THE POSITION OF MORAL VALUES IN LAW

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Abstract

Moral values in legal science are important. However, the flow of law sees a variety of moral values. This paper aims to see the position of moral values in the science of law. Legal positivism separates strictly between law and morals. According to him, there is no law other than the command of the authorities. Even extreme identifying the law (Recht) as the law (wet). Legal positivism activities are aimed at concrete problems, which are different when compared to natural law thinking which engages itself with the validation of man-made law. For adherents of natural law theory, an unjust law is not law. there is an absolute relationship between law and morality. the two cannot be separated, so the law must refer to moral principles.

Keyword: *Moral Values; Legal Theory*

1. Introduction

Legal theory is an overall statement that is interrelated with the conceptual system of legal rules and legal rulings, and that system for the most part is important to be positive. We can discuss legal theory in the broad sense and legal theory in the narrow sense.

Meuwissen states the oldest part of Legal Theory in the broadest sense is the Philosophy of law. Legal philosophy is the mother of all juridical disciplines because legal philosophy addresses the most fundamental issues that arise in law[1].

Philosophy of law does not seek the meaning of one concrete law, but rather the meaning of the law as law [2]. Since we have already discussed the object of legal philosophy, other features that manipulate legal philosophy as an independent part of legal theory in a broad sense will become clear. Establishing the goals of legal philosophers is purely theoretical and also theoretical understanding is important for the practice of law because the practice of law is always influenced (also determined) by an understanding of the philosophical foundation of law. The discourse of thought regarding the relationship between law and morals in the perspective of legal thought is centered on the conflict of ideas between positivism and natural law. The main

[1] Imam Ghozali, "Dialektika Hukum Dan Moral Ditinjau Dari Perspektif Filsafat Hukum," *Murabbi:Jurnal Ilmiah Dalam Bidang Pendidikan* 02, no. 01 (2019): 18–30, https://ejournal.stitalhikmah-tt.ac.id/index.php/murabbi/article/view/24 %0D%0A.

[2] Syafruddin Muhtamar and Muhammad Ashri, "Dikotomi Moral Dan Hukum Sebagai Problem Epistemologis Dalam Konstitusi Modern," *Jurnal Filsafat* 30, no. 1 (2020): 123, https://doi.org/10.22146/jf.42562.

problem is related to the presence or absence of a relationship between the two rules that affect the existence and validity of the rule of law so that it is binding on citizens.

This paper discusses how the position of moral values in the science of law from the study of the philosophy of law.

2. Discussion

2.1. Moral Essence

Moral is the essence of law, and this cannot be easily released [3]. Moral in etymologically comes from the Dutch moral, which means morality, character. While in terms, moral is interpreted as teaching about good and bad deeds and behavior [4]. In Etymologically the word moral comes from the word mos. Which means customs or habits, while the plural is mores. The word moral has the same meaning as the word ethos (Greek) which decreases ethics. In Arabic, moral, which means morality, is the same as moral values, whereas in the Indonesian concept, moral means morality. According to Driyarkara, morals or decency are true values for humans. In other words, moral or morality is perfection as a human or morality is the demand of human nature. Thus moral or morality is the whole norm that regulates human behavior in society to carry out actions that are good and right [5]. Moral used as a measure of a person or group in carrying out an action or act[6].

2.2. Position of Moral Values in law

In the flow of legal philosophy, there are two big camps namely Nature / Natural Law Flow and positivism. Natural law is universal and eternal [7]. Even though there are quite various variants of the meaning of law according to the Nature of Law of Nature, one thing is clear that this school places legal ontology at a very abstract level. The nature of law in the real sense is interpreted more as principles than norms. The existence of positive law is still recognized, but this positive law can be threatened if it does not meet the morality requirements imposed by natural law.

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[3] Constanza Núñez Donald, "Legal Philosophy and Cosmopolitan Constitutionalism. Debates on Morality, Unity, and Power," *Age of Human Rights Journal* 14, no. June (2020): 77–107, https://doi.org/10.17561/tahrj.v14.5479.

[4] Emima Alistar (Hîrlav), "The Relation Between Law and Morality," *SSRN Electronic Journal*, no. 1995 (2019): 2–4, https://doi.org/10.2139/ssrn.3388103.

[5] Miswardi. Nasfi. Antoni, "Etika , Moralitas Dan Penegak Hukum," *Menara Ilmu* XV, no. 02 (2021): 150–62, http://jurnal.umsb.ac.id/index.php/menarailmu/article/view/2425 .

[6] Eri Hendro Kusuma, "Hubungan Antara Moral Dan Agama Dengan Hukum," *Jurnal Pendidikan Pancasila Dan Kewarganegaraan* 28, no. 2 (2015): 96–104, http://journal.um.ac.id/index.php/jppk/article/view/5449.

[7] Ira Thania Rasjidi. Lili. Rasjidi, *Pengantar Filsafat Hukum* (Bandung: Mandar Maju, 2018).

In the legal hierarchy introduced by Aquinas, especially at the level of *lex aeterna* (eternal law) and *lex naturalis* (natural law), it appears to be loaded with the content of natural law (law of nature). The inevitability of this natural law departs from the postulates of causality. The proposition was then founded on the building of a syllogism that departs from the premises of the self-evident and suprapositive. "All humans love truth and justice" is one form of *self-evident* premise that is most relevant to the context of this description.

The truth and justice is the deepest longing in humanity that has been sought throughout the ages. It seems that the Law of Nature is designed to answer this need [8]. This means, human-made law (human law), without exception, must be interpreted as the embodiment of the self-evident premise. So strong is the demand so that even man-made law is given the ideal limits as the principles of truth and justice as well.

The meaning of the law as the principles of truth and justice in the Law of Nature is supported by idealism. According to this understanding, the idea of truth and justice does not come from experience but precedes experience (a priori not aposteriori). The idea is very basic and at the same time, this principle must be maintained in every form of law [9].

To prove the existence of the principles among these laws, an approach through deductive reasoning is used. At the epistemological level, Aquinas thought can all be said to proceed according to this deductive reasoning. In general, the pattern of reasoning of Legal Positivism as will be described later and the Natural Law Flow, are entirely patterned the same. The difference is only at the highest limit of the legal hierarchy. In Legal Positivism, the highest legal form, as well as the source of the highest law, is positive law itself. There is no place for non-human law to appear as a regulative standard that binds citizens. At the Natural Law Flow, the legal hierarchy is opened further up, so that the *"closed logical system"* which locks the pattern of reasoning. Legal Positivism is given more space in the Natural Law Flow.

The pattern of reasoning of the Natural Law Flow model fully shows the similarity with moral reasoning. *Legal reasoning* here is identified as *moral reasoning*. As Visser't Hooft said, an important reference framework in legal reasoning indeed lies in the analysis of moral speech, which is the meaning of rational conversation in the field of determining the moral standpoints.

Legal Positivism, in its most traditional definition of the nature of law, interpret it as positive norms in the legal system. In terms of ontology, such meaning reflects the combination

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[8] Latifah Hilman,Didi . Ratnawaty, "Membangun Moral Berkeadilan Dalam Penegakan Hukum Di Indonesia," *Yustisi* 4, no. 1 (2017), http://150.107.142.43/index.php/YUSTISI/article/view/1123 .

[9] Shidarta, *Hukum Penalaran Dan Penalaran Hukum* (Yogyakarta: Genta, 2013).

of idealism and materialism. An explanation of this can refer to The Will Theory of Law from John Austin and The Pure Norm Theory of Law from Hans Kelsen.

Law is an expression of the will of a ruler. This will is not something empty. This was explained by Kelsen, by saying, a collection of norms that were systematically arranged was a meaningful formula because it became a source of legal discovery activities by the legal authorities. The content of the meaning *(ought or may meaning content)* is obtained by the approach of idealism and materialism and processed with epistemological aspects of rationalism. Understanding the dualism of this approach is completed by Kelsen by saying that the unit of the meaning content is the "norm." Furthermore, "*A norm is the expression of the idea... .that an individual ought to behave in a certain way* [10].

Unlike the Nature of Law of Nature which is busy with the problem of validation of man-made law, then in Legal Positivism, its activity is actually down to concrete issues. The issue of validity (legitimacy) of rules is still given attention, but the regulatory standards that are used as a reference are also legal norms. Logically, legal norms can only be tested by legal norms as well, not by legal norms. Positive norms will be accepted as axiomatic doctrine, as long as it follows *"the rule-systematizing logic of legal science"* which contains the principles of exclusion, subsumption, derogation, and non-contradiction.

If the flow of natural law has the power of argument in the discourse of validation (legitimacy) of man-made law, then the strength of the positivism argument of law lies in the application of the structure of positive norms into the structure of concrete cases. If the Natural Law Flow and Law Positivism schemes are combined, it soon appears that the two models of reasoning are continuous from the y-axis to the x-axis, with a top-down and doctrinal-deductive pattern.

Legal positivism itself once tried to answer the question of how to validate those positive norms. Hans Kelsen was relatively successful when explaining the existence of a hierarchical system of positive norms. The problem only arises when he comes to the top of the hierarchical system, which Kelsen gives the name *Grundnorm* (basic norm). This basic norm is present a priori and is relatively permanent. This concept was later taken over by Hans Nawiasky with his *Staatsfundamentalnorm*. The discourse on basic norms and fundamental norms of this country has actually "trapped" Kelsen and Nawiasky to the *"trap"* of the Law of Nature, as well as von Savigny when putting forward the *Volksgeist* as the soul of the nation which must be present as a

[10] Kusuma, "Hubungan Antara Moral Dan Agama Dengan Hukum."

guideline for the institutionalization of social behavior. Hans Kelsen realized this and rejected Savigny's way of thinking. According to him, the *Volksgeist* doctrine was misdirected and abandoned.

Apart from Kelsen's objection to being equated with the concept of Natural Law Flow and the School of History, it remains that the *Grundnorm* concept he proposed forced Law Positivism to open a little gap from the solidity of argumentation and the closure of his logical system, those positive norms have a peak that is both regulative and constitutive. The hierarchical system shows the levels of norm abstraction. As a result, this basic norm is at the highest level of abstraction, which plays in the boundary area between law and morals.

Legal positivism holds that the law must be seen in the provisions of the law, because only then can the legal provisions be verified. As for those outside the law cannot be included as a law because it is outside the law [11]. Moral can only be accepted in the legal system if it is recognized and approved by the ruling authority by applying it as law. Moral can only be accepted in the legal system if it is recognized and approved by the ruling authority by applying it as law.

However complete conceptual legal positivism is, it still has limitations. Positioning humans as moral sources has natural limitations for creating laws. Even positive law is reactive because it was only made after a bad experience that befell human beings. Also the ability to anticipate positive law is limited so that many cases cannot or are difficult to handle because they are not part of the law. However, the existence of moral relevance as a minimum content of law does not automatically eliminate the possibility of bad law.

Hans Kelsen in his legal theory the Pure Theory of Law has a fundamental similarity with the law expressed by H.L.A Hart who wants to try to answer the question of "what is law?" but not the question "what the law should be". The Kongkrit in Hart's perspective on the question of "the nature of the law" is about how the law and legal obligations differ from how it relates to the orders that are supported by threats [12].

H.L.A Hart revealed, there is a separation between law and morality, but the separation is not extreme because morality must be a condition of drinking from the law. This is caused by two factors [13]: a) Humans have limitations on doing good to others; and b) The law has limitations in regulating the development of society.

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[11] Hans Kelsen, *Teori Hukum Murni* (Jakarta: Nusamedia, 2018).
[12] H.L.A. Hart, *Konsep Hukum (Concept Hukum)* (Jakarta: Nusamedia, 2013).
[13] Bernard L Tanya, "Pengembangan Epistemologi Ilmu Hukum" (Surakarta: Seminar oleh AFHI dan Sekolah Pasca Universitas Muhamadiyah Surakarta, 2015).

Hart added legal thinking is closely related to morals is a way of thinking in the flow of natural law. In the flow of positive law, law and morals have absolutely nothing to do. This can be observed with the characteristics of understanding legal positivism as stated by H.L.A Hart, among others [14]:

a) Law is an order from humans (command of the human being);
b) There is no absolute relationship between "Law" and "Moral" as applicable/existing and the law that should be;
c) Understanding that the analysis of legal conceptions, first: has an important meaning, secondly; must be distinguished from investigations such as a) Historical regarding causes and sources of law; b) Sociological regarding legal relations with other social phenomena; c) Critical investigation of the law or judgment, whether based on morals, social goals, and legal functions;
d) The legal system is a logical, permanent and closed system in which correct legal decisions can usually be obtained through the logic of predetermined legal regulations without regard to social objectives, politics, and moral measures

The understanding that moral considerations cannot be made or maintained as statements of reality which must be proven by rational arguments, proofs, or experiments. Although then Hart realized the limitations in positive law because "considered" always lags behind the incident. Therefore, a space for morals is given as a foundation that must be owned by law enforcers / legal subjects in the form of "moral obligations" to take legal actions [15].

The relationship between law and morality according to Hart, in fact; 1) the law embodies moral ideals; 2) morality and law have an independent relationship; 3) the law must realize moral ideals; 4) moral values affect the law; 5) the law by definition embodies the moral; and 6) from the facts about the nature of human beings and the world in which they live, the rules of morality have the same minimum side. The legal system for Hart is a system of social rules [16].

How to internalize moral principles in law can be done at the time of lawmaking. Here the law is given input, such as good ideas, bad and legitimacy as an effort to explain human behavior, especially the behavior of law enforcement officials.

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[14] Hart, *Konsep Hukum (Concept Hukum)*.
[15] Fitrah Dimyati, Khudzaifah. Absori. Wardiono, Kelik. Hamdani, *Hukum Moral Basis Epistemologi Paradigma Rasional H.L.A Hart, Yogyakarta, Genta, 2017.* (Yogyakarta: Genta, 2017).
[16] Bernard L Mangesti, Yovita A. Tanya, *Moralitas Hukum* (Yogyakarta: Genta, 2014).

Hart was also put forward, that moral principles functioned as regulative ideas for all rules of life, including the rules set by law. From this statement it becomes clear that actual law is moral, meaning that the law and all legal norms must be in following moral norms. That also means that the notion of law is incomplete, if not explained about these moral principles. Nevertheless Hart still sharply separates between moral and, law. This is only possible if both morals and laws are taken in a narrow sense. The moral is about the human mind, the law is originating from the source of law, whether the contents are moral or immoral. Finally, the law in the narrow sense only concerns the formal aspects of the rule of law and does not concern the relationship with the moral contents.

The firmness of legal positivism to eliminate the connectivity requirements between law and morals makes the axiological domain of this flow limited to the achievement of legal certainty. The essence of legal certainty is predictability, which is the ability to perceive *"an individual ought to behave in a certain way.*

The camp of inclusive legal positivism says that the rules of positive law that are not in line with or even conflict with moral factors, could be positive legal rules become invalid. Nevertheless, this opinion is also at odds with the theory of exclusive legal positivism which considers that law is the law.

If it is assumed that the law is the principle of truth, then it is understandable that one of the most interesting things from the Nature of the Law of Nature is its preoccupation with focusing on testing normative validity, specifically the validity (legitimacy) of man-made law. This has actually to some degree reduced the nuances of practical reasoning that is inherent in legal reasoning. The answer to this validity test also gave birth to new variants in the Natural Law Flow, such as from Lon F. Fuller with *"inner morality of law"* and Ronald Dworkin with his *"interpretive theory".*

Dworkin has another opinion. Prominent *Interpretive Theory* [17] believes, that every product of law (legislation) by itself must be interpreted and applied with a moral approach. For him, positive law must have moral integrity. Integrity may not guarantee the achievement of justice, but this integrity will guarantee a certain degree of morality (which is sufficient) in every legal product so that legislation is avoided as a product of political violence. According to him, the law is an expression of the philosophy of government. This philosophy consists of moral principles establishing the fundamental objectives of government and the relationship between government

[17] Alani Golanski, "Argument and the 'Moral Impact' Theory of Law," *SSRN Electronic Journal* 11, no. 2 (2018), https://doi.org/10.2139/ssrn.3201891.

and individuals. These principles are *legitimate bases of legal decisions*, which also guide the interpretation of a rule of law.

According to Dworkin, three values are highly related to law as integrity, namely justice, fairness, and *procedural due process* [18]. Fairness values are principles related to respect for people's rights as lawmakers through their representatives in parliament. Therefore the people in the form of legislation products must not be ignored and ruled out in any public policy or decision, including court decisions. For Dworkin, the value of fairness in the realm of law requires that judges respect and adhere to what has been decided by the majority of citizens through the legislature.

On the other hand, the value of justice places more emphasis on the product and the quality of the outcome of a public decision (in this case the judge's decision). Or for example, the protection of individual rights and freedoms is considered by the public as a fundamental principle of justice, so every decision made must protect these individual rights and freedoms in the most morally acceptable ways. Whereas the value of *procedural due* process requires respecting existing legal procedures, both when establishing new rules and when the law is applied to particular cases. This value is related to the principle of legal certainty [19].

Law as integrity, according to Dworkin, is the unity of the three principles. When adjudicating and making decisions, one must seriously take into account and find the right fit point *(best fit)* between the three values above, so that they can produce decisions that are weighted from the legal and moral. For Dworkin, the principles of morality cannot be ignored in making legal decisions. The validity of these principles is adjusted according to their weight or depends on the case at hand. According to him, moral principles have a legal position because they give meaning to the law. Many of the moral principles (such as' prang may not take advantage of the mistakes he has made), are integrated aspects of the law and can be used by judges in making weighty decisions [20].

Thus, for Dworkin, the law is not just a system of rules, as Hart understands. More than that, the law also contains standards that are not rules, namely the principles and policies. Legal interpretation is a constructive interpretation, namely constructing the interpretation to find the unity of moral principles with the law, legal decisions that are relevant to the case at hand.

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[18] Mangesti, Yovita A. Tanya, *Moralitas Hukum*.

[19] Sandra Baez et al., "The Impact of Legal Expertise on Moral Decision-Making Biases," *Humanities and Social Sciences Communications* 7, no. 1 (2020), https://doi.org/10.1057/s41599-020-00595-8.

[20] Mangesti, Yovita A. Tanya, *Moralitas Hukum*.

Law and morals are related, good law is a law with a moral foundation, so that a law has a spirit, both from the product of the law and the spirit of law enforcement so that the law can be upheld to obtain justice, legal certainty, and usefulness. The law provides limits on how morale can be implemented with various law enforcement efforts not merely with threats/sanctions for violators [21].

The position of moral values in law according to the author is like two sides of a coin that cannot be separated. Unite and inherent. Because the nature of the science of law that teaches to be a court requires moral reading in solving cases in the community.

Moral teaches what is good and what is bad according to general truth without a clear rule regarding sanctions. Meanwhile, more concrete than that, the law regulates prohibitions and imperatives with clear sanction rules made by the state, the existence of the law is strongly influenced by human rationality [22].

Law should be a guide to life, with the simple language we say that the existence of law is a tool for humans to achieve prosperity. Law is not understood as an esoteric and autonomous institution, but rather as part of a larger social process, so Satjipto Rahardjo firmly states that: "law as a great Anthropological Document", means understanding that understands the law as a set of rules for the benefit the profession as understood by positivists must be changed by understanding that law is an anthropological document [23].

Ratios serve as benchmarks for moral provisions, even ratios that are separate or purified from their objects can make universal moral determinants on which human laws are based. The moral is always rational. Without rational reasoning selection, morals cannot be said to be moral. "You must, then you can" is a moral rationale that remains rationalized. Moral provisions without going through the process of rationalization are similar to those of irrational animal provisions *(arbitral brutum).* Thus, Kant answered, the relationship between the human mind and moral laws has a strong connection. As soon as Kant was careful, he revealed the moral stipulations that should have come from pure thought, not from the faculty of human-animal

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[21] Subiharta, "Moralitas Hukum Dalam Hukum Praksis Sebagai Suatu Keutamaan (Legal Morality in Practical Law as a Virtue)," *Jurnal Hukum Dan Peradilan* 4, no. 3 (2015): 385–98, https://www.researchgate.net/publication/317565725_MORALITAS_HUKUM_DALAM_HUKUM_PRAKSIS_SEBAGAI_SUATU_KEUTAMAAN.

[22] Taufik Firmnto, "Kedudukan Moral Dan Hukum Dalam Bangunan Hukum Indonesia Oleh:," *Sangaji Jurnal Pemikiran Syariah Dan Hukum* I, no. 1 (2017): 96–110, http://ejournal.iaimbima.ac.id/index.php/sangaji/article/view/81/32.

[23] Iin Ratna Sumirat, "Penegakan Hukum Dan Keadilan Dalam Bingkai Moralitas," *Al-Qisthas: Jurnal Hukum Dan Politik Ketatanegaraan* 11, no. 2 (2020): 85–100, http://jurnal.uinbanten.ac.id/index.php/alqisthas/article/view/3827 .

desires. Human-animal desires have a dependence on the object, through the sensation of humans feel the accidents they receive from the object form the feelings, interests, tendencies, and so on. Only with contemplative and intellectual encouragement can moral construction be built not from desire, but through that goodwill [24].

3. Conclusions

The moral position in the science of law with the study of legal philosophy is like two sides of the eye that cannot be separated. The formation of laws has weaknesses such as multiple interpretations. Weaknesses that are sometimes not responded with a conscience by the judge who examined the case. The use of moral values as the main test stone to resolve cases. A rule that only contains legal certainty without justice, then moral values are used.

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[24] Dudi Badruzaman, "Hubungan Antara Hukum Dengan Moral Dalam Islam," *Syiar Hukum : Jurnal Ilmu Hukum* 16, no. 1 (2019): 56–64, https://doi.org/10.29313/sh.v17i1.4226.

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