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Hans Kelsen's thoughts about the law and its relevance to current legal developments

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Abstract. The purpose of this study is to describe and explain Hans Kelsen's ideas on law and analyze its relevance to current legal developments. This research is a normative legal research with a statutory and conceptual approach. The results of the study found that there are 2 (two) main ideas or theories about law that proposed by Hans Kelsen, namely (1) pure legal theory that views "what the law is" or "law as such", therefore the law must be separated from morality, justice, and others; and (2) the theory of hierarchy of norms which views that legal norms in the state have a hierarchy or level (the higher norms and the lower norms).. Pure legal theory has no relevance to current legal developments, because currently judges are tasked with enforcing law and justice and are required to explore the values and sense of community justice in making decisions. The government is also given the authority to act based on discretionary authority. Theory of hierarchy of norms still has relevance to current legal developments because currently a judicial review mechanism is used on legal norms to maintain their validity.

Keywords. Hans Kelsen, the Pure Legal Theory, the Theory of Hierarchy of Norm

Introduction

Hans Kelsen (1881-1973) was one of the exponents of the legal positivism school that was popular among legal scientists, besides Bentham and Austin. As a positivist, Hans Kelsen also argues that law is an order of human behavior [1]. Hans Kelsen views the law as an order to regulate human behavior. The order is a system of legal rules. Therefore, Hans Kelsen views law as a legal system. Hans Kelsen views law as a just rule, so that law is different from justice.

Although Hans Kelsen is a positivist, there are some opinions that differ from other exponents of the school of legal positivism, such as Jeremy Bentham and John Austin. These differences include, among others, the validity of legal norms. According to Hans Kelsen, the validity of legal norms lies in their conformity with higher legal norms. Meanwhile, Jeremy Bentham [2] with his utilitarianism stated that the validity of the law lies in the command and its benefits for the community at large. This is also different from the opinion of John Austin that law is set by political superiors to political inferiors [3], so that the validity of the law lies in the sovereign command which is backed by legal sanctions for those who violate it.

Based on this view, Hans Kelsen issued two theories that are currently widely debated by legal scientists. The two theories are the pure legal theory and the theory of the hierarchy of norms (stufent theory). With a pure legal theory, Hans Kelsen states that law must be separated

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from non-legal factors such as justice, morality, religion, good and bad values, politics, ethics, culture, economy, and other non-legal factors [4]. Hans Kelsen only sees about "what the law is" on given time and place and not "what the law ought to be" or what the ideal of law. As for the theory of hierarchy of legal norms, Hans Kelsen states that legal norms in a country are tiered and multi-layered, so that lower legal norms originate from higher legal norms.

The description of previous research to show the originality of this article are: First, tracing the roots of Hans Kelsen's thoughts on stufenbeautheorie in a normative-philosophical approach [5]. The focus of this article is to find out the basics of Hans Kelsen's thoughts on the theory of legal norms level using a normative-philosophical approach. Second, the comparison of Hans Kelsen's thoughts on law with Satjipto Rahardjo's ideas on progressive law based on legal theory [6]. This paper focuses on the comparison of Hans Kelsen's thoughts with the pure theory of law and progressive legal theory proposed by Satjipto Rahardjo. Third, Hans Kelsen's theory of positivism influences the development of law in Indonesia [7]. This paper discusses Hans Kelsen's thoughts, especially regarding positivism and its influence on the development of law in Indonesia. The three writings have similarities with this paper, especially they examine the legal theory proposed by Hans Kelsen. However, this paper has differences with these there writings because this paper examines two basic ideas about law from Hans Kelsen, namely the pure legal theory and the hierarchical theory of legal norms. In addition, this paper also analyzes the relevance of these two ideas of Hans Kelsen to the development of law in Indonesia today.

Based on the background above, the problems in this paper are about (1) Hans Kelsen's thoughts on law, especially regarding pure legal theory and the theory of hierarchy of legal norms; and (2) the relevance of these two ideas of Hans Kelsen to the development of law in Indonesia today

Research methods

This research is a normative legal research using 2 (two) approaches, namely the statutory approach and the conceptual approach. The legal materials used are primary legal materials such as legislation and regulations and secondary legal materials in the form of legal textbooks and legal journals. The legal materials were analyzed using normative (prescriptive) analysis techniques to answer the two problems in this paper.

Results and Discussion

Hans Kelsen's Thoughts on Law

Hans Kelsen was born on October 11, 1881 in Prague, Czechoslovakia. He graduated from law studies and obtained a doctorate degree at the University of Vienna in 1906, and obtained a professorship in law and politics from the University of Vienna in 1911. Later, he was also appointed legal adviser to the Austrian Government. One of his very big roles was when he was directly involved in the drafting of the Austrian constitution which was passed in 1920 and the adoption of the Constitutional Court whose main function was to examine laws against the constitution, so it was known as the Kelsenian Model which is currently expanding to continental European countries and countries affected by the continental European legal system. Political developments in Europe at that time, forced Hans Kelsen in 1941 to move to the United States. He teach at Harvard University and was appointed Professor of Political Science at the University of California (Berkeley).

Hans Kelsen is one of the main exponents of the school of legal positivism. Although in several respects, the views on law that he proposed differ from other exponents of legal positivism such as John Austin and Jeremy Bentham. Among Hans Kelsen's most famous works

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are the books entitled "General Theory of Law and State" and "Pure Theory of Law". From the two books, there are 2 (two) thoughts of Hans Kelsen which have always been a discourse in legal theory and legal philosophy, namely pure legal theory and theory of hierarchy of norm. Hans Kelsen's two thoughts are described below.

Pure Legal Theory

Separating law from justice, morality, religion, good and bad values, culture, politics and other non-legal factors is the foundation of the legal positivism school of thought, both Bentham, Austin and Hans Kelsen. Hilaire McCoubrey and Nigel D. White stated that psotivist theories like Hans Kelsen concentrate upon a description of law rather than to moral. They identification of law as such [8].

The school of legal positivism views "law as such", so that non-legal elements must be removed. Related to this, Hans Kelsen issued his theory "the pure legal theory", because this theory only describes and analyze the law and separate/eliminate everything that is not relevant to the law [9]. In this regard, C.H Wilson as quoted by Hilaire McCoubrey and Nigel D. White stated that the pure legal theory only concerned about the the definition of what the law is-not to what the law ought to be. The pure legal theory is the theory of positive law [8]. In fact, Hilaire McCoubrey and Nigel D. White stated that pure legal theory not only separates law from morals, politics, and social values, but is also a matter of the purpose of law. Why is that, because for Hans Kelsen the function of law is coercion [8]. Thus, the law must be separated from non-legal elements, namely morality, ethics and justice. Zhang Wan Hong stated that Hans Kelsen believed that the validity of law not depends to non-legal element [10]. Hans Kelsen also stated that law different form morality and justice. Law as separated from justice and morality is positive law. Therefore, the science of law must be distinguished from justice and morality [1].

From this view, Hans Kelsen clearly separates between law and justice. Because, what is justice is something that is confusing and unscientific. Pure legal theory as a science is unable to answer scientifically whether the law is fair or not. For Hans Kelsen pure legal theory does not talk about justice. Justice for Hans Kelsen lies only in the rules that govern happiness for everyone, and everyone feels it. Therefore, Hans Kelsen stated that "justice is social happiness" which is regulated in law, so that legal certainty will be created.

According to Hans Kelsen, justice is a matter of subjective value (justice as subjective judgment value). Fair or not depends on the subjective assessment of the individual. If an individual says it's fair, then it's a matter of taste, and it may be at the same time that someone else says it's unfair" [1]. Thus, justice in pure legal theory is a subjective and relative assessment. If the law is associated with the value of justice, then the law is not objective. Whereas a just law is an objective law that determines behavior for all. From this opinion, he indirectly stated that the main legal ideal is legal certainty. It is in legal certainty that justice is obtained, not from external judgments. If the law provides certainty for everyone, then the law has the value of justice. Hans Kelsen distinguishes what he calls "moral norms" and "legal norms". He stated that law is coercive orders and normative orders to certain behavior with sanction for individual who breach the law. Meanwhile, a moral is one of social orders without coercive and sanctions [1].

This opinion was opposed by the exponents of natural law, such as Thomas Aquinus, St. Augustine, Ronald Dworkin, John Finnis, and others. In their view, justice is not obtained from definite rules, but from the value of those rules. So, for them legal certainty is useless, if there is no value of justice. A just law is the real law. If the law has no value of justice, then in

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fact the law is only limited to orders from the ruler to perpetuate his power. In fact, Thomas Aquinus issued a theory of "summa theology (Summa Theologiae)" which means that "the just law, ...is the law that furthers the common, human good" [11]. Departing from this theory, Thomas Aquinus stated "an unjust law is no law at all" [11].

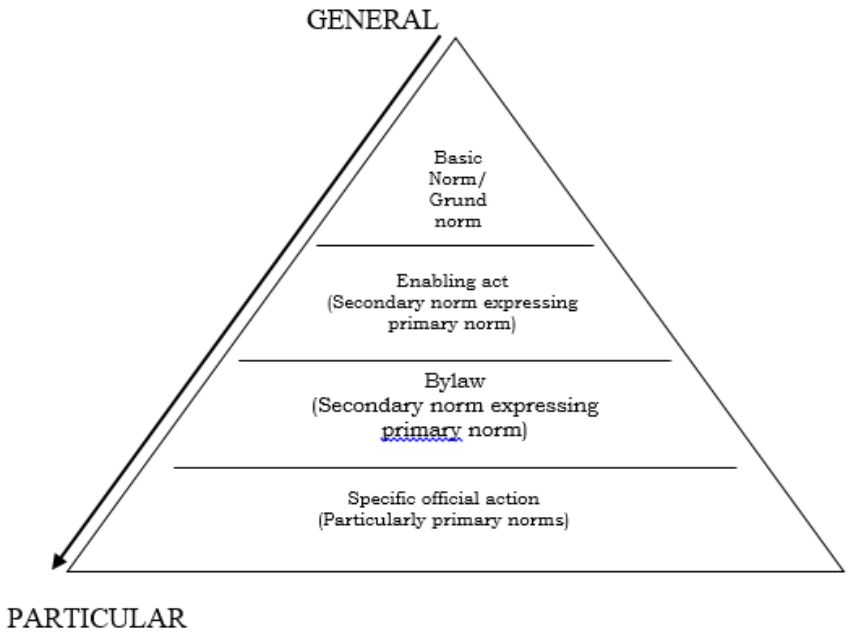
Theory of Hierarchy of Legal Norms

In contrast to other positivists, Hans Kelsen views law as a system of norms (legal order). As a system, law cannot be understood as something separate, but can only be understood as a unified legal system. Therefore, Hans Kelsen issued a second theory known as the "stufent theory" or theory of hierarchy of norm. This theory explain that the state's legal norms are tiered and layered. Higher legal norms are the source for lower legal norms. In other words, the validity of a lower legal norm depends on its conformity with a higher legal norm [1].

From the opinion above, Hans Kelsen emphasized that legal norms in a country are hierarchical, so that there is a relationship between all legal norm, both the higher legal norms (super) and lower legal norms subordination). Legal norms that form the basis for the formation of other legal norms have a higher hierarchy (higher norm). The legal norms formed by the higher legal norms have a lower position (lower one). Both the higher norm (super) and the lower norm (subordination) are one unit as a legal system. Therefore, the validity of a lower legal norm depends on its conformity with a higher legal norm.

In response to this, Hilaire McCoubrey and Nigel D. White stated that according to Hans Kelsen that legal system of a country is one of a hierarchy. Each norm is validated by a prior name until the basic norm [8].

From the opinion above, the legal norms in the country are not formed in equal legislation. However, their relationship is vertical. The highest legal norm in Hans Kelsen's view is what he calls "Grundnorm". Below is described the hierarchy of legal norms according to Hans Kelsen [10]:



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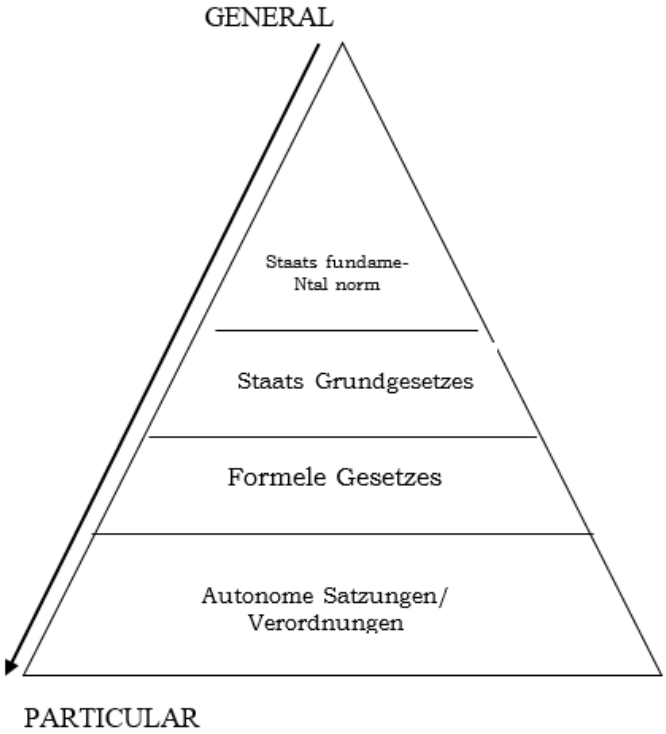
Kelsen's hierarchy of legal norms above, was later developed by his student Hans Nawiasky. The hierarchy of legal norms according to Hans Nawiasky is as follows:



The hierarchy of norms from Hans Kelsen and Hans Nawiasky can be described as follows:

a. Staats fundamentalnorm is the highest legal norm and is the first group in the hierarchy of legal norms. This norm is a pre-supposed and not formed by a higher norm. This norm determined in advance by the community in a country and is a norm on which the legal norms under it depend. The contents of Staats fundamentalnorm are norms that are the basis for the formation of the constitution of a country (Staats verfassung). Staats fundamentalnorm is a requirement and source for the enactment of a constitution [12]

b. The basic rules of the state (Staats grundgesetzes) are a legal norms under the fundamental norms. The norms of the basic rules of the state are the rules that are still basic in nature and are general rules that are still outline so that they are still the single legal norm.

c. Formel Gezets or literally translated by law (formal) is a legal norm which is under the Basic State Rules (Staats grundgezets), therefore it is more concrete and detailed.

d. Verordnung & Autonome Satzung is a legal norm located under the law whose function is to implement the provisions of the law. The implementing regulations are sourced from the delegation's authority while the Autonomous Regulations are sourced from the attribution authority.

From the opinions above, there are two consequences Kelsen's theory of hierarchy of legal norms, namely as follows:

a. Higher legal norms become the source of the formation of lower legal norms. The source of all legal formation is the pre-supposed Grundnorm; and

b. The validity of lower legal norms depends on their conformity with higher legal norms, therefore lower legal norms must not conflict with higher legal norms.

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The Relevance of Hans Kelsen's Thoughts With Recent Legal Developments

In relation to the relevance of Hans Kelsen's thoughts above, the author proposes several things as follows:

a. Hans Kelsen's pure legal theory is the prima donna for positivists, beside views of Bentham and Austin, including in legal practice and teaching legal education in Indonesia. Positive law that is free from morals, justice, religion, and social values becomes a god. Law enforcers, whether police, prosecutors, advocates and judges in Indonesia are still stuck with legal positivism. So that law enforcers in Indonesia do not enforce law and justice, but only enforce laws which are not necessarily fair. Law enforcement in Indonesia is only limited to the speaker of the law, not law enforcement and justice. Law enforcers are afraid to get out of the language bars of the legislation, so that justice is pawned. The interpretation that is at the heart of the law is more of a legal-positivistic interpretation, without seeing the values that live in the midst of society.

Therefore, the author argues that Kelsen's pure legal theory which separates law from morals and justice is inappropriate. The only ideal of law is justice. If the positive law is no longer fair, the judge in accordance with his function to enforce law and justice as regulated in Article 24 paragraph (1) of the Constitution of the Republic of Indonesia Year 1945 must dare to get out of the bars of unfair legislation. There is a postulate "unjust is not law", so separating law from morals and justice is an inappropriate view [13]. What is the use of legal certainty, if justice is lost. Unjust laws are only sovereign decrees without philosophical validity.

However, the author argues that legal certainty is needed in a country so that the lives of citizens become orderly. However, as the author described earlier, legal certainty is not the real essence of law, but justice is the main essence. Ideally, the state in forming laws must pay attention to the value of justice that develops in society.

Today, in judicial practice, especially in the Constitutional Court, Hans Kelsen's pure legal theory has begun to be abandoned with the birth of several decisions of the Constitutional Court that are trying to break through the barriers of legal positivism. Normatively, Article 5 of Law Number 48 of 2009 stipulates that judges are obliged to explore the sense of law or legal values that live in the midst of society. Administrative Law also recognizes the existence of discretion (vrijheid bevoegd), which gives freedom to the government officials to act outside the law if the law does not exist, empty or incomplete based on general principles of good government (algemene beginselen van behorlijke bestuur). These examples indicate that Hans Kelsen's pure legal theory has begun to be abandoned little by little.

b. Kelsen's theory of hierarchy of legal norms is very influential in the constitutional system of several countries, including Indonesia. At least there are some influences that the author can convey, namely:

- Legislation in Indonesia is also structured in hierarchically. This is stipulated in Article 7 paragraph (1) of Law Number 12 of 2011. Furthermore, Article 2 of Law No. 12 of 2011 stipulates that Pancasila is the highest source of law. Therefore, Pancasila is a pre-supposed norm (Grundnorm/Staats fundamentalnorm). This means that all laws in Indonesian legal sytem must be based on the values of Pancasila. However, Kelsen's theory of hierarchy of legal norm cannot be applied absolutely into the hierarchy of Indonesian law. The types of laws in Indonesia are not the same as in other countries that are used as examples, both by Hans Kelsen and Hans Nawiasky. For example: 1) regarding the position of Peraturan Pemerintah Pengganti Undang-Undang (Perppu) cannot be placed in the Formele Gezet hierarchy, because the Formele Gezet can only be interpreted as a law. Whereas Perppu and laws are not absolutely

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the same, especially in the formation procedure; 2) Regarding the position of the Tap MPR, it cannot be placed in the Staatsgrundgezet or in the Formele Gezet. For this reason, Hans Kelsen and Hans Nawiasky's theory of hierarchy of legal norm cannot be applied absolutely.

- Kelsen's theory of hierarchy of legal norms has greatly inspired the development of a review of the laws and regulations in Indonesia. The validity of a lower legal norm is only obtained if it is in accordance with a higher legal norm. Therefore, in the Indonesian constitutional system, a legal norm control mechanism is adopted to ensure that one norm does not conflict with another. In Indonesia, it is known that there are three types of reviews of laws and regulations, namely judicial review, executive review and legislative review. The three types of review are heavily inspired by Kelsen's theory of hierarchy of legal norms. Almost all laws and regulations in Indonesia have a review mechanism, for example: 1) judicial review of the law on the Constitution of the Republic of Indonesia Year 1945 which is the authority of the Constitutional Court in accordance with the provisions of Article 24C paragraph (1) of the Constitution of the Republic of Indonesia Year 1945; 2) judicial review of statutory regulations under the law against laws that are the authority of the Supreme Court in accordance with the provisions of Article 24A paragraph (1) of the Constitution of the Republic of Indonesia Year 1945; 3) political review of Perppu which is the authority of the House of Representatives in accordance with the provisions of Article 22 paragraph (2) of the Constitution of the Republic of Indonesia Year 1945; and 4) executive review of Village Regulations by the Regent/Mayor in accordance with the provisions of Law Number 6 of 2014. Even in the Indonesian state administration system, the term executive pre-review is known in the form of facilitation and evaluation of Provincial and Regency/City Regional Regulations by the Central Government as regulated in Law Number 23 of 2014 in conjunction with Minister of Home Affairs Regulation Number 80 of 2015.

The validity of legal norms is not only applied to abstract regulations as described above, but also applies to concrete legal norms. Such as testing the State Administrative Decree which is the authority of the Administrative Court as regulated in Article 47 of Law Number 5 of 1986.

From the two descriptions above, the two theories of Hans Kelsen when associated with the Indonesian constitutional system, some are still relevant and some are irrelevant. Pure legal theory according to the author is no longer relevant, because law without justice is not law. In addition, judges in accordance with Article 5 of Law Number 48 of 2009 determine that judges are obliged to explore the sense of law or legal values that live in the midst of society. In addition, in Administrative Law also known as discretionary power which is based on general principles of good governance. However, the theory of hierarchy of legal norm is still relevant for use in the Indonesian constitutional system, which is marked by the adoption of a review mechanism for legal norms, so that lower legal norms are maintained their validity.

Conclusion

There are 2 (two) main ideas about law proposed by Hans Kelsen, namely pure legal theory and theory of hierarchy of legal norm. Through pure legal theory, Hans Kelsen states that law must be separated from non-legal factors such as justice, morality, religion, good and bad values, politics, ethics, culture, economy, and other non-legal factors. Hans Kelsen only views "what the law is" not "what the law ought to be". According to the theory of hierarchy of legal norms, Hans Kelsen states that legal norms in a country are tiered and multi-layered, so that lower legal norms originate from higher legal norms and the validity of lower legal norms depends on their conformity with higher legal norms. In the current legal developments, Hans

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Kelsen's two thoughts on the law are still relevant and some are irrelevant. Pure legal theory is no longer relevant, because law without justice is not law (unjust law is not law). Currently, judges are given the task of upholding law and justice. Even Article 5 of Law Number 48 of 2009 requires judges to explore the sense of law or legal values that live in the midst of society. In addition, the government is also given the authority to act based on discretionary authority based on the general principles of good governance. Meanwhile, the theory of hierarchy of legal norms is still relevant for use in current legal developments. This is indicated by the adoption of a review mechanism (especially judicial review) of legal norms, so that the validity of lower legal norms is maintained.

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