

The Role of Morals in the Legal System and its Influence on the Judiciary in Indonesia



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ABSTRACT: The system has a set of components that are in it. The legal system cannot be considered a system if it runs alone by setting aside moral values. Pancasila is the basis of the state, so every product of legislation must be based on the values contained in Pancasila. Following the opinion of Ronald Dworkin, who said that morality is fundamental to be used to evaluate legal products and, in some instances, morality cannot be separated. If the law is considered an applicable rule, then the truth to be realized must be directed to substantive (essential) truth. A positivistic view that is only limited to rules and logic, but in some instances, cannot only view positivism so that it can lead to progressive laws.

KEYWORDS: Morality, Legal System, Progressive Law

I. INTRODUCTION

Laws are values that must be obeyed together because there are sanctions for anyone who violates these laws. If interpreted more deeply, the law is a product of the authorities through political tools to regulate people's lives so that law becomes a tool to create change or development in society.

That Positivism views rule and logic or rules and logic. Where the rules must be written (*lex scripta*), the formulation must be firm (*lex stricta*), and the formulation must be precise (*lex certa*). Positivism holds that the human senses consider metaphysical forms of knowledge unprovable. The basis of positive knowledge is objective truth emphasizing objective experience.¹

An autonomous legal system can work by separating itself from non-legal influences. According to Hans Kelsen, non-legal elements must be separated from law enforcement because they can interfere with the authenticity of the law, namely the truth and a view of something as it is.² This view is contrary to the law, which is expected to be applied to meet the needs of society, which is contrary to Hans Kelsen's view which separates positive law from morality.

Even though it is autonomous as a system, more is needed to carry out its role; there needs to be another point of view from the environment towards the success of a system. According to Luhmann, the law is not fully responsive to its environment; it will respond to events in society (environment) by sorting out events that are considered legal events.³ This is in line with Ronald Dworkin's view that morality cannot be separated in some instances and significant cases, morality cannot be separated.

In Hugo Sinzheimer's opinion, along with the development of society or the times, the law always follows these changes. Therefore, the law is adaptive and responds to things that develop in society.⁴ Good law cannot be separated from values and morals. Law is not only how the sound or text of the law. However, the law helps provide legal certainty and can be translated further to provide justice for justice seekers. As the Adegium in the law states fiat Justicia et pereat mundus (even though the sky will fall, the law must be upheld), this shows not only the law that must be upheld but also justice, the benefit of society.

Indonesia, as a pluralistic country, of course, must be based on moral principles. It is different from the individual colonial legal model. Even though Indonesia still adheres to the colonial legal system with codification and unification. However, in the current reality, many favorable laws (legislation) do not reflect the moral values of society. Favorable law products often do not reflect reality in society or even side with the authorities because the law is made by sovereign authorities or governments (Hans Kelsen). Thus, the law has not yet become the goal, as stated in Pancasila and the 1945 Constitution. Adherents of the Civil Law system provide great flexibility for judges to decide cases without following previous judges' decisions. So that the judge's hand is the rule made by Parliament, namely the law.⁵

¹ F. Budi Hardiman, *Beyond Positivism and Modernity*, Kanisius, Yogyakarta, 2003, p. 53.

² Hans Kelsen, *Pure Legal Theory*, Fundamentals of Normative Law, Nusa Media, Bandung, 2011, p. 21.

³ Niklas Luhmann, *Law As Social System*, Oxford University Press, New York, 2006, p. 26.

⁴ Esmi Warassih, *Legal Institutions A Sociological Study*, Suryandaru Utama, Semarang, 2005, p. 87.

⁵ Jeremias Lemek, *Seeking Justice: A Critical View of Law Enforcement in Indonesia*, Galang Press, Jakarta, 2007, p. 45.

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Legal products are in line with law enforcement. Law enforcement tends to be sharper downwards and blunter upwards. For example, grandmother Asyani (62 years) in Situbondo was sentenced to 5 years in prison because she was accused of stealing seven pieces of Perhutani teak wood. It shows that positivistic law enforcers view positive law only as a translation. However, there is another way to get out of this rigid thinking.

Theft is translated as an act committed by someone committing the crime of theft, which is punishable by imprisonment or a fine according to Article 362 of the Criminal Code. However, law enforcers do not explore legal values in society. What basis caused him to steal, and how much loss resulted. So progressive thinking should prioritize substantive justice in its enforcement.

In the case of Asyani's grandmother, law enforcers should be able to think progressively by recovering from the loss, not retaliating. If a law enforcer is only a mouthpiece for the law, he does not place morality on his thinking and justice in society. So this has an impact on the influence of other law enforcement. So what is the purpose of law enforcement for the National Police, Prosecutors, Judges, and all the sub-systems within it must be highly committed to presenting a more substantive face of legal justice.

Based on the description above, the problem in this paper is the position of morality in the legal system in Indonesia and its practice in the justice system in Indonesia.

II. FORMULATION OF THE PROBLEM

In the above context, this paper will focus on the following:

1. What is the moral position in the legal system in Indonesia?
2. How is the moral practice in the justice system in Indonesia?
- 3.

III. RESEARCH PURPOSES

This article aims to:

1. Knowing the moral position in the legal system in Indonesia.
2. Explain and analyze moral practices in the justice system in Indonesia.

IV. RESEARCH METHODS

The approach method used in this study is the normative legal method. This method is carried out through the stages of collecting primary data from the reality of cases in Indonesia. Meanwhile, the primary data is examined from literature sources, such as laws and regulations related to the moral function in law enforcement and the legal theory used in the legal system. Thus, normative legal research needs to be carried out to create arguments, theories, or new concepts of ideas as guidelines for solving legal problems, which are the subject of this journal's discussion.

V. DISCUSSION

1. The Position of Morals in the Legal System in Indonesia

The theory of Legal Interpretation (Ronald Dworkin) states that law integrates three values, justice, fairness, and procedural due process so that the resulting legal product or decision places a moral side. The law is a product of interpretation in which texts, principles, foundations, and values live in society. It becomes a moral absolute unity. Moral assesses whether legal practices and products are under practice in society.

Dworkin put dignity as his point of view. Where the rights attached to a person cannot be disturbed or even ignored, the role of law enforcers must be able to examine or translate as a unitary community morality. This interpretation can provide overall justification if it is compatible and acceptable as a law.

Actions that contain values about good or bad actions or human conscience are referred to as morals. Humans grow in social life with a conceptual system of morals and law so that the system becomes part of their life by learning the moral language of society and, at the same time, understanding the morals formed in that society.⁶

The existence of a legal and moral relationship is clarified in 3 ways, namely:⁷

1. Law is part of the ideology and morals of religion. Laws originate from the principle of benefit and religious teachings that generally can provide good.
2. Law and morals give rise to a reciprocal relationship or causality. The law influences the community to regulate their life, and the community can influence the law in its formation, which is under the principles of their view of life.
3. Moral can be a consideration to assess positive law. In this case, the rule of law, the reasons for its formation, and the legal basis to be applied are appropriate.

⁶ Bruggink, et.al., *Reflections on Basic Understandings of Law in Legal Theory*, Citra Aditya Bakti, Bandung, p. 83.

⁷ Petrus CKL. Bello, *The Relationship between Law and Morality According to H.L.A. Hart*, Journal of Law and Development, Vol. 44 No. 3, 2014, p. 377.

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L.H.A. Hart argues that law and morality are fundamental. Morality and law meet each other with the same goal: to maintain their existence. In order to achieve justice, law, and morality must be interrelated. The relationship between the three cannot be separated. However, he strongly criticizes that separating morals and law is also necessary to avoid a political understanding.

In the Roman era, saying *Quid leges sine moribus* meant that law is meaningless if not imbued with morality. This proverb illustrates that law cannot be separated from morality; the law must contain moral values; in other words, it is said that law is the crystallization of moral values.

The law that follows the morality of society will create order, and the people will obey the law itself. So according to the opinion of Thomas Aquinas, if it includes moral values, namely doing good (doing good), then society will stay away from crime.⁸

When interpreted as a legal system, the law cannot work alone by setting aside moral values. The system has a set of components that are in it. These components make a system work properly. The legal system will work well if there are principles of moral values, justice, welfare, Etc.

Law is used as a guiding and protecting sector. However, in order for the law to play its role, policymakers (legal policy) and law enforcement officials can respond and follow up on improvements to the legal system.⁹ The development of national law that is oriented towards religious, moral values can be understood that the noble moral values that have been grounded in Indonesia must be used as a starting point in formulating national legal policies. It means that the noble moral values rooted in Indonesia are colored by transcendent religious values, namely Islamic teachings. Pancasila does not clash with religious teachings. Implementing Pancasila values in the life of the nation and state can be understood as a form of practicing religious teachings in the Indonesian context. In a society that adheres to the Civil Law legal tradition, laws are the primary source of law, so the process of forming laws influences the formation of a legal system.¹⁰

The legal system in Indonesia includes all elements, such as substance, structure, and culture. It is stated in the fourth paragraph of the Preamble of the 1945 Constitution, and the state achieves state objectives based on the five basic principles of the state (Pancasila).¹¹ Pancasila determines whether a positive law is fair or not. Pancasila as a Grundnorm is used as the highest source of law that determines the content and form of lower laws and regulations, which are arranged hierarchically.¹²

Pancasila's "Margin of Appreciation" position can be applied in legal theory and law enforcement practice. It includes the process of Law Making, Law Enforcement, and Law Awareness.¹³ Pancasila has a crucial (fundamental) function in the National Legal System, where Pancasila can embody the characteristics in each precept as follows:¹⁴

1. Have a religious nature and respect every belief that everyone has;
2. Presenting justice for everyone, without exception;
3. Help each other to achieve common goals by the law and the principles of moral values;
4. Accommodate and implement all the aspirations of the Indonesian people;
5. Justice is not limited to a personal context but to substantive justice for the common good.

Pancasila, which is the fundamental norm of the state, every legal product produced must contain the five precepts (values) contained therein. By applying these five precepts in every legal product of the legislation, the legal product can realize the law's goals: justice, benefit, and legal certainty. The position of Pancasila as the "Margin of Appreciation" can be used in legal theory and in law enforcement practice which includes the process of Law Making, Law Enforcement, and Law Awareness.¹⁵

For example, in Indonesia, the perpetrators of corruption are quite concerned due to the separation of law and moral values related to law enforcement against perpetrators of corruption. The relief provided by law enforcement and the lack of criminal sanctions contained in positive law. It shows that the law should reflect the moral values of the place where the law is developed. The legal and moral values that exist in the national legal system must be based on Pancasila.¹⁶

The legislative process of laws originating from executive and legislative initiatives always leads to lengthy discussions during deliberations. Legislators have issues representing the interests of groups, political parties, central government, and other interests, thus forgetting the interests of the people, which are much more important in the laws that are made.

Parliament is a political institution that has the task of producing legal products, namely laws; it should be able to accommodate people's aspirations. However, it is often found that the resulting legal products do not prioritize the community's needs. The interests of the community tend to be ignored and instead prioritize political interests or the interests of certain groups.

The importance of the morality of legislators to realize this is from the actions taken in every aspect, including in formulating a law. If everyone has a sense of morality, he will bring up ideas, change, and put forward objective justice for every society.

⁸ Fithriatus Shalihah & Oksep Adhayanto Hukum, *Op. Cit.*, p. 676.

⁹ Sanyoto, *Law Enforcement in Indonesia*, Journal of Legal Dynamics, Vol. 8 No. 3, 2008, p. 203.

¹⁰ Suryani, *Moral Values in Forming Legislation*, Pena Justisia: Vol.19 No.2, 2020, p. 5.

¹¹ Suteki, *Law and Society*, Thafa Media, Yogyakarta, 2021, p. 384.

¹² *Ibid.*, 385.

¹³ *Ibid.*, 386.

¹⁴ Maroni, *The Existence of Moral and Legal Values in the National Legal System*, Journal of Legal Issues, Vol. 41 No. 2, 2012, p. 308.

¹⁵ *Ibid.*, 309.

¹⁶ *Ibid.*, 310.

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The point of view of policy-forming institutions (legal policy) and law enforcement in Indonesia is not appropriate to use positivism as the country of origin of Indonesian law. A wise view by considering morals/religion or ethnicity/ethnicity is important in Indonesia. Durkheim gave the opinion that religion tends to be synonymous with social systems. Society (collective consciousness) creates individuals according to its ideas. Religion is considered a factor of community socialization. If religion is seen as a functional social mechanism, then certain people, incredibly weak, should be religious.

Unity and diversity can be reflected in the law that lives in a "living law" society so that that law can create substantive justice. It follows the opinion of Cicero, who said, "*ubi societas ibi ius*," where there is society, there is the law. The living law remains valid as long as it does not conflict with the Pancasila precepts.

Values in proper morals should not be separated from the law itself. Law without moral values is only a mere collection of words that establish rules (provisions) as a norm but override the values contained in Pancasila, which will be realized through law.

Indonesia, whose law is interpreted as legal formalistic, does not prioritize the people's need for justice. So Menski offers an approach known as the legal pluralism approach, which is based on the relationship between regulations made by the state (state-positivism), social aspects (socio-legal approach), and natural law (moral/ethic/religion).¹⁷ In other words, if the legal system is not following these aspects, the law will likely cause injustice in its enforcement.

The law will have substantial justice (actual justice), so it must be considered a rule with values in it. Law enforcers who, in practice, can influence a social life in the community must look more profoundly to earnestly explore a sense of justice for the community. According to Satjipto Rahardjo, that is the concept of progressive law that can present a true sense of justice for everyone.

Law enforcement must be seen from how far humanity exists in him and presents the need for society for justice, prosperity, and happiness. Satjipto Rahardjo believes that progressive thinking requires law enforcement to dare to escape mainstream thinking or thoughts of legal absolutism. Placing the law must be in a relative position.

Law Enforcement Officials (LEO), carrying out their duties in law enforcement, must have sensitivity to the conscience of the community (a person of justice must be a person of wisdom), even though this voice is not uttered directly or under pressure.¹⁸ Law enforcers in carrying out their duties uphold the legal principle of equality before the law. It means that the role of law enforcers must treat every citizen equally before the law.

In the 1945 Constitution, it is apparent that the state guarantees equality or equality of position. This equality of position is explained in Article 27, paragraph (1) "All citizens have the same position before law and government and are obliged to uphold that law and government without exception." Thus, the goal is to realize justice for society.

If embodied in a legal product, the principle of prioritizing morals must be in line with the implementation of the legal product itself. However, there are still legal products that do not follow moral principles. Therefore, law enforcement officials must have the courage to uphold moral values .

2. Moral Practices in the Justice System in Indonesia

Positive (dogmatic) law assumes that truth lies in the body of regulations. However, progressive law considers this to be a benchmark due to the complexity of assessing the contents of the regulation. So it is often found that legal products need to be more appropriate and clear.

The positivistic perspective can guarantee legal certainty because the law is written, inevitable, and clear (*lex scripta, lex strict, lex certa*); it is considered that its existence has been maintained until now, even in the future for society. However, the formalistic view questions whether the enacted norms are fair. Therefore, in some instances, it cannot be seen as positivistic only so that it can lead to progressive law.

Whereas the moral relationship with the legal system in Indonesia still fully adheres to the principle of concordance using the legal system from the Netherlands or continental Europe or what is known as civil law. Where the source of law is statutory regulations or written law so that the legislature is the leading law-making institution in written form so that judges are only mouthpieces of laws.¹⁹

Around 2022 its creator, Satjipto Rahardjo, introduced the concept of Progressive Law. This concept arose because of dissatisfaction with the teachings of positive law (analytical jurisprudence), which are inconsistent with empirical reality in Indonesia. Progressive Legal Thinking as a solution to the problem of the quality of law enforcement in Indonesia, especially after the reformation in mid-1997. If the function of law is supposed to help solve social problems ideally, then the current situation in Indonesia is very different from that ideal.²⁰

The concept of progressive law, "not only rules and logic but also behavior, even behind the behavior," is not limited to legal formalism, which only enforces regulations. Not only rules and logic but behavior, even behind the behavior. Thus, what is

¹⁷ Werner Menski, *Comparative Law in A Global Context*, Cambridge, Cambridge University Press, 2006, p. 187.

¹⁸ Esmi Warassih, *Legal Construction*, Thafa Media, Yogyakarta, 2021, p. 10.

¹⁹ Sundari, *Comparison of Law and the Phenomenon of Adoption of Law*, Light of Atma Pustaka, Yogyakarta, 2014, p. 2.

²⁰ Satjipto Rahardjo, *Progressive Law: Liberating Law*, Journal of Progressive Law Doctoral Program in Law, Univ. Diponegoro, Vol. 1 No. 1, 2005, p. 3-5.

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progressive is not only a matter of enforcement (behavior) but also material/substance (rules) and including how to use the logic of the law.

That positivistic view of law as rules and logic. According to Hans Kelsen, non-legal elements must be separated in law enforcement. In enforcement, judges are only mouthpieces or mouthpieces for laws. However, this was denied by Ronald Dworkin, who said that, in some instances, morals cannot be separated.

An example is the case of Minah's grandmother, whom the Purwokerto Court sentenced for stealing three cocoa pods. This case reflects that law which is only interpreted as rule and logic, is likened to a kitchen knife which tends to be sharper downwards and blunter upwards (greater than upward), according to Donald Black. Thus, progressive law is a legal thought that aims to present substantive justice and benefits, not merely legal certainty.

Present substantive justice for society with truth and honesty. Substantive justice is more than just procedural justice or how the rules sound. However, it focuses on its goals, namely values and a sense of justice in society, especially vulnerable groups and the lower classes. In line with that, it is stated in Article 5 of the Law on Judicial Powers that Judges and constitutional judges are required to explore, follow, and understand legal values and a sense of justice that lives in society.

One example is law enforcement officials who have a progressive character. In the corruption and bribery cases committed by Angelina Sondakh. At the time of investigation, a message was on his cellphone. The message does not show the word money but the term poor apples, Washington apples. However, investigators believe that the term is money because there are expressions of gratitude from the giver and recipient based on evidence and conviction from law enforcement.

Not only that, in the previous sentence, the High Court sentenced him to 4.5 years in prison. However, the panel of judges doubled Supreme Court Justice Artidjo Alkostar's sentence to 12 years in prison. These cases can serve as an example that progressive thinking is not fixated on positive law, so law enforcement officials can prioritize morals and can create true justice.

Criminal acts emphasizing humanism or a sense of humanity are called Restorative Justice, leading to Non-Law Enforcement Policies to achieve Substantive Justice. It means the law is sometimes not enforced to present a sense of justice in society, not retaliation. Restorative justice can be a solution for cases considered insignificant for material losses. RI Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice in Article 1 number 1 explains that "Restorative Justice is defined as a form of settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other parties who are bound to find a settlement using the remedy of circumstances and not retaliation.

As law enforcement officers, prosecutors can stop a crime based on certain conditions. In this case, the prosecutor also plays an active role in exploring every case that is delegated to him and whether the case can harm justice in society. Even though in principle in the principle of legality, the prosecutor must prosecute every crime that occurs. However, the principle of legality is tried to be eliminated by the principle of opportunity, which gives authority to public prosecutors to prosecute or not sue in the public interest conditionally or unconditionally a person or corporation that has committed an offense.

The case for stopping the prosecution of the Baswedan novel case in 2016, when he was still a Corruption Eradication Commission (CEC) investigator, was because there was insufficient evidence. In the public interest, the case was stopped. Because at that time, there was an issue of criminalization to the CEC, which was handling significant cases such as a driver's license simulator.

As in RI Attorney Regulation Number 15 of 2020, it is stated that criminal acts can be terminated by law, and prosecutions can be stopped based on restorative justice. It means that these provisions limit recovery for perpetrators of criminal acts. Therefore, restorative justice cannot be carried out for cases with a significant impact or large losses. Progressive law is not anti-law or justifies breaking the law. But more fighting for justice rather than legal certainty.

In simple societies, moral standards are sufficient to establish order, guide people's behavior, and maintain prosperity. Ethics gives a person rules and laws to become a perfect human being. The consequences of these orders and prohibitions come from moral standards based on individual freedom. His conscience will tell him what was wrong and determine whether he did something. However, in an advanced society, more than these rules are required. It is motivated because the moral foundation is individual freedom. To regulate everything, it is necessary, among other things, not to be based on individual freedom but also to limit individual freedom in the form of coercion, intimidation, and punishment; these rules are called law.²¹

VI. CONCLUSION

From the explanation above, the law cannot be separated from the values of morality in it. Humans grow in social life with a conceptual system of morals and law so that the system becomes part of their life. As a grundnorm, Pancasila is the highest source of law determining the content and form of statutory regulations. Legislation must achieve legal objectives, which include justice, certainty, and benefits for the people of Indonesia. Therefore, laws and regulations must align with Indonesia's moral and legal values .

²¹ Ria Anggraeni Utami et.al., *Law and Morals in Legal Cases in Indonesia*, Al-Imarah: Journal of Government and Islamic Politics, Vol. 7 No. 2, 2022, p. 197.

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Relations between morals, the legal system, and lawmakers who hold complete control in the formulation of new laws lead to superiority between lawmakers and society so that morals and ethics in general (the people) are considered not to have fantasies about rule-makers. The author agrees with Ronald Dworkin's theory that morality cannot be separated from some issues. Moral can be used as an assessment of how legal products and practices are in society. It is in line with law enforcement. Satjipto Rahardjo believes that progressive thinking must be bold from mainstream thinking or thoughts of legal absolutism. Getting out of a positivistic view can lead to progressive law by prioritizing substantive values and justice, not just procedural justice (only the sound of the law).

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