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THE EXISTENCY INTERNATIONAL LAW ACCORDING TO BRIAN Z. TAMANAHA THOUGHT "*A REALISTIC THEORY of LAW*"

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Abstract

The existence of international law is still widely debated. This research will examine the existence of international law based on the thoughts of Brian Z. Tamanaha: A Realistic Theory of Law. The research method used is normative research using conceptual and philosophical approaches. According to Tamanaha, law is whatever is called law, there are many laws that exist in society which have an equal position so that no law serves as a standard for evaluating other laws. The relationship between law and morals is relative, not absolute. That is, law is still called law even though it is moral or immoral. From this Tamahana thought, we can see that international law is law, whether it is moral or not.

Keywords: *A Realistic Theory of Law; Brian Z. Tamanaha; Existence of International Law*

INTRODUCTION

Statements about *what is law* ?, have been put forward for the last 150 years. However, the answers are often vague and do not represent the essentials. Many of the answers put forward are strange and contain paradoxes. This is because what is stated about the law is that which exists and occurs at one time and its development is understood somewhere. The question of whether the law is considered important and is always raised as if it is capable of revealing the truth about the law.[1]

Although there are different conceptions of law, most people have the ability to list examples of law. In fact, even though each country has a different legal system, similarities can be identified, regardless of differences from one another. Every educated person can identify the framework that forms the building of legal understanding, namely (1) rules that prohibit or place certain behavior under a law; (2) a rule that requires a person to

[1] Muchammad Ali Safa'at, (2016), *Konsep Hukum H.L.A Har*t, Jakarta : Konstitusi Press, pg. 9

provide compensation to another person who is injured in certain events; (3) rules that define what must be done to make wills, contracts or other matters giving rise to rights and obligations; (4) the court determines what the rules are, when the rules are violated and decides on the punishment or compensation to be paid; (5) legislature that makes new rules and removes old ones.[2]

If the building of the legal understanding above has become common knowledge, then why does the question still raise what is law? Is it because there are certain cases that can raise doubts such as international law and primitive law? International law is seen as lacking a legislative body, states cannot stand before an international tribunal without its consent, and no organization can implement sanctions effectively. This also applies to primitive laws.[3]

To know about international law, it is not enough just to read the articles in the convention, but we also have to look at a series of rules that exist in relations between countries. International law must be associated in the life of the international community. The development of the international community gives rise to new needs which have a real impact on international law. Traditional international law that arose from the history of the emergence of the nation-state (*Nation State*) has changed in scope, nature and a number of features attached to it to adapt to these new developments and demands.[4]

The question of the quality of "international law" as law already exists and is strongly influenced by John Austin's theory which conceptualizes law as a commandment from the sovereign. A sovereignty is something that is obeyed by the majority of society and is disobedient to other superior authorities. This argument forms the basis for the assertion that "international law" is not law. This theory has a lot to influence attitudes towards international law. Even if they don't refuse, at least they reduce the role of international law in the reality of international politics. Hart rejects Austin's argument that international law has no legal validity but only moral validity. Hart acknowledges that international law is a set of legal rules even though it is not a legal system. This gives rise to the opinion that the flow of legal positivism has an effect on the perspective of a voluntary approach to international law, although this is not al-

[2] Ibid, pg. 11
[3] Ibid, pg. 12
[4] Hata,(2017) *Hukum Internasional ' Sejarah dan Perkembangan Hingga Pasca Perang Dingin*', Jakarta : Setara Press, pg. 1

ways the case.[5] Tamanaha is one of the philosophers who criticized Hart's concept of legal positivism. According to Tamanaha, there are 2 ways of defining the law, namely:

(1) Defining law by looking at the building between law and society. This method produces two theses, namely the law as a mirror of society which is called the *mirror of the thesis* and the law which functions to maintain social order called *the social order thesis.*

(2) Defining law by looking at the relationship between habit, morals and positive law. [6]

In the international community there is an orderly law that regulates the survival of the international community. However, what often happens is that many countries use these rules of international law as a justification for fighting other countries, for example, there are still many violations of human rights even though the international rules that regulate it are the *Declaration of Human Rights.* Such conditions certainly make international law considered non-law because it cannot work effectively.

What is experienced by international law is actually almost the same as what happened to national law, for example, there are still many rapes, murders, thefts, even though we already have a national criminal law. Of course this proves that violations of national law never stop. In essence, violations only concern legal effectiveness, not legal validity. With doubts about the existence of international law, through this paper the author would like to discuss "**The Existence of International Law according to Brian Z Tamanaha's Thought:** ***A Realistic Theory of Law*** ".

RESEARCH METHOD

This research uses normative legal research, this research is descriptive analytic. As a research that seeks scientific truth, several approaches used in this research are:

(1) The conceptual approach (*Conceptual AApproach*), namely this approach is used because the definition, principles, and principles of forming laws and regulations related to legal issues are still very abstract.

(2) Philosophical approach, namely this approach is used to examine the existence / meaning of consensus prin-

[5] M. Ali Safa'at, *Op. Cit*, pg. 202
[6] Muji Kartika Rahayu, (2018) ,*Sengketa Mazhab Hukum*, Jakarta : Kompas Penerbit Buku, pg. 22

ciples in international commercial arbitration agreements.

Legal material analysis techniques begin with the qualification of facts that produce normative legal materials in the form of legal problems / events, legal theory, social theory and materials related to legal philosophy, the development of thoughts in the realm of legal science studies and qualitative legal materials obtained from the information collected by sources and systematic, then described and analyzed according to the problem under study.

ANALYSIS AND DISCUSSION

The Nature of International Law

Human history, to find true knowledge, revolves through a dialectical process that shows propositions and postulates with varying degrees of difference, from those showing incremental differences to diametrically opposed to one another. Not much different from what happens in social science, the frenzy of trying to find true knowledge occurs in the science of law.[7]

This can be seen by the emergence and development of three major paradigms that influence the development of legal science, namely; The Moral Paradigm *(the idea law*) which affects manifested in the natural law school / natural law school; The rational paradigm (*the rational law*) which later became the paradigmatic foundation of the positivistic legal philosophy school and the scientist paradigm which later became the reference school of history, the school of philosophy of law *sociological jurisprudence* and the school of philosophy of law *pragmatic legal realism* .[8]

As for the diversity of conceptual offerings, propositions or statements and reasoning that exist in the thinkers group above, it causes each thinker to have the flexibility to make choices regarding a particular juridical thinking orientation, in accordance with the professional duties of the legal development. Law is very necessary in society to regulate daily life. Law is arule / norm that appears due to social symptoms that occur in society. Without social phenomena, law cannot be formed and vice versa.[9] Law is a system of norms that regulates life in society along with norms of courtesy and morals, legal norms

[7] Khudzaifah Dimyati (2014), *Pemikiran Hukum Konstruksi Epistemologis Bebasis Budaya Hukum Indonesia,* Yogyakarta : Genta {ublishing, pg. ix

[8] *Ibid*

[9] Amran Suadi,(2019) F*ilsafat Hukum Reflekfi Filsafat Pancasila, Hak Asasi Manusia dan Etika*,Jakarta : Prenadamedia Group,pg. 63

are included in the norms of human behavior.[10]

In its development, law has controlled almost every area of human life. With the existence of the law there is a relationship or effective communication among fellow members of society. It is impossible for society to run without the law, even though law is not the only norm that governs social life.

This is also the case in state life in the context of international law. The development of the international community gives rise to new needs which have a real impact on international law.[11] Traditional international law that was born since the emergence of the nation states (*Nation State*) has changed in scope, nature and a number of characteristics attached to it to adapt to the developments and demands of the times. Friedman detailed the new developments:

(1) Expansion of public international law with the inclusion of new dimensions that were originally outside its field;

(2) Entry as a participant and subject to international law of public international organizations, and to a certain extent state enterprises and individuals;

(3) Expansion of international law, especially through the accession of non-western countries to international law;

(4) The strength of organizations that are political, social, economic in nature to the universality of public international law, especially when the scope and issues regulated are developing;

(5) The role and diversity of international organizations in completing new tasks of international law.

Another development that has had a very significant impact on international law is the change that has occurred in the world map of world politics. Not only with the horizontal expansion in the international community, namely with the birth of a number of new countries in the world, but perhaps in the ideological map adopted by the nations of the world. History has changed and distorted international law to an alarming stage, which in its extreme

[10] Frans Magnis-Suseno, *(2018) , Etika Plotik Moral dasar kenegaraan Modern*, jakrta : Gramedia Pustaka Utama pg. 83
[11] Hatta, *Loc.i*t, pg.l 1

form is a complete denial of the existence of international law It self.[12]

International law is part of an overall legal system. This still raises the problem of whether international law is legal or not? Therefore we need to see the nature of international law itself. Before that, we have to re-understand the nature of the law itself, because until now the debate about "what is law" is still on going. We can understand the many differences regarding the meaning of the law itself because it is caused by many factors that affect each school of law such as historical factors.

Tracing the history of legal definitions convinced Tamanaha that law was defined using the help of social science, namely conventionalism, functionalism and essentialism. Furthermore, Tamanaha uses Hart's legal concept. Then Tamanaha proposed a new concept called *social-legal positivism* . This concept confirms Tamanaha's position on the concept of law, among others: law is whatever is called law, there are many laws that live in an equal society so that no law serves as a standard for evaluating other laws. The relationship between law and morals is relative, not absolute. That is, law is still called law even though it is moral or immoral..[13] From this Tamahana thought, we can see that international law is law, whether it is moral or not. Meanwhile, if we look at the conventional approach, according to Tamanaha, law is a human social creation. Law is whatever is called law. The existence of law is not determined by the attitude of the legal institution towards norms and is not determined by the compliance of citizens, nor is it determined whether the law fulfills several functions or does not fulfill a function at all.[14] Legal truth is determined by the existence of actors who coordinate their actions to do something with existing norms. This coordination requires agreements that serve as the new norm.[15]

According to Mochtar Kusumaatmadja, international law is the whole legal principles and principles governing relations or problems that cross national borders that are not civil in nature.[16] Meanwhile, according to Oppenheim, there are 3 essential requirements for the existence of law, namely: the rule of law,

[12] *Ibid*, pg. 5

[13] Muji Kartika Rahayu, *op.cit*, pg. 23

[14] Brian Z. Tamanaha, (2001), *General Jurisprudence of Law and Society*, New Yorl:Oxford University Press, pg. 153-154

[15] *Ibid*, pg. 151-154

[16] Muchtar Kusumaatmadja, (1082) , *Pengantar Hukum Internasional, Buku I Bagian Umum*,Jakrta : Bina Cipta, pg. 1

the existence of a community and the existence of guarantees of external implementation of these rules.[17] The first condition can be seen with the many international rules in everyday life such as international treaties on human rights, trade, sea and national borders, and the environment. The second condition for the existence of an international community is the countries within the scope of bilateral, multilateral, regional agreements. The third requirement for implementation guarantees can be in the form of sanctions that come from other countries. International organizations or international courts.[18]

From the explanation above, we can see that international law is the real law. The international community accepts international law as law, not just a moral principle. This is in accordance with what Tamanaha said that there are 2 ways to define law, one of which is by looking at the relationship between law and society. This method produces two theses, namely the law as a mirror of society which is called the *mirror of the thesis* and the law which functions to maintain social order called *the social order thesis.*

In international law there is no supranational body that has the authority to make and enforce an international rule, no law enforcement apparatus has the authority to take direct action against a state that violates international law, and the relationship is based on a coordinative, not subordonative relationship. However, it turns out that the international community accepts international law as law which is actually not only a positive moral.

The questions, "is international law binding? How can international law be binding? Or, what makes international law binding? Expressing doubts not about the implementation but about the legal status of international law. This doubt stems from the absence of a centrally organized system of sanctions. However, if because of these rules international law is not binding, it is futile to clarify it as a law that contains certain obligations.[19]

If you look at the article 16 Convenant *of the League of Nation or Chapter VII of the United Nations Charter* , it is clear that it does not include anything that can be equated with sanctions on national law in international law. Although international law is used in the case of the Kore-

[17] Sefriani, (2010), *Hukum Internasional Suatu Pengantar*, Jakarta : Raja Grafinso Persada,pg. 8
[18] *Ibid*

[19] H.L.A Hart, *The Concept Of Law*, sebagaimana dikutip oleh Muchamad Ali Safaat, *Konsep Hukum HLA Hart*, pg. 203

an war or the Suez Canal as an important part, the enforcement of the provisions of the charter seems to be parallel to the veto and it must be said that it only exists on paper.[20] However, claiming that international law is non-binding in the absence of sanctions is tacit acceptance of an analysis of obligations contaminated by theories that law is essentially an *order-backed by threast issue.*[21]

International law has evolved in a different form from national law. In the population of modern nations, if there is no organized pressure and penalties for crime, violence and theft will occur more frequently than expected. However, for states in the context of international law, war is only a short respite from a long peace. It can be said that a rule only applies if it regulates a matter for which the state is not interested in going to war.[22] Thus, Hart rejects the argument that the absence of sanctions means that international law cannot be called law and indeed in international law sanctions do not have the precautionary effect that is the goal of sanctions in national law.[23]

There are several theories about the binding of international law, namely[24]

(1) Natural law theory

This theory argues that international law is binding because international law is part of natural law that is applied to the community of nations. In other words, it can be said that countries want to be bound by international law because their relations are governed by a higher law, namely natural law. Natural laws are laws that come from nature and are passed down to humans through their reason or reason. Law according to this school was not created but found.

(2) Positive legal theory.

This flow argues that the basis for the binding strength of international law is the will of the state. Even though it is more concrete than what is conveyed by natural law, what this school says has a weakness, namely that not all international laws gain binding strength because of the will of the state. Many rules of international law have the status of customary international law or

[20] *Ibid*, pg.l 204
[21] *Ibid*
[22] I*bid*, hm 205
[23] Payandeh,*The Concept of Internastional law in the Jurisprudence of HLA Hart*, sebagaimana yang dikutip oleh Muchamad Ali Safaat, *Konsep hukum HLA Har*t pg. 205
[24] *Ibid*, pg.l 13

general law principles that existed before the birth of a state. Without ever giving a statement of willingness to agree or disagree with these rules, these newly born countries will be bound by these international rules. This is consistent with Tamanaha's view that one of the ways to define law is to describe the relationship between habit, morals and positive law. Habits here refer to social traditions and practices that already exist and continue to be practiced in secret[25]

(3) Sociological Approach Theory

According to this flow, the people of nations as social beings always need interaction with one another to meet their needs. In this interaction, the international community needs a rule of law to provide legal certainty for what they do. In the end the international community will experience order, order, justice and peace. Thus according to this flow, the basis for binding international law is the common interest and need for legal order and certainty in carrying out international relations.

Although international law has become a law, international law has a different character from national law due to the existence of different structures of society.

International Law Purposes

The existence of law in society is always needed as an integration of various interests, as well as in the life of the state in the international community, law is needed to create order, security and peace so as to guarantee an element of certainty in every orderly relationship.. [26]Meanwhile, according to Apeldorn, the purpose of law is to regulate life in peace. In order for this goal to be achieved, fair rules must be created, meaning that in these regulations there is a balance between the protected interests, in which everyone gets as much of what he / she belongs to.[27]

In line with the aforementioned legal objectives, Muchtar Kusumaatmadja said that the main objective of international law is to create a more orderly international legal system. In detail, the objectives of international law are as follows:[28]

(1) Maintain international peace and security

[25] Muji Kartika Rahayu, *Op.Cit*, pg. 97

[26] Muchtar Kusumaatmadja, *op.cit,* pg. 12

[27] Apeldron(1960) , *Pengantar Ilmu Hukum*,Jakarta : Noor Komala,, pg. 20

[28] Sam Suhaedi Admawiria, (1968), *Pengantar Hukum Internasional,* Bandung : Alumni, Bandung, pg. 2

(2) Advancing the public interest for the citizens of the international community and developing the general welfare of mankind

(3) Develop friendly relations and cooperation in all fields between nations

(4) Developing respect for human rights and freedoms

(5) Carrying out an order for the life of the international community in such a way as to provide possibilities for mankind to perfect their personality and advance the degree of their life in all fields as a civilized and cultured nation.

The Role and Development of International Law

Currently international law regulates almost every state activity, for example, trade, borders, human rights, war, space and Antarctica. This proves that international law is the main tool in international trade. Apart from that, international law also pays close attention to nationality, extradition, the use of armed force, the environment and national security. This proves that it is very difficult to find state activities that are not regulated by international law.

International law coordinates and facilitates cooperation between countries which are dependent on one another. The practice of international law cannot be separated from diplomatic, political, attitude, patterns and foreign relations policies. In many cases, despite the consideration that the state is important, it is very likely that the state in seeking the legality of any action or decision it takes prioritizes *self interest, expediency* or *humanity* .[29]

There are several factors that influence the development of international law today, namely:[30]

(1) Increase the number of new countries as a result of decolonization.

(2) The emergence of various international organizations

(3) The recognition of individuals as subjects of international law

(4) Development of technology and communication

(5) The emergence and development of non-state actors in international regulations

(6) The era of globalization is marked by the increase in business transac-

[29] Sefriani, *Op,Cit, pg. 35*
[30] Ibid

tions carried out by business actors between countries, the weakening of the exercise of the sovereignty of developing countries under pressure from developed countries and the use of international law by developed countries for various purposes.

(7) In line with the era of globalization, global issues such as democracy, human rights, the environment, and terrorism have emerged which have influenced the development of international law.

International Law Enforcement

In contrast to national law, in international law there are no law enforcement officers such as police, prosecutors, judges. International law does not have an international legal police, although we know international judges and international lawyers in the International Court of Justice. But they can do little to countries that violate international law.

In the international community there is a social control system in line with the principle of international relations which is always based on the principle of reciprocity. With this principle, each country relinquishes part of its sovereignty. The existence of international law will not be maintained, if each country in international relations maintains its absolute sovereignty.

In line with this, as stated by Oppenheim, that in international law there is a guarantee of implementation in the form of " *external power* " , namely the power that exists in the international community itself. If observed, guarantees for the implementation of international law in the form of " *external power* " in the international community can be in the form of:

1. The actions of other countries, that is, if there is a country that violates international law, there will be reactions from other countries.
2. The existence of an international judicial body
3. The actions of international institutions / organizations in accordance with the authorities they have.

CONCLUSION

Based on the description above, it can be concluded that, of course, the existence of international law cannot be doubted. International law is a set of rules / rules that are deliberately made by the international community in regulating order and justice in the international com-

munity as stated by Tamanaha that law is whatever is called law, there are many laws that live in an equal society so that no law exists. serves as a standard for evaluating other laws. The relationship between law and morals is relative, not absolute. That is, law is still called law even though it is moral or immoral.

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