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The Concept of "Austin and Jeremy Bentham" and Its Relevance to the Construction of Indigenous People

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ABSTRACT

The concepts of positivism and utilitarian schools show differences in regulating or interpreting society and individual rights. The purpose of this research is to find the views of the pure law school and the utilitarian law school in reconstructing indigenous peoples. This research uses normative legal research. In its study, this research uses several approaches, namely the statutory approach and the concept approach. The results showed that John Austin's pure legal school places the construction of indigenous peoples in the standard norms contained in Article 18 B paragraph (2) of the 1945 Constitution. This flow limits the interpretation of the construction of indigenous peoples. Meanwhile, according to the utilitarian legal school of Jeremy Bentham, the view of Article 18 B paragraph (2) of the 1945 Constitution as the basis for the construction of indigenous peoples shifts by interpreting the existence of indigenous peoples is not only seen as law an sich, but the legal regulation of legal communities is seen in 3 (three) aspects, namely a) indigenous peoples are seen in the position of legal reality; b) Customary law becomes a translation of the legal provisions referred to in Article 18 B paragraph (2) of the 1945 Constitution; c) Recognition and protection of the law of indigenous peoples are constructed in the aspect of legal reality. Thus, the utilitarian school of law opens a new approach in the construction of indigenous peoples that is not only reviewed from the norms an sich in statutory regulations but the existence of utilitarian schools of law can be used to open more lively legal spaces in constructing recognition and protection of the rights of indigenous peoples as subjects of law.

Keywords: *philosophy of law, pure law, utilitarian, customary law society*

INTRODUCTION

Theoretically, many explain how the law that becomes the commander is created, and this is greatly influenced by the development of the school of legal theory. Among the many schools of thought, one of them that is known is the school of legal positivism, which wants the law to be in the formal form of the state (Triwijaya et al., 2020). Legal positivism views the law as from the ruler with the main slogan of legal legality. (Triwijaya et al., 2020). Apart from being a school of legal positivism, it is also a pure legal theory, referred to as pure because this school explains the law and seeks to cleanse the object of its explanation from everything that has nothing to do with the law (Kelsen, 2019). This emphasizes that the law must be cleaned from non-juridical factors, such as sociological, political, historical, and even ethical elements. This thinking is known as pure legal theory (Reine Rechtlehre) (Shomad & Thalib, 2020).

On the other hand, Hans Kelsen's view is challenged by Jeremy Bentham with the utilitarian school, according to Jeremy Bentham, the purpose of law according to Jeremy Bentham is to provide full benefit and happiness to society based on social philosophy which states that every society wants happiness and law as a tool to realize that happiness. (Noorsanti, 2023). According to Bentham, legal expediency can be measured by providing great happiness for people. Utilitarianism means that happiness exists without considering whether a law is good or bad, but what is considered is whether or not the law is able to provide happiness to the community. The principle of Utilitarianism is that humans can create happiness with the intention of reducing suffering with the actions they want (Noorsanti, 2023). To achieve the intended happiness, namely individuals and society in the legislation contest must achieve four goals, namely providing a living, providing abundant food, providing protection and achieving equality (Ridwansyah & Pasundan, 2024).

The concepts of positivism and utilitarianism show differences in regulating or interpreting society and individual rights. Austin and Jeremy Bentham show differences in legal arrangements and positions that see the law on different sides. This difference makes the regulation of human actions, especially customary law communities, in the fulfillment and protection of law in accordance with their respective legal approaches. This is indicated by the existence of different recognitions related to the position of customary law communities, both regulated in the Law and the organic regulations below (Kaka, 2021). Although the recognition of indigenous peoples has been regulated in various laws and regulations, this recognition

requires requirements, namely that the customary law community is still alive, in accordance with the needs of the community, in accordance with the principles of the unitary state of the Republic of Indonesia and regulated in the Law, so that according to this view it can be said that indigenous peoples are recognized as long as this conditional recognition is fulfilled by indigenous peoples (Setyowati, 2023).

The conditional recognition of indigenous peoples in legislation shows differences in legal treatment according to the pure law school of Jhon Austin and the utilitarian law school of Jeremy Bentham. This paper tries to analyze the two views of legal schools so that the issue of conditional recognition of legal communities is known in the legal philosophy approach.

RESEARCH METHOD

This research uses normative legal research. In its study, this research uses several approaches, namely the statutory approach and the concept approach (Marzuki, 2013). While the data source used is primary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. The collection of legal materials contains related research topics sourced from legislation related to indigenous peoples, research on legal philosophy and indigenous peoples and other legal materials related to the topic of this research. While data analysis is carried out grammatically analysis to formulate legal solutions from legal issues that are built so that prescriptive analysis is found.

RESULTS & DISCUSSION

1. The Views of Jhon Austin and Jeremy Bentham's School of Law

Jeremy Bentham in the study not only popularized utilitarian, but Jeremy Benthan analyzed the legal objectives of each legal school ranging from utilitarian to Critical Legal Studies. The explanation is that according to Jeremy Bentham, the purpose of law is solely to provide maximum benefit or happiness for as many citizens as possible. The essence of Jeremy Bentham's theory is that the law must bring "Happiness" (Indriati & Sabowo, 2023). According to Bentham, basically every human being is under the rule of 2 sovereign 'rulers': displeasure (pain) and pleasure (pleasure). By nature, humans avoid displeasure and seek pleasure. Happiness is achieved when one has pleasure and is free from distress. Since happiness is the

main goal of humans in life, then an action can be judged good or bad, as far as it can increase or decrease the happiness of as many people as possible (Santoso, 2024).

The terminology of Happiness is pleasure, in the implementation of this principle, humans must choose one of the 3 (three) options of the "Happiness Principle", namely whether to choose higher pleasure, lower pleasure or equal pleasure. This option (choice) in my view is very subjective and difficult to equalize the meaning of happiness because each person has a different view of the size of happiness / pleasure eventually it will result in less happiness instead of more happiness. Jeremy Bentham, in the concept of utilitarianism, illustrates that if an event is morally important to someone, we can calculate who will be affected by the action and how much pleasure and pain it can cause to those affected. Then, we can choose an action that optimizes happiness or reduces suffering. In utilitarianism theory, Jeremy Bentham believes in the process of maximizing utility, where maximizing utility is considered equivalent to maximizing happiness, benefits, advantages, and enjoyment for as many people as possible (Ridwansyah & Pasundan, 2024). Similarly, maximizing utility is considered equivalent to minimizing suffering for as many people as possible who are affected by situations that are morally important.

Based on this analysis, the theory of legal objectives put forward by Jeremy Bentham, namely "the purpose of law is merely happiness" is subjective and aims more at legal individuality, the law is not only in the area of happiness but the law must also be in the moral area (S. H. S. Salam et al., 2020). Because the intrinsic values of happiness are broad in nature and the moral aspect is one part of it, if using a legal lens it is limited but if done through a moral approach, the legal goal of happiness can be achieved because morals are broad and unlimited in scope because the essence of moral teachings is good and bad, so if it is connected to Jeremy Bentham's theory of legal objectives, namely Happiness can be achieved if "happiness brings good and happiness has not been achieved if it brings bad to society." The natural law school's view of Jeremy Bentham's theory of the purpose of law, the purpose of law is solely happiness, law is happiness without any other aspects. This means that law is separated from morals as believed in the teachings of natural law. If examined further this can be seen in the utilistic teaching, the law comes from the ruler who is forcing the goal to achieve happiness (Happiness comes from the ruler) and the application of law (Law) is limited to concrete cases. As a result, the nature of the law does not apply universally as believed by the teachings of natural law (Wardiono & Rochman, 2020).

Then Jeremy Bentham also reviewed the flow of positive law, according to Jeremy Bentham is strongly supported by the flow of positive law because the law is an order, the law must be separated from morals, the separation of the concept of law (pure concept) with other legal concepts outside the law. In the historical flow, this flow is contrary to Jeremy Bentham's theory of legal objectives, according to Jeremy the law must be concretized through the authority of the authorities in the form of laws to achieve happiness while according to the historical flow of juris prudence the law is in the midst of society, the law does not need to be made because the law already exists in society, meaning that the law is not made but found in society, so the authorities through the courts must decide cases in accordance with existing law in society (customary law). However, Jeremy Bentham's Theory of the Purpose of Law and the historical school have similarities in terms of the applicability of the law. because the nature of the law of these two schools is not universal, meaning that it cannot be applied to all nations. The anthropological school shows that this school is very different from other legal schools because the focus of anthropological studies is the study of humans, the law includes a view of society more to the culture of society, the law is society, this is very different from the utilistic school that views the law as a product of the law issued by the authorities. Then the sociological flow, in the utilitarian concept, this flow supports and does not support Jeremy Bentham's theory of legal objectives because this flow views law as a social reality but on the other hand also has the same attention as the utilistic flow, namely attention to written law or legislation. Here are the differences but with the same attention to written law, namely Utilitarianism: Law in book while sociist flow: law in action. Utilitarian flow: Autonomous law, the sociological flow is that the law is not autonomous influenced by non-law factors. The method used by the Utilistic School: Prescriptive while sociological flow: descriptive. Meanwhile, the Realist flow is a flow that bases its study on the law in action / law in its implementation by paying attention to the influence of non-law on law and if it is associated with the utilistic flow (S. Salam, 2020). The realist flow has similarities and differences where the object of study is the same, namely the law, the law is the order of the ruler in the form of a law, while the difference is that the realist flow, the law must be built from the implementation of the law itself by looking at the substance of the law made by legal institutions by showing the law in relation to non-law factors (politics, economy, environment, human rights). Finally, the Critical Legal Study flow is a flow that is not based on and does not look for certain forms of norms, the basis of this flow is to examine legal theory and practice which is completely antithesis when associated with the utilistic flow,

clearly critical legal study strongly rejects the utilistic flow which only sees the law from the formal side (Unger, 2019). Because the focus of attention of critical legal studies is the gap that occurs between law in theory (law in box) and law in reality (law in action) and the failure of law to respond to problems that occur in society.

In the pure law school Austin views that Law is seen as a rule, more specifically its juridical form. (Kelsen, 2019). Legal science only deals with the fact that there is a state-created legal system, and therefore it must be obeyed. If you don't obey, be ready to accept sanctions. Law, not just-unjust, and also not a matter of being relevant or not to the struggles of the real world (Ali, 2023). The only thing relevant when talking about law is that it exists and is juridically valid. Austin added that juridical positivism wants to capture the legal system as a sensual fact, just an empirical fact. As a result, it is only concerned with aspects that can be captured by the five senses (Budhi et al., 2021). Because what can be sensually captured is a collection of rules, and the rules are factually made by a legitimate authority, and enforcement can be enforced, according to this school, the law is nothing more than a pile of formal rules from the state. Austin concluded that the legal system is real and valid, because it has a positive form from the authorized institution. The justification of law is in its formal-legalistic aspect, either as a form of ruling order.

Hans Kelsen's theory in which Kelsen sees a difference between the field of "is" (Sein) and the midwife "should" (Sollen) as two elements of human knowledge. The field of Sein is related to nature and facts (which are entirely controlled by cause-and-effect formulas). Whereas the field of Sollen is related to human life (which is controlled by freedom and responsibility). That is why, in the field of Sollen, the question of human freedom and responsibility is discussed. Every human being has freedom, but in living together he bears the responsibility of creating an orderly common life. But in order to create an orderly common life, there needs to be objective guidelines that must be adhered to. These guidelines are called laws. The Sollen field, (in which the law is sucked in), according to Kelsen, the source of all these objective guidelines is the grundnorm (basic norm).

Grundnorm resembles a presupposition of the "order" to be realized in the collective (in this case, the state). Grundnorm is a transcendental-logical requirement for the enactment of the entire legal system. The entire positive legal system must be hierarchically guided by the grundnorm. Kelsen calls it the theory of juridical order. Using the concept of Stufenbau (layers of rules according to echelons), Kelsen determines the levels of legislation. The entire system

of legislation has a pyramidal structure (starting from the abstract grundnorm to concrete ones such as laws, government regulations, etc.). So according to Kelsen, the way to recognize a legal and illegal rule is to check it through the stufenbau logic, and the grundnorm becomes the main touchstone.

2. The Construction of Indigenous Peoples in the Pure Law School and Jeremy Bentham

There are several references to the term indigenous peoples in Indonesia in literature and legislation, such as 'customary alliances', 'indigenous peoples', and 'customary law communities'. However, this is not a reason to negate their existence and rights. (Kaka, 2021). Law No. 5 of 1960 on the Basic Regulation of Agrarian Principles (UUPA) has regulated the existence of customary law communities, especially in the field of customary rights. Article 2 paragraph (4) states: "The right to control from the state above can be exercised by the regional self-government and customary law communities, as needed and not contrary to national interests, according to the provisions of government regulations". In addition to the UUPA, the term 'indigenous peoples' has also begun to be widely used among non-governmental organizations as well as by other parties such as the government, the private sector and the mass media since the term was agreed upon as a term used for advocacy for the defense of communities affected by development in various regions by a number of non-governmental organizations in a workshop (Kaka, 2021). The provisions of Article 18B paragraph (2) of the 1945 Constitution are strengthened by the provisions of Article 28I paragraph (3) of the 1945 Constitution which states that the state recognizes and respects the unity of MHA and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia, which are regulated by law (Setyowati, 2023). However, 70 years after Indonesia's independence, the ratification of the Indigenous Peoples Bill has not yet been achieved. The Constitutional Court Decision No. 35/PUU-X/2012, which recognizes the existence of customary forests and the rights of indigenous peoples, shows that after three years since the Constitutional Court Decision No. 35 was issued, until now not a single right of indigenous peoples in Indonesia has been recognized by the government. In fact, indigenous peoples are part of the history of the establishment of the Unitary State of the Republic of Indonesia (NKRI) (Jamil, 2021).

Based on this issue, when viewed from the flow of pure law and utilitarian law flow, there are 2 views that cause the Draft Law on Indigenous Peoples not to be ratified by the DPRI. These legal views can be described as follows:

1. The existence of Article 18 B paragraph 2 of the 1945 Constitution which regulates the conditional recognition of customary law communities still needs to be interpreted according to existing legal provisions (pure legal flow approach). The conditional recognition in question is that the existence of customary law communities must be: in accordance with the times, still alive and the principles of the unitary State of the Republic of Indonesia and regulated in the Law.

   The requirements, if viewed from the flow of pure law, still need to be translated back into more concrete regulations because the provisions of Article 18 B paragraph 2 of the 1945 Constitution are still too general and cannot be implemented so that according to existing legal provisions they are still waiting for the Law. The existence of the above prerequisites will certainly be a difficulty for a customary law community unit to obtain their rights to forests. This is because there will be very few customary law communities that can fulfill the eleven prerequisite elements. For example, regarding prerequisite element number 1, namely that the customary law community unit concerned must have existed since ancient times and has been successfully maintained uninterrupted until now (S. Salam, 2016).
2. The interpretation of Article 18 B paragraph (2) of the 1945 Constitution according to the utilitarian school of law views the intended conditional recognition differently, with the utilitarian school of law approach the existence of requirements for legal communities must be reviewed in the position of customary law which is positioned that the purpose of customary law can provide maximum happiness for indigenous peoples. The point is, the purpose of customary law is to provide the greatest possible happiness for indigenous peoples. On the other hand, the existence of legal provisions in the constitution that regulate requirements is expanded in meaning by the existence of customary law and state law which in legal arrangements must provide maximum happiness for indigenous peoples. So that if it is returned to the conditional recognition arrangement, the conditional recognition must be able to provide benefits, not hinder or obstruct the construction of indigenous peoples.

The opposition of the two legal views, in the view of the pure law school and utilitarian law school has (empty legal space) in viewing conditional recognition. So that the difference in legal views shows the existence of a tug of war over the regulation of the existence of legal communities in the Law, which until now has not been ratified by the legislature. In addition,

the views of the pure law school and the utilitarian law school actually have different legal objects and legal objectives so that there are obstacles in the legal regulation of indigenous peoples. In this position, if we go back to the nature of the law, there are

The legal view of the pure law school towards the existence of indigenous peoples who are only taklik on the phrases written as stipulated in Article 18 B paragraph (2) of the 1945 Constitution. The phrase conditional recognition must be reviewed from the principle of "expediency" which if examined from Jeremy Bentham that the existence of legal arrangements Article 18 B paragraph (2) of the 1945 Constitution must be able to provide the maximum benefit for indigenous peoples. In this context, indigenous peoples can obtain their inherent rights. These basic rights have been guaranteed as stipulated in the 1945 Constitution.

In legal practice, the implementation of utilitarian legal flow in the context of the existence of legal communities can be found in the form of ease of legal recognition and protection as mandated by Article 18 B Paragraph (2) of the 1945 Constitution. The ease of legal recognition and protection in question is not merely based on limited interpretations and limited legal arrangements related to conditional requirements on the meaning of Article 18 B Paragraph (2) of the 1945 Constitution. The utilitarian school of law emphasizes the legal objective of expediency in the legal arrangement so that if it is based on the legal objective of expediency, it can be translated that the construction of indigenous peoples in legal arrangements refers to:

a. Customary law communities are seen in a position of legal reality.
b. Customary law becomes the translation of the legal provisions referred to in Article 18 B paragraph (2) of the 1945 Constitution
c. Legal recognition and protection of indigenous peoples is constructed on the aspect of legal reality

The legal regulation of the construction of indigenous peoples as viewed by the utilitarian school basically positions indigenous peoples in terms of the fulfillment of customary rights (basic rights). The basic rights of indigenous peoples are one of the objects of utilitarian studies that solely prioritize the goal of fulfilling the rights of indigenous peoples not only normatively but also in the practical aspects of the implementation of legal norms that have been formed in law.

CONCLUSION

The pure legal school of John Austin places the construction of indigenous peoples in the standard norms contained in Article 18 B paragraph (2) of the 1945 Constitution. This school limits the interpretation of the construction of indigenous peoples. This is evident during Indonesia's independence, the legal recognition and protection of customary law communities has not yet been regulated in the form of the Law on Customary Law Communities. This legal view is in stark contrast to the utilitarian legal school of Jeremy Bentham, as Bentham's theory emphasizes the legal aspect: happiness/benefit". With the utilitarian legal school approach, the view of Article 18 B paragraph (2) of the 1945 Constitution as the basis for the construction of indigenous peoples shifts by interpreting the existence of indigenous peoples is not only seen as law an sich, but the legal regulation of legal communities is seen in 3 (three) aspects, namely a) indigenous peoples are seen in the position of legal reality; b) Customary law becomes a translation of the legal provisions referred to in Article 18 B paragraph (2) of the 194 Constitution; c) Recognition and protection of the law of indigenous peoples are constructed in the aspect of legal reality. Thus, the utilitarian school of law opens a new approach in the construction of indigenous peoples that is not only reviewed from the norms an sich in the legislation but the existence of utilitarian legal flow can be used to open more lively legal spaces in constructing recognition and protection of the rights of indigenous peoples as subjects of law.

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