

LEGAL POSITIVISM: A COMPARATIVE STUDY OF MODERNITY IN THE INDONESIAN CRIMINAL JUSTICE SYSTEM

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Abstract

In practice and reality, legal positivism tends to be detrimental to justice seekers, legal positivism is formal and can only realize justice procedurally. This study uses normative legal research to inventory positive law, find legal principles and doctrines, with several approaches, the first is the Legislative Approach, Second, the conceptual approach is carried out by examining concepts, theories and opinions of experts that are related to the object being studied. Third, the comparative approach is a way of comparing to understand the law. The results of the study show that the law itself is always viewed as written law (law as it written in the books) in the text of legislation or law is law (law is law) only, even though the law itself should also be seen from the facts that occur in the field, for example those processed in court hearings. However, in positive law, the police, prosecutors and judges or other formal legal institutions cannot be blamed because they only fulfill and implement the formulation of the law which does not provide an opportunity for law enforcement officers to act according to their conscience. Even though judges are given freedom according to their conscience, if faced with complete evidence, there is no reason for the judge not to decide the case. Therefore, in the author's opinion, legal positivism is seen as unable to realize substantively just law for justice seekers but is only able to realize formal legal certainty and procedural justice in the implementation of the criminal justice system.

Keywords: Legal Positivism, Modernity, Criminal Justice

INTRODUCTION

The legal positivism paradigm is faced with a dilemma between realizing legal certainty or legal justice, especially in the criminal justice system in Indonesia. Legal positivism in the criminal justice system in Indonesia is used to identify the weaknesses of legal positivism in realizing just law. Marginalization in the national legal system due to inconsistencies in regulations and court decisions, as well as the absence of a clear harmonization mechanism. The implications of this study emphasize the need for more inclusive legal reform, increased capacity of law enforcement officers, and strengthening the role of indigenous peoples in formulating legal policies. (Arifin et al., 2025). Law is not something that is dead, but law always moves dynamically and follows the development of the times. Small cases such as the cases that have been described previously are examples of the wildness of law enforcement that uses the positivist paradigm without anyone being able to control it, even this positivist thinking has taken root in judges as decision-making apparatus in the judiciary.

However, in positive law, the police, prosecutors and judges or other formal legal institutions cannot be blamed because they only fulfill and implement the formulation of the law which does not provide an opportunity for law enforcement officers to act according to their conscience. Even though judges are given freedom according to their conscience, if they are faced with complete evidence, then there is no reason for the judge not to decide the case. Therefore, in the author's view, legal positivism is seen as unable to realize substantively just law for justice seekers but only able to realize formal legal certainty and procedural justice.

Legal positivism has a significant influence on the formation of national law which philosophically, sociologically and normatively certainly also influences the implementation of law. The reading of the law should not be seen rigidly, but must be understood more about the moral meaning contained in the law which of course both in its formation and implementation is oriented towards the protection and welfare of the people where the law is located. In legal literature, positivism has various meanings and it is important to note the context in which it is used. The phrase *Jus positivisme* comes from "laying down" a law, writing about "positive law" instituted by humans "for their honor and use" or based on authority. The phrase is generally used of law that is posited by humans to indicate that a law is a command from a sovereign authority (Mappatunru, 2020).

In practice, the use of the positivist paradigm in law turns out to hinder the search for truth and justice that is in accordance with conscience. The search for justice is hampered by the procedures created by the law itself, so what emerges is formal/procedural justice that does not represent or fulfill conscience. In reality, the positive legal school approach does not completely solve the problem. The impact of the development of positivism in Indonesia is the emergence of legal forces that are considered that the law in Indonesia is unable to create justice which is a consequence of the dominance of the doctrines of the positivism paradigm. In the author's opinion, one of the legal doctrines inspired by the teachings of positivism is "equality before the law or justice for all" (all are equal before the law), making this doctrine good in theory, but not in practice, where the reality is that the law is only sharp downwards and the law is blunt upwards because the law is not neutral. In other words, the working of the law is greatly influenced by the existence of other forces.

In positive law, the police, prosecutors and judges cannot be blamed for only fulfilling and implementing the formulation of the law which does not provide an opportunity for law enforcement officers to act according to their conscience. Even though judges are given freedom according to their conscience, if they are faced with complete evidence, then there is no reason for the judge to decide the case. On the other hand, the community as the object of the law feels disturbed by the judge's decision on small cases compared to big cases such as corruption cases, tax mafia cases, cases of bribery of judges and other cases that cost the state billions of rupiah or even more.

In addition, the criminal justice system in Indonesia faces various challenges in implementing the *Dominus Litis* principle, which plays an important role in ensuring efficiency, substantive justice, and legal certainty. Bureaucratic inefficiency, political pressure, and lack of technological integration are the main obstacles that affect the optimization of this principle in practice. Although this principle is recognized in regulations, its implementation is often hampered by poor coordination between institutions, limited resources, and minimal digitalization of the justice system. In comparison, countries such as Germany and the Netherlands have successfully overcome similar challenges through comprehensive digitalization, increasing the capacity of law enforcement officers, and strengthening accountability oversight. The implication of this study is the importance of criminal justice system reform in Indonesia which includes revising regulations, adopting modern technology, and strengthening the capacity and integrity of prosecutors. These steps are needed to ensure that the *Dominus Litis* principle

can be implemented effectively, support the modernization of the justice system, and meet the needs of society for responsive and sustainable justice (Sudiadi, 2024).

Harmonization of criminal law with socio-cultural aspects of society, explains the efforts to achieve substantive justice at the normative and theoretical levels. Achieving harmony between legal norms and societal culture requires comprehensive legal reform, a very important alternative, especially for countries with a legal history shaped by foreign legal traditions. Focusing on the evolution of Indonesian criminal law after the enactment of the new Criminal Code. The transition from colonial legal substance to a modern and authentic framework implicitly prioritizes substantive justice, which is in line with Indonesian socio-cultural philosophy and values. Over time, Indonesia has abolished colonial law, integrating living law into the national legal order. The paradigm shift, which aims to instill a distinctive national character in Indonesian law, presents conditions, advantages that encourage substantive justice, and challenges in formulation and implementation. Although complicated, the 63-year process of drafting the new Criminal Code has yielded profound results, improving the legal system. This transformative journey marks a deliberate shift from the colonial legal paradigm, embracing a framework that is in line with Indonesian values. This shift underscores Indonesia's commitment to substantive justice and resilience in addressing challenges associated with legal reform. (Faisal et al., 2024).

RESEARCH METHOD

In this research, using normative legal research to inventory positive law, find legal principles and doctrines, synchronise existing laws and regulations and conduct research by reviewing and examining and tracing various existing literature. (Irwansyah, 2021) With several approaches, the first is the Legislative Approach to understand the hierarchy and principles in laws and regulations. (Marzuki, 2017). Secondly, the conceptual approach is carried out by examining concepts, theories and opinions of experts who have something to do with the object under study. Third, the comparative approach is a way of comparing to understand the law. In this context, Legal Positivism: A comparative study of modernity in the Indonesian criminal justice system. Primary legal materials are relevant legal policies and secondary data are all publications on law including textbooks, legal dictionaries, legal journals, and comments on court decisions. (Marzuki, 2017). Data collection used in this research is through library research. Data analysis is conducted by analysing principles, conceptions, views, legal doctrines related to the issues raised, namely the Legal Positivism: A comparative study of modernity in the Indonesian criminal justice system.

RESULTS AND DISCUSSION

The Paradigm of Legal Positivism in the Indonesian Criminal Justice System

The material understanding of criminal law has shifted to a formal understanding. Law is more identified with decisions from legislative authorities that are carried out according to procedures or technical requirements and organized into laws and regulations. The understanding of this legal paradigm will influence law enforcers who only implement laws and regulations scripturalistically. On the other hand, law is not only limited to what is stated in a state document or in a statutory text, but also what lives in society, because in sources of law other than laws there are other important sources of law, namely jurisprudence, agreements, customs, habits and doctrines.

Modern legal thought is often dominated by the positivist school of thought that emphasizes legal certainty through written rules and formal procedures. However, this approach often ignores the substantial aspect of justice, namely the sense of justice that lives in society. Fransiscus Budi Hardiman, in his work *Beyond Positivism and Modernity*, sharply criticized formal justice that only focuses on legality without paying attention to morality and human values. This study aims to analyze Hardiman's thoughts in the context of criticism of positivism and its impact on legal life in Indonesia. Using a philosophical approach and qualitative-descriptive methods, this study found that Hardiman encourages a reinterpretation of law that is not only legal-formal but also humanistic and contextual. This thinking is relevant in dealing with various legal cases in Indonesia that often show a gap between legal decisions and the sense of justice of society. This research is expected to contribute to the development of a legal theory that is more responsive and adaptive to social dynamics (Awaluddin, 2023).

The transformation of the Indonesian criminal law system has entered a new chapter with the enactment of Law No. 1 of 2023 concerning the Criminal Code. One important change is the recognition of living law in society as a source of criminal law in addition to statutory regulations. This recognition has given rise to pros and cons in aligning the principle of legality, which has so far been the main pillar of the Criminal Code, with the dynamic character of living law. The integration of living law into the new Criminal Code reflects a shift from a rigid system to one that is more responsive to the needs of society.

However, its implementation still faces challenges, such as determining valid living law, determining the limits of its application, and regulating customary sanctions within the framework of national law (Djamaludin, 2024).

The assertiveness of legal positivism to eliminate the requirement of connectivity between law and morality makes the axiological realm of this school of thought limited to achieving legal certainty. The essence of legal certainty is predictability, namely the ability to perceive "an individual ought to behave in a certain way" The axiological aspect fought for by legal positivism is legal certainty. By taking the formal legal source of law in the form of statutory regulations, it is believed that this can be realized. The principle of legality is the spirit of the pursuit of legal certainty. This principle was formulated by Von Feuerbac in the adage "No punishment without law, no punishment without crime, no crime without punishment" (*nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena*) This principle is so dominant, especially in the criminal law arena, that in many codifications it is included in the first article.(Herlambang, 2019)

The criminal trial process is carried out offline or carried out in court with a direct meeting based on the provisions of Law Number 8 of 1981 concerning Criminal Procedure Law (hereinafter referred to as the Criminal Procedure Code). However, the threat of the Covid-19 pandemic has disrupted the implementation of the Criminal Procedure Code, especially regarding trials, considering that the court is a place for people to litigate in order to resolve a problem and obtain justice. The disruption of the implementation of the Criminal Procedure Code, namely regarding the trial process in court which is not possible to be carried out in accordance with previously regulated standards. Thus, the Supreme Court (MA) continues to make efforts to deconstruct the judiciary by modernizing and improving the quality of judicial institution services for justice seekers and the community, by implementing electronic trials in court (Rahman, 2021).

Criticism of Legal Positivism in Determining Justice and Substantive Legal Certainty

It should be emphasized, in terms of justice accommodated in the law is not procedural justice, but substantial justice that cannot necessarily be fulfilled by a legal product that is identified with statutory regulations. Even though the principle of legality adopted by Indonesia in the continental European system in the background of the theory of positivism which is the barometer in determining whether someone has violated the law or not, the principle of legality must also be able to guarantee providing real justice. The law can be enforced without having to carry out formal legal procedures that have been neatly arranged in a procedural law format, as well as with its material law. However, law enforcement must also be seen from the purpose of the law itself, namely to create comfort, order, happiness and justice based on the philosophy of punishment.

Justice is an important element of law and even the ultimate goal of social life, which cannot be separated from the values of the philosophy of life in society. The question is whether legal positivism guarantees substantive justice. That the main character of the modern legal system is its rational nature. This rationality is marked by the procedural nature of legal regulations. Procedures, thus, become an important basis for legality to uphold what is called justice, even procedures become more important than talking about justice itself.

Although legal positivism makes significant contributions, it is important to acknowledge that this approach can also be subject to criticism, especially regarding its ability to address justice and moral aspects of law. In response, many countries, including Indonesia, also pay attention to the values of justice and human rights in developing their legal systems. Criticism. As a criticism of legal positivism, the law should not solely rely on formal legality with its procedural processes in pursuing legal certainty. However, the law must also be able to holistically view the various problems that arise in the midst of society and its life. In other words, the law must also be a value system, not just a system of rules. So it is not only about legal certainty but also inseparable from the values of justice that exist in society. Therefore, law enforcement must continue to be an effort to realize the idea of substantive justice, legal certainty and social benefits into a reality (Awaluddin, 2023).

In practice, the dialectic between the principle of legality and living law raises several crucial issues. First, there needs to be a mechanism for identifying and verifying living law. The new Criminal Code mandates further regulation through Regional Regulations, but this process requires clear parameters to determine the validity of a customary law. Customary law that can be recognized is customary law that has obtained legitimacy from customary leaders through customary decisions. The application of living law must consider these territorial and personal boundaries to avoid conflicts between legal systems. Harmonization is needed between customary sanctions and criminal sanctions. The new Criminal Code opens up the possibility of implementing customary sanctions in addition to

criminal sanctions, but with the limitation that they must not conflict with the values of Pancasila, the Constitution, and human rights. He emphasized that legal reform must consider the values that live in society, while remaining within the framework of modern national law (Djamaludin, 2024).

Transparency and transformation are inevitable and must always be reflected in judicial practice. The practice of judicial transparency in Indonesia is reflected in the existence of internal regulations in the Supreme Court and technical policies related to the implementation of e-court-based trial mechanisms. The practices carried out by the Supreme Court and the judicial bodies under it are the embodiment of modern technology-based justice that is in line with the principles of simplicity, speed, and low cost. Efforts to transform the judiciary in Indonesia are carried out by accommodating the e-court trial mechanism as stated in the procedural law which in this case can be accommodated through changes to the Criminal Procedure Code and the implementation of long-distance trials (teleconferences) by determining villages as partners that can be placed in teleconferences because their areas are far from the court location and the difficulty of access to the court location. (Liba & Arief, 2025).

The formation of legal rules in Indonesia is largely influenced by the Continental European legal system which is very close to Legal Positivism. This legal positivism is a part of legal modernism which is very identical to written, clear and firm rules. Such rules turn out to have weaknesses in overcoming the development of human civilization in the digital era. The change in the paradigm of modern law, namely positivistic law, becomes a law that is more flexible in overcoming the development of society (Setyawan & Kurniawan, 2022).

CONCLUSION

In practice and in fact, legal positivism tends to be detrimental to justice seekers, because in the author's opinion legal positivism is formal and can only realize justice procedurally. The reason is that in the view of society, the law is often blunt at the top and sharp at the bottom because the law itself is always seen as written law (law as it written in the books) in the text of legislation or law is law (law is law) only, but the law itself should also be seen from the facts that occur in the field, for example, those processed in court hearings. However, in positive law, the police, prosecutors and judges or other formal legal institutions cannot be blamed because they only fulfill and implement the formulation of the law which does not provide an opportunity for law enforcement officers to act according to their conscience. Even though judges are given freedom according to their conscience, if they are faced with complete evidence, then there is no reason for the judge not to decide the case. Therefore, in the author's view, legal positivism is seen as unable to realize substantively just law for justice seekers but only able to realize formal legal certainty and procedural justice in the implementation of the criminal justice system.

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