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The Comparison of Schools of Law in Philosophy: Natural Law, Positive Law, and Modern Schools

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ABSTRACT

The philosophy of law is a branch of science that combines philosophy and law. Philosophy uses rational reason as its concept and system, and law uses evidence as its tool and concept. Throughout its history, philosophy has come up with various methods and concepts in presenting new scientific discoveries that are beneficial to humans. Philosophical schools are a method as well as a medium for philosophy to display its development from time to time. By combining an inquisitive mentality and a critical rational mind, philosophy is a complex branch of science. Starting from the habits of human life, and the secrets of the universe to the relationship between God, humans, and nature. Because of its completeness in presenting new knowledge and knowledge, philosophy and its schools cannot be separated from one another to witness the history of the development of philosophy itself. The philosophy of law, that is, philosophy and law have much in common. One of the similarities between the two is that they both use rational reason and concrete evidence as their media so famous philosophers juxtapose the two to declare the existence of each so that it is more complete and acceptable to the next human being.

Introduction

Philosophy was born in Greece in the 6th century BC. In Greece, the word philosophy is also called the word Philosophia which consists of two words, namely the word "philos" or "philia" and the word "Sophos" or "Sophia". Where philosophy means love, and friendship, while sophos means wisdom, wisdom, and knowledge. Referring to this sense, we can interpret philosophia (philosophy) as the wisdom of love or love of knowledge. It is still debated to this day about who introduced the term philosophy. Some say that the term philosophia was first introduced by Heraclitus (540-480 BC), and others argue that the term philosophia was first introduced by Pythagoras (Ginting et al., 2022). Apart from meaning as the love of knowledge, philosophy also means the love of wisdom. In the period of Socratic philosophy, namely in the 5th century BC, Plato once explained in his work entitled Phaidros that the word Sophos means "wise being", therefore it is too noble to be used for ordinary humans, so the word is only appropriate to be used for a god. Plato continued in his explanation in the book that he acknowledged that humans are not wise creatures, but are in the process of becoming wise (Fatimah & Fitrisia, 2022).

The state of Indonesia is a country in the form of a unitary republic and is regulated by law in the form of a law, so the law is called positive law. Academics who are experts in the field of law, when discussing law, usually the object is this positive law. (Stephens, 2023). Then, what if the shelf is about the law? They will answer that the law exists to be regulated fairly and equitably. Because of the emergence of social constraints and clear differences in status, there is a strict separation of lines between the nobility and the peasantry. Because of these stark differences in status and power, these two types of people see things in different ways. (Pramono, 2017). So, in this case, the law in the eyes of ordinary people is the norm for living together and society must be regulated fairly. Because there is no more reliable guarantee for them but the word justice (Nylander, 2023). So in passing the people's demands, the people ask that the actions of the rule of law be by the higher norms contained in the Law, where the highest norm is the norm of justice (Bagenda, 2022).

According to Soetikno, the Philosophy of Law is the search for the essence of the law, that is, to find what is behind it, which is hidden in the law, to seek the truth in the rules of legal values as a consideration and to explain the value of law to the basics. Satjipto Raharjo defined legal philosophy, as the philosophy of law that has the meaning of learning the basics of questions for the law itself.13 As Serlika Aprita said legal philosophy is the material source of law, where the applicable legal rules themselves are the formal source (Djoko & Warsito, 2019).

Relevant previous research or literature reviews searched include:

(Darmawan et al., 2022), entitled: Mapping Theses in Streams of Legal Philosophy and Its Methodological Consequences. The focus of this study is the mapping of theses in schools of legal philosophy and the methodological consequences of these schools. As for the similarities and differences, namely in the mapping of the schools of legal philosophy itself. In this article, there is no stream of natural law, positive law, legal realism, and jurisprudence as contained in the author's writing.

(Arliman, 2016) Titled: The Concept of Utilitarianism Legal Philosophy and Its Relevance to the Construction of Election Supervision Regulations. The focus of this study is the concept of utilitarianism legal philosophy and its relevance to the construction of election supervision regulations, unlike the author's study which focuses on discussions related to these schools, especially natural law, positive law, legal realism, and jurisprudence. (Shalihah, 2017). This is also the similarity and difference between the study concepts of the two articles.

The purpose of the research carried out must be in line with the formulation of the problem being researched. The objectives of the research are:

1. To find out how to understand the currents in the philosophy of law (natural law, positive law, and legal realism!

2. For how to examine the relevance between schools of law, natural law, positive law, legal realism, utilitarianism, and jurisprudence!

Method

This research uses direct (in the field) and indirect interview techniques (through social media) and uses historical methods, namely collecting existing data. In terms of this writing, the author uses previous works from several existing academics.

1. Observation

Observation is the first and foremost thing that needs to be done by the researcher to record the latest things related to the title raised. In this case, the researcher made observations in the area of the city of Mataram.

Observations reviewed from the involvement of researchers and resource persons are divided into two types: First, direct observation, namely the involvement of researchers with resource persons directly. Second, indirect observation, namely researchers conducting interviews remotely (via cell phones, social media, etc.). In this study, the researcher conducted both, namely direct observation and indirect observation.

2. Interview

Interviews are question-and-answer activities carried out by researchers with resource persons to obtain information related to the research title being raised by the researcher. In the study, the researcher interviewed directly with resource persons in the Mataram city area and outside the city of Mataram using a mobile phone.

3. Sources

There are three types of resource persons used in the study: The first is the primary type of resource person, namely the first source or the source person. Second, is a secondary type of resource person, namely a second-party resource person who is very close to the source. Third, there are tertiary types of sources, namely third-party sources, where this type of tertiary source are rarely used by researchers because of the lack of accuracy of the information obtained.

Results and Discussion

Everything that Allah has created on this earth is nothing but a purpose and purpose, namely to worship Allah SWT by carrying out His commands and following His Commandments. How do we know such a thing, namely by learning it in the holy book of the Qur'an through the teachings of the Prophet Muhammad (saw)? As for the way of spreading knowledge and teachings of goodness, of course, some streams are passed through so that they can reach the next human being and be studied by the prophet's people in the following generations. And the great thing is, that the intelligence of mankind can not only teach religious sciences but also other sciences and also with their streams of these sciences, so that every new knowledge learned by humans can be beneficial to nature and humans themselves.

There are schools in the context of legal philosophy. Several book sources have conveyed the schools of this philosophy of law, such as Law in a Philosophical Approach by Muhammad Syukri Albani Nasutin et al., there are fourteen schools of legal philosophy, namely: Historical schools and legal sociology, historical mahlab, several figures of historical schools, the core of the teachings of the historical school, the influence of historical schools in the context of Indonesia, positive legal schools, pure legal theory, Islamic law school, sociological jurisprudence school, legal realism, utilitarianism, anthropological law school, natural law/natural law school, and finally critical legal school (Critical Legal Studies). The schools of legal philosophy that we will discuss on this occasion are six streams, namely: a) natural law school, b) positive law school, c) utilitarian school, d) historical school, e) sociological jurisprudence school, and f) real legal school (legal realism), utilitarianism.

1. Natural Law Stream

The theory of the teachings of natural law is essentially that humans are seen as the guardians of nature to achieve a goal. Because indeed human beings are very noble creatures created by Allah as leaders on earth, everything on earth must be managed by humans, including the universe. And He is the one who made you the caliphs on earth, so as the leaders chosen by God, it is natural for humans to preserve the realm.

The work of John Finch (1974) entitled Introduction to Legal Theory stated that in the process of natural law activities, several natural laws apply along with it, such as the law of the universe, the law of God, the eternal law, the law of mankind, and the last one is the law of reason. Which of the four natural laws is each related to each other and all of them are the result of God's creation, whose ultimate goal is for the benefit of nature? Because in essence, the rules of the universe and the normative order that exist in them are God's creation in God's law which is eternal and universal. In this process of creating the law of nature, God strongly emphasizes that to achieve a goal of natural interests, man does not necessarily carry it out but must do it with a good conscience and morality.18 Thus there is an essential connection between law and morality. So the result of achieving the interests of the universe depends on how ingenious humanity is in managing it. 20That is the essence of the two, which is the law and morality, according to the law of nature, must prioritize the interests of the universe above other interests, including the interests of the man himself, and the form of the interests of the universe, for example, for the good of nature.

The reason why law and morality must be interconnected when it comes to the question of natural law is because moral value is the main prerequisite needed for the existence of legal value logically. 21 This picture between law and morality corresponds to Augustius' statement that an unjust law is not law, and Augustine's statement reflects morality as an important factor in the natural law order, this picture is also supported by Aquinas' statement:

"Law is nothing than an ordinance of reason for the common good promulgated by him who has the care of the community Human law has the nature of law in so far as it partakes of right reason So far as it deviates from reason, it is called an unjust law and has the nature, not of law, but of violence rather than laws because as Augustine says a law that is not just seems to be no law at all."

So every time a human being makes a law that must be by the rules of natural law, the real meaning is that the law must come from the law of nature and the law that is made must be just as justice is applied by the law of nature, because if the law that is made is contrary to the law of nature, then such a form of law is not a good law. For the concept of good law in Aquinas' statement is a just law, and if the law is unjust, it is invalid.23

The concept of the theory that an unjust law is not a law in itself, is based on the idea that the elaboration of general rules and principles and moral rules is the essence of the law itself. What this means is that a good law or a just law is a form of realization of general moral principles and principles. According to the natural law school, there are general moral principles like morality where these moral principles are fixed and eternal (eternal). This principle is also called natural law (natural law) whose position is higher than the law made by the state (positive law). Thus, positive law is the realization of natural law, and therefore the making of positive law must not contradict and deviate from natural law.

2. Positive Legal Stream

Positive law is a term for a law made by the state with the principle of making it based on Pancasila, which is the one and only God, and a just and civilized society. Positive law is also known as the term Ius Constitution, which is the law that applies today to the people in a country. The point is that positive law is a law that is currently in force in a certain society in a certain area and at a certain time.

The definition of modern positive law recognizes the latest phenomena that can be observed as well as positive facts that apply in today's society. Where these facts and phenomena determine the law to be enforced and are the cause of the applicable law because positive phenomena and facts are the origin of the law. That is, positive law is not a law based on uncertain speculations but based on facts that are completely valid in society. This picture is also in line with the theory of Auguste Comte (1798-1857), a French scholar.

Comnte's new views on political philosophy and science and social action. The thought of this French scholar is an expression of the period of European culture which is colored by the rapid development of the exact sciences as well as a sign of the period of European culture. In the application of the development of human thought, Comnte divides it into three phases, namely: the positive phase, the theological phase, and the metaphysical phase.27

An example of the realization of a positive legal flow that has been enforced in the community is when there is a risk of motorcycle accidents in the community, and some of those who experience the accident die directly at the scene, so on this awareness, the government requires people who ride motorcycles to wear helmets to protect the rider's head. Article 106 Paragraph 8 of Law No. 22 of 2009: "For people who drive motorcycles and motorcycle passengers, they are required to wear helmets that meet Indonesia's national standards." 28

In the work of Muhammad Syukri Albani Nasution and his friends, namely Law in a Philosophical Approach, there are five characteristics of legal positivism according to

Professor Hart, namely: first, the law is command of human being, which means that the law is a form of command from humans. Second, the interests between law and morality are not related between the two parties, that is, between the applicable law and the real law. Third, legal conceptions analyzed based on the value of historical and sociological study interests must be distinguished by firm lines and also critical judgments. Fourth, for the legal system to be by its original meaning and purpose, which is to be a logical and closed system, then for legal decisions to be precise and correct must be obtained logically without giving importance to one particular aspect, such as socio-political interests and moral measures. Fifth, that morality cannot be maintained as a form of consideration of statements and used as rational arguments. For this school of positive law, two patterns have been distinguished by philosophers, namely:

1. Legal Positivism – The Analytical School by Jhon Austin (1790-1859), in which the Austin Analytic School stated that law is a command.
2. Legal Positivism – Pure Law Theory by Hans Kelsen (1881-1973), Kelsen's school of pure law theory states that law is a necessity.

1. Utilitarian Streams

The school of utilitarianism was first proposed by John Stuart Mill his father James Mill and his teacher, Jeremy Bentham, as one of the schools of philosophy with systematic theory. Where, the term utilitarianism comes from the Latin word "Utilitis" which means useful, beneficial, and profitable.

By holding the principle that all human actions must be based on the greatest profit and reduce losses to the minimum. Therefore, according to the Benthan principle, the act of an act will be judged as severe based on whether the act brings profit or not.

2. School of History

According to the view of the historical school, the law is only studied about the historical framework and structure (historicity) where the law appears so that the law can be understood. Law is a rule that is born from the association and social interaction of the community, because in the socialization of society, there are values and life orders that are formed naturally without any intentionality, along with the dynamic changes that occur in the society.

According to Friedrich Karl von Savigny, the pioneer of this school, the law is a legal representation of public consciousness (volkgeist). Customs are the origin of the law, and many of the people's beliefs and beliefs do not come from legislators. The background of Friedrich's view is due to his counterproductive attitude to the codification of civil law in Germany and the law of France (Code Napoleon) as a patron. Meanwhile, according to Friedrich, such codification is very contradictory, even diametrically, to the legal consciousness of the German people and their spirit. This is what makes Friedrich argue that law does not come from legislators but from the consciousness of the people's soul which is dynamic and noble.

1. Legal Realism School

The birth of this school of legal realism (Legal Realism) is motivated by several legal and non-legal factors, the first of which are social and legal development factors and developmental factors in philosophy and science. Nevertheless, the pragmatism of William James and John Dewey had a real influence on the teachings of Roscoe Pound and an influence on the teachings of Oliver Wendell Holmes. Because of the influence of the school of pragmatism on legal realism in philosophy. Which, at the beginning of the 20th century, the development of the teachings of pragmatism that were very pronounced, especially those embraced by the teachings of William James and John Dewey. It can be said that the teaching of pragmatism is the foundation of philosophy in the school of legal realism. A very obvious example of the influence of pragmatism on legal realism is in the writings of Benjamin Cardozo or the writings of Oliver Wendel Holmes.

In this theory of legal realism, that is, the view of realism adherents, view the law as the result of social control tools and social forces. The object of the teaching of legal relativism is not limited to human beings alone, but to the social environment, human personality, economic situation, business interests between human beings, as well as general emotions (happiness, anger, sadness), and ideas that are in force, and all of these things are the drivers of laws and laws resulting from social life. So Llewellyn expressed his opinion on the subject of realist jurisprudence, where movement and thinking in legal work are the basic points of realism.

Meanwhile, according to the concept of legal realism, the concept of legal realism is to view the law as an advocate views the law. Law for an advocate is seen as the result of legal predictions of a process and what the future of the legal rule will be. Because for them (advocates), to accurately predict the outcome of a decision, an advocate must consider the results of past decisions, then be able to analyze the results of the old decisions, and then predict the results of future decisions.

Most realist groups prefer to support the concept of legal ideology or method of justice by relying on understanding the material purpose of the law by prioritizing the actual legal system, so as not to accept metaphysical aspects or other aspects that are prone to raising repetitive questions and non-existent entities. Therefore, natural law and the value of justice are never used as objective judgment parameters for them, because according to them the judgment must be subjective. Likewise, Lundsted thought that jurisprudence should be based on observed facts, and not on individual judgments and metaphysics.61

The difference between American Realism and Scandinavian Legal Realism can be seen in the way the system works and operates from both. The Serica school focuses more on the way the legal process works more practically, while the Scandinavian realism focuses more on the theoretical operation of the legal system as a whole. In presenting the Scandinavian empiricism school can reach the extreme, while for American realism, it prioritizes factual studies in finding solutions to a legal problem. Therefore, Scandinavia always relies on a priori arguments as a determinant of solutions to these legal problems.62

Scandinavian realism in its movement was influenced by the philosophical tradition from Europe, while American realism was influenced by the empiricism of the United Kingdom. However, even so, the pragmatism of William James and John Dewey had a great influence on the teachings of Roscoe Pound and Oliver Wendell Holmes, although its influence on Oliver's teachings was not as great as the influence on Pound's teachings, there are indeed traces of this pragmatism theory on Oliver's teachings.

Conclusion

Schools in the philosophy of law include the natural law school, the positive law school, the utilitarian school, the historical madhab, the sociological jurisprudence school, and the legal school of realism (legal realism). These schools are a small part of the branches of the philosophy of law.

The school of natural law is a school whose conception is that laws apply universally and eternally. The advantages of this school are being able to develop and revive the minds of people who want to philosophize in law in seeking justice, being able to develop the protection of human rights (HAM), and developing international law. The drawback is that this school considers the law to apply universally and eternal, while the real law is always adjusted to human needs and always follows the direction of the times. The nature of philosophy is universal, where everything that is real and exists is the object of study, while science as the material of the object of study is more specific and empirical.

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