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The Principle of Legal Certainty in the Perspective of Legal Positivism

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Abstract: The principle of legal certainty, as defined by Gustav Radbruch, is considered a fundamental value of law. This principle essentially expects and requires laws to be formulated clearly in written form. Its existence is crucial as it ensures clarity in the positive legal products in place. The significant meaning of this principle shares a similarity with the core idea present in the construct of legal positivism, namely clarity (certainty). Therefore, this paper aims to achieve an understanding of the principle of legal certainty through the framework of legal positivism reasoning. The principle of legal certainty, as defined by Gustav Radbruch, is considered a fundamental value of law. This principle essentially expects and requires laws to be formulated clearly in written form. Its existence is crucial as it ensures clarity in the positive legal products in place. The significant meaning of this principle shares a similarity with the core idea present in the construct of legal positivism, namely clarity (certainty). Therefore, this paper aims to achieve an understanding of the principle of legal certainty through the framework of legal positivism reasoning.

Keywords: legal certainty, principle, legal positivism.

Abstract: Prinsip kepastian hukum, seperti yang didefinisikan oleh Gustav Radbruch, dianggap sebagai nilai dasar hukum. Prinsip ini pada dasarnya mengharapkan dan mengharuskan hukum dirumuskan dengan jelas dalam bentuk tertulis. Keberadaannya sangat penting karena memastikan kejelasan dalam produk hukum positif yang ada. Makna signifikan dari prinsip ini memiliki kesamaan dengan gagasan inti yang hadir dalam konstruksi positivisme hukum, yaitu kejelasan (kepastian). Oleh karena itu, tulisan ini bertujuan untuk mencapai pemahaman tentang prinsip kepastian hukum melalui kerangka penalaran positivisme hukum. Prinsip kepastian hukum, seperti yang didefinisikan oleh Gustav Radbruch, dianggap sebagai nilai dasar hukum. Prinsip ini pada dasarnya mengharapkan dan mengharuskan hukum dirumuskan dengan jelas dalam bentuk tertulis. Keberadaannya sangat penting karena memastikan kejelasan dalam produk hukum positif yang ada. Makna signifikan dari prinsip ini memiliki kesamaan dengan gagasan inti yang hadir dalam konstruksi positivisme hukum, yaitu kejelasan (kepastian). Oleh karena itu, makalah ini bertujuan untuk mencapai pemahaman tentang prinsip kepastian hukum melalui kerangka penalaran positivisme hukum.

Kata Kunci: kepastian hukum, prinsip, positivisme hukum

Introduction

In any legal regulation, there are underlying legal principles that serve as the foundation for its creation. According to Satjipto Rahardjo, legal principles can be described as the "heart" of legal regulations[1], to understand a legal regulation, legal principles are essential. In his book, *Methodenlehre der Rechtswissenschaft*, Karl Larenz states that legal principles serve as ethical standards that guide the formation of law.[2] Since legal principles encompass ethical demands, they can be seen as a bridge between legal regulations and the social ideals and ethical views of the community. In the process of establishing legal rules, a fundamental principle is developed to create clarity in legal regulations, namely legal certainty. This concept of legal certainty was first introduced by Gustav Radbruch in his book "Einführung in die Rechtswissenschaften". Radbruch states that there are three foundational values within the law:[3] (1) Justice (Gerechtigkeit); (2) Utility (Zweckmäßigkeit); and (3) Legal Certainty (Rechtssicherheit).

Returning to the discussion of legal certainty, this principle is fundamentally understood as a condition in which the law is clear due to the concrete authority behind it. Legal certainty serves as a protection for the justice seekers (yustisiabel) against arbitrary actions, meaning that an individual can and will receive what they expect in specific circumstances.[4] This statement aligns with Van Apeldoorn's view that legal certainty has two aspects: the determination of law in concrete matters and legal security. This signifies that those seeking justice wish to know what the law entails in a specific case before initiating legal proceedings, as well as receiving protection as justice seekers.

Furthermore, regarding legal certainty, Lord Lloyd states that: "...law seems to require a certain minimum degree of regularity and certainty, for without that it would be impossible to assert that what was operating in a given territory amounted to a legal system."

From this perspective, it can be understood that without legal certainty, individuals do not know what actions to take, leading to uncertainty that can ultimately result in chaos due to the lack of decisiveness in the legal system. Thus, legal certainty refers to the application of law that is clear, consistent, and stable, where its enforcement is not influenced by subjective factors.[5] Although it is stated that legal principles are the heart of legal regulations, they should not be equated with legal norms in the form of positive law. Legal principles are regulatory and explanatory in nature, aiming to provide an overview rather than being normative.[6] Therefore, legal principles are not classified as positive law and cannot be applied directly to resolve legal disputes. In this regard, Van Eikema Hommes firmly asserts that legal principles should not be viewed as concrete legal norms but rather as general foundations or guidelines for applicable law.[7]

In the field of law, there are numerous principles that serve as the foundation for creating legal regulations. This paper will not comprehensively discuss all of these principles; instead, it will focus on one principle that, according to Gustav Radbruch, can be regarded as a fundamental legal value: Legal Certainty. This writing aims to explore how the principle of legal certainty correlates with the reasoning of Legal Positivism. It is hoped that this paper will clarify the relationship between the principle of legal certainty and legal positivist reasoning.

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[1] Santoso Lukman and Yahyanto Yahyanto, "Pengantar Ilmu Hukum," *Setara Press*, 2016.

[2] Dewa Gede Atmadja, *Asas-Asas Hukum Dalam Sistem Hukum*, *Kertha Wicaksana*, vol. 12, 2018.

[3] Satjipto Rahardjo, *Hukum Dan Perilaku* (Jakarta: Kompas , 2009).

[4] Siti Halilah and Fakhrurrahman Arif, "Asas Kepastian Hukum Menurut Para Ahli," *Jurnal Hukum Tata Negara* 4, no. Desember (2021).

[5] Samudra Putra Indratanto, Nurainun Nurainun, and Kristoforus Laga Kleden, "ASAS KEPASTIAN HUKUM DALAM IMPLEMENTASI PUTUSAN MAHKAMAH KONSTITUSI BERBENTUK PERATURAN LEMBAGA NEGARA DAN PERATURAN PEMERINTAH PENGGANTI UNDANG-UNDANG," *DiH: Jurnal Ilmu Hukum* 16, no. 1 (2020), https://doi.org/10.30996/dih.v16i1.2729.

[6] Miftahul Qodri, "'BENANG MERAH' PENALARAN HUKUM, ARGUMENTASI HUKUM DAN PENEGAKAN HUKUM," *Jurnal Hukum Progresif* 7, no. 2 (2019), https://doi.org/10.14710/hp.7.2.182-191.

[7] P.B. Cliteur, "RECHTSBEGINSELEN: TUSSEN NATUURRECHT EN RECHTS-POSITIVISME," *Philosophia Reformata* 49, no. 1 (2015), https://doi.org/10.1163/22116117-90001409.

Literature Review

Theory of Legal Certainty

Legal certainty, as one of the objectives of law, can be seen as part of the effort to achieve justice. A tangible manifestation of legal certainty is the enforcement of law regarding an action, regardless of who performs it. With legal certainty, everyone can anticipate the consequences they will face if they engage in a specific legal action. Certainty is essential to realizing the principle of equality before the law without discrimination [8]

Etymologically, the term "certainty" is closely related to the principle of truth, meaning something that can be strictly concluded within a legal-formal framework. Through deductive logic, positive legal rules serve as the major premise, while concrete events act as the minor premise. By employing a closed logic system, conclusions can be derived automatically. This conclusion must be something that can be predicted, requiring everyone to adhere to it. With this guidance, society becomes orderly. Therefore, certainty will lead society towards orderliness.[9]

Gustav Radbruch asserts that certainty is one of the objectives of law. In societal life, legal certainty is closely related. Legal certainty encompasses normative aspects, including regulations and judicial decisions. It refers to the implementation of societal order that is clear, organized, consistent, and coherent, and is not influenced by subjective factors within the community.[10]

Method

This article employs a normative research methodology. Normative legal research examines the analysis of gaps between law from a theoretical perspective and its application in practice.[11] This study will focus on law from a theoretical perspective in relation to the principle of legal certainty, analyzed according to legal positivism theory. The approach used in this research is a conceptual approach.[12] The legal materials utilized include primary legal materials and secondary legal materials. The technique for analyzing the legal materials used is literature study.

Results and Discussion

Legal reasoning, according to Shidarta, is essentially a problematic thinking activity.[13] In his book, he quotes Visser't Hooft, who states: "The object of a scientific inquiry is discovery; the object of a legal inquiry is decision." This thinking activity falls within the realm of practical reasoning, as stated by Neil MacCormick: "...legal reasoning as one branch of practical reasoning which is the application by humans of their reason to deciding how it is right to conduct themselves in situations of choice."[14]

The patterns of legal reasoning are heavily influenced by the perspectives of the subjects engaging in that reasoning. These perspectives ultimately lead to a juridical thinking orientation, which manifests as models of reasoning within the field of law, particularly as widely recognized in the various schools of legal philosophy.[15] The term "perspective" refers to the subjective background that shapes the framework of juridical thinking. This paper will discuss one pattern of legal reasoning from the viewpoint of legal positivism.

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[8] Suparyanto dan Rosad (2015, "Teori Kepastian Hukum," *Suparyanto Dan Rosad (2015*, 2020.

[9] Willy Riawan Tjandra, "Dinamika Keadilan Dan Kepastian Hukum Dalam Peradilan Tata Usaha Negara," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, 2012, https://doi.org/10.22146/jmh.16158.

[10] Syafrida Syafrida and Ralang Hartati, "MEWUJUDKAN PERLINDUNGAN HUKUM DAN JAMINAN KEPASTIAN HAK KONSUMEN MUSLIM TERHADAP PRODUK HALAL (SUATU KAJIAN AJARAN GUSTAV RADBRUCH)," *Jurnal Hukum Replik* 7, no. 1 (2020), https://doi.org/10.31000/jhr.v7i1.2416.

[11] Mukti Fajar ND and Yulianto Achmad, *Dualisme Penelitian Hukum*, *Yogyakarta. Pensil Komunika*, vol. 1, 2007.

[12] Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (2020), https://doi.org/10.14710/gk.2020.7504.

[13] Shidarta Shidarta, "Bernard Arief Sidharta: Dari Pengembanan Hukum Teoretis Ke Pembentukan Ilmu Hukum Nasional Indonesia," *Undang: Jurnal Hukum* 3, no. 2 (2020), https://doi.org/10.22437/ujh.3.2.441-476.

[14] Urbanus Ura Weruin, "Logika, Penalaran, Dan Argumentasi Hukum; Logic, Reasoning and Legal Argumentation," *Jurnal Konstitusi* 14, no. 2 (2017).

[15] Christina Bagenda, "Filsafat Realisme Hukum Dalam Perspektif Ontologi, Aksiologi, Dan Epistemologi," *Jurnal Ius Constituendum* 7, no. 1 (2022), https://doi.org/10.26623/jic.v7i1.4777.

Legal positivism reasoning stems from the positivist movement, which emerged and matured in response to significant changes in European society, particularly following the Industrial Revolution in England and the bourgeois revolution in France in the mid-18th century. The dominance of kings and the church as the old regime of knowledge began to be challenged, giving rise to new ideas that sought to expose the errors in the thinking of monks and kings while searching for essential truths.[16]

The fervor for seeking truth became unstoppable and intensified during the Enlightenment (Aufklärung). The dominance of religion began to be challenged by science, leading to a decline in interest in the church alongside the emergence of universities, and ultimately, metaphysical knowledge was replaced by rational and empirical knowledge. The culmination of the effort to purify knowledge from subjective interests was achieved through the ideas of the renowned French thinker, Auguste Comte.[17]

The meaning of positivism as articulated by Comte at this stage can be understood in five possibilities:[18]

1. As the opposite of something imaginary, "positive" refers to the affirmation of something real.
2. As the opposite of something unhelpful, "positive" signifies the affirmation of something beneficial.
3. As the opposite of something doubtful, "positive" denotes the affirmation of something certain.
4. As the opposite of something vague, "positive" indicates clarity or precision.
5. As the opposite of something negative, "positive" is used to describe its philosophical attributes, which always point toward organization or orderliness.

From the stages of societal development, Auguste Comte emphasizes that knowledge must be based on facts, viewing reality as something objective that should be separated from subjective metaphysical concepts. As the influence of positivism spread within science, the field of law also faced a similar situation. Positivist adherents regard law as an object of study, considering it merely as a social phenomenon.[19] Positivist thinkers generally recognize only positive knowledge, and similarly, legal positivism acknowledges only one type of law: positive law. In its most traditional definition regarding the nature of law, this term is understood as the positive norms within the legislative system.[20]

Although the development of legal positivism became clearer and more scientifically conceptualized after the emergence of positivism by Comte, the reasoning regarding legal positivism had already developed since the classical thought era in China. Han Feizi, a political philosopher, began contributing his ideas related to legal positivism in China during the Han Dynasty (206 BC – 220 AD). Han Feizi stated that: "A law is that which is recorded on the registers, set up in the government offices, and promulgated among the people."[21]

According to him, the law must be recorded and documented in government offices and announced among the people. Through such laws, the public will know what they should and should not do. Once the laws are enacted, the ruler must remain vigilant in observing and supervising the behavior of the people. Because he has the authority, he can punish those who violate the laws and reward those who comply with them. In this regard, Han Feizi also stated:[22]

"In his rule of a state, the sage does not depend upon men doing good themselves but brings it about that the people can do no wrong, the entire state can be kept peaceful. He who rules a country makes use of the majority and neglects the few, and so does not concern himself with virtue but with law."

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[16] Bambang Asep Hermanto, "Ajaran Positivisme Hukum Di Indonesia: Kritik Dan Alternatif Solusinya," Jurnal Hukum Dan Bisnis (Selisik) 2, no. 2 (2016).

[17] Emma Dysmala Somantri, "Kritik Terhadap Paradigma Positivisme Hukum," *Wawasan Hukum* 28, no. 01 (2011).

[18] Sri Wahyuni, "PENGARUH POSITIVISME DALAM PERKEMBANGAN ILMU HUKUM DAN PEMBANGUNAN HUKUM INDONESIA," *Al-Mazaahib: Jurnal Perbandingan Hukum* 1, no. 1 (2012), https://doi.org/10.14421/al-mazaahib.v1i1.1342.

[19] Johni Najwan, "Implikasi Aliran Positivisme Terhadap Pemikiran Hukum 1," *Inovatif Jurnal Ilmu Hukum* Vol 2, No, no. 1 (2013).

[20] Hayatul Ismi, "BEBERAPA PEMIKIRAN HUKUM DALAM MENYIKAPI POSITIVISME HUKUM," *Riau Law Journal* 1, no. 1 (2017), https://doi.org/10.30652/rlj.v1i1.4181.

[21] Albert Galvany, "The Court as a Battlefield: The Art of War and the Art of Politics in the Han Feizi," *Bulletin of the School of Oriental and African Studies*, 2017, https://doi.org/10.1017/S0041977X16001063.

[22] Mohammad Haris Taufiqur Rahman et al., "PENGARUH FILSAFAT TIMUR HINGGA BARAT PADA PERKEMBANGAN FILSAFAT HUKUM," *SEIKAT: Jurnal Ilmu Sosial, Politik Dan Hukum* 2, no. 3 (2023), https://doi.org/10.55681/seikat.v2i3.556.

According to Theo Huijbers, legal positivism is based on several principles, namely:[23]

1. Only what appears in experience can be called true;
2. Only what can be truly verified as reality can be called true. This means that not all experiential data can be considered true, but only experiences that encounter reality;
3. Only through the sciences can it be determined whether something experienced is indeed a reality.

In the positivist school, law emerges as an explicit product of a specific legitimate source of political power. In this context, law primarily manifests as explicit commands that have been clearly formulated to ensure certainty, such as national legislation applicable in a country. Therefore, it can be said that the operation of these schools is fundamentally based on positive legislative norms from the realm of positive normative law.[24] The existence of legal positivism indicates that law is created and abolished by human actions, thus it is separate from morality and the normative systems themselves.[25] In other words, it can be stated that law stands alone and is clearly separate from morality (between the law that exists and the law that ought to be, between das Sein and das Sollen). In this context, there is no law other than the commands of the ruler.

From the various understandings above, legal positivism can be formulated into several premises and postulates regarding law, namely:[26]

1. The legal system of a country is valid not because it is grounded in social life or the spirit of the nation, nor based on natural law, but rather receives its positive form from the competent authorities;
2. Law must be viewed solely from its formal aspect, thus it should be separated from its material aspect;
3. The content of the law or legal substance is acknowledged to exist, but it should not be the subject matter of legal science, as this could undermine the scientific truth of legal studies.

From the overall understanding above, it can be concluded that there is a close relationship between the principle of legal certainty and legal positivism. The common thread connecting the principle of legal certainty with positivism lies in the aim of providing clarity to positive law. Law within the positivist framework necessitates the presence of "regularity" and "certainty" to support the effective and smooth functioning of the legal system.[27] Thus, the objective of legal certainty is essential to achieve in order to protect the public interest (which also includes individual interests) by serving as the primary mechanism for upholding justice in society (order), fostering citizens' trust in the authorities (government), and maintaining the authority of the ruler in the eyes of the citizens.

In addition to providing clarity, the application of legal positivism in the realm of fundamental legal thought requires the dismissal of meta-juridical concepts of law as upheld by proponents of natural law.[28] Therefore, every legal norm must exist in its objective realm as positive norms and be affirmed through concrete contractual agreements between members of society and their representatives. In this context, law is no longer conceptualized as abstract meta-juridical principles of justice but as ius that has been positivized into lex, ensuring certainty about what is considered law and what, even if normative, must be stated as things that are not considered law.

In the author's view, the principle of legal certainty can be considered a product of positivist reasoning regarding law. Legal positivism, as previously explained, seeks to create objective or written laws formulated by the state to establish order within society. With such laws in place, the principle of legal certainty emerges, ensuring that the society governed by these laws is clearly informed about what must be done and what is prohibited. Therefore, it can be said that legal positivism encapsulates its value in creating clear laws within the principle of legal certainty. Consequently, law is not based solely on subjective speculation, which would render it unclear and ambiguous.

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[23] Theo Huijbers, *Filsafat Hukum Dalam Lintasan Sejarah*, *Kanisius*, 1982.

[24] Ibid.

[25] Hans Kelsen, *General Theory of Law and State*, *General Theory of Law and State*, 2017, https://doi.org/10.4324/9780203790960.

[26] Y. Wiratama, "Pengaruh Perkembangan Pemikiran Filsafat Hukum Dalam Hakekat Keadilan," *Multilingual: Journal of Universal Studies* 3, no. 4 (2023).

[27] Monika Agustina, "Pentingnya Kesadaran Hukum Di Lingkungan Masyarakat," *De Cive : Jurnal Penelitian Pendidikan Pancasila Dan Kewarganegaraan* 2, no. 2 (2022), https://doi.org/10.56393/decive.v2i2.1499.

[28] Citra Rosika, Azmi Fitrisia, and Ofianto Ofianto, "Analisis Paradigma Filsafat Positivisme," *COMSERVA : Jurnal Penelitian Dan Pengabdian Masyarakat* 3, no. 06 (2023), https://doi.org/10.59141/comserva.v3i06.1033.

Conclusion

From the various explanations above, it can be concluded that there is a close relationship between the principle of legal certainty and legal positivism. The core idea of legal positivism serves as the logical rationale underlying the emergence of the principle of legal certainty. This principle is then realized in the form of positive law through clear regulations and legislation. Thus, legal positivism not only provides a theoretical foundation but also plays a crucial role in ensuring that the law is understandable and accessible to the public, thereby creating order and justice within the legal system.

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