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The Position of Moral in the Legal System in Indonesia and its Practice in the Justice System in Indonesia.

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ABSTRACT: Legal interpretation plays a crucial role in legal studies and legal practice, many legal experts still do not agree on the presence of interpretation science in the position of legal discipline studies. Especially Indonesia which adheres to a positive legal system, so that the emergence of legal interpretation in society becomes a pro-contra discussion. This interpretation model is a serious challenge in judicial practice because it is related to serious problems related to analytical jurisprudence, how in judicial practice judges are played in making decisions not based on written legal provisions or positive law. Ronald Dworkin is a legal philosopher who is very involved in the issue of interpretation models, which makes Dworkin distance positivism by criticizing it as a standard rule. However, assessing the theory of the legal system presented by Dworkin actually in judicial practice has a value of benefit for those seeking justice and legal certainty, so that some judges in Indonesia also use interpretation in making decisions related to legal vacuum or legal uncertainty.

KEYWORDS: Ronald Dworkin; Model of legal interpretation; legal positivism.

A. INTRODUCTION

The law (positive law) is used as the main source of law by Indonesia, even the laws and regulations in Indonesia are arranged in a tiered and hierarchical manner. Almost all levels of government are given the authority to make laws and regulations, there is not a single aspect of state administration and community behavior that is free from positive legal regulations. Therefore, many experts state that Indonesia is like a state of law.[1]

Indonesia is a country that adheres to a positive legal system, this is related to the country being a former Dutch colony so that its legal system is driven by written regulations. This is why positivism is more developed in Indonesia with the dominance of positivistic legal thinking, so that it has implications that tend to be negative rather than positive.[2] The implication means the result of the legal process accepted by the community, including feeling that the values of justice and humanity are set aside because positivism is basically not influenced by values and morals. In fact, the community places great hope in the state and the law to be able to protect it so that the welfare value in society is achieved.

The theory of positivism itself was popularized by Hans Kelsen who stated that the law does not discuss issues of justice, morals or formal values, but the law shows that the law is only at the formal level.[3] The theory presented by Hans Kelsen makes every role of a judge in carrying out his duties clash with his conscience and beliefs, seeing that justice seekers often become a part whose rights are not accommodated.

Indonesia is a country based on the values of justice and humanity so that the legal position that applies must be based on the principles of Pancasila justice. This is a problem in the Indonesian legal system which adheres to a positivist legal system so that the role of judges in court practice becomes standard because it is driven by written provisions. The role of judges in giving decisions for justice seekers so that it is not implemented as Pancasila demands, so these are the thoughts conveyed by Ronald Dworkin that can be accommodated in the Indonesian legal system by interpreting a legal problem regarding legal vacuum or legal uncertainty to be accommodated with the progressive thinking of judges.

Ronald Dworkin is undoubtedly one of the leading legal thinkers who has moved away from the influence of legal positivism which continues to be dominant, Dworkin places human dignity as a characteristic of his legal philosophy. Dworkin focuses primarily on dignity, responsibility and free will in relation to freedom of speech, the right to privacy and human rights.[4]

[1]Syofyan Hadi, *Hukum Positif dan the living law* (DiH Jurnal Ilmu Hukum Volume 13 Nomor 26 Agustus 2017) Hlm 264

[2] Cahya Wulandari, *Kedudukan Moralitas dalam Ilmu Hukum* (Jurnal Hukum Progresif, Vol. 8, No. 1, April 2020), hlm 8

[3] *Ibid, hlm 2*

[4] https://www.pn-kandangan.go.id diakses pada tanggal 13 Desember 2022, Pukul 19.05 Wib

Based on this thought, his theory has developed up to the modern era until now, even some judges' roles use his thinking as a basis for thinking like Dworkin's. Ronald Dworkin rejects the positivist Social Fact Thesis on the grounds that there are some legal standards whose authority cannot be explained in terms of social facts. In deciding difficult cases, for example, judges often use moral principles that Dworkin believes do not derive their legal authority from the social criteria of legality contained in the rules of recognition. However, because judges are bound to consider these principles when relevant, they must be characterized as law. Thus, Dworkin concludes, "if we treat principles as law, we must reject the positivist's first principle, that the law of a community is distinguished from other social standards by some test in the form of a primary rule".[5]

This study places the problematic role of judges in practice requiring a legal system that originates from Dworkin to carry out its role in providing justice to every seeker of justice in the justice system, so that the decisions given by judges are not only legally positivistic but can also be progressive.

To achieve progressive justice in the justice system, it is important to understand how the concepts of legal positivism and legal progressivism can be integrated. Legal positivism is a legal theory that states that law is a set of rules and norms recognized by the competent authority, such as laws made by the legislature or precedents set by the courts. This theory emphasizes that the law must be applied as it is, without taking into account moral or justice aspects. While legal progressivism, on the other hand, argues that the law must develop and adapt to social, economic, and political changes. This approach encourages dynamic and flexible interpretation of the law, so that the law can be more responsive to the needs of society and can overcome injustices that may arise from the application of rigid rules.

To achieve a justice system that is not only legally positivistic but also progressive, judges and legislators can consider the following:[6]

1. Contextual Interpretation: Judges must interpret the law taking into account the current social, economic and political context. This allows the law to be applied in a relevant and fair manner in accordance with the conditions of the times.
2. Emphasis on Principles of Justice: In addition to following existing legal rules, judges must consider moral and justice principles. This can include human rights, equality and protection of vulnerable groups.
3. Flexibility in the Application of Law: Judges must be given the space to use their discretion in applying the law, so that they can adapt their decisions to the concrete situation at hand. This allows for a more humane and fair application of the law.
4. Legal Development Through Decisions: Court decisions can serve as a tool for developing and improving the law. By making progressive decisions, judges can help drive broader legal change and adapt the law to developments in society.
5. Public Participation and Transparency: The justice system must be open to input from the public and take public views into account in decision-making. This helps ensure that the law reflects the values and needs of the wider society.

By integrating the principles of legal positivism and legal progressivism, the justice system can deliver decisions that are not only formally legal but also just and socially relevant. This requires a balanced approach, where the rule of law is applied with wisdom and sensitivity to the broader values of justice.

B. DISCUSSION

Ronald Dworkin is one of the most important legal thinkers, especially in relation to his thoughts on content theory in law. For Dworkin, the legal system has four characteristics, namely elements, relationships, structure and wholeness. Dworkin's point of view is not as per the view of a social researcher, his view is taken from the perspective of the Judge or the parties that exist as part of the practice which he then called Law's empire.[7] The legal theory presented by Dworkin is basically a critique of positivism, namely the theory developed by Hart, who believes that the theory presented by Hart in positivism is the "ruling legal theory".[8] N However, considering the criticism conveyed by Dworkin to the positivists regarding the theory of positive law being too powerful and fixed, the theory of the interpretive legal system he created is a theory adapted from the theory of positivism. Dworkin also opposes the liberal legal paradigm that is strongly embedded in the study of law in the United States, Dworkin states that "law is based on objective decision principles, while politics depends on subjective decisions of policy" so that according to Dworkin law is based on objective decision principles, while politics depends on subjective decisions of the policy itself. So in his argument the process of forming or interpreting law cannot be separated from the influence of morals, religion and political pluralism.[9]

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[5] Ronald Dworkin, Law's Empire, Harvard University Press, 1986

[6]Muhammad Shofwan Taufiq,Adhimas Kondang Pribadi,Nurhuda Ramli, Vol 3, No 1 (2023): SMART: Journal of Sharia, Tradition, and Modernity, http://dx.doi.org/10.24042/smart.v3i1.17984

[7] Otje Salman S., et.al, *Teori Hukum mengingat, mengumpulkan dan membuka Kembali*, (Refika Aditama, Bandung, 2005), Hlm 93.

[8] Gabriel Santos Lima,Filipe Augusto Oliveira Rodrigues,Igor De Souza Borges 13 Aug 2021 - (Conselho Nacional de Pesquisa e Pos-Graduacao em Direito - CONPEDI) - Vol. 7, Iss: 1, pp 18.

[9] Ramlani Lina Sinaulan, *Buku Ajar Filsafat Hukum*, Cetakan kedua, (Zahir Publishing: Yogyakarta, 2021), hlm. 157.

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The problem of the positivist theory that has occupied Indonesia since Indonesia's independence until now, in practice, findings of weaknesses still occur so that it is considered that the positivist legal system theory cannot always be maintained. The purpose of this presentation is that there are several conditions in practice where this positivist theory cannot be maintained if there are findings of legal vacuum and legal uncertainty arising from problems in the community environment that pressure the judicial system to be able to provide appropriate and correct decisions so that the problems are real and concrete in law.

In the modern era today, with the development of the era that is increasingly developing and the law seems to be running after the era so as not to be left behind, in fact there are still written laws in Indonesia that have not accommodated. Concretely, the law in Indonesia also cannot be applied retroactively so that it is difficult to solve problems in society due to being too focused on positivism. This is why the interpretation theory presented by Dworkin is increasingly developing in modern society, seeing its flexible nature, not rigid, so that basically the values of justice and truth can be accepted by those seeking justice in court.

C. RESEARCH RESULTS

The proponents of legal positivism separate the legal domain from the moral domain. Positivism experts state that the essential nature of law is independent of morality and does not see whether morality is understood differently from immorality, wise or factual.[10] Lon Fuller, who is a positivist, argues that in a legal system there is a human effort that aims to subdue human behavior based on general guidelines and rules. Whatever its substantive purpose, the legal system is bound to comply with certain procedural standards, without compliance with the law, the existing legal system is meaningless.[11]

H.L.A Hart provides a non-extreme separation between law and morality, because morality is a minimum requirement, in the form of limitations for each person to regulate changes in society. It is implied that positive law often lags behind the development of society, so that moral space is needed that must be owned by law enforcers in enforcing the law.[12] In line with one part of positive law according to H.L.A Hart, secondary rules include legal rules that provide rights and obligations to state authorities consisting of change, rule of adjudication and rule of recognition. Related to the rule of recognition, this shows a close relationship between law and society.[13]

However, positivism that has long been in Indonesian life, in fact, is not the answer in law enforcement due to the thirst for justice values. Satjipto Rahardjo cures the thirst in the long search for substantive justice through the idea of progressive law. Law must be seen as a rule or statute that remains full of values. The views of legal experts and law enforcers on the law itself influence the level of practice. If the law is seen as a rule that is full of values, then the truth that is to be realized is more on substantial truth (real truth).[14]

Jurisprudence is a normative science and at the same time a practical science. Jurisprudence is said to be a normative science because it is not free from values but contains values. Jurisprudence contains judgments about what should or should not be done. It is said to be a practical science because jurisprudence solves practical problems in human life.[15] Discussing the position of moral values in legal science and the implications in its enforcement, it is necessary to first look at the relationship between law and morals which in essence have a close relationship with 5 (five) close connections, including: a) Law requires morals; b) Law is codified and more objective compared to unwritten morality; c) Law is related to external actions while morals are related to a person's inner self; d) Morality is the "content of the legal drink". Legal norms and moral norms both contain rules that are used as guidelines for humans to behave, and; e) Law concerns norms and inner self that are morally binding if believed in the heart, while morality is only related to the inner attitude of humans (Immanuel Kant).[16]

Immanuel Kant stated that the formation of law is part of an imperative moral demand (everyone must live according to moral principles and just laws). However, in practice, society places high hopes on the working of the law itself.[17] This is why in practice normative science has not been able to accommodate imperative provisions as conveyed by Immanuel Kant, because in practice regulations are made standard and cannot follow the development of the times that are always changing and developing. Dworkin, who always criticizes positivism regarding Hart's views, is descriptively inaccurate and morally unattractive, inaccurate because it is related to the courts. According to Dworkin, using principles and background rights in making decisions is unattractive because it makes judges free to use their discretion in other ways, namely by using policy considerations and ignoring the background rights of the accused. Dworkin also tries to insert his legal theory into the context of other interpretation theories,

[10] Mathew H.Kramer, *Where Law and Moralite Meet, First* (United States: Oxford University Press Inc, 2004)

[11] Raymond Wacks, *Understanding Jurisprudence*, 4th ed. (United Kingdom: Oxford University Press Inc, 2015).

[12] Dimyati, Khudzaifah, *Etos Hukum Dan Moral*, 1st ed. (Yogyakarta: Genta Publishing, 2018).

[13] Asep Bambang Hermanto, "*Ajaran Positivisme Hukum Di Indonesia:Kritik Dan Alternatif Solusinya,"* Selisik 2, no. 4 (2016): 113.

[14] Cahya Wulandari, *Kedudukan Moralitas dalam Ilmu Hukum, Op.Cit.*Hlm 7

[15] *ibid*

[16] Dimyati, Khudzaifah, *Etos Hukum Dan Moral*, 1st ed. *Op.Cit.*

[17] Eman Sulaeman, Delik Perzinaan Dalam Pembaharuan Hukum Pidana Di Indonesia, 1st ed. (Semarang: Walisongo Press, 2008).

especially interpretation theories directed at literary texts. Dworkin's Interpretation Theory is Law as integrity, which is a unity of three closely related values, namely justice, fairness and procedural due process which are related to each other so that they can produce decisions that are weighty from a legal and moral perspective.

a. Justice value emphasizes the quality of the final result of a public decision that must protect individual rights in the most morally acceptable ways.
b. Fairness value is a principle related to respect and compliance with the rights of the people as law makers by law enforcement officers.
c. Procedural due process value demands compliance with existing norms both when establishing new laws and when laws are applied in unique cases. This value is related to the principle of legal certainty.

One of Dworkin's main concerns was to develop and defend an interpretive theory, adjudication, to offer an explanation of how courts (and judges) decide not only hard cases but also how they ought to decide hard cases, that is, cases where settled rules have been exhausted or where no settled rule applies. It was this concern that prompted Dworkin's critique of Hart. His central insight was his perception that when judges reason about hard cases, they appeal to principles and standards other than positivistic rules, namely rules that can be identified by their genealogy, by how they came to be as determined by some secondary set of rules. It is the integrity of judges to assume, as far as possible, that the law is structured by principles of justice and fairness and that due process is integral to them, and to ask them to uphold/decide new cases before them. It is a matter of respect, ambition, and a principle of society. According to Dworkin, a system has four characteristics:[18]

a. Elements/parts (elements): are moral considerations about what is right and what is bad that have been made by the judge to justify that these are the elements of his best legal theory. This principle is divided into several principles as follows:[19]
    1) The principle of what he calls political morality and political organization that justifies constitutional regulation;
    2) The principle that justifies the judge's method in interpreting according to the law;
    3) The principle of substantive human rights to justify the content of most decisions that have been issued by the court.
b. Relationship: one of the most important claims is that this principle is connected to intense intersection and interdependencies in a systematic whole.
c. Structure: Dworkin often emphasizes the structured picture of law as integrity, and that the principles and decisions that are justified form part of a whole structure. This form looks like a pyramid that is cut off with a principle of view at the top, and many individual rules at the bottom.
d. Wholeness: a complete unity that should not be seen as merely an opinion from many of Dworkin's writings, but also as something that must be continuously developed and improved.[20]

Basically, the opinion conveyed by Dworkin is related to the theory that is in accordance with the perspective of the judge and the parties who are related in practice, that is why Dworkin gave the title to his book Law's empire. Furthermore, related to legal interpretation according to Dworkin, there are two elements of successful interpretation. First, because the interpretation is successful insofar as it justifies certain practices of a particular society, the interpretation must be in accordance with those practices in the sense that it is coherent with the existing legal material that defines those practices. Second, because the interpretation of moral justification for those practices, the interpretation must present them in the best moral light. Thus, Dworkin argues, a judge should try to interpret a case roughly as follows:[21]

A wise judge might set for himself, for example, a rough “threshold” of suitability that any interpretation of data must meet in order to be “acceptable” on the suitability dimension, and then assume that if more than one interpretation of some piece of law meets this threshold, the choice between them should be made, not by further and more precise comparison of the two along that dimension, but by choosing the “substantively” better interpretation, that is, the one that better promotes the political ideals he thinks are right. Dworkin's thinking on the role of a wise judge often occurs in judicial practice in Indonesia in handling large and difficult cases, this is supported by written provisions that often do not accommodate so that progressive thinking emerges where judges make efforts to interpret or interpret the law in order to fill the legal gap. This thinking is supported by the provisions stipulated in Article 1 point 10 of the Criminal Procedure Code. "The court is prohibited from refusing to examine, try, and decide a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it". Regarding the provisions, it was even clarified by the examining judge that what is not legally valid, the judge should have a basis for thinking that the law exists and things that are unclear become clear. According to Achmad Ali, there are two theories in legal discovery, namely the interpretation method and the construction method. In practice, the interpretation method is used when the regulation already exists but has an unclear meaning or has a double meaning of the provision or in concrete terms the meaning of the norm is unclear which creates uncertainty in a provision, then this interpretation method is considered necessary in the process of legal discovery.

[18] Otje Salman dan Anthon Susanto, *Teori Hukum (mengingat, mengumpulkan, dan membuka kembali)*, (Bandung: Refika Aditama, 2013), hlm 93

[19] *Ibid*, hlm 94

[20] *Ibid*, hlm 94

[21] Cahya Wulandari, *Kedudukan Moralitas dalam Ilmu Hukum, Op.Cit.*Hlm 5

Meanwhile, the legal construction method is practically used when there is no written legal provision that can be applied directly to the legal problem being faced or indeed there is no regulation so that there is a legal vacuum (recht vacuum) or a legal vacuum (wet vacuum). [22]

As for the legal discovery process carried out by progressive judges, methods are needed in their discovery so that there are characteristics of a progressive legal discovery method, this was conveyed by Ahmad Rifai as follows:[23]

1. A method of legal discovery that has a visionary nature in seeing legal problems that occur for a period of time to come by looking at case by case;
2. A method of legal discovery that is brave in making a breakthrough (rule breaking) by seeing legal problems in society, but still based on the law, values of truth, and values of justice that are biased and sensitive to the fate and conditions of the nation and country;
3. A method of legal discovery that creates welfare and prosperity for society, so as to bring the nation and country out of the slump due to social instability.

These methods in legal discovery are an effort as an alternative form if there are provisions that cannot be reached by written law, the judge has a big role in the decision. Dworkin's views on difficult cases or controversial cases are contained in his writing entitled Hard Cases. Hard Cases is one of Dworkin's early writings where he began to introduce the concept of interpretation. Regarding the status of interpretation in difficult cases, Dworkin's theoretical position is reflected in his statement: "integrity is the key to a constructive interpretation of our clear legal practices and especially in relation to the way our judges decide difficult cases in law." Another important idea of Dworkin that emerged in Hard Cases is related to what he called the "rights thesis" which states that "judicial decisions in civil cases, even in difficult cases ... must typically be produced through principle rather than (through) policy. "[24]

This rights thesis, with its emphasis on principles (principles will be explained further below), is Dworkin's critical response to Hart's thinking on judicial discretion but at the same time the rights thesis is also one of the main conceptual foundations that greatly determines Dworkin's thinking on law as interpretation. According to Hart, difficult cases emerge because of the "open texture" of a legal rule. To respond to difficult cases that are based on this open texture, a judge is then required to exercise discretion. In Hart's view, discretion is exercised by a judge to create choices among open alternatives. The judge, thus, is involved in a creative act. Dworkin disagrees with Hart. For Dworkin, the discretion proposed by Hart falls into what he calls "strong discretion". In this discretion, the judge is no longer bound by any standards that reflect legal authority.[25]

Dworkin disagrees with Hart's position on judicial discretion as mentioned above. According to Dworkin, judges are never free to exercise strong discretion in deciding legal issues, even when there is no clear rule of law in these cases. When a judge makes decisions based on something outside the existing rules, the judge, according to Dworkin, must base the decisions he makes not on non-legal standards but on what Dworkin calls principles (which are part of the law itself). From the explanation above, it can be seen that difficult cases arise from the character of language or rules that indicate an open texture or vagueness (vagueness) where the vagueness according to Dworkin must be interpreted by the judge. Seeing the explanation that has been presented in this study can be used as a reference for how the position of morals in the Indonesian legal system that uses a positive legal system in practice in the judicial system requires the interpretation of thinking presented by Dworkin as an alternative that makes the role of judges in trials still able to fulfill the sense of justice and humanity for justice seekers in the Court.

D. CONCLUSION

1. The position of moral values in legal science and its implications for law enforcement in Indonesia must be seen as rules/laws that remain full of values, therefore morals become an inseparable part of legal science. The views of legal experts and law enforcers on the law itself influence the level of practice. If the law is seen as a rule that is full of values and contains morals in it, then the truth that is to be realized is more substantive truth. To support law enforcement that is no longer confined to legal dogmatics or formalistic legalistic thinking, it is time to develop progressive legal ideas in the law enforcement process as part of the development of the modern legal system. In Indonesia, a legal system based on Pancasila is used. And it is time for the development of science and law enforcement to be based on the culture of the Indonesian nation itself, based on the values of Pancasila which are full of moral values.
2. Dworkin's teaching is a critique of Hart's teaching on the freedom of judges to exercise discretion in difficult cases, according to Hart, the discretion exercised is not bound by any standards that reflect legal authority, where according to Dworkin, judges are never free to exercise discretion in deciding legal issues that do not have strict legal rules but still decide based on moral principles that are part of the law itself. 3. The essence of Ronald Dworkin's teaching is legal interpretation, where law is a

[22]Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*, (Chandra Pratama: Jakarta, 1993), hlm 167.
[23]Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif,* (Sinar Grafika: Jakarta, 2010), hlm 93.
[24] *Ibid*, hlm 66
[25] *Ibid* , hlm 67

concept of interpretation, law is interpreted using a consistent moral approach, especially justice. This can be done especially in solving difficult and complicated cases.

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