

DEVELOPMENT OF NATIONAL LAW IN PERSPECTIVE TRANSCENDENTAL PARADIGM

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Abstract

This study aims to analyze and explain development of national law in perspective transcendental paradigm. The results of the study that the fundamental values of national legal order Indonesia which is based on the paradigm of transcendental include: (1) the value of the first foundation: the legal character to protect (protect) and not just govern granted, (2) the value of the second base: laws that embody social justice for all people Indonesia. Social justice and not solely as a destination. However, in the grip of concrete in making laws, (3) The value of the third basic: the law is of the people and contain properties populist, and (4) The value of the basic four: the law is a statement of decency and morality, both in legislation and in implementation as taught in religious teachings (transcendent) and customs of our people.

Keywords: Development of National Law, law positivism, Transcendental Paradigm.

INTRODUCTION

Thoughts of alternative epistemologi jurisprudence in Indonesia continues to be done in line with the development of science. The desire to move from thinking of modern legal science positivism towards thinking postmodernism legal science began to be felt in the legal world. The longing for peace of mind, spirituality, religious values and Godhead is a strong influencing factor. Thought that is paradigmatic of renewal of post-positive jurisprudence. Post positivistik jurisprudence trying to show the other and the different concepts of modern positive law. It can be said that science from time to time experiences changes that usually start from changes in the paradigm used.¹

Thinking about the alternative epistemologi jurisprudence directly and also have an influence on the development of national laws. Laws can be the object of development in order to realize the ideal of law in accordance with the values that live in the community.²

Over time, the development of national laws directed to replace all the laws that come from the Dutch East Indies with the national legislations while improving and enhancing the quality of life of the law. The implementation of a quality of life law would create equal opportunities for every citizen to develop themselves optimally which will encourage creativity and enable all functions

¹ Sigit Sapto Nugroho, *Pengembangan Epistemologi Ilmu Hukum Berbasis Transendental*, Jurnal Perspektif, Vol. XXI No. 2, Edisi Mei Tahun 2016, hlm. 98.

² Teguh Prasetyo dan Arie Purnomosidi, *Membangun Hukum Berdasarkan Pancasila*, Nusa Media, Bandung, 2014, hlm. 142.

implemented law, in particular function as a means of renewal of society.³

DISCUSSION

Transcendental paradigm

The term comes from the word paradigm paradigm. Paradigm or paradigm term first used by Thomas Kuhn in his book *The Structure of Scientific Revolutions*, in 1962. The term paradigm is often equated with the term theoretical framework; frame of thinking; theoretical orientation; perspective and approach.⁴

According to the Cambridge Dictionary of Philosophy by borrowing the sense of Thomas Kuhn defines a paradigm as paradigm sebagai a set of scientific and metaphysical beliefs that make up a theoretical framework within which scientific theories can be tested, evaluated, and if necessary revised.⁵ Meanwhile, according to Ahimsya Putra, the paradigm is defined as a set of concepts that relate to one another logically form the entire framework that serves to understand, interpret and explain the reality and / or problems encountered.⁶

From the definition mentioned above, it can be some of the elements or components of the paradigm. According Ahimsya putra, a theoretical framework or paradigm in the social sciences approach to culture composed of elements or the following components: 1) the basic assumptions; 2) values; 3) the problems studied; 4) models; 5) concepts; 6) methods of research; 7) methods of analysis; 8) the analysis and theory; 9) representation.⁷

There are various approaches in the development paradigm as a science, like positivism, pospositivisme, holistic and transcendental. D images are transcendental in postmodernism can be seen in a wider range in the form of religion, ethics, and morality, which is no longer understood in one aspect, the aspect concerning issues of theology and desire alone, but more than that issue these values can discussed with the issue of development of scientific, social, cultural, economic, and legal.⁸

Kuntowijoyo interpret the transcendental by basing faith in Allah (Ali Imron: 110) to introduce the science of prophetic, in the form of humanization (*ta'muruna bil ma'ruf*), liberation (*tanhauna anil munkar*) and transcendence (*tu'minuna billah*). In this case, the element of transcendence should be the basis of another element in the development of science and

³ Bernard Arief Shidarta, *Refleksi Tentang Struktur Ilmu Hukum*, Mandar Maju, Bandung, 2000, Im. 189

⁴ Heddy Shry Ahimsa Putra, *Paradigma Profetik (Sebuah Konsep)*, Dalam M. Syamsudin (Penyunting), *Ilmu Hukum Profetik (Kemungkinan Pengembangannya di Era Postmodern)*, FH UII Press, Yogyakarta, 2013, hlm. 28

⁵ Robert Audi, *The Cambridge Dictionary of Philosophy*, Second Edition, Cambridge University Press, 1999, hlm. 641.

⁶ Heddy Shry Ahimsa Putra, *Op Cit*, p. 29.

⁷ *Ibid*, p. 33.

⁸ Absori, *Epistemologi Ilmu Hukum Transendental dan Implementasinya dalam Pengembangan Program Doktor Ilmu Hukum*, Disampaikan pada Seminar Nasional dengan Tema "Pengembangan Epistemologi Ilmu Hukum", 11 April 2015 di Universitas Muhammadiyah Surakarta, hlm. 37.

human civilization. The method of developing science and religion according to Kuntowijoyo called the prophetic term based on the Qur'an and the Sunnah is the main basis of the overall development of science. Al-Quran and Sunnah basis of which the whole building prophetic science, good science faulty (verse kauniyah) as the basis of natural laws, humanities (verse Nafsiyah) as the basis of meaning, value and awareness and divinity (verse qauliyah) as a base law- God's law.⁹

With the concept of humanization, liberation, and the transcendence of jurisprudence built in order to find the epistemology of law that can address the problems of law in Indonesia. Humanization is an attempt to take back the human dignity through the way of the Lord. Liberation is the science of law which has responsibility prophetic to free mankind from putridity. Transcendence is a form of law that contains the basic elements of faith in God.¹⁰

Character of Legal Development.

Legal development is all the work done by social groups within a community, with regard to how the law was created, conceptualized, implemented and institutionalized in a political process.¹¹ Legal development begins with deconstructing the

law thoroughly, fundamentally, quickly, and drastically. At the theoretical level, legal deconstruction is carried out by restoring the development strategy in Indonesia as mandated by the founders of the republic, namely to make The Living Law in the pluralist nation of Indonesia as the main source of legal development.¹²

There are two kinds of legal development strategy has implications for the character at the same end of its legal product, namely the construction of orthodox law and legal development responsive.¹³ In the orthodox legal development, the role of state institutions (government and parliament) is very dominant in determining the direction of development of the law. In contrast, in large part responsive legal development lies in the judiciary along with the widest participation by social groups or individuals in the community.¹⁴

Both legal development strategies have different implications for their legal products. Legal development strategy orthodox or conservative elitists will produce legal products are positivist-instrumentalist, the laws that it better reflects the social vision of the political elite, more mencerminkan government desires. Orthodox law are closed to the demands of groups or individuals in the

⁹ Ibid, p. 42.

¹⁰ Khudzaifiah Dimiyati, *Pemikiran Hukum: Kontruksi Epistimologis Berbasis Budaya Hukum Indonesia*, Genta Publishing, Yogyakarta, 2014, h. 135-139, as quoted by Sigit Sapto Nugroho, *Pengembangan Epistemologi Ilmu Hukum Berbasis Transendental*, Jurnal Perspektif, Volume XXI No. 2 Tahun 2016 Edisi Mei, hlm. 103.

¹¹ Abdul Hakim Garuda Nusantara, *Politik Hukum Indonesia*, Yayasan Lembaga Bantuan Hukum Indoensia, Jakarta, 1988, hlm. 27

¹² Luthfiah Trini Hastuti, *Studi tentang wacana Hukum Responsif dalam politik Hukum Nasional di Era Reformasi*, tesis, Program Pascasarjana Fakultas Hukum Universitas Sebelas Maret, Surakarta, 2007, hlm.32-33

¹³ See Abdul Hakim Garuda Nusantara, *Op Cit*, hlm. 27., Moh. Mahfud MD, *Politik Hukum di Indonesia*, Edisi Revisi, Cet. Ketiga, Rajawali Pers, Jakarta, 2010, Hlm. 29.

¹⁴ Moh. Mahfud MD, *Ibid*, p. 29

community. In the creation of the role and participation of the community is relatively small.¹⁵

Meanwhile, responsive legal development strategies will produce laws that are responsive or populist, namely legal products that reflect a sense of justice and meet the expectations of society. In the process of making it gives a large role and full participation of social groups or individuals in their communities. The results are responsive to the demands of social groups or individuals in society.¹⁶

Implementation transcendental paradigm in Development of National Law.

Development of national law be interpreted as establishing knowledge or concept of national law. Indonesian national law has been built with a foundation of law positivism. As it is known that according to the positivism view that the law must be separated from the elements outside the especially moral legal field concerning *das sollen* and *das sein*. Even in the view of positivism or legism it is more explicitly stated that law is a act.¹⁷ The influence of the positivism thought highly have an enormous impact on the development of the law.

In the perspective of science of positive law, that rule of law is the overall rules of positive law set by the state, the theory of legal research, called the rule positivism if it considered that the object of the study of law

is the only piece of legislation, and called the legal empiricism if it considers that the study of law is the behavior (of authority in society) which can be observed empirically or about the application of the law (theory of the application of law), or include all three. In general it can be said that the law is a command (so, statement of the will) of people and must be separated from morality.¹⁸ In the view of legal positivism, moral and legal relations not mutually exclusive relationships but even diametrically apart.¹⁹

Understanding of the science of law positivism that only priority objective truth, empirical and logical that have tersistematis, procedures and formal contained in the written text alone and did not try to dig up the hidden meaning behind the written text that would eliminate the core of real substance is problematic to develop, so try explore the thoughts in the direction of thinking is not only born but also cedar cedar mind.²⁰

The presence of a transcendental law approach the turning point of the hegemony of positivism that has been widely questioned because its effects are destructive to human life. In the context of transcendental paradigm, the law should be a good guide and fair.

According to Barda Nawawi Arief as quoted by Paisol Burlian, said that in building a national law must be adapted to the characteristics of the community and a source

¹⁸ Absori, et all, *Hukum Profetik Kritik Terhadap Paradigma Hukum Non-Sistematik*, Genta Publishing, Yogyakarta, 2015, hlm. 85.

¹⁹ Yovita A. Mangesti dan Bernard L. Tanya, *Moralitas Hukum*, Genta Publishing, Yogyakarta, 2014, hlm. 46.

²⁰ Sigit Sapto Nugroho, *Op Cit*, p. 97.

¹⁵ *Ibid*, p. 32.

¹⁶ *Ibid*, p. 31-32

¹⁷ Teguh Prasetyo and Arie Purnomosidi, *Op Cit*, p. 147.

of law in Indonesia. Characteristics of Indonesian society is more monodualistik and pluralistic. Resulting in building national law should be guided by the values of living law glittering society, that is derived from the values of customary law and religious law.²¹ Resulting in the development of national law ought to be guided by a transcendental paradigm, ie religious values, ethics and morality.²²

In the context of morality, the law must be the guide was right, good and fair so longing back to nature can be realized. The essential imperatives maintained, because if not, then the law will only serve as the crooked path that will keep people from nature. There are several imperative which must be a legal principle of morality, namely: first, the law should belong to all to the good; second, because it belongs to everyone then the law should not be monopolized by specific individuals or groups. The interests of all people should be accommodated the same and equal; Third, the law must be a public guide which is really a public space where truth, goodness, and justice defended and preserved; Fourth, the law should be

²¹ Paisol Bumrlan, *Hakikat Pembangunan Hukum*, Jurnal Miqot, Vol. XXXVIII, No. 1, Januari-Juni 2014, hlm. 149.

²² Ethics and morality are two different things. Ethics is the science of morals. Or often said also, ethics as a philosophy of moral teachings. Meanwhile, the moral is the overall rules, rules, or laws that take the form of the injunction and prohibition. Therefore, different from the moral ethics. Moral teachings answered questions about how people should live, what is allowed, what is not allowed, and what shall be done, while the ethical answer questions about how the moral question is answered. See Khudzaifah Dimyati, et all, *Hukum dan Moralitas Basis Epistemologi Paradigma Rasional H.L.A. Hart*, Genta Publishing, Yogyakarta, 2017, hlm. 14.

established and maintained in accordance with the values of the public; fifth, legal norms must be born of mutual consent without coercion on the basis of communication between all groups in society; Sixth, the guards and bodyguards public guidelines, it should also be subject to the values and norms of the public attached to the office and the task in hand; seventh, any betrayal of the obligation to care for the public guidelines, must be regarded as reprehensible act for the public interest; and eighth, to prevent moral betrayal that need to be grown in a lawless habits. must be regarded as reprehensible act for the public interest; and eighth, to prevent moral betrayal that need to be grown in a lawless habits. must be regarded as reprehensible act for the public interest; and eighth, to prevent moral betrayal that need to be grown in a lawless habits.²³

For Indonesia these transcendental values have been reflected in the Pancasila ideology. Especially if it is drawn in the history of the formation of Pancasila which is actually very rich with transcendental values because it was built on religious spirit. There is no single literature that can prove that Pancasila in its manufacturing process is free from transcendental considerations. Hence the meaning of stagnation Staatsfundamental-norm attached to Pancasila should reinterpretation with minimal opportunities give transcendental bolder color in the official interpretation of Pancasila. There is no concern at all of this integration process that

²³ Arie Yovita Mangesti and Bernard L. Tanya, *Op Cit*, p. 4.

threatens the existence of Indonesia, happens precisely the opposite would be able to provide new expectations and a powerful energy in the life of a nation that had suffered acute pessimism in response to all the problems including the law. The position of Pancasila as an ideology in the legal system is placed as a paradigm used as reference and source of values and orientation in the formation of a law to regulate public order. Term paradigm used to position implies Pancasila as a result of the study of philosophy. Ian G Barbour approach can be used as a comparison that science and religion can be juxtaposed to bring certain aspects that may be associated with harmony.²⁴

Pancasila is the primary justification for the development of jurisprudence Indonesia based epistemology rasio empiris-intuition-revelation. The influx of intuition-religious (transcendental) as a method of jurisprudence Indonesia is expected to make a complete science of law and giving spirit and soul of the development of law in Indonesia.²⁵

Efforts to assess and understand the law should be emphasized that substantive and transcendental by basing on the social fact that can not be separated from religious

values, ethics and morals, but without prejudice to the criticality of a theory that is offered as a human *iktihad*.

Spiritual perspective Science, including the science of law is not only based on the *qauliyyah* truth, that it is true at the level of *haqq al-confident*, collected in the Qur'an and Hadith, but also based on the truth that by the ability of human potential through *ulum naqliyyah*, ie, reflection, reasoning and discourse that developed in the community. Human explore, process and formulate science with the aim not only to science but also to the policy, the benefit of society at large, by the blessing and mercy of Allah.²⁶

Therefore, the relationship between man and the law can not be separated. Thus, in the development of Indonesian law must be through an understanding of human nature. Notonagoro show of integral human nature. Basic essence of human beings in the Republic of Indonesia air-Pancasila as being *monopluralis* (single compound). Human beings *monopluralis* by Notonagoro interpreted as being that once had three essence of nature as follows: (1) The composition of nature *monodualis*: the man as a creature composed of body and soul, (2) The nature of nature *monodualis*: that human beings as individual beings and creatures social, and (3) Position *monodualis* nature: that of mankind as a stand-alone and creatures of God Almighty.²⁷

The desired transcendental values in building national law are positive Godhead

²⁴ Sugeng Wibowo, *Integrasi Epistimologi Hukum Transendental Sebagai Paradigma Hukum Indonesia*, Jurnal Hukum Legal Standing, Vol. 1 No.1, Maret 2017, hlm. 76.

²⁵ Abdul Ghofur Anshori, *Menggali Makna Sistem Hukum Dalam Rangka Pembangunan Ilmu Hukum Dan Sistem Hukum Nasional, Orasi Ilmiah Dies Natalis Fakultas Hukum UGM ke-62 Tahun 2008*, p. 5

²⁶ Absori, *Op Cit*, p. 45.

²⁷ *Ibid*, p. 12.

values that glorify brotherhood and justice based on the truth over the power of God, the Essence of the Almighty, the determinant of life and human life. With such a transcendental paradigm based on the expected national law is expected to realize the objectives for the benefit of mankind / people of Indonesia.

Transcendental paradigm of national law is expected to carry out the function expressive and instrumental functions.²⁸ Expressive function that expresses the views of life, cultural values, the values of the Divine and justice. While the instrumental function of which is to create and maintain order, stability and predictability, a means to preserve the cultural values, the values of Divinity, the value of justice in order to create a civilized society and community renewal means (pushing, canalization and directing changes in society).

Thus, national laws based on the paradigm of transcendental can create a dignified law,²⁹ the law that humanize, meaning that the laws that enforce and uphold human values according to the nature and purpose of his life. This is because human beings as creatures of God Almighty as contained in the precepts of the 2nd Pancasila, namely Humanitarian fair and civilized that has a value recognition of the dignity of the human being with all the rights

²⁸ Bernard Arief Shidarta, *Refleksi Tentang Struktur Ilmu Hukum*, Mandar Maju, Bandung, 2000, hlm. 189

²⁹ Related with dignity law see Teguh Prasetyo, *Teori Keadilan Bermartabat dalam Perspektif Teori Hukum*, Nusa Media, Bandung, 2015.

and obligations and equitable treatment to people, to myself itself, the surrounding nature and against God.³⁰

CLOSING

The fundamental values of national legal order Indonesia which is based on the paradigm of transcendental include: (1) the value of the first foundation: the legal character to protect (protect) and not just govern granted, (2) the value of the second base: laws that embody social justice for all people Indonesia. Social justice and not solely as a destination. However, in the grip of concrete in making laws, (3) The value of the third basic: the law is of the people and contain properties populist, and (4) The value of the basic four: the law is a statement of decency and morality, both in legislation and in implementation as taught in religious teachings (transcendent) and customs of our people.

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³⁰ Teguh Prasetyo and Arie Purnomosidi, *Op Cit*, hlm.163.

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