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The Matter of Grandma Minah in the Perspective of Positivism

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Abstract:

Purpose:
In law, various parties will enforce the laws in force in Indonesia. These parties conduct law enforcement to avoid violating the law, bring order to society, and regulate society. Following the norms and rules in a country takes work to apply in public life.

Methodology:
The resolution of a case of violation of the law is a legal process. The legal process is an action to resolve cases of law violations to achieve a settlement following applicable regulations in Indonesia.

Findings:
In legal cases that have occurred in Indonesia, the provision of criminal sanctions against Grandma Minah, a cocoa thief, has received much attention from the public. The case of "Grandma Minah" is an example of law enforcement in Indonesia that is still considered by the public to have not realized sanctions in rulings following conscience and moral considerations.

Implication:
The reason often arises is the injustice of sanctions against theft crimes that can still be resolved by familial means. However, this reality occurs on the ground between legal theory and practice with different implementations.

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INTRODUCTION

In law, various parties will enforce the laws in force in Indonesia. These parties conduct law enforcement to avoid violating the law, bring order to society, and regulate society. Following the norms and rules that apply in a country is not easy to apply in public life. Particular institutions are law enforcement and experts in the field of law, namely law enforcement officials. Law enforcement functions in enforcing, analyzing, and resolving cases that do not follow applicable law in Indonesia. Law enforcement officials must also run by applicable laws in Indonesia because law enforcement officials must obey and comply with applicable laws and regulations in Indonesia. One of the law enforcement officials in Indonesia is the judiciary, which functions to enforce applicable laws (Handri, 2016).

The resolution of a case of violation of the law is a legal process. The legal process is an action to resolve cases of law violations to achieve a settlement following applicable regulations in Indonesia. The truth of a legal process must be accountable to the law and applicable laws. In a legal process, law enforcement officials will follow a flow of steps to solve a problem related to the law. The legal process starts with making laws consisting of legal materials and law-making structures; law enforcement, namely the application or implementation of law in real public life justice is a law enforcement, administration of justice, the application of justice in a society, requires management from various parties (Satjipto, 2014).

In legal cases in Indonesia, the provision of criminal sanctions against Grandma Minah, a cocoa thief, has received much attention from the public. The case of "Grandma Minah" is an example of law enforcement in Indonesia that is still considered by the public to have not realized sanctions in rulings by conscience and moral considerations. The reason often arises is the injustice of sanctions against theft crimes that can still be resolved by familial means. However, this reality occurs on the ground between legal theory and practice with different implementations.

In that case, Minah's grandmother was legally guilty. However, the judge's ruling invited objections. The judge should have given other avenues, such as mediation between Minah's grandmother and the plantation

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company where she worked. From the practice of law, it seems that in Indonesia, the law has yet to give much room for moral judgment in making legal decisions.

The presentation of the legal decision shows common problems in law enforcement, namely, the issue of equality before the law, then the principle of moral justice and expiry in law, which are applied in the resolution of legal cases. Because the complexity of human life provides many motives for carrying out a legal act, and the law itself must be able to solve it. The law needs to pay attention to many aspects, especially at the social level and legal certainty, that should be considered in every legal decision made by law enforcement, such as judges and other law enforcement officials. It is more than just an appeal that the law in Indonesia needs to synchronize laws derived from local wisdom as laws promulgated (ius constitutum) immediately no longer as national laws that are aspired to (ius constituendum). That is why the government should immediately make regulations in the criminal and civil codes that can protect the Indonesian people so that there is no sharp downward but blunt upward law enforcement (Amad, 2013).

METHODS

Positivism and Legal Science. Positivism is a school of philosophical understanding that developed in Continental Europe, especially France, with its famous exponents, Henri Saint-Simon (1760 – 1825) and August Comte (1798 – 1857). In law, positivism developed as a legal science labeled positivism in jurisprudence and also known as legalism in jurisprudence. Legal science with legalism favors the role of lege/lex (law) in resolving court cases. In the United States, it is called mechanistic jurisprudence, and in Austria, by Hans Kelsen, it was introduced under the name die Reine Rechtslehre (Soetandyo, 2013).

Positivism requires that any methodology of discovering truth should treat reality as existing, as objectivity to be detached from all subjective metaphysical preconceptions. Since the 16th and 17th centuries, positivism has claimed to be more scientifically truthful than actual rationalization (Soetandyo, 2013).

Positivism then enters legal thought and requires that every legal norm must exist objectively as positive norms, affirmed as a form of concrete contractual agreement between citizens of society (or their representatives). Law as ius that has undergone positivization as lege or lex, to ensure certainty between what is spelled out and what is not (Soetandyo, 2013).

In Continental European countries, where the legal system is commonly called The Civil Law System, including Indonesia, legal thinking is more controlled by academic jurists who only flinch a little from the teaching of positivism jurisprudence, which conceptualizes as pure teaching about the administration of law In contrast, the law here is nothing but positive (lege or constitutum) which is a product of positivization.

Positivism sees the need for a strict separation between law and morals as embraced by idealism (including the school of natural law). Positivism separates the law that applies and the law that should apply between Das Sein and Das Sollen. Even as a part of positivism, legalism conceptualizes law as synonymous with law. Positivism was born to refute the theory of natural law (Soetandyo, 2013).

The ontological aspect of positivism is the law as legislation, the etymological doctrinal deductive, while the axiological aspect strives for legal certainty. In order to achieve legal certainty, the principle of legality is the "spirit" of efforts to achieve legal certainty. Application in criminal law, for example, no punishment without law, no punishment without crime, no crime without punishment (nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena). Legal validation is the main thing, and validation can be carried out by legal norms, not meta-laws so that the science and enforcement of the law validity of this law are always returned to positive law (Yusriyadi, 2014).

It is assumed that "potential" positivism makes legal science ignore the value of justice and the value of obedience. Furthermore, the implications for law enforcement are different from a search for justice and expediency. Many cases in Indonesia indicate this, which is ironic in Indonesian law enforcement. On the one hand, positivism is widely criticized because it contains many weaknesses. On the other hand, positivism has been so "established/traditional that it dominates so strongly as the only way of thinking in science and law enforcement. The implications for science and law enforcement are assumed to be more harmful than positive. The value of justice and expediency is further away from science and law enforcement (Pan, 2009).

Several arguments can be put forward, among others, because the positivism alone approach is always connected with the positive law that applies. Hence, the analysis or solution is inseparable from the positive law. His analysis only stops at favorable laws; some say this perspective is not a science. The following argument is

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that positivism is not the only thing that should be used in science and law enforcement in Indonesia. In addition to positivism, there are various other schools, - which in this paper are idealism and sociological schools. Even in the West itself, the birthplace of positivism, starting from the 19th century in the social sciences, positivism is considered inadequate for understanding humans and society, so it has received some criticism, namely, positivism is considered the root of dehumanization and modern totalitarian domination (Bob, 2003).

The emergence of positivism as the dominant mainstream began with the rise of the human ratio. Positivism enters legal thinking that conceptualizes law as mere legislation (lege, lex, ius constitutum). In other words, positivism sees law as a document or regulation emphasizing rule and logic. The dominance of positivism has implications for legal studies as a value of justice as taught by legal philosophy and likewise for social studies on law, such as the sociology of law. Legal philosophy, which is concerned with the values of justice and sees law as an expression of society's sense of justice, needs to be revised in its role as an integrator of state life. Likewise, social studies of law, cq the sociology of law, have yet to function more in the reality of pluralism. This dominance of positivism is assumed to be the cause of the low contribution of legal science in Indonesia to get out of the crisis in the legal field (Satjipto, 2007).

The non-teleological way of thinking and scientific methods with a monist understanding then entered social thought, including legal science. This thinking can be seen from Hart, who proposed five principles of legal positivism: (1) To describe the idea of law as a command of a superior (as favored in the explanations of law by, e.g., Austin and Bentham. (2) To describe the view that there is no necessary link between law and morals, (3) To name the idea of analysis of legal concepts. (4) To denote the concepts of legal systems as a closed logical system, (5) To denote the theory that moral judgments cannot be derived from rational argument as such (L. B. Curzon, 1998).

Here, we see the ontological aspect in positivism, namely law as a positive norm in the legal system, and there is no need for moral considerations, so the epistemological aspect is doctrinal, deductive, and the axiological aspect that is strived for, namely legal certainty.

To achieve legal certainty the principle of legality is the "spirit" of efforts to achieve legal certainty. Application in criminal law, for example, no punishment without law, no punishment without crime, no crime without punishment (nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena). Retroactive prohibitions and analogies are strongly emphasized in traditional legal positivism.

RESULTS AND DISCUSSION

Use of Positivism Study in the Case of Grandma Minah. Based on the school of Positivism in legal philosophy, the case of theft of cocoa fruit by Minah's grandmother is associated with the elements of article 362 of the Criminal Code, namely (Widodo, 2010):

1. Elements of Whomever. According to the judge, whoever is a person whose identity is apparent is brought to trial because he has been charged with a criminal offense and can account for his actions.
2. Elements of taking things Item. According to the judge, what is meant by 'taking an item' is moving goods from one place to another, based on the facts revealed at the trial that the defendant on Sunday, August 2, 2009, at around 13.00 WIB had taken 3 (three) cocoa/chocolate fruits by picking from trees on the plantation of PT. RSA and until caught by foreman witness Tarno Bin Sumanto and witness Rajiwan ... So (conclusion) based on the above legal considerations, this second element is fulfilled.
3. Elements that wholly or partially belong to others. Based on the testimony of witnesses connected with clues reinforced by the defendant's statement before the court, it was obtained that the corresponding facts were obtained, and it was confirmed that the defendant had taken 3 (three) cocoa or chocolate fruits entirely milik PT. RSA does not belong to the defendant, so based on the above legal considerations, this third element has been proven;
4. Elements with the intent of Unlawfully Possessing Goods. Minor Premise: Based on the testimony of witnesses connected with clues reinforced by the defendant's testimony before the court, the corresponding facts are obtained that it is true that the defendant has taken 3 (three) cocoa or chocolate weighing +- 3kg, which all belong to PT. RSA and the defendant took the above items without the permission and knowledge of the owner, PT. RSA is to be owned for plant seeds, and the defendant's actions resulted in PT. RSA suffered a loss of Rp.30,000,- (thirty thousand rupiahs);... then (c. conclusion) based on the above legal considerations, the fourth element is satisfied;

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Since all the elements contained in article 362 of the Criminal Code have been fulfilled, the judge believes that the defendant is declared legally and conclusively guilty of committing a criminal act as in the indictment, violating article 362 of the Criminal Code; therefore, the defendant must be punished accordingly with his act.

According to positivism, every legal norm must exist objectively as positive norms and affirmed in concrete contractual agreements between citizens or their representatives. Hans Kelsen was a prominent exponent of positivism. The core teaching conveyed by Hans Kelsen in his book (Atmadja, 2013) The Pure Theory of Law, namely: "that the law must be cleansed from non-juridical factors such as ethics, sociology, politics, history, and so on." Furthermore, according to Kelsen, people obey the law because they feel obliged to obey it as the will of the state. This theory sees law as a system consisting of a pyramid-shaped arrangement of norms that states that the legal system is essentially a hierarchical system from the lowest to the highest. The higher the ranking of the position, the more abstract and general the nature of the norm it contains, and the lower the rating, the more concrete the operational nature of the norm's content. The lower norm derives its power from the higher norm.

Kelsen calls the highest norm that tops the pyramid the Grundnorm (the basic norm is nothing but a rule of order that requires people to obey it as they should. Hans Kelsen is also famous for the grundnorm that drives the entire legal system, the basis for why the law must be obeyed, and the basis for accountability for why the law must be implemented. From the concept of grundnorm, Kelsen, as the originator of pure legal theory, is also credited with developing the theory of levels (stufentheorie) initially proposed by Adolf Merkl (1836-1896). This theory sees law as a system consisting of a pyramid-shaped arrangement of norms that states that the legal system is essentially a hierarchical system from the lowest to the highest (Atmadja, 2013).

The higher the ranking of the position, the more abstract and general the nature of the norm it contains, and the lower the rating, the more concrete the operational nature of the norm's content. The lower norm derives its power from the higher norm. The highest norm that tops the pyramid, Kelsen calls the Grundnorm (basic norm)

Critical of Positivism Study in the Case of Grandma Minah. The story of the theft case is between the theft of cocoa fruit by Minah's grandmother and the cassava theft committed by a grandmother in Sidoarjo. On the one hand, normatively, every theft must be criminalized; on the other hand, is it fair to equate the application of Article 362 of the Criminal Code in the two cases with Lamborghini car theft? The law should provide a concept of justice that pays attention to contributive principles, legal conformity with the actions taken, and utilitarian principles that prioritize the principle of expediency and significant social benefit. The implications of this justice will also be carried over into the concept of punishment and punishment which is given. Man is a monopluralistic being, which includes the nature and position of human nature as body and soul, individual and social, and as a person and creature of God. It is appropriate for Indonesian people to have a character that is always two-dimensional, where carrying out the law must also be by human nature and nature for the common interest in the social sphere (Ummul, 2014).

Looking at the case of Minah's grandmother, it can be said that the law in Indonesia still cannot follow the ideals of a nation that wants progressive laws and free from injustice as the ideals of the Indonesian nation existed in the preamble to the 1945 Constitution in the fourth paragraph. Presumably, it has yet to be adequately realized.

The problem in the case of Minah's grandmother is that the provision of legal sanctions is viewed positivistically by not paying attention to the moral concepts that exist in her. However, the law aims to achieve mutual happiness. The judge in the case based himself on the law in a lettered manner, meaning that the law is only read textually and does not look contextually at the event. The effect is that society perceives judges as not having the wisdom that society expects. Many compared the decision in the context of morality. Also, they compared the severity of the sentence imposed with the severity of the punishment received by the defendant in other cases, such as corruption. Society in this context is not wrong as a whole, but society has the right to judge whether the decision given is morally appropriate or not. It follows what Rawls said, where the public has the right to judge and weigh anything in the law because it is considered not in accordance with what it should be.

The issue of giving sanctions through legal decisions imposed on each judge becomes a dilemma because if the judge cannot be wise in giving a decision, what happens is a decision not by the truth that should be defended. The issue of morality and integrity of judges to always be consistent in every decision should be used

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as a standard benchmark and must always be maintained. The code of ethics and religion should strengthen each judge in sentencing a defendant in a particular case. However, is more needed?

Therefore, Bagir Manan stated that it is contrary to the universal duty that judges must set aside the law in the name of justice. Judges everywhere must decide according to the law. So, the justice that the judge must find is justice according to the law. From a positivistic perspective, justice is always considered relative because being fair to one person is not necessarily fair to others; fair to this (contemporary) will not necessarily be fair for the future. So, justice can always vary according to person, place, and time. It seems to be a justification for Hans Kelsen's following statement (Bagir, 2005); "Justice is primarily a possible, but not a necessary, quality of a social order regulating the mutual relation of men" (Hans, 2006).

CONCLUSION

The criticism of the law enforcement model based on the Positivism School, which only spells out laws by Satjipto Rahardjo, is elaborated with a philosophical proposition, namely that law enforcement must be carried out as a legal discovery activity, a process to explore and discover the soul of the law itself so that the law is not carried out passively. Furthermore, the law, from a progressive legal perspective, is a continuous, creative, innovative, and equitable effort. Ufran suggests that progressive law enforcement involves not only mere intellectual intelligence but also emotional and spiritual intelligence. In other words, law enforcement is an effort based on determination, empathy, dedication, and commitment to the nation's suffering and the courage to look for other paths that are different from conventional paths or methods (Hans, 2006).

Such factual conditions are an asset in reviving progressive law enforcement. Indeed, building a sound law enforcement system requires cooperation from all system elements. The work of each element will move the wheels of law enforcement on an ongoing basis. In this context, progressive law enforcement should also be seen as a comprehensive effort. These efforts are not only on elements of legal structure and culture but also on elements of legal substance, especially formal law. The renewal of rules in legislation that are no longer based on the development of community dynamics is necessary to implement progressive law enforcement (Abdul, 2007).

It is undeniable that the influence of Legal Positivism, on the one hand, has indeed contributed to strengthening the existence of legal science, as well as clarifying and sharpening the way of thinking about law (juridisch denken). However, on the other hand, legal science then forces people to work alone. It closes the space to cooperate with other disciplines, which weakens the anticipation of law to the development of society and science. One thing inhibiting the development of legal science is too narrow the scope of legal science, which is limited to questions of rules, principles, and logic. Law, by Legal Positivism, is described as sterile territory, separate from other elements, so there is no room for other views beyond that claim. The use of Positivism in Legal Reasoning in the case of Grandma Minah seems to be limited to sanctioning in law. It should provide a concept of justice that can pay attention to distributive principles, legal compatibility with the actions taken, and utilitarian principles that prioritize the principle of expediency and significant social benefit. The implications of this justice will also be carried over into the concept of punishment and the punishment given.

Man is a monopluralistic being, which includes the nature and position of human nature as body and soul, individual and social, and as a person and creature of God. It is appropriate for Indonesian people to have a character that is always two-dimensional, where carrying out the law must also be by human nature and nature for the common interest in the social sphere.

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