International Journal of Judicial Law

Impact and Implementation of Legal Theory in Legal System in Indonesia

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Article Info

ISSN (online): 2583-6536
Volume: 03
Issue: 01
January-February 2024
Received: 05-01-2024
Accepted: 12-02-2024
Page No: 31-35

Abstract
Theory and law are a continuous unity. Because theory is closely related to problem solving and how to make decisions. In various aspects, legal theory is a guideline that can be used as a reference in taking a stance and solving problems. The method used in this study is qualitative using a literature approach. Which produces research results where a person must have a legal theory in themselves when living their daily lives, because by having a legal theory that has been implemented in each person, they will succeed in the legal field. Success in this legal field is a very important requirement for understanding legal theory to minimize or guarantee problems or errors in making scientific works where scientific works themselves are a process of academic activities that are engaged in research.

DOI: https://doi.org/10.54660/IJJL.2023.3.1.31-35

Keywords: legal theory, implementation

1. Introduction

The position of theory is very important in the world of science. This can be seen from the function of theory, namely to understand the problems studied in more depth. By looking at the function of the theory, users of legal theory must also implement things related to solving problems caused by problems which consider decisions based on the legal theory used. Theory is also a means of providing a summary of how to understand a problem in every field of legal science. It is very important for a legal academic to know the broad meaning of theory, so that there are no mistakes in making scientific works which are the process of an academic's activities in scientific activities or in research [1].

Theory can contain subjectivity when it meets very complex things, such as law. From here emerged various schools of thought in legal science that use a theory in law. Legal theory has at least two functions, namely:

a) Explanatory function
b) The function of predicting phenomena

The theory of the function of law in an advanced society can be seen from two sides, namely the first side where the progress of society in various fields requires legal rules to regulate it. So that the legal sector is also drawn by the development of society. From the second side is where good law can develop society or direct the development of society.

Legal Theory is part of a cognitive strategy that is built from the factual realm, generalized to concepts, from concepts realized to other concepts as interrelated proportions and forming a framework for thinking to explain or explain and estimate or predict a phenomenon [2].

As a cognitive strategy, theory is assumed to exist (be born) before a science. After the science is formed and established, it will continue to produce new theories or modify old theories. Theory is positioned as the pillars of a science, so that a science including legal science has legal theories as its supports (pillars) [3].

However, the function of law in society is very diverse, depending on various factors in society. In addition, the function of law in an undeveloped society will also be different from that in an advanced society. In every society, law functions more to law

[1] Pupu Sriwulan Sumaya, "The Relevance of Applying Legal Theory in Law Enforcement to Realize Social Justice Values," Responsive Law Journal 6, no. 6: 55–66.
[2] Satjipto Rahardjo, "Legal Science" (Citra Aditya Bakti, 2006), 110–11.
[3] Sumaya, "The Relevance of Applying Legal Theory in Law Enforcement to Realize Social Justice Values."

guarantee security in society and guarantee the social structure expected by society. However, in an advanced society, becomes more general, abstract, and more distant from its context. According to legal theory, law plays an important role in a society, and even has multifunctions for the good of society, in order to achieve justice, legal certainty, order, benefits, and other legal objectives. However, the opposite situation can occur and often occurs, where state authorities use law as a tool to suppress society, so that society can be driven to the place desired by the state authorities.

In an advanced legal system where the creation and development of laws are designed professionally and logically, there is no doubt that legal products can influence and even change the foundations of people's lives [4].

Observing the development of the Indonesian legal system, it can be seen that there are specific and interesting characteristics to study further. Before the influence of law from the Dutch colonialism in Indonesia, customary law and Islamic law were in effect, which differed from various indigenous communities in Indonesia from each kingdom and different ethnic groups. After the arrival of the Dutch colonialists, they brought their own laws, most of which were concordance with the laws in force in the Netherlands, namely written law and positivist legislation. However, the Dutch adopted a customary law policy (adatrechtpolitiek), namely allowing customary law to apply to indigenous Indonesian communities and European law to apply to European groups residing in Indonesia (the Dutch East Indies) [5].

2. Method

In this study, the subject is approached normatively and juridically, and the essential components of the subject are analyzed by considering its scope and identification. The normative approach of jurisprudence is also known as doctrinal research, which investigates the relationship between written legal texts and judicial interpretations of those texts. Another name for this type of research is doctrinal analysis. The research methods used are mostly descriptive and analytical. The purpose of analytical descriptive research is to describe, analyze, explain, and examine a legal regulation.

3. Results and Discussion

1. Legal Theory as a Means of Change

The theory of social change in relation to the legal sector is one of the major theories in legal science. The relationship between social change and the legal sector is an interactive relationship, in the sense that there is an influence of social change on changes in the legal sector, while on the other hand, legal changes also influence social change. Legal changes that can influence social change are in line with one of the functions of law, namely the function of law as a means of social change, or a means of engineering society (social engineering). So, law is a tool of social engineering, a term first coined by the famous American legal expert Roscoe Pound [6].

Indonesian positive law also adopts the concept of positive law from legal positivism thinkers so that Indonesian positive law is also a written regulation, authorized by a sovereign power, and separate from moral values (good and bad). Indonesian law or what is called Indonesian positive law is law that is legally applicable in Indonesia at the moment; law that has been made and authorized by an authorized body to be enforced in Indonesia. The term positive law is concrete evidence of the concept of positivism in Indonesian law [7].

Indonesia adheres to the Roman German legal system (Continental Europe) or what is known as the civil law system, which was brought by the Dutch colonial government from France. The concept of legism is very familiar in this legal system, namely that society must be regulated by law; and the law is written and made officially by the state. Therefore, in Indonesia, law is a regulation that is made legally and officially by the state government.

This legal concept is the influence of positivism. Law becomes a standard rule that applies to all citizens. This is called legal unification (unification of law for the entire territory of the country and for all citizens). Valid Indonesian law is a regulation that has been legislated through the legislative body, namely the DPR and the President; and this regulation is then called a law, which is applied in a unified and comprehensive manner to all citizens. From here it is clear that positivism greatly influences the development of law in Indonesia [8].

Roscoe Pound has an opinion on the law that emphasizes law on discipline with his theory, namely: "Law as a tool of social engineering" (That the Law is a tool to renew or engineer society). In order to fulfill its role, Roscoe Pound then made a classification of interests that must be protected by the law itself, namely as follows [9].

1. Public Interest
a. State interests as a legal entity
b. The state's interests as guardian of the interests of society.

2. Social Interest
a. The interests of peace and order
b. Protection of social institutions
c. Prevention of moral decline
d. Prevention of violations of rights
e. Social welfare.

3. Private Interest
a. Individual interests
b. Family interests
c. Ownership interests.

The role of law as a tool to change society has actually been proclaimed by many scholars, especially by sociological legal scholars. For example, Roscou Pound with his popular term "law as a tool to engineer society". Or other terms that are sometimes used, such as law as an agent of change or social planning. Even pioneered by Mochtar Kusumaatmaja, during the reign of President Soeharto, in Indonesia the term

[4]Sudikno Mertokusumo, Legal Theory (Yogyakarta: Atma Jaya University), 2011, p. 11.
[5]Hamdan Zoelva, "Law and Politics in the Indonesian Legal System – Zoelva & Partners," accessed June 10, 2023, https://zoelvapartners.id/hukum-dan-politik-dalam-sistem-hukum-indonesia/.
[6]Munir Fuadi, Grand Theories in Law, (Jakarta: Kencana Prennamdeia Group, 2013), page 248
[7]Wahyuni, "The Influence of Positivism in the Development of Legal Science and the Development of Indonesian Law."
[8]Ali, "Mapping Theses in Schools of Legal Philosophy and Their Methodological Consequences."
[9]Andro Meda, "Sociology of Law (Sociological Jurisprudence School)", accessed at http://akhyar13.blogspot.co.id/2014/05/sosiologi-hukum-aliran-sociological_8330.html, on June 10, 2023

law as a tool of development was once popular, because at that time the legal sector was greatly sought to help make development a success, which unfortunately due to the low legal awareness of the law makers and enforcers at that time, caused the law as a tool of development to change function to law as a tool to secure development, which had the consequence of the emergence of many laws that were very repressive and violated the rights of the people, which led many activists to prison or the grave [10].

The opinions outlined regarding the formulations and classifications in Roscoe Pound's social engineering can be likened to the law being considered an engineer in revealing the basics of renewal in society and moving where society will be directed and how society has been regulated. So, law functions as a tool to regulate and manage society. Regulating and managing society will lead to renewals, changes in the structure of society and determination of thought patterns according to the law that lead to development. This will result in legal progress, so that an atmosphere will be achieved that can be categorized as a civilized society. Although the definition of "civilized" contains elements of very subjective assessment (because it is not absolute and must be seen in the dimensions and cultural context of a particular society and time), but as a guideline that he statistically drew Roscoe Pound (in 1919) outlined that "in a civilized society" it will be depicted that: [11]

1. Every person can master the beneficial goals of what they find, what they create, what they obtain in the social and economic order that at that time holds power.
2. Each person can expect that others will not attack him.
3. Everyone can expect that people with whom they deal in general relations will act in good faith or fulfill promises they undertake; will conduct their businesses according to public morality; will replace similar goods in case of errors.

Finally, it can be underlined that Roscoe Pound's teachings operate in 3 (three) main scopes/dimensions: [12]

1. That the law truly functions as a tool to regulate and manage society by
2. Balanced with the fulfillment of the needs or interests of the community, as well as
3. There is supervision to maintain and continue human civilization.

There are many examples of the application of this theory found in regulations, both written and unwritten. Here is an example of the application of the theory of law as a tool of social engineering: One example is in the Law on the Elimination of Domestic Violence Number 23 of 2004, in Article 5 concerning (Prohibition of Domestic Violence) which states: "Everyone is prohibited from committing domestic violence against people within their household by:

a. Physical Violence
b. Psychological Violence
c. Sexual Violence, or
d. Violence Neglect

Article 6: "Physical violence as referred to in Article 5 letter a is an act that results in pain, illness or serious injury."

Article 7: "As referred to in Article 5 letter b are acts that result in fear, loss of self-confidence, loss of ability to act, feelings of helplessness and/or severe psychological suffering in a person." Analysis of the articles above: From the provisions contained in the articles of the law above, we can see the existence of a paradigm: namely law as social engineering.

Where before the existence of this article of the law, there was a lot of violence that occurred in households, especially violence committed by a man against his wife or between members of the household, both psychological and physical violence that threatened the life of the household, for example: a husband who was cruel enough to beat his own wife until she was bruised, this is physical violence that must be eliminated so that the life of a wife is not threatened.

So from the existence of these various cases, the law is made for social engineering with the existence of this law, there is no violence that occurs in the household to form a society that loves each other between family members and does not do bad and detrimental actions such as hitting and others, so this social engineering can be seen to create people, especially women, to live peacefully and safely from the threat of domestic violence and the law can protect people in the household (husband, wife, child caretaker, maid, and all those in a family) and engineer so that there is no more violence that occurs in a family and also engineer so that there is no sexual coercion, for example: in the case of an employer forcing a maid to have sex, and also so that people do not neglect someone in the household so that all family members do not feel afraid and miserable will keep family members safe because in marriage and life in the household of course there will be many problems and quarrels so with the existence of these articles someone will be afraid and aware of the law and will not act arbitrarily between family members and will feel obedient and will not think of acting violently with their family members.

4. Legal Concept

*Law as a tool of social engineering*is a theory put forward by Roscoe Pound, which means law as a tool for renewal/engineering in society, in this term the law is expected to play a role in changing social values in society. By adjusting to the situation and conditions in Indonesia, the concept of "law as a tool of social engineering" which is the core of the thinking of the pragmatic legal realism school, was then developed by Mochtar Kusumaatmadja in Indonesia. According to Mochtar Kusumaatmadja's opinion [13] Law in today's modern society has a prominent characteristic, namely that its use has been carried out consciously by the community. Here the law is not only used to confirm patterns of habits and behavior that exist in society, but also to direct them to desired goals, eliminate habits that are deemed no longer appropriate, create new patterns of behavior and so on. This is what is called a modern view of law which leads to the use of law as an instrument,

[10]Munir Fuady, Grand Theories in Law, Op. Cit, page 259.
[11]Deden Kusdinard, "Legal Changes in Societal Changes", accessed at http://www.kusdinard.id/2014/03/peranan-hukum-dalam-perubahan-masyarakat.html, on June 10, 2023
[12]Andro Meda, "Sociology of Law (Sociological Jurisprudence School)", accessed at http://akhyar13.blogspot.co.id/2014/05/sosiologi-hukum-aliran-sociological_8330.html, on June 10, 2023.
[13]Mochtar Kusumaatmadja. Law, Society, and Development. (Bandung: Binacipta, 2006), p. 9.

namely law as a social engineering tool [14].

The statement that a norm is valid and the statement that it is effective are two different statements. But although validity and effectiveness are two completely different concepts, there is nevertheless a very important relationship between them. A norm is considered valid on the condition that it belongs to a system of norms, to an order that is fully effective. Thus, effectiveness is a condition of validity; a condition, not a reason, of validity. A norm is valid not because it is effective; it is valid if the order surrounding it is fully effective. However, this relationship between validity and effectiveness can be understood only from the perspective of a dynamic legal theory that discusses the problem of reasoning about validity and the concept of the legal order. What is discussed from the perspective of a static theory is the validity of law [15].

The theory of legal validity is one of the important theories in legal science. The theory of validity or legitimacy of law (legal validity) is a theory that teaches how and what the requirements are for a legal rule to be legitimate and valid in its application, so that it can be enforced on society, if necessary with coercive efforts, namely a legal rule that meets the following requirements: [16].

1. These legal rules must be formulated into various forms of formal rules, such as in the form of articles of the Constitution, laws, and various other forms of regulations, international rules such as in the form of treaties, conventions, or at least in the form of customary practices;
2. These formal rules must be made legally, for example if they are in the form of laws they must be made by parliament together with the government;
3. Legally, this legal rule cannot be revoked;
4. There are no other legal defects in the formal rules. For example, they do not conflict with higher rules;
5. These legal rules must be able to be applied by law enforcement bodies, such as courts, police and prosecutors.
6. These legal rules must be acceptable and obeyed by society;
7. The legal rules must be in accordance with the spirit of the nation concerned.

3. Legal Realism

Realism means relating to the real world, the world as it is now. Legal realism is a study of law as something that is actually implemented, rather than just law as a number of rules that are only contained in legislation, but never implemented. According to adherents of this school, the normative nature of law must be set aside. Because for them, law is essentially a manifestation of the symbolic meanings of social actors. Such an interpretation is clearly very far from the nuances of philosophy, but rather leads to a combination of various disciplines, such as sociology, psychology, anthropology, and economics. In relation to handling a case, the judge must always make a choice, which principle will be prioritized and which party will win. This decision often precedes the discovery or development of legal regulations that form its basis.

Therefore, the creativity of judges is central to the formation of law (judge-made law) because law is not logic, but experience (the actual life of law has not been logic: it has been experience) [17]. In the United States, empiricism has its own form, namely the pragmatism school that denies the possibility for humans to know the correct theory. It is necessary to investigate ideas in the practice of life. This began in the early 19th century when empirical science and technology dominated the development of American society and with this development gave birth to an intellectual movement that influenced philosophy and social sciences, even logic. This is used to explain and enlarge knowledge empirically and to provide practical solutions to social problems. The attitude of pragmatism in the United States is considered realistic. Some American legal realism philosophers include OW Holmes, J. Frank, K. Llewellyn and W. Twining. Their thoughts had a great influence in the early 20th century when in the United States there was a movement from very individualistic to a collective form of society. Furthermore, for American legal realism, the most important thing is what the law actually treats. The parties who enforce the law are limited to judges and parties in court. They are the ones who are seen as lawmakers. Therefore, legal rules are a generalization of the power of judges. Legal science must be guided by judges [18].

One of the figures of American Legal Realism is Jerome New Frank, born in New York on September 10, 1889. He was a practicing advocate, researcher and served as chairman of the Securities and Exchange Commission from 1939 to 1941 and a federal appellate judge of the United States Court of Appeals for the Second Circuit from 1941 until he died in 1957. One of his famous books is Law and the Modern Mind and became a jurisprudential bestseller and received widespread criticism. What is called Frank's realism is the similarity of a characteristic negative bond, namely skepticism towards conventional legal theory. Skepticism that is simulated for a spirit of reform in the interests of justice from the perspective of the court. Frank expressed "rule skeptics" which aims to realize greater legal certainty. There is a view that when legal scholars file a lawsuit they should be able to predict the court's decision against their clients, even though they cannot guarantee what the court's decision will be. This skepticism is seen as a problem because the “paper rules” or formal legal regulations conveyed in court opinions often cannot be used as a guide to predict court decisions. On the other hand, “real rules” are descriptions of the non-uniformity or regulations in actual judicial behavior and these real rules will be more reliable to become a prediction instrument. Rule skeptics focus almost exclusively on higher courts, namely appellate courts, which aim to find meaning in the accuracy of the appeal decision [19].

Realism actually wants to criticize Legal Positivism for two reasons, namely: First, there is no legal reasoning, there is

[14]Rahardjo, Satjipto, Legal Science, (Bandung: Citra Aditya Bakti, 2006), page 206.
[15]Hans Kelsen, General Theory of Law and State (Translation of the book Hans Kelsen, General Theory of Law and State, (Bandung: Nusa Media, 2014), p. 56.
[16]Munir Fuadi, Grand Theories in Law, Op. Cit, page 109.
[17]Ali, “Mapping Theses in Schools of Legal Philosophy and Their Methodological Consequences.”
[18]“Legal Realism Views From Jerome Frank,” Business Law, accessed June 10, 2023, https://business-law.binus.ac.id/2018/11/09/pandangan-realisme-hukum-dari-jerome-frank/
[19]“23328-ID-legal-realism-and-its-criticism-of-legal-positivism.pdf,” accessed June 10, 2023, https://media.neliti.com/media/publications/23328-ID-legal-realism-and-its-criticism-of-legal-positivism.pdf

only political reasoning and moral reasoning, and; Second, when the judge makes a decision, the judge's basic reason is not actually on the law but on the facts that the judge finds. The implementation of legal realism, for example, is taking the remaining harvest (gresek/gasak) of rice, kapok, clove leaves and other agricultural products that have become the customs of village communities in Java. The question is whether the community members who take these agricultural products are categorized as taking other people's property unlawfully as intended by Article 362 of the Criminal Code? Of course, the judge does not need to look at the Criminal Code to decide the case, but rather bases it on the customs of village communities in Java which have become stable behavioral patterns. The conclusion is that taking the remaining agricultural products is not theft because it has become the customs of village communities in Java. In this case, the judge acts as a law maker (judge made law) rather than an enforcer of the law.

5. Conclusion

The influence of legal theory and its implementation in the Indonesian legal system is very strong, in this case it can be seen from the start of legal reform, legal formation, legal enforcement, and many others. Each legal theory has its advantages and disadvantages. There is also one theory that tries to criticize other theories. Law develops all the time, the use of legal theory in life continues to develop according to its respective relevance.

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