Positivism Theory in the Context of Modern Legal Thought

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Abstract. The theory of legal positivism plays a crucial role in the development of modern legal thought by emphasizing the importance of written and systematic norms in law enforcement. This approach is based on the assumption that the law is the product of regulations made by state institutions, as stipulated in various laws, including the 1945 Constitution, the Criminal Code (KUHP), and Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. The methodology used in this study is qualitative analysis through literature studies and interviews with legal experts to explore the understanding of the application of positivism theory in legal practice in Indonesia. The results show that although positivism provides a strong framework for legal analysis and supports legal certainty, there are still significant challenges related to the application of the values of justice and morality in the legal system. This study concludes that to achieve social justice, there needs to be an integration between positivism and moral principles in modern legal practice.

Keywords: Positivism Theory, Modern Legal Thought, Laws and Regulations, Indonesian Law, Legal Certainty, Social Justice.

1 Introduction

In law, there are various schools that play an important role, such as positivism and empiricism. These streams continue to be studied as the theoretical basis in the study of law. In legal practice, the school of positivism, in particular, is still very relevant, especially in the context of law enforcement. Judges tend to refer to written law as the main reference in making decisions in the cases they handle, reflecting the principles of positivism. The positivist school emphasizes the importance of clear and written laws as the main source for law enforcement. This means that legal decisions must be based on existing legal texts, without considering external factors such as morals or social values. In this context, the judge plays the role of an interpreter of the law, who is tasked with implementing the regulations that have been established by the law. This approach provides legal certainty, where each party can clearly know what to expect from their actions.

Existing laws can be analogized to positive laws, while laws that do not exist do not fall into the category of positive laws. Positive law refers to laws that actually exist and apply in the context of a certain space and time. The law is written in concrete form, usually in written form. Because of its written nature, positive law has clarity that not only makes it easier to understand, but also reduces the potential for disputes regarding its legality. Laws that are established in written form, such as laws and regulations, have certainty that provides assurance to the public about what is expected to behave in accordance with applicable legal norms. These provisions are guidelines that can be referred to by individuals and agencies in carrying out their activities. This tangible form of positive law includes various laws and regulations that are drafted and ratified by authorized institutions. In addition, jurisprudence or existing court decisions are also part of positive law, because they reflect the interpretation and application of applicable law. The agreement agreed upon by the relevant parties is also a concrete example of positive law, which serves as a consensus and reference for the parties involved. [1]

The second positivism, known as soft positivism or amalgamational positivism, is an approach that rejects the analytic separation contained in the hard positivist law. This positivism recognizes the importance of the entire legal component, both written and unwritten, as part of positive law. This approach aims to present a philosophical view of law in a more comprehensive way. In the context of amalgamational positivism, there are basic assumptions that are considered to be true without the need to be tested or verified. These assumptions include understanding that law is not only made up of written rules, but also involves traditions, norms, and practices that have evolved in society. The soft positivism approach provides room for recognition of unwritten norms, such as the social and ethical values that underlie people's behavior. This means that the law cannot be viewed only from the perspective of official documents, but also from the social and cultural context that influences how the law is applied and understood. Through this approach, law is seen as a dynamic entity, where the interaction between written and unwritten law forms a more complex legal system.

There are advantages in the positivism school, namely, positivism offers predictable certainty in law. This legal certainty provides assurance of clear boundaries about what is and is not allowed under the law. This creates a firm understanding of the rights and obligations of individuals in the context of a particular situation in writing. In other words, positivist law provides clear guidance for society, so that individuals can act by understanding the legal consequences of their actions. The school of positivism emphasizes the stipulation of values contained in written laws. Clear and definite laws not only set norms, but also provide values that can be held as a reference. When the law-making authority establishes a certain value, it becomes permanent as part of the rules that the society must follow. Through these advantages, the school of positivism shows that despite developments in legal thought, the basic principles offered by positivism still remain relevant. Legal certainty and value determination are important foundations for creating justice and order in society.

In addition to the advantages mentioned earlier, the law of positivism also has a number of other advantages, including:

1. Familiar: This law is easily recognized by the public, so individuals can quickly understand the applicable norms.
2. Intelligent: The law of hard positives is formulated in such a way that it is easy to understand, so that it does not cause confusion among the public.
3. Accessibility: Every individual has equal access to the law, ensuring that everyone can access the necessary legal information.
4. Verifiable: With written rules, proof becomes easier, because the authorities no longer need to prove the applicability of norms to get recognition from judges.
5. Coordinated: Mastery of the law can be aligned with what is contained in the codification, which serves to reduce the potential for legal uncertainty.
6. Facilitative: Written laws facilitate the development of new regulations, facilitating the formation of better legislation.

Based on the advantages above, the legal school of positivism still exists today, even in the future. The existence of positivism is mainly in the legal practice used by judges in deciding a case.

2 Method

The methodology used in this study is a qualitative analysis approach, which prioritizes a deep understanding of the application of positivism theory in legal practice in Indonesia. In this process, researchers conduct literature studies to examine various written sources, including books, articles, and relevant laws and regulations, in order to gain a comprehensive understanding of the theoretical foundations and historical context of positivism. In addition, the researcher also conducted in-depth interviews with legal experts, such as academics, legal practitioners, and judges, to explore their perspectives related to the application of positive law in everyday legal decisions.

3 Result and Discussion

3.1 Thought in Legal Positivism

Positivists view law as an object of study that is a social phenomenon, considering law to be nothing more than a phenomenon that can be observed and analyzed. In this perspective, positivism puts forward positive science, which means that only knowledge that can be proven and verified empirically is considered valid. Correspondingly, legal positivism is limited to understanding one type of law, namely positive law. This positive law is considered a written and accessible system of rules, which serves as a guideline in law enforcement. From the framework of legal positivism, various schools and approaches emerge, such as analytical legal positivism and analytical jurisprudence. Analytical legal positivism focuses on the structural and functional analysis of positive law, trying to understand how the law operates in society. Meanwhile, analytical jurisprudence seeks to explore the meaning and concept of law more deeply, questioning the nature and function of law in a social context. In addition, there is also a pragmatic positivism approach, which tries to integrate practical aspects in the application of law, prioritizing the effectiveness and purpose of law in daily life. One of the most important figures in this school was Hans Kelsen, who developed Kelsen's pure theory of law. This theory emphasizes that law must be separated from moral and social values, and focuses on the norms of law itself. [2]

The school of legal positivism tends to analyze the law only from the aspects that appear physically, focusing on what can be observed in social reality, without considering the values and norms such as justice, truth, and wisdom on which the rules of law are based. These values, which are more subjective and cannot be measured by the five senses, are considered beyond the reach of positivist analysis. Thus, this approach is often criticized for ignoring the moral and ethical dimensions that are often considered in law enforcement. Nonetheless, legal

positivism acknowledges the existence of law outside the law, with the note that the law must be established or recognized by law. This shows that even if there is recognition of unwritten norms, they still depend on the legitimacy provided by positive law. This shows positivism's dependence on formal and written legal structures. Legal positivists do not separate the applicable law (positive) from the ideal law that should exist. Although they contain different norms, positivists believe that the analysis of these two things should be done in different contexts. In this way, positivism emphasizes the importance of understanding the law as it is in practice, without getting caught up in idealism that may not be applicable.

Because it ignores the fundamental aspects behind the law, such as the values of truth, welfare, and justice that should be reflected in the law, positivism tends to adhere to the following key principles:

a. Law is considered a command of human being.
b. There is no need to link law with morality; The difference between the existing law (das sein) and the law that should exist (das sollen) is not a concern.
c. The analysis of legal concepts should be separate from historical studies that examine the causes or origins of laws, and differ from critical assessments of law.
d. Legal decisions can be derived logically from pre-existing regulations, without the need to refer to social objectives, policies, or moral aspects.
e. Moral judgment cannot be enforced or justified through rational reasoning, proof, or objective testing. [3]

From the explanation of the principles held by legal positivists, it is clear that this school has a significant influence on the development of legal philosophy known as legal positivism. Before the emergence of legal positivism, there had been another thought in the legal world known as legism. This school of legism began to develop since the Middle Ages and had a wide impact in various countries, including Indonesia. Legism identifies law exclusively with statute, affirming that no law can be considered valid outside of written law. In this view, the only recognized source of law is the law itself. The school of legism considers the law to be sacred, encouraging the rulers to create as many legal rules as possible so that all aspects of people's lives can be governed juridically. This thinking is based on the belief that if there are many good and clear regulations, then life together in society will run better and more orderly. However, although legism provides a clear legal structure, this approach also carries the risk, namely reliance on rigid legal texts without considering the social context and human values. [4]

According to Budiono, although the initial development of legal positivism began in France with Saint-Simon as the main figure, a deeper interest in the application of legal positivism actually came from legal thinkers in Germany. German thinkers put themselves in the context of a debate with the historical school led by von Savigny. They unequivocally state that the state is the only legitimate source of law; Outside the country, no law is recognized. One of the key figures in this development, Jhering, introduced two key concepts in jurisprudence: Begriffsjurisprudenz, which means jurisprudence of understanding, and interessenjurisprudenz, which means jurisprudence of interests. The concept of Begriffsjurisprudenz focuses on understanding law as a set of concepts that must be interpreted and understood in depth. Meanwhile, the interessenjurisprudenz emphasizes that various interests in human life are the factors underlying the formation of law. [5]

Schools of positivism and legism, which emphasize the importance of written laws, have strong support in countries with continental legal systems, which tends to lead to the codification of laws. This spirit of codifying law was actually inspired by the practice of Roman law. In the Roman era, the king's power was very dominant in creating rules through decrees. These decrees then became a reference for state administrative officials in carrying out their duties and deciding various legal cases. Although the legal positivists expressly separate between the existing law (das sein) and the law that should exist (das sollen), they nevertheless recognize that this separation must be carried out by considering two different areas: the contemplative and empirical areas. In this frame of thought, the positivist school remains considered part of the philosophy of law, which uses typical methods and approaches, and is influenced by empirical thinking. The empirical method in positivism emphasizes the importance of observation and experience as the main sources in understanding and applying the law. This approach seeks to generate knowledge that can be tested and verified through real experience, rather than relying on abstract moral norms or principles. This makes positivism a pragmatic school, focusing on concrete and measurable results in the application of the law.

Laws and regulations basically function as tools or symbols that should contain the values of truth and justice intrinsically and ideally. However, translating legal idealism into the context of society is not easy. Many people see law as objective and meaningless, and there are even academics who propose "pure legal theory" that considers law as an entity separate from non-juridical elements such as ethics, morals, religion, and so on. This perception creates a distance between the ideal law and the reality of its application in society. Many people may

understand the law as simply a set of rules to be followed, without considering the values that underlie its formation. This causes the law to be treated as a rigid norm, which is unable to answer the complexity and dynamics of social life that are constantly changing.

In this context, it can be said that it is a mistake to consider the law completely separate from the non-legal elements. Friedman points out that various factors, such as religion, ethics, and economics, exert a significant influence on the view of legal philosophy. For example, scholastic teachings rooted in religious principles influenced philosophical and political views. In addition, ethics has shaped Immanuel Kant's philosophical thought, while economic thought is the basis for Marxism's legal philosophy. On the other hand, the functional approach carried out by the realist movement is influenced by empirical science. The history of legal thought also records that Hegel previously stated that law is a reflection of spirit or morality. The importance of non-legal elements in the formation of law shows that law is a complex social product. In practice, law serves not only as a regulatory tool, but also as a reflection of society's values, norms, and beliefs. Ideally, every type of legislation should include juridical, sociological, and philosophical aspects. The juridical aspect includes the following: [6]

1. There must be legitimate authority from the party that drafts laws and regulations.
2. The form or type of legislation must be in accordance with the regulated material, especially if it is regulated by a higher or equivalent regulation.
3. The preparation of regulations must follow the established procedures.
4. The regulation must not conflict with regulations that have a higher level.

The sociological aspect of law is related to a teaching known as Sociological Jurisprudence, which emphasizes that good law is one that is in harmony with the norms that live in society. In order for a law or law to have social legitimacy, the law must be appropriate and accepted by the community concerned. This means that there is a harmony between the needs or desires of the community and the will of the lawmakers. If the law does not reflect the existing social values and realities, then it will be difficult for the community to recognize and obey the law. Therefore, understanding social dynamics and community needs is important in the process of forming laws. In this context, the interaction between the community and lawmakers is crucial, because good laws must be able to answer the challenges and problems faced by the community. The philosophical aspect of law focuses on the substance of the law itself, which reflects the values of truth and justice. The law should not only be an applicable rule, but also must contain the underlying ethical principles. Therefore, the content of the law must reflect universal values that are considered right and fair by society.

3.2 Implications of Positivism on Legal Thought

Legal positivism generally adheres to two fundamental principles. First, he argues that only laws are recognized as law; In other words, the law cannot exist outside of written regulations. Second, positivism asserts that the state or public authority is the only legitimate source of law. From these two principles, it can be concluded that any law established by the competent authority must be considered a law that must be complied with, regardless of the substance or content of the law. The implication of this approach is that the law serves as a tool of legitimacy for those in power. This means that the government or authority can use the law to support and defend its power, regardless of whether the law is fair or not.

In the context of state life, especially in countries that adhere to the principle of welfare state, there is a tendency for rulers to intervene in the affairs of citizens through various legal instruments. This led to the birth of many regulations that were used as the basis for government actions, regardless of whether the law was fair or could oppress the people. In authoritarian or dictatorial systems of government, although the law formally serves as the foundation of power, it often does not reflect the values of justice, truth, and protection for the people. On the contrary, the law is more beneficial to the interests of the ruler.

A clear example of this can be seen in the Nazi regime in Germany under Hitler and the Musolini government in Italy, where all laws established were considered valid and must be obeyed by the people, even though they were contrary to the principle of justice. In such a system, the validity of the law is not directly proportional to moral or ethical values, but rather to the authority to set the law. The main advantage of legal positivism lies in the guarantee of legal certainty, where the public can clearly know what is allowed and what is prohibited. In this case, the state or government can act decisively based on what has been regulated in the law. This also makes the judge's job easier, as they only need to apply the existing provisions without having to consider aspects of the values of justice and truth.

Some of the weaknesses of the positivism legal system are as follows:

1. Law is often used as a tool by rulers to strengthen and maintain their power. As a result, the law that is supposed to provide protection for the community can actually become a tool of oppression against the people.
2. Laws tend to be rigid and inflexible in the face of changing times. Given that the development of society is rapid and often unpredictable, laws are often unable to keep up with these dynamics.
3. Written laws cannot accommodate all problems that exist in society. It is very difficult to include all political, cultural, economic, social, and other issues in a law.

Because of these weaknesses, the existence of unwritten laws is very important. According to Bagir Manan, unwritten law has several roles, including:

1. Become an instrument that complements and fills the gaps in laws and regulations.
2. Provide the necessary dynamics for legislation.
3. Functions as an instrument of relaxation or correction to laws and regulations to be more in line with the demands of development and the values of justice and truth that apply in society. [7]

In the history of law enforcement, there have been significant changes in the way laws are applied. Initially, the application of the law was highly dependent on written laws, in accordance with the views of the legism. However, as time goes by, it can be seen that if the law is only based on the law, then the value of justice can be ignored. One example is the Lendebaum Cohen case in 1919, where a judge made a decision on unlawful acts that differed from previous rulings, although still referring to the same article, namely 1365 BW. Before 1919, unlawful acts were considered equivalent to violations of the law, so the law was understood as the law itself. However, after 1919, the meaning of unlawful acts was expanded, not only to include violations of the law but also violations of norms of decency and obedience that should be respected.

From the explanations and existing examples, it is clear that legal positivism and legism have a weakness that cannot be maintained, namely the dependence on written laws in legal positivism makes them often ignore the values of justice that should be considered in every legal decision. This leads to situations where the law can be used as a tool to strengthen the power of the ruler, without regard for the welfare of the people. In many cases, laws can be a means of oppressing the people, instead of protecting their rights. Legislation, which equates law with written law, also faces challenges as society evolves dynamically. Rigid laws and inability to adapt to social changes often fail to accommodate the various problems that arise in people's lives. This suggests that an approach that focuses too much on legal texts can generate injustice and dissatisfaction among the public. In the shift in understanding of unlawful acts, as happened in the case of Lendebaum Cohen, it emphasizes the importance of considering values outside the law. When judges begin to consider norms of decency and social obedience in their rulings, this shows that the law cannot be separated from the social and moral context in which it applies. Therefore, the existence of unwritten laws is becoming increasingly important as an instrument that complements and provides dynamics to existing laws and regulations.

4 Conclusion

Overall, legal positivism and legism, while making significant contributions to legal structure and legal certainty, have glaring weaknesses, particularly in ignoring moral and social values that should be considered in law enforcement. By emphasizing the importance of written law as the sole source of law, these two schools risk ignoring the complexity of societal dynamics and the need for more substantial justice.

Legal positivism and legislation, while providing guarantees of legal certainty, have significant weaknesses in ignoring the values of justice, morality, and social context that are essential in the application of law. Reliance on written laws often makes the law a tool of legitimacy of power that can oppress people, instead of protecting their rights. The shift in understanding of unlawful acts, as seen in the case of Lendebaum Cohen, emphasizes the importance of considering social norms and decency in law enforcement. Therefore, the existence of unwritten laws is indispensable to complement and provide flexibility and responsiveness to changes in social dynamics, so that the law can better reflect the values of justice that live in society.

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