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Jhon Austin's Positivism Legal Policy: Convergence of Natural Law

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Abstract

Legal positivism is influenced by natural law from Ancient Greece, natural law comes from God to regulate human life. Humans were created by reason by God to make rules, John Austin stated that to make a rule sourced from orders or policies in the field of law by the king or parliament as the highest authority. This influenced the thinking of Hans Klesen with a pure legal theory that complies with hierarchical rules and sanctions, Hart's legal positivism explains that law comes from morals that regulate one's behavior. This paper is in the form of legal research in literature studies in the form of books and journals that discuss positivism legal policy, which is legal research, then analyzed using the John Austin doctrine. The advantage of the influence of natural law on legal positivism according to Austin is that it divides the law into two forms, namely the law from God for humans (the divine law), the law created by God for His creatures. Laws are compiled and made by humans, which consist of: Laws that are actually positive laws (properly so called), and laws that are not actually laws (improperly so called). 2. The doctrine of legal positivism, state power must be limited and controlled by law, the state must be constructed as a state of law and not a state of power. Every citizen is considered to have the same position, law enforcers to think and act legally formalistically, by placing legal justice as the goal of law.

Keywords: *Natural Law; Positivism; Legal Policy; John Austin*

Introduction

In Greece the ancient world of thought was marked by a deep religious zeal, distinguished by conflicting religious schools. The first stream is the flow of religion views the universe as a power that threatens humans. The view of life contained in this school listens to the Greek philosophy of man. Humans consist of two dark parts, namely matter and body. The part of light i.e. spirit or soul comes from the divine heaven.

The ancient minds of Greek philosophers viewed humans as part of the universe. Anaximnader argues that the necessity of nature is not understood by humans, Herakleotis argues that humans must comply with natural order, Parmenindes further views that nature and life have a fixed order. It can be

concluded that according to philosophers, law is not limited to society. Law covers the universe, so there is no distinction between natural law and positive law.

The Sophists in the fifth century, namely Protogoras, one of the Sophists, stated that the citizens of the police determine the contents of the law, so that good and fair does not depend on natural rules, but decisions made by humans in the form of positive legal rules.

In ancient Greece, law was influenced by natural law, natural law was ruled by human law. This view serves to regulate human life in accordance with its essence. The rule of law from God functions to regulate all human life and functions to maintain the public interest, protect rights, achieve justice, the rules from God are in the teachings of each religion. In modern times in the form of law created by humans by determining the rules in social life, the rules made by humans must be made in writing and binding which is better known as positive law or legal positivism.[1]

Legal positivism is influenced by the thoughts of John Austin, in his book Province of Jurisprudence Determined which contains law as an order in the form of coercion. Meanwhile, Hans Klesen's pure legal positivism is in the form of a normative legal order that regulates human behavior for good behavior[2].

Biography Jhon Austin

John Austin was born in Creating Mill, Sulfox England. Born on March 3, 1790, his parents named Johnathan and Anne Austin. His father worked as a wheat farmer in southern England, adhering to absolute monarchy on the European continent. The life of John Austin in the 19th century, where this period experienced great shocks along with the French revolution. Austin first studied law in 1812, served in the military and became a legal practitioner but was not very successful, only being able to solve a few cases. In 1820 Austin left the world of practice, and chose the study of legal theory. This year also Austin married Sarah Taylor, a beautiful and intelligent woman who helped inspire Austin's work. Since marrying Austin, mingled with young intellectuals John Stuaart Mill and James Mill part of Ultilatiran Bentham. In 1860 Austin founded University College London, earning the title of professor of law and international law at his first university. Asutin studied civil law and modern law in Germany, Austin's teachings were influenced by the thoughts of Taihbut 1772-1840 German jurists as a figure in the school of philosophy. Defending the notion of natural law and rational law, his arrival in Germany Austin experienced a fierce legal debate between the school of legal philosophy and the school of history by Savigany.

When teaching Austin law lectures attended by figures Stuart Mill, Geogre Cornwall Lewis, Samuel Romily as Bentham's inner circle, unfortunately many students were not interested in attending Austin lectures so that in 1832 - 1834 Austin stopped teaching and declared retirement. However, the material from his lectures was recorded, the work of Austin the Province Jurisprudence Determance which became a reference for law in England. After Austin's retirement as the Criminal Law Reform Commission in England in 1833, unfortunately Austin's opinion on this commission did not get support and declared it quits in 1836. In the same year Austin was appointed Commissioner of Malta in England, Austin lived in Paris in 1848 and then Austin returned to Surray England in 1859 until he died.[3]

[1] Dr. Theo Huijbers *"Filsafat Hukum Dalam Lintas Sejarah "*Yogyakarta: Kanisius. 1982. Hal 284
[2] Hans Klesen *"Teori Hukum Murni Melalui Dasar Dasar hukum Normatif* "diterjemahkan oleh Raisul Mutttaqim. Bandung: Nusa Media. 2018. Hal 4
[3] David Deyzehaus *"Khazanah Jhon Austin"* Pajajaran Jurnal Ilmu Hukum volume 3 No 2 tahun 2016 (issn 2640-1543) (e issn 2442 9225) hal 436-347.

The Effect of Natural Law on Legal Positivist

According to Soetandyo Wignjosoebroto interpreting theory as a construction of human thoughts or ideas, which are built with the intention of depicting reflective phenomena of events in the human senses into in abstract reality and in cronrecto reality. Neuman explained that theory is a system that is structured and connected to one another on various knowledge that exists in the world[4].

Theory is indispensable as a science of knowledge, including studying the law is also required a legal theory. JJ. Bruggink explains that legal theory is a statement that is interrelated, with the rule of law and legal decisions. Bruggrink further defines legal theory in a broad sense, referring to understanding the nature of the various branches of legal theory, namely the sociology of law. Legal theory in the narrow sense of the application of formal law / normative law.

The development of legal science cannot be separated from legal theory originating from events that will be studied through observation and experience, resulting in legal theories. Legal theory Legal postivism is influenced by the doctrines of world leaders, namely John Austin, Hans Klesen, Hart. Focus This paper will discuss the influence of natural law on Jhon Austin's legal positivism.

The theory of positivism developed in the 19th century, the meaning of legal positivism is an understanding which argues that every methodology to find the truth of the current treats reality as an objectivity, there are several basic principles of legal positivism, namely;

a. A state legal order is not based on social life (Agus Comte and Spencer), Von Savigny, but rather a form of positive law by the competent authority.

b. The law must only be seen in a formal form and free from content / substance.

c. The content of the law is acknowledged to exist, but it is not the language of legal science which destroys the scientific truth of the science of law.

A study of legal positivism is very much needed as a theory as part of legal science, several figures who represent legal positivism, namely Legal Theory as a Coercive Order by Jhon Austin.

According to Austin, law is an order from a ruler, namely a sovereign ruler in a state of origin, law is a logical system that is fixed and closed so that jurisprudence is seen as positive law that fulfills the elements of command, obligation, sanction and prayer.

Interpreting the concept of law simply in the form of commands (commands) and custom (custom) in his book Austin Province Of Jurisprundence Determined, the Austin doctrine is conveyed by a command that is accompanied by a threat to be obeyed. In the UK the order is made by the highest parliamentary legislator in the UK, this order applies to subordinates (subordinates). The Queen of England in Parliament cannot comply with the rules made by British parliamentary legislators. Because the Queen is the higher and highest position in a royal government, this has become a custom custom in England. The contents of criminal law must be fulfilled as an obligation, if they do not comply, they violate the law and are found guilty. The UK criminal code establishes behavior to do good and not to do wrong, punishments or sanctions are given to people who break a rule.

British private law governs individuals between private individuals, power is not in the parliamentary legislator but the power of the parties. The power to make a contract agreement and the power to make a will, there are legal qualifications of maturity or common sense for the party who entered into

[4] WL. Nemuan. *"Social Recaerch Methods"* London: Land and Barcon. 1991. hal 2

the agreement. public policy regarding contracts or rules: rules againt accumulations in wills or cooperation agreements, violations of private law in the form of threats to provide compensation for damages to the aggrieved party. Actions as a violation of obligations are referred to as violations and compensation, other legal as sanctions[5].

Examples of private law are making a will, marriage, contracting cooperation agreements, there are no rules that are coercive and threatening. For example, in the case of A marrying B, in marriage there should be no element of coercion. C and D enter into a cooperation agreement in the contact of the cooperation agreement there must be an element of maturity and common sense, cooperation that is built on the basis of willingness. E makes a will on the assets that will be passed on to their children, making a will must not be coerced by others, including their children, must be based on the awareness of the maker of the will.

English criminal law regulations contain orders accompanied by threats, in criminal law distinguishing between certain behaviors that are prohibited by regulations and sanctions aimed at preventing them. The analogy is that if someone is going to violate a rule, that person will think first for fear of the imprisonment threat that will be received. While customs in England, one of the modern and developed countries in Europe, do not include a source of law, customary law is only subordinate. It is interpreted as an egilator bandan through the law on the legal status of customary regulations. The legal system is carried out by the courts, customary regulations are not written legal systems, only apply orally in indigenous peoples. The explanation of this customary law is that customary regulations do not have legal status until they are used in legal cases, customs obtain legal status from orders secretly by the holder of the highest sovereign power.[6]

1. HLA. Hart

Hart argues that the law is a human command, there is no relationship between law and morals, existing law, and the law that should be. Legal analysis is continued with cause and effect. The legal system of predetermined legal rules without social demands, wisdom, norms, morals, moral judgments cannot be given or maintained, such as statements of facts, rationales, instructions.

The distinction between morals and law is not related to people's behavior, for example, people who are about to commit suicide are against moral values as well as against the law, the prohibition to kill and take the lives of others is a moral and legal value. Behavior from external takes the lives of others, internal behavior in the form of an intention to take the lives of others. Law comes from moral behavior, morals command and prohibit legal norms, and vice versa, morals prohibit breaking the law[7].

Moral comes from conscience, not to violate the rule of law. Law and morals are part of justice, according to Hart, the characteristics of justice distinguish between moral principles, not just forms of rules of social behavior. The general principle of justice is that everyone has the right to status and equality. The distribution of justice is also not based on an equal basis, but on the needs of each individual[8].

Hans Klesen's pure legal theory

Pure legal theory is a science that comes not from the will, desire, but in the form of knowledge about existing laws not what they should be. Legal science as normative is not from natural law, formal legal theory contains ways of setting, changing content, specific patterns, the relationship between legal theory and positive legal systems are interrelated.

[5] Jhon Austin yang diterjemahkan olehM Khozim *"Hukum Sebagai Perintah Paksaaan "*. Bandung: Nusa media. 2018. Hal 32-39
[6] Jhon Austin diterjemahkan oleh M Khozin *"Province of Jurisprundence Determined "*. Bandung: Nusa Media. 2018 hal 230
[7] Hans Klesen. diterjemahkan oleh Raisu Muttaqim *"General Theory Of law and State"* Bandung ; Nusa media . hal 68 dan 75
[8] H. L. A Hart diterjemahkan oleh M. Khozim "The *Concept of Law"*. Bandung; Nusa media. 2014. Hal 240

Method

This research is a research with normative juridical method. The approach in this research is an analytical approach and a library approach. The basis of pure legal theory from Hans Klesen comes to the conception of legal science, that is a normative understanding of the meaning of positive law. So that legal science only studies legal norms, while legal theory (legal theory) theory about positive law uses a juristic understanding method by looking at law as a normative determinant of accountability between right and wrong behavior.

Soerjono Soekanto and Sri Mamuji explained the notion of normative law called literature study how to research library materials or secondary data. law) then analyzed using the doctrine of John austin, HLA. Hart , Hans Klesen and others.

Discussion

The legal order or legal system of a dynamic type, legal norms contain the contents of human actions that have legal rights obligations in accordance with moral values. Legal norms are made according to certain rules as the highest legal order. Establishing, deleting, granting, revocation is a legal order. The statement that everyone produces or sells liquor must be punished, the statement is a legal norm. The law is always identical with positive law, the location of legal positivism in the fact that events that occur can be made, removed from human actions. That is what distinguishes natural law and positive law from legal moral reasoning. Positive legal norms are the basic rules of a positive legal order, legal events are the beginning of legal norms with dynamic characteristics[9].

Hans Klesen's pure legal theory as a positivist legal theory about the doctrine of positive legal norms, according to Klesen the constitution is a specialty of positive law, the constitution is the highest level of positive law. The constitution is understood as a set of positive norms that regulate legal norms that are carried out by individuals and are made through the legislature. constitution in the form of written rules in the form of the constitution and other legislation. Furthermore, Klesen, general legal norms from statutory regulations are carried out by law enforcers, namely courts and government organs. The category of legal norms consists of formal and material legal norms. Formal law norms governing organizations, courts, government related to civil, criminal, administrative processes. Meanwhile, material legal norms contain court decisions and administration including civil law, criminal law, administrative law.[10]

Empirical Legal Theory

Legal science is studied as an empirical science, distinguishing between facts, norms, decisions. Empirical legal theory is free, there is a separation between law and morals, between law and politics interpreted by legal practitioners. Included in the empirical legal theory are the history of law, comparative law, sociology of law, anthropology of law, psychology of law.

The connotation of the term empirical contradicts experience and metaphysics, positive legal theory is parallel to empirical natural science, natural law doctrine is parallel to metaphysics. Normative law, describing law is different from legal sociology to describe its object. The sociology of law statement is a statement of a kind of natural law, the analogy of a positive legal statement is intended to describe the analogy of a legal event related to other events.[11].

[9] Hnas Klesen diterjemahkn oleh Raisul Muttaqim*" Teori Umum tentang Hukum dan Negara ".* Bandung; Nusa mdia. 2014. Hal 163-164
[10] Hans Klesen diterjemahkan oleh Raisum muttaqim *"Teori Hukum Murni"*. Bandung; Nusa Media. 2018. Hal 252-253
[11] Hans Klesen diterjemahkan oleh Raisum Muttaqim *"Teori Hukum Murni".* Bandung; Nusa Media. 2014 Hal 236

The legal task of a theory cannot be separated from the legal paradigm adopted, adherents of ancient Greek natural law have the task of creating justice and welfare, while positive law is to promote legal certainty, justice, welfare and guaranteed social order. The task of law according to the sociological flow of jurisprudence is to provide real welfare, not just a formal process. So the paradigm adopted is legal socialism which is part of the positivism paradigm[12].

Legal idealism comes from the ideals of the law that apply generally formulated in legal principles in the form of upholding human rights, the rule of law, determining the meaning of law in the form of orders and prohibitions, and adjudicating institutions. Positive legal idealism needs to be done systematically because law is a system. Legal norms in positive law are not the only rules that regulate human relations. Legal norms, social norms, decency, religion have soft sanctions rules compared to positive legal norms which explicitly mention prohibitions and sanctions.[13]

From the explanation above, it can be formulated the problem that will be raised 1) what are the advantages of the influence of natural law on Jhon Austin's legal positivism? 2) what about the influence of natural law on Jhon Austin's legal positivism?

History of Austin Legal Postivism Thinking

Austin is known as legal positivism thought, explained that Austin's book positivist thought is a vague term (vague) limited by an observation. Positivism is not something that is observed based on experience. Positivism is clear, real and genuine. It is not a metaphysics that cannot be proven in real terms.

The school of legal positivism uses a posited law theory approach to law established by law-making institutions, such as parliament and courts, legal positivism emphasizes the law that sets. Separated from morals and ideas created by humans, Austin, an influential figure in legal positivism, distinguishes the substance of law and existence with moral values, propriety (merit), impropriety (demerit). The law does not question the substance, but the law maker, namely the state.

Austin claims that the law is the command of the ruler (law as commad of the sovieregn), Austin also claims that law is the commad of law giver that law is part of the ruler's product. The law of the product of independent power, Austin's theory is often called the commado theory. The basic idea of this theory points to Betham. Austin found a real command, wanted someone to point at the command[14].

An order to become law must have three elements 1) wish ; will, communication ; communication. Sancions; penalty. Intention or intention is not just an intention, a will on a person's intention to do something and not do something. The communication is meant to communicate on the will of orders, sanctions are interpreted as bad intentions ordered by other parties that are contrary to the will. The institution that has the will is called sovereign / sovereignty, the owner of the highest power of the king and the institution in the form of parliament. According to Austin the owner of the highest power (king) does not have to obey equal power (parliament), the sovereign can order to do something or not to do something.[15]

[12] Dr. Dominikus Rato, S.H., M.Si *" Filsafat Hukum ; Mencari, Menemukan, dan Memahami Hukum".* Jakarta; Laksbang Justitia. 2010. Hal 36
[13] Sutiksno, *"Filsafat Hukum"* Jakarta; Prandya Paramitha. Jilid dua. 2015. Hal 39
[14] Jhon Austin *"Province of Jurisprundence Determined. Edited by wilferd E. Rumbl"*. Cambrige. University Press. 1995. Hal 10
[15] Ibid

The Relevance of the Advantages of the Influence of Natural Law on Jhon Austin's Legal Positivism

Austin explained that the highest power holder is an order from the ruler that must be obeyed (law is command of a lawgiver), because the ruler is the holder of the highest sovereignty. Justice. Austin divides the law into two forms, namely[16]:

1. The law from God for humans (the divine law), the law created by God for His creatures. This law is a moral of human life in the true sense.
2. Laws drawn up and made by humans, which consist of: The actual law (positive law), such as laws made by the legislature such as laws, government regulations and others; Laws made by the people individually, for example the rights of guardians against people who are under guardianship. An untrue law is a law that is not considered a law because it is not stipulated by a sovereign/sovereign body such as the provisions made by sports bodies or students. There are two categories of man-made laws, namely:

a. The real law (properly so called). Political law exercises the rights granted by political authorities.
b. The actual law is not law (improperly so called). This law is made by humans but not as those who have political authority or in exercising the rights they have. This includes what Austin calls existing laws because of analogy, for example the rules concerning a person's membership in a particular group.

Hujbers analyzes Austin's thinking in the juridical field, which has a limited place, namely being an element of the state. The jurisdiction coincides with the territory of a country. Law has the meaning of plurality because there are several fields of law besides the state, even though these fields do not have legal meaning in the full sense. Law in the true sense is law that originates from the state and is confirmed by the state. Other laws can be called laws, but they have no real juridical meaning[17].

The basic concept of analytic law is that which contains the provisions of orders, sanctions and sovereignty. First, the commandment requires the other person to do his will. Second, the ruled party will experience suffering (sanctions) for those who do not implement it. Third, the commandment is a distinction between the obligations of those who are governed and those who govern. Fourth, the order will only be carried out if the ruling party is a sovereign party.

In the end, the main ideas of analytical jurisprudence can be concluded as follows[18]:

1. Not based on good and bad judgments, because these judgments are outside the realm of law;
2. Separation between morals and law;
3. His views are contrary to the schools of history and the schools of natural law;
4. The essence of law is an order from a sovereign power;
5. Sovereignty is outside the law, both in politics and in society, which does not need to be questioned because it is a fact;
6. Austin's teachings do not provide space for laws that live in society.

The analysis that the author puts forward is that legal positivism cannot be separated from the influence of natural law, the law that comes from God to regulate human life. God regulates human life in the form of good deeds and obeys His commands. If humans do bad then God will give "sanctions", which

[16] Ali Rasjidi," *Dasar-dasar Filsafat Dan Teori Hukum"*. Bandung; Citra Aditya Bakti. 2001. Hal 58.
[17] Dr, Theo Huijbers *"Analisis Pemikiran Austin".* Bandung: Nusa Media. 2006. Hal 30
[18] Http: www.blogsoprt.go.id Dr (Cand) Ardiansyah SH.M.H *"Analytical Jurisprudence John Austin dan Ajaran Hukum Murni Hans Kelsen (Positivisme Hukum)"* Kajian Magister Ilmu Hukum.diakses 1 November 2019. Pukul 10.00 wib

he will receive in the hereafter. The level of human obedience will certainly believe in the existence of God as the creator of humans, that obedience will regulate humans to do good.

Natural law that comes from God to regulate human life in the world, if natural law regulates human life is more at the level of obedience, namely religion. So natural law cannot be separated from human regulation in the world, to regulate humans between humans, a regulation in the form of norms and laws is needed. legal arrangements are made at the behest of the ruler, in today's era the order of the ruler can be in the form of an authorized official or the government. The order of the ruler / government to make a regulation in a country, the government as a policy maker and the people as the implementation of the policy.

The current relevance of legal positivism is very much needed in a country, in order to create a good legal order. In the absence of law, the state is guaranteed not to be safe, although it is not yet a full guarantee that state law will be safe. With the rule of law, people who commit crimes will be afraid, because of the threat of imprisonment and fines.

In Indonesia, legal positivism is in the form of legal regulations made by the government, namely; the judiciary as the legislature. Executive agency; The President, Minister, Governor, Regent, Mayor as policy makers in certain fields. Ordinary people can not make a rule, both laws and policy regulations, the people must submit and obey government regulations. Therefore, regulators in the legislative and executive fields, as representatives of the people who are elected through elections, should make regulations that are more concerned with the interests of the people they choose.

Relevance of the Lack of Influence of Natural Law on Jhon Austin's Legal Positivist

The doctrine of legal certainty as a child of the doctrine of legism which is defended by the followers of this pure legal theory, which glorifies rationalism in the study of law and judicial practice is actually a teaching that developed and was supported by adherents in an era when the democratization process was taking place, with the aspiration that power the state must be able to be limited and controlled by law. The state must be constructed as a state of law and not a state of power[19].

According to the legal concept, every citizen and citizen is considered to have the same position, but in the reality of life which is completely contractual in nature, the agreements that occur between parties do not always and forever reflect the protection of balanced interests.

Placing law enforcers to think and act legally formalistically, by placing legal justice as a legal goal. In certain cases, legal positivism cannot provide a solution. Regarding the duties of legislators and legal science, among other things it is said: Das Recht wird nicht gemacht, est ist und wird mit dem volke-Law is not made but grows and develops with the community. Each nation has a volkgeist-people's soul that is different both according to time and place.

Placing judges as mouthpieces of laws who cannot express themselves to make decisions that fulfill a sense of social justice and substantive justice. . The law is in the middle of society, it will not be separated from human life in society[20].

Behind the advantages of legal positivism, it also has disadvantages in the flow of legal positivism. In this school, the law is made in writing, containing the rules of norms and laws along with the sanctions that violate them. The law can be said to be "rigid", the law is made by the ruler, the ruler will use his power

[19] Sotandyo Wignjosobroto, Terwujudnya Peradilan Yang Independen Dengan Hakim Profesional Yang Tidak Memihak Sebuah risalah ringkas, dimaksudkan untuk rujukan ceramah dan diskusi tentang *"Kriteria dan Pengertian Hakim Dalam Perspektif Filosofis, Sosiologis dan Yuridis"* yang diselenggarakan dalam rangka Seminar Nasional bertema *"Problem Pengawasan Penegakan Hukum di Indonesia"* diselenggarakan oleh Komisi Yudisial dan PBNU-LPBHNU di Jakarta 8 September 2006. hal 2.
[20] Sudiyana dan Suswoto. *"Kajian Kritis Terhadap Teori Positivisme Hukum Dalam Mencari Keadilan Substantif".* Yogyakarta Fakultas Hukum Universitas Janabadra. Jurnal Ilmiah Ilmu Hukum QISTIE Vol. 11 No. 1 Mei 2018 Jurnal Ilmiah Ilmu Hukum QISTIE Vol. 11 No. 1 Mei 2018

to regulate all the rules. In Indonesia since independence and the current era, the regulations made by the legislature contain many weaknesses. Because the existing law favors the proponent party, the rules are made based on an agreement between the legislatures without regard to the interests of the people. This gives rise to legal ambiguity and legal injustice. We need a ruler who fully sided with the people in order to create justice for all Indonesian people..

Conclusion

1. The advantages of the influence of natural law on legal positivism according to Austin are to divide the law into two forms, namely the law from God for humans (the divine law), the law created by God for His creatures. Laws are compiled and made by humans, which consist of: Laws that are actually positive laws (properly so called), and laws that are not actually laws (improperly so called).

2. The doctrine of legal positivism, state power must be limited and controlled by law, the state must be constructed as a state of law and not a state of power. Every citizen is considered to have the same position, law enforcers to think and act legally formalistically, by placing legal justice as the goal of law.

Suggestion

1. Natural law that comes from God and the law of legal positivism that comes from the orders of the rulers, the rulers in making regulations should have legal certainty and benefit the community. must reflect the sense of justice in society.

2. The postovist doctrine of law made by the authorities must have a sense of substantive justice and social justice can be achieved.

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