

Conference Paper

A Critical Study of Legal Positivism As a Legal System in a Pluralist Country

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Abstract.

Legal positivism is one of the schools of legal philosophy that has a dogmatic paradigm, the fundamental principle in positivism is the principle of legality. In addition, the characteristics of positivism are legal unification, the meaning of a law is the spirit to make one law, the state of positivism law is also influenced by legal universalism, and the law is considered relevant in any part of the world. This is based on the historical character of the Indonesian nation. The spirit of unification in Indonesia started from the youth oath, initially, there was no such spirit. In line with this, the law has existed since before the entry into legal colonialism. This means that customary law was born before the Indonesian state was formed. With the existence of the state, then the law is configured to become a legal unification. So that the applicable law is the law passed by the state. The law resulting from the concordance is forced to become a binding rule in a country. The approach in this study is conceptual.

Keywords: legal positivism, legal system, pluralist state

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1. INTRODUCTION

Human life is always dynamic, as well as civilization including the treasures of the state legal system. According Auguste Comte, a German put forward his theory that the human paradigm in thinking goes through three stages, in the first stage humans are strongly influenced by theological thinking, meaning that all problems that befall humans will be connected with something transcendent. Second, in the metaphysical stage, after many theological thinking paradigms can be criticized, then a metaphysical paradigm appears, meaning an imaginative paradigm about the world that is described in a conceptual system.

Human thinking, lastly the positivist paradigm, the basic principle of this paradigm is the attitude of anthropocentrism, the notion that humans are the center and determinant of life with the power of their ratio. In the context of science, the human positivist

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paradigm takes a distance from the object being observed so that what is produced is objective.

This paradigm penetrates into every aspect of life affairs, including the world of law. Previously, the dominant legal paradigm adopted by countries was the flow of natural law. This school says law comes from God. There are two classifications of the flow of natural law, first, irrational, which considers the law of God as Thomas Aquino, and second, rational, which assumes that law originates from human reason and morals. The figure who entered the second classification was Immanuel Kahn with his teachings on categorical imperatives and Grotius who later became known as the father of international law.

European countries with the dominance of the positivism paradigm gave birth to the concept rule of law. As a result, the law is formal, procedural, applies nationally and the state dominates in reconstructing and applying the law. According to Ahkam Jayadi, so many case resolutions are more oriented towards formal law (legal positivism), and the impact has experienced many failures and has led to arbitrariness and injustice.[1]

A state of law that is oriented towards a system of legal positivism tends to bring the state into a police state style/power.[2] Because in positivism state law is the center of law, the law of positivism according to John Austin is sourced from the authorities, and all laws that are formed must be obeyed by the people. Thus, several legal paradigm movements emerged that criticized the doctrinal paradigm of positivism. Austin as one of the figures at the center of analytical jurisprudence is very strict in distinguishing transcendent law from the law made by the ruler, according to transcendent law it is not a law that is said to be law when it is made by a social institution (state) and ratified by a legal ruler.

2. METHODOLOGY/ MATERIALS

In this article, the research method was juridical-normative, which analyzed norms and legal concepts related to problems by researching library materials as secondary data in the form of primary and secondary legal materials.[3] Primary legal materials were sourced from laws and other related laws and regulations, while secondary legal materials were from books, journals, and many others.

3. RESULTS AND DISCUSSIONS

The initial concept of the rule of law was the answer to the existence of very strong state power at the time of state sovereignty. State sovereignty is a concept of sovereignty that comes from the state, the implication is that with the application of this principle the state may act without any rules that limit state power so that the name of arbitrariness is carried out by the state.

The next development was because the state was unable to provide protection to its people, then there was pressure from the people to make an agreement with the king related to the rules or better known as the limitation of the king's power. The first time the agreement was made between the people and the king took place in England, it was named the Magna Charta. Magna Charta is essentially an agreement between the people and the king related to the management of the government so that the king can no longer carry out arbitrary policies.

This means that the king can take action as long as it is regulated by law. This principle became known as the principle of legality. Axiologically, the principle of legality aims to protect the people from arbitrary actions by the king.

The term positivism was first coined by August Comte, this teaching of positivism emphasizes that truth can only be based on something real and certain. This stretch of positivism then penetrated the legal world, this is the beginning of what is known as legal positivism. Legal Positivism, according to Pufendorf and Wolff, another form of this school is what is known as legalism, which is a school that interprets law only as a law, so that there is no law outside the law. That is why, the basic principle of the Civil Law System, as a legal system that is strongly influenced by this flow, is that the first and main source of law is the law.[4]

The flow of legal thought originating from the philosophy of positivism is commonly referred to as legal positivism. According to Samekto in Faiz Guslan Legal positivism conceptualizes law as applicable provisions binding the community because it is issued by the highest power, and contains orders and sanctions, this understanding was initiated by John Austin. The school of law that first opposed legal positivism was the flow of historical law, the emergence of this flow because the flow of positivism claimed that law was universal, meaning that the law in all parts of the world was considered the same that the theory of concordance law emerged. Positive Law, known as Legalism", argues more firmly, that the law is identical to the law.[5]

The flow of positivism views that experience is the basis for the scientific method. Therefore, internal matters that cannot be reached by reason or are beyond reason,

do not concern the positivists. The positivists oppose metaphysics, the unseen, what is beyond the limits of human experience. They regard metaphysics as meaningless to science because metaphysics withdraws from any attempt to verify, the truth or untruth of an indeterminate position.[6] According to Benda Beckmann, F & K, the law does not only contain normative conceptions of things that are prohibited and permitted but also contains cognitive concepts. [7]

Legal positivism separates strictly between law and morals, borrowing the terms Immanuel Kahn *das sein* and *das sollen*, namely between the law that should be and what it actually is. The essence of positive law is the existence of legal certainty. The figure regarding the teaching about the purpose of the law is a certainty is Thomas Hobbes. Certainty will be realized if the law is considered a closed and autonomous system of various moral, religious, philosophical, political, historical, and other issues.[8] Then the teachings of Thomas Hobbes were criticized by John Locke, according to him, the law must protect the naturalist rights of citizens, whereas when the law is only given to the state, it is possible that irregularities will occur, resulting in what is called an authoritarian government.

The flow of legal positivism in Indonesia thrives as an implication of the Indonesian state being a colony of the Dutch state which adheres to the tradition of the civil law system (Guslan, 2019). The era of legal positivism in Indonesia which is considered to be a milestone in the enactment of national law, especially after the enactment of the Presidential Decree on 5 July 1959 was marked by the first, the adoption of the Provisional Consultative Assembly Decree (MPRS), namely MPRS TAP No. XX/MPRS/1966 concerning the DPR GR Memorandum regarding the Sources of Orderly Law of the Republic of Indonesia and the Order of Legislations of the Republic of Indonesia. Second, the stipulation of the Decree of the People's Consultative Assembly (MPR), namely TAP MPR No. III/MPR/2000 concerning Sources of Orderly Law of the Republic of Indonesia and the Order of Legislations of the Republic of Indonesia. Third, Law number 12 of 2011 concerning the formation of laws and regulations.

As for the problem of applying the concept of Positivism in the first pluralist state, the vast territory of the Unitary State of the Republic of Indonesia becomes a very big obstacle in the dissemination (dissemination) of any legal product stipulated by the state. Second, the unavailability of adequate facilities and infrastructure, especially in the fields of science and technology that is able to assist the state in disseminating (disseminating) every product of the law to all corners of the country, and directly accessible to the public. Third, the limitations of the people and society in general, in understanding the legal

system adopted by the Republic of Indonesia, because the state has not been optimal in conducting socialization with the community.[5]

The Indonesian legal system, as described above, cannot be denied the influence of the flow of legal positivism and/or legal legalism, which are very strong characteristics of the Continental European school of thought brought by the Dutch colonialists, and in certain circumstances (the principle of concordance) was applied to the system. Indonesian law. Whether we like it or not, whether we like it or not, we must obey and participate in a Dutch legal system that may not be in harmony with the spirit of the Indonesian people and nation as contained in Pancasila and the 1945 Constitution of the Republic of Indonesia. Even though it has been enacted for almost 70 years, in the end, we all have to obey and submit to the provisions that have been set by the state.[5]

Legal positivism views the legal system as a logical, permanent, and closed system in which correct/correct legal decisions can be obtained by means of logic from pre-determined legal regulations without regard to social, political, and social goals moral measurements.[9] Legal studies limit themselves only to the exposure of positive legal rules as they are. Thus, a study of the existence of indigenous peoples can only be carried out on positive legal rules that allude to the existence of indigenous peoples.[4]

Based on the above, there are several positive legal rules that can be used as a reference. These rules include the rules in the constitution, namely Article 18B paragraph 2 of the 1945 Constitution which reads: "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, the Republic of Indonesia, which is regulated by law.[4]

3.1. LAW, COMMUNITY, AND CULTURE

Law and society cannot be separated, as the adage of Cicero, "*ubi sociates ibi ius*", where there is society there is law, and law arises because of social phenomena. Cicero's adage "*ubi sociates ibi ius*" where there is law in the community, means that people's lives will always be decorated by law, in turn the law will be influenced by the culture and habits of the community. In line with that, borrowing the phrase from Brian Z. Tamanaha, legal pluralism is everywhere. Interestingly, legal pluralism lies not only in the diversity of the normative system but also in the facts and potential for conflict with each other to create uncertainty. This uncertainty is one of the weak points that is "attacked" by from legal pluralism, although this is not entirely true because the main problem of the potential conflict is the asymmetrical relationship of the normative system.[10]

John Griffiths classifies legal pluralism into two, first, the concept of weak legal pluralism (weak pluralism), second, the concept of strong legal pluralism (strong pluralism). The first concept means that the state recognizes the presence of elements of other legal systems outside of state law, but non-state law only becomes subordinate to state law. While the second concept means that the state recognizes the existence of non-state law in the same position between state law and non-state law.[10]

The opinion of HLA Hart, one of the leaders of legal positivism, also admits that law comes from society. Humans are basically zoon politics so interactions between people arise, these interactions form norms which then turn into rules. The same thing is also the teaching of Rosco Pound that the law is like a language, it grows according to the habits that exist in society. Then the Rosco Pound is known as the flow of historical law. Lawren M. Freidman there are three elements of law, the first is a legal substance, legal structure, and legal culture. Between the three, they must be intertwined and must not be lame or one-sided over the other. From this, it can be learned that the importance of legal culture in creating good law, is good law when the law is a reflection of culture. So that the law is not only legitimate but also accepted as a rule that is needed by the community. HLA Hart also has the same opinion that a good law is not enough just to gain legitimacy, meaning that regulations are made valid in accordance with applicable procedures, but also the most important thing about the law is acceptance. Legal pluralism according to Myrna A, Safitri as quoted by Putri that law is a situation where there is a field of life or the same business that can apply various norms from different laws which are interpreted as conditions of legal pluralism.[11]

3.2. PLURALIST STATE LEGAL SYSTEM

The legal system in a country will be influenced by that country's colonizers, this theory is known as law and imperialism, but this theory does not apply for sure, depending on whether the country concerned wants to maintain its colonial system or not, but in the 20th-century legal pluralism mushroomed when many countries freed themselves from colonialism and left the European legal system in these countries.[7]

Legal pluralism is often faced with a dichotomy between state law and people's law which in principle does not originate from the state, which consists of customary law, religion, customs, or conventions. However, in the era of globalization, it is necessary to take into account the presence of international law in the arena of legal pluralism. In empirical reality. Particularly in the economic and human rights fields. The presence of imaginal law is very visible.[7] The concept of legal pluralism according to Griffiths is a

product of social scientists, this is based on empirical observations of the plurality of legal orders in society.

The condition of the community environment as a legal working area shows pluralism and is increasingly dynamic, including the characteristics of the community with its diversity of ethnicity, religion, culture, and geographical environment. Legal pluralism for social movements is important because justice can be found in various laws. For some people, especially those who oppose legal positivism, if justice is the main point, then whether state law is present or not is something that can be determined a priori. This also validates the existence of legal pluralism as a condition that gives birth to many opportunities and possibilities for selecting the legal system that provides the most sense of justice for the community. Although then the main weakness in legal pluralism is the lack of legal certainty. However, as the old adage asks which came first between the chicken and the egg, many people have stated what is the meaning of legal certainty if it turns out that people are still looking for new legal norms that provide justice. Then something that is certain becomes an intrinsically uncertain thing.[11]

Indonesia is a pluralist country, this is marked by the many cultures that exist, besides that Pancasila also has a prismatic state basis, meaning that the truth of the Pancasila perspective is not determined by one particular ideology, Pancasila ideology is open to the existing concept of truth. In other words, Pancasila is a home for pluralism. According to Werner Menski, legal pluralism is the most appropriate approach to solving problems in a pluralist country. Legal pluralism offers a plurality-focused model for understanding the law by considering three main elements, namely natural law (ethic/moral/religion), positive law, and socio-legal. Legal pluralism places a comprehensive and holistic understanding of the law, in order to achieve substantive justice.[12]

According to Nurjaya in Faiz Guslan, Indonesia is included in the traditional and religious law system, this is due to the pluralism of religions, races, ethnicities, and different legal cultures. To indicate this condition, there is a motto, namely *Bhinneka Tunggal Ika*, which means that Indonesia is a country with all its pluralism but still within the Unitary State of the Republic of Indonesia. In this way, Indonesia adheres to written legal regulations, as well as unwritten legal regulations according to the style and culture of the people recognized by the state. Includes self-regulation/inner order mechanisms that function as a means of social control (legal order) in society (Guslan, 2019).

According to Suteki, legal pluralism is a new approach strategy to make legal breakthroughs through the non-enforcement of law so that the law can make a rule breaking towards living law and natural law. Indonesia has 4 (four) legal systems, namely customary law, religious law (Islam), civil law system, and common law system. Customary

law that applies in Indonesia is the original law that was born and lives in the pulse of the development of Indonesian society (living law) which acts as a law society. While the values contained in religious law apply to natural law.

SARA conflicts are not only resolved with a positivistic (state positive law) because basically laws and regulations have limitations that can lead to a rule deadlock, while the dynamics of society and its problems are increasingly complex. Substantive justice will not be obtained if justice is only sought through law in the books. For this reason, another approach is needed that can help reveal and seek to resolve this problem, namely through the socio-legal approach.[12]

However, in the midst of the call to legal pluralism, there is a trap because it turns out that there are parts of non-state law that are not worthy of being appointed as a guide because they are oppressive, unfair, inefficient, and corrupt so that they are not compatible to be compared with state law which is ideal. This thesis reminds Indonesian legal experts to be more selective in choosing non-state laws to be used as references. These non-state laws sometimes hide behind the predicate of local wisdom or the like and are declared ready to use, even though these norms require reinterpretation and recontextualization. (Ruhijat, 2019).

According to Nyoman Nurjaya, as concluded by Faiz Guslan, legal positivism and the ideology of centralism must be shifted towards the paradigm of legal pluralism (legal pluralism). Efforts must be made to build a legal development paradigm that provides genuine recognition of legal systems such as customary law, religious law, and local regulatory mechanisms (inner-order mechanisms) actually exist in Indonesian society (Guslan, 2019).

4. CONCLUSION AND RECOMMENDATION

The state legal system with a pluralist pattern, be it religion, race, ethnicity, or culture, will also require a pluralist legal system known as legal pluralism. Indonesia adheres to a positivist legal system, this is because the state is a former Dutch colony, So as in imperialism theory and Indonesian law, it adheres to legal positivism. Positivism, also known as legalism, is a legal system that focuses on laws. Another characteristic is the law that applies universally, that is, applies nationally. This is contradictory and unsuitable for a pluralist state which is plural in its legal culture. Therefore, it is necessary to have a system of legal pluralism in solving legal problems that often occur in the legal community.

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