

## MEASURING POSITIVISM IN LEGAL SCIENCE AND LEGAL PRACTICE IN INDONESIA

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### Abstract

*This research departed from strong legal positivism in the development of legal science and legal practice in Indonesia. This research aims to analyze the positivism in legal science and legal practice, particularly in law enforcement reflected on judge jurisprudence (court verdict). The method used in this research was juridical normative with library study approach, related to expert's doctrines and news sources related to some cases in Indonesia. This research explains that positivism highly affects law enforcement system. It can be seen from some judge jurisprudences tending to emphasize dominantly the positive law and ordinance and to prioritize law certainty. It of course generates pros and cons within society concerning judge verdict in some cases by people considered overriding justice aspect. In making verdict, a judge should obligatorily prioritize justice value, and law certainty and benefit and thereby can protect, put anything in order, and create peace in society life in dealing with the challenge of rapid time change.*

**Keywords:** *Jurisprudence, Legal Practice, Positivism*

### A. Introduction

Indonesia is a constitutional state, the organization or the activity of which is based on law; it is in line with the Article 1 clause 3 of 1945 Constitution (UUD 1945).<sup>1</sup> A constitutional state aims to create orderliness in society, nation, and state lives. In formulating law, some legal theories develop to be used as the rationale. One of theories used by the states is positivism theory. Positivism theory began to develop in 18<sup>th</sup> century along with a very advanced technological development. The development of advanced technology makes a state more modern in which social and economic changes occur.<sup>2</sup> These changes will also affect the legal drafting in a state.

August Comte is the most influential figure to raise positivism theory with his work *Cours de Philosophie Positive*. The work explains a synthesis

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<sup>1</sup> Muhammad Muslih, "Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum)," *Legalitas: Jurnal Hukum* 4, no. 1 (2013): 130–52, <https://doi.org/http://dx.doi.org/10.33087/legalitas.v4i1.117>.

<sup>2</sup> Asep Bambang Hermanto, "Ajaran Positivisme Hukum Di Indonesia: Kritik Dan Alternatif Solusinya," *Jurnal Hukum Dan Bisnis (Selisik)* 2, no. 2 (2016): 108–21.

of all sciences using positivism thought.<sup>3</sup> Positivism emphasizes more on the fact occurring and confirms that science should not surpass the facts.<sup>4</sup> From this explanation, it can be concluded that the fact or the factual condition becomes important rationale to provide the direction of thought to develop science.

Positivism also becomes the rationale of legal science and legal practice developments, known as legal positivism. Legal positivism is one of legal theories, considering that law and moral will be important to be separated.<sup>5</sup> It is because positivism distinguishes what makes a norm existent to be a valid legal standard and what makes a norm existent to be a valid moral standard.<sup>6</sup> From this explanation, it can be said that legal positivism theory prioritizes more the validity of a norm in the legislation to achieve a law certainty.

Hans Kelsen, a prominent figure of legal positivism, explains that law is a norm system and a system based on imperatives. These norms will bind the people if they are not wanted to be the law and should be written, issued by the authorized institution and should contain command or order.<sup>7</sup> If the elements explained by Hans Kelsen have been fulfilled, the law can be effective to regulate the people and binding.

Positivism in legal science and legal practice developments is a theory and a tenet reducing human existence in their life process dominated by causal law certainty.<sup>8</sup> People, in their life, are restricted by the presence of formality enacted in the law. Thus, the freedom the people have is in accordance with what has been specified by the law. It is this stipulation in the law that regulates the people strictly if the legal drafting has been consistent with the provisions.

The adherents of legal positivism prioritize more the legal enactment itself, whether or not the law can apply to the people life.<sup>9</sup> It is because legal

<sup>3</sup> Muhammad Chabibi, "Hukum Tiga Tahap Auguste Comte Dan Kontribusinya Terhadap Kajian Sosiologi Dakwah," *NALAR: Jurnal Peradaban Dan Pemikiran Islam* 3, no. 1 (2019): 14–26, <https://doi.org/https://doi.org/10.23971/njppi.v3i1.1191>.

<sup>4</sup> Sri Wahyuni, "Pengaruh Positivisme Dalam Perkembangan Ilmu Hukum Dan Pembangunan Hukum Indonesia," *Al-Mazaahib: Jurnal Perbandingan Hukum* 1, no. 1 (2012): 1–19, <https://doi.org/https://doi.org/10.14421/al-mazaahib.v1i1.1342>.

<sup>5</sup> Muhammad Citra Ramadhan, "Pengaruh Aliran Positivisme Dalam Kebijakan Pembentukan Peraturan Perundang-Undangan Di Indonesia," *Majalah Ilmiah Warta Dharmawangsa*, no. 53 (2017), <https://doi.org/https://doi.org/10.46576/wdw.v0i53.265>.

<sup>6</sup> Sudyana and Suswoto, "Kajian Kritis Terhadap Teori Positivisme Hukum Dalam Mencari Keadilan Substantif," *QISTIE* 11, no. 1 (2018): 107–36, <https://doi.org/http://dx.doi.org/10.31942/jqi.v11i1.2225>.

<sup>7</sup> Fransiskus Xaverius Adji Samekto, "Menelusuri Akar Pemikiran Hans Kelsen Tentang Stufenbeuthetheorie Dalam Pendekatan Normatif-Filosofis," *Jurnal Hukum Progresif* 7, no. 1 (2019): 1–19, <https://doi.org/http://dx.doi.org/10.14710/hp.7.1.1-19>.

<sup>8</sup> Haryono, "Eksistensi Aliran Positivisme Dalam Ilmu Hukum," *Jurnal Meta-Yuridis* 2, no. 1 (2019): 96–107, <https://doi.org/https://doi.org/10.26877/m-y.v2i1.3521>.

<sup>9</sup> Wardah Wasliati, Laily Washiati, and Balqis Wasliati, "Analisis Yuridis Pengaruh Usia Terhadap Tingginya Tingkat Perceraian Di Kota Batam (Studi Penelitian Di Pengadilan Agama Kelas IA Batam)," *Ensiklopedia of Journal* 4, no. 3 (2022): 15–20, <https://doi.org/https://doi.org/10.33559/eoj.v4i3.551>.

positivism sees more reality existing in the people life. If the law governed and formulated has been consistent with the provisions enacted, the law will be the positive law and if the legal drafting process has not been consistent with the provision, the law cannot be applied to the people life. The morality living within the community and becoming an indicator of justice element is obscure, because the legal drafting process relies on legal positivism theory prioritizing more certainty.<sup>10</sup> Therefore, such condition gets serious attention in legal science and legal practice development in which justice and certainty is a legal component that should be existent and maintained well. Considering the elaboration, this research aims to study positivism in legal science and legal practice development in Indonesia.

## **B. Identified Problems**

This research departs from the strong flow of legal positivism in the development of legal science and legal practice in Indonesia. So that the formulation of the problem of this research is how the flow of positivism in legal science and legal practice, especially in law enforcement reflected in the jurisprudence of judges (court decisions)?

## **C. Research Methods**

This research uses normative legal research techniques. The purpose of normative legal research is to find the truth by using legal scientific logic from the normative side. This serves as a foundation for researchers to examine the influence of legal positivism in law enforcement through several judges' jurisprudence related to sentencing. The literature sources collected by the researcher were examined to obtain data. The research materials referred to are primary legal materials such as judicial decisions, secondary legal materials such as books, journals, scientific works, and other academic works in the field of law. The data collected through the literature study was then sorted and scrutinized more deeply. The researcher used a qualitative approach to examine the findings of the research study. Then the data obtained was analyzed and presented descriptively.

## **D. Research Findings and Discussions**

### **1. The Development of Legal Positivism Theory**

Legal science has developed very rapidly along with modern and very advanced time development. Information develops so rapidly in the society life that requires the developments in legal science. For example, the emergence of modern technology that can deliver information quickly make the people life pattern change very rapidly. It makes the people life vulnerable to a conflict with other communities or states. This era is called disruptive era in which people can change their behavioral pattern very quickly. It becomes a

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<sup>10</sup> Cahya Wulandari, "Kedudukan Moralitas Dalam Ilmu Hukum," *Jurnal Hukum Progresif* 8, no. 1 (2020): 1–14.

challenge to legal science theories that has existed to answer the challenges in society life. One of theories still become reference in understanding legal science until today is positivism legal theory.

The positivism-based legal theory assumes that legal theory serves as *lage* or *lex* to ensure whether or not there is a certainty. This theory is also limited or sees that the law which can be called a rule is the positive one and neither sees whether the positive law is good or bad nor discusses the effectiveness of law.<sup>11</sup> This explanation can ascertain that positivism legal theory prioritizes more a law certainty by relying on legal positivism. In the future perspective, legal product relying on this theory will generate problem in its justice value. It is because this legal theory does not discuss the effectiveness of a law enacted in the people life.

Positivism also develops in time change, in which there are two patterns of positivism. The first one is Analytical Jurisprudence initiated by John Austin and the second one is Pure Law (*Reine Rechtslehre*) initiated by Hans Kelsen.<sup>12</sup> These two patterns become the expansion of positivism legal theory that also contributes to understanding and learning legal science. The *Analytical Jurisprudence* initiated by John Austin explains that the law is the ruler's order in a state, and essentially the law lies on the governmental element and thereby it serves as the order of a sovereign ruler.<sup>13</sup> Meanwhile, a positive law is a regulation to do some deeds applying generally from the political superior class to the political inferior one.<sup>14</sup> Thus, it can be seen that the law established by state or government is accordance with the provision regulating the legitimate legal drafting and binding the society life. People should obey the law as well and if they break the provisions of law, the sanction will be imposed to them as regulated by the law.

Pure Law (*Reine Rechtslehre*) thought initiated by Hans Kelsen defines law as "A law is a despsychogized, a command which does not imply a will in a psychological sense of the term a rule expressing the fact that somebody ought to be act in a certain way, without implying that anybody really 'wants' the person to act in that way".<sup>15</sup> From this definition, it can be said that the law is an order that can reveal a fact that an individual is required obligatorily to act in the specified way. This specified way should be implemented by the people, meaning that the law has prevailed in the society life. The

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<sup>11</sup> Islamiyati, "Kritik Filsafat Hukum Positivisme Sebagai Upaya Mewujudkan Hukum Yang Berkeadilan," *Law & Justice Journal* 1, no. 1 (2018): 82–96, <https://doi.org/http://dx.doi.org/10.14710/ldjr.v1i1.3574>.

<sup>12</sup> Yusriyadi, *Ilmu Hukum: Dogmatik Dan Teoretik Serta Problema Penegakan Hukum* (Semarang: UNDIP Press, 2020).

<sup>13</sup> Yogi Prasetyo, "Legal Truth (Menakar Kebenaran Hukum)," *Legal Standing: Jurnal Ilmu Hukum* 1, no. 1 (2017): 89–111, <https://doi.org/http://dx.doi.org/10.24269/ls.v1i1.588>.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid, P. 82.

society (people) here has been bond by the provision of law and should implement it compulsorily.

The development of legal science and legal practice is also affected by positivism thoughts even until today. It is because positivism has an advantage, “the presence of predictable certainty” in the sense of the guarantee of law certainty indicated with the definition of what is allowed and not allowed by the law, becoming the people’s rights and obligation in concrete situation that should be understood clearly.<sup>16</sup> The presence of a concrete certainty can indicate that learning a legal science becomes clear and the development of legal science is in accordance with what existing in the society life with the reality that can be accountable.

## 2. Measuring Positivism in Legal Science and Legal Practice in Indonesia

The development of legal science based on positivism also provides a study adjusted with reality; thus, an individual learning it can get something concrete rather than abstract. However, in this positivism thought, the development of legal science cannot follow time development quickly.<sup>17</sup> It is based on the positivism view prioritizing something concrete rather than abstract in a reality occurring within society life. Thus, this legal science development should adapt to the reality and the development goes along with the facts appearing in the society life. Thus, legal science and legal practice developments cannot accommodate the needs existing in the society life quickly in line with time development occurring rapidly as well.

Legal practice, in fact, is also affected by positivism thought. It can be seen from the presence of judge verdict relying on written law and ensuring law certainty. Some cases occurring in Indonesia can be the example. Firstly, in a case of an old man imprisoned for 2 months and 4 days because he had collected the residual rubber tree sap adhering to the tree, converted into rupiah, amounting to IDR 17,480.00. Chronologically, the problem occurred on July 17, 2019 when an old man collected residual rubber tree sap from a plantation belonging to a Company and put it into plastic bag, after he herded cows in Nagori Dolok Ulu (Dalok Ulu Village), Tapian Dolok Sub District, Simalungun Regency. At the same time, the plantation officers were patrolling and knew what the old man did and they brought him to the security office. Thereafter, the company owning the plantation reported the case to the local Police office and the case was registered in Simalungun District Court on November 27, 2019 with an indictment “breaking Article 111 jo Article 107 of Law

<sup>16</sup> Haryono, “Eksistensi Aliran Positivisme Dalam Ilmu Hukum.”

<sup>17</sup> Mochamad Fajar Gemilang, “Restorative Justice Sebagai Hukum Progresif Oleh Penyidik Polri,” *Jurnal Ilmu Kepolisian* 13, no. 3 (2019): 225–38, <https://doi.org/https://doi.org/10.35879/jik.v13i3.194>.

Number 39 of 2014 about Plantation. The Simalungun District Court, on January 15, 2020, stated that the old man was evidently guilty for committing a crime by illegally harvesting or collecting the plantation product as mentioned in the second alternative indictment.<sup>18</sup>

Secondly, a case occurred in a Senior High School student, ZA, who stabbed a robber who headed off his way in the edge of sugarcane garden until he died in the venue. At that time four robbers headed off ZA and forced him to hand over his handphone and motorcycle with violent threat. He then had a chance to take a knife (he brought for practical purpose in his school) from below his motorcycle's seat and stabbed one of robbers until died. ZA was then assigned to be the suspect and had undertaken the trial. In the trial, the indictment was read by Public Prosecutor and stated that he had broken Articles 340, 338, 351 clause (3) of Penal Code and Article 2 clause (2) of Emergency Law with lifetime imprisonment being the punishment. The trial held in Kepanjen District Court, Malang Regency on January 23, 2020 decided that ZA was guilty and the Judge stated that he had broken Article 351 Clause (3) of Penal Code about mistreatment that makes others die.<sup>19</sup>

Thirdly, the case occurred in a 63-year-old woman in Situbondo, East Java punished with one-year imprisonment with 15-month probation and fine of IDR 500 million for stealing teak wood belonging to Perhutani. The woman working as a masseur has ever been arrested in Situbondo penitentiary for three years before being released then by the Regency who became the underwriter in the problem. In the trial, the woman admitted that she did not steal the wood but she had stored it since a long time ago. However, her explanation could not indicate the information about the origin of wood. It made the 63-year-old woman was threatened with Article 12 letter d junto Article 83 clause (1) letter d of Law Number 18 of 2013 about Forest Damage Prevention and Eradication. This verdict made 63-year-old by the Judge was only lighter than from the Public Prosecutor's Claim suing the woman with 1-year imprisonment, 18-month probation, and fine of IDR 500 million, with 1-day subsidiary confinement.<sup>20</sup>

The cases aforementioned became hot topics in the public and generated pros and cons. The settlement of cases represents how strong the positivism is in the legal practice occurring. Seeing the

<sup>18</sup> Andi Saputra, "Kakek Samirin Pungut Sisa Getah Karet Rp 17 Ribu Dihukum 2 Bulan Penjara, Adilkah?," *detiknews*, 2020, <https://news.detik.com/berita/d-4862699/kakek-samirin-pungut-sisa-getah-karet-rp-17-ribu-dihukum-2-bulan-penjara-adilkah>.

<sup>19</sup> Andi Hartik, "Pelajar Yang Bunuh Begal Divonis 1 Tahun, Pengacara: Kami Pikir-Pikir," *KOMPAS.com*, 2020, <https://regional.kompas.com/read/2020/01/23/18264921/pelajar-yang-bunuh-begal-divonis-1-tahun-pengacara-kami-pikir-pikir>.

<sup>20</sup> Helmi Firdaus, "Nenek Asiani Dinyatakan Bersalah," *CNN Indonesia*, 2015, <https://www.cnnindonesia.com/nasional/20150423151941-12-48782/nenek-asiani-dinyatakan-bersalah>.

legal practice in those cases, law certainty becomes more dominant than other legal values, justice and benefit. Viewed from justice and benefit perspective, the legal practice prevailing in the settlement of such cases has not been achieved. From these cases, it can be seen that the law enforcers have done their job in accordance with the legislation and thereby they are bound to those provisions.<sup>21</sup>

Seeing such reality, the legal practice prevailing in our legal system tends to rely on positivism in which the law is legislation or law and ordinance. Anything done in contradiction with the provisions governed in positivism law is a wrong deed. If this positivism remains to affect legal practice, it can be ascertained that law enforcement will lead to law certainty. It is because the law enforcement is done based on the legislation or positive law. In the development of legal practice, not only law certainty but also legal justice should be sought that indeed live in the society and likewise, the legal benefit affecting the society that also compensate the law enforcement.

#### E. Conclusions

In the development of legal science and legal practice, positivism indeed affects strongly the reality existing in the society life. It can be seen from the facts occurring, such as a conception that law is the legislation prevailing or positive law, in which bad and wrong things are specified by what is specified in positive law. In addition, in the legal practice the law enforcers are also bound to the provisions governing the law enforcement. Thus, if the law enforcers have done their job or duty as mandated by the legislation, it has been correct. The development of legal science and legal practice should prioritize more justice, law certainty, and legal benefit values. It becomes a difficult work, recalling that justice, law certainty and legal benefit attempt to dominate each other. Although it is difficult, these three values should be maintained to enable the law to keep protecting, organizing, and creating peace in the society life in dealing with the challenge of very rapidly changing time.

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<sup>21</sup> Muhammad Azil Maskur, "Potret Buram Positivisme Hukum: Sebuah Telaah Terhadap Kasus-Kasus Kecil Yang Menciderai Rasa Keadilan Masyarakat," *Humani (Hukum Dan Masyarakat Madani)* 6, no. 1 (2016): 41–57, <https://doi.org/http://dx.doi.org/10.26623/humani.v6i1.853>.

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