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The Development of Law in Indonesia is Linked to Hans Kelsen's Positivism Theory

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ABSTRACT

The evolution of legal theory from classical to modern periods reveals significant shifts in how law is understood and conceptualized. While earlier legal theories were strongly shaped by philosophical and political thought, modern legal theory is largely developed within frameworks constructed by legal scholars themselves. Legal positivism, particularly Hans Kelsen's Pure Theory of Law, argues that law must be separated from non-juridical elements such as social, political, historical, and ethical factors. Nevertheless, in the Indonesian context, law cannot be viewed solely through textual norms. Its effectiveness depends on legal culture, law enforcement performance, and supporting infrastructure. This complexity demonstrates the limitations of a purely positivistic approach when applied to a multidimensional legal system. Therefore, the ongoing development of legal philosophy shows that law cannot be confined to statutory texts alone, but must be understood as a living social institution influenced by broader external factors.

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1. INTRODUCTION

The development of law in Indonesia is related to Hans Kelsen's positivist theory because the Indonesian legal system, which is characterized by civil law, adheres to positivism, where law is seen as a system of norms that must be obeyed and studied purely without being influenced by moral or social factors. Kelsen's theory classifies law as "positive law" or law that has been created and officially approved by the competent authority, and likens the legal order to a hierarchy of tiered norms (Stufentheorie) with basic norms (Grundnorm) as the basis for its validity.

The development of various schools of thought within the philosophy of law demonstrates the ongoing struggle of thought within the field of legal science. While in the past, philosophy was a byproduct of philosophers, this is no longer the case today, as issues within the philosophy of law have become separate subjects of study for legal experts.

In essence, legal theory also aims to explain events in the legal field and tries to provide an assessment (Haryono, 2019). According to Radburch, the task of legal theory is to clarify values through legal postulates down to their deepest philosophical foundations. In this sense, legal theory is essentially

a continuation of efforts to study positive law. Legal theory uses positive law as its study material, with philosophical analysis as a means of explaining law (Faisal, 2010).

Historically, the fact is that legal theory has been studied since ancient times. Greek and Roman legal experts have developed various thoughts about law down to its philosophical roots (Bakir, 2007). Before the 19th century, legal theory was primarily a byproduct of religious, ethical, or political philosophy. It is worth noting that the greatest legal thinkers were originally philosophers, religious scholars, and political scientists. The most significant shift in legal philosophy from philosophers or political scientists to legal philosophy of lawyers occurred only recently, following significant developments in legal research, technical studies, and legal studies (Bakir, 2007).

If examined further, it is clear that legal theories in ancient times were based on general philosophical and political theories, while modern legal theories are discussed in the language and thought systems of legal experts themselves. The difference lies in the method and emphasis. The legal theories of modern legal experts, like the legal theories of scholastic philosophers, are based on the highest beliefs whose inspiration comes from outside the field of law itself.

The emergence of the positivist movement influenced much thought in various fields of human science. Positivism is a philosophical school that asserts natural science as the only true source of knowledge and rejects metaphysical activities. It does not recognize speculation; everything is based on empirical data. In fact, this school rejects theoretical speculation as a means of gaining knowledge (Kelsen, 1995).

Thus, it can be understood that Positivism is a school of thought in legal philosophy which assumes that legal theory is only concerned with positive law (Adji, 2019). Legal science does not discuss whether positive law is good or bad, nor does it address the effectiveness of law in society. In addition to the analytical school of positive law developed by John Austin, there is also a purely positive school of law developed by Hans Kelsen, which draws on two forms and materials from the scientific field. His famous theory is outlined in his book entitled:

1. Reine Rechtslehre (pure legal teachings), 1934;
2. Algemeine Staat-slehre (general teachings about the state), 1925;
3. General Theory of Law and State (general theory of law and state), 1945 (Kelsen, 1995)

Based on the description that has been presented, the following problem formulation is formulated:

1. What is the meaning of positivism theory according to Hans Kelsen?
2. How does the theory of positivism influence the development of legal positivism in Indonesia?

2. METHODS

This research uses a qualitative approach with a normative juridical research type. This approach was chosen because the research focuses on the study of legal norms applicable in Indonesia and their relevance to the theory of legal positivism proposed by Hans Kelsen. Normative juridical research is conducted through a review of library materials that include laws and regulations, legal literature, and doctrines that have developed in legal science. The approaches used in this research include a statute approach and a conceptual approach. The statute approach is used to examine various regulations that reflect the development of law in Indonesia, while the conceptual approach is used to understand and analyze Hans Kelsen's theory of legal positivism, particularly regarding the concept of the hierarchy of norms (Stufenbau theory) and the separation between law and morality. The data sources used in this research consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include laws and regulations relevant to the development of law in Indonesia. Secondary legal materials include books, scientific journals, and previous research results related to the theory of legal positivism and the Indonesian legal system. Tertiary legal materials include legal dictionaries and encyclopedias that support understanding of the concepts used in the research. Data collection was conducted through library research, which involved collecting and reviewing various literature relevant to the research topic. Furthermore, data analysis was conducted qualitatively using

descriptive-analytical methods. This analysis aims to systematically and in-depth describe legal developments in Indonesia and relate them to Hans Kelsen's positivist theory.

3. FINDINGS AND DISCUSSION

The Development of Law in Indonesia is Linked to Hans Kelsen's Theory of Positivism

The history of legal development in Indonesia demonstrates the strong influence of the Continental European legal system, or civil law. This influence is evident in the structure of legislation and legal thinking, which emphasizes certainty and codification. The influence of the civil law system in Indonesia:

1. The Indonesian legal system adheres to the civil law system which is a legacy from the Netherlands.
2. This system is oriented towards written and codified law, which is very much in line with the principles of positivism.
3. Legal positivism, one of whose figures is Kelse, is the basis for this legal system to prioritize legal certainty through formally created regulations.

In the context of Indonesia's civil law system, Hans Kelsen's Pure Legal Theory holds strong relevance. Kelsen's separation of law from moral and social aspects serves as the basis for the formation of positive law in Indonesia.

1. Law as a system of norms: Kelsen views law as a system of norms that has a logical and hierarchical structure. In the Indonesian context, this means that law is viewed in terms of its conformity to higher norms in the legal hierarchy, from the constitution to its implementing regulations.
2. Separation of law from morality and social values: Kelsen's pure legal theory emphasizes that law must be studied "purely," that is, without considerations of morality, justice, or social influence. This aligns with legal practice in Indonesia, where the validity of a legal regulation is based on the process by which it was created, not solely on moral or just judgments.
3. The Grundnorm Concept: Kelsen's theory of basic norms (Grundnorm) explains how a legal system can be considered legitimate. In the Indonesian context, the Grundnorm can be considered the constitution, which serves as the foundation for all legal norms below it, such as laws and other regulations.
4. Das Sein and Das Sollen: Kelsen distinguishes between "what is" (das Sein) and "what ought to be" (das Sollen). Obedience to the law is based on das Sollen (ought) contained in norms, not on das Sein (social facts) that occur in the field.

Hans Kelsen's Pure Law Theory emphasizes law as an autonomous system of norms free from external influences. However, in the Indonesian context, this theory faces both conceptual and practical limitations because the national legal system cannot be completely separated from the social, cultural, and moral values of society. The limitations and challenges of Kelsen's theory in Indonesia are as follows.

1. Although Kelsen's positivism influenced the development of formal law in Indonesia, there are challenges when it comes to facing a more complex and dynamic legal reality.
2. Issues such as globalization, cyber law, climate change, and human rights demand a more flexible legal approach, which may be inadequate if it relies solely on the separation of law from social and moral values as in Kelsen's theory.
3. The reality in the field often shows a gap between existing norms (das Sollen) and social facts (das Sein), as illustrated by the example of freedom of expression which is regulated in the 1945 Constitution but is sometimes met with intimidation. According to Kelsen, law is a system of norms.

A norm is a statement that emphasizes the “ought” or das solen aspect, by including some rules about what must be done. Norms are the product of deliberative human action. Kelsen believes that David Hume distinguished between what is (das sein) and what “ought,” and Hume's belief that it is impossible to draw conclusions from factual events for das solen. Therefore, Kelsen believes that laws, which are “ought” statements, cannot be reduced to natural actions (Kelsen, 1995).

Basic norms are the basis for the validity of legal norms originating from the same legal order. Therefore, these basic norms constitute the unity of these various norms. This unity is also expressed by the fact that the legal order can be explained in legal rules that do not contradict each other. Hans Kelsen explained that if there is a conflict between one norm and another, the lower norm must submit to the higher norm. The higher norm becomes the basis for the validity of the lower norm (Kelsen, 1995).

The basic norms applied by Hans Kelsen here later gave birth to the theory of the Hierarchy of Legal Norms (Stufentheorie), a theory that views the legal system as a process of creating its own norms, from general norms to concrete norms. Positivist legal theory, according to Hans Kelsen, is not a more or less imperfect copy of transcendental ideas. This pure legal theory does not attempt to view law as the offspring of justice, but rather as the child of a sacred parent. Legal theory seems to uphold a clear distinction between empirical law and transcendental justice by eliminating transcendental justice from its specific concerns.

This theory does not see the manifestation of a supernatural authority in law, but rather examines a specific social technique based on human experience. Pure legal theory rejects being made into a metaphysical science of law. Basically, there is no essential difference between analytical law and pure legal theory. As for the difference, the two fields differ because pure legal theory seeks to continue the analytical legal method more consistently than Austin and his followers attempted. Kelsen's approach is considered a middle ground between the two previous schools of thought, namely natural law and legal positivism. Kelsen argued that law is not limited by moral considerations and that legal interpretation is related to non-empirical norms. This theory places particular emphasis on a clear distinction between empirical law and transcendental justice by removing it from the scope of legal studies.

This theory rejects the metaphysical study of law. It seeks legal foundations as the basis for validity, not in metajuridical principles, but through a juridical hypothesis, namely a basic norm constructed through logical analysis based on actual juristic thinking. Hans Kelsen's approach was motivated by his review of traditional legal science that developed in the 19th and 20th centuries. According to him, 19th and 20th-century legal theory was far from pure and legal science had been mixed with elements of psychology, sociology, ethics, and political theory. According to Hans Kelsen, this is understandable because the fields of psychology, social science, and political theory discuss topics related to law.

This theory can be seen as a very thorough development of the positivism school. As stated above, it rejects ideological teachings and only accepts law as it is, namely in the form of existing regulations. According to Kelsen, pure legal theory is a theory of positive law. It seeks to question and answer the question "what is the law?" and not "What should the law be?" Because of this starting point, Kelsen argued that justice as it is usually questioned should be removed from legal science.

All laws within the realm of basic norms must be able to relate to them, therefore they can also be seen as the parent that gives birth to legal regulations within a particular system. These basic norms do not need to be the same for every legal system, but they will always be there, whether in written form or as an unwritten statement. Basic norms are the highest norms. Basic norms are the parent that gives birth to legal regulations within a particular system (Astomo, 2014).

All norms whose validity can be traced back to a basic norm constitute a system of norms, an order of norms. The basic norm is the ultimate source of validity for all norms originating from the same order; it is the common ground for their validity. The fact that a particular norm originates from a particular order is based on the fact that the ultimate ground for its validity is the basic norm of this order. It is the basic norm that forms the unity of the various norms by providing the ground for the validity of all norms originating from this order (Kelsen, 1995).

Thus, it can be concluded that, for Hans Kelsen, legal positivism must be purified of non-juridical elements, such as sociological, political, historical, and even ethical elements. This thinking is known as pure legal theory. For him, law is a necessity that regulates human behavior as rational beings.

It's no exaggeration to say that positive law rejects legal determination based on God's commands. However, it's also important to note that Indonesia doesn't completely rigidly enforce this school of thought within its legal system, thus not allowing other legal schools of thought to be accommodated.

For example, Indonesia accommodates Islamic law for certain cases handled by Religious Courts, as well as customary law. Furthermore, political developments in Indonesia have made the country's legal system very dynamic and pluralistic, in line with the country's openness and democracy.

Positivistic law as the prevailing legal school believes that legitimate sources of law are written rules, provisions and principles that have been legislated, adopted and recognized by the applicable government or political institutions including administrative, legislative and judicial institutions.

On the other hand, the idea of legal positivism is also inseparable from the influence of the development of positivism (science) and at the same time shows its difference from the idea of natural law, where natural law is preoccupied with the problem of validating man-made laws, while in legal positivism, activity is actually reduced to concrete problems. Through positivism, law is viewed from the perspective of juridical positivism in the absolute sense and legal positivism is often seen as a legal school that separates law from morality and religion. In fact, not a few discussions on legal positivism have come to the conclusion that, in the eyes of positivism, there is no other law except the command of the ruler (law is command from the lawgivers), the law is identical to the law (Prasetyo, 2013).

The emergence of the positivist movement influenced much thought in various fields of human science. Positivism is a philosophical school that asserts natural science as the only true source of knowledge and rejects metaphysical activities. It renounces speculation; everything is based on empirical data (Prasetyo, 2013). In fact, this school rejects theoretical speculation as a means of gaining knowledge.

The core teachings of legal positivism are about beliefs, existing laws, and the laws that apply now, at a particular time, and in a particular place. According to August Comte, the founder of positivist philosophy, as mentioned previously, positivism's doctrine rests on experience.

In other words, experience is considered true, because it can be verified (investigated) in reality through science, so that it can be determined that something is in accordance with reality (truth). Legal positivism (the positive legal school) sees the need to clearly separate law and morality (between das sein and das sollen). In the positivist view, there is no law other than the commands of the ruler. Even the part of the positive legal school known as the legism school holds a more firm opinion that law is statute (Rasjidi, 2012).

Based on the concept of the philosophy of positivism, the legal positivism school of thought formulates a number of premises and postulates regarding law which result in the basic view of the legal positivism school of thought that:

1. The legal system of a country applies not because it has a basis in social life, or in the soul of the nation, and is also not based on natural law, but gets its positive form from the authorized agency;
2. Law must be viewed solely from its formal form, and thus must be separated from its material form;
3. The content of the law or legal material is acknowledged to exist, but is not the subject of legal science, because this could damage the scientific truth of legal science (Soekanto, 2012).

According to Soetandyo Wignjosoebroto, the positivist school claims that legal science is also a science about the life and behavior of citizens (who should be orderly in following the norms of causality), so those who adhere to this school try to write down these causalities in the form of legislation.

Furthermore, Soetandyo further explained that whatever the claims of the positivist jurists, regarding the application of causal law in efforts to maintain order in social and national life (Wignjosobroto, 2002), however, the reality shows that causality in human life is not a highly necessary causality as can be observed in the natural realities that study the "behavior" of inorganic objects. These causal relationships are punished or posited as norms and are never described as nomos, norms can only survive or be maintained as causal realities when supported by structural forces formulated in the form of threats of sanctions.

Indonesia is a vast country rich in culture and customs, stretching from Sabang to Merauke. Each region has its own distinct social life, as well as its own set of norms. These norms, in the form of customary law, still exist within the community. This predates the arrival of the Dutch colonialists and the implementation of legal positivism.

The existence of legal unification and positivism has closed the space for customary law and other customary laws that exist in society to be applied in the midst of society, so that local wisdom in the form of living law is squeezed by laws made by the authorities. Therefore, resistance to the law and court decisions in Indonesia to this day still occurs because the law crystallized in laws and court decisions is very far from the values of justice that apply in society (Soetiksno, 2004).

Society is evolving at a rapid pace, so to keep pace with these developments, the law must always keep pace. Existing law must serve as a guide and solution to all current problems. However, within the legal positivism school, law is constrained by complex procedures, resulting in legal reforms always lagging behind societal developments. Existing law is unable to address the challenges of the times (Ramadhan, 2004). According to Friedmann, law as a system consists of interconnected subsystems that are inseparable and influenced by one another. These subsystems consist of Legal Substance, which concerns the content of legal norms/rules; Legal Structure, which concerns legal facilities and infrastructure, including legal apparatus resources; and Legal Culture, which concerns the cultural behavior of law-consciousness and obedience, both by the government and its citizens. A good legal culture will be formed if all parties are seriously involved to participate fully in the process of law-making, so that everyone truly feels ownership of the law. Because of the enormous role of legal culture (Wibisono, 1983), so it can cover the weaknesses of the legal substance and legal structure.

This concludes our discussion of the schools of thought in legal philosophy, which constitute the core of legal philosophy itself. By understanding the main points of these schools, we can also observe various modes of thought regarding law. This way, we realize how complex law is, with its various perspectives. Law can be interpreted in various ways, as can its objectives. Each school of thought stems from its own arguments. Ultimately, understanding these schools of thought can enrich our perspective and broaden our perspective on law and its issues.

According to Hans Kelsen's research, law is a field of "must" (sollen), a necessity, for example if this happens then that should also happen, it is clear that this is a reality that is principled and normative (Kristeva, 2011). This means that if this happens, it doesn't necessarily mean it happens, but it should happen. This principle, if applied in the legal system, is that if a violation of the law occurs, the act should be followed by punishment, although in reality this is not always the case, because the sanctions applied to someone who violates the law depend on the determination of state institutions, while norms are seen as imperatives for the state and then become individual obligations.

4. CONCLUSION

The development of schools of thought within the philosophy of law demonstrates the ongoing struggle of thought within the field of legal science. While in the past, legal philosophy was a byproduct of philosophers, this is no longer the case today, as philosophical issues have become separate subjects for legal experts. For Hans Kelsen, positivism law must be purified of non-juridical elements, such as sociological, political, historical, and even ethical elements. This thinking is known as pure legal theory.

Law is a necessity that regulates human behavior as rational beings. In Indonesia, law has a very broad scope, not limited to textual forms of legislation. The functioning of law in society requires not only legislation but also other factors such as community culture, law enforcement officials, and facilities and infrastructure. From this, we can see that positivism attempts to confine law to textual limitations.

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