Indonesian Journal of International Law

Volume 8
Number 2 *Progressive Development of International Law - Part II*

Article 18

4-30-2011

# Basic Concept of Positivism in the Development of Legal Studies

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*Legal norms governing a social system are known as the legal system, which function as guidelines for the creation of rules for community members. A legal system comprises norms (principles) serving as guidance (reference), either individually or in groups, which include command (compulsion) and restrictions (regulation) as well as sanctions. Command and restrictions are construed as the materialization of the agreement made in regulating interactions, which can be used as comprehensive guidelines in the social system. Whereas sanctions are intended as retribution (punishment) for any person (group) who fails to abide by (comply with) the rules. Retributions as the consequences of the agreement on a legal system as well as sanctions provided for in the legal system constitute psychological motivation for taking or refraining from taking action.*

***Keywords:** positivism, legal system, norms, criticism*

## I. Introduction

Social activities of human beings are subject to various social rules and principles. They include principles (norms) in the form of rules of life,[2] serving as guidelines in engaging in social interactions. Such rules of life are based on practical logical review and social symptoms originating from moral norms.[3] In their application in interactions between a community and the nature as well as between a community and other communities, moral norms develop into legal

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[2] Utrecht & Moh. Saleh Jindang, Pengantar Dalam Hukum Indonesia (Introduction to Indonesian Law), (Jakarta: Ichtiar Baru, 1983), p. 3. Legal principles (norms) can be formulated as a compilation of guidelines on life, commands and restrictions regulating order in a community, and may result in the taking of actions by the government or the ruler, if they are not complied with.

[3] Theo Huijbers, Filsafat Hukum Dalam Lintasan Sejarah (Legal Philosophy in History), (Yokyakarta: Kanisius, 1992), p. 101. Moral norm is perceived as an abstract and binding principle, because it serves as a guidance referring to the aesthetic and ethical values of human behavior in interaction.

norms after being formally formulated by the state.[4]

Legal norms regulating the life of a community in conducting its interactions are known as legal system.[5] The legal system has the function of serving as guidance or guidelines in the creation of rules for a community in their interactions. A legal system comprises norms (principles)[6] as guidance, references, and guidelines for all community members, either individually or in groups. In its application, such legal system comprises commands (compulsion) and restrictions (regulation) as well as sanctions.[7] Instructions and restrictions are construed as the materialization of the agreement made in regulating interactions, which can be used as comprehensive guidelines for the social system, hence the rights and obligations arising from it can be accepted by all levels of the community. Whereas sanctions are intended as retribution (punishment) for any person or group who fails to abide by (comply with) the rules.[8] Such reward or retribution, as one of the consequences of the agreement on the legal system, as well as sanctions provided for under the legal system, constitute psychological motivation for taking or retraining from taking action.[9]

Developments in the application of the legal system have sparked heated debates between legal and non-legal experts up until now. The debates may concern formalistic and materialistic aspects.[10] The formalistic aspect is real-

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[4] Achmad Roestandi, Responsi Filsafat Hukum (Response of Legal Philosophy), Second Edition, (Bandung: Armico, 1987), p. 68. According to Austin, legal system is regulations targeted at rational creature and made by rational creatures having power over them.

[5] Lili Rasjidi, Filsafat Hukum Mazhab dan Refleksinya (Legal Philosophy, Its School of Thought and Reflection), (Bandung: Remadja Karya, 1985), p. 13.

[6] Legal norms or principles grow and live amongst community members, either in written form or otherwise, based on the developments of intention, willingness and needs in conducting interactions.

[7] This rule automatically serves as a call for taking or retraining from taking action, so that the actions (behavior) of a person would not violate or harm other people's interests. Non-compliance with

the rules will result in retribution (sanctions) imposed by the institution authorized to impose such sanctions.

[8] Those sanctions are the facilities for compelling people to act (behave) as intended in the rules, otherwise they will be subject to retribution for their non-compliance to the applicable rules.

[9] Retribution (sanctions) for non-compliance are absolute in nature, because the legal system is a compilation of norms or principles applicable in a country and addressed to the people, and all people jointly determine what constitutes a law with regard to people's inter action.

[10] Bruggink, Refleksi Tentang Hukum (A Reflection on Law), Translated by Arief Sidharta, (Bandung: Citra Aditya Bakti, 1996), p. 72.

ized in the following contexts: what is the legal system? How can we determine its form? Who has the power to create it? What are the existing types of form? What is the ideal form for inducing compliance? At the same time, the materialistic aspect (substance) is formulated in the following questions: What is the content of a command and a restriction? What are the sanctions? Who has the right to impose sanctions? To whom they will be applied? Where do the rules come from?

The legal rules must provide answers to the questions arising in the debate. This is related to the accountability of norms, which are in the form of legal rules applicable among community members.[11] In order to answer those questions, we cannot merely use simple argumentation, but we also need an in-depth analysis and study. One of the alternatives is turning to philosophy which is able to provide the reasons regarding what, why and from where something is obtained (introduced).[12] Reflection on philosophical study is required because those questions have implications on the appropriate legal system in the social life of society, either in individual or group interactions. Such reflection of legal philosophy is automatically started from the logical aspect of legal theory, questioning the ideal law and the actual law.[13] The system of legal theory is related to philosophy and politics.

Legal theory is inspired by the manifestation of the desire of human beings to live in an orderly manner. Such desire is not only formulated formally, but it must also include a moral assessment. The formal desire is articulated in written (positive) law, while morality assessment constitutes the unwritten norms, which live and develop continuously in the people's conscience. Legal theories consider the relationship background of the concept about human being and human relation with the environment.[14]

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[11] Lili Rasjidi, Dasar-Dasar Filsafat Hukum (Principles of Legal Philosophy), (Bandung: Alumni, 1985), p. 15.

[12] Louis Kattsoff, Pengantar Filsafat (Introduction to Philosophy), Translated by Soejono Soemargono, (Yokyakarta: Tiara Wacana Yogya, 1986), p. 119. See also Lili Rasjidi, Filsafat Hukum: Apakah Hukum itu? (Legal Philosophy: What is Law?), (Bandung: Remadja Karya, 1988), p. 10.

[13] W. Friedmann, Teori dan Filsafat Hukum, Telaah Kritis Atas Teori-Teori Hukum (Theory and Philosophy of Law, A Critical Study of Legal Theories), Volume I, (Jakarta: Radjawali Pers, 1993), p. 1.

[14] Abdurrahman, Ilmu Hukum, Teori Hukum dan Ilmu Perundang-Undangan (Legal Science, Legal Theory and the Science of Legislation), (Bandung: Citra Aditya Bakti, 1995), pgs. 112-113. See also Satjipto Rahardjo, Ilmu Hukum (Legal Science), (Bandung: Alumni, 1982), p. 8.

The task of legal theories is formulating the endeavors for clarifying legal values and their postulates up to their ultimate philosophical foundations. On the other hand, legal theory provides a systematic illustration of the positive law as a common symptom in a community. It is also the case in the search for causal relation between each legal symptom occurring in a community and basic foundations of the positive legal order concerned.

The applicability of law as a causal action leads us to understanding the function and objective of law in life. The objective of law[15] is formulated in order to guide people in understanding life, peer interaction, as well as in even broader relations. The initial step for people in understanding law is oriented towards the aspect of justice in the natural spirit.[16] Law is justice and justice is the only objective of law, which is developed in a mystical, transcendental philosophical system in the metaphysical space. In the substantiation aspect, metaphysics always refrains from the verification of facts.

In its theory, mystical, transcendental philosophy coopts the independence of human mind (reason).[17] The applicability of law does not involve human mind (reasoning) in an independent manner. This form of law finds its ideal formulation in the theory of Natural Law. Everything comes from nature and the religious message, along with a symbol of alignment to its absoluteness. In reasoning, human beings are coopted by symbolic meaning of nature and religion. Law is perceived as a symbol of naturalness and an illustration of religious absoluteness, free from the superiority and independence of human mind (reason).

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[15] According to Radbruch: the objective of law is perceived as legal goals, namely: Justice, Utility, and Certainty.

[16] Aristoteles believed that justice. according to the law, is to the equivalent of general justice, which is left to the judgment of human habits and the universe.

[17] H.L.A. Hart, The Concept Of Law (London: Oxford at The Clarendon Press, 1979), p. 183.

[18] Theo Huijebrs, Filsafat Hukum Dalam Lintasan Sejarah (The Philosophy of Law in the Track of History), Op. Cit., p. 79. John Locke, as one of the front-runners in Modern Empiricism Philosophy, gives priority to the investigation of nature based on experience. Therefore, knowledge only comes from experience. Natural law functions as a moral guidance, rather than the actual law, hence it cannot be maintained in its very abstract applicability. Human beings require very concrete and realistic rules in arranging their interaction with the urrounding environment. Whereas Pupendorf is of the opinion that natural law is applicable only as a moral norm rather than a legal norm (legal system).

The stigma of the objective of law to achieve absolute justice is then elaborated from the formalistic aspect.[18] The formalistic aspect evolves around legal certainty as the objective of law. The objective to achieve legal certainty is preached in the rationalism and empirism philosophical systems. Rationalism and empirism are the antithesis of the dissatisfaction of human reason with regard to abstract and unreal matter.[19]

The independence of the human mind (reason) was introduced as an antithesis to the confinement of logical abstraction. Logical abstraction is related to the sacredness of nature in religious messages revealed in holy books (religious teachings) regarding human life and the living environment. Such confinement had been broken by the evolution of thought by using logic, occurring from the empowerment of the mind (reason) with the aim of identifying itself and nature.

The independence (freedom) of reason from the confinement of morality and religion embraced the emergence of a new philosophical system. This new philosophy reduced some basic concepts of mystical, transcendental philosophy. The natural-religious absoluteness and the abstract nature of thinking were marginalized by the evolutionary ability of the mind (reason in identifying itself and its living environment).[20] Evolution in the development of ability to use the mind (reason) emerged at the same time as the emergence of the philosophy of empirism, rationalism, idealism and concretism. The ability of the human mind (reason) was used as a source in understanding and investigating the living environment. Meanwhile, legal norms were framed in a formalism of rules. Such formalism of rules did not yield to a philosophical system which is resigned to natural symptoms and the stagnancy of religious teachings.

The beginning of the evolution of thinking was marked by the dawn of the Renaissance Era,[21] as the beginning of enlightment and refreshment of reason in construing life. Norm (legal system) was inspired by the empirism philosophy,[22]

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[19] D.F. Scheltens, Inleiding Tot De Wijsbegeerte Van Het Recht, Translated by Bakri Siregar, Introduction to Legal Philosophy (Jakarta: Erlangga, 1983), p. 67.

[20] The human mind is the only source of law or the investigation of the universe. Human logic as the materialization of development of thought plays an important role in the establishment of laws.

[21] The Renaissance Era was inspired by the philosophy of rationalism. Its supporters: Pufendorf, Thomasius, Zpinoza, Leibniz, Wolf, Montesquieu, Voltaire, as well as J.J. Rousseau and, at its peak in the 17th and 18th century, Immanuel Kant, who prioritized the human mind (reason) as the source of power of life and the world.

which refuses the existence of actual and concrete rule.[23] The legal objective was no longer aimed at the abstract aspect of justice alone, but it had been elaborated in an effort to achieve permanent, actual and concrete legal certainty.[24]

Legal certainty was construed as a compelling rule,[25] and it originated from a structure of sovereign social organization.[26] Law is the spirit of power,[27] in implementing the stigma of policies[28] issued as means of coercion in order to monopolize a community. The purpose of monopoly applied by using such means of coercion was to arrange the significance of interactions between communities with the goals and objectives of living as a state.[29] Eventually, the state goals and objectives are synchronized with the meaning of human life, which is materialized in the form of prosperity, security, safety, welfare and people's life as a state.

## II. The Basic Concept of Legal Positivism

It started in the 19th century, which was known as the century of development in the evolution of reasoning, based on the people's increasing awareness

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[22] Philosophers such as Descartes, John Locke, Berkeley Hume believed that empirism was the antithesis of rationalism, holding the view that experience,rather than thought, was the source of all knowledge.

[23] The theory of Legal Positivism, calling for a rule which is actual and concrete and has permanent certainty in its applicability.

[24] The portrait of justice is reflected in laws when they are codified into the positive law, which can provide permanent legal certainty.

[25] Law that has compelling characteristic is expected to create certainty in the application of law in the community, because without such compelling force in the application of law, the law will be deemed a moral motivation that does not have clear objectives, so that the organ creating and making laws will not have any authority in regulating the community.

[26] Jean Bodin was of the opinion that in a sovereign state there is a power over the citizens, which is not limited by other powers, other than the state.

[27] Power is a foundation for law in its applicability, because it obtains legitimation from authorized agencies.

[28] Law is an organization of coercion, because it entails the use of coercion in the relations among human beings under certain conditions. See in Hans Kelsen, General Theory of Law and State, translated by Somardi, Pure Legal Theory, (Jakarta: Rimdi Press, 1995), p. 19.

[29] Von Jhering was of the opinion that the state and law originate from an egoistic motive, namely coercion, because the state is an organization of power that exercises coercion.

[30] As the justice doctrine of Natural Law faded away in the 17th-18th centuries, the theory of Legal Positivism put forward its doctrine on justice which is evident (portrayed) in laws as they are codified (turned into positive law).

about power (strength) of their own rational ability.[30] The human mind was freed from the constraints of religious theories and it was no longer seen as the materialization of the divine mind of God (which was realized in the form of religious teachings). The human mind (reason) was considered as the source of the one and only knowledge (law) in engaging in evolution.[31] Such evolution of thought was the initial start of an empirical investigation of legal principles (norms) at the level of idealism philosophy. Idealism philosophy was the continuation of Kant's rationalism, which considered that idealistic legal theory was based on the principles of human beings as rational and ethical creature as well as the development of human beings as spiritual subjects.

In its development concept, idealism philosophy valued the mind (reason) and the identity of human beings as source of knowledge. In addition to that, idealism philosophy was one of the foundations bridging the emergence of Legal Positivism. Legal Positivism[32] emerged (in the 19th Century) as a response to dissatisfaction with the concept of Natural Law (the 17th-18th Centuries) that confined and constrained the human mind (reason) in its expression. It first emerged in the Renaissance era (at the end of the 18th century),[33] in which the human mind (reason) was the centre of investigation in the development of human civilization and investigation of the universe.[34] Positivism as a philosophical doctrine in the 19th century, was inspired by Kant's philosophy[35] which has

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[31] The human mind (reason) became the center after it went through the process of enlightment evolving towards the maximal use of existing potentials. This was aimed at putting the human mind at the center of the search and investigation of science.

[32] Legal positivism was inspired by the Renaissance era and it was the philosophical work of Augustte Comte (1789-1857) that first introduced the Three Phases Theory. Those three phases are as follows: 1) Theonomical (theocratic) idea, the will of God for deities is the ultimate benchmark for anything declared as the law; 2) The idea of natural law or the philosophical phase, ethical, pre-juridical norms, based on human nature, which determines the principal outlines of law; 3) The idea of positive law, fully independent from any other agencies and from the will of the lawmakers and automatically, it must be recognized as the only actual law. Based on its postulates, a theory was introduced that the entire history of human mind must engage in an evolution from Theological (mystical) stadium to philosophical stadium, in order to achieve the definite victory of the mind in the positivist stadium.

[33] The Renaissance era was driven by the Rationalism Philosophy, which prioritized human mind as the source of truth regarding life and the world.

[34] The tendency in the investigation of sciences based on facts that could be observed by the five senses and law that could be found in facts was the only object in legal science.

[35] According to Kant, human beings are unable to discern material realities by any other means than through science.

three branches (sociological, legal, and general legal doctrine).[36]

The fundamental principle of Positivism Philosophy holds that positive science is science that can only advocate reality (realities in social life); science that is intended for observation (through empirical investigation) for identifying the regularity of law; refusing all sciences that cannot be observed by using the senses (trying to keep away from the aspect of abstraction that cannot be verified scientifically). In its development, the basic concept of positivism philosophy also included the development of legal science.

Here, Positivism Philosophy,[37] was not directly the school of legal positivism commonly known in Legal Philosophy and Legal Theory; rather than that's positivism in a school of philosophy applicable to all sciences. Conceptually and methodologically, the school of Positivism Philosophy had not been specialized for studying and developing legal science in a positive manner.[38] Positivism Philosophy in its implementation studied the developments in human civilization or sciences that studied the universe. Auguste Comte, as one of the founding fathers of Positivism Philosophy, introduced the three phases concept. His three phases concept included the theonomical (theocratic) idea, the natural (philosophical) law idea, and the positive law idea. This concept allowed the investigation of sciences in the philosophical system,[39] in order to explain human thought in engaging in the evolution of the mind (reason).

The system of positivism philosophy resulted in a doctrine holding that only experience is true because it can be assured in reality through science, hence it can be determined that a certain matter is reality (truth). Similarly, in the investigation of science, the tendency was based upon facts that could be observed

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[36] Sociological Positivism considers law as social symptoms observed by sociology, legal positivism investigates law through positive legal science, The General Law theory, with the method of the empirism philosophy.

[37] Positivism is a school of thought in philosophy, which desires to work merely with sciences that are based on the facts of experience, the truth (verifiebaar) or falseness (falsifiebaar) of which can be verified and the data is then processed by using meticulous scientific methods. See in N.E.Algra, et.al, The Origin of Law (Several chapters on law and sciences for education of law in the introduction to legal science), (Jakarta: Bina Cipta, 1983), p. 133.

[38] The basic principles of positivism at that time were as follows: 1) Positive sciences are sciences that only preached about reality; 2) sciences are intended for observing actual conditions, with the aim of recognizing the regularity of law in them; 3) Positivism denies all sciences that cannot be investigated by using the human senses.

[39] Human beings evolved in stadiums (phases): from Mystical theology, Philosophical phase, and finally reached the authority of mind (reason) in the positivist phase.

by the five senses. The regularity of law that could be found in facts was the only object in science. The positivistic law theory was based on the basic principles of the law itself without involving non-legal principles (ethics, politics, economy). This theory considered that law was only related to positive law. The method applied in its implementation did not touch upon good and bad values, effectivity values and the acceptability of its applicability in the community.

The development of Legal Science in the 19th century, which was supported by the development of Idealism and Legalism Philosophy, had a specific nuance, which was different from the doctrines preached by Natural Law. The implementation of the legal science concept (legal rules) in arranging people's interactions tended to abandon teachings about the sacredness of nature, religious sacredness, and stagnancy of reason. People were starting to abandon the value of justice which was closely related to the abstract value of the objectives of absolute law in the Natural Law doctrine because it was not able to satisfy the people's sense of law. People started to search for other (new) formula, both in terms of implementation method as well as the substance of the objectives of law enforcement.

The implementation of law in the community is not intended only for achieving justice, it also has to provide certainty. It is expected that legal certainty as serve as guidance to the community and as permanent guidelines to the law enforcement apparatuses in making decisions. Law started to be introduced (perceived) officially in a formalistic form, in line with the development (progress) of the theory of state sovereignty in living as a state. Such formalistic concept (form) of law adopted Comte's theory of legal positivism. This Comte's theory was included in the School of Legal Positivism in the history of Legal Science, Legal Philosophy and Legal Theory.[40]

This school of thought emerged for several reasons. ***First***, the development of the Natural Law doctrines which were used as guidance in people's interactions with other people, in people's interactions with their surrounding environment, as well as in the interactions of people and the state, had become

[40] Norms (legal system) gain a positive form from an authorized (sovereign) institution. Law is considered to be inapplicable if its basis is derived from social life, its source is the national spirit, and it constitutes a reflection of the natural law. This is due to the fact that law is not associated with norms other than legal norms

increasingly unsatisfactory. The doctrines of Natural Law had put forward extremely abstract teachings, making it very difficult to apply the rules of law in the reality of people's life.

***Second,*** the doctrine of absolute justice as the only objective of law was very difficult to be applied because it could not guarantee certainty in deciding or resolving frequently emerging issues (cases) among the people. Consequently, the people's sense of law often remained unsatisfied. The applications of legal rules, on a case by case basis, did not result in permanent legal certainty. Accordingly, with regard to its concept, despite the highly ideal doctrine of Natural Law, implementation was extremely difficult due to it had highly abstract principles.

***Third,*** the concept of Natural Law which was closely associated with the sacredness of nature and religious sacredness did not leave any room for people to develop any idea or thought in explaining themselves. As a result of that, the human mind (reason) could not be used appropriately in understandingly themselves and the universe. The desire to engage in the evolution of thought was not allowed by the natural and religious doctrines. Legal rules put forward in their application among the people came from the natural and religious doctrines (teachings), which did not leave any room for the creativity of the human mind (reason) in determining (making) legal rules that could be used as guidelines or guidance for people in engaging in interactions.

***Fourth,*** it was in line with the people's wish to limit the arbitrariness of kings (rulers) who had absolute power, which was often reflected in the sayings: the king's words are the law, the king's desire is the rule, the king has absolute legal immunity. Under such conditions, the emergence of legal positivism offered limits to the authority of kings in state (government) administration and provided protection to the people against the rulers' arbitrariness.

***Fifth,*** it was also in line with the developments of theories about state administration, including the development of the state sovereignty theory in the 19th century. The State Sovereignty theory provided justification for rulers to make laws intended for regulating the people's life, as well as for providing guidelines to all people in engaging in interactions, so as to create an ideal arrangement of interaction in the form of comprehensively applicable rules.

Based on the aforementioned matters, Legal Positivism was born, as a result of the elaboration of the concept of Natural Law. Legal Positivism devel-

oped two main sub-divisions of its main concept,[41] namely: Analytical Jurisprudence advocated by **John Austin** in his books: ***The Province of Jurisprudence Determined*** and ***Lectures on Jurisprudence*** (further developed by **H.L.A. Hart**), and the Pure Theory of Law advocated by **Hans Kelsen** in his book ***Pure Theory of Law*** (further developed by **Dworkin**).

The basic concept of Analytical Jurisprudence developed by John Austin in Legal Positivism,[42] can be understood in several basic concepts. ***First***: law is perceived (defined) as ***"Law is A Command Of The Law Giver"*** or a command (the command theory-bevels theory) from a ruler who holds the highest power and is sovereign (authorized). Law as a compelling command may be just (wise) or otherwise.[43]

***Second:*** based on its characteristics, law is considered as a closed logical system, which is permanent in nature.[44] Accurate and appropriate legal decisions are obtained from pre-determined regulations and without observing (involving) elements outside the law so that it clearly separates law from morality (which are related to justice), because juridically morality is not important for

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[41] Whereas Friedmann also included Functional-Pragmatic Positivism, holding that social realities are the determinants of legal concepts.

[42] W. Friedmann, Legal Theory (London: Stevens & Sons Limited, Third Edition, 1953), p. 151. Law is seen merely in its formal form, which is separated from its material form. Law is formed with certain methods in order to create a basis for its validity, so that the law is based on the power of the ruling party, rather than on the principle of justice, or good and bad morality. See also G.W. Paton, A Text Book of Jurisprudence, translated by Arief, S.S.T, Pustaka Tinta Mas, Surabaya, p. 16. The concept of law as a command of the ruler is defined in an implicit rule (law) which includes commands from the parties holding the highest power or sovereignty for running administration in a state. See also Achmad Roestandi, Responsi Filsafat Hukum (Responses of Legal Philosophy), Op. Cit., p. 81. Analytical Jurisprudence emerged in a mixed concept of national state in England which had very extensive power and unconditional compliance by the people. In Germany, it was supported by the followers of the State Sovereignty Theory, namely Paul Labank and Jellinek, saying that only principles originating from the will of the state can become law and such will is set out in laws.

[43] Brian Bix, Jurisprudence: Theory and Context (London: Sweet & Maxwell, 1991), p. 31. Brian Bix stated that: "In simple terms, legal positivism is built around the belief, the assumption, the dogma, that the question of what is the law is separate from, and must be kept separate from, the question of the law should be". The law is applicable not because it has basis in the people's social life and not because it originates from the national spirit and because it is not based on the binding nature of natural law, but because law obtains its applicability force from the command of an authorized and sovereign institution. See also Darji Darmodihardjo & Shidarta, Principles of Legal Philosophy, What and Why of Indonesia Legal Philosophy, (Jakarta: Gramedia, 1995), p. 97. See also Soetiksno, Filsafat Hukum (Legal Philosophy), 5th Edition, (Jakarta: Pradnya Paramita, 1986), p. 54.

law even though it has influence on the people. Law does not consider and assess good and bad, because they are beyond the study of law.

***Third:*** A good and actual law is a law which contains command, sanctions, obligations and sovereignty.[45] Basic legal norms are as formulated by lawmakers as something that must be accepted by the people.[46]

Whereas the concept of law introduced by Hans Kelsen in his Pure Theory of Law can be understood in three main concepts. ***First***:[47] a methodic concept of law. Based on this concept, law enforcement must apply the normative method approach and must be clean from non-juridical elements, such as: sociological, political, historical, and ethical elements. Separating law from the element of ethics means keeping law at a distance from the judgment of good and bad. Separating law from the sociological element means that positive law considers that law living and developing in the community is not too important. Law is always the positive law contained in various existing regulations, because the question is actually about what constitutes law, rather than what the law should be. Legal science is a science, it is not a will or wish, it emerges from hypothesis of will and the human mind.

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[44] Accurate and appropriate legal decisions can be obtained from the logical means of predetermined legal provisions without considering social and political objectives and moral measurements.

[45] A command is principally intended to ensure that other persons carry out the intention of law, and it is the imposition of obligation for the person being commanded so that the obligat

ion can only be implemented if the party giving the command is a sovereign (authorized) party (which may be a person or a group of persons). A sanction will principally result in suffering if a law is not complied with or observed. Duty is principally the imposition of obligation on persons being commanded. Sovereignty is principally a ruling party who has sovereignty (authority) over other persons. Positive law that does not fulfill the elements of command, sanction, duty, sovereignty is referred to as positive morals.

[46] Law is a compelling system, reward is given as motivation, punishment is imposed as compulsion and voluntary compliance is not a freedom, but rather a coercive motivation in a psychological sense.

[47] Hans Kelsen, Pure Theory of Law, translated by Max Knight from German (Berkeley: University of California Press, 1967), p. 1. Kelsen said: "It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law. Its aim is to free the science of law from alien elements". See also R. M. Dworkin, The Philosophy of Law (New York: Oxford University Press, 1977), p. 17-37. See also John Arthur and William H. Shaw, Reading in the Philosophy of Law (New Jersey: Prentice Hall, 1993), pgs. 97-107. According to them, Hans Kelsen's pure theory of law was actually a revolt against ideological legal science which only developed law as a means of state administration in totalitarian countries.

***Second,*** the concept of positive law is the law that should be (*sollenkategoris/ius constituendum*), rather than the law as reality (*sein kategoris/ius constitutum*).[47] Legal science is a normative science, based upon the fact that law is made and annihilated by human actions. A legal scientist cannot work in the area of *sollen* (the "should be") with the construction of thought from the *sein* ("is") world or vice versa. In the *sein* world, the applicable rules are not of causal nature; rather than that, they are based on accountability.

***Third,*** the concept of law in "*Stufentheorie*". The basic norm of a legal system is the highest regulation of the legal system as the fundamental regulation of various norms of the positive legal system. In addition to the pure theory of law, Kelsen also contributed to the development of "*Stuffentheorie*" which was further developed by Adolf Merkl (1836-1896). This theory views law as a system comprising of a construction of norms (principles) in the form of a pyramid.[48] A rule is deemed applicable because it is based on another higher rule. Such higher rule is based on an even higher rule, which is called "*grundnorm*" (fundamental norm) which cannot be further referred to a higher rule. A lower norm has its power from a higher norm. The higher a norm, the more abstract it becomes, and the lower a norm, the more concrete (actual) it becomes.

In its basic concept, the applicablity of Legal Postivism recognizes law as a form of positive law made by a ruler (sovereign party). Law is separated form norms (principles) other than legal norms, because they will affect the actual meaning of law.[49] Law is studied based on its juridical form, or formal form from its formal aspect which is separate from the principles of material law. The principles of material law are not deemed as part of legal science.[50]

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[47] Kelsen considered law as a necessity which is totally separated from law as a reality. Law is complied with by people because they feel they have obligation to comply with it as a command from the state (ruler).

[48] The legal system is basically a hierarchical system comprising the lowest to the highest (groundnorm) levels. See also Hans Kelsen in Pure Theory of Law, translated by Somardi (Rimdi Press, 1995), pgs. 126-137.

[49] The validity of a legal norm cannot be questioned on the basis that the contents are not in accordance with a moral or political value.

[50] Jean Bodin, Legal Positivism Theory is influenced among others by Humanism, with the idea about the sovereignty of kings (state), that the only source of law is its establishment by the state.

Legal norm (legal system) is perceived as a binding rule, because it origates from the ruler (the sovereign party).[51] Therefore, the formulation of its applicability is *sein* or *ius constitutum* (the actual rule) rather than *sollen* or *ius constituendum* (the rule that should be). Real and concrete norm in the people's experience is called law, in its formalistic frame. Hart provided more concrete formulation of Legal Positivism. Hart was a successor of Austin's theory of command.

According to Hart,[52] the characteristics of positivism currently existing in law are as follows: a) law is a command from men (sovereign ruler); b) there is no absolute relationship between law and morality or applicable law (*sein/ius constitutum*) and the law that should be (idealized/*sollen/ius constituendum*); c) law is the closed logical system and it does not consider social, political objectives or morality measurements; d) non-juridical elements are set aside because they cannot be substantiated based on logical argumentation (reason).

## III. Development and Criticism of Legal Positivism

The basic concept of legal positivism is an antithesis of the development of the natural law which reached its peak in the 17th – 18th centuries, and saw a decline at the beginning of the renaissance era. The concept of Justice[53] as the main objective and function in the application of law, as stated by the followers of the Natural Law theory, was very different from the concept of Legal Certainty put forward by the followers of Legal Positivism in the 19th century.[54] The concept of Legal Certainty of the doctrine of Legal Positivism continuously tried to separate the legal concept from other elements discussed outside the context of law.

Even though the main objective and function of legal certainty of Legal

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[51] As reflected in Hegel's dialetics, the only applicable law is the law from the sovereign state and ruler.

[52] Lord Lloyd, Introduction to Jurisprudence-Third Edition, (London: Steven & Son, 1972), p. 271. See also R.M. M. Dias, Jurisprudence, (London: Butterworhs, 1976), p. 451.

[53] Justice according to Aristotle is the general justice that must be complied with.

[54] Natural Law theory is general and abstract in nature, so that it requires a set of Positive Laws as the State's Law the applicability of which is concrete. Natural Law is of regulative nature (function) only, hence it cannot be applied as real (concrete) rules. Pufendorf considered Natural Law as a moral norm rather than a legal norm (legal system). John Locke said that it was only a moral guidance, rather than the actual law.

Positivism were basically a form of appreciation of the previous legal concept advocated (put forward) by the Natural Law theory, in the course of its development, Legal Positivism also discussed the development of the concept of justice, however, it was the concept of justice that was no longer within the spirit of justice itself, namely justice that was unable to fulfill the sense of justice growing and developing within the community.

The legal concept being developed was written law (codification) as positive law, so that it could not be changed at any time. As the same time, the sense of justice and the public need for the use of legal rules in their application had become absolute. Changes occurring in the community also directly brought about changes in the objectives and function of law desired by the people.

Due to such dissatisfaction, people were looking for an accurate formulation in accordance with the developments on human civilization, as well as the need for a common legal system in accordance with the basic needs for legal rules in interactions within the community. Such changes in the development of legal science were included in the doctrine concerning the revival of natural law which no longer separated law from non-legal elements. Such revival of natural law was of course no longer follow the conventional form and patterns of natural law.

The formulations of the new doctrines of law, as a response to the dissatisfaction with the basic concept of Legal Positivism, were classified in the Historic and Utilitarianism schools of thought, which tended to combine portions of the concept of natural law and portions of the concept of legal positivism. Such dissatisfaction resulted in several criticisms to the basic concept of Legal Positivism theory in its development.

*First:* Thomas Aquino was of the opinion that even though legal positivism had been born as a result of the evolution of the human mind (reason), it could not be free from the influence of the Natural Law theory. Man-made positive laws emerged or were created (derived) from *lex naturalis*, which was a part of the *lex aeterna* that could be captured and understood by people as rational creation. Positive law would lose its power if it were to be against Natural Law. Positive laws are the facility for the justification of Natural Law, in its positive applicability within the community.

*Second:* John Chipman Gray as a follower of Pragmatic Legal Realism criticized Kelsen's opinion about his Pure Theory of Law. Law is not as set out

in Legislation, but it is the law as it exists or is practiced in courts and other law enforcement institutions. Law is reflected in the behavior of the apparatuses (the police, prosecutors and other law enforcement officers), and law cannot be free from external non-legal elements, such as political, sociological, psychological, and other elements.[55]

***Third:*** Austin, as one of the pioneers (followers) of legal positivism, was often inconsistent in his concept, according to Thomas Aquino. According to him, law can come from God to human beings, and law can be made by human beings, referred to as the Positive Law, made by the ruler, such as legislation and law made by people individually. The indicator used for measuring the qualification of a legal rule is the sovereign ruler, so that a distinction can be made between the law that "is" and the law that "ought to be".

***Fourth:*** Austin's Theory of Command, which was further developed by Hart received sharp criticism. Here, law was compared to the concept of Thomas Hobbes, that the strong would win (rule) in the context of living in a community. In issuing a compelling rule, the ruler was considered similar to a robber who forced his victims to comply with his demands.

***Fifth:*** Meanwhile, Fichte[56] supported Austin's theory of command, in this case commands given by a state, and was of the opinion that a moral obligation was a legal obligation, while Austin was of the opinion that legal obligations came from the commanding and compelling nature of the law.

***Sixth:*** In addition, Hart also disagreed with several arguments proposed by Kelsen. First, that a legal rule can contain anything as long as it is in accordance with the *Grundnorm* system. According to Hart, there is a natural requirement that has to be met when a rule is made. Second, the applicability of the *Grundnorm* was accepted in the legal science, but according to Hart, it cannot be proved in reality. The mindset in the modern era during the renaissance period, was rationalistic[57] and individualistic in nature. Rationalism em-

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[55] Lili Rasjidi and I.B. Wyasa Putra, Hukum Sebagai Suatu Sistem (Law as a System) (Bandung: Remadja Rosdakarya, 1993), p. 65. John Chipman Gray, who has the slogan: "all the law is judge made-law", gave examples in England and the USA, which illustrated the great extent to which non-legal factors affected the settlement of a dispute.

[56] The ruler does not comply with the law or legal principles originating from a higher source (moral aspect).

[57] Descartes, in his philosophical study, greatly influenced the Rationalism Philosophy, in addition to Empiricism.

barked from general ideas that were applicable to all people, which were then applied to people individually. Such mindset provided freedom for empirical investigation and gained permanent position in the consideration of legal principles, which were finally developed in the idealism philosophy.[58] The idealistic philosophy (idealism) studied law based on the principles of the existence of human beings as creation that had reason and ethics, which was different from positivistic philosophy in viewing law based on the fundamental issues of the law itself, without involving non-legal aspects.[59]

***Seventh:*** According to L. Fuller, in view of legal positivism, a higher law can be trusted for justice, however, such trust should not be confused in the implementation of law, because it would depart from the principle of legal science. Therefore, law is the law recognized, made and promulgated as law by the state. This view clearly indicates that law has an absolute status which cannot be contested, and was all is applicable definitively without any doubt. It was this aspect that sparked a debate when Natural Law was compared to Legal Positivism, from the aspect of their applicability in the community. The rationalistic Natural Law considered that the applicability of positive law is based on the value of the legal rules, whether or not the contents and norms of a legal rule are in accordance with the ideal law originating from (moral) norms living in the community.

***Eighth:*** This view of the natural law was contested by the followers of positivism, stating that such view was false and inappropriate, because it contradicted a decision which had a permanent (certain) legal force. The applicability of a positive legal rule is the actual implementation of regulation by the ruler and it is in accordance with the applicable legal system. In its purest form, legal positivism is a school of thought in the theory of law, which strives to understand applicable law merely for the law itself, and refuses the slightest evaluation of decisions regarding legal provisions.

***Ninth:*** Kant in his *Kategorische Imperative* argumentation,[60] opposes

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[58] The idealism philosophy developed by Hegel was the continuation of Kant's rationalism. Law was regarded to be a result of human development as a spiritual subject.

[59] According to L. Fuller, in view of legal positivism, a higher law can be trusted for justice. However, one may not confuse such trust in the implementation of law.

[60] The categories of ethics in Kant's philosophy were based on the second function of human reason, namely wish, and not on the first function of reason, namely thought. As illustrated in the argumentation: you should act in such a way that your action can become the basis for the action of all persons.

the basic concept of positivism concerning the absolute separation of law and moral. Kant is of the opinion that there is no principle difference between Law and Moral, because on the only reason is in the aspects of people's activities, namely law is external in nature, while moral is internal in nature.

***Tenth:*** Whereas with regard to legal study, Kant disagrees with Austin and Kelsen. In this study, Kant considers the law as it "ought" to be, and he does not raise any question about the law as it "ought" to be and the law as it is[61], unlike Austin and Kelsen who were of the opinion that the law in the existing law is not the law that should be. Neo-Kantianism was born as a reaction to the positivism in the 19th century, which based their opinion regarding the idealism philosophy on a critical method developed by Kant, after a reduction by the analytical method.[62]

***Eleventh:*** At the same time, Stamler supported the closed and permanent concept of legal positivism. According to him, law must be formal (in its form) and universal, meaning that it has to be free from the ever changing social experience or reality.

***Twelfth:*** The elements of Sovereignty and Command of the basic concept of Legal Positivism received sharp criticism by the History and Sociological Jurisprudence schools of thought.[63] Law is complied with (observed) by people because the law itself is sovereign in nature (the theory of law sovereignty), and people are not ordered to comply with the law, rather that, such compliance is based on their own conscience, because it is related to moral values. Thus, law is free from sovereignty and command.

***Thirteenth:*** Von Savigny criticized Legal Positivism in its formal concept (codification). The codification of law always brings about a negative effect, namely it hampers the development of law. The history of human civilization continues on its path, but it is difficult for the law which is codified to follow developments.

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[61] This opinion of Kant was in line with Fichte's opinion, stating that moral obligation becomes legal obligation, but law can only be controlled by and within a state.

[62] Kant's philosophy was supported by Hegel in his monistic philosophy, stating that there is only one reality, namely idea, due to the existence of a dialetical process (a process which occurs because for every thesis, there is an antithesis which leads to a synthesis).

[63] It is impossible for a government (ruler) to apply law without observing principles living and applicable within the community, and its development is always related to the history of the development of human civilization in understanding life in this world.

***Fourteenth:*** Utrecht[64] supported legal certainty as an objective in the basic concept of legal positivism. According to him, only decisions can create comprehensive legal certainty, therefore law has the function of a tool for achieving legal certainty. Law is a symptom of power for achieving certain position in the application of a certain and permanent law.

## IV. Conclusion

Endeavors to understand the basic concept of Legal Positivism are inseparable from the ideological point of view, the school of thought and the theory adopted. Followers (frontrunners) of Legal Positivism in Legal Philosophy and Legal Theory had considerable difficulties in positioning it in the appropriate perspective. This was due to the inconsistency of each theory in upholding the basic principles adopted, either in the methodological, substantial or functional aspects.

For example, in the concept of how people comply with the law? Where do the legal norms come from so that they can be binding on every person? Who has the right to make and impose sanctions? What are the ideal objective and function of law? Considering those questions, it is very difficult to sort out which opinion (view) of legal experts is accurate and which school of thought can resolve (answer) those questions comprehensively, so that every person can be satisfied and the law can be applied universally.

Accordingly, in the development of legal science, the object of the analysis of Legal Philosophy and Legal Theory brings us once again back to the expression that there is no permanent theory. Referred to as permanent here is that the basic concept of a doctrine or experts develops in line with the developments in the mindset, the environment or the place at which it is applied, the level of quality of analysis and the viewpoint from which it considers the law.

The formulation of thesis which results in antithesis and eventually leads to synthesis is also applicable at all times in the development of thought in the Legal Philosophy and Legal Theory. From pre-historic time up to the current modern time, there has not been a single basic concept of each of these doctrines that can be accepted absolutely. Similarly, with regard to the opinion

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[64] The main function of law is to ensure legal certainty (rechtszekerheid) in social intercourse, in addition to creating justice and realizing benefits for the people.

(view) of legal experts, there has not been a single person who has been able to propose (put forward) a theory that can be used as guidance by all people, in all countries, at any place and at any time.

Finally, legal science has been evolving in accordance with the axis of civilization and the needs of human beings, which takes its origin in the need for a legal rule that has never been satisfied. The development of ideas of legal experts has always been accelerating on natural phenomena, the voice of conscience, and in the continuously failing search for an ideal model (form) of rule. It will eventually lead to a process of searching, searching, and searching by applying scientific methods and analysis with the aim of finding the mysterious identity of human beings and nature, which have remained undiscovered up to this very moment.

## Bibliography

Abdurrahman, 1995, *Ilmu Hukum, Teori Hukum dan Ilmu Perundang-Undangan* (Legal Science, Legal Theory and Legislative Science), Citra Aditya Bakti, Bandung.

Apeldoorn, L. J. Van, 1982, *Pengantar Ilmu Hukum* (Introduction to Legal Science), Pradnya Paramita, Jakarta.

Bix, Brian, 1999, Jurisprudence: Theory And Context-Second Edition, Sweet And Maxwell, London.

Bruggink, J.J.H, 1996, *Refleksi Tentang Hukum* (A Reflection on Law) (Translated by Arief Sidharta), Citra Aditya Bakti, Bandung.

Darmodihardjo, Darji & Shidarta, 1995, *Pokok-Pokok Filsafat Hukum, Apa dan Mengapa Filsafat Hukum Indonesia* (Principles of Legal Philosophy, What and Who of Indonesian Legal Philosophy), Gramedia, Jakarta.

Davies, Howard and David Holdcooft, 1991, Jurisprudence: Text And Commentary, Butterworths, London.

Dias, R.M.M, 1976, Jurisprudence, Butterworhs, London.

Dworkin, R.M, 1977, The Philosophy Of Law, Oxford University Press, London.

Finch, John, 1974, Introduction To Legal Theory, Sweet and Maxwell, London.

Freeman, M.D.A, 1994, Introduction To Jurisprudence-Sixth Edition, Sweet and Maxwell, London.

Friedmann, Wolfgang, 1993, *Teori dan Filsafat Hukum* (Theory and Philosophy of Law) (Volume I,II,III), translated by Moh. Arifin, Radja Grafindo Persada, Jakarta.

———————————, 1970, Legal Theory, Columbia University Press, New York.

Hart, H. L. A, 1962, Law, Liberty And Morality, Stanford University Press, California.

———————————, 1979, The Concept Of Law, Oxford at The Clarendon Press, London.

Huijbers, Theo, 1992, *Filsafat Hukum Dalam Lintasan Sejarah* (Legal Philosophy in the Tract of History) – Sixth Edition, Kanisius, Yokyakarta.

Kelsen, Hans, 1978, Pure Theory Of Law, University Of California Press.

———————————, 1995, *Teori Hukum Murni* (Pure Theory of Law) (translated by Somardi), Rimdi Press, Jakarta.

Kattsoff, Louis O, 1986, *Pengantar Filsafat* (Introduction to Philosophy), translated by Soejono Soemargono, Tiara Wacana Yogya, Yogyakarta.

Lloyd, Dennis, 1994, Introduction To Jurisprudence-Sixth Edition, Sweet And Maxwell, London.

Lloyd, Lord, 1972, Introduction to Jurisprudence-Third Edition, Steven & Son, London.

Paton, George Whitecross, 1979, A Text Book Of Jurisprudence (translated by Arieeff, S- Volume I, Pustaka Tinta Mas, Surabaya.

Rasjidi, Lili, 1985, *Filsafat Hukum Mazhab dan Refleksinya* (Legal Philosophy, Doctrines and Reflection), Remadja Karya, Bandung.

———————————,1988, *Filsafat Hukum: Apakah Hukum Itu?* (Legal Philosophy: What Is Law) – Second Edition, Remadja Karya, Bandung.

———————————, 1990, *Dasar-Dasar Filsafat Hukum* (Principles of Legal Philosophy), Citra Aditya Bakti, Bandung.

Rahardjo, Satjipto, 1982, *Ilmu Hukum* (Legal Science), Alumni, Bandung.

Roestandi, Achmad, 1987, *Responsi Filsafat Hukum* (Response of Legal Philosophy) – Second Edition, Armico, Bandung.

Rahardjo, Satjipto 1982, *Ilmu Hukum* (Legal Science), Alumni, Bandung.

Setiardja, Gunawan, 1990, *Dialektika Hukum dan Moral* (Dialectics of Law and Moral), Kanisius, Yogyakarta.

Soetiksno, 1976, *Filsafat Hukum* (Legal Philosophy) (Parts 1 and 2 – Fifth Edition), Pradnya Paramita, Jakarta.

Utrecht, E and Moh. Saleh Djindang, 1982, *Pengantar Dalam Hukum Indonesia* (Introduction to Indonesian Law) – Tenth Edition, Ichtiat Baru, Jakarta.