

LEGAL REASONING COMPARATIVE MODEL OF ASY SYATIBI AND GUSTAV RADBRUCH

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Abstract: *This paper discusses the comparative legal reasoning of Asy Syatibi and Gustav Radbruch in their philosophical basis framework. By using a comparative analysis of reasoning models, both examine the influence between philosophical modalities and legal reasoning models developed by both legal theorists. The results of the research show that the ontological stance of Asy Syatibi is identical to transcendental-based foundationalism, while Gustav Radbruch positions himself on transcendental idealism. Meanwhile, the identification of epistemological modalities Asy Syatibi is more inclined to internal coherence, while Gustav Radbruch is influenced by the flow of methodical dualism and empirical realism. As for his axiological modality, Asy Syatibi is much influenced by maqashid ethics as a legal goal, while Gustav Radbruch is influenced by deontic ethics.*

Keywords: substantive induction, maqashid ethics, coherentism, methodical dualism, deontic ethics.

Introduction

The relationship between reasoning and law is one of the central themes in the legal science discourse. Operationally reasoning is an attempt to apply formal logic to compile and test the validity of inference, then the law is located as a premise that expresses the predicate to act in accordance with the legal order (Prakken, H, 1997:15-31).

Bernard Arief Shidarta highlighted legal reasoning as the basis for juridical argumentation that most often faces obstacles, especially when the legal event being faced is unclear. Besides that, legal reasoning is responsible for presenting juridical arguments the most acceptable so that there is no gap between law and justice. (Shidarta, B. A., 2013:25-26).

The gap of law and justice cannot be separated from the legal reasoning model that develops internally within the science of law itself, bearing in mind that legal reasoning is a very practical instrument but is still demanded to accommodate social problems in society. The gap between the vision of justice and morals with the vision of legal certainty above represents many philosophical problems in the science of law that are increasingly urgent to be resolved. (Shidarta, S, 2013: 5-6).

Legal reasoning in Indonesia has so far relied on the logic of syllogism, even though the legal events faced are not all linear with existing legal provisions. Even legal events are more often found to be more complex and complicated than those stipulated in legal material because they are intertwined with social and cultural motives. Under these conditions, juridical facts as a minor premise in the syllogistic reasoning system cannot simply be applied, contextualization of facts to the relevant legal rules is still needed (Widodo Dwi Putro, 2011: 28-30).

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The weakness of syllogism as a model of legal reasoning has been reminded since the 1980s by Roeslan Saleh, he mentioned it in terms of "juridical automation" (Roeslan, 1983: 30). This happens because every premise that forms deductive inference is seen to have the nature of self-evident truth so that conclusions have been completed by things that are objective and universal. This is one reason why syllogism is called closed reasoning (Anshori, 2018: 88).

The reasoning system with the closed system above gave birth to the phenomenon of the separation of the legal ethical vision with its normative vision. Legal products, especially judicial decisions, tend to emphasize certainty, rather than justice and expediency. This separation is inevitably bringing legal knowledge to the verge of scientific dysfunction.

The inability of legal reasoning to respond to increasingly swift social dynamics can be understood in connection with the increasing number of traces of inequality inherited by syllogistic reasoning. This demand is felt even stronger when connected with the insistence that legal reasoning is oriented towards centripetal motion so that the resulting legal spectrum is not merely formal juridical nuances, but also reflects the Law of God (Alkostar, 2018: 54).

Looking at the gaps in legal certainty and justice, this paper intends to compare the legal reasoning of Imam Asy Syatiby (Asy Syatibi: Vol. 2: 39), and Gustav Radbruch (Leawoods, 2000). Both were chosen based on objective factors, namely both Asy Syatibiy and Gustav Radbruch are legal theorists who are not satisfied with the legal reasoning based on deductive syllogism. Asy Syatibi is known for his *istiqra ma'nawy* legal reasoning model, and Gustav Radbruch is known as the *idee des recht* (Purpose of the Law) (Wolf, 1958).

Both of them represent friendly legal reasoning models with theological concepts although with varying portions so that they become relevant for the development of legal reasoning in Indonesia which requires justice with a Divine dimension.

The interconnection study of legal reasoning from the two theoretical above is very important because the comparative law can encourage the expansion of the meaning of law (legal extrapolation) by connecting the similarities and differences in scientific perspectives that develop in each school of continental law and Islamic law (Erick Wolf, 1958).

Based on the background description above, what will become the subject of the writing is how is the comparison of Asy Syatibi and Gustav Radbruch's legal reasoning models viewed from the philosophical basis of reasoning?

Research methods

The theoretical framework used to analyze the problem statement above refers to the legal reasoning model contained in the flow of analytic and normative legal philosophy with the coherency and foundationalism perspective reasoning model as a reference to identify the basic characteristics of reasoning law which are the objects of research in this article namely Imam Asy Syatibi and Gustav Radbruch.

Comparative analysis between the reasoning models of Asy Syatibi and Gustav Radbruch begins with the philosophical modalities contained

therein, namely ontological, epistemological, and axiological (Shidarta, 2013:125). Departing from the philosophical modality, an explanation will be seen as intended by Sunarjati Hartono as a point of equality and point of difference in the comparison of law. Including solving a problem that is the same scientific issue in the world of law (Hartono, 1991: 5).

Discussion and Result

Legal Reasoning Based on Philosophy of Al-Syatibi (d.790 H/1388 M)

Asy Syatibi's reasoning is strongly influenced by his theory of maqashid (the purpose of law). Asy Syatibi points to a number of ontological and epistemological modalities that are relatively different from their predecessors, especially Ibn Hazm. Asy-Syatibi responded to the theory of Islamic law that emerged in the eighth century Hijriyah which highlighted the logic of infant law. Asy Syatibi criticizes this model of reasoning because in binary opposition opposes the omission as the goal of law and the text of revelation as the normativity of Islamic law (Moosa,2011).

The genealogical reading of the ontological position of Asy Syatibi can be known based on his view that the fundamental premise in legal reasoning must be something clear and tested for certainty (qath'i) (Hallaq, W, 1997: 206). Therefore, the ontological modality built by Al-Syatibi is essentially based on the principles of foundationalism. Asy Syatibi offers the method of *istiqra ma'nawy* or sub-induction which is claimed to be able to combine the scriptures and the hadith of the Prophet with the benefit as a universal premise in the formation of law. According to Asy Syatibi Sharia law is based on the principle of public interest (*mashlahah*). (Asy Syatibi, Vol. 2:10). Therefore the *istiqra 'ma'nawy* method is structured not only as a logical operational framework but also to achieve what Asy Syatibi calls epistemological certainty (Moosa, 2011).

Related to Asy Syatibi's epistemological certainty project, Thaha Abd al-Rahman argued that Asy Syatibi was very eager to complement the infant reason (text) which had so far adopted the deductive model with benefit as a general legal objective.

The *istiqra ma'nawy* project connects the principles of the verses of the Qur'an and the hadith of the Prophet in the context of inductive reasoning so that the two sacred sources of text are factually connected with benefit as epistemic supremacy in Islamic law. The validity of Asy Syatibi's law in the context of *istiqra ma'nawy* , found with cumulative readings that produce epistemological certainty.

To achieve this goal, Asy Syatibi relates it to the sources of the revelation and the hadith of the Prophet on a particular topic, then evaluates and considers the cumulative messages collected in the sources of the text. (Thaha, 2020, 41). The cumulative message set allows it to comprehensively assess the meaning of law that is connected with the purpose of the law, then adopt it in a certain legal hierarchy from the highest level of certainty to the lowest (Thaha, 2020, 41).

The position of the Qur'anic verses and the hadith of the Prophet in the context of *istiqra ma'nawy* according to Asy Syatibi must be seen in the historical spectrum of Mecca and Medina. The spectrum of Makkah represents universal claims while the second is elaboration and refinement of the Meccan verses (Thaha, 2020, 41). Asy Syatibi's exploration of the text of

the revelation placed him as a legal reasoner who dared to explore the law of the Qur'an (text) in a historical container. A model of reasoning that is not very populist among Zahirī Schools. According to him, legal typology is recognized based on the type of group of verses of madaniyah law and verses of makkiyah law. The makkiyah verses refer to universal or basic norms and are the aims of Islamic law (Asy Syatibi, Vol. 4: 236). The Madaniyyah verses refer to substantive law as a guide for the practical application of the universal value of the makkiyah verses in detail (Asy Syatibi, Vol. 4: 236).

Asy Syatibi argues that law is bound by its axiological purpose to protect the five basic human benefits: religion, life, religion, property (ownership) and rationality. According to him, these basic interests are universal legal postulates. (Asy Syatibi, Vol. 2:10). These five basic benefits show Asy Syatibi's effort to replace hermeneutical deductive reasoning with self-evident premises even though they are not connected with general benefit as the main goal in Islamic law.

Although Asy Syatibi did not completely reject the deductive legal reasoning system that is prevalent among legal experts such as Ibn Hazm, the maqashidasy shari'ah project shows Asy Syatibi's strong desire to reduce its use in Islamic law (Sheehi, 2000: 130).

The foundation of Asy Syatibi's reasoning is also known that there are basic norms as often appear in Kelsen's and HL Hart's research, but what distinguishes them is in Asy Syatibi's thinking the outermost circle of law is regulation, because the relation between basic norms and legal objectives takes place in a dialogic rather than subordinated (Asy Syatibi, Vol. 2:284).

Discourse (maqashid) as a moral discourse in Islamic law consists of three concentric maslahat, dharuriyah (primary), hajiyah (secondary) and tahsiniyyah (complementary) circles (Asy Syatibi: Vol 4: 42). The hierarchy of legal objectives in Asy Syatibi's moral discourse reinforces his epistemological position as adherents of coherentism. His desire for coherentism is a middle ground so that infant reasoning as a closed system of reasoning can dialogue with dialogical reasoning.

Asy Syatibi's epistemological position as a coherentist increasingly emphasized his criticism of the fuqaha (juris) for ignoring the universal principles of the Makkiyah verses and ignoring the inductive method (burhani reasoning) associated with the new culture (Asy Syatibi, Vol. 4: 238). In short, Asy Syatibi discovered the normative basis of Sharia which is rooted in human reason and social standard practice of cultural reference (Masud, 1970).

Legal Reasoning Based on Philosophy of Gustav Radbruch (1878-1949)

The modality of Gustav Radbruch's legal reasoning is known based on his main work *rechtsphilosophie* as compiled by Edwin W. Petterson. In his work, the ontological dualism position of Radbruch's reasoning starts from his belief in the nature of the world of human experience consisting of combined reality and values. Radbruch explains that there are differences between values that are not visible, value-related, value conquests, and evaluating attitudes (Spaak, 2008: 261-290). The invisible value is a scientific attitude in the natural science approach that focuses on physical reality without evaluating it. The attitude of evaluating the focus with the relation between one value with another value (Spaak, 2008: 262). He continued that according

to these four types of attitudes, we can divide the viewpoint of knowledge based on four different categories: existence, value, meaning, and essence (Patterson (ed.), 1950, 43-224).

These four categories show that Radbruch's ontological modality is focused on reasoning towards abstract, ideal, independent concerns in the relationship of prediction. These characteristics then become the foundation for Radbruch to combine three legal objectives namely justice, certainty, and expediency.

Radbruch then compiles the ontological modality by introducing three different approaches to understanding the law: (i) evaluative views, (ii) views related to relations between values, and (iii) views related to the conquest of values (Spaak, 2008: 262). This perspective was born from a combination of methodical dualism and relativism (Patterson (ed.), 1950: 43–224). Methodist dualism stems from neo-kantian teachings which believe that truth is not determined by its existence or simply because if it will exist / not exist. Neo Kantian even considers that there is no logical connection between *das sollen* and *das sein* (Istijab, 2019: 90). Therefore, the evaluation of the law is not based on the material and substance of the law, but rather the aims and ideals of the law (*idee des recht*). (Brian, 2019: 93).

Meanwhile, the relativist method is used by Radbruch as the principle that the truth of *das sollen* (what should be) is not due to its compatibility with *das sein* (what is actually) but is determined by another *das sollen* (Istijab, 2019: 93). This statement shows the great passion of Gustav Radbruch for reasoning in the Neo-Kantianism (Samekto, 2015: 11-17).

The conception of moral relativism led Gustav Radbruch to his most famous axiological modality of justice as the basic idea of law. In terms of justice Radbruch argues that the separation of law and morality facilitates Hitler's cruelty. The legal positivism adopted in the German legal system during Hitler's reign in Germany made the legal system helpless against the arbitrariness of power (Tyler, 2020)

Based on the description above it can be seen that the ontological modality built by Radbruch is transcendental idealism. The ontological modality that stands diametrically with empirical realism. Transcendental idealism is a form of direct (non-inferential) knowledge and certain knowledge about the existence of objects in space only through self-awareness (Stang, 2016).

The notion of transcendental idealism above demonstrates Kant's legacy of Radbruch's thinking about legality and morality. Moral attitude based on intuition is autonomous, whereas moral attitude which is originally intended to obey the rules that come from outside and personal is called heteronomy (Dryden, 2003).

Based on the ontological modalities mentioned above, Radbruch explained that legal justice is not related to the right and wrong of an action, but rather relates to the moral autonomy possessed by each individual and regardless of the circumstances and consequences of the act. The form of justice mentioned above is a continuation of the deontic ethics doctrine which understands that the determination of prohibited and permitted actions is determined based on the moral goals to be achieved not based on the pleasure, satisfaction and happiness of individuals understood in teleological ethics and consequentialism. The strength of the basic values of

justice which is rooted in deontic ethics because it provides support for the value of the law to assess the moral position so that a person does work is not limited to his moral obligations but beyond his obligations and position. (Alexander & Moore 2016)

But the most striking weak point in deontic ethics is its uncertainty in resolving the moral paradox that occurs because the non-consequentialist model of rationality requires "action to produce the best rational consequences. Deontic ethics does not provide conceptual resources to escape the moral paradox (Alexander, & Moore, 2016). Moral paradox in this context is when moral obligations conflict with other moral interests, such as carrying out obligations that violate the protection of the rights of others.

Conclusion

This article explores the legal reasoning of Asy Syatibi and Gustav Radbruch with a focus on three philosophical modalities as the basis of reasoning. Related to the ontological modality Asy Syatibi seems to base his substantive induction reasoning (*istiqra ma'nawy*) on transcendental foundationalism, while Gustav Radbruch positions himself on transcendental idealism. Meanwhile, in his epistemological modality review, Asy Syatibi was more inclined to use internal coherence, while Gustav Radbruch was influenced by methodical dualism. As for the axiological aspect, Asy Syatibi was influenced by *maqashid shar'iah* as a legal goal, while Gustav Radbruch based himself on deontic ethics.

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