

PEMISAHAN HUKUM DAN MORALITAS:
Kritik Positivisme Hukum H.L.A. Hart atas
Bahaya Penyatuan Hukum dan Moralitas

DISERTASI

**Karya tulis sebagai salah satu syarat
untuk memperoleh gelar Doktor dari
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ABSTRAK

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[D] Kata Kunci: positivisme hukum, teori hukum kodrat, perintah, ketaatan, kewajiban, aturan primer, aturan sekunder, aturan pengakuan, realisme legal, formalisme, tuturan askriptif, pemisahan hukum dan moralitas, diskresi yudisial, tesis sumber sosial.

[E] Hukum cukup pasti terbentuk dari tradisi moral, tapi hukum tidak identik dengan moralitas. Kaitan keduanya ditandai oleh kontinuitas dan diskontinuitas. Berkaitan dengan relasi keduanya disertasi ini bertujuan untuk mengajukan argumen bahwa klaim hukum harus dibedakan, bahkan dipisahkan dari klaim moralitas dan sebaliknya, klaim moralitas harus dibedakan, bahkan dipisahkan dari klaim hukum. Untuk memasuki persoalan yang terlihat dalam kompleksitas relasi antara hukum dan moralitas ini, disertasi ini belajar dari pemikiran Positivisme Hukum yang diajukan oleh H.L.A. Hart.

Berdasarkan gejala-gejala kontemporer penyatuan hukum dan moralitas yang terjadi dalam tuntutan masyarakat adat dan kelompok agama tertentu untuk menjadikan tradisi moral mereka sebagai hukum negara ditelaah pemikiran Hart yang menawarkan pentingnya pemisahan hukum dan moralitas. Telaah konsep hukum Hart ini ditelusuri dari komitmennya sebagai bagian gerakan filsafat analistik (Lingkaran Oxford) yang membedakan dengan tegas antara fakta sejati dan klaim metafisis. Tiadanya pembedaan itu mengakibatkan korupsi pemikiran Eropa dan melahirkan rezim totalitarian. Komitmen Hart yang tegas antara fakta sejati dan klaim metafisis ini mempengaruhi pemikirannya tentang hukum yang membuatnya menjadi pembela yang terkenal atas tesis pemisahan hukum dan moralitas.

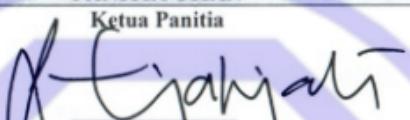
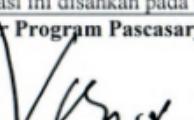
Alasan utama Hart untuk membela pentingnya pemisahan hukum dan moralitas dalam debatnya dengan Lon L. Fuller dalam "Positivism" dan dalam karya utamanya *The Concept of Law*. Alasan utama Hart adalah untuk melepaskan hukum dari belenggu moralitas yang spekulatif hanya bisa dicapai dengan pembedaan yang tegas, bahkan pemisahan hukum dan moralitas. Sebaliknya, klaim kontinuitas hukum dan moralitas yang didukung oleh THK menjadi kabur dan berbahaya, jika diekstrimkan menjadi klaim yang menyamakan atau menyatukan hukum dan moralitas. Telah terbukti dalam sejarah bahwa klaim terakhir ini telah disalahgunakan oleh rezim monarki absolut, rezim otoriter dan totaliter atas dasar ideologi sekular dan religius. Dalam disertasi ini juga ditunjukkan bagaimana Hart tetap mampu menunjukkan keunggulan pemisahan hukum dan moralitas berhadapan dengan kritik Dworkin. Akhirnya di dalam penelitian ini disimpulkan bahwa klaim kontinuitas hukum dan moralitas tidak bisa dipertanggungjawabkan dan dipertahankan. Sebaliknya, klaim diskontinuitas hukum dan moralitas dibuktikan sebagai klaim yang bisa dipertanggungjawabkan dan dipertahankan.

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PEMISAHAN HUKUM DAN MORALITAS:
Kritik Positivisme H.L.A Hart atas
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