



Effect of Positivism in Clinical Legal Education

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Abstrak

Saat ini, seiring dengan kompleksnya masalah masyarakat, karakter utama hukum modern adalah bersifat rasional. Rasionalitas dicirikan oleh sifat peraturan prosedural hukum. Prosedur, sehingga menjadi dasar hukum yang penting untuk menetapkan apa yang disebut keadilan, bahkan prosedur menjadi lebih penting daripada membicarakan keadilan itu sendiri. Pendidikan hukum, lebih cenderung menghasilkan praktisi profesional. Praktisi hukum yang dihasilkan adalah pelaku hukum yang diharapkan membuat keputusan yang salah dan mana yang benar berdasarkan ketentuan undang-undang. Tulisan ini membahas tentang hubungan metode Clinical Legal Education (CLE) dengan Alumni pendidikan hukum yang tidak hanya mengutamakan kepatuhan kepada hukum positif, namun juga tetap berpedoman pada etika dan upaya mencapai keadilan. Metode yang digunakan untuk penulisan makalah ini adalah penelitian sosio-legal dengan analisis induktif.

Abstract

At present, along with the complexity of the problems of people and society, the main character of modern law is a rational nature. Rationality is characterized by the nature of a procedural rule of law. Procedure, thereby becoming an important legal basis to establish what is called justice, even the procedure becomes more important than talking about justice itself. Legal education, thus more likely to produce professional practitioners. The resulting legal practitioners are legal actors who are expected to make a decision which side is wrong and what is right under the provisions of the law. This paper discusses on the relationship of CLE method to the result of the Law degree who is not only give priority to the compliance procedure as positive law, but also still guided ethics and efforts to achieve justice. The method used for writing this paper is the socio legal research with inductive analysis. Thus, the fact that occurred in the law enforcement practices will be a major premise and provide input and analysis in this paper.



1. Introduction

Entering the XVII century the influence of religion is really backwards because of the development of rationalism philosophy. This philosophical view that human reason is the only source of civilization and human progress. Philosophical rationalism adopted the view that God did not interfere in the events in this world. In the view of philosophy of rationalism, science is the only important thing for human progress. In the early seventeenth century, science is seen as a natural science. The development of this knowledge is obtained from the facts, which were collected through observations and findings can be repeated indefinitely. The result will always be the same wherever the research is done. The development of rationalism philosophy is part of human effort to understand nature in a more rational, objective, without prejudice. He refused anything metaphysically analyzed, reject teaching that can not be proved scientifically / science.

Justification for the view above, can be based on founder of scientific evaluation Francis Bacon from England, Rene D'Cartes from France and Galileo Galilei from Italia. They adopt that nature and natural objects do not have souls like humans, and therefore to know, things should be examined in an impersonal, that is separated from the mystical values, theology, but based on ratio reason and experience. The view is then gave birth to the idea that science and scientific thinking should be value free (Hartono, 1991:10). This is what in the world is known as the foundation of "Modernism". Modernism philosophy was dominating the ideas which developed in the XVII century until the early XX century.

Modernism has encouraged the utilization of ratio and reasonable that is so strong. The thoughts or works based on the utilization ratio and reasonable were so admired. This motivated the rapid progress of science and technology in the era of enlightenment. The development of science and technology which are based on observations and actual experiences are believed to provide much benefit because it is based on empirical evidence, objectively and all described based on

the relationship of symptoms to one another is no longer on the teachings derived from religious scripture. Science (especially natural sciences) and the scientific method were greatly admired. Began to develop the view that the right is the real (concrete). This view underlies the birth of positivism philosophy, that the development is very fast in the era of century XVIII - XIX.

Positivism philosophy based on something real, tangible, concrete, not based on metaphysical system. Philosophy of positivism is not about to explain the essence, since essence is something abstract. The essence can be related to the value and interpretation, something invisible. Therefore the positivism does not explain the essence. Philosophy of positivism - *once again* - only basing on the fact and only use the scientific method.

The school of positivism contains basic values drawn from natural science tradition, which places the phenomenon under study as an object that can be controlled, be generalized so that the symptoms in the future can be predicted (*Bonaventura de Sousa Santos, 1996:14-15*). School of positivism start from the assumption that the natural sciences is the only science that is universally valid. Based on this assumption then, although there are differences between natural phenomena with social phenomena, considered to be always possible to study social phenomena in the natural science approach. Santos said that these symptoms appear such as in the opinion of Montesquieu that, man-made legal system can not be separated from the natural law.

The dominance of positivism paradigm in natural science that was later adopted in the social sciences lead to a way of thinking as if social phenomena must be understood by an impersonal method, neutral and objective, and "the formula" is always the same everywhere regardless of space and time.

Max Weber, a character who developed sociology in the early XX century continue the thought method of Auguste Comte. According to Auguste Comte sociology was a science that adopted empirical approaches and can not break away from the attitude of

naturalism. Empirical approach in the sociology is evident from the ideas of figures of the early sociologist : Max Weber and Eugen Erlich. It is therefore not surprising that Max Weber's views about the law: rule of law are the facts of reality that emerges from the struggle in the development of symptoms that are cause and effect. The law in fact exist in the community is one element of social life. Weber's view about this law is a view of the law from the sociology perspective is based on empirical approaches. This is the classical view that in the present (XXI century) experienced significant changes.

2. Effect of Positivism in Legal Doctrine

Because of the strong influence of the paradigm of positivism, then modern law scientification has also begun to liberate themselves from the ancient orders, especially the effects of theology, so the law becomes very forward in thinking rationally. So positivism not only get in on the areas of society like sociology, but also in the field of law.

If positivism in sociology see the law as a mere social phenomenon, then positivism in legal doctrine see the law as a symptom of its own. The emergence of norms that should apply and that should not apply comes from the existence of certain values. So the law is seen as the embodiment of certain values. This thought leads us to study what should be legal to realize those values. For example what should be done by law to fulfill the justice value. This has been a hallmark of legal studies, and differentiate it from other social studies.

Empirical approach that originates from the teachings of Auguste Comte's Positivism has a big influence in the development of legal science. Great influence of positivism appeared in the teachings of John Austin (1790-1859) about the law. In his opinion the law should be concrete and tangible in written form, created by the institution that it has the legal authority for it. The institution in question is a state. Not just stopping there only: The concept of the state - in the view of John Austin - is still abstract, so it must be conc-

reted. Concretization of the state indicated by the state attribute of sovereignty. Based on its sovereignty then a state can make the rule of law. In the inter-state, countries develop international law, while inside the state, a country has an authority to compile national law. John Austin calls it with the words: that in the context of law, sovereignty has an external aspect (as embodied in international law) and the internal aspect (as embodied in positive law in force in the country). John Austin introduced the term *Analytical Jurisprudence* to refer to the legal doctrine that was developed from the school of positivism. The term *Analytical Jurisprudence* indicating a proficiency in law science limits, which must be removed from the study of metaphysics. Furthermore, he said, the period of the late nineteenth century was marked by a *modern legal scientification*.

Influence of positivism in law (*Jurisprudence*) later gave birth to the so-called *school of Jurisprudence: formalism or conceptualism*. In the article titled: *Jurisprudence: An Overview*, published by *Law School Cornell University* in 2004 stated:

"... Formalism or conceptualism, treats law like math or science. Formalist believe that a judge identifies the relevant legal principles, applies Them to the facts of a case, and logically deduces a rule That will from govern the outcome of the dispute ... "

The statement reflects the application of natural sciences positivism thought into the science of law. Positivistic thinking in the law as such has created School of Jurisprudence, called formalism or conceptualism, which believes that in dealing with a case, the judge will identify the legal principles that are relevant, and will apply them deductively, so that the provisions of this law will lead to litigation settlement . So the formalism is the School of Jurisprudence, developed from the theory of Jurisprudence in the positivist tradition, as stated by Herman J. Pietersen (2004): *"... Another, related, theory of Jurisprudence in the positivist tradition is the so-called approach of legal formalism"*. Similar to the description issued by Law School Cornell

University, Herman J. Pietersen also stated:

“... The chief purpose of legal formalism is to build a comprehensive and tight (“seamless”) body of legal principles, propositions and justificatory structures that can be applied to legal practice in the manner of a logical - deductive science like mathematics, but without recourse to any non-legal disciplines such philosophy or social science ...”.

Based on the opinion of Herman J. Pietersen then the main purpose of *legal formalism* is to build legal principles, propositions and *justificatory structures* that comprehensive and rigorous, so it can be applied to practice law in a way (method) of deductive logic natural science, without the help of other discipline sciences such as philosophy or social science.

In nineteenth-century legal science also experiencing tremendous growth, which has never experienced before. Legal fields were growing, especially in the field of trade. Legislation achieved a large magnitude, so need to be systematically arranged that produce codifications. These developments confirmed the nature of legal science as an *analytical jurisprudence*. In the *analytical jurisprudence*, all intellectual activity has one characteristic that is not allowed out of the realm of positive law.

In the realm of *legal formalism*, law conceived primarily as a means of social control to ensure certainty for behavior is always fixed and predictable (logic normologic). So the main study is motivated to set (*to regulate*). Legal norms then become a justification or repellent behavior or in other words, legal norms used to justify whether a fact has legitimate basis or not. On that basis, the pattern of thinking that used to do research is deductive syllogism (Soetandyo Wignjosoebroto, 2000).

Furthermore, the legal doctrines developed from the paradigm of positivism became so dominant in practice and in legal education. Legal doctrines that were inspired by the paradigm of legal positivism is neutral, impartial, impersonal and objective with

derivations in the *principle of equality before the law* for example, become a doctrine that can not be denied its validity and become an integral part in legal education materials (including in Indonesia .) The development of legal doctrine in the “umbrella” positivism paradigm is expected to be producing legal actors to maintain neutrality, impartiality and objectivity, so it is assumed the law would be fair.

In this context, the tasks of legal education are merely maintain the purity of these legal doctrines, and produce legal practitioners who are able to apply rules based on the doctrines of neutrality, impartiality and objectivity of the law. Legal education, thus more likely to produce professional practitioners. The resulting legal practitioners are legal actors who are expected to make a decision which side is wrong and what is right under the provisions of the law.

3. Modern Law Scientification: An Overview

From the above description it can be concluded that the modern law scientification is strongly influenced by the emergence of positivism paradigm in modern science. Modernity is not just affecting science and technology, but also become a source of change in people’s lives, and also the sociology science. At present, along with the complexity of the problems of people and society, the main character of modern law is a rational nature. Rationality is characterized by the nature of a procedural rule of law. Procedure, thereby becoming an important legal basis to establish what is called justice, even the procedure becomes more important than talking about *justice* itself. In this context the search for justice could be a failure just because knock violation of procedure. *“All the handling of the case shall be in accordance with applicable legal procedures,”* according to the expression that represents how important procedure to ensure the rationality of law. Instead all forms of another effort to seek the truth in an effort to uphold justice, outside the rules applicable law, can not be accepted and considered as *out of legal thought*, even

illegal.

In the modern legal system, *justice* has been considered to be given by making positive law. However, in practice, the use of positivism paradigm in modern law was also generated a lot of stiffness in such a way that *searching for the truth* and *searching for justice* was not achieved because of blocked by the “walls” procedural.

The lesson to be drawn is that the *formal justice* upheld by positive law (the legislation) in Indonesia, which is said to uphold the principles of *rule of law* was not yet able to achieve substantial justice. Efforts to achieve *substantial justice* could fail due to hit the procedures that must be met in fulfilling the legality of a modern legal system. Through legislation, certain parties may damage conscience or common sense that is *genuine* behind the statement “all shall be in accordance with legal procedures”, but when the legal procedure is executed, it turns out the fulfillment of justice can be blocked by procedures or formalities which was created by modern law itself. The term of law supremacy then identified with the supremacy of legislation. As a result of legal issues is reduced to a mere juridical technical skills problems. Furthermore, for professional interests there was a *sacred* of positive law. It should be maintained for reasons of the rule of law, even if it had shackles Indonesia in fecklessness uncover cases that led Indonesia to the deterioration of national ethics.

4. Conclusion

Clinical Legal Education (CLE) is an education in legal study that aims to provide knowledge on practical expertise that aims to make law graduates capable of providing legal services (legal advocacy). CLE become important in recent days because of the tendency to resolve the matter through legal channels is increasing. But in fact, it shows that law enforcement is almost interpreted only as rule enforcement. The trend that happens, aspects of compliance procedures take precedence over justice.

Through the description that mentioned above, thus in CLE should be avoided

the understanding that in law enforcement, the embodiment of justice is much more important than compliance procedures. Formal justice is enforced through the fulfillment of the legal procedures should still be able to bring about justice that can be received through common sense. In the CLE, the term supremacy of law should not be identified with the supremacy of regulations, because it raises a result, the law would be reduced to technical skills juridical issues. It was to be avoided in the CLE. Based on these understandings beyond, it is expected CLE will produce law graduates that are not just as a guard of Act or rule of law, but also a man that committed to justice who are able to balance between the interests of individuals with a common interest.

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