



Scandinavian Legal Realism in Two Criminal Convictions of the Same Thing

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Abstract

Human life is regulated and will never be separated from the provisions of binding regulations. Binding rules or norms in human life have the purpose of creating order, justice, and public welfare. The paradigm of legal positivism has always relied on the logic and validation of the ruler which makes people think that the ruler is the only law. This is strongly criticized by legal realists. The interesting thing about legal realism is the view that law must depart from the study of facts. American legal realism states that a judge decides something based on his personal preferences, and then makes a legal analysis to justify the expected outcome. This is different from legal realism in Scandinavia, which is based on logical positivism that developed in the modern era. Legal realism in Scandinavia intends to make legal science more scientific. Criticisms of legal realism include: legal realism presents the law only as a tool for resolving disputes on a case-by-case basis, there is no need for legal certainty because the approach is very casuistic so that judge's understanding of cases can vary widely. Using legal studies approach, be expected that it can provide an overview of the problems that occur related to Scandinavian Legal Realism in the adultery case of SS with minors which is contrary to The Law of Number 35 of 2014 concerning Child Protection in conjunction with Article 65 Paragraph 1 of the Criminal Code. The judge's authority over the case is to give a verdict related to the SS case in accordance with positive law, the facts that actually happened, and the truth of the case that has been observed by the people involved and legal experts with the aim of maintaining order and protecting the community so that they always do the right thing. This research uses a legal study approach or normative juridical research that examines literature related to legal issues. The purpose of this study was to determine the application of Scandinavian legal realism in cases of sexual intercourse that occurred in minors and were prosecuted many times by different courts for the same case. The main finding of this research is that the Scandinavian legal realism views the judge's decision in favor of the victim based on facts and finds the truth based on psychological concepts.

Keywords: Scandinavian Legal Realism, Criminal Cases, Adultery

1. Introduction

The paradigm of legal positivism has always relied on the logic and validation of the ruler which makes people think that the ruler is the only law (Tamanaha, 2001; Coleman, 2009; Leiter, 2001). The doctrine for judges in making decisions is very biased. The paradigm of legal positivism is not in accordance with the case at hand. Especially, if the judge is faced with a complicated case that couldn't be resolved even with the various existing legal rules. This clearly demands the judges to make fair constructions as a result of the disorientation of a rigid positivist mindset that has a harmful impact on society (Basoeky, 2019; Tamanaha, 2007; Dyevre, 2014).

Based on these problems, the school of realism then emerged. Legal realism is the strongest critic of legal positivism. Realism comes from an empirical perspective, facts, and reality that exists and is faced, and not logic (Utami et al., 2018; Adygezalova, 2018). This is in accordance with David Hume's theory which explicitly rejects knowledge that is based only on logical reasoning. Hence, it can be concluded that legal realism as social control is not only limited to legal science, but also human personality, social environment, economy, and business (Skolnick, 2012; Prayogo, 2018; Selviria, 2019). This understanding also focuses on the legal conception of the people who work in court and what is done there.

As explained above, legal realism is a study of the law based on reality or facts, hence, it cannot be separated from the role of judges (as law enforcers) in court and human behavior. Therefore, legal realism is grouped into American Legal Realism which pays attention to the legal practice of law enforcement. The judges in implementing the law in

real cases, where various legal norms are nothing more than legal benchmarks. In other words, the application of law in real cases relies on the area of wisdom of the implementer, or refers to the judge's decision in adjudicating cases based on the reality of experiences and applicable law. Meanwhile, the placement of empiricism in Scandinavian Legal Realism, in a psychological point of view, refers to human behavior as an empirical reality. The search for truth in a certain understanding and condition by using psychology. Thus, it aims to analyze the application of Scandinavian Legal Realism in two decisions of criminal cases with the same case. The main contribution in this research is to participate in the development and add insight and knowledge of doctrines in philosophy, especially in the field of law and to fulfill the task of the philosophy of law course.

2. Methodology

The writing of this article uses legal studies approach, which is a special approach referring to the analysis of juridical legal norms. This approach is able to provide an overview of the problems that occur. The legal study is an approach that refers to laws and regulations, namely by examining all laws and regulations relating to legal issues that occur. As well as a conceptual approach that is based on the views and doctrines that develop in the discipline of law. Thus, the legal materials used to analyze the problems in this paper are the applicable laws and regulations and the literature that supports the issues that are being discussed. This legal studies article demands the active role of researchers to obtain the truth based on the latest data and information sources in the hope that the legal substance can be explained in more detail.

2.1. Scandinavian Legal Realism

The interesting thing about legal realism is the view that law must depart from the study of facts. Legal realism, especially the one that developed in America, is rooted in the concerns of legal experts, especially lawyers or advocates (Bjarup, 2005). They are the ones who are faced with the fact that the law is not as described in the book of law. This concern shows their very serious attention to the final outcome of a court decision which they think has been too mechanical because it is only based on dogmatic provisions contained in the law. American realism states that a judge decides something based on his personal preferences, then makes a legal analysis to justify the expected outcome. Even though the judge tries to show that the act of judging is not personal, it is still affected by the judge's personal values. How do judges judge? ... For the realists, the judge "decides by feeling and not by judgment; by 'hunching' and not by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster. This is different from the realism that existed in Scandinavia, because they were none other than legal philosophers. Legal realism in Scandinavia is based on logical positivism that developed in the modern era. Logical positivism is different from legal positivism (Pihlajamäki, 2004).

The five basic assumptions of logical positivism are as follows: 1. Empirical Logic, where the truth is proven by means of empirical evidence. 2. Objective Reality, emphasizing on one reality without any room for subjective interpretation. 3. Reductionism, which in modern times is directed at the laws of physics where each object is analyzed in small units, otherwise that means it is not reality. 4. Determinism, namely the order of the world due to the linear law of causality. The world can be controlled using science. 5. Value-Free Assumption, i.e. there is no room for subjectivity, then the value is irrelevant. Science is always value-free (Alexander, 2002).

The similarity between legal positivism and legal realism is that they both view law as separate from morals and also both view law as a product that is cut off from the continuous ties of history, space and time and only sees law from a micro and case-by-case perspective. Legal realism in Scandinavia wants to make legal science more scientific. Criticisms of legal realism include: legal realism positioning law only as a tool for resolving disputes on a case by case basis, there is no need for legal certainty because the approach is very casuistic so that judge's understanding of cases can vary widely, legal realism strongly believes in legal life in the judiciary so that what appears called Judicial Activism (Strang, 2018).

Scandinavian Legal Realism is a form of resistance or rejection against Continental European legal culture. This view stems from Continental European legal positivism which favors empirical rationalism studies⁶. Scandinavian Legal Realism is more empirical than American Legal Realism. Scandinavian Legal Realists, such as Axel Hagerstorm, Olivecrona, Lundstet, and Ross, firmly reject metaphysical legal views and prioritize legal values, principles, and norms that can be scientifically verified on empirical or real legal phenomena (Uusitalo, 2020).

This Scandinavian Legal Realism also has the concept of seeking the truth by using psychology. With the use of psychology, school leaders analyze human behavior in law to get the true meaning of law. The Scandinavian Legal Realism states that the law is not only obeyed because of fear of getting sanctions, but rather, it is obeyed when people considered the law to be the good and right action.

2.2. The principle *ne bis in idem*

The principle of *ne bis in idem* in Article 76 of the Criminal Code states that a defendant may only be examined once for a criminal act committed which expressly the law prohibits the person from being examined and tried again for the second time in the same crime. Eddy Hiariej argued that the *a quo* article contains, among others: first, *nemo*

debit bis vexari which means that a person should not be bothered with two prosecutions for the same case; second, nihil in lege intolerabilius est (quam) eadem rem diverso jure censi, which means that the law does not allow the same case to be tried in several courts. The requirement for ne bis in idem must be res judicata, that is, a criminal act that has been examined in relation to the criminal liability of the defendant has been decided and has permanent legal force (Neagu, 2012).

In the relation between the teachings of Scandinavian legal realism according to the view of Scandinavian legal realism based on legal facts or facts, the use of ne bis in idem in Scandinavian legal realism is very close, where ne bis in idem creates legal certainty by stating that a person should not be punished repeatedly for the criminal acts he committed. Therefore, Scandinavian realism states to observe legal facts that occur so that there is no imposition of the law on someone more than once.

3. Results and Discussion

3.1 Concursus

Concursus is a combination of two or more criminal acts committed by a person where the initial and subsequent criminal acts have not been limited by the judge's decision. This in principle explains how to resolve cases and impose penalties if there is more than one crime that has not been examined at all and a decision has been made by the court. There are two reasons of the legislators require several criminal acts to be tried simultaneously and produce a criminal verdict and the concursus is not fully punished according to the threat of each criminal, among others: first, psychological considerations that one criminal sentence is carried out by a defendant within a certain period of time it is felt that the punishment is heavier than twice; second, the consideration of the error that the imposition of a crime is a warning by the state to someone who commits a crime (Obe and Utari, 2020).

Concursus consists of 3 types, namely idealist concursus, realist concursus, and continuing criminal acts. First, Idealist Concursus is an act that falls into more than one criminal code, is regulated in Article 63 Paragraph 1 of the Criminal Code, and adheres to an absorption penalty system. The essence of the article is that an act that is included in more than one criminal rule is only one of the rules, but if the rules are different, the main punishment is the most severe. Second, Realist Concursus is a combination of several acts committed by a person, each of which is a criminal act, regulated in Articles 65 and 66, Article 65 (several acts with similar principal crimes and the absorption punishment system is aggravated (maybe more of the heaviest +1/3)) and Article 66 (several acts with different principal penalties and the maximum cumulative punishment system is the same as the heaviest +1/3), Article 67 (death/life sentence), for violations (Article 70 and 70 bis of the Criminal Code), Article 70 (combined crime + offense or violation + offense and the criminal penalty system is sentenced to self-punishment (cumulation), the offense is imposed individually with a maximum total of all penalties for two-time violations, a maximum of 1 year 4 months. Specifically, imprisonment in lieu of a fine should not be more than 8 months (accumulation is aggravated)) and Article 70 bis (minor crimes are considered as a violation of guarantee, maximum sentence of 8 months). Third, Continuing Criminal Acts, namely if a person commits several acts and these acts are criminal acts themselves, but between those acts there is such a close relationship with each other that some of these acts must be considered as a follow-up act, this is regulated in Article 64 of the Criminal Code. by adhering to the punishment of absorption.

Regarding to Scandinavian legal realism which views legal reality or legal facts related to consensus, where in fact a criminal act can commit more than one crime, so that when referring to Scandinavian legal realism, the law can only be observed based on reality or facts which exists

3.2 Criminal Legal Case

The realism of Scandinavian law can be found through a case based on law number 2135 K / Pid. Sus / 2016 that occurred between October 2014 and April 2015, the crime involves sexual intercourse done by SS (63 years old) with a minor in Kediri Regency and the City of Kediri. Sexual intercourse in various locations is considered as various acts and each of these acts is considered a crime and is regulated in the Child Protection Law (Bywaters et al., 2015; Sedlak, 2006).

The defendant's appeal against the decision of the Kediri City District Court was decided by the Surabaya High Court on August 3, 2016. The judge decided based on Article 81 Paragraph 2 of the Child Protection Law Jo Article 64 Paragraph 1 of the Criminal Code with a prison sentence of 13 years and a fine of IDR 250,000,000.

Scandinavian legal realism views the judge's decision in favor of the victim. This continuous sexual intercourse causes physical and emotional trauma to the victim and damages the victim's mental and psychological well-being. Likewise with the self-esteem of the victim who has been injured by the perpetrator. In some experiences, minors who are victims of sexual intercourse can cause behavioral disorders, depression, low self-esteem, and even become psychopaths. Not to mention, the disgrace of the victim and the victim's family because the good name of himself and his family was indirectly damaged by the perpetrator's actions. Seeing the facts that happened and the negative impact on the victim's future, the judge's decision was right in favor of the victim, although of course, no matter how severe the punishment was, it would not be able to restore the victim's condition before she was traumatized.

In fact, this case was tried by two different courts, so there is a situation where there is no legal certainty. The principle of *ne bis in idem* in this case cannot be applied because at that time this case was still in the cassation process where there was no decision from the Supreme Court so that it did not have permanent legal force. However, the combination of several cases carried out by the perpetrator to produce a decision also pays attention to and considers the psychological impact that occurs on the victim regardless of the truth of the objective reality of the case.

In addition, in making decisions, the judge's belief is a prerequisite that must exist for the process of the birth of a law formation. The judge may not decide a case solely by relying on the facts or objective conditions that occur in a case, but must actually formulate his belief in various objective facts and circumstances as well as the belief that the defendant is indeed guilty. The judge's conviction is created because of the legal facts that prove the actions taken (Dobbie et al., 2018). This is what Scandinavian legal realism sees, which states that law is based on facts or facts that occur. In line with Scandinavian legal realism, the principle of *Res Ipsa Loquitur* is known which states that "something that speaks for itself" can be translated as a thing or event that has spoken for itself.

4 Conclusion

The legal provisions given in the SS case are in accordance with a study of the facts or existing facts. Based on the findings of evidence and statements of witnesses and victims (AP and CAL) it is true that SS had sexual relations with two minors in two different places, namely the Bukit Daun Hotel (Kediri Regency) and the Mitra Semampir Hotel (Kediri City). The truth through evidence by various related parties emphasizes more on objective reality in accordance with applicable laws and regulations. This is also a form of seeking the truth of the SS case by taking into account the psychological considerations of the perpetrators of the crime where one crime committed by the defendant within a certain time is considered more severe than twice the sentence handed down. in the same case.

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