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ADVOCATE IMMUNITY: QUO VADIS OF VALUE AND ETHICS IN LEGAL NORMS?

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Abstract

If the value in the ethics of a particular profession is attributed to the property of that particular profession, then the judgment of a 'good faith' offense can only be traced through a mutual consensus agreed upon by those in the profession. However, in this case, the Researcher is not in a position to say an Advocate cannot be convicted. The researcher is more respectful of the value that should be heard and raised surface on the hegemony of legal norms.

Jika nilai dalam etika profesi tertentu dikaitkan dengan properti profesi tertentu, maka penilaian pelanggaran 'itikad baik' hanya dapat dilacak melalui konsensus bersama yang disepakati oleh mereka yang ada dalam profesi tersebut. Namun, dalam hal ini, Peneliti tidak dalam posisi untuk mengatakan bahwa seorang Advokat tidak dapat dihukum. Peneliti lebih menghargai nilai yang harus didengar dan diangkat ke permukaan tentang hegemoni norma-norma hukum.

Keywords: immunity, advocate, good intention, corruption.

Introduction

Since its enactment and promulgation of Law No. 18 of 2003 concerning Advocates [Law No. 18/2003] dated April 5, 2003, was a historic milestone for all Advocates who were previously regulated in various classical authoritative texts. For example, such as *Reglement op de Rechterlijke the Organization of the Beleid der Justitie in Indonesia* (Stb. 1847 No. 23 amended by Stb. 1848 Number 57), *Bepalingen has a right to develop the Higher Education Ambient of the Advocate*, Procureurs en Deuwaarders (St. 1848 Number 8), *Bevoegdheid department of finance in burgelijke zaken van land* (Stb. 1910 Number 446 amended by Stb. 1922 Number 523); and *Vertegenwoordiging van de land in rechten* (K.B.S 1922 Number 522).

One juridical acknowledgment and a pride to be an advocate is the recognition of an advocate as a profession in the field of legal services [vide Article 1 number 1 Law No. 18/2003] and at the same time, apart from all its pros and cons, bearing status as law enforcers [vide Article 5 paragraph (1) Law No. 18/2003]. The difference between the two is if the advocate in the Reglement Op de Rechterlijke Organitate en het beleid des Yustite in Indonesia (St. 1847 Nr. 23 dated 30 April 1847 amended by St. 1848 Nr. 57) or commonly abbreviated as "RO", must be Meester in de Rechten (law degree), and supervised by Judge Raad van Justitie with an additional 2 (two) appointed advocates. So, the position of the police can represent and defend in civil matters in the Landraad court based on Stbl. 1927-496 can be filled by anyone, does not need a law degree, and is supervised by the court.[1] Based on this, we can know that for the Indonesian people at that time the need for legal assistance had not been felt so that the profession of lawyers from the Bumiputera circle did not develop. Most judges and all notaries and advocates are Dutch.[2]

This also influences why the development of Indonesian post-independence advocates is still slow. Regarding this, Daniel S. Lev explained that the size of the number of indigenous advocates depends on the combination of government ideology and colonial economic policy. When the Dutch seized the interior of Java, which followed the outbreak of the Napoleonic war, the Dutch established indirect rule in Indonesia by utilizing unity with the Javanese *priyayi* elite. This alliance put the Javanese elite as if they were still in power, while the Dutch could exploit this natural wealth, such as plantations, to a quarter century of independence.[3]

The presence of Bumiputera advocates in 1910 who received the title meester in de rechten (Mr.) from the Netherlands, was the beginning of the emergence of a history of legal aid in Indonesia. Initially, the colonial government did not allow the establishment of legal high schools in Indonesia because there was concern that the

[1] Binziad Kadafai, et al., *Advokat Indonesia mencari legitimasi* (Jakarta: Pusat Studi Hukum & Kebijakan Indonesia, 2001) p. 55.

[2] Frans Hendra Winata, *Pro Bono Publico: Hak Konstitusional Fakir Miskin Untuk Memperoleh Bantuan Hukum* (Jakarta: PT. Elex Media Komputindo, 2000) p. 3.

[3] Endang Sri Suwarni, "Peranan advokat dalam hukum Indonesia", *Probank*, vol. 20, no. 22 (2012), p. 5.

Dutch East Indies were studying law they would understand democracy, human rights, and the rule of law, and would eventually demand independence. Indonesians who want to take legal education must study it in the Netherlands such as at Utrecht University and Leiden University. It was only in 1924 that the Dutch established the Reschtschoogeschool in Batavia, which became known as the Faculty of Law, University of Indonesia. Law school graduates in the Netherlands include Mr. Sartono, Mr. Sastro Moeljono, Mr. Besar Mertokoesoemo, and Mr. Ali Sastroamidjoyo.[4]

One of the pioneers of the emergence of an indigenous advocate profession was Mr. Besar Mertokoesoemo, who was the first Indonesian advocate who opened his legal office in Tegal and Semarang in around 1923.[5] The Bumiputera advocates, both those who completed their studies in the Netherlands and in Batavia, were the drivers of the implementation of legal assistance in Indonesia, although initially, these advocates are part of Indonesia's national movement against invaders. According to Abdurrahman, based on such motives, even though the provision of legal assistance is related to commercial advocate services, because it aims specifically to help the Indonesian people who are generally unable to use Dutch advocates, this can already be seen as the starting point of the program legal assistance for the poor in Indonesia.[6] Looking at the history of the development of the advocate profession, it seems quite intriguing from the statement of Otto Hasibuan (Chair of the Indonesian Advocates Association Board of Trustees) who stated at a press conference on January 18, 2018, as follows, 'because actually by nature (naturally) was born from the system our laws in essence prevent investigation.'

However, Otto Hasibuan on the same occasion explained the meaning of the word 'blocking' into two types, namely in a positive sense and in a negative sense. In a positive sense, when carrying out their duties, it has become natural for a lawyer to do various ways so that his clients get fair legal treatment. One of them is taking a pretrial

[4] Endang Sri Suwarni, "Peranan advokat dalam... ," p. 10.

[5] Bambang Sunggono and Aries Harianto, *Bantuan hukum dan hak asasi manusia* (Bandung: CV. Mandar Maju, 2009) p. 12.

[6] Abdurrahman, *Aspek-aspek bantuan hukum di Indonesia* (Jakarta: Cendana Press, 1983) p. 43.

track or another legal defense. While in a negative sense, obstructing so that investigators cannot carry out their duties.

The statement from Otto Hasibuan expressed in the context of the phenomenon of debate on the behavior of advocates who are entangled in criminal cases allegedly related to the interpretation of the implementation of duties and functions of advocates in conducting assistance and defense of their clients. Criminal cases that ensnare an advocate are not the first time this has happened in Indonesia. For example, on March 25, 2011, Made Rahman, a Legal Counsel from Abu Bakar Ba'asyir was sentenced to prison for 7 (seven) days based on Article 217 of the Criminal Code, because it had made a commotion in the contempt of court.[7]

The same thing happened to Bambang Widjajanto who was suspected of committing a criminal act Article 242 in conjunction with Article 55 of the Criminal Code, when he was a legal counselor from Ujang Iskandar who was a Democratic Regent Candidate, in the case of the West Kotawaringin Pilkada, against Sugianto Sabran, Regent Candidate from PDI- P. Bambang Widjojanto (BW) is alleged to have encouraged witnesses to give false information, aka false at the trial of the Constitutional Court (MK). The accusation was quite surprising because this case was the first case of an advocate being a suspect on charges of being a criminal offender related to the defense of his client, although finally, the attorney general issued depowering.

The case that was also seen in the case of advocate OC. Kaligis was determined by the KPK as a suspect in the case of alleged bribery of US $ 27,000 and 5,000 dollars for Sing to judges and clerks at the Medan PTUN. Where the first level was sentenced to 5.5 years, the appeal rate was sentenced to 7 years, and the rate of cassation was sentenced to 10 years in jail, however, through extraordinary efforts to review, the sentence was returned to the appeal decision.[8]

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[7] Decision of the South Jakarta District Court Number 6/Pid.Tpr/2011/PN.Jkt.Sel dated March 25, 2011 which was corroborated by the Decision of the DKI Jakarta High Court Number 207/PID/2011/PT.DKI. The cassation law submitted by the Defendant was rejected by the Supreme Court in the Decision of the Supreme Court of the Republic of Indonesia Number 1800 K/Pid/2011.

[8] See, Decision of the Supreme Court of the Republic of Indonesia Number 1319 K/Pid.Sus/2016 dated 10 August 2016 amended by Decision of the Supreme

The last phenomenon is that advocate Fredrich Yunadi who was arrested by the KPK allegedly violated Article 21 of Law Number 31 of 1999 concerning the Eradication of Corruption Crime [Law No. 31/1999], as amended by Law Number 20 Year 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crime [Law No. 20/2001], because it obstructs the investigation process.

In fact, Indonesia Corruption Watch (ICW) has more complete data. ICW stated that the total number of Advocates convicted had reached 22 people, since 2005. Although, long before that, even before Law No. 18/2003, many Advocates have been convicted, for reasons that are different from the current phenomenon. Talks about whether or not an advocate can be convicted have always been a matter of interest to this profession and have always been associated with the Immunity Rights of Advocates in carrying out their duties and functions.

These phenomena encourage several Advocates to apply for judicial review of Article 16 of Law No. 18/2003 on Article 28D paragraph (1) ammended by Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia [1945 Constitution of the Republic of Indonesia] through the Constitutional Court. The Constitutional Court gave its decision in the Decision of the Constitutional Court Number 26/PUU-XI/2013 dated May 14, 2014 [Decision of the Constitutional Court No. 26/2013], wherein the *motivering* verdict (legal considerations) confirms the following:[9]

> "Whereas the provisions of Article 1 point 1 of Law 18/2003, states" Advocates are persons who provide legal services, both inside and outside the court who fulfill the requirements under this law. "The definition of legal services is the services provided by advocates in the form of providing legal consultation, legal assistance, exercising power, representing, assisting, defending and carrying out other legal actions for the client's legal interests [vide Article 1 point 2 of Law 18/2003]. Based on these provisions, according to the Court, the role of Advocates in the form of

Court of the Republic of Indonesia Number 176 PK/Pid.Sus/2017 dated 19 December 2017.

[9] Decision of the Constitutional Court Number 26/PUU-XI/2013 dated May 14, 2014, p. 63.

providing legal consultations, legal assistance, exercising power, representing, assisting, defending and carrying out other legal actions for clients' legal interests can be done both inside and outside the court. The role of the Advocate outside the court has made a significant contribution to community empowerment and national law reform, including also in resolving disputes outside the court."

Based on the *motivering* verdict, the Constitutional Court ruled in the following ruling:

I. Article 16 of Law Number 18 of 2003 concerning Advocates (State Gazette of the Republic of Indonesia of 2003 Number 49, Supplement to the State Gazette of the Republic of Indonesia Number 4288) is contrary to the 1945 Constitution of the Republic of Indonesia insofar as it is not interpreted, "Advocates cannot be prosecuted either civil or criminal in carrying out the duties of his profession in good faith for the benefit of the defense of clients inside and outside the court session.

II. Article 16 of Law Number 18 of 2003 concerning Advocates (State Gazette of the Republic of Indonesia of 2003 Number 49, Supplement to the State Gazette of the Republic of Indonesia Number 4288) does not have binding legal force insofar as it is not interpreted, "Advocates cannot be prosecuted either in civil or criminal the duty of his profession in good faith for the benefit of the defense of clients inside and outside the court session."

If the date of the MK Decision No. is observed. 26/2014, namely in 2014, the 'victims' who still felt the 'prison seat' were the suspect/the defendant was Bambang Widjajanto, OC. Kaligis, and Fredrich Yunadi. That is, the decision of the Constitutional Court which is erga omnes does not apply to the realm of Criminal Law. So, how exactly do law enforcers—including advocates, build their legal reasoning in arguing?

Julius Hebani of the Legal and Human Rights Assistance Association (PBHI) stated his opinion that Advocates can still be convicted, as long as it is known that there is bad faith in the defense of

their clients.[10] Likewise, the ICW NGO through Tama S Langkun stressed that an advocate certainly knows the limits of his profession in upholding the law because he is a law enforcer. According to Tama S. Langkun, the message we can see is actually who violates the profession he must understand very well because he enforces the law. Tama S. Langkun, then added that professional ethics had been fully held by an advocate so that he would not be caught in a criminal offense. When people carry out their profession ethically they will not be convicted when the ethical gap has been breached, surely he is close to the criminal.

On the other hand, Academics and Advocates Abdul Fickar Hadjar argued that the steps of the Corruption Eradication Commission (KPK) that arrested former lawyer Setya Novanto, Fredrich Yunadi, were not criminalization of the profession of legal counsel. Furthermore, Abdul Fickar Hadjar asserted, that Fredrich Yunadi's behavior as an advocate as done in defending SN (Setya Novanto) does not represent the behavior of all advocates in Indonesia, therefore the case is an individual case.[11]The same thing was also expressed by the Professor of Criminal Procedure Law of the General Sudirman University, Hibnu Nugroho, arguing that the KPK must continue to investigate allegations of blocking the investigation that had ensnared Fredrich and Bimanesh.[12]

In the end, Deputy Chairperson of the KPK, Basaria Panjaitan, stressed the following:[13]

> "Determination of suspects as a suspected legal process preventing Setya Novanto's investigation in the case of e-KTP is purely a legal process. This is clearly the article, so it is not criminalization. There are already articles and we have applied them. If the two evidences

[10] "Advokat Bisa Dipidana Sepanjang Ada Itikad Buruk", source: http://nasional.republika.co.id/berita/nasional/hukum/18/01/14/p2jd40280-advokat-bisa-dipidana-sepanjang-ada-iktikad-buruk, accessed on January 26, 2018.

[11] "Pengamat: Penahanan Fredrich Yunadi Bukan Kriminalisasi Advokat", Sumber: https://nasional.tempo.co/read/1050279/pengamat-penahanan-fredrich-yunadi-bukan-kriminalisasi-advokat, accessed on January 26, 2018.

[12] "Fredrich Yunadi dan Drama Pokrol Bambu", Sumber: https://www.cnnindonesia.com/nasional/20180113191824-12-268663/fredrich-yunadi-dan-drama-pokrol-bambu, accessed on January 26, 2018.

[13] "Disebut Kriminalisasi Fredrich, Begini Respon KPK", Sumber: http://hukum.rmol.co/read/2018/01/10/321768/Disebut-Kriminalisasi-Fredrich,-Begini-Respon-KPK-, accessed on January 26, 2018.

already exist, then the element of Article 21, the element of the offense has been fulfilled. So the mindset is like that. So there is no KPK here to criminalize."

This paper does not aim to defend lawyers who are suspected of committing a criminal act in exercising their power. The main focus of this writing is more to deconstruct the patterns of legal reasoning that should be suspected of being still hegemony by the lust of retribution from the classical flow with robes "for the sake of the nation". Therefore, the focus of the problem to be discussed is whether the fixed position is good in the tension between legal norms and values?

Understanding Values, Ethics, and Norms

In various legal literature, of course, many are found regarding studies of the meaning of ethics, norms, and professions. However, it is very rarely found in legal bookshelves that discuss the meaning, function, and relation between values and ethics, norms and legal profession. Understanding of value is an understanding that is intuitively assumed to exist in every human cognitive process. As a result, we have no longer questioned the differences between them, so, we have never troubled hierarchies among them.

The shift in understanding of the issue of value is in line with the paradigm shift of human beings in interpreting life, as a result of shifting patterns of paradigms in science as well. So, the researcher feels the need to remind us all about the meaning and nature of that value.

The complexity of studying problems regarding 'value' has been far more advanced by K. Bertens, who said that it is not easy to explain what a value is. At least, it can be said that value is something that is interesting to us, something that is fun, something we are looking for, something that is liked and desired, or in short 'something good'.[14] Whereas according to Scheler, values are things that are addressed by feelings, which manifest a priori emotions. Value is not an idea or an ideal, but something that is real and can only be experienced with a vibrating soul, namely with emotion. Understanding of values is not the same as understanding in general, such as in hearing, seeing, and kissing. Reason cannot know a value, because value appears when there is a

[14] K. Bertens, *Etika* (Jakarta: Gramedia Pustaka Utama, 2007), P. 139.

feeling directed at something. Values are things that are addressed by feelings, namely a priori feeling.[15]

Other thinkers, in the realm of sociology, for example, Kathy S. Stoley, assert that cultural values are interpreted as ideas about something that is considered important. Values are differentiated into ideal values claimed by society and there is a real value, that is, the values practiced in that society.[16] Meanwhile, according to Darji Darmodiharjo, emphasizing that value is the quality or condition of something that is beneficial for humans, both physically and mentally.[17] Whereas according to Soenarjati Moehadjir and Cholisin, value is basically referred to as a guiding standard in determining something that is good, beautiful, valuable or not.[18] According to Milton Rokeach and James Bank, explained that value is a type of trust that is within the scope of a belief system, where a person must act or avoid an action regarding something that is appropriate or inappropriate to do.[19] Therefore, a 'value' is known as the basis for determining something in life, so it is not surprising when the content of value is also dynamic-evolutionary. That is, the shift did not move in a revolutionary manner but followed the development of science, especially the Axiological philosophy.

The development of philosophical thought that adorned the history of mankind from the past until now is divided into 4 (four) phases namely cosmosentric, theocentric, anthropocentric and logocentric. The cosmosentric phase is the phase where nature is seen as an object of discourse that occurred in classical times. In the theocentric phase, God became the object of conversation that took place in the middle ages. In the modern age, which is the anthropocentric phase, the important and dominant discourse in the study is about humans, especially the power of reason or ratio. Finally,

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[15] Harun Hadiwijono, *Sari Sejarah Filsafat Barat 2* (Yogyakarta: Kanisius, 1980), p. 145.

[16] Kathy S. Stoley, *The Basic of Sociology* (Westport: Greenword Press, 2005), pp. 45-46.

[17] Darji Darmodiharjo and Shidarta, *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia* (Jakarta: Gramedia Pustaka Utama, 2002), p.1.

[18] Soenarjati Moehadjir and Cholisin, *Konsep Dasar Pendidikan Moral Pancasila* (Yogyakarta: IKIP Yogyakarta, 1989), p. 25.

[19] M. Chabib Thoha, *Kapita Selekta Pendidikan Islam* (Yogyakarta: Pustaka Pelajar, 1996), p. 60.

in this recent century, the 20th century was a logocentric phase, language became the center of an interesting object of conversation.[20] So, the discussion of the problem of value, in essence, is inseparable from the attraction between the reasoning patterns of subject-objects and subjects, which have grown and developed since the modern and postmodern times.

Thus, the discussion of the problem value has two types of quality, namely values with objective qualities and values with subjective qualities. Adherents of objective quality values, for example, are Scheler, who holds that values are objective qualities. Its existence does not depend on objects, not even depending on people's views. Therefore, Scheler explained, one cannot understand the value of a valuable object, because value precedes the object. Thus, a value is a priori quality meaning not only does it depend on all objects that exist, but also does not depend on one's response. Value has an absolute nature, does not change, so it is not influenced by one's actions. A person's knowledge of values can be relative, but not the relative value itself.[21] In this position, Scheler positions a universal value. However, the value is hidden behind facts and facts, and the essence of that value does not change. This adherent of value with objective quality presupposes the existence of eternal value. The value behind the reality that is not good, does not change the value to be not good. So, in the context of that value, it is clear that Scheler rejects all kinds of assumptions about the value that goes from rationality. This can be seen from the method used by the Scheler, namely *erleben* or fresh appreciation of experience. Truth is not the result of thought or consideration but must be sought by opening up. On the basis of openness to the reality that states itself then the philosopher reflects and tries to understand it more deeply.[22]

Different from K. Bertens who is one of the followers of values that is subjective quality, where he explains that a value has a role in an atmosphere of appreciation or judgment and consequently an object will be assessed differently by various people. Therefore, K. Bertens

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[20] Herry Hamersma, *Tokoh-tokoh Filsafat Barat Modern* (Jakarta: Gramedia, 1992), p. 141.

[21] Frondizi, *Que Son Los Volares*, trans. Cuk Ananta W. (Yogyakarta: Pustaka Pelajar, 1963), p. 82.

[22] Franz Magnis Suseno, *12 Tokoh Etika Abad Ke-20* (Yogyakarta: Kanisius, 2000), p. 33.

gives characteristics to values, namely first, values will always be associated with the subject. Therefore, an assessment can only be given by the subject, without the subject, then there is no such value; second, values will always appear in a practical context. So, in this case, a value becomes dependent on judgment based on rationality; third, an object has value because it is pinned by the subject. So, in addition to the properties of the object, the subject also adds value to the object.[23] The opinion of K. Bertens is a different pole from Scheler in understanding the nature of values.

The difference in perspective, although the problem of value is the branching of the philosophy of science, namely axiology, is also a result of the branching of science in other philosophical sciences namely epistemology. So that everyone who moves from a different source of epistemology can certainly have a different opinion. Thus, it is not possible to understand a problem only associated with one branch of the philosophy of science, because, in the philosophy of science, both ontology, epistemology and axiology will continue to be interrelated. Thus, the equation that arises is the meaning of the nature of a value is something that has metaphysical (transcendental) and abstract nature. Whereas, the differences that arise are related to the process of conclusion.

Further development, in the realm of philosophy of science, ethics emerged as a theory that discussed, discussed and examined values, one of which was ethics.[24] Ethics, according to the Big Indonesian Dictionary, is the science of what is good and what is bad and about moral/moral rights and obligations.[25] Ethics comes from Greek, 'ethos', in the singular which means custom, good morals. The plural form of ethos adala *ta etha* means there is a habit. From this plural form, an ethical term was formed which Aristotle had used to show moral philosophy. Based on the origin of this ethical term, ethics means the knowledge of what is usually done or the knowledge of customs. Ethics is a world of philosophy, values, and morals in which ethics are abstract and pertain to problems of good and bad. It can be concluded that

[23] K. Bertens, *Etika*, p. 140-141.

[24] Burhanuddin Salam, *Logika Material: Filsafat Materi* (Jakarta: Rineka Cipta, 2000), p. 168.

[25] Supriadi, *Etika & Tanggung Jawab Profesi Hukum di Indonesia* (Jakarta: Sinar Grafika, 2014), p. 7.

ethics are: (1) knowledge of what is good and what is bad and especially about moral rights and obligations; (2) a collection of principles or values relating to morals; (3) the value of right or wrong that is adopted by a group or society.[26] In that sense, ethics is related to philosophical foundations in relation to human behavior.[27]

According to Martin, ethics is defined as 'the discourse which can act as the performance index or reference for our control system'. Thus, ethics will provide a kind of boundary and standard that will regulate human relations within the social group. In a sense that is specifically associated with the art of human association, ethics is then made in the form of written rules (code) that are systematically made based on existing moral principles and when needed can be used as a tool to judge all kinds of actions that common sense logic is considered to deviate from the code of ethics. Thus, ethics is a reflection of what is called self-control, because everything is made and applied from and for the benefit of the social group (profession) itself.[28]

More explicitly, as expressed by E. Sumaryono, ethics is one part of Philosophy. Philosophy, as an interpretation of human life, has the task of examining and determining all concrete facts to basically deep ones. Ethics tries to explain what the problem is and why one is right and the other is wrong. Therefore, Ethics is the study of human will, namely the will related to decisions about right and wrong in human actions, so that ethics seeks to find the most appropriate principles in attitude, in order to make human life as a whole prosperous.[29] The same thing was explained by James J. Spillane SJ, that Ethics or ethics pays attention to or considers human behavior in moral decision making. Ethics directs or connects the use of individual reason with objectivity to determine a person's truth or error and behavior towards others.[30]

However, according to Franz Magnis Suseno, ethics must be distinguished from morality. Moral is a form of teachings, while ethics is not a supplement to moral teachings but ethics is a philosophy or

[26] Abdulkadir Muhammad, *Etika Profesi Hukum* (Bandung: Citra Aditya Bakti, 2014), p. 13.

[27] Kaelan, *Pendidikan Pancasila* (Yogyakarta: Paradigma, 2010), p. 173.

[28] R. Rizal Isnanto, *Buku Ajar Etika Profesi* (Semarang: Fakultas Teknik UNDIP, 2009), p. 1.

[29] E. Sumaryono, *Etika Profesi Hukum: Norma-Norma Bagi Penegak Hukum* (Yogyakarta: Kanisius, 1995), p. 11-12.

[30] Suhrawardi K. Lubis, *Etika Profesi Hukum* (Jakarta: Sinar Grafika, 2012), p. 1.

critical and fundamental thinking about moral teachings and views. Ethics is a science, not teaching. So, ethics and moral teachings are not at the same level. Which says 'how we must live', not ethics but moral teachings. Ethics want to understand 'why we must follow certain moral teachings', or 'how we must follow certain moral teachings', or 'how we can take a responsible attitude in the face of various moral teachings'. So, ethics are both lacking and more than moral teachings. What is meant by 'less' because Ethics is not authorized to determine what we can do and what is not allowed. The authority to stipulate is claimed as the authority of moral teachings. While what is meant by 'more', because Ethics seeks to understand why or on what basis we must live according to certain norms. Moral teachings can be likened to a guidebook on how we should treat our motorbikes well, whereas Ethics gives us an understanding of the structure and technology of motorcycles themselves.[31]

From the results of K. Bertens' analysis it was concluded that ethics has three positions, namely as (1) a value system, namely values and norms that become a guideline for a person or group in regulating their behavior, (2) a code of ethics, namely a group moral principles or values; and (3) moral philosophy, namely the science of good or bad. In this point, we will find a link between ethics as a system of philosophy as well as articulation of culture.[32]

If the discussion above has elaborated on values and ethics, where ethics itself is a value and norm, then the author also needs to explain 'the norms'. According to Jimly Asshiddiqie, norms or rules are the institutionalization of good and bad values in the form of a rule that contains permits, recommendations or orders. Both recommendations and orders can contain positive or negative rules that include recommended norms for doing or encouraging not to do something, and norms of orders to do or orders not to do something.[33]

Likewise, E. Sumaryono explained that norms are a rule, a standard or a measure that is something that is definite and unchanging, with which we can compare something whose nature, size, or quality and so

[31] Franz Magnis Suseno, *Etika Dasar: Masalah-Masalah Pokok Filsafat Moral* (Yogyakarta: Kanisius, 2005), p. 14.

[32] K. Bertens, *Etika*, p. 6.

[33] Jimly Asshiddiqie, *Perihal Undang-Undang* (Jakarta: Rajawali Press, 2010), p. 1.

on, we doubt. These norms will also be used to assess the merits of acts, even can also be moral criteria.[34]

So, how relations between the three? According to Kaelan, a value will be more useful in guiding attitudes and behavior, if it is concretized and formulated to be more objective, making it easier for humans to describe it in concrete behavior. A more concrete form of value is a norm,[35] or it can also be said that the norm is a concrete elaboration of values.[36] So, it can be concluded that discussing value and norm as a guiding star in social life is summarized in an ethic

Legal Norms and Values in Legal Professional Ethics

Based on the descriptions above, the question arises, where is the position of values, ethics, and norms in the legal profession? Which is the postulate in assessing the behavior of law enforcers - including Advocates? So, his understanding must be directed first to the meaning of the 'profession' itself. According to Shidarta, that profession is a concept that is more specific than work. A profession is a job, but not all jobs are professions.[37] Thus, according to Brandeis, to be called a profession, the work itself must reflect the existence of (1) intellectual character, (2) devoted to the interests of others, (3) the success is not based on profit financially, (4) supported by the existence of professional organizations and associations, among others, determining various provisions which constitute a code of ethics, as well as being responsible for advancing and disseminating the profession concerned, and (5) determining the standards of professional qualifications.[38]

In line with Brandeis thinking, Daryl Koehn said that although to determine who fulfills the requirements as a professional is very diverse, there are five characteristics that are often attached to professionals; (1) get permission from the state to take certain actions; (2) being a member of the organization/actors who share voting rights who disseminate standards and/or behavioral characteristics that discipline each other

[34] E. Sumaryono, *Etika Profesi Hukum*..., p. 110.

[35] Kaelan, *Pendidikan Pancasila*, p. 179.

[36] E. Sumaryono, *Etika Profesi Hukum*..., p. 114.

[37] Shidarta, *Moralitas Profesi Hukum, Suatu Tawaran Kerangka Berpikir* (Bandung: Refika Aditama, 2009), p. 101.

[38] Darji Darmodiharjo dan Shidarta, *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia* (Jakarta: Gramedia Pustaka Utama, 2002), p. 274.

for violating these standards; (3) possessing 'esoteric' knowledge or skills (which are only known and understood by certain people) that are not owned by other community members; (4) having autonomy in carrying out their work, and the work is not very understood by the wider community; and (5) publicly promising to provide assistance to those who need and consequently have special responsibilities and duties; those who do not make this promise are not bound by these specific responsibilities and duties.[39]

Thus, in broad outline, relating to a proper and continuous attitude for a legal scholar, related to the legal profession, it must have: (1) a humanitarian attitude, so that he does not respond to the law formally; (2) the attitude of justice, to find what is appropriate for the community; (3) propriety, because consideration is needed of what is truly fair in a concrete case; and (3) honesty, don't take part in corruption.[40]

To achieve this goal, every prospective law graduate must take theoretical lessons, conduct research in the field to find out the needs of the people, and devote themselves to the community by always defending justice.[41] It is worth remembering the remarks from the Deputy Chairperson of the Indonesian Republic Supreme Court, Purwoto S. Gandasubrata, who appealed to law faculties, to early equip students with moral education and an introduction to the legal profession ethics, so that law graduates were 'sujana',[42] and behaved not reprehensible because of good character.

As for relating to the meaning of professional ethics, according to Bernard Arief Sidharta, ethical behavior is an integral part of living in living a profession as a profession. Only profession professors themselves can or are most aware of whether their behavior in carrying out their profession meets the demands of their professional ethics or not. Because it does not have technical competence, the layman cannot

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[39] Supriadi, *Etika & Tanggung Jawab Profesi Hukum di Indonesia* (Jakarta: Sinar Grafika, 2014), p. 17.

[40] Theo Huijbers, *Filsafat Hukum* (Yogyakarta: Kanisius, 2016), p. 147.

[41] Theo Huijbers, *Filsafat Hukum*, p. 147.

[42] The Sujana is a graduate who has the ability to position himself in his environment whether in the community or the environment of his profession. And also he was able to apply the abilities he had in his life. Which is then able to provide something useful for people who are around it. So that he is also able to create a person who is positively valued and deserves to be a scholar.

judge that. This means that compliance with professional ethics will depend on the morals of the profession concerned.[43]

In addition, according to Bernard Arief Sidharta, the development of the profession is often faced with situations that create complicated problems to determine what behavior meets the demands of professional ethics. While the behavior in the development of the profession can have far (negative) consequences for patients or clients. The fact stated earlier shows that the profession of the profession itself requires an objective guide that is more concrete for its professional behavior. Therefore, from within the profession of the profession itself, a set of behavioral rules is raised as a guideline that must be adhered to in carrying out the profession. This set of rules is called the professional code of ethics (commonly abbreviated as a code of ethics), which can be written or unwritten.[44]

Legal Norms and Values in Law: A Binary Opposition

Since the age of enlightenment (renaissance) or the modern century, the pattern of reasoning for science and especially legal science is a value-free science. The law itself, according to Satjipto Rahardjo, suddenly became independent, first, because it was a deliberately created order. Starting from the rules, modern law is dominated by regulations which are deliberately sought by the institution authorized for it. Second, the emergence of logic and legal procedures, special personnel and administration, so that the law as an esoteric territory, isolated from ordinary people.[45]

In traditional philosophy, it is busy questioning supernatural reality, both known as God, spirit and so on. Whereas modern philosophers were busy questioning the way to find the basis of authentic knowledge about all that. With this shift in interest, gradually the reflection of God shifts to reflection on humans with all their natural abilities. In other words, theocentrism shifts to anthropocentrism. Human abilities with

[43] Bernard Arief Sidharta, "Etika dan Kode Etik Profesi Hukum", *Jurnal Veritas et Justitia*, vol. 1, no. 1 (2015) p. 231.

[44] Bernard Arief Sidharta, "Etika dan Kode Etik...", p. 232.

[45] Satjipto Rahardjo, *Hukum dan Perilaku. Hidup Baik Adalah Dasar Hukum yang Baik* (Jakarta: Kompas, 2009), p. 3.

subjectivity such as ratio, perception, affection, and will become new reflection themes.[46]

The journey of philosophical thought of science from science cannot be separated from contemporary or sociocultural developments. The scientific paradigm has developed and even debated every era. For example, XII century philosophical debates between Francis Bacon's empirical flow and Rene Descartes's line of rationalism. Francis Bacon said that modern science must begin with observable empirical facts so that the theory is based on generalizations from these facts (inductive hypothetic). On the one hand, Descartes argued that science must base itself on ratios oriented thinking and emphasize the importance of the role of reason. Although then the mixed paradigm of the two schools emerged by Newton with his exact science combining deductive and experimental inductive hypothetical methods. That is, modern science is not just rational or empirical, but also empirical rational (objective objective) knowledge.[47]

Philosophical thinking develops rapidly towards its grandeur followed by a demythologization process towards the movement of logocentrism. Demythologization is caused by a large current of rationalism, empiricism and positivism movements pioneered by contemporary experts and thinkers who eventually usher in human life at the level of modernity based on scientific knowledge.

Starting from the philosophical debate above, then positivism was born and matured by the great changes that took place in European society, especially after the industrial revolution erupted in England and the bourgeois revolution in France in the mid-18th century, where the domination of king power and the Church as a knowledge regime (epistemology) long ago in Europe began to be sued. The passion for truth-seeking was unstoppable and overflowing since the time of enlightenment (Aufklarung) was born in Europe with the explosion of the declaration of 'sapere Aude', where Aufklarung thinkers also offered a new scientific knowledge system that replaced speculative and mystical tendencies (theology) and philosophy. When the dominant metaphysical studies throughout the Middle Ages were abandoned and

[46] F. Budi Hardiman, *Pemikiran-Pemikiran yang Membentuk Dunia Modern (dari Machiavelli sampai Nietzsche)* (Jakarta: Erlangga, 2011), p. 6.

[47] Sobirin Malian, "Perkembangan Filsafat Ilmu Serta Kaitannya Dengan Teori Hukum", *Jurnal Unisia*, vol. 33, no. 73 (2010), p. 65.

viewed as the culprit of the underdevelopment of human civilization, the emergence of natural sciences which were more able to provide assurance and predictability through the development of rationalism and empiricism thought developed pure theory concepts. With this purification, positivism claims to be knowledge that is free from interest so that the theories it produces are neutral.[48]

Criticism directed at philosophy is that philosophy is considered a lack of method in its discussion. Scientists say philosophy is only a servant who can entertain lazy minds. Scientists criticize philosophers' reasoning as a mind that states something without evidence, applies mysticism without its explanation, or theorizes without including practical aspects. Science considers itself to have a clear scope of scope and is easy to digest and easily assembled to the extent of its own scope.[49]

The shift in the philosophy of science, especially the Augustinian Positivism Philosophy which said that the senses were important tools in the process of knowledge of science and had to be sharpened by experimentation, had an impact on the development of legal science. Positivism as a theory which aims to compile observable facts, so that August Comte totally rejected metaphysics and other forms of knowledge, such as morals, ethics, theology, art that transcended observed phenomena. As a paradigm, positivism basically originates from a school of philosophy that borrows the views, methods, and techniques of natural science in understanding reality (scientism), as a result, the law is liberated from hermeneutics and is required to follow the quantitative method of science. Therefore, the adherents of this school greatly glorify legal certainty. This thought also had an impact on the system of proof in the law as stated by Ernst Mach, who emphasized limiting himself to facts. The thought is in line with its predecessor in the Empiricism School, David Hume, who affirms the basis of science is what we hear, see and feel, not what we think.[50]

On the other hand, thinkers or legal scientists are of the view that law is a science that is Sui generis. Sui generis is Latin which means only

[48] Widodo Dwi Putro, *Kritik terhadap Paradigma Positivisme Hukum* (Yogyakarta: Genta Publishing, 2011), p. 13.

[49] E. Sumaryono, *Hermeneutik. Sebuah Metode Filsafat* (Yogyakarta: Kanisius, 1999), pp.15-16.

[50] Widodo Dwi Putro, *Kritik terhadap Paradigma...*, p. 17.

one for its own type.[51] Law has a distinctive character. A distinctive feature of legal science is its normative nature. Such characteristics cause while those who do not understand the legal science personality begin to doubt the nature of legal science. Doubt is caused by the normative nature of law science is not empirical science.[52] The peculiarity of law science is seen in law as normative law. Normative law has a unique study method that describes its specific objects,[53] in the form of norms and not patterns of real behavior.[54] Law explains the legal norms created by human behavior and must be applied and obeyed by these actions, and thus, he explains the normative relationship between the facts set by those norms.[55]

In its position as a normative science, then the philosophy of legal positivism is strengthened by the teachings of John Austin as the founder of legal positivists. In giving the formula, Austin replaced 'the ideals of justice' became command of sovereign "as explained by Austin" Positive law ... is the set by sovereign person, or a sovereign body of a person, to the members of the independent political society where the supreme person or body is sovereign pr." According to Austin, the law is a regulation that is made to be used as a guideline for intelligent beings and has power over it, so that positive law is rooted entirely from empirical facts originating from sovereign provisions.[56]

Positivism tends to use the empiricist approach (description-empirical), but legal positivism actually shows the opposite way of thinking at all, namely by using deductive logic (prescriptive). So that to find out the reason for the difference, it must be re-examined to the verification method as the main center of logical positivism. In the principle of verification, for philosophy and science that cannot be

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[51] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Kencana Prenada Media Group, 2008), p. 35.

[52] Philipus M. Hadjon and Tatiek Sri Djatmiati, *Argumentasi Hukum (Legal Argumentation/Legal Reasoning): Langkah-langkah Legal Problem Solving dan Penyusunan Legal Opinion* (Yogyakarta: Gadjah Mada University Press, 2005), p. 1.

[53] Philipus M. Hadjon and Tatiek Sri Djatmiati, *Argumentasi Hukum...*, p. 3.

[54] Hans Kelsen, *General Theory Of law And State*, trans. H. Somardi (Jakarta: Bee Media Indonesia, 2007), p. 203.

[55] Hans Kelsen, *Pure Theory of Law,* trans. Raisul Muttaqien (Bandung: Nuansa dan Nusamedia, 2007), p. 81.

[56] James Bernard Murphy, *The philosophy of positive law: foundations of jurisprudenrce*, (Yale University Press, 2005), p. 176.

empirically verified, it is considered to have no meaning. At this point, only description-empirical propositions can be tested by the principle of verification. The problem now in law contains norms (guidelines) that are not empirical descriptions which are 'what is' (is) but normative which are 'supposed' (ought) intended to direct human behavior, usually recognizable from deontic terms such as mandatory, prohibited and so on. What is called normative is initially an extension of the concept of philosophy of value, but the values and principles are still in the abstract world so that they cannot be verified empirically. In order for the normative statement to be verified, it must be positive in the form of legislative regulations,[57] so that, from that moment on, only statements are normative—in the form of written language, which can be verified.

Thus, the nature of positive norms becomes binding when it is juxtaposed with the power of authority which establishes it as law, in this case, the state. The existence of the state, in relation to legal positivism thinking, moved from the theory of social contracts initiated by John Locke in his book, Two Treaties in Government. Locke took a different position from Thomas Hobbes on the theory of social contracts, which according to Locke, humans were basically not good. The state, in this case, is the government, is needed precisely to guarantee the security of the entire community. The main function of the government is to protect personal property rights.[58]

Locke explained that with the agreement of each individual, thus making society a body with the power to act as one body, which occurred by and for the will of the majority. What makes any society exist, is only the agreement of the individuals in it, and because the society is one body, it must move in one direction (one way), and thus, the body needs to move in the direction of the greater force carrying it, namely the majority agreement. If not, it is impossible for the community to act or continue as a body, one community/community. The agreement of each person who forms it agrees that the community must do so, and thus, each person is bound by the agreement to be surrounded or in the name of the majority. Therefore, we see that the assemblies that are authorized to act by positive law, while the positive

[57] Widodo Dwi Putro, *Kritik terhadap Paradigma*..., p. 116.

[58] F. Budi Hardiman, *Pemikiran-Pemikiran*..., p. 70. See also, John Locke, *Kuasa Itu Milik Rakyat: Esai Mengenal Asal Mula Sesungguhnya, Ruang Lingkup, dan Maksud Tujuan Pemerintahan Sipil*, trans. A. Widyamartaya (Yogyakarta: Kanisius, 2002), p. 11.

law authorizes not to determine the amount, the majority action acts as an overall act and of course determines as having the overall power and the law nature and common sense.[59]

At this point, when talking about power, then the view of Michel Foucault becomes very interesting for us to peer into the initial intention of that power. Foucault emphasized that power is everywhere because power is one dimension of relations. Where there is a relationship, there is power.[60] The power that arises because of the existence of relations of various forces, will take place in absolute terms and override aspects of human consciousness. Therefore, according to Foucault, this power is only a strategy to determine the system, rules, arrangements, and regulations that arise from the internal relations of these forces.[61]

The power relations described by Foucault, it seems to be absolute if we examine from the point of view of Antonio Gramsci through his hegemony theory. According to Roger Simon, hegemony is not a relationship of domination by using power, but a relationship of agreement using political and ideological leadership. In simple language, hegemony is a consensus organization,[62] which in other terms, hegemony is a chain of victories obtained through a consensus mechanism, rather than through suppression of other social classes. Hegemony also refers to the position of the ideology of one or more groups or classes in civil society that is higher than others.[63]

On the other hand, Gramsci also explained that the concept of hegemony means something more complex, in order to examine certain political, cultural, and ideological forms that pass in existing society, a fundamental class can build its leadership as something that is forced.[64]

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[59] John Locke, *Kuasa Itu Milik Rakyat: Esai Mengenal Asal Mula Sesungguhnya, Ruang Lingkup, dan Maksud Tujuan Pemerintahan Sipil*, trans. A. Widyamartaya (Yogyakarta: Kanisius, 2002), p. 82-83.

[60] K. Bertens, *Filsafat Barat Kontemporer Prancis* (Jakarta: Gramedia, 2001), p. 139.

[61] Michel Foucault, *Seks dan Kekuasaan*, trans. S.H. Rahayu (Jakarta: Gramedia, 2000), p. 144.

[62] Roger Simon, *Gagasan-Gagasan Politik Gramsci* (Yogyakarta: Pustaka Pelajar and Insist, 1999), p. 19-20.

[63] Nezar Patria and Andi Arief, *Antonio Gramsci: Negara dan Hegemoni* (Yogyakarta: Pustaka Pelajar, 2003), p. 191-121.

[64] Faruk, *Pengantar Sosiologi Sastra dari Strukturalism Genetik sampai Post-Modernisme* (Yogyakarta: Pustaka Pelajar, 2005), p. 62-63.

Thus, continued Gramsci, in building leadership is to move from the starting point of the concept, that a class and its members exercise power over the classes below in two ways, namely violence and persuasion. The way of violence (repressive) carried out by the upper class against the lower classes is called the act of domination,[65] while the way of persuasion is called hegemony. The intermediary for acts of domination is carried out by state apparatus such as the police, the army, and judges, while the hegemony is carried out in the form of instilling ideology to dominate the class or society below it.[66]

Until finally, up to this point, a legal norm will hold its control because it is motivated by the existence of three elements, namely relations of power, domination and hegemony. Legal norms, in the perspective of logical positivism and legal positivism, are the only truths that are free of value in the paradigm of modernity. Thus, legal norms become privileged elements rather than values because they are understood positively.

In the view of binary opposition (binary Opposition), one element is privileged, while other elements are marginalized. The two inner elements are also arranged based on certain boundaries which make them separate.[67] This opposition in linguistics goes hand in hand with the same thing in the tradition of Western philosophy. In this binary opposition, according to western philosophical tradition, the first terms, employer, is superior to the second, subordinates/employees. The second terms are false representations of the first or inferior. This tradition is called logocentrism and is used to explain the assumption of

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[65] The meaning of this dominance, the Researcher directed him to the act of domination between the KPK and Advocates. Where, in essence, there has been a denial of the Advocate's status as a law enforcer. This is clearly illustrated by the coercive behavior of the owner's reasoning pattern, the KPK, towards Advocates as the lower class of law enforcement strata. These patterns are suspect as an action that occurs because of the existence of power relations that are absolutely formed through the arrangement, rules and systems that are forced to be applied.

[66] Heru Kurniawan, "Relasi formatif Gramsci dalam novel Perburuan karya Pramoedya Ananta Toer", *Jurnal Ibda'*, vol. 5, no. 1 (2007), p. 3. The form of instilling ideology into society as a persuasion effort is to instill anti-corruption jargon and take advantage of the feelings of anger and anger from the public towards the behavior of the perpetrators accused of being cronies of corrupt behavior. Thus, voluntarily the community will 'burden' the will of the authorities because of the power relations.

[67] Marcelus Ungkang, "Dekonstruksi ##", *Jurnal Pendidikan Humaniora*, vol. 1, no. 1 (2013), p. 33.

the privileges that the first term carries and "harassment" of the second term.[68] If Derrida's deconstruction aims to uncover binary opposition in displaying and evaluating inferior elements in binary opposition as something that should be heard, then, in this study, the author followed in his footsteps to dismantle the inferior element which was not revealed in the track record of legal norms and values as the most decisive position in creating legal actions and actions from an advocate.

Conclusion

The situation of the binary opposition which has become the dominance and hegemony of the authorities has been reconciled by Immanuel Kant to decrease the tension between rationalism and empiricism through the formality of values in a positive form. Through this Kant's hand, values and morals are merely mere formalities, known as 'imperative categories', where a phrase shows how an obligation to do well is not based on the desire to do good but is only a general obligation only. So, the meaning of 'good faith' in Article 16 of Law No. 18/2003 is only one element of mere legal norms. There is no more value in 'good faith', so testing of 'good faith' violations is a value, also mediocre. Of course, it is a meaning that is unilateral and arbitrary, therefore, the legislators clearly place the element of 'good faith' value as the basis of the test of the exercise of power in terms of the interests of clients outside and inside the court session.

Negative excesses from the use of formalities to 'good faith' values, is allowing the use of systematic interpretations by tracking their footsteps in other laws. As expressed by the positivists above in the background, insofar as there are two pieces of evidence and their elements fulfilled, then the action fulfills the article and is a criminal act. There is no consideration of the value in the statement because values are equal and legal norms. The 'good faith' value was tested using legal norms, even legal norms of the law which did not give birth to an advocate.

If the values in ethics in a particular profession are attributed to the property of that particular profession, then the assessment of a violation of 'good faith' should only be traced through a shared consensus agreed

[68] Christopher Norris, *Membongkar Teori Dekonstruksi Jacques Derrida* (Yogyakarta: Ar-Ruzz Media, 2016), p. 9.

upon by those who take refuge in the profession. However, in this case, the author is not in a position to say that an advocate cannot be convicted. Researchers are more concerned with respect to values should be heard and raised above the hegemony of legal norms.

More concretely, the Researcher actually hopes for the existence of ethical justice before being recommended to ordinary courts, so that the author's immunity means the suspended ordinary judicial authority in examining an advocate before the ethics court is implemented.

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