



Implementation of Progressive Legal Theory in Law Enforcement in Indonesia

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Abstract

The development of medical action not only in clinics, but also in beauty clinics, requires a standard regarding informed consent. This study used 2 problem formulations, namely: 1. The essence of Informed Consent, 2. Informed Consent in Aesthetic Beauty Actions. This study used a Statue Approach, and a Conceptual Approach. The result of this study was that Informed Consent should be a process from the doctor explaining the action until the patient accepts/rejects the action, either in oral or written form. In practice, medical action for beauty at Aesthetic Beauty Clinic was carried out in accordance with professional standard and standard operating procedures. The relationship that arises between the doctor and the patient is called a therapeutic agreement. In this agreement, an approval for a medical action that is given by the patient appears as a form of approval for aesthetic beauty medicine action which is initiated by an offer of the doctor.

Introduction

The 1945 Constitution of the Republic of Indonesia Article 1 paragraph (3) states that "Indonesia is a rule of law state". In the sense of Indonesia highly upholds the law in every aspect of social and state life. A rule of law is that the State cannot act arbitrarily, the actions of the State against its citizens are limited by law. Many legal theories teach that law must be stable, but must not be silent or rigid. At first glance it seems that these statements contradict one another, but in fact they do not contradict one another. Because, that is one of the essential phases of the law where on the one hand the law must contain elements of certainty and predictability, so that it must be stable. But on the other hand, law must be dynamic, so that it can always follow the dynamics of human life development. In addition, it is often said that a jurist (dogmatic) begins to enter the world of legal theory when he/she has begun to leave dogmatic questions of law, namely questions about "from where", "why", "how", and "What for". Or to put it another way, the legal theorist's thinking is indeed a bit dreamy, because he/she is indeed required to reflect a lot.

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 the legal sector is also drawn by the development of this society. The second side is where good law can develop society or direct the development of society. The functions of law in society are very diverse, depending on various factors in society. In addition, the function of law in an underdeveloped society will also be different from that in an advanced society. In every society, law functions more to ensure security in society and guarantee the social structure that is expected by society. However, in an advanced society, law has become more general, abstract, and more distant from its context. According to Cotterrell, (1995) legal theory

law plays an important role in a society, and even has multiple functions for the good of society, in order to achieve justice, legal certainty, order, benefit, and other legal purposes. However, the opposite situation can occur even frequently, where the state authorities use the law as a tool to suppress society, so that people can be driven to the place desired by the state authorities.

Social change in relation to the legal sector is one of the important studies of the Sociology of Law discipline. The relationship between social change and the legal sector is an interaction relationship, in the sense that there is an effect of social change against changes in the legal sector while on the other hand changes in law also have an effect on social change. Legal changes that can affect social change are in line with one of the legal functions, namely the function of law as a means of social change or a means of social engineering. In a country, in terms of legal changes, there are two types of law, namely laws that tend to be changed and laws that tend to be conservative. Family law or laws regarding individual property are conservative and rarely changed. On the other hand, many areas of business law, state administration, and state administration are laws that tend to change according to the wishes and developments in society. From the background described, the writer has the following problem formulations: "Implementation of Progressive Legal Theory in Law Enforcement in Indonesia"

Methods

This research was chosen as normative juridical, which is a scientific research procedure to find out the truth based on the logic of legal science from the normative side. This research used a normative research method by examining literature on the Implementation of Progressive Legal Theory in Law Enforcement in Indonesia. Normative juridical, which means legal research methods are carried out by examining library materials or secondary data. The first approach in this research was the statute approach or the statutory approach. The statute approach is a legal research that places the statutory approach as an approach in the form of legislation and regulation. The second approach used was a conceptual approach, namely a legal research approach that departs from the views and doctrines that develop in legal science. These views and doctrines were used to find out ideas that give birth to legal concepts and legal principles that are in accordance with the legal issues at hand, so that they can become the basis of arguments in solving legal issues at hand. The conceptual approach connects existing concepts with legal issues, namely the implementation of progressive legal theory in law enforcement in Indonesia.

Results and Discussion

Definition of Legal Theory

According to Van Hoecke, (2002) legal theory is an independent discipline whose development is influenced and is closely related to the teachings of general law. The definitive development of legal theory into a discipline in the second half of the twentieth century was inspired by the emergence of new sciences or branches of existing sciences, such as informatics, deontic logic, kibernetics, sociology of law, etiology (law) and its kind. Legal theory is a whole statement that is related to the conceptual system of legal rules and legal decisions, and the system is partially positive. According to Bruggink, the definition above has a double meaning, that is, it can mean a product namely, all related statements are the result of theoretical activities in the field of law.

In the sense of process, namely theoretical activities about law or can contain other double sense, namely legal theory in the broad sense and legal theory in the narrow sense. In a broader sense, it means referring to an understanding of the nature of the various parts (sub-disciplinary branches) of legal theory, namely the sociology of law, talking about the factual or empirical

enforceability of law. Legal theory in a narrow sense, talks about the formal or normative enforceability of law. Philosophy of law talks about the evaluative enforceability of law, the last is legal dogmatics, or the science of law in a narrow sense. Against the four theoretical research activities in the field of law itself. Besides containing the double sense above, according to Bruggink's study of the theory above, Bruggink explains that legal theory in a broad sense consists of any part, is a difficult problem because each author proposes his/her own division using the appropriate definition.

Legal dogmatics (rechtsleer) or legal dogmatics (rechtdogmatiek), also often referred to as legal science (rechtswetenschap), in the narrow sense aims to explain and systematize and in a certain sense also explain (verklaren) the applicable positive law. However, legal dogmatics is not a value-free neutral science. So that if you look at the dogmatic relationship of law with legal theory, it does not overlap, but one another has its own (independent) analysis, as below: (a) Legal dogmatics studies legal rules from a technical point of view (although not a-normative), so legal theory is a reflection of this legal technique; (b) Legal dogmatics talks about law. Legal theory talks about the way in which legal scientists talk about law; (c) Legal dogmatics tries by means of certain interpretive techniques to apply statutory texts which at first glance does not raise questions about the usability of interpretive techniques, about the logically compelling nature of interpretive reasoning and the like;

Legal philosophy is a general philosophy that is applied to law or legal symptoms. In philosophy the deepest questions are dealt with in relation to the foundation, structure, and the like of reality. According to Van Hoecke & Soeteman (2016) legal philosophy has the following analysis: (a) Legal ontology, research on the nature of law, for example the essence of democracy, the relationship between law and morals, (b) Legal axiology, determination of content and values such as worthiness, equality, justice, freedom and others, (c) legal ideology (teaching of ideas), (d) Legal epistemology (teaching of knowledge), a form of metaphylology, (e) Legal Teleology, determines the meaning and purpose of law, (f) Teaching science from law, meta theory from law science, (g) Legal logic.

It can be known the relationship between legal philosophy and legal theory is that if Legal Theory embodies a meta-theory regarding legal dogmatics, then Philosophy of Law fulfills the function of a meta-discipline regarding Legal Theory. Structurally, Legal Theory is linked to the Philosophy of Law in the same way as Legal Dogmatics, to Legal Theory. Philosophy of Law is a meta-discipline with regard to Legal Theory. Philosophy of Law as the teaching of values from legal theory and Philosophy of Law as the teaching of Legal Theory (Soekanto, 2011). Philosophy of Law as a teaching of legal theory and as a teaching of knowledge embodies a meta-discipline with regard to Legal Theory does not require further explanation, considering that Philosophy of Law here takes part of the activities and Legal Theory itself as the object of study.

From the above it can be concluded that Legal Theory and Philosophy of Law can be summarized as a meta-disciplinary relationship (philosophy of law) to object discipline (legal theory), and related to Philosophy of Law essentially embodies a speculative thought while Legal Theory seeks a scientific-positive approach to legal symptoms. Thus, Philosophy of Law can be rational only on the basis of its own criterion, whose existence itself is discussed or can be discussed. On the other hand, legal theory is rational (or should not endeavor to do so) on the basis of general criteria, which are accepted by everyone.

The Development of Hans Kelsen's Legal Theory of Thought

When viewed from the works that were written by Kelsen (1999) the thoughts expressed include three main problems, namely concerning legal theory, the state, and international law. These three problems actually cannot be separated from one another because they are interrelated and developed consistently and are developed consistently with the logic of formal law. The general theory of law developed by Kelsen includes two important aspects, namely static law (nomostatics) which sees actions governed by law, and dynamic aspects (nomodinamic) which see laws governing certain actions. From its origin, pure legal theory is a form of rebellion aimed at ideological law science, which is a teaching that only develops law as an instrument of governance of a totalitarian state regime.

Kelsen's theory can be formulated as "an analysis of the structure of positive law, which is carried out as closely as possible, an analysis that is free from all ethical or political opinions regarding a value". Kelsen basically wanted to create a pure legal science, remove from all the insignificant elements and separate jurisprudence from the social sciences, as the: The purpose of the theory of law, like any science, is to reduce confusion and increase unity. Legal theory is a science, not will, desire. It is knowledge about existing laws, not about laws that should exist. Law science is normative, not natural science

The relationship between legal theory and a certain positive legal system is like between possible laws and existing laws. The approach taken by Kelsen is called the pure theory of law has its own place because it differs from two poles of different approaches between the schools of natural law and empirical positivism. Some scholars call Kelsen's thought as a middle way of the two schools of law that had previously existed. The main focus of legal theory, according to Hans Kelsen, is not a more or less imperfect copy of transcendental ideas. This pure legal theory does not try to see the law as the posterity of justice, as the child of holy parents.

According to Kelsen, (1934) Law is a system of norms. Norms are statements that emphasize aspects of ought or *das sollen*, by including some rules about what to do. Legal empiricism sees that law can be reduced as a social fact. Meanwhile, Kelsen argues that legal interpretation is related to non-empirical norms. These norms have a structure that limits legal interpretation. On the other hand, different from the schools of natural law, Kelsen argues that law is not limited by moral considerations. Law science is a "normative science", has been stated by Kelsen many times. The law is solely in the *sollen* world region. The essential characteristic of norms is their hypothetical nature. It was born not because of a natural process, but because of human will and reason. Willingness and reason give rise to statements that serve as basic or starting assumptions. It is stated, that doing this or that is a general proposition and as a continuation that must be followed by certain consequences. Such consequences will be carried out by man's own will as well.

Therefore, one of the salient features of Kelsen's theory is coercion. Kelsen, (1934) argues that legal norms are stratified and layered in a hierarchy of structure, where a lower norm applies, originates and is based on a higher norm. Higher norms apply, originate from and are based on even higher norms, and so on until a norm that cannot be traced further and is hypothetical and fictitious, namely the basic norm (*grundnorm*). Thus, a lower norm derives its strength from a higher norm. The higher a norm, the more abstract its nature will be, and conversely, the lower the position, the more concrete the norm will be. The highest norm, which occupies the top of the pyramid, is called by Kelsen as *Grundnorm* (basic norm).

Progressive Legal Theory in Law Enforcement in Indonesia

As a theory that is being discussed a lot, Progressive Legal Theory, of course, cannot be separated from other legal theories. Of course, Raharjo (2006) has reviewed the principles in legal theory to suit the legal climate in Indonesia and the community's needs for the law itself. For example, the relationship between Progressive Legal Theory and Nonet & Selznick's version of Responsive Legal Theory, in the principle of legal sensitivity. Both theories want the law to be sensitive to every development of society. One of the salient features of this responsive legal theory is that it offers more than just procedural justice, which is more oriented towards justice by paying attention to the public interest.

Progressive Legal Theory is in line with Oliver Wendell Holmes' version of Realist Law Theory which is famous for the adagium, "The life of the law has not been logic; it has been experience". So, the law is basically not only a logic, but law is an experience. Law should be assessed from the social goals to be achieved and the consequences resulting from the way the law works. Progressive legal also has similarities with sociological jurisprudence in terms of focus on legal studies which do not only see law as written rules. Both also see the work of the law and the consequences of law enforcement. The absorption of the principles in the legal theory mentioned above, of course, is based on the progressive concept of thinking. To think progressively, having to dare to leave the mainstream of legal absolutism thought, then placing the law in a relative position. In this case, the law must be put in all humanitarian matters. Working based on a mindset that determines the law is necessary, but it is not an absolute thing to do when legal experts are faced with a problem which, if using modern legal logic, will injure the position of humanity and truth. Working based on a progressive legal mindset (progressive legal paradigm), of course, is different from the positivistic-practical legal paradigm that had been (before the birth of progressive legal, it was more likely to be taught) in universities.

However, Prayogo, (2018) argues that written law still needs to be made as a document that guides people's processes and behavior. However, this positive law should not be placed as the only source of law. Thus, judges are then given the freedom to refer to norms that are not contained in positive law, even those that are different from positive law in making decisions. However, the judge's discretionary space must remain limited by the ideological values that live in society, and the principles that became the agreement of the founders of the nation. This is because, if it is not limited by judge's ideological values of the discretionary freedom will make the courts become liberal and in fact have the potential to injure justice and further away from the public interest.

Potential Deviation and Abuse of Progressive Legal Theory

Progressive legal theory is a systematic theoretical framework. Like a system, the Progressive Legal Theory can only work optimally, if all its parts play a role in the cycle of a philosophical system of thinking. If there are only a few parts that do not play a role or work, then the progressive legal theory thought system will produce disaster in law enforcement. The fundamental ideology of Progressive Legal Theory according to Prof. Sadjipto Raharjo is achieving broad justice for society. When justice generated by positive law only generates benefits for certain individuals and groups, law enforcement officials are required to think philosophically. Law Enforcement Officials are required to free the frame of mind from the shackles of positive law. Law Enforcement Officials must think about carrying out liberations in knowledge, theorizing and practice. Positive law is man-made at a certain time. So, it is not impossible that the existence of a positive law will degenerate following changes in time and changes in the situation in society, it could even be the result of not optimal philosophical thinking by the maker or compiler of a rule. when serving as a Constitutional Justice, said that progressive legal can invite benefits on the one hand, and can invite calamity on the other.

"Like a double-edged knife. Progressive legal can be a light, but it can also be a danger," he said in a seminar at Sebelas Maret University (UNS) Solo, Central Java, Saturday (17/12/2011), as quoted from HukumOnline.com.

Progressive Legal Theory will be dangerous if it is held by a judge who lacks integrity. Because, it is possible for a judge to take shelter behind a progressive theory to break through positive law, but they actually do so at the expense of broader legal norms and justice. One of the mistakes in its application is in the case of adultery. The adultery case occurred between a man and a woman. The two people who commit adultery (dishonest) are each in a marital status with their legal partner. The Criminal Code (KUHP) states adultery occurs when one of the perpetrators is in a legal marital status with another person. When referring to the Criminal Code, the two people can be categorized as committing the crime of adultery. However, the judge has another ruling. The panel of judges decided to release the two defendants.

The judge was of the view that the Criminal Code stated that one of the perpetrators had to be married. However, because two or two were married to another person, they were declared not guilty. In that case, the Judge did have a progressive view. However, the Progressive view was not comprehensive. In other words, progressive legal theory is understood in pieces, not in a systematic whole. Imron & Sumarsono (2017). emphasized that progressive legal enforcement is carrying out the law not just black-and-white words from the regulations (according to the letter), but according to the spirit and deeper meaning (to very meaning) of the constitution or law. Law enforcement is not only with intellectual intelligence, but also with spiritual intelligence. In other words, law enforcement is carried out with full determination, empathy, dedication, commitment to the suffering of the nation and accompanied by the courage to look for other ways than what is usually done. However, the next tough challenge is how to produce law enforcement officers like that. So in this case, integrity education needs to be continuously carried out.

In responsive law enforcement, law enforcement is not only based on formal law, where the law is enforced only based on the rules and the law is only enforced as a guard against every violation or formatted to prevent every violation. But the law must be more progressive, that is, the law must be seen from the perspective of community justice. So that when the law is enforced, the public will truly feel the meaning of justice. In this case, those who can feel a certain amount of justice will really be felt by the community, of course the community itself. So the role of the community in supervising law enforcement officers will be really needed.

Conclusion

In implementing Progressive Legal Theory in Indonesia, it would be wise to start with the development of the rule of law. The fundamental ideology of Progressive Legal Theory according to Prof. Satjipto Raharjo is to achieve broad justice for society. When the justice produced by positive law only produces benefits for certain individuals and groups, law enforcement officials are required to think philosophically to carry out liberations in knowledge, theorizing, and practice. Progressive legal also has similarities with sociological jurisprudence in terms of focus on legal studies which do not only see law as written rules. Both also see the work of the law and the consequences of law enforcement. The absorption of the principles in the legal theory mentioned above, of course, is based on the progressive concept of thinking the suggestion based on the conclusions above, there are several suggestions to support the application of Progressive Legal Theory in Indonesia Building the rule of law that can create the widest possible justice and in accordance with the dynamics of society in Indonesia

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