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Philosophy of Sociological Jurisprudence as a Reform in Criminal LawIn Relation to Living Law in Society

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Abstract. *This paper discusses and explains the perspective of living law in society in the reform of criminal law. namely, how the position of living law in society in the reform of criminal law is seen from the perspective of legal theory. In this study, the type of research used is normative law, which is carried out with a statutory approach and analyzing legal concepts. This study is complete because it uses primary and secondary legal materials, using literature study techniques so that the legal materials are collected and the legal materials are analyzed using description and evaluation techniques. From the results of this study, the contribution of living law in society in the reform of criminal law is strengthened theoretically.*

Keywords: *Criminal; Law; Legal; Society.*

1. Introduction

Legal reform, including criminal law reform, is essentially a reform of the main ideas, often interpreted as a reform of concepts or basic ideas—not just changing the formulation of articles textually. Although the textual explanation cannot be ignored, the basic value behind the textual is its priority interest. This means that in legal reform, including criminal law reform, the reform of these values is the basic need. Because the substance of law is value. Law is truly a depiction of a system of values. Law is not a series of dead and empty words. Therefore, no matter how beautiful and good the textual explanation is, it cannot be given the quality of law if it does not contain and does not embody a system of values. Considering its essence, the discussion of criminal law reform in this article will begin with a discussion of the main ideas or basic ideas that are the foundation and guidelines.

Muladi said there are at least five main ideas or guidelines in the renewal of national criminal law. Each is:

First, criminal law reform, in addition to being carried out for sociological, political and practical reasons, must be consciously structured within the framework of the national ideology of Pancasila. Second, criminal law reform must not ignore

aspects related to human conditions, nature and Indonesian traditions while still recognizing the laws that live in society both as sources of positive law and as sources of negative law. Third, criminal law reform must be adjusted and adapted to universal tendencies that grow in civilized society. Fourth, considering the harsh nature of criminal justice and one of the objectives of preventive punishment, criminal law reform must also consider preventive aspects. Fifth, criminal law reform must always be responsive to developments in science and technology in order to increase the effectiveness of its function in society.

Reinforcing what Muladi stated above, it is clearly illustrated that legal reform including criminal law reform cannot ignore aspects of Indonesian tradition while still recognizing the law that lives in society both as a source of positive law and as a source of negative law. The narrative put forward by Muladi actually confirms how the law that lives in society is an important ingredient in legal reform, including national criminal law reform.

Intertwined with Muladi's thoughts, Barda Nawawi Arief also once reminded that the law of a nation is "Nation Centric". Therefore, the legal reform of a nation, including the reform of criminal law, is essentially an effort to review and re-evaluate the socio-political, socio-philosophical and socio-cultural values that underlie and provide content to the normative and substantive content of the criminal law that is aspired to. The legal reform of a nation thus cannot be separated from the culture of the nation concerned.

The Sociological Jurisprudence School is one of the schools of thought in Legal Philosophy that grew and developed in the European continent pioneered by Eugen Erlich. This school is included in the sociological school of legal thought that studies the influence of law on society with an approach from law to society.

Based on the description above, the author is interested in developing a writing objective to study and analyze the legal position that exists in society in the renewal of criminal law seen from the perspective of legal theory.

2. Research methods

To conduct research in this writing, the author uses a normative legal method. The writing specification is carried out using a descriptive analytical approach. The data used for this writing is secondary data. To obtain data in this writing, a secondary data collection method is used which is obtained from literature books, laws and regulations, and the opinions of legal experts. The data that has been obtained is then analyzed using qualitative analysis.

3. Results and Discussion

3.1. The legal position that exists in society in the renewal of criminal law seen from the perspective of legal theory

Discussions on living law in the renewal of national criminal law have been conducted by several authors. The most recent article related to this discussion can be traced in the writing of Prianter Jaya Hairi, Research Center of the Expert

Body of the Indonesian House of Representatives with the title "Contradiction of the Regulation of "Living Law in Society" as Part of the Principles of Legality of Indonesian Criminal Law". The focus of this study is the discussion on the basis of the regulation of the principle of material legality in the Draft Criminal Code. The study in this article concludes that the basis for the regulation of the principle of material legality in the Draft Criminal Code is the national legislative policy after independence and agreements in national seminars. Positioning living law in society in the renewal of national criminal law will be faced with theoretical stability that confines it. First, embryonically, Cartesian-Newtonian thinking—which was later followed collectively by John Austin, August Comte, Hans Kelsen—which has dominated and hegemonized legal thought, does not provide space for the application of living law in society within the framework of the national legal system. Second, sharing with Cartesian-Newtonian thought, the reception theory initiated by Snouck Hurgronje strengthens the dominance of such legal thinking. Therefore, it is understandable when in the intellectual debate that accompanies the reform of national criminal law, the idea of cleaning up traditional elements (laws that live in society) in the national criminal law system emerged. The inclusion of laws that live in society in the reform of national criminal law is feared to cause problems as narrated by I Dewa Made Suartha (2015) quoted by Budi Suhariyanto, who in essence stated that the plan to reform criminal law that juxtaposes the principle of legality with recognition of laws that live in society is not without problems. The limits of criminal acts are expanded, not only to those written in the law but also according to customary (criminal) law, both written and unwritten. In this context, deviations from the principle of lex certa are very likely to occur.

The theoretical constraints on the entry of living law into society in legal reform, especially in Indonesia, will be explained in the following presentation. Analytically, Descartes' thinking—which was later continued and elaborated by Hans Kelsen to become the core teaching of legal positivism—still leaves unresolved theoretical problems. Although legal positivism still dominates and hegemonizes the legal thinking of the heirs of Continental European law—including Indonesia—its great document needs to be presented so that acceptance of its teachings is not done blindly (taken for granted). Especially for Indonesian society whose traditional basis is more "confronted" than "intertwined" with Continental European traditions.

The idea of legal positivism originates from scientific positivism initiated by Rene Descartes and Isaac Newton. Legal positivism is the embodiment of the Cartesian-Newtonian paradigm. Descartes and Newton, who were confirmed as the founders of scientific positivism, have a strong influence on legal positivism through the principles of their teachings: First, subjectivity-anthropocentrism, which is the principle that represents the awareness that humans are the center of the world. This awareness was embedded by Descartes through the principle of his teachings, "because I think I am" (cogito ergo sum). This awareness becomes

the ontological basis for the existence of external reality outside the subject. Second, dualistic, this principle represents the division of reality into subject and object, human and nature, by placing the superiority of the subject over the object. This separation is a natural consequence of Descartes' principle to find objective and universal truth, namely the principle of clear and distinct. This view assumes that humans can explore reality that is free from human mental construction, measuring objects without being influenced by objects. Dualism also includes a real and fundamental separation between consciousness and matter, between mind and body, between soul cogitans and matter extensa, and between value and fact. Third, reductionist, the view that assumes that reality can be understood by analyzing and breaking it down into small parts, then explained with quantitative measurements. Fourth, mechanistic-deterministic, the cosmological assumption that the universe is a giant machine that is dead, lifeless and static, not only nature, everything outside the subject's consciousness is considered a machine that works according to quantitative mathematical laws, including the human body.

Theoretical debates on the adoption of living law in society in the reform of national (criminal) law continue to emerge along with the still strong hegemony of legal positivism in Indonesia. However, the space for the adoption of living law in society in the reform of national (criminal) law has also been strengthened theoretically. In the current context, where pluralism is becoming an issue in the international community, the presence of traditional values has a place in various scientific forums. Therefore, it is also easy to understand when many theoretical studies take the object of study of the issue of pluralism, including pluralism in the legal field.

4. Conclusion

Based on the analysis as explained above, it can be concluded that from the perspective of legal theory, the adoption of living law in society in the renewal of national law is a step that can be scientifically justified. There is a theoretical explanation of the inclusion of living law in society in the renewal of criminal law. Likewise, legally, the inclusion of living law in society in the renewal of criminal law is strongly justified, not only by national legal instruments, but also by international legal instruments.

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