



LAW AND MORALITY: THE HART AND FULLER DEBATE

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Abstract

This paper aims to explain how the relationship between law and morality in the H.L Hart and Fuller debate. The relationship between law and morality in the development of legal science is inseparable from legal and morality debates. Legal positivism scientists place law and morals separately, while natural law scientists place law and morals as inseparable. In this case, the author tries to recall how the post-World War II conditions were shocked by the debate between British legal scientists and American legal scientists, namely H.L.A Hart and Lon Fuller.

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I. INTRODUCTION

The development of legal science in intellectual discourse in Indonesia seems to have stagnation (Intellectual Logjam). This is, among other things, seen from the indications that legal scientists in their research are always law-oriented in the context of formalism, namely law can only be seen and studied with the eyes of the law itself. Some legal researchers use law as an analytical tool in looking at legal issues, without considering the social, cultural, political, and economic aspects which are the basic sciences in their educational curriculum. At the Faculty of Law, Criminal Law Section, for example, they must study criminology and victimology as basic science for criminal law, but when their scientific research melts back into basic science, and irrelevant they assume as if they can leave social science it at all. Instead of legal researchers in compiling scientific works, they are like law enforcers (practitioners) who verify the elements of the articles of law (UU) on legal cases.

In the world of legal practitioners, there is a tendency that law is only interpreted as a mere statutory text that is dry from and without philosophical and sociological meaning. It is as if legal science is not a legal practice that is integrated and inseparable from the world of people's lives. It is something illogical, but that is what happened to legal education in Indonesia, especially in Aceh. The question that arises is, is it true that the development of law in the academic and practical world is like that? If this is true, the law is now disembedded from people's lives or can be referred to as law

without society . As a result, the law is no longer working to serve people's lives, but the law is only for the law itself.

There is a classic saying "where there is society there is law", *Ubi societas ibi ius*, is a well-known adage in the Greek legal tradition. The adage shows that law exists because of society. In society, law functions as a tool to meet the needs of the community or individual, in the form of justice. What if the law becomes an exclusive part of people's lives? If the law no longer serves the community, then who does the law serve? Of course, this is not an easy question to answer.

This paper does not aim to provide steps in solving legal problems, nor does it intend to answer the questions above. However, this paper is only a form of intellectual discourse (Intellectual Exercise) in learning law in universities, especially those who are worried about legal developments that are increasingly uprooted from people's lives, with the intention of suing anyone who reads this paper.

The development of legal science at the level of worldly intellectual discourse has recently been very developed following the development of the social sciences and humanities. This can be seen through how the science of law collaborates with other sciences in answering legal issues for the sake of an effective and just law, especially the schools of legal philosophy. For example, in the United States, critical legal studies emerged or known in Indonesia as a critical legal movement that challenged legal positivism traditions and ideas by creating a critical legal theory based on social science theory. Not only that, there are also developments in other legal schools, such as socio legal studies , sociological jurisprudence , pragmatic legal realism, historicism, and sociology of law.

However, this is different from the development of legal discourse in Indonesia, which is dominated by legal positivism, and it is not clear who the expert refers to. As a result, legal experts in Indonesia tend to be more often misunderstood than understood. In the history of legal science , the cause (*raison d'être*) of the emergence of the flow of positivism in legal science is also a form of interruption to the failure of the idea of power absolutism in providing justice and certainty to legal cases initiated by the flow of legal naturalism. Not only that, the emergence of legal positivism cannot be separated from the development of empirical sciences, such as sociology and physics. If we trace the development of legal science in England, legal positivism is based on descriptive sociology. Social science in this case, sociology conducts research to describe and find social facts (social facts). Social facts consist of: groups, certain community units, social systems, positions, roles, values, family, government, and so on (Ritzer, 1980). It is this social fact that is intended to be formulated and agreed to become a positive law. As a result, legal practice runs independently, regardless of certain political, social, and moral views because political, social, and moral issues have been discussed both in the form of legislators' arguments as representatives of the people and in the form of scientific research (academic manuscripts) by multi-disciplinary academics. disciplinary.

Legal positivism cannot be separated from criticism, both from its followers and from parties

outside its stream. The positivists also have very diverse views on legal positivism itself. It is a necessity that science, both as a product and a process, gets interrupted and criticized. Such is Science, it continues to seek its best form as a product of human reason. However, do legal scientists sufficiently understand how the development of legal positivism in the worldly intellectual discourse? The author himself is pessimistic about the question. Therefore, this paper needs to be presented as a form of concern with the development of legal science and legal practice in Indonesia.

In this paper, the author does not discuss the entire relationship between the science of law and the sciences outside the law, but only discusses the relationship between law and morality. The development of legal science is inseparable from legal and morality debates. Legal positivism scientists place law and morals separately, while natural law scientists place law and morals as inseparable. In this case, the author tries to recall how the post-World War II conditions were shocked by the debate between British legal scientists and American legal scientists, namely HLA Hart and Lon Fuller.

II. RESEARCH METHODS

The research method uses doctrinal or literature study methods to explain Hart and Fuller's debate about the relationship between law and morality. The types of data used are related writings or documents about the Hart and Fuller debate. The books used include the book written by Suri Ratnapala entitled Jurisprudence, Lon Fuller entitled The Morality of Law and Positivism and Fidelity to Law; A Reply to Professor Hart.

III. RESULT AND DISCUSSION

3.1. Debate Background

In fact, Hart and Fuller's debate was published in a Harvard law review in 1958. The debate was their response to Radbruch's doctrine of justice regarding the post-World War II trial, particularly in the case of The Grudge Informant (TGI). In that case, the Bamberg Trials tried the wife of a Nazi German soldier who was convicted by the Nazi government for insulting the then-Nazi supreme leader, Hitler. Not only the wife of the Nazi soldier, but the judge who tried the Nazi soldier was also tried at the Bamberg Court. The wife of the Nazi soldier was charged with the offense of depriving her husband of his freedom. The court argued that the wife as an informant deliberately used the court as a tool to imprison her husband in order to get rid of her husband because the wife wanted to cover up her cheating actions (Dyzenhaus, 2008). According to the German Code of 1871, the act is classified as a crime. However, the wife's defense as a defendant was that she had acted in accordance with the law and had not committed any crime. The case of the grudge informant sparked a debate between Hart and Fuller and Fuller's student, Ronald Dworkin, who participated in responding to the debate.

3.2. Radbruch Doctrine

Hart and Fuller's debate is inseparable from Radbruch's 1946 essay, namely Statutory Lawlessness and Supra-Statutory Law. Radbruch was a professor of law at the University of Heidelberg and one of the foremost German philosophers before the second world war. He also briefly served as the German Minister of Justice from 1921 to 1924. In 1933 Radbruch was expelled from the University of Heidelberg by the Nazi government. The decision to dismiss him was due to ideological differences and political views between Radbruch as a member of the German Social Democratic Party (SPD) and the Nazi Party as the ruling party at the time.

After the defeat of the Nazi regime, Radbruch resumed his academic activities at the University of Heidelberg and at that time proposed the "Radbruch Doctrine" against post-war trials of crimes against humanity. The Radbruch legal doctrine is as follows: when statutory rules reach a level of extreme injustice, so that the contradiction between positive law and justice becomes intolerable, they cease to be law. That is, "when the legislation reaches an extreme level of injustice, so that the contradiction between positive law and justice becomes intolerable, then the rule ceases to be law" (Haldemann, 2005). The Radbruch doctrine proved influential in many post-war trials in the German courts and at the Nuremberg trials (Suri Ratnapala, 2009). Radbruch's doctrine was an amalgamation of elements of German legal positivism and natural law thought. The legal validity of the legal positivism school is based on the law (orders) of the competent authority and the separation of law from other rules (morals, ethics, and religion), different from legal naturalism, where the law is valid if it is in accordance with morals. In other words, law and morals cannot be separated. Then HLA Hart in his debate with Fuller took the position of legal positivism, while Lon Fuller leaned on the development of Radbruch's earlier thought.

The beginning of Radbruch's thinking based on Aristotle's formulation of justice states that those who are equal before the law must be treated equally. In the final days of Nazi rule, Hitler's words often violated judicial or statutory provisions. Arbitrariness that really messes up and breaks down the hierarchical order. Radbruch recognized the need for security and legal certainty, and Radbruch felt obliged to repeal laws from the Nazi era because they conflicted with the basic justice that should exist in higher courts or legislation.

Radbruch's opinion was applied in several important post-war decisions in West German courts, the most important of which was the decision of the Supreme Court of the Federative Republic of July 1951. In this case the defendant, a Nazi political official, of middle level, was appointed in March 1945 in March 1945. as a special officer to fight despair and awaken the will to fight. On definite information, that the plaintiff and her husband hid a half-Jew in their home and to protect him from the Gestapo they prepared lists of party officers for the Allied Armed Forces, the defendant

arrested both of them, and when her husband tried to escape, the defendant shot him dead. the next day the wife gave information that her husband died of a sudden heart attack.

The main issue is whether the accused should be held responsible, given the temporary collapse of the Nazi government as a legitimate entity. The question faced by Jurisprudence is whether the defendant can take refuge behind a national socialist party, in this case an official state organ.

The court confirmed that it was the German government that was responsible. In March 1945 the Court ruled that the so-called *katastrophenbefehl* meant that it acquitted any armed German to shoot its citizens fleeing military service. The court supports Radbruch's opinion, that if positive law completely loses the principle of equality, then law is no longer law. This opinion also discards the temporary legal view of the national socialist jurists.

Furthermore, every Hitler statement that does not conflict with the law can be used as a norm and has legal force. The court described it as degrading the dignity of members of the legal community by surrendering to an autocrat, which, from the point of view of legal provisions, did not deserve to be taken seriously. Furthermore, Radbruch said that the philosophy of law is part of philosophy. Radbruch further says it is necessary to point out general philosophical assumptions about the philosophy of law. First what is given, such as raw materials that have not been formed from an experience, reality and value mix drastically. Humans are affected by value and worthlessness, without reflecting that value and worthlessness originate from the human being. Human attitude towards blind value, evaluation, value relation and value conquest. the attainment of the mind consists in the ego withdrawing and confronting what is given thereby distinguishing reality from value. The mind learns how to evaluate consciousness which may be filtered and entered. so value blindness is created out of chaos given because nature is nothing but what is given.

Furthermore, the attitude of the value relationship can be illustrated with several concepts resulting from the value relationship. The concept of science is not identical with the concept of truth. The science of an age includes not only its scientific achievements, but also its scientific errors, but the reason why it uses the concepts of science to incorporate its work regardless of its failure or success is because they are all at least intended and claimed to be true: science is anything given, whether achieved or not. lost the truth, still has significance, that is, to serve the truth.

In the same way art, in the sense in which it is the subject of art history, is not sheer beauty, but a mixture of style and tastelessness, joined in a unified concept only by the general search for beauty. to all of his creation. Morals, in the sense discussed, say, in anthropology, include also guilt of conscience, but only because it is also meant to fight for the good they actually miss. All of these and many other concepts are included in the concept of culture. The general concept of law in relation to the fact that the circle is smaller or smaller does not guarantee the collective value that exists in society. The concept of law does not have to be from a small or large community, but an efficient

legal concept that results in where it is not in small or large groups but how the community demonstrates legal values. the concept of law is more inclined to the science of law than the philosophy of law. Legal science wants to separate the concept of law from legal phenomena and it is possible to compare various kinds of legal phenomena contained in the concept. Justice in the legal concept is not to measure the justice given by the judge because what measures the justice given by the judge is the positive law or the law that applies in the country, while justice measures the positive law, righteousness is justice as measured by the judge.

The concept of law is a cultural concept, a concept of reality related to values, a reality whose meaning serves a value. The concept of law is oriented to the idea of law. the idea of law is justice. Justice means the value given to everyone according to their rights. Justice is often considered only as a form in which moral goodness arises, indeed justice is considered a human quality, a virtue as Ulpian constans ac perpetua voluntas jus suum cuique tribuendi says.

But justice as in this very subjective sense cannot be defined but as a sentiment that is directed to objective justice, for example honesty is directed to truth. The morally good is only human: human will, human sentiment, human character. Even social ethics evaluates human beings, in relation to humans to ascertain, but does not evaluate the relationship itself. but fair, in the sense of objective justice only relates to the relationship between humans. The ideal of moral goodness is represented by the ideal human being. The ideal justice is represented by the ideal social order.

Furthermore, Radbruch distinguishes between law and morals. the concept of value is justice and morality, while the concept of culture is law and morals. the difference between law and morals as stated in the slogan "Law is outward, moral is inward. The legal layer lies in outward behavior that is subject to the law, while internal behavior is subject to morals.

However, legally relevant internal behavior is often known as legal experience. One of the internal behavior can regulate the legal treatment of certain appropriate external behavior, for example, the form of wrongdoing, good faith; or sometimes internal behavior by itself can produce legal results, for example, supervisory education can be established when a child's "mental well-being" is threatened. On the other hand, moral evaluation is only limited to internal behavior as is legal evaluation. for external action; indeed, only internal behavior is beyond moral evaluation. Just as "godly desires" that are never followed by actions, or "good decisions" that open the way to hell, are not considered meritorious, so there is consistently no fault to be found in "evil desires," disturbing "temptations." ' The passive life of the impulse itself is morally irrelevant; what is morally relevant is only the active will wrestling with it. But the will is distinguished from the impulse precisely by its activity. Action alone proves its existence. So the area in which morals prevail can be precisely searched for in human action.

The contradiction between the outward and inward seems to signify the different duties of man. Morals require a person to do his duty out of a sense of duty. morals are satisfied by sentiments

that conform to norms, while the law of behavior that conforms to rules, as in Kant's sentence "morals need morality, law only needs legality. The general concept of law in relation to the fact that the circle is smaller or smaller does not guarantee the collective value that exists in society. The concept of law does not have to be from a small or large community, but an efficient legal concept that results in where it is not in small or large groups but how the community demonstrates legal values. the concept of law is more inclined to the science of law than the philosophy of law. Legal science wants to separate the concept of law from legal phenomena and it is possible to compare various kinds of legal phenomena contained in the concept. Legal science is interested in getting concepts from inductive with various phenomena by comparing one phenomenon with other phenomena to get a general concept of law. Justice in the legal concept is not to measure the justice given by the judge because what measures the justice given by the judge is the positive law or the law that applies in the country, while justice measures the positive law, righteousness is justice as measured by the judge.

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3.3. Separations of Law and Morals

HLA Hart is a major figure in British legal positivism. In the flow of British legal positivism, law is considered a 'social fact', meaning that law is found in the actual practice or institution of society (Suri Ratnapala, 2009) . According to British legal positivism, law is a rule that is universally obeyed in a society, but will not become statutory regulations unless it is made or recognized by an established authority. Hart is a utilitarian, in his philosophical view, he sees the benefits to the public in the separation of law from other types of rules (morals, religion, and ethics). But unlike its predecessor, Austin. He realized that the law could not be identified exclusively with the orders of a ruler (command). Therefore, Hart argues that the relationship between law and morality (what is a good or a bad?) is separate, but contingent . He admits that laws often have an influence on morality, as when laws prohibit certain crimes. However, he stated that the law, however immoral, would become law if it was recognized as law according to the established rule of recognition . The rule of recognition provides authoritative recognition of the law, namely to amend the law and to adjudicate disputes based on the law. Rule of recognition usually establishes judicial, legislative, and executive institutions. The rule of recognition provides the main criteria for verifying the validity of the law. In most countries in the world the rules of recognition are stated in the constitution. (CREATE EXAMPLE OF RULE OF RECOGNITION IN INDONESIA)

To understand Hart's position in the relationship between law and morality, it is necessary for the learner to recall the important distinction between 'laws' and 'legal systems' (Suri Ratnapala, 2009) . A legal system can be stated to exist when citizens generally accept and comply with primary rules of obligation (laws) and officials also accept secondary rules regarding recognition, change and enforcement of the law. Laws are primary rules that govern generally accepted procedures of behavior , such as prohibitions against murder, theft, violence, and other forms. The validity of the law is based on its conformity with the rule of recognition and it is determined by the competent authority based on the constitution.

Hart calls his theory soft positivism (Suri Ratnapala, 2009) . The term soft is based on two senses. First , he accepts the view that law may exist in society as a matter of practice and compliance, even if it is not officially declared as law. Second , he accepts the view that the legal system can allow courts to apply moral standards in resolving a case before him. This does not mean that morality trumps law, but the rule of recognition in the legal system allows discretion in courts to consider

morality in identifying laws or in creating new laws. Thus, Hart distinguishes law (law) with morality, consequently legal obligations are different from moral obligations.

Hart criticized Radbruch for the TGI case which obscured 'moral obligations' and 'legal obligations'. Hart clearly distinguishes between moral obligations and legal obligations. For Hart, the law in socio-political conditions like the conditions in Germany during the Nazi era is law. However, the condition is under the requirement that a person chooses to obey an 'inhumane law' because of a legal obligation or to disobey the law because of a 'moral obligation'. The following is Hart's opinion regarding the TGI case, Hart argues that from the positivist standpoint there were two choices before the German state: to let her go free, or punish her under a new retrospective statute . That is, "Hart argues that from a positivist point of view, there are two choices before the German state: leave him free, or punish him under a new retrospective law". (Suri Ratnapala, 2009) . Hart's point is that if a post-World War II German court convicts a defendant of considering the Nazi law to be illegal because it does not conform to moral principles, then the court violates fidelity to the law. Hart's proposal as a resistance to cancellation through a judicial process, in the form of a retrospective law. The law is a retroactive law to overturn inhumane Nazi laws in order to maintain loyalty to legal concepts. Of course, Hart's proposal cannot be separated from criticism by other legal scientists, especially Lon Fuller.

3.4. Unifications of Law and Morals

Lon Louvois Fuller (1902–78) was the Carter Professor of General Jurisprudence at Harvard Law School. Fuller was not a natural law theorist in the traditional sense, but in some ways his theory went further. One of Fuller's books that includes his legal thinking, namely *The Morality of Law*. Ronald Dworkin is an American legal philosopher who was a Fuller student at Harvard Law School. He continued Fuller's legal thought and also criticized HLA Hart's legal theory.

Fuller's theory of legal morality states that law (read: statute) and morals cannot be separated because the concept of law itself contains certain moral qualities. As a result, the law is only possible if it is based on the morality of society. Law obtains societal obedience based on the moral content of its rules, Fuller calls it external morality. Fuller argues that law also has an internal morality that arises from its nature as a purposeful human activity (Suri Ratnapala, 2009) . Internal morality in principle is not about the content of the law, but concerning the quality of the law that must be possessed to become law at all.

Fuller proposes a legal definition in the form of a proposition as follows : (a) purposive, (b) reciprocal, and (c) an ongoing enterprise (Suri Ratnapala, 2009) . This means that Fuller understands the law by considering the purpose of the law itself (purposive). Second, law is made through the interaction between citizens and the government (legislature) with a certain orientation and purpose (reciprocal). Not only that, the law is also a continuous aspiration activity in the sense that legal ideals

will never be fully achieved (on going entrepreneurship). Therefore, Fuller distinguishes between moral aspiration (morality of aspiration) and moral obligation (morality of duty).

Moral aspirations and moral obligations are the internal morality of the law. Vertically, the position of 'moral aspiration' is higher than 'moral obligation'. Social attitudes about rewards and punishments are indicators in distinguishing between 'moral aspirations' and 'moral obligations'. Following is Fuller's argument: “ A person is usually condemned for violating morality of duty but not praised for observing it (Fuller 1969, 30). I will be condemned if I commit theft but will not be praised because I did not steal. In contrast, a person is usually praised for displaying morality of aspiration but not condemned for the lack of it. I will be praised for plunging into the raging torrents to save my neighbor's cat, but will not be condemned if I thought better of it. That is, “a person is usually condemned for violating the morality of duty, but he is not commended for obeying it (Fuller 1969:30). I will be punished if I commit theft, but will not be praised for not stealing. On the other hand, a person is usually praised for demonstrating aspirational morality, but not condemned for his shortcomings. I would be commended for jumping into a rushing current to save my neighbour's cat, but I wouldn't be cursed if I thought about it better.” (Fuller, 1969) .

Fuller's position on the TGI case is more or less the same as that of post-war Radbruch. Fuller's theory of legal morality cannot be separated from Radbruch's argument in the essay Statutory lawlessness and supra-statutory law . Of course Fuller rejected Hart's argument that proposed the abolition of the inhumane Nazi laws with retrospective laws through the legislature because it was no different from annulment through the judiciary. The issue of loyalty to the law, the legislature and the executive both cancel laws that are inhumane. For Fuller, Germany's legal system under the Nazis was unfit to legislate. How it relates to the concept of internal morality of law. Law (read : law) is only possible if it fulfills internal moral elements, namely morality of aspiration and morality of duty. As Fuller argues: to me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system . That is, it seems to me nothing surprising to say that a dictatorship that wraps itself in the tinsel of the form of law can so far deviate from the morality of order, from the inner morality of law itself, that it ceases to be a legal system.” (Fuller, 1958).

IV. CONCLUSION

The difference in views between Hart and Fuller cannot be separated from their different philosophical schools. Many legal scholars categorize Hart and Fuller 's debate as a debate in the realm of legal philosophy. So, what are the implications for the development of legal practice and legal research? Based on the experience of the German State which experienced dark times under the Nazis' fascism and totalitarianism, what should be noted is the principle of being careful with laws that do not conform to morality. The philosophical view of legal positivism means that an immoral

law is still law. As a result, immoral laws still have both validity and authority. As was Radbruch's belief in the proposition that 'acceptance of positivistic philosophical views in pre-Nazi Germany made the path to dictatorship smoother' (Fuller, 1958) . This is due to the legal positivism perspective that places judges as mechanic jurisprudence or the mouthpiece of the law. Assuming legal positivism, judges are like value-free robots in verifying legal cases based on the law. In contrast to legal realism, where judges can freely interpret and find the law according to the morality of society, as happened in the case of TGI. This shows that certain philosophical views have roles and implications in influencing legal practice. For legal positivism, the central figure is in the legislature . However, for the flow of natural law and legal realism, the central figure lies in the interpreter of the law (the judiciary).

What about legal research today? It is the same as previously mentioned, legal research today is dominated by legal research by law, meaning that legal researchers verify laws and regulations in certain cases as well as law enforcement duties in the view of legal positivism. Appropriately, research is based on certain philosophical assumptions and theories related to the object of research. Therefore, research methods from sciences outside of law are needed.

Legal research today seems to have closed itself off from sciences outside the law, such as the science of society (sociology and anthropology) and the science of human beings (culture, language, and philosophy). Basically, legal science cannot work alone to answer problems of legal practice. He needs the help of empirical sciences, such as sociology and anthropology in formulating laws that suit his society. Legal science also requires formal sciences such as logic and linguistics such as linguistics, hermeneutics, and semiotics.

This paper only presents to readers, especially those who work in the field of law, both practitioners and academics, that legal science will not be able to solve legal problems related to community problems without collaborating with other sciences.

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