Sibuea (2008 : 293) explains that the goal of the state and the purpose of statehood of each nation is something unique and unique so that it is never the same for every nation. The state structure which is negated from each state's goal and the state's purpose which is different by itself will also always be different for each nation. So, to achieve the goal of the state as a common goal of the nation, it is necessary to organize the state power which starts from the state's ideals.

The need for legislation in the context of the rule of law becomes very important. That is because, according to Soediman Kartohadiprodjo, the state is run by humans and not by machines. Thus, in daily practice, all actions of the state are carried out by humans. And because there are no human beings without blemishes, all work is imperfect. Therefore, if a person who is given power in that country cannot exercise power with a spirit of humanity and justice, then a state of law cannot be achieved (Sudargo Gautama, 1983 : 6) .

The view of life, in the context of Indonesianness is Pancasila, is a collective agreement or general consensus from the majority of people in the country concerned. According to Jimly Asshiddiqie (2010 : 2 1), if the general agreement collapses, then the legitimacy of the relevant state power also collapses, and in turn civil war or a revolution can occur. Theoretically, Jimly Asshiddiqie's view is a justification for the position of the Pancasila in a legal study.

Long before Jimly Asshiddiqie's opinion, according to Achmad Ali (2012 : 82), Cicero said that law emerged from the community, but what needed to be understood was that law enforcement officials were also part of the community itself. Likewise in the view of the Historical School of Law, pioneered by Karl von Savigny (1799-1861) and Maine (1822-1888), the teachings about volgeist were popularized by von Savigny's pupil, G. Puchta, who explained that the law grew together with the growth of the people, and to be strong together with the power of the people, and in the end the law will die if the nation loses its nationality. Therefore, according to Derita Prapti Rahayu (2014: 15) , it is emphasized that the law is basically always appearing since the first times the community exists, which is marked by the clashing of

interests. However, this meaning, still does not describe the complexity between " societas " (society) and " ius " (law). Not described, when Cicero, and von Savigny (Pen), issued the statement, how intensive and complicated the relationship between the two.

Related to law enforcement in the realm of Criminal Law, according to Barda Nawawi Arief (1998 : 133) states that there is no meaning of criminal law (KUHP) replaced / renewed, if not prepared or not accompanied by changes in criminal law. In other words, criminal law reform or legal substance reform must be accompanied by renewal of "science" about criminal law (legal / criminal science reform). It must even be accompanied by a renewal of the legal culture of society (legal culture reform) and a renewal of its legal structure or instrument (legal structure reform).

Pancasila as philosophie grondlags of the Indonesian nation must have a view that is different in looking at an Indonesian man, even people in general. It must be recognized that the emergence of the Pancasila is not in its nullity, but is influenced by a variety of ideas. However, as part of eastern philosophy, the position of intuition in the method of understanding the nature of humanity makes Pancasila as a philosophical model that is philosophical-dogmatic-theological.

As a philosophy, Pancasila has the object of its study is Indonesian people. When talking about the views of Pancasila on humans, it essentially will not be separated from the opinions Notonagoro (1971: 94-105) that describes Indonesia is human beings are monopluralis, namely the first, based on the position of the nature of Man Indonesia who consist of as a personal being standalone as well as God's creatures; secondly, based on the composition of the Indonesian human nature, which consists of physical and mental elements ; Third, nature of nature, which consists of individual elements and social elements.

This way of thinking is, of course, foreign to legal scientists today. With regard to this matter, Bernard Arief Sidharta (2009 : 173-174) asserted that the starting point of view of the life of the Indonesian people is the belief that humans were created in togetherness with each other; the individual and the union of his life (society) is a single. So togetherness with others or the association of life is an essential element in human existence. The elements of body, taste, and ratio together embody the aspects of individualism from humans, and the harmony element embodies the social aspects of humans; aspects of individualism and aspects of sociality are a unity that can not be separated from one another.

The principle of harmony or "harmony", according to Soediman Kartodiprodjo, is a supplementary tool for humans, besides Body, Taste, and Ratio , in group life, and not as separate beings, and then, because something wants to live together, based on the Principle Kinship which is the core of the soul of Pancasila. In the context of the principle of harmony, then because there is no benefit in living in groups when living in harmony, then this human equipment is going to be called the pillars of harmony in human life. If Indonesian people see the purpose of human life is to live happily as outlined earlier, then the way to find a way to get to that happy life, the way to use the tools of life as well as possible, is the way of deliberation, the way of consensus. (Achmad Suhardi Kartodiprodjo, et.al, 2009: 57-60).

3. The Paradigm Method (Philosophy) of Pancasila Law

Ria Casmi Arrsa (2011: 37) explains, ditetapkannya Pancasila as the ideals of law (rechtsidee) as well as the norms of fundamental state, the direction and purpose of development in Indonesia within the framework of theoretical and in practice can not escape from the Pancasila as the ideals and

spirit of the law which is constitutive. So that Pancasila becomes the basis of the validity of the formation of legal norms in the legal norm system in Indonesia. Therefore, Pancasila as a Legal Paradigm (Philosophy) has its own characteristics.

Legal studies based on Pancasila as part of the study of Sciences, also trapped in an ongoing debate that is between the methods of the Natural Sciences (naturwissenschaften) with the methods of Social Sciences-Humanity (geisteswissenscaften). So, the question is which method is best for representing Pancasi la as a Legal Paradigm (Philosophy)?

Satjipto Rahardjo (2007: 37) asserts that anyone can use the method according to his choice, provided that the choice is applied consequently. Referring to this opinion, the author tries to first adopt the views of Willhelm Dilthey in his scientific position which distinguishes explicitly the use of methods for the Natural Sciences (naturwissenschaften) and the Social Sciences-Humanities (geisteswissenscaften).

According to Wilhelm Dilthey, all human sciences is never static. This is different from the natural sciences which are isolated from the totality of a living nature, even subsequent developments can be predicted in methodical ways. Wilhelm Dilthey considers the difference very important, the aim is that in fact both types of science use different methods or methodologies for discussion. Against geisteswissenschaften cannot be applied scientific methods as in naturwissenschaften, because geisteswissenschaften is related to human life. Furthermore Wilhelm Dilthey asserted, if someone is understood with an understanding of universal human beings, this causes us to have to re-experience the inner relations of universal human beings to each individual expression. Meanwhile, to be able to understand other people and the expressions of their lives, understanding themselves is absolute. Understanding of the geisteswissenschaften depends on our inner experience, that experience can not be reached by scientific methods (E. Sumaryono, 1999 : 50-51).

According to Willhelm Dilthey, that our mind cannot move beyond life itself. That statement is the background of Lebensphilosophie , which explains that the base and purpose of thinking are life, while Leben , life, is understood as all the inner strengths of humans, especially the forces of humanity irrational, like lust and feeling. Against the backdrop of Lebensphilosophie, Dilthey developed his hermeneutics against the mechanistic human image supported by positivism. Here hermeneutics is no longer understood as a way to read a text, but rather as a scientific method. Lebensphilosophie motives can be realized in hermeneutics, because hermeneutics as the art of understanding is nothing but an attempt to understand experiences that are lived concretely and historically. The experience lived in life is what produces "meaning", and capturing that meaning is the task of hermeneutics. Then Richard E. Palmer explains that we experience life not in the mechanical categories of 'power' but in individual and complex moments of the 'meaning' of direct experience of life as a whole and in the embrace of love from the special. Seen from Lebensphilosophie hermeneutics is an integral part that is inseparable from life itself (F. Budi Hardiman (1), 2014: 2-3) . Strengthening and perhaps even, according to the Author, perfecting the views of Willhelm Dilthey, then Hans-Georg Gadamer asserted however that our usual relationship with the past is not characterized by distancing and liberating ourselves from tradition, but rather we are always in a position in traditions, and this is not a process that objectivates — that is, we do not understand what tradition says is something else, something foreign. Tradition is

always our part, a model or a copy, a recognition of ourselves that our historical judgments will almost never see it as a kind of knowledge, but rather as the most sincere bond with tradition (F. Budi Hardiman (2), 2014: 4) .

When looking at the view, already a consensus without debate that the Legal Studies adal a h section of geisteswissenschaften , then it would be a hassle to determine the method is to build the Indonesian Legal Studies based Paradigm (Philosophy) Law Pancasila ?

The concept of legal science and methodology used in a study plays a very significant role so that the science of law and its findings are not trapped in poverty of relevance and actuality. Bearing in mind, these findings will provide a nuance of humanity for the science of law in serving social welfare. However, the breadth of the scope of the concept of legal science makes it difficult to understand. This is exacerbated by the debate over the use of methodology that never ends. The debate was caused because social science is a genus of legal science, so the debate in social science methodology has an influence on the science of law (Johnny Ibrahim, 2007: 28) . Thus, this contradiction is not just whether living law deserves recognition or not. , but in principle is a tug of war between studies based on the Law and Social Sciences in viewing the law. Philipus M. Hadjon & Tatiek Sri Djatmiati (2014: 1) , explained that Indonesian jurists wanted to elevate the degree of legal scholarship to try to eliminate legal science through sociological studies. This has caused confusion in the business of developing legal science. In line with this opinion, Peter Mahmud Marzuki (2011: 88) also saw an effort to make Law as an empirical study by using statistical analysis in problem solving. Thus, it should be as disclosed by Mochtar Kusumaatmadja (2013: 8) where the approach to Legal Studies should use analytical methods or positivism. Where in dealing with this positive law we will deal with normative science, meaning knowledge of the rules of how people should behave (das sollen) in society, not how they actually behave (das sein) in society. In order to formulate an appropriate method for developing Legal Studies (theoretical legal advances) and practical Legal Studies (practical legal advances) in the reality of social life , it is necessary to understand the scientific activities of the Legal Studies themselves.

In carrying out the development of Legal Studies, it must go through the activities of Legal Studies, namely the stage of exposure which consists of interpretation and the stage of systematization of legal materials. In the systematization stage, legal material is then divided into 3 (three) levels, namely the technical level, teleological level, and external systematization. Where in this external systemization utilizes the products of various Human Sciences, which are known as interdisciplinary or transdisciplinary methods. Law Science activities mentioned above are used to solve the main problems of Law that are based on the object of study, namely the facts of society and the rule of law. In the process, both aspects interact or must be interacted (Bernard Arief Sidharta, 2013: 148-160) .

By carrying out the systematization-external function, the legal science development has been carried out by referring to the Social Science Strategy that enables the Law Science to be alive and relevant to the dynamics of social and state life, but the final processing of these various inputs can still only be carried out using normative methods that refers to values and rules. However, jurisprudence in its development must always refer to and core values-rationality and principle-rationality without ignoring rationality-efficiency and rationality-reasonableness. It can be said that in fact the development of Law Science also accommodates in itself the History of Law, Legal Sociology, Legal Anthropology, Psychology of

Law and Theory of Justice (Bernard Arief Sidharta, 2013: 76) .

CONCLUSIONS:

The Debate of Law and Social Sciences, never lose in stop polyming on the determination of methods in the field of Science geisteswissenschaften and naturwissenschaften . These problems are more or less directly influenced by the tug-of-war between the Legal Paradigms (Philosophy) which are the general basic framework in carrying out legal reasoning on a social problem.

Since the use of the Legal Positivism Paradigm (Philosophy), especially in the realm of practical legal science by law enforcers, has separated the power of reasoning and the loss of humanity towards humans who have social problems. As a paradigm that does not grow and develop from the values that live in Indonesian society, but it receives de facto recognition by law enforcers, becoming an antinomy and legal anomaly continues to be created, maintained and unresolved. Pancasila, both as a rechtsidee and a staatsidee , did not experience proper distillation by the legislators. So as a philosophical grondlags , Pancasila is only at the level of ideas and discourse.

Law has a unique and unique nature as a sui generis . Each country has its own peculiarities that influence the development of its Legal Studies. Likewise in Indonesia, the Pancasila is one of the elements that characterizes this uniqueness and uniqueness. Referring to the view that the Indonesian Man in the view of Pancasila is a monopluralist. Where this view prioritizes the balance aspect of the elements which by nature are monodualist pairs. So, is the Law as a positive science, in the view of Aristotle, contains a normative nature that in practical practice, moves based on the Social Sciences Strategy. Therefore, it cannot be denied that Law has the purpose of providing alternative solutions for solving concrete problems in society. The use of the Social Sciences Strategy is not intended to change the normative nature of Legal Studies. However, adopting Pancasila as a Legal Paradigm (Philosophy), then Legal Studies in its move towards geisteswissenschaften is not possible to use the scientific methods as the Cartesian Paradigm and Positivism Comte Paradigm want.

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