# The Theory of Positivism and the Judges' Social Jurisprudence in Indonesia

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## ABSTRACT

*Positivism is a branch of philosophy, which is a source of knowledge on positive law and based on the Constitution applied. The law-making institution makes a positive law. The laws which have been determined and issued must be complied with by all citizens. It is enforced, and it comes with strict sanctions. Judges have a significant role in enforcing the aims of the law, which are certainty and justice. Apart from holding on to the formal law (the positive law), the judges also have the capability to see the condition in the field empirically and adjust to it flexibly. Thus, judges may have more flexibility in deciding upon a case and in examining the real data to uphold justice. Such decisions may be followed by other judges, which is called jurisprudence.*

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## 1. INTRODUCTION

Positivism states that the truth or righteousness is only the positive or factual fields of knowledge. If a field of knowledge applies to the scientific positivism method, it will need real observation. There must be real symptoms, and it must use these facts to create scientific laws that explain how -- instead of why -- these symptoms work (Protevi, 2005).

Positivism views that actual knowledge comes from examining characters and actions which may be observed, not based on ratio or speculation. It is a theory that is based on social facts instead of moral claims. Positivism holds on to the principle that the only law which fulfills the requirement of the law is that which is based on social facts, which are then applied, or it is stated clearly by those in power (the executive, legislative, and others). Positivism also views that the law and morality are different fields. The law does not need validity from morality to be deemed as valid.

The underlying assumption of law positivism is known as the law theory, which considers the separation between law and morality is a crucial thing. Positivism differentiates what makes a norm existent as a stringent legal standard and what makes a norm existent as a valid standard of morality. For positivists, "evil" norms of law may be accepted as the law if it fulfills the formal criteria on the law (Ali, 2009).

Further, the theory of positive law from Hans Kelsen states that the law is a coercing order of human behavior; it is the primary norm which stipulates the sanction. In *reine rechlehre*, or the pure theory of law Kelsen views that the law must be cleansed from non-legal elements such as culture, politics, sociology (Kusumohamidjojo, 1999).

The certainty of law may only be achieved if the law is regarded as a closed system which is independent of the various non-juridical problems such as philosophy, politics, psychology, economy, and morality. The foundation of law positivism, which is sterile, may show its character by itself, which

closes all doors and even cracks from all questions which may arise regarding justice and the benefits of law. The positivism of law does not provide room for non-legal variables. Moreover, it does not have room to question positive law from other non-legal aspects. Thus, it may seem that law positivism rejects the philosophy of law (Suharto, 2006).

The thoughts of Hans Kelsen may influence the thoughts regarding the law from all over the world. The law-thinking system starts to take a sharp turn to become monistic. Hans Kelsen's faction is consistent in preventing themselves from discussing legal philosophy, which is abstract. Thus, the law must be separated from all considerations of morality, politics, economy. The sterilization or the purification of law from the non-legal elements is epistemologically the end basis and is absolute for Kelsen. Many groups claim that Hans Kelsen is the founder of the theory and the discipline of law, the one who makes it an autonomous discipline (Kelsen & Wedberg, 1999).

The discipline of law's epistemology (foundation) from Hans Kelsen is what attracts epistemological arguments in the Faculties of Law in Indonesia. The believers of law positivism assume that the theories of law which do not centralize their ideas towards positive law cannot be analyzed academically in the Faculty of Law (Sidharta, 2006). The college class of the Sociology of Law, the Philosophy of Law, the Anthropology of Law, and others are not "purely" considered as the discipline of law. The multidisciplinary and interdisciplinary approaches do not only get considered as a non-discipline of law, yet they are also considered as a rebellion towards the legal formalism (Rasjidi & Sidharta, 1994).

The law is neither functional nor pragmatic. It only protects the elite citizens, so the equality before the law and the rule of law do not work. It prioritizes the doctrine of law certainty instead of justice and benefits. The judge's decisions emphasize procedural and formal legal justice instead of substantive justice and social justice (Sadjipto Rahardjo, 2009).

## 2. RESEARCH METHODS

This research was conducted by the normative-empiric method to describe the law stipulations normatively and the legal phenomena which happen in the society. In the normative method, the positive law is specified, which is the law written in the Constitution. It cannot be denied that Article 1 paragraph (3) of the 1945 constitution normatively states that Indonesia is a state of law. in the empirical research is carried out by seeing the phenomena which happened in the society, and it is deemed to show the facts realistically. In deciding upon a case, a judge does not only hold on to the Constitution, yet he/she also considers the phenomena which happen in society.

## 3. RESULTS AND DISCUSSION

### 3.1. The Relations Between the Law and Morality in the Perspective of Positive Law

A character of law positivism is the view that separates the law from morality, as both are different. Even though the law is the opposite of morality, the law is still valid as a law. Hans Kelsen views that the law needs to be separated from morality. Nowadays, the law has been mixed up by some people who are not experts in the law. The perception of law positivism, which is regarded as the fair, positive law, has positive perceptions of just leaders.

According to the theory of positivism, the law is a set of specific rules which cannot be changed except by the authorized institutions. In this perspective, the law is regarded as the same as the constitutional regulations; thus, it is acknowledged that the legalized source of law is the Constitution. The law is an order from the authorities which have sovereignty. The law is a system that is certain and closed. Decisions and sanctions contained in it are taken from the previous stipulations and regulations. This is one of the characters of the law's certainty, as one of the aims of law (Jonaedi & Ibrahim, 2018).

The difference between the law and morality are as follows: the law binds everyone who is a citizen of the country without exception. Meanwhile, morality binds people as individuals. The law and morality must come side-by-side as the basis of law is morality. A law that is of quality has a good quality of morals. On the contrary, in increasing the quality of morality, there needs to be the law. However, the more codified law has legal certainty compared to morality, which is not written. If the law regulates physical things, morality tends to regulate people's mentality (Greenawalt, 1996).

The law and morality are different in the formal aspect, yet they do not have differences in the aspect of substance. Both the law and morality have the aim to regulate the behavior of human beings. Law experts give a different understanding of the law, as the science of law is comprehensive. Positivism defines the law as a constitution in which its legality has been acknowledged. Positivism often obtains critics from society (Bakir, 2005).

As the pure law, positivism upholds the law certainty highly, both in the enforcement of law and in practical life. With the existence of positive law, the state may limit and control the government's power. This is also because the Constitution states that every citizen has the same position in the face of law (Bix, 2018)

In its realization, the idea that every citizen has the same degree in the face of law is not yet fully applied. Many normative goals are not yet achieved. The interest protection of the upper-class and that of the lower-class are not yet balanced. Some parties try to use the law to manipulate, so it will bring results that benefit specific groups. The law-enforcing process has not yet been appropriately applied.

Empirically, the law must be able to see the development which happens in society, not only regarding the positive law, yet it must also provide justice based on the real facts. In some instances, it is not enough to solve cases solely by using the positive law, yet it must see the experimental condition and the symptoms which happen to be able to find the solution.

A judge should not only tend to the positive law. However, he/she must be able to place himself/herself and express the constitution in making a verdict. Thus, it is hoped that justice may be upheld. Even though, until now, the jurisprudential decisions of judges have not given full contribution in achieving justice in the society, yet it is an effort to achieve and to enforce justice in Indonesia (Putro, 2012).

Society prefers responsive decisions. The law cannot only be seen from one side as the constitution. The law must be flexible with the society. A good law is a law that grows according to the law which develops in the society (Ali, 2009). Social jurisprudence is a theory of law which studies the interacting relations between the law and the society. In the social jurisprudence, the law starts from the society, and it views the "living law" as a crucial thing (Rasjidi & Sidharta, 1994).

Sociology points towards the social data and the experimental condition which happens in society so that the decisions do not tend to one side. Such a decision must be analyzed with detail as the judges' decisions must give satisfaction to the people. It must also fulfill the principle of justice instead of becoming a tool of manipulation (Irianto & Shidarta, 2011)

Even in the civil law tradition, the positive law is dominantly in the form of a written constitution. However, judges do not only deal with norms. They must also be neutral and cannot link a case with their mood. The law is not the willingness of the authorities. However, the law is a habit. Principally, the growth of law is organic (Irianto & Shidarta, 2011)

Indonesians are very diverse (plural). As a country in which its foundation is Pancasila, the law must be able to provide welfare for the people, and it must be according to the character of law, which is hoped for by the Indonesians. In this case, positivism will only give procedural justice. It will not achieve substantial justice.

### 3.2. The Implication of Positivism Towards Legal Thinking

The theory of positivism believes in certain principles. One of them is that the law is only the constitution. If a regulation is not stated in the constitution, it cannot be regarded as the law. The state is the sole source of law. The implication is that every constitution which has been issued and applied by the state must be complied with without exception. In consequence, the law may be used as a tool of legitimization by the authorities to strengthen their position (S Rahardjo, 2000).

There are two types of states. First, a country which beliefs upon the principle of welfare, where the authorities issue some legal regulations which become the basis in behaving, and without caring whether or not the regulations are applied justly to the people. Second, is the state of dictatorship, where power is regulated by the law and is applied based on the existing law. However, here, the law is not only that which is beneficial for the people and which gives mutual justice, yet the law emphasizes the interests of those in power (Indarti, 2001).

Positivism has some advantages and weaknesses. Its advantages include the presence of clear, strict, and binding certainty of law according to what is contained in the constitution. This may ease a judge in giving a verdict and in examining a case, as basically, the judge has a source which is the constitution, which may be applied in facing a concrete case (Roestandi, 1984).

Positivism also has some weaknesses. The law may be misused by some people to maintain their power. There are many cases of buying and selling positions and money politics these days. This condition will oppress the people. The law, which has the primary aim to provide welfare for the people and to protect them, is ironically used for the interest of certain groups. Apart from that, the constitution is not flexible with the quick development of the state and society. Instead, it cannot be balanced (Samekto, 2005).

As a written law, the constitution only sees things normatively. However, it cannot fulfill the cases which happen in society. The constitution does not describe all cases in the aspects of the economy, politics, social, culture, etc. With such weaknesses, Indonesia also uses unwritten laws. The unwritten laws have a role in supporting the written laws, including filling in the legal gaps in the constitution and providing dynamics in the constitution. The unwritten laws also have a role in giving flexibility to the written constitution to be able to adapt to the development of society.

Positivism also has some undeniable weaknesses. According to Sidharta (2007) argument, there are some rejections towards the theory of positivism. This condition because the value of neutrality in the law cannot be accepted, as basically the law is created by human beings to create order and peace among the people because, with that order, the human beings have the opportunity to develop themselves and to carry out activities to fulfill their needs naturally.

The principle of positive law is the results of the humans' judgment towards their behavior with the orientation towards order, which is based on values. Positivism cannot eradicate the values of justice since the elimination of the justice values will also eliminate the substance of that law. The law is a result of the interaction between various social symptoms with the values which live in society. Because of that, in the law, there are many social symptoms and values (Rasjidi & Sidharta, 1994).

The theory of positivism emphasizes specific laws. It should also pay attention to the importance of carrying out empirical research towards the symptoms which happen in society so that the law may run harmonically with society's development.

The law must have three main goals, which are the benefit of law, the certainty of law, and justice. A good law must be able to contain these three things, so that the main aim of the law's existence as an instrument to create order in the society may be reached (Soewardi, 1996).

The value of justice in this country must also be upheld so that there is no gap of interest between the different groups. It is often heard that the lower-class group complains that the law in Indonesia is "blunt to the top, yet sharp to the bottom." Such quotes should become a reminder to the law enforcers

to work more professionally. This is because, if the law enforcers are not responsive, and if the law is used as tools of manipulation, then this country will be wrecked (Tanya, 2013).

In deciding upon a case, a judge does not always have to hold the normative values contained in the Constitution. However, he/she must also observe the normative symptoms which happen in society, even though the judge may not be able to come directly to the crime scene. So, he/she may analyze and observe the present data. Based on the principle of justice, the judge may make the right decision, which is honest, just, and not siding with particular groups, which is according to the society's hopes (Tamanaha, 1999).

## 4. CONCLUSION

Based on the discussion regarding the research problem, it can be concluded that the theory of positivism is a theory of law that is certain and that its legality is acknowledged by the state. Positivism is a basis of knowledge that makes the law normative. Positivism always makes an effort to follow up with the changes which happen in society so that it may be flexible, and it may be according to the development which has happened. The positive theory is a philosophical material of analysis that becomes a supporting facility in explaining the law further. Positivism is a branch of legal philosophy that states that the law is solely adrift to the positive law. Positivism is formed from abstract values instead of the values which develop in society. So, it can be said that these values are repressive instead of responsive. This law tends to protect certain groups, even though there are already strict and binding sanctions, yet the value of justice has not been fully reached. The difference in protection between the upper and the lower groups are still often seen and heard. The theory of positivism emphasizes the doctrine of the principle of law certainty instead of the principles of justice and benefit. This is because the law enforcers are not responsive enough towards the empirical condition which happened realistically in the society.

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