International Journal of Social Science Research and Review

http://ijssrr.com
editor@ijssrr.com
Volume 6, Issue 1
January, 2023
Pages: 378-387

Positive Influence: Separation of Law and Morals in the Pursuit of justice Writer in Indonesia

Eva Dwi Dayati; FX Joko Priyono

Master of Law, Faculty of Law, Diponegoro University, Indonesia

E-mail: evadayati742@gmail.com

http://dx.doi.org/10.47814/ijssrr.v6i1.933

Abstract

The history of positive birth is a claim, criticism or resistance to the flow of idealism and within it the flow of the laws of nature. A stream of idealism assumes the truth exists in the human mind. By the positivism the thinking is challenged because they attempt or wish to release the law's study from the metaphysical, separating the law from the moral. So what one would accomplish in a positive flow is certainty. In practice, the use of legal positivism in a modern state such as Indonesia, they stand in the way of achieving justice in Indonesia. The study aims to see and analyze how concepts of separation of law and morals in a positive flow and how a positive influence on separation of law and morals in an effort to bring about justice in Indonesia. This kind of research is normative yuridis, where the data used was secondary data obtained through literature and documentary studies. The results obtained in the study that the concept of separation of law and morals in positivism is that morals have been discussed at the time of the establishment of regulatory regulations and positive influence have led to failure in efforts to establish justice in Indonesia, where only procedural and substantiating justice cannot be achieved.

Keywords: *Positivism; Law and Morals*

Introduction

Actually the opposition between idealists versus materialists, metaphysics versus positivists. oncologists versus empirical has been going on for quite some time. It means that the positive reinforces the appearance of philosophy. They are as old as philosophy. But even so, they did not flourish until the 19th century when empirianism dominated thinking. Positivism is born and develops in the shade of empiriism[1], It means that between empiricism and positivism cannot be separated. Rapid positive

[1] Muh. Baqir Shadr. 1991. *Falsafatun*a. Bandung: Mizan. hal. 56. Sebagaimana dimuat dalam Johni Najwan. 2010. *Implikasi Aliran Positivisme terhadap Pemikiran Hukum.* Inovatif Jurnal Ilmu Hukum. Vol. 2 (3). Hal. 19. Diakses dari https://online-journal.unja.ac.id/jimih/article/view/199 pada 22 Desember 2022.

development occurs after the creation of the secularization movement, which attempts to strictly separate political affairs (state) and church (religion), and along with the collapse of church dignity, which offers a transcendental base of thought.

The greeks in the beginning still thought that law was a natural necessity (nomos); Human life and the entire cosmos are under the laws of nature. In his development, Aristotle divided the laws in 2 (two) groups of natural laws (laws of nature) and positive laws. The laws of nature as laws never change are in harmony with the natural order, just as positive laws are man-made[2].

Aristotle viewed the truth (theorem, contemplation) as the primacy of life (summun bonum). In this case humans are guided by two guides, sense and morals. Reason (ratio, reason) leads to the introduction of right and wrong in pure reason, as well as to one another to determine what material things are viewed as good for his life. So sense has two function, which is theoretical and practical. While morals, the function of guiding people to choose between two opposing extremes, is in determining justice[3].

The flow of natural law above, is sued, criticized in the denial of a positive flow. Challenged by a positive flow because they wanted to release the law study from metaphysical ora meta juridical, separating law from moral and justice. It is also the history of positive birth. Legal idlers come from a positive streamline. Positivism[4] Born and matted by the big changes that occurred in European society especially after the industrial revolution in England and the bourgeois revolution in France in the middle of the 18th century. Dominance of the king and the church as the old epistemology in Europe began to be challenged, everywhere came thinking disproving the monks' thinking and rajaserta's search for essential truth.

Further, they flourish in continental Europe particularly in France, which is spearheaded by aguste comte. Where positivism wills that every methodology to find truth should treat reality as existing, regardless of an objective preconception. According to lili rasjidi [5] The main principle of positive flow is:

1) Just assume correctly what actually comes up in experience.
2) Only what is literally called and acknowledged as truth, means that not all experiences are counted true, only real ones are true.
3) Only through your light can that true experience be proven.
4) Since all truth can be acquired only through science, then the duty of philosophy is to govern the results of such an examination.

More fully, the principles of positive flow are brought forth by arief sidemaining, as follows [6]:

1) only science can give you a shah knowledge.
2) only facts can be the object of knowledge.
3) The methods of philosophy are no different from the methods of science.
4) The duty of philosophy is to find common principles that apply to all science and use these principles as guides to human behavior and become the foundation for social organizations.

[2] Theo Huijbers. 1995. *Filsafat Hukum.* Yogyakarta: Kanisius.
[3] Bernard L. Tanya, Yoan N. Simanjuntak dan Markus Y. Hage. 2013. *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi.* Yogyakarta: Genta Publishing. Hlm. 41.
[4] Shidarta. 2013. *Hukum Penalaran dan Penalaran Hukum.* Yogyakarta: Genta Publishing. Hlm. 123.
[5] Maryati. 2014. *Kritik Terhadap Paradigma Positivisme Hukum Dan Beberapa Pemikiran Dalam Rangka Membangun Paradigma Hukum Yang Berkeadilan.* Inovatif, Jurnal Ilmu Hukum. Vol.7 (2). Hlm. 79. Diakses dari https://online-journal.unja.ac.id/jimih/article/view/2061. Pada 8 Desember 2022.
[6] Arief Sidharta. 1994. *Filsafat Hukum Mazhab dan Refleksinya*. Bandung: Remaja Rosda Karya. Hal. 50. Sebagaimana dimuat dalam Johni Najwan. 2010. Ibid. Hal. 21.

5) all interpretations of the world must be based solely on empirical experience.
6) the point point to natural sciences.
7) seeks to acquire a singular view of the world of phenomena, both the physical world and the human world, through applications of methods andan expanding reach of natural sciences.

According to erlyn indarti, the positivism (legal positivism) is included in the "umbrella" positivism paradigm along with the "legal philosophy" and "natural law" flow. According to him, legal positive views of the law as "law as what it is written in the books," meaning positive rules that apply generally in abstract to at a time or place [7]. To the positivism of the law, there is no virtue in enforcing the law, for it is in essence only a set of subjective principles about human behavior. Since the subjective principle is constantly changing, then to the positivism of the law, recognizing the existence of morality in the law is the same or identical by introducing a principle of uncertainty of law. For kelsen in the pure theory of law and subjective Labour groups that support separate laws from morals to them laws are not moral and not fact, the legal point for his medical commission is formalism [8].

They are part that cannot be removed from the influence of positive development, because legal positivism is born from a streamline that is beginning to enter the law. Further, these positivism enters legal thinking, or they come into existence called positivism law, which is spearheaded by Hans kelsen with his famous concept of the pure theory of law. The law is not about justice, morals or formal values. A theory of pure law pursues more certainty of the law than justice.

Wise originators separate legal domains from moral domains. Positive or factual experts establish that the essential nature of the law is independent of morals and do not see whether morality is understood to be different from immorality, expedient or factual[9].

Legal positivism develops in a way that has an impact on its development in science and practice. As it is the will of legal thought that relinquishes from such things as islamists or metaphysics as the jurist has taught, then the truth is only in the form of the law. Something that has been in accordance with the law is regarded as something that is right and can provide justice.[10]

But in its development there has been much criticism about its effect on people's justice. The development of society cannot be released from environmental and social reality. So that the use of law independent of morals could not solve the problem is in society, for it is defined only as what is written.

Formulation of the Problem

The problem raised in this study is:

1. How is the concept of separation of law and morals in positivism?
2. How is a positive influence on separation of law and morals in the outworking of justice in Indonesia?

[7] Erlyn Indarti. 2010. *Diskresi dan Paradigma Sebuah Telaah Filsafat Hukum.* Disampaikan pada Upacara Uenerimaan Jabatan Guru Besar dalam Filsafat Hukum pada Fakultas Hukum Universitas Diponegoro. Semarang: Badan Penerbit Universitas Diponegoro. Hlm. 21.

[8] Ridwan, Khudzaifah Dimyati, Absori. 2015. *Relasi Hukum Dan Moral: Sebuah Potret Antar Mazhab Dan Konteks Ke-Indonesiaan.* Program Doktor Ilmu Hukum Universitas Muhammadiyah Surakarta. Hal. 181. Diakses dari https://publikasiilmiah.ums.ac.id/xmlui/handle/11617/9401 Pada 22 Desember 2022.

[9] Cahya Wulandari. 2020. *Kedudukan Moralitas Dalam Ilmu Hukum*. Jurnal Hukum Progresif. Vol.8 (1). Hlm. 4. Diakses darihttps://scholar.google.com/scholar?q=related:BSe3k8P8I7UJ:scholar.google.com/&scioq=KEDUDUKAN+MORALITAS+DALAM+ILMU+HUKUM+Cahya+Wulandari&hl=en&as_sdt=0,5 Pada 8 Desember 2022.

[10] Ibid. Hlm. 2.

Research Methods

The study used normatif juridical research methods. According to soerjono soekanto and sri mamlaw study or so-called law of literature study is a legal study conducted by the study of literature or a mere secondary data[11]. The data used in this study is secondary, the dimaana data collection techniques are done through documentary studies and literature studies. The data is presented in a descriptive analytical form, which means itis presented in descriptive texts to provide such detailed data as facts or research.

Discussion

1. Concept of Separation of Law and Morals in Positivism

Before discussing how the concept of separation of law and morals is discussed, then we will see what the definition of law and morals is. The legal terms used in today's English version come from the word hukm, which means norms or rules, rules, measures, guidelines used to assess human behavior and matter[12]. Law is a rule (order) asa system of rules (rules) of human behavior, so the law does not point to one single rule (rule), but a set of rules (of) that have a unity so it can be understood asa system. as etymologically, the Dutch moural, meaning decency, meaning decency. Being in terms of, morality is defined as a teaching of good or evil deed and conduct [13].

When the positivism observed the law as an object of study, he regarded it only as a social symptom. They were generally acquainted with only positive science, and so the positivism of law knew only one type of law, a positive one. Positivism next gave rise to legal analytical positivism, analytical jurprudence, pragmatic positivism, and kelsen's pure theory of law [14].

Positivism of the law provides a separation between law and morality. Wise originators separate legal domains from moral domains. Positive or factual experts establish that the essential nature of the law is independent of morals and do not see whether morality is understood to be different from immorality, expedient or factual [15]. As a disregard for what lies behind the law, which is the value of truth, welfare and justice that should exist in law, the positivism only adheres to the following principles:

a)laws are commandments from humans being.
b) There needs to be no link between law and morals, between law that exists (das sein) and the law that should (das sollen).
c)The analysis of worthy legal concepts continues and must be distinguished from historical studies of causes or origins of legislation, as well as from critical assessments.
d) decisions can be logically deduced from existing regulations without referring to social purposes, wisdom, and morality.
e) judgment (judgment) is morally unenforceable and maintained by rational reason, confirmation, or testing.[16].

[11] Salim HS dan Erlies Septiana Nurbani. 2013. *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi.* Jakarta: PT. Raja Grafindo Persada. Hal. 12.
[12] Muhammad Daud Ali. 2002. *Hukum Islam: Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia*. Jakarta: Raja Grafindo Persada. hlm. 39.
[13] Ahmad Mansur Noor. 1985. *Peranan Moral dalam Pembinaan Kesadaran Hukum*. Jakarta: Ditjen Binbaga Islam Departemen Agama RI. hlm. 7.
[14] Arief Sidharta. Op. Cit. Hal. 51.
[15] Cahya Wulandari. Ibid. hlm. 4.
[16] W. Friedman. 1996. *Teori dan Filsafat Hukum*. Jakarta: Rajawali. Hal. 147. Lihat juga Satjipto Raharjo. 1996. *Ilmu Hukum*. Bandung: Citra Aditya Bakti hal. 148. Sebagaimana dimuat dalam dalam Johni Najwan. Op. Cit. Hal. 25.

On the other hand, the development of positive thinking known to auguste comte was followed by John Austin as a jurist who introduced positivism to the law. Positivism of law according to John Austin had to separate positive laws from moral ones. The positive laws of a sovereign ruler are accompanied by threats or penalties and an authority that subjects no one but rules by society. Of course the positive or stagnant view of the law that John Austin influenced was that auguste comte thought it was not correct to be applied to the positivism of the law, because the object of the law itself was a person moving dynamically, unrigid or stagnant. It is expected that laws can be applied to meet people's needs, not as John Austin did in separating positive laws from moral ones. Associated with objective realities, positive laws cannot just interpret values by pronouncing value free. Positive laws are made by being bound by time and space in particular interests that certainly cannot be separated from certain values that behave as morals [17].

Positivism of the law according to Hans kelsen describes it asa system of norms based on necessity (das sollen), a moral and value is thought to have been essays under consideration in the regulations of the legislation being established. According to the theory of pure law developed by Hans kelsen, laws are obeyed because they were written and validated by rulers, not in good or fair regard. The law is viewed as separate from morals, although the positive acknowledges that its development includes links between theology, moral discipline, sociology, and politics. Morals are considered part of the law when attestation and recognition by authority [18].

The pure theory of law refuses to be a metaphysical study of law. This theory looked for the basis of the law asa basis for validity, not on the meta-juridis principles, but through a juridical hypothesis, built with a logical analysis based on the actual yuristic way of thinking. Kelsen wanted to put down the notion of law as adopted by the exponent stream of natural law. Therefore, every law norm must exist in its object realm as positive (all law is, law), defined as a concrete contractually agreement between people. The law is no longer defined as abstract moral principles of metayuridis on the nature of justice, but iushas experienced positivisation as legeor lex, to secure certainty as to what is lawful and what might be normative should be declared as anything other than lawful [19].

In addition to Hans kelsen, one of the scientists who pioneered positivism was H.L.A hart. But there's little difference with kelsen on the theory of separation of laws and morals. H.L.A hart provides a nonextreme separation between law and morality, as it is the minimum requirement, of which each person is limited to regulating the changes in society. It implies that positive laws are often lagging behind the development of society, so there is a need for a moral room that should be occupied when it comes to enforcing law enforcement. In harmony with one part of positive law according to H.L.A hart, secondary rules include the rules of the law that give rights and obligations to the state ruler of change, rule of adjudication and rule of recognition. Associated with this rule of recognition indicates a close link between law and society.

The most important and fundamental point of H.L.A hart's thinking was that it rejected John Austin's thinking that law authority asa fact of command of habit and obedience. The real basis of the law lies in access by the community asa whole of the basic rule that gives specific individuals or groups the authority to make laws. So the legal proposition is valid not only by the dictates of rulers to be obeyed, but even more so by the social conventions that represent the acceptance of society's acceptance of the rule scheme which empowers the person or group to create a legitimate law [20].

[17] Ibid. hlm. 4-5.
[18] Hans Kelsen. 2011. *Teori Hukum Murni Dasar-Dasar Ilmu Hukum Normatif*. Bandung: Nusa Media.
[19] Mahrus Ali. 2017. *Pemetaan Tesis dalam Aliran-Aliran Filsafat Hukum dan Konsekuensi Metodologisnya*. Jurnal Hukum Ius Quia Iustum. Vol. 24 (2). Hal. 221. Diakses dari https://journal.uii.ac.id/IUSTUM/article/view/8676. Pada 8 Desember 2022.
[20] Ibid. Hlm. 5-6.

2. Positive Influence on Separation of Law and Morals in an Effort to Bring About Justice in Indonesia

They were generally acquainted with only positive science, and so the positivism of law knew only one type of law, the positivism of it. This term, in its most traditional definition of the nature of the law, is defined as positive norms in the legislation system [21]. In a positive flow, laws rise as the explicit product of a certain legitimized source of political power. In this case the main law has been established as explicit commands that are positive in order to ensure their certainty, such as national legislation in a country. To that end, it could be said that the current operation is based primarily on the legislative positive norms of the positive normative domain [22]. The positivism of laws indicates the fact that they are made and abolished by human actions, so apart from morality and systems of norms [23].

The positivism of the law holds that it must be seen in the terms of the law, for only then can the terms of the law be verified. As for those outside the law cannot be entered as a law because it is outside the law. The law is to be separated from morals, although the positivists acknowledge that a focus on legal norms has to do with moral discipline, theology, sociology, and politics that influence the development of the legal system. Morals are acceptable only in the legal system when recognized and validated by ruling authority by enforcing itas law[24].

Positivism of the law as applied to the thinking of law in human domes, it would mean the release of a juridical sense of law as held by the thinkers of natural law (naturalist). So a positive flow strives to create legal certainty. As John Austin said, certainty of the law is the very last objective of the positivism of the law, in which to attain legal certainty, it is necessary to separate laws from morals in order to produce a logical, fixed, and closed system.

On the basis of the law's moral adherence in Indonesia shows integrational relations, it constitutionally does not differentiate between morals and laws, in the act of values that are considered morally even positive by law, but the phenomenon of integrative relas above assumes a shift in pattern when at the level of enforcement or execution in the courts. Independent relations were seen at the execution or the handlers of a case of moral-ethics violations, said to be independent because of violations of the law and violations of the ethics were made as such and consequently there were two different agencies dealing with ethical violations and lawlessness, the treatment being independent by any agency handling the professional affairs of each perpetrator. Interestingly, the ruling of each such agency is as binding and final as is judicial decision [25].

They are further developed in Indonesia by a perceived dominance of positive thinking, and they have negative, adverse implications over the positive. On the other hand, society holds high hopes for the existence of law in order to bring justice rather than mere legal certainty. Instead of being able to satisfy a sense of justice in society, law enforcement that sees from the positivism of the law as truth as law will provide only truth coherence with procedural justice. The law is justified in accordance with the law. The law is supposed to have delivered justice when it has been in accordance with the rules of the law. A man endowed by god with the heart becomes dull and functions like a machine that prints everything

[21] Mario Julyatno dan Aditya Yuli Sulistyawan. 2019. *Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum.* Jurnal Crepido Jurnal Mengenai Dasar-Dasar Pemikiran Hukun; Filsafat dan Ilmu Hukum. Vol. 1 (1). Hlm. 17.
Diakses dari https://ejournal2.undip.ac.id/index.php/crepido/. Pada 8 Desember 2022.
[22] Theo Huijbers. 1993. Filsafat Hukum dalam Lintasan Sejarah. Yogyakarta: Pustaka Pelajar. hlm. 122.
[23] Mario Julyatno dan Aditya Yuli Sulistyawan. Ibid. Hlm.19.
[24] Merdi Hajjii. 2013. *Relasi Hukum dan Politik dalam Sistem Hukum Indonesia.* Jurnal Rechtsvinding Media Pembinaan Hukum Nasional. Vol. 2 (3). Hlm 365. Diakses dari https://rechtsvinding.bphn.go.id/ejournal/index.php/jrv/article/view/65/59. Pada 8 Desember 2022.
[25] Ridwan, Khudzaifah Dimyati, Absori. Op.Cit. Hal. 184.

according to what is literally written, does not interpretation to give more room for justice [26].Such a concept certainly does not fit the goals of the Indonesian people as reflected in the fourth paragraph of the constitution of the republic of Indonesia in 1945, which marks the realization of social justice for all people of Indonesia.

For example, a view or interpretation of chapters 284 of the criminal code on adultery presents a different view of morality. Article 384 of the penal code is part of the Dutch heritage, which is not in accordance with the moral standards of Indonesia. The separation of laws and morals as found in chapters 284 of the criminal code on adultery often leads to conflict. In the opinion of achmad ali[27] In his essay entitled "from formal legalistic to delegalization," failure to provide only procedural justice and cannot produce substantial justice is due to the perceived law enforcement apparatus as an influence of positivistically stiff.

The effect that development of understanding on Indonesia, with the influence of positive teaching of the law, would appear that the rigidity of the laws thought that Indonesia would not be able to create justice, the source of a paradigm of positivism and of modern law. The prevailing legality principle in Indonesia in particular, further the way the substantive justice would be embodied. Law enforcement officials are locked in the positivity of the law and few who dare to rule by interpreting the existing laws. Moral values should never be separated from the law itself. The law of no moral value in it is merely words that give rules or terms as a norm but omit the values embodied in pancasila and will be implemented by law. It should reflect the moral value of the place where it grows. The value of laws and morals in the national legal system should be based on pancasila [28].

In practice, the use of the positive in modern law impedes the search for truth and justice according to conscience. The search was hindered by procedural walls created by the law itself. So it appears on the surface is formal justice/procedural that has not represented or satisfied the conscience[29]. Lili rasjidi, says that in fact a positive stream of law approach does not fully solve the problem. The solution of problems oriented by legislation or positive laws will touch only the root of the problem [30].Thus, a positive influence on separation and morals leads to failure in efforts to bring about justice in Indonesia, where justice is managed dural rather than substantiating justice as mentioned in the opening of the 1945 and pancasila constitution.

The lesson to be learned is that the justice formal enforced by positive law (laws) in Indonesia that are said to uphold the rule of law, has not been able to bring about substantial justice. Efforts to bring about substantial justice could fail as a result of a procedure that must be met in compliance with the legality of the modern legal system. Through law, certain individuals can corrupt the genuine conscience or good sense behind the statement "all things must be lawful," but in the manner in which such judicial proceedings are carried out, it is evident that the realization of justice can be obstructed by the very procedures or formalities created by the modern law itself. The term rule of law has always been defined by law, so the legal matter is routed into a mere question of juridical technical skills[31].

Then, for professional sake there isa canonization of positive laws. Therefore, they must be maintained under the predominant status of law, even if positive laws direct Indonesia into helplessness, revealing cases that lead to a national ethic decline. Therefore, it is essential today to form a mental and

[26] Cahya Wulandari. Op.Cit. Hal. 9.
[27] Adjie Samekto.2008. *Justice Not For All Kritik Terhadap Hukum Modern Dalam Perspektif Studi Hukum Kritis*. Yogyakarta: Lengge Printika.
[28] Cahya Wulandari. Op.cit. Hal. 10-11.
[29] FX Aji Sameko. Op.Cit. Hal.2.
[30] H. Lili Rasjidi. 2009. *Dinamika Situasi Kondisi Hukum Dewasa Ini dari Perspektif Teori Dan Filosofikal*. Bandung. Hal . 4-5. Sebagaimana dimuat dalam Asep Bambang Hermanto. Op.Cit. Hal. 110.
[31] Asep Bambang Hermanto. Ibid. hal. 115-116.

moral integrity. In accordance with President jokowi's phrase, in nawa ideals it is necessary to "mental revolution" or in line with the first ir President's words. Soekarno, this nation needs "nation and character building". Law enforcement is effective and justice can be achieved, so its moral and integrity enforcement is the top priority, not the first or first legislation [32].

Conclusion

First, positivism of the law according to Hans kelsen describes the law asa system of norms based on necessity (das sollen), a moral and value is thought to have been essays under consideration in the regulations the legislation has been established. According to the theory of pure law developed by Hans kelsen, laws are obeyed because they were written and validated by rulers, not in good or fair regard. The law is viewed as separate from morals, although the positive acknowledges that its development includes links between theology, moral discipline, sociology, and politics. Morals are considered part of the law when attestation and recognition by authority. So in practice the law had to be freed from the meta juridical anoids belonging to it had to be legalized between law, morals and justice.

Second, in a positive flow, laws rise as the explicit product of a certain legitimized source of political power. In this case the main law has been established as explicit commands that are positive in order to ensure their certainty, such as national legislation in a country. According to the positive influence of the dapkit which cannot be incorporated into law because it is outside the law and therefore must be separated by morals. The law is justified in accordance with the law. The law is supposed to have delivered justice when it has been in accordance with the rules of the law. Such a concept certainly does not fit the goals of the Indonesian people as reflected in the fourth paragraph of the constitution of the republic of Indonesia in 1945, which marks the realization of social justice for all people of Indonesia. Thus, positive influence results in a failure in efforts to bring about justice in Indonesia, where its only procedural and unsubstantiating properties cannot produce substantive justice results from the perception of law enforcement officials who act as a result of their positive and rigid influence. The prevailing legality principle in Indonesia in particular, further the way the substantive justice would be embodied.

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[32] Ibid. Hal. 116.

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