
Traditional Society Assessed From Legal Sociology

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ABSTRACT

Law as a cultural product has always existed in every society, both traditional and primitive societies. Law develops and grows in society itself. Laws are not formed, but laws are found. Therefore, every society has laws that have lived and grown together with the growth and development of society. This law is known as the living law. However, as modern countries grow and develop, the living law tends to be eliminated and replaced with positive law. The living law is not considered law. Even in the civil law tradition, positive law (law) in Indonesia is the main source of law, but in reality the living law is still recognized to some extent. So that the judge who has the authority to decide a case, it is fitting to explore the sense of law that grows and develops in communities, especially indigenous peoples who have already used customary law in society.

Keyword : Custom Society, Positive Law, Sociology of Law

1. INTRODUCTION

In our daily lives there is something that is very important to be able to regulate people's lives, that something is law. In principle, law is a variety of facts and statements to ensure the adjustment of a person's freedom and will with another. Based on this assumption, the law basically regulates the relationship between humans in society based on various principles. Therefore, everyone in society is obliged to obey and obey it (Indonesia, n.d.).

Cicero stated "ubi societas ibi ius". This statement indicates that in every society there are always laws that function to regulate their behavior. Even law is part of the cultural development of society. No wonder it is said that law is a cultural product (law as a product of culture). Martin Kryger stated that "law as tradition". Therefore, cultural development is always followed by legal development or vice versa law develops and grows along with the development and growth of the culture of the community. This indicates that the people cannot give up the law. Society is the main source of law. It is not surprising that Ronald Dworkin stated that society is the fabric of rules.

The historical and cultural schools have a stand that is very opposite to the formalistic schools. This school emphasizes that law can only be understood by examining the historical and cultural framework in which the law emerged. A prominent figure from this school is Friedrich Karl Von Savigny (1779-1861) who is considered a leader in the history of law. Von Savigny argues that law is a manifestation of the legal awareness of society (Volksgeist). He argued that all laws originated from customs and beliefs, not from legislators. Von Savigny, a German, was against German legal conditions. The decisions of the legislative body can endanger the community because they do not always comply with the community's legal awareness (T n sescu, 2020).



Culture in each society will produce its own laws so that society will produce its own types and types of laws. The culture of each society adjusts the form of its legal identity. Therefore, every society always produces different legal traditions from one society to another, for example, the civil law and common law traditions have different characteristics because the two legal traditions develop and grow in the cultural life of different communities.

When viewed from the sociological and anthropological aspects, Indonesian society is a plural society with a variety of cultures, religions, and customs. Therefore, there are various laws that live in Indonesian society, for example customary law and Islamic law. So before Indonesia's independence, the Indonesian people already had The living law. In fact, there has been legal pluralism where each legal community has its own law with its own characteristics and characteristics.

Dutch colonialism in Indonesia to some extent influenced the Indonesian legal system. As is well known, the Netherlands is a country with a civil law tradition. The main characteristic of civil law is the law as the main source of law. Joseph Dainow stated that the main source of law in civil law is codified legislation (Dainow, 1966). In line with this, Vincy Fon and Fransico Parisi stated that laws are the main source of law, while court decisions are the second source of law.

In Indonesia, laws (positive law / legal positivism) are also used as the main source of law. Even the laws and regulations in Indonesia are compiled in stages and levels. In fact, almost all levels of government are given the authority to make laws and regulations. There is not one single aspect of state administration and community behavior that is escaped from positive legal regulation (legal positivism). Therefore, many experts say that Indonesia is like a constitutional state. The need for law is a logical consequence of a rule of law, where there is a demand to act in accordance with the principle of legality. For that reason, law is the answer. But on the other hand, positive law also has many weaknesses, including unclear, empty, contradictory, incomplete and other problems (Rudianto & Roesli, 2019).

Legal positivism teaches that psychological law is the prevailing law and positive law here is the judicial norms that have been established by state authorities. State law is obeyed absolutely which is concluded in a statement *gezetz ist gezetz* or the law is the law (Suherman, 2008). Another legal theory that was born from a dialectic process between legal and historical positivism, namely sociological jurisprudence which argues that good law must be in accordance with the laws that live in society. This theory strictly separates the positive law from the developing law. Famous figures of this school include Eugen Ehrlich (1862-1922) a legal expert and sociologist from Austria, arguing that issues concerning law at this time are no longer a matter of formal legality, on the interpretation of articles of statutory regulations. properly, but moving towards the use of law as a means to help shape the new life order or in accordance with current conditions. In other

words, positive law will only be effective if it contains or is in accordance with the laws that live in society (Susanti, 2016).

Satjipto Rahardjo argues that law science includes and discusses all matters relating to law (Rahardjo, 2000). Like other branches of science, law also has an object, namely law. Satjipto Rahardjo has compiled a list of problems that can be included in the objective of studying them, namely: (i) learn basic legal principles; (ii) study the formal system of law; (iii) studying legal conceptions and their functional meaning in society; (iv) learn what social interest are protected by law; (v) want to know what the law really is, where did it come from / appeared, what it did and in what ways / means did it; (vi) learn about what justice is and how it is manifested in law; (vii) Learn about the development of law: has it been the same law as we know it today? How actually the law changes from time to time; (viii) studying thoughts about the law of all time; (ix) studying how the real position of law is in society. How is the relationship or relationship between law and other sub-systems in society, such as politics, economics, and so on; and (x) If law science can indeed be called a science, what are the characteristics or scientific characteristics?

2. RESEARCH METHOD

This study uses a legal research method with the type of juridical normative research which uses the basis of analysis of tax and banking laws and regulations as well as several other legal documents. The author uses a research approach in the form of a statutory approach (Statute Approach) and a conceptual approach (Conceptual Approach).

3. RESULTS AND DISCUSSION

If observed in depth, it can be seen that the flow of Sociological Jurisprudence in which this flow can be said to be a flow of various approaches. This school grew and developed in the United States and was spearheaded by Roscoe Pound with his well-known works such as "Scope and Purpose of Social Jurisprudence" (1912), "Outline of Lectures on Jurisprudence" (1903), *The Spirit of Common Law* (1921) and other works. Its characters include Benjamin Cardozo and Kantorowics.

The flow of sociological jurisprudence is classified as sociological streams in the field of law in the European continent pioneered by an Austrian legal expert named Eugen Ehrlich (1826-1922) who first wrote a book on law from a sociological point of view with the title "Grundlegung der Soziologies Rechts" which translated into English by Walter L. Moll: "Fundamental Principles of the Sociology of law" in 1936).

In this connection, Sociological Jurisprudence uses a social law approach, while sociology of law uses a community-to-law approach. According to Sociological Jurisprudence, a good law must be in accordance with the laws that live in society. This flow clearly separates the positive



law from the law that lives in society (living law). This flow arises as a result of the dialectical process between the viewpoint of legal positivism and the view of the historical school.

The author quotes the meaning of Living law from Eugen Ehrlich's book as follows : "The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those that it has disapproved." (Littlefield, 1967).

The term the living law first put forward by Eugen Ehrlich as the opposite of state law (law made by the state / positive law). For Eugen Ehrlich legal development is centered on the community itself, not on the formation of law by the state, judges' decisions, or on the development of legal science. Eugen Ehrlich want to convey that society is the main source of law. Law cannot be separated from society. On this basis, Eugen Ehrlich stated that the living law is a law that dominates life itself, even though it has not been included in a legal proposition.

From the above opinion, it can be seen that the living law is a set of provisions that coincide with the birth of society. Law cannot be separated from society. Law is formed by society, and law functions to serve the interests of society. Therefore, for Eugen Ehrlich, state law is not something that is independent from social factors. State law must pay attention to the living law that has lived and grown in people's lives. In this regard, Eugen Ehrlich stated:

"Rules of law were not lifeless constructions which existed independently of the social reality. On the contrary, they are parts of the "living", i.e. functioning and effective order of social communications, which protect certain interests privileged by society and discriminates those interests that are denounced and disapproved by society. Society itself engenders a general order of societal relations, which later is put into legal forms by social groups and individuals who act thereby in the capacity of lawmakers (in the broader meaning, as specified above)".

As the author explained above, the Sociological Jurisprudence school is different from the Sociology of Law. This means that the law reflects the values that live in society. Sociology of law as a branch of sociology that studies the influence of society on law and the extent to which the symptoms that exist in society can influence the law as well as investigating the opposite effect, namely the influence of law on society. In examining legal problems, the approach used by the flow of sociological jurisprudence starts from law to society, while sociology of law approaches from society to law.

Tabel 1. From the descriptions above, the author suggests several characteristics of positive law and the living law :

	Positive Law	The Living Law
Shape	Written	Unwritten
Character	Autonomous	Not Autonomous (responsif dan progresif)
Shape	Legislation	Customs, religious norms, and others.
Formation	Sovereign orders	Found in society
Penalty	Primary norms	Not required
Source or formation	will ruler	Community life
Purpose	Legal Certainty	Justice
Coercin	Implemented by state institutions	Citizen's awareness
Applicability	Juridical	Sociological

Sociology of law is conceptualized as an instrument for researching or explaining the real condition of society, with the ultimate goal of trying to describe the state of society or to make changes in society. Therefore, in the sociology of law, law is studied not for the purpose of law itself, but is studied to explain society (social order) (Samekto, 2008).

Meanwhile, Sociological Jurisprudence observes how law with all its characteristics is applied and used in and used by society. When the law is implemented, there is an interaction between the law and the behavior of the people who use it. Sociological Jurisprudence talks about the social meaning of law. Social meaning is given to law through contacts with the social environment in which the law is applied. Sociological Jurisprudence's view states that the rule of law cannot force the content of regulations to be carried out absolutely, but in many cases it is defeated by the social structure in which the law is enforced. Research on legal culture in Indonesia by Daniel S. Lev as quoted by Satjipto Rahardjo shows how the notion of law, legal procedures, in Java is defeated by patterns of harmony, maintaining feelings and so on.

So in this case the social structure is also a determining factor in law and society actually contribute to shaping law by giving it social meaning. We can also observe the relationship between social structure and law by thinking backward, how the law is formed and implemented also depends on the social structure of society (Nugraha & Suteki, 2018).

4. CONCLUSION

Law as a cultural product has always existed in every society, both traditional and primitive societies. Law develops and grows in society itself. Laws are not formed, but laws are found. Therefore, every society has laws that have lived and grown together with the growth and development of society. This law is known as The living law. However, as modern countries grow and develop, the living law tends to be removed and replaced with positive law, namely law as a command of sovereign backed by sanction. The living law is not considered law. Even in the civil law tradition, positive law (law) is the main source of law.

Ehrlich's teaching is based on the distinction between positive law and living law, or in other words, a distinction between legal principles and other social rules. He stated that positive law will only be effective in accordance with the laws that live in society, or what anthropologists call culture patterns. Ehrlich said that the center of the development of law is not in the legislative bodies, the decisions of the judiciary or the science of law, but rather lies in society itself. The order in society is based on regulations imposed by the state. The goodness of Ehrlich's analysis lies in his attempt to direct the attention of the jurists to the scope of the social system, where one can find the forces controlling the law. Ehrlich's theory is generally useful as an aid to better understanding law in a social context. However, the difficulty is to determine what standards that can be used to determine a rule of law are really living (and considered fair) laws.

Indonesia as a former Dutch colony is also influenced by the civil law tradition above, therefore positive law is also used as the main source of law. However, in the Indonesian legal system, The living law is still recognized with certain limits. For example, the judge is obliged to explore the sense of law that lives in the midst of society, recognition of indigenous peoples and their traditional rights, recognition of customary rights and so on.

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