



Hans Kelsen's Nomostatics and Nomodinamics Legal Theory

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Submit: 15/02/2024

Revised: 25/03/2024

Accepted: 02/06/2024

DOI: 10.37893/jv.v2i2.773

Keywords:

Hans Kelsen;
Theory;
Law.

ABSTRACT

Hans Kelsen is a famous figure in the positivist school, which puts forward the concept of pure law (the pure theory of law) in the concept Hans Kelsen provides two legal theories, namely static law (nomostatics) and dynamic law (nomodinamics). The purpose of this research is to understand the two legal theories put forward by Hans Kelsen, about static and dynamic law. The method used in this research is the normative juridical method with secondary legal materials in the form of books and journals that have a relevant research focus. Nomostatics legal theory is the law as a system of norms that apply, law in its resting state while nomodynamics legal theory is the process when the law is created and applied and the law is in running condition. In using a legal theory as a basis for making a law, it is necessary to be as clear as possible about the theory in the hope that the legal theory remains relevant for the next few years so that a legal theory truly follows its purpose, namely to know legal acts and to assess these acts. A legal theory is not always perfect in terms of its relevance to the times.

A. INTRODUCTION

Legal theory is a field of study in legal science that seeks to explain, analyze, and understand the concept of law, the nature of law, the structure of law, and its role in society. The legal theory aims to provide a deeper understanding of how the law operates, why the law exists, and how the law affects individuals, communities, and institutions. Law is different from rules and norms, the difference lies in its nature that the law is heteronomous in the sense that the law comes from outside a person while the norm is autonomous, namely coming from a person. In another case with rules, according to Soerjono Soekanto, rules are benchmarks measures, or guidelines for behavior or actions in life (Soekanto, 1976).

From the explanation above, it appears that law is a system of rules in which there are rules, norms, and sanctions that aim to regulate human behavior to form an order and regularity of life. Law and society are different entities but both have interrelated roles and functions in life. The existence of law in life cannot be separated from society, the law requires the existence of society and vice versa, society without law will only be in endless chaos.



Law has a function as a control over the life of a complex and growing society, as well as providing a sense of justice and preventing individual behaviors that are not following the rules of life or norms that have been mutually agreed upon in carrying out an orderly and peaceful life. Thus, the law must exist and be played optimally in society because the behavior of individuals or social groups is closely related to various social and legal norms, whether codified or not.

The law is binding, whether a person agrees with the law or not, still a person must obey the law because if it is not obeyed it will get sanctions. In the development of legal thought, one thought will depend on other thoughts as a basis for criticism to build the next theory or law (Mappatunru, 2020). According to Maria Farida Indrati, the law is valid if it is made by an institution or authority authorized to form it and is sourced and based on higher norms so that in this case lower norms can be formed by higher norms and the law is tiered and layered forming a hierarchy (Soeprapto, 2021).

B. METHOD

This research method used in this research is the normative juridical method or library research. This research is also usually called doctrinal research which in research has a limited range and is sourced from legislation, court decisions, expert opinions, and other legal theories to obtain secondary data which includes primary, secondary, and tertiary legal materials. Normative juridical research is research aimed at obtaining objective law, therefore several approaches are used, namely the statutory approach by examining the norms contained in the statutory provisions.

C. RESULTS AND DISCUSSION

Norm

Norm comes from the English word norm. In the Oxford dictionary, norm means usual or expected way of behaving, which is a general norm that contains how to behave. Norms are benchmarks of behavior in a particular group, norms allow a person to determine in advance how his actions will be judged by others, norms are also criteria for others to support or reject a person's behavior. Norms are also binding in a group of people, which in turn is referred to as social norms because they maintain relationships in society.

Hans Kelsen explains the law in the following explanation: the law is a system of norms, a system based on imperatives (*das sollen* or what should be) (Fauzan, 2022). Norms are part of culture because the beginning of a culture is an interaction between humans in certain groups which will produce something called norms. So we will find a definition of culture such as culture is a way of life that develops and is shared by a group of people and is passed down from generation to generation.

In addition, some define norms as values because norms are the concretization of values. Norms are the embodiment of values because every norm must contain values in it, values are also the source of norms, without values it is impossible to realize norms. Conversely, without a norm, the value to be carried out is impossible to be realized.

Norms are divided into two parts, namely norms that come from God and norms made by humans. Norms that come from God are called religious norms, while those made by humans are called social norms, although basically, both are in the same orientation, namely regulating human life to become a cultured and civilized human being. The main element, according to Berry, is the social pressure on members of society to implement these norms. The background of his thinking is that if rules are not reinforced by social rules, then they cannot be considered social norms, because norms are called social norms not only because they have gained their social nature, but also have been used as a benchmark for life in behavior and action.

Basic Norms

The basic norm is abstract, it is a value that has niches, and spaces in the basic norm itself. The basic norm cannot be determined by anyone, although in positivistic understanding it is free from religious elements, but it must be understood that the concept of basic norms is the command of God or in the concept of natural law called *lex divina*.

Hans Kelsen's conception of the basic norm is seen as that the main norm that becomes the source of law must have a basis, ideals, and values. Stufenbau's theory which relies on the grand norm is not only fixated on efforts to understand and criticize positive law alone (*grundnorm* function) (Kusumohamidjojo, 2019) but also examines the possibility of deviations in the application of law and re-examines the relevance of legal norms to the ideals of achieving a true justice.

Hans Kelsen's theory that has received much attention is the hierarchy of legal norms and the chain of validity that forms the legal pyramid (*stufentheorie*). One of the figures who developed the theory was Hans Kelsen's student, Hans Nawiasky. Nawiasky's theory is called *theorie von stufenaufbau der rechtsordnung*. The arrangement of norms according to this theory are:

- 1) The fundamental norm of the state (*staatsfundamentalnorm*);
- 2) The basic rules of the state (*staatsgrundgesetz*);
- 3) Formal laws (*formell geset*); and
- 4) Implementing regulations and autonomous regulations (*verordnung en autonome satung*).

The main idea of Hans Kelsen departs from the belief about the legal system as a system of norms that is free from any element. A norm whose validity cannot be obtained from other higher norms, we call the basic norm (*grundnorm*) (Humiati, 2020). All norms whose validity can be traced to the same basic norm form a system of norms, or a normative system of norms. The basis that becomes the main source is a binder between all the different norms that form a normative system.

Nomostatics and Nomodinamics

Static legal theory (*nomostatics*) is the law as a system of norms that apply, the law in its resting state, while dynamic legal theory is the process when the law is created and applied, the law that runs (Rizhan, 2020). Human behavior is regulated by norms or norms

that regulate human behavior, namely whether knowledge is addressed to legal norms that are created, applied, or obeyed by human actions or to acts of creation, application, or compliance required by legal norms. Law is so important because human behavior is very different. The differences in behavior are very likely to cause various kinds of actions.

Throughout the history of human civilization, the central role of law is creating an atmosphere that allows humans to feel protected, and coexist peacefully. According to some, the law is so complex and technical that one often encounters it with an impatient and cynical attitude, but it is one of the most important concerns of civilized man on earth, as it can offer protection against tyranny on the one hand and anarchy on the other. Law is one of the main instruments of society to preserve freedom as well as order and arbitrary interference, whether by individuals, groups of people, or governments, therefore the main element of the law is order and to realize that order humans are required to form rules.

The order and rules necessary for human beings authentically create the conditions that allow humans to naturally realize their full personality, through which they can develop all their human potential as they freely wish (*vrije wil*).

Of course, establishing an order requires an adequate answer, namely how the order can be answered properly and measurably using a theory. The theory is by using static legal theory and dynamic legal theory. Static legal theory is law as a system of norms that apply, law in its resting state. While dynamic legal theory is the process when the law is created and applied, the law that runs that needs to be considered is that the process itself is regulated by law (Haris, 2014). Thus, the legal theory mentioned above can be used as a reference to answer some legal questions when there is a problem that is related to legal issues.

In the life of society, there are always various kinds of norms that directly or indirectly affect the way a person behaves or acts. In his book entitled *General Theory of Law and State*, Hans Kelsen expressed the existence of two norm systems, namely a static norm system (*nomostatic*) and a dynamic norm system (*nomodynamic*).

The static norm system (*nomostatics*) is a norm system that looks at its content, according to the static norm system itself a general norm can be drawn into a specific norm and the specific norm itself can be drawn from a general norm. The withdrawal of a special norm from a general norm can be interpreted as, from the general norm it is detailed into a special norm in terms of its content (Wibowo, 2021).

The author gives 2 (two) examples as follows: (1) A general norm that states “You should respect your parents” can be broken down into specific norms such as the obligation to help your parents if they are in trouble, or the obligation to take care of them if they are sick, and so on. (2) A general norm stating “You should observe the commandments of religion” can be broken down into specific norms such as performing the five daily prayers, fasting on time, paying zakat, and so on.

While the dynamic system of norms (*nomodynamics*) is a system of norms on the

enactment of a norm and the way of “its formation or elimination.” According to Hans Kelsen, norms are tiered and layered in a hierarchical arrangement, the lower norms apply, are sourced and based on higher norms, higher norms apply, sourced and based on higher norms, and so on until finally this ‘*regressus*’ stops at a supreme norm called the basic norm (*grundnorm*) which cannot be traced anymore who formed it or where it came from. This norm is the highest norm that does not derive from and is based on any higher norms. But it is ‘presupposed’, that is, it is determined in advance by the community.

According to Hans Kelsen, the law is a dynamic system of norms (*nomodynamics*) because the law is formed and removed by institutions authorized to form and remove it, so, in this case, the law is not seen in terms of the content of the norm, but in terms of its creation and enactment (Asshiddiqie & Safa’at, 2006).

The law is valid if it is formed by authorized institutions or authorities and is sourced and based on higher norms so that in this case lower (inferior) norms can be formed by higher (superior) norms and the law is tiered and layered forming a hierarchy (Syaputra, 2016).

In its dynamics, legal norms are divided into two, namely vertical and horizontal legal norms. The dynamics of vertical legal norms are dynamics that are tiered from top to bottom, in this vertical legal norm dynamics a legal norm is valid, sourced, and based on the legal norms above it until it reaches a legal norm that becomes the basis of all legal norms below it. Likewise, in terms of top-down dynamics, the basic norm is always the source and basis of the legal norms below it, the legal norms below it are always the source and basis of the legal norms below it, and so on downwards.

Horizontal legal norm dynamics are dynamics that move not upwards or downwards, but sideways. This horizontal legal norm dynamic does not form a new legal norm, but the norm moves sideways due to an analogy, namely the withdrawal of a legal norm for other events that are considered similar. Analogical derivation can be given the following example: In the case of ‘rape,’ a judge has made an analogical withdrawal from the provisions on ‘property damage’ so that against a ‘rape’ in addition to being subject to criminal sanctions can also be given the sanction of paying compensation. To emphasize the concept of dynamic and static law, it is necessary to underline that the rule of law in a dynamic view is to define the concept of law by ignoring the element of coercion without considering the need to attach a criminal or civil sanction to its violation. The opposite is a norm that is coercive (static).

A norm is a law (in the dynamic concept of law) if:

- 1) The norm has been made by an authority that is constitutionally competent to make law;
- 2) Born of a law-making authority;
- 3) A law is something that happens in the way that the Constitution prescribes for the formation of laws; and
- 4) Law is something that is made through a certain process.

Not only a norm but an order regulating human conduct can also be made in the manner prescribed by the constitution for law formation. The important stages of the process of law formation through the procedure of lawmaking (where general norms are created):

- 1) Two identical resolutions from both houses of parliament (for countries with two houses), approval by the head of state/president, publication in the official gazette;
- 2) Official recognition of the usefulness of a statesman, a statement decided by parliament, approved by the head of state or president, announced in the state news; and
- 3) The product of legislative procedure (a law is the same as a document containing words, sentences do not constitute a norm but are still law).

In addition, the creation of general norms can also be based on: normative character, strictly theoretical views on particular issues, the motives of the legislator, political ideologies embodied in references such as ‘justice’ or God’s ‘will’, and so on. All these elements are statutory content that has no legal relevance. Judicial deliberations often also contain elements that have no legal relevance. Not everything that is made according to the procedures established by the constitution is law in the sense of a legal norm. It is a legal norm only if it contains norms to regulate human conduct, and if it regulates human conduct by establishing a coercive measure as a sanction.

According to Hans Nawiasky, the highest norm which Hans Kelsen calls the basic norm in a state is called the fundamental norm of the state. So the placement of Pancasila as a *staatsfundamental* norm means placing it above the Constitution. Pancasila is not included in the constitution, because it is above the constitution (Hakim, 2018).

Among adherents of the Continental European legal system, Hans Kelsen, who is known for his pure legal teachings, is always classified as an adherent of this positivist school. There are two theories put forward by Hans Kelsen that need to be highlighted. First, his teaching on pure law and second, derived from his student Adolf Merkl, namely the *stufenbau des recht* which prioritizes the hierarchy of legislation (Sumakto, 2012). The essence of Hans Kelsen’s pure legal teaching is that the law must be separated from non-juridical factors such as ethical, sociological, political, and so on. Thus Kelsen does not provide a place for the enactment of natural law. Law is solely a juridical *sollen* that is separated from *das sein*/social reality. Meanwhile, the *stufentheorie* teaching argues that a legal system is a hierarchy of laws in which a certain legal provision is sourced from other higher legal provisions (Rokilah & Sulasno, 2021). The most advanced provision is the *grundnorm* or basic norm which is hypothetical. Lower provisions are more concrete than higher provisions. The pure doctrine of law is a theory of the actual law and does not question the actual law, namely whether the actual law is just or unjust.

Today, legal theories that have a strong influence on the concepts and implementation of legal life in Indonesia are positivist legal theories. The influence of this theory can be seen in the dominant concept of legal codification in various types of laws applicable in Indonesia and has even spread to international and traditional legal systems. Likewise, in

the practice of law in the community, the influence of the positivist school is very dominant. What is called law is always associated with legislation, outside of that, it is considered not law and cannot be used as a legal basis. Values and norms outside the law can only be recognized if allowed by law and only to fill the void of laws and regulations that do not or have not regulated the issue.

The influence of political forces in shaping the law is limited by the enactment of a constitutional system based on checks and balances, as adopted by the 1945 Constitution (UUD 1945) after the amendment. If examined more deeply, the material changes to the 1945 Constitution regarding the implementation of state power emphasize the power and authority of each state institution, emphasize the limits of power of each state institution, and place it based on the functions of state administration for each state institution. Such a system is called the “checks and balances” system, which is the limitation of the power of each state institution by the basic law, there is no supreme and no law, and everything is equally regulated based on their respective functions.

Such a system provides an opportunity for every citizen who feels harmed by their constitutional rights by political products from law-forming political institutions to file a lawsuit against these state institutions. If the violation is committed through the formation of laws, a complaint can be filed with the Constitutional Court, and in the case of all legal products from other political institutions under the law, it is submitted to the Supreme Court.

Although outside the political forces that sit in political institutions, other forces contribute to and influence legal products born by political institutions. These forces are various interest groups that are guaranteed and recognized for their existence and role according to legal provisions as a country that adheres to a democratic system, such as business people, scientific figures, community organization groups, professional organizations, religious leaders, non-governmental organizations, and others. Even Law No. 10/2004 on the Formation of Laws and Regulations, in Chapter X emphasizes the existence of public participation, which is regulated in Article 53, explaining:

“The public has the right to provide input orally or in writing in the context of preparing or discussing draft laws and draft regional regulations.”

The science of law is a “normative science”, as Kelsen stated many times. The law exists solely in the realm of the *sollen* world. The essential characteristic of a norm is its hypothetical nature. It is born not because of natural processes, but because of human will and reason. This will and reason produce statements that function as basic assumptions or beginnings. It states that doing this or that is a general proposition and as a continuation must be followed by certain consequences. Such consequences will be carried out by the human will itself as well. Therefore, one of the prominent features of Kelsen’s theory is coercion. Kelsen argues that legal norms are tiered and layered in a hierarchical arrangement, where a lower norm applies, is sourced, and is based on a higher norm. The higher norm applies, is sourced and based on a higher norm, and so on until a norm that cannot be traced further and is hypothetical and fictitious, namely the basic norm (*grundnorm*). Thus, a lower norm derives its strength from a higher norm. The higher the

norm, the more abstract it will be, and conversely, the lower the position, the more concrete it will be. The highest norm, which tops the pyramid, is called the *grundnorm* (basic norm) by Kelsen.

The Indonesian legal system adheres to the theory developed by Hans Kelsen. This can be seen in the formulation of the hierarchy of Indonesian laws and regulations as we can find in Article 7 of Law Number 10/2004 on the Formation of Laws and Regulations. According to Bagir Manan, positive law is a collection of written and unwritten legal principles and rules that are currently in effect and binding in general or specifically and enforced by or through the government or courts in the state (Manan, 2004). Pure legal theory is still widely used in Indonesia, this is reflected in the following/implementation of some of Hans Kelsen's ideas in the juridical system of life. In the relationship between the duties of judges and legislation, the influence of the legis school (legalism view) is still visible, which states that judges cannot do anything other than strictly apply the law. Judges are only trumpeters of the law and in addition, the application of law by judges is still fixated on written laws and regulations. Written laws and regulations are considered sacred by many judges in Indonesia. However, not all of Indonesia's national legal system unanimously adopted the legal system that developed in Europe, although most of the Dutch colonial legacy laws still apply. Pure legal theory in its journey is unable to explain the state of law holistically, so Satjipto Rahardjo borrowed legal sociology as a tool to explain the problem. The main cause of the failure of a theory is because the theory is instructive.

D. CONCLUSION

In using a legal theory as a basis for making a law, it is necessary to be as clear as possible about the theory in the hope that the legal theory remains relevant for the next few years so that a legal theory truly follows its purpose, namely to know legal actions and to assess these actions.

A legal theory is not always perfect in terms of its relevance to the times. However, this does not mean that the theory can no longer be used following the purpose of the theory because however a theory that is no longer relevant to the times can still be used as a foundation to make the theory more perfect.

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