Postmodern Philosophy as a Form of Human Reaction to Legal Positivism Concerning the Criminal Justice System in Indonesia

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Abstract. The study of Philosophy of Law is developing rapidly from time to time as we know that there are many schools of Philosophy of Law that are believed and used in a particular place, time, and adherents. Philosophy of Law, nowadays a school growing very fast is Postmodern Philosophy of Law. The postmodern flow of legal philosophy as a reaction to the flow of Positivism Legal Philosophy. Postmodernism's thinking about law is that legal truth is not particular, absolute, and objective, but relative, plural, consensual. This thinking often raises the pros and cons among experts. Therefore, this study tries to increase the flow of postmodern philosophy as a form of human reaction to legal positivism concerning the criminal justice system in Indonesia. This study uses a qualitative approach with a literature review method. The results of the study indicate that the criminal law system in Indonesia is unable to accommodate the purpose of the law, namely justice, because the criminal law system in Indonesia always considers justice based on the fulfilment of written law in which everyone applies a rule of law that is ultimately the same. Therefore, the author expresses Postmodern Philosophy as a creative legal justice breakthrough that is heterogeneous or combines various elements in everyday human life such as social, legal, cultural, psychological, political, educational, etc.

Keywords: Philosophy, Postmodern, Legal Positivism, Criminal Justice System.

A. INTRODUCTION

Everything that applies and is defined in Philosophy also applies to the Philosophy of Law. Philosophy is self-reflection on "things" in general (Arief, 2007). Philosophy is an attitude or critical thinking towards a belief accepted uncritically. Philosophy is better understood by asking the right questions and finding the correct answers. Rather than explaining the applicable law, legal philosophy seeks to understand the law as a whole. It aims to understand the "nature" of law, its basic principles (Darmodiharjo, 1995). Social theory and law are all branches of philosophy (Patawari, 2012). These include epistemology, ontology, and axiology. Axiology discusses values, and ontology concerns objects (Susanto, 2021). These are all types of epistemology of course, each of these epistemologies has a central concept that philosophers seek to argue for social truth—religion, the universe, law, social order, humans, etc. (Khambali, 2014).

The study of Philosophy of Law is developing rapidly from time to time as we know that there are many schools of Philosophy of Law that are believed and used in a particular place, time, and adherents. This happens not without reason but is caused by the fundamental nature of the study of Philosophy of Law, which is strongly influenced by various conditions, such as geographical, political, social, cultural, and so on (Nalle, 2021). Therefore, it is not a taboo subject when it is known that there are many different views on the Philosophy of Law. Talking about the flow of Legal Philosophy, nowadays, the fastest-growing flow is the Postmodern Legal Philosophy. The term Postmodern itself was first used by Frederico de Onis in the 1930s to refer
to the critical movement in literature, especially French and Latin American literature. Onis calls the early modernism stage between 1896-1905 and the postmodern stage between 1905-1914 what he calls the "intermezzo period" or middle and higher modernity – in the ultramodern stage between 1914-1932 (Maksum, 2008). Based on that, it can be concluded that postmodernism was born after Modernism.

Postmodernism has its roots in philosophy and creates anomaly because of its deconstructive and destructive characteristics. Existentialism can reduce the authority of ontology to epistemology; postmodernism can lead to the deconstruction and destruction of the reputation and achievements of logic, axiology, ontology and epistemology that have succeeded in bringing to modern times (Syarifuddin, 2011). Although the Postmodern flow was initially developed in culture and art, this understanding quickly developed into various other areas, such as economics and social, architecture, history, sociology, anthropology, comic books with fiction, theatre, film, television, pop life, and not to be missed, of course, in the legal field (Fuady, 2005). This is the point of the publication of Postmodern Legal Philosophy.

Postmodernism assumes that legal truth is certain, absolute, one, and objective, but at the same time, it is also agreed upon. This is an extraordinary way of looking at things. The main goal is to make sure that everything is clear. However, on the other hand, law enforcement is not always specific in real life (Weruin, 2018). If you consider justice the most crucial goal of the law, you may see it changing to benefit particular groups. Process: It's like a drama. On the one hand, the law must be accurate, definite, absolute, and objective.

On the other hand, the law must be applied with due regard to other principles outside the law (e.g. morals, culture, etc.), subjective lawyers, prosecutors, and judges. In this case, the law cannot be taken from dubious sources, is relative, and is no longer neutral. A group called legal postmodernism thinks and does this kind of thing. Thus, legal postmodernism thought, and movement presents a new way to change the law through constructive criticism of the vision and practice of modern law, namely legal postmodernism. This article wants to know what postmodernism thinks about the law (Artadi, 2016).

One type of legal philosophy called "positivism" says that because of legal theory, the term "ius" is changed to "lege" or "lex" to clarify what is legal and what is not (Islamiyati, 2018). So, the law can be said as a rule that only regulates good law. Legal science does not discuss whether positive law is good or bad and does not talk about how the law works in the real world. Legal positivism says that law is legal positivism in an absolute sense. This means that the law is neither moral nor religious. He also said that there must be a difference between the law and a law (Halim, 2008). In legal positivism, few people talk about no other law than what the rulers say. In the eyes of positivism, there is no law other than what the rulers say. The existence of law facilitates the law's implementation because it has clarified what law is, and there is no law outside the law (Hanafi & Anggraini, 2018).

Based on the above description, the article from this literature research tries to answer the main problem, namely the Postmodern Philosophy as a Form of Human Reaction to Legal Positivism concerning the Criminal Justice System in Indonesia. It is hoped that this research can answer the relationship between the positivism law of Postmodern philosophy and the criminal law system in force in Indonesia. It is hoped that this research can be a reference material for other researchers who want to develop research on the legal philosophy of positivism.
B. **METODE**

This study uses a qualitative methodology. Methods for analyzing social or human problems, such as the meaning of some individuals or groups of people, can be found in qualitative research (Creswell, 2016). The framework of the final qualitative study report can be adapted to the project's needs. This study uses an inductive approach, which emphasizes the individual meaning and translates the complexity of the problem. Content analysis is used in this literature study, which is a form of qualitative research. Studying legal postmodernism literature such as books and scientific journals and observing actual legal practice is the first step in conducting a thorough investigation. A comprehensive review of all data, literature and observations has been collected, analyzed, synthesized, and described as research results.

C. **RESULT AND DISCUSSION**

Positivism is a way of thinking that demands that any methodology used to find truth be treated as an object to be done without subjective metaphysical prejudice. If applied to law, we want meta-juridical thinking of law. This means that legal norms cannot be mixed (separated) with other realms of thought. A concrete conceptual form between citizens is emphasized. It is no longer an abstract meta-juridical moral principle about the nature of justice but a lex (Salman & Susanto, 2009). Legal positivism maintains a clear distinction between law and morals (the law that applies and ought to be).

a. Law is an order to humans, according to Hart (2016). B. Analysis of legal concepts is helpful. Sociological studies and critical evaluation must be distinguished. No reference is made to social, policy, or moral purposes in making decisions. D. Law and morals are not related because morals are meta-juridical. e. Morality cannot be proven.

Positive law is a written legal provision issued by an institution that gives positive law. A statutory regulation established by the authorities or the state is also conceptualized as a law. Orders must be obeyed because they contain sanctions. Positive law has agreed on values and is incorporated into positive legal norms. As a result, the law of positivism contains the values contained in positive law (law), but only the values that are discussed and determined during the positive law-making process. It is fundamental law once enacted and is non-negotiable, whether it is effective or not, fair or not (Coleman & Leiter, 2010).

Positivism, realism, and legal legalism are no longer trusted in the law. It seeks to defend the rights of marginalized groups, such as minorities and women, and to seek views and the legal system, even voicing their voices that are not being heard. Postmodern is a category of periodization after modern. At the same time, the contemporary era itself follows the premodern era. Postmodernism is an era and thought that emerged "after the modern era and modernist thought". Computers, mass communication, and the emphasis on language in social and cultural studies have all been described as "postmodern" by Jean Francois Lyotard (Lyotard, 1993).

Based on the flow of Postmodern Legal Philosophy, we can find several legal paradigms that are pretty different from the previous legal paradigms that have ever existed, and the legal paradigms are as follows:

1. Legal authority is superior to positive law;
2. The theory of enlightened truth must be transformed into systemic reality;
3. There is no uniformity of values in a culture. Culture is multiplicity and heterogeneous;
4. The legal methodology should change to an action-based method;
5. Likewise, there has been a change in the criteria for rationality, from initially a uniformity to a heterogeneous one because each subculture has its perspective. So, there is a shift from universal rationality to perspective rationality;

6. The justice sought by Postmodern Legal Philosophy is not legal in the conventional sense but 'creative'. By creative justice, we mean that there is justice in an active society, whose social, technological, economic, and ethical standards are constantly changing;

7. A reformulation and reorientation of formal categories are required to be transformed into functional categories;

8. A new judicial process is needed to replace the impression of impartiality from the judge, who justifies one party and blames the other. What is needed is a judicial process that can respect plurality (Fuady, 2005).

In advance, it should be remembered that postmodernism was born after Modernism, as previously mentioned. More specifically, we need to know that Postmodern Legal Philosophy was also held after Modern Legal Philosophy (in this discussion, Positivism Legal Philosophy is part of Modernism). The Postmodern Legal Philosophy school was taken due to the Positivism Legal Philosophy school. Talking about Modernism, the word modernism itself contains all advanced, sparkling, and progressive. This understanding is certainly not an exaggeration because Modernism is related to cultural forms characterized by rationalism, positivism, empiricism, industry, and technological sophistication. (Maksum, 2008)

In connection with everything that has been described above, in this section, the main reasons for the birth of the Postmodern Legal Philosophy as a reaction to the Positivism Legal Philosophy school will be explained. However, it is better to clarify what is meant by the flow of Positivism Legal Philosophy. The flow of Philosophy of Law Positivism is essentially a flow of Legal Philosophy which views the need for a strict division or separation between law and morals. The flow of Positivism Legal Philosophy is divided into 2 (two) styles, namely:

1. Analytical Positive Law School (John Austin)
   According to this school, the law is an order from the state's ruler. The essence of the law itself lies in the withdrawal of the 'order'. This school views law as a fixed, logical, and closed system.

2. Pure Law School (Hans Kelsen)
   According to this school, the law must be cleaned of non-juridical analyzes, such as sociological, political, historical, and ethical elements. So, in essence, this school views law as a necessity or an ideal thing and not something factual, and the law itself can be considered in a formal and material sense. (Huijbers, 1982)

Legal science bearers very widely applied the flow of Positivism Legal Philosophy in its time. Still, over time several conflicts did not approve of the existence of Positivism Legal Philosophy, one of which was the Postmodern Legal Philosophy school. As stated in the title of this discussion, Postmodern Legal Philosophy is a human reaction to Positivism Legal Philosophy. This certainly happened not without reason; there were several criticisms directed at the Positivism Legal Philosophy school, namely as follows:

1. Whereas culture, including legal culture, is heterogeneous and not just one particular value that shapes that culture:

2. That a uniform law, which is only directed or formed on the premise of being applied to a constant society, is no longer possible to maintain;
3. That the law will vary according to the context and according to different legal cultures and do not connect;
4. The general opinion can no longer be defended, which states that the law-making and law-enforcing authority is considered to have a meta-normatively superior hierarchy (Fuady, 2005)

These critiques ultimately make people react and create the Postmodern Philosophy of Law. Postmodern Philosophy of Law is expected to make substantial changes to the law itself. This is considered very important because, according to the flow of Postmodern Legal Philosophy, in the postmodern era, there are many changes in the pattern of human life in various aspects, from the minor elements to the most considerable aspects. This situation indeed cannot be separated from the reason for the very rapid development of technology and the flow of globalization that is happening at this time, so that rapid changes, dynamism, and fluctuations in human life patterns are unavoidable. Therefore, the Postmodern Legal Philosophy school assumes the Positivism Legal Philosophy flow can no longer be applied at this time because the Positivism Legal Philosophy school has several very substantial weaknesses, such as:

1. Legal Philosophy Positivism is very focused on legal certainty so that in many cases, this school is another legal goal, namely justice and legal benefit;
2. Legal Philosophy Positivism tends to objectify many things in its studies, even though various things in the study of legal science are very subjective, such as public awareness of law;
3. The Philosophy of Law Positivism is too dogmatic so that it intentionally forgets an essential thing, namely the facts that occur in society or other legal subjects;
4. The flow of Philosophy of Law Positivism is considered unable to make a formulation on the study of legal science that is tested and holistic;
5. The flow of Philosophy of Law Positivism can no longer go hand in hand with today's society, a very dynamic society. Social change often occurs much faster than the written regulations themselves.

Departing from the things that have been described above, the author will try to relate these things to the Criminal Justice System. As we all know, the Criminal Justice System can be interpreted as a Criminal Justice System (law) which essentially regulates and provides corridors for the implementation of Criminal Law, from the earliest process of investigation & investigation at the Police level to the trial process in the Court and ends with the disciplinary process in the Correctional Institution. Seeing this, we understand that criminal law, which must be based on the principle of legality (looking at written law), cannot fully accommodate the purpose of law from the perspective of Postmodern Philosophy.

The meaning of the inability of Indonesian Criminal Law to accommodate the purpose of the law is in terms of justice; Postmodern Philosophy always tries to get out of conventional justice/legal justice, legal justice is often prophesied as justice based on the fulfilment of written law wherein everyone applies a rule of law that is ultimately the same. On the other hand, Postmodern Philosophy tries to create 'creative' justice, which is heterogeneous or combines various elements that exist in everyday human life such as social, legal, cultural, psychological, political, educational components, etc. Of course, 'creative justice' will be more challenging to apply to the Criminal Justice System in Indonesia, considering that various legal authorities need to have strong analytical skills and understanding of legal philosophy, especially regarding the actual reasons for using the law itself, primarily criminal law.
For example, based on Postmodern Philosophy, we cannot see a criminal case only from what is written in the law, for example, Article 362, which regulates theft, whether the police only need to prove the elements in the article before concluding whether an act can be classified as theft. Or, more than that, the police need to understand the specific circumstances behind an action, the motivation/inner attitude, the person acting, etc. Simple questions such as whether Article 362 should apply equally to people who intentionally steal and those who commit theft out of necessity and ignorance of a particular item (e.g. scavengers who take one orange in someone's garden without knowing that the garden has an owner).

The question mentioned above will undoubtedly be difficult to answer if we examine it from the philosophical point of view of the rule of law. Could it be that conventional justice "all people are equal before the law" actually gives birth to injustice in some instances? As a further example, it has become common knowledge that one of the essential elements in the Criminal Justice System is the presence of legal counsel/lawyers in the trial process; essentially, legal advisors/lawyers are tasked with explaining and ensuring the rights of suspects in criminal trials can be fulfilled by the state through power judiciary, the question is whether everyone has equal access to legal counsel/lawyers, of course not. Paying for the services of legal advisors/lawyers costs money, in which people with high economic conditions benefit much more than people with low economic conditions when facing criminal law cases. If that's the case, is there still holistic justice in the Indonesian Criminal Justice System, or is the conventional justice we discussed previously ineffective at this time?

It does not stop there, in the process of finding law by judges (court decisions) and carrying out sentences in Correctional Institutions, the Indonesian Criminal Justice System is still very much based on a positivist view where legislation is the only source of law that forms the basis for legal discovery. Then what about conditions that cannot be separated, such as the economic effect of the suspect's family, social views, labelling, family psychology, family future, etc. Therefore, the author argues that it is time for the Indonesian Criminal Justice System to open itself to views and philosophies that can renew the system towards a better one, and one of them is Postmodern Philosophy. One of the main keywords in this discussion is 'heterogeneous', meaning that in the process of implementing and enforcing the Criminal Justice System, the main elements such as the Police, Prosecutors, Judges, Legal Advisors, Correctional Institutions must be able to interpret the law based on various backgrounds, various backgrounds. Studies, multiple sciences and multiple disciplines give birth to a philosophy of justice close to a holistic or perfect nature.

In the author's philosophical view, the principle of the ultimum remedium of criminal law has always been the basis of every study analysis. Ultimum Remedium is defined as a last resort, meaning that criminal law may only be applied if no other legal instruments can be used. Why is that, because the criminal law with its sanctions, namely criminal sanctions are very sharp, the only legal sanctions that can directly rob human rights, do not stop there, criminal sanctions can also have such a significant impact on the family and relatives of the convict, the impact It can also be felt for a very long time, and can continue across generations. For example, a family head is sentenced to leave a small child and a wife who does not have education without a breadwinner. The child and wife can fall into the abyss of poverty, which can be passed down from generation to generation. From this view, we can imagine together what would happen if criminal law was applied in a way that was not based on the various elements and values of human life; of course, criminal law would not be able to achieve its legal objectives and could even cause more significant losses to the convict, his family, and society as a whole general.
D. CONCLUSION

This discussion is not intended to search for a better or worse flow of Legal Philosophy, which is wrong and right concerning the Indonesian Criminal Justice System, but rather to understand why certain schools of Legal Philosophy were created in a time and place, why certain schools of Legal Philosophy are created—deemed to be no longer valid in a particular time and place and to understand the nature of the law that applies in a specific time and place. Specifically, regarding the Indonesian Criminal Justice System to achieve legal objectives, especially criminal law, the elements, elements, and legal structures in the Criminal Justice System need to examine various philosophies and views and current theories to adapt the development of the law itself. In a better direction, as a scientific foundation that is humanities.

REFERENCES