

TOWARDS RELIGIOSITY-BASED LEGAL SCIENCE: CRITICAL-CONSTRUCTIVE PROPHETIC LAW ON POSITIVISM PARADIGM

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Abstract

Positivism, which is the spirit of modern legal development, has brought legal science to an increasingly ridiculous realm, resulting in the collapse of public trust in legal institutions. The alienation of legal principles such as the substance and legal structure of the religious value also contributes to this distrust. Thus, it is necessary to make a philosophical criticism of the legal positivism paradigm. This objective of this study is to explore what is the urgency of philosophical criticism of the positivism paradigm and how critical-constructive prophetic law is in the development of legal science based on religious the values. This research is doctrinal research using a philosophical approach. The data collection technique was conducted by using a research library. The results of this study provide findings. First, the urgency of a philosophical criticism of the positivism paradigm is based on that this paradigm has taken the law away from the values of religious morality. Ideally, in the framework of prophetic law, law is not only a human affair, but as an embodiment of divine values. Second, critical-constructive prophetic law rests on the development of legal science based on transcendental religious values. The application in the Indonesian context is to synergize the pillars of humanization, liberation and transcendence within the framework of the rule of law Pancasila. Therefore, the law can benefit all. The contribution of this study will further strengthen the building of Indonesian law which is divinity, humanity, unity, democracy, and justice.

Keywords: *Positivism; Paradigm; Prophetic Law; Transcendental.*

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A. Introduction

Reflective knowledge is the torch and energy of civilization in which humans find themselves and live life more perfectly. Humans in obtaining knowledge are based on three main problems, which are what do you want to know? how do you acquire knowledge? and what is the value of this knowledge? Science is one human method to answer this question. In such a context, science can be interpreted as a whole of coordinated knowledge on a particular subject.²

Science itself is comprised of both a product and as a process. As a product, science is knowledge that has been verified in a certain field and is organized into a system. Meanwhile, as a process, the term science refers to the activity of the human mind to acquire knowledge in a particular field systematically or *stelselmatig* by using a set of meanings specifically created for it. Science also observes the symptoms (*gegevens*) that are relevant in the field resulting in the form of decisions which validity is open to study by people based on the same criteria and has been agreed upon or that are commonplace within the expertise community in the field concerned.³

The study of the philosophy of science that introduces the concepts of ontology, epistemology and axiology, can be used for an analytical framework in any problem, and in various scientific disciplines.⁴ The development of theories and paradigms in all scientific disciplines, cannot be separated from the epistemology that develops in the philosophy of science. Legal studies are also inseparable from the broad framework of paradigm developments in the philosophy of science.⁵ For instance, the formation of a positivism paradigm in law. In the influence of this positivism paradigm, law rests on legal-formal certainty, and modern legal theory is the fruit of this paradigm.⁶

From the positivism viewpoint, what is recognized as science must be proven empirically. The adage that became popular among this paradigm was "experience is the

² A term of science (*ilmu*) refers to several terms in different languages, '*ilm* (Arabic), *science* (English), *watenschap* (Dutch), dan *wissenschaft* (Germany), which etymologically means theories which have been examined. See Mohammad Adib, *Filsafat Ilmu: Ontologi, Epistemologi, Aksiologi, dan Logika Ilmu Pengetahuan* (Pustaka Pelajar 2010) 38 & 46.

³ Titik Triwulan Tutik, 'Ilmu Hukum: Hakekat Keilmuannya Ditinjau Dari Sudut Filsafat Ilmu dan Teori Ilmu Hukum' (2014) 44 *Jurnal Hukum dan Pembangunan.*, 245 - 247.

⁴ Noeng Muhadjir, *Filsafat Ilmu* (Rake Sarasin 2011) 17.

⁵ Ratna Riyanti, 'Tinjauan Filsafat Ilmu Tentang Penegakan Hukum Yang Berbasis Transendental' (2018) 2 *Hermeneutika: Jurnal Ilmu Hukum* 217.

⁶ Sri Wahyuni, 'Pengaruh Positivisme Dalam Perkembangan Ilmu Hukum dan Pembangunan Hukum Indonesia' (2012) 1 *Al-Mazahib: Jurnal Pemikiran Hukum*, 2. See Abu Yasid, *Aspek-Aspek Penelitian Hukum* (Pustaka Pelajar 2010) 8.

source of knowledge." The method used in this thought is based on inductive logic.⁷ Legal positivism calls for the release of meta-juridical thinking from law. Legal norms must exist in their objective nature as positive norms, affirmed as a concrete contractual form.⁸

Positivism in law emphasizes a method that looks more at the formulation of regulatory texts that are considered neutral, impartial and objective, context-free and emphasizes empirical realities that can be grasped by the senses and primarily refer to natural laws. However, positivism which is the spirit of the development of modern law has brought legal science to an increasingly ridiculous realm, resulting in the collapse of public trust in legal institutions.

The alienation of legal components such as the substance and legal structure of the religious value also determines this distrust. The moral and ethical and aesthetic values inherent in every culture of society determine the way of thinking and acting and the operation of law has been eliminated by positivism law. Thus, in an effort to develop a more inclusive and holistic legal science, it is necessary to make a philosophical critique of the legal positivism paradigm which currently tends to hegemony the Indonesian legal system. Therefore, it is impossible to study law linearly and on its empirical aspects alone, but it is also necessary to bring it closer to the transcendent realm, which is more religious, which is through optical prophetic views.

B. Problem Formulation

To sharpen the focus of this research study, the authors formulated the following two research questions: 1) what is the urgency of conducting a philosophical criticism of the positivism paradigm? and 2) how critical-constructive prophetic law which moves the pendulum of legal science studies to be shifted towards the development of legal science based on religious-science values?

C. Research Method

This research is a type of doctrinal research with a philosophical approach.⁹ The data collection technique was administered by using a research library. Books, scientific journals and literature related to the theme of the study are subjects collected using a snowball

⁷ Auguste Comte is a representative figure of positivism. Thus, he is known as the Father of Positivism. The most well-known work of his is *Cours de Philosophie positive*.

⁸ Arief Budiono and Wafda Vivid Izziyana, 'Theistic Legal Realism (Suatu Pilihan Radikal Bagi Pengembangan Hukum)' (Prosiding Seminar Nasional & Call for Papers Hukum Transendental 2018) 367.

⁹ Yasid, *Op. Cit.*, 79.

sampling pattern.¹⁰ The type of data used in this research is qualitative data consisting of primary and secondary data sources.¹¹ Primary data as the main material in research¹² while secondary sources serve as a complement to primary sources that can enrich research.¹³ Analysis of legal data was conducted by organizing, sorting, systematizing, and interpreting so that it finds patterns, categories, units of description and meaning.¹⁴ In order for the research data to better support the accountability aspect, a double check was performed, either in the form of triangulation or peer debriefing (analytical triangulation).¹⁵

D. Discussion and Results

1. Criticism on Positivism Paradigm

The term paradigm means a model or pattern. In Greek, paradigm means to "compare," "be next to" (*para*) and show (*deik*).¹⁶ A paradigm is also defined as a model in scientific theory,¹⁷ or a frame of mind.¹⁸ Also a set of assumptions, concepts, values, and practices which are applied in viewing reality in the same community.¹⁹ Heddy Shri-Ahimsa Putra explained that the term paradigm is very popular for referring to a "theoretical framework." This term became popular after Thomas Kuhn used it in his book *The Structure of Scientific Revolutions* (1945). In that book, Kuhn said that the scientific revolution is basically a paradigm shift or a change of mindset, way of looking, or how to define a symptom or a problem.²⁰

Methodologically, the positivism paradigm is a departure from the thoughts of Auguste Comte. According to him, positivism is the pinnacle of the development of science. Comte divides it into three phases comprising of 1) Theological stage, a stage or era in which humans believe that the nature behind natural phenomena is a supernatural

¹⁰ Basuki, *Cara Mudah Menyusun Proposal Penelitian* (Pustaka Felicha 2011) 1–2.

¹¹ Hadari Nawawi and Mimi Martini, *Penelitian Terapan* (Gajah Mada University Press 1996) 16.

¹² *Ibid* 17.

¹³ Abu Yasid, 'Paradigma Tradisionalisme Dan Rasionalisme Hukum Dalam Perspektif Filsafat Ilmu' (2010) 17 *Jurnal Hukum Ius Quia Iustum* 589, 592.

¹⁴ Artidjo Alkostar, *Metode Penelitian Hukum Profetik* (UII Press 2018) 35–36.

¹⁵ Basuki., *Op. Cit.*, 1.

¹⁶ Online Etymology Dictionary, 'Paradigm' (Mei 2019) <" <https://www.etymonline.com/search?q=paradigm>>. Accessed 11 Mei 2019

¹⁷ KBBI Online, 'Paradigma' (Mei 2019) <<https://kbbi.web.id/paradigma>>. accessed 11 Mei 2019

¹⁸ Abid Rohmanu, *Paradigma Teoantroposentris Dalam Konstelasi Tafsir Hukum Islam* (IRCiSoD 2019) 69.

¹⁹ Farlex, 'Paradigm' (Mei 2019) <<https://www.thefreedictionary.com/paradigm>>.accessed 11 Mei 2019.

²⁰ Heddy Shri Ahimsa-Putra, *Paradigma Profetik Islam: Epistemologi Etos Dan Model* (UGM PRESS 2019). See also Jawahir Thontowi, 'Paradigma Profetik dalam Pengajaran dan Penelitian Ilmu Hukum' (2012) 34 *UNISIA* 86.

power that regulates the function and movement of these symptoms; 2) The metaphysical stage, a stage where the essence of supernatural powers is replaced by abstract terms, for instance: nature and causes; 3) The positive stage, which is a stage where people no longer reach absolute knowledge of both theological and metaphysical but limiting to the facts presented (empirical).²¹

Positivism does not admit anything beyond human empirical-sensitivity. Starting from scientific laws, positivism emphasizes that the object to be studied must be factual, and that the study must lead to certainty and accuracy.²² It means that it can be done to conduct scientific studies through observation, comparison, experiment, and historical methods.²³ By using this approach, the exploration of legal science is considered to be more scientific because it can be quantified and allows the use of exact science formulas to guarantee scientific evidence from an empirical point of view.²⁴

This context is what makes the flow of law inspired by scientism and objectivism.²⁵ Thus, it is said that the essence of law is something clear and definite. Positivism advances the principle of verification to prove scientific truth. Based on this principle, a scientific decision is correct only if it can be verified empirically, the test field being an observable fact or reality. For this, the method used is the empirical method through induction reasoning. Meanwhile, regarding truth, the positivism school adheres to the correspondence theory which states that truth is the conformity between a decision or proposition and the world of reality.²⁶ Legal positivism provides meaningful explanations of a legal phenomenon that are interpreted factually, but its future reflection is only meaningful towards the formulation of future legal policies and statutory rules and is meaningless towards a problem or legal case which is currently taking place and must be decided immediately.²⁷

Etymologically, the phrase positivism in law have a defined, well-determined, willful, and positive meaning. Another meaning of positivism is to put down, which is

²¹ Absori, Kelik Wardiono, and Saepul Rochman, *Hukum Pofetik* (Genta Publishing 2015) 78–79. See also Sulistyowati Irianto, *Metode Peneltian Hukum: Konstelasi Dan Refleksi* (Yayasan Pustaka Obor Indonesia 2009) 5–6.

²² Juhaya S Praja, *Aliran-Aliran Filsafat Dan Etika* (Prenada Media 2003); Lihat pula Rahardjo Satjipto, *Ilmu Hukum* (PT Citra Aditya Bakti 2012) 229.

²³ Theo Huijbers, *Filsafat Hukum Dalam Lintasan Sejarah* (Kanisius 1993) 133.

²⁴ Moch Koesnoe, *Kritik Terhadap Ilmu Hukum* (Pusat Penelitian dan Pengabdian Masyarakat, Fakultas Hukum, UII 1983) 3.

²⁵ Absori, Wardiono, and Saepul Rochman, *Op. Cit.*, 82.

²⁶ Johnny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif*, vol 57 (Bayumedia Publishing 2006) 92. See also Yasid, *Op. Cit.*, 101.

²⁷ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, vol 57 (Bayumedia Publishing 2006) 125.

human action is fair or not, completely depends on the rules or laws that are laid down or enforced.²⁸ In its most traditional definition of the nature of law, positivism defines law as positive norms in the statutory system.²⁹ Para exponents of legal positivism, including: John Austin, H.L.A. Hart, and Hans Kelsen.³⁰ Although both followers of legal positivism and interpret legal work are the same, all three have different theoretical specifications and philosophical foundations in parsing the nature of law.

Through its character, John Austin claims, positivism places the essence of law as an order, command, or ruler's sovereignty. Meanwhile, according to H.L.A. Hart and Hans Kelsen interpreted the nature of law as a positive reality called the law itself.³¹

In simple terms, the question of nature is the question of what something is, and the fact that something exists. Thus, when parsing the nature of the law in depth, what is meant is "what is the law" and the fact that "the law exists" includes the possibility of "being" it. It means that in the view of positivism, the essence of law can be interpreted from the definition of the law itself. John Austin defined law as an order from the ruler of the state. Meanwhile, Hans Kelsen defined law as something normalized (positive) and hierarchical.³²

Basically, positivism is not an independent pathway. It only completes empiricism and rationalism working together. In other words, it perfects the scientific method (scientific method) by including the need for experiments and measurements. Hence, positivism is the same as empiricism plus rationalism. It is simply that in empiricism it can accept inner experiences, while in positivism it limits it to an objective journey.³³

The starting point of this thought is that the essence of law cannot be abstract, but rather must be empirical/concrete. This concretization is indicated by the imperative that laws must be written. This discourse is the embryo of the development of the modern legal system used in the world today.

The essence of law which ideally should be concrete, according to H.L.A Hart, must be manifested in the following concepts: a) Law is an order; b) There is no need to link law with morals; law as promulgated, stipulated, positum, must always be separated from the law which

²⁸ Yasid, *Op. Cit.*, 117.

²⁹ Anthon F. Susanto, *Dekonstruksi Hukum Eksplorasi Teks Dan Model Pembacaan* (Genta Publishing 2010) 29

³⁰ Khudzaifah Dimiyati, *Pemikiran Hukum: Konstruksi Epistemologis Berbasis Budaya Hukum Indonesia* (Genta Publishing 2014) 29.

³¹ Hyronimus Rhiti, *Filsafat Hukum Edisi Lengkap (Dari Klasik Sampai Postmodernisme)* (UAJY 2011) 157–158, dan 143–144.

³² Abdul Aziz Hakim, *Negara Hukum Dan Demokrasi Di Indonesia* (Pustaka Pelajar 2011) 79–82.

³³ Noeng Muhajir, *Metodologi Penelitian Kualitatif; Telaah Positivistik, Rasionalistik, Realisme Metaphisik* (Rake Sarasin 1999) 69–70.

should be created and which is desired; c) Analysis or study of the meaning of legal concepts is an important study, it must be distinguished from historical studies, sociological studies and assessments, critical in terms of moral, social goals, and social functions; d) The legal system is a closed system which is logical and constitutes correct decisions. Thus, it can be logically deduced from the existing rules; e) Moral punishment can no longer be enforced but must be made by means of rational arguments or proof through evidence.³⁴

Hence, in this context, John Austin separated law from morals. Austin explained that the ideal law only discusses positive law, regardless of whether the law is good or bad, accepted or not by society. Austin also conducted a sorting between form and content, where he focused more on form. Distilled down to its essence, Austin strove to get the law off the issue of justice.

There are two famous John Austin books, which are "The Province of Jurisprudence Determined" and "Lectures on Jurisprudence." Regarding the meaning of this law, Austin initially divided the law into two types, as in his explanation:

Taking it with the largest of its meanings which are not merely metaphorical, the term *laws* embraces the following objects: Laws set by God to his human creatures and laws set by men to men.

The whole or a portion of the laws set by God to men, is frequently styled the law of nature, or natural law: being, in truth, the only natural law, of which it is possible to speak without a metaphor, or out a blending of objects -which ought to be distinguished broadly. However, rejecting the ambiguous expression of natural law, I named those laws or rules, as considered collectively or in mass, Divine law, or the law of God.

The laws or rules set by men to men, are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason, should be severed precisely, and opposed distinctly and conspicuously.

Of laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies.³⁵

Austin's core teachings in his works are:³⁶ a) Law is the order of the sovereign; b) The law is always related to positive law with other provisions which can expressly be called that, which is those that are accepted without regard to their good or bad; c) The concept of the rule of law.

According to Austin, "Law is it is" is called positive law, because in fact the law is a product of human authority. Austin's famous theory is "The command theory of law," that

³⁴ Maryati Maryati, 'Kritik Terhadap Paradigma Positivisme Hukum Dan Beberapa Pemikiran Dalam Rangka Membangun Paradigma Hukum Yang Berkeadilan' (2014) 7 INOVATIF Jurnal Ilmu Hukum 80.

³⁵ John Austin, *The Province of Jurisprudence Determined*, vol 2 (J Murray 1980) 1–2.

³⁶ Achmad Ali, *Menguak Teori Hukum Dan Teori Peradilan* (Kencana 2010) 266.

in essence, law is an order.³⁷ Basically, law is a method of coercion for social control. The law demands the attention and willingness of those who accept the rules. Command in the Austin concept is limited by two things: 1) showing willingness, and 2) ability to charge crimes or harm (sanctions) against the unsatisfied wishes of the commander.³⁸

This command theory means that a person is not categorized as commanded to conduct something unless the very possibility is realized that the author of the order can actually impose harm or ugliness (sanction) to the one who was ordered to do so if he does not fulfill his orders. From the analysis of this theory, A. Qodry Azizy provided an example as follows: Person A breaks the law and then flies to another country, where he cannot be reached. It means that the sanctions may not be applied to person A; and even person A cannot be said to have broken orders or laws. Reality like this implies that the better a person is at avoiding the threat of sanctions, the less he will be subject to orders.³⁹

This is in line with another positivism figure, Hans Kelsen, who stated that Law does not recognize ideal laws (*sein*: in fact), but actual laws (*sollen*: existing laws). Kalsen added that the norm applies in *sollen* not in *sein*. It is a consequence of the opinion that law is the will of the State. State is not *sein* but *sollen*. Thus, Kalsen sharply separated reality from necessity.⁴⁰

It means that positive law in the form of Human Law (*Menschelijke Wet*) exists as applicable law. The law is not based on nature but is based on reason. The law must serve the public interest because law is a certain rule of reason that aims to serve the public interest and comes from one "power" as the supreme ruler. Hence, in order to guarantee legal certainty, legal positivism rested philosophy from its speculation work, and identified law with statutory regulations.

Furthermore, according to Kelsen, with his pure theory of law, legal positivism seeks to cleanse legal science from non-legal factors.⁴¹ Thus, the law must be separated from moral considerations that are abstract, political considerations, economics and other factors outside the law. The law must be completely objective without prejudice.⁴²

³⁷ Ahmad Qodri Azizy, *Eklektisisme Hukum Nasional: Kompetisi Antara Hukum Islam Dan Hukum Umum* (Gama Media 2002) 201.

³⁸ Lukman Santoso and Yahyanto, *Pengantar Ilmu Hukum: Sejarah, Pengertian, Konsep Hukum, Aliran Hukum Dan Penafsiran Hukum* (Setara Press 2016) 102.

³⁹ *Ibid* 203.

⁴⁰ Anthon F Susanto, *Ilmu Hukum Non Sistematis (Fondasi Filsafat Pengembangan Ilmu Hukum Indonesia)* (Genta Publishing 2010) 153.

⁴¹ Santoso and Yahyanto, *Op. Cit.*, 273.

⁴² Maryati, *Op. Cit.*, 81.

Positivism influences the life of the state to strive for the norms of justice so that they immediately become legislative norms to accelerate the realization of the idealized nation state. This understanding has a tightly integrated structure in a centralized manner and with a central authority that cannot be described, legal positivism always receives top priority in any legal development efforts in countries that grow modern and want unity and or unite. Not only those who headed to the nation state, but also those who used to go to the colonial state. There is no doubt that legal positivism is always entitled as a process of legal nationalization towards the ability of the state and government to monopolize formal social control through the use of positive law.⁴³ Thus, the nature of law can be underlined as a command (Austin), a system of rules (Hart), and a norm structure (Kelsen). Hence, the law has a regulatory and compelling nature. The law regulates human behavior in society to create legal certainty, which in turn creates order.

On the other hand, Islamic Law is a legal system rooted in religious teachings. The commands and prohibitions in Islam are contained in the holy book of the Qur'an. It is where it is clear how since the beginning the normative character is inherent in Islamic teachings. Moreover, the Qur'an is the source of all sources of law. Hence, the essence of embracing Islam is obedience to Allah, and consciously following His will through His laws.⁴⁴ It is God's will which determines the highest value and purpose of human life. Regarding this matter, Abdul Mun'im said that law is the divine system of Allah's orders.⁴⁵

The above elements reinforce the character of Islam as a "religion of law." Basically, law and theology are integral.⁴⁶ Theologically, every Muslim is instructed not to take legal answers to the existing problems from outside Islam, because theoretically, all these problems have solutions in the confines of religion. The Qur'an as a revelation from Allah was revealed to solve human problems, meaning that Islamic law pays special attention to human responsibility, because it is from that responsibility that a person's personal and communal rights can be granted.⁴⁷

⁴³ Soetandyo Wignjosoebroto, 'Permasalahan Paradigma Dalam Ilmu Hukum, Paper of National Symposium on Indonesian Science Paradigm' (Doctorate Program Seminat, Faculty of Law UNDIP, Semarang, 1998) 2.

⁴⁴ Ratno Lukito, *Hukum Sakral Hukum Sekuler* (Alvabeta 2009) 73–74.

⁴⁵ Abdul Mun'im Saleh, *Otoritas Masalah Dalam Madhhab Syafi'i* (Magnum Pustaka Utama 2012) 41.

⁴⁶ Abid Rohmanu, "Demistifying" Puritanism in Islamic Laws' (2018) 13 *Epistemé: Jurnal Pengembangan Ilmu Keislaman* 289.

⁴⁷ Saleh, *Op. Cit.*, 75.

Islamic law is law that was sent down through the construction of revelations from Allah, but in the process of transformation, it requires the intervention of the 'agent' to become a mediator between the sacred source of God and human life on earth. It is in this context, Muhammad PBUH believed to be a Prophet to be a conveying agent capable of discussing Islamic teachings in the language of the common people.⁴⁸ It is in this transformation that all activities and decisions taken by the Prophet outside the text in the Qur'an are manifested, which in general definition is referred to as *sunnah*.

Because the resulting law has a transcendental basis, the working principle is that humans must obey the law and not that laws that must be created according to human desires. Therefore, Islamic law is designed to be very comprehensive and applicable in perpetuity.⁴⁹ This is certainly different from the positivism described by Hart in his book "The Concept of Law." He argued that law has natural weaknesses in the form of language limitations and its range of situations that arise in the future. Regulations are often constrained by language problems that are less straightforward and lead to multiple interpretations. Likewise, regulations often cannot anticipate situations that arise later, so that discretion is afforded to judges to match legal events with the regulations governing them.⁵⁰

The idea of law as an all-encompassing entity characterizes how Islam views life.⁵¹ Including the issue of relationship with God (*habl min Allah*), human relations (*habl min an-nās*), and reflection on the relationship between humans and God.⁵²

Clearly, this differs from positivism, which requires the abandonment of meta-judicial ideas about law as espoused by supporters of the naturalist school of natural law (naturalist) or the flow of natural law. Therefore, according to positivism, every legal norm must exist in its objective nature as positive norms and be affirmed in the form of a concrete contract agreement between members of the community or their representatives. In this context, law is no longer conceptualized as abstract meta-judicial moral principles about the nature of justice or moral value, but something that has been made into positivism to guarantee certainty about what is considered law.⁵³ Thus, in positivism, human action is fair or improper, proper or not fully dependent on the rules or laws that

⁴⁸ *Ibid* 75–76. See Arie Purnomosidi, 'Transcendental Paradigm In Pancasila' (2019) 1 Journal of Transcendental Law 147.

⁴⁹ *Ibid* 79.

⁵⁰ HLA Hart, *Konsep Hukum (The Concept of Law)* (Nusa Media 2009) 192–210.

⁵¹ Ratno Lukito (n 44) 76.

⁵² *Ibid* 77.

⁵³ Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode Dan Dinamika Masalahnya* (ELSAM & HuMA 2002) 96.

are put in place or enforced. It seems that now, it has reached a nadir point so that a more radical epistemological reconstruction of the positivism paradigm is needed using a religious-transcendental legal basis.⁵⁴

2. Prophetic Law: Towards a Religious Indonesian Legal Foundation

The development of modern legal science as a consequence of the change in the construct of the modern state and the increase in globalization is inevitable. Science has influenced the formation of the modern state, and the modern state demands the mainstream of modern legal science to organize state life. Modern legal science which bases on objectivity, empiricism and rationality becomes a systematic, procedural and formal order. It can be understood that modern legal science that has developed so far is the embodiment of the positivism paradigm. Thus, prophetic law which departs from the basis of religious-transcendental values is present as the anti-thesis of the mainstream order.⁵⁵

It is believed that a religious-transcendental-based legal epistemology will be well-received because it comes together with the spirit of reviving spiritual values and is expected to be pioneering and a roadmap for the formation of a more civilized Indonesian legal system.⁵⁶

Furthermore, the discourse of religious-transcendental epistemology of law can also enrich the scientific domains in Indonesia, which have long fought against the marriage of religion and science. Transcendental epistemology is the answer because it will bring together the social system and the legal system which has always run to the opposite sides and ends up on the crossing roads.⁵⁷

Longing for peace of mind, inner self, religious and divine values, has become a strong soul and factor to revive the transcendental dimension in the positivism world. It is time for thinking that has a paradigm of renewal to emerge in search of a change. Science in the modern world today is considered less capable of solving life and life problems. Thus, it is necessary to deconstruct the science of law to get what is sought by a positivism

⁵⁴ Derry Angling Kesuma, 'Penegakan Hukum Berbasis Transendental' (Prosiding Seminar Nasional & Call for Papers Hukum Transendental 2018) 533.

⁵⁵ Sigit Sapto Nugroho, 'Pengembangan Epistemologi Ilmu Hukum Berbasis Transendental' (2016) 21 *Perspektif: Kajian Masalah Hukum dan Pembangunan* 97, 97.

⁵⁶ Myaskur Myaskur, 'Implementation of Sustainable Prophetic Electoral Rights In The General Election Process' (2020) 2 *Prophetic Law Review* 97.

⁵⁷ Sugeng Wibowo, 'Integrasi Epistemologi Hukum Transendental Sebagai Paradigma Hukum Indonesia' (2017) 1 *Legal Standing: Jurnal Ilmu Hukum* 61. See Kelik Wardiono, 'Prophetic: An Epistemological Offer for Legal Studies' (2019) 1 *Journal of Transcendental Law* 17.

law school using a spiritual approach. Spirituality is not just intuition. Modern science relies on ratio to be analytic, logical and systemic (*newtonian*), while the spiritual mind (ratio) is silent (passive) and the heart (small universe center) will actively open a complex universe (large universe) which is natural, emitting an atmosphere of depth which understands life as full of miracles.

The term Prophetic Legal Science was developed from the Social Prophetic Science which was initiated by Kuntowijoyo. The word "prophetic" itself in the Big Indonesian Dictionary (KBBI), contains the meaning as an adjective relating to prophecy.⁵⁸ The Social Prophetic Science that was introduced by Kuntowijoyo intended not only to change for the sake of change, but to change based on a prophetic ideal. These ideals are contained in QS. Ali Imran 104, and was later derived into humanization, liberation, and transcendence which became the elements/pillars of the Social Prophetic Science itself.⁵⁹

Social Prophetic Science has a philosophical basis in revelation. *Wahyu* (revelation) is a priori knowledge that occupies a position as forming reality, providing guidance in thinking as one of the formers of Muslim action. Thus, revelation is expected to become a constitutive element of the Islamic paradigm in fulfilling its prophetic mission, which is building civilization/mercy for all worlds, including in this case building a state of law.⁶⁰

Reestablishing revelation as a source of law does not mean that the enforcement of Islamic law is the next agenda, but as a basis for legal construction. In addition to bringing about past debates on the basis of a state that is neither Islamic nor secular, placing *wahyu* as a source of law will make other people/groups suspicious of Muslims who seem to dominate, not accommodate the interests of other people/groups.

The prophetic paradigm has transformative implications at both the individual and social levels. At the level of individual transformation, one of the bases of the ethos of the prophetic paradigm is appreciation. It is where prophetic science can also include branches of science such as psychology. This individual transformation can be of two types, because prophetic can produce transformations in prophetic scientists, or in individuals who become studies of certain prophetic sciences which are psychology and medicine. Medical prophetic science produces individual transformation in the physical domain, while prophetic psychology can produce transformations in the psychological realm.

⁵⁸ KBBI Online, 'Profetik' (Mei 2019) <<https://kbbi.web.id/profetik>>.accessed 12 Mei 2019.

⁵⁹ Syamsul Arifin, 'Dimensi Profetisme Pengembangan Ilmu Sosial Dalam Islam Perspektif Kuntowijoyo' (2014) 4 TEOSOFI: Jurnal Tasawuf dan Pemikiran Islam 477.

⁶⁰ Thontowi, *Loc. Cit.*

Meanwhile, at the level of social transformation, this starts from the level of view of life, which then manifests into a lifestyle, and then on the impact of the results of the studies they conduct. Prophetic scientific studies will be able to provide a wider social transformative impact if these studies are always published and disseminated to the community in a systematic and well-planned manner.⁶¹

In the prophetic paradigm, “objectification” is the key word. Objectivity means internal translation into categories of objectivity. Objectification is a concrete form of internal belief. An action is considered objective if that action, even though it is committed by a non-Muslim, is no longer considered as acts of religion, but something natural, although from a Muslim point of view. It is still considered an act related to religion, including charity.

Objectification avoids secularization and domination at the same time. Kunto gave an example of *amar ma'ruf* (one of the pieces in Qs 03:104), which means doing good, with humanization, which is humanizing humans, returning humans to their nature, as God's creatures who serve as leaders on earth, who are responsible for managing earth.

The science of prophetic law places revelation as the source of knowledge. It is performed by reorienting the epistemology towards the mode of thought (way of thinking) and the mode of inquiry (the way of discovering) which then results in the mode of knowing.⁶² Hence, legal science becomes a means of liberating humans from the knowledge, social, economic, and political systems that shackle humans. The science of prophetic law also wants to free humans from structural domination, which makes them entangled in extortion and poverty.

In the formation of prophetic legal norms, objectification still considers revelation as a source of law. However, the format must be agreed-upon to become a source of state law, which is positive state law. It can be in the form of legal transformation, or in other forms. Thus, Islamic law as the basis of prophetic law does not directly become state law, but first goes through a process of objectification.⁶³

This process of objectification also refutes the positivist view that Islamic law is irrational. As the matter of fact, the positivists' opinion only looks at the elements of the

⁶¹ Heddy Shri Ahimsa Putra, ‘Paradigma Profetik: Jalan Baru Ilmu Sosial Keindonesiaan’ (Seminar Nasional Fakultas Ilmu Sosial, UNY Yogyakarta, 7 September 2016).

⁶² Kuntowijoyo, *Paradigma Islam, Interpretasi Untuk Aksi* (Mizan 2010) 170.

⁶³ Muhammad Nur, ‘Rekonstruksi Epistemologi Politik: Dari Humanistik Ke Profetik’ (2014) 48 *Asy-Syir’ah: Jurnal Ilmu Syari’ah dan Hukum* 131. See also Faizal, ‘Paradigma (Ilmu) Hukum Profetik, Kritik Atas Ilmu Hukum Modern’ <<https://www.selasar.com/jurnal/>> accessed 2 Mei 2019.

laws of worship (ritual) which do have an immutable character. In the realm of the law of worship, the human mind and intellectual elements do not play much role in the process of exploring the meaning behind what is written. On the other hand, it is in the legal element of *muamalah* that Comte, Austin and Kelsen's judgment explained that where law is a part of metaphysics that makes no sense and does not contain moral elements has no relevance. It is because the legal content of *muamalah* in Islam is not only very positivism but also appreciates moral values in building social institutions based on operational legal provisions. It is of course contrary to positivism which separates law from morals. Moreover, the human mind has a significant role in the series of legal exploration works to produce legal provisions. The source of inspiration in *muamalah* law is apart from the general principles in the provisions of the revelation. It is also the reality of society with its inevitable aspects of change and development.

The dimension of justice in law based on religious values is a harmonious combination of law and morality, because law does not aim to destroy individual freedom, but controls that freedom for the sake of harmony in society which consists of various individuals. Prophetic law in this context has a role in reconciling individuals with collective interests, not the other way around. Individuals are given the right to develop their personal rights on the condition that they do not interfere with the interests of others.⁶⁴ Meanwhile, legal positivism does not assess in more detail, whether an order is fair or not. Hence, it renders justice unattainable.⁶⁵

Prophetic law unites law as "being" with law as "ought to." What "exists" means stability in law, while what "should" represent the highest goal of law, which is absolute justice. It is precisely separated by legal positivism.⁶⁶ Justice in Islamic law means a balance between the obligations that must be fulfilled with the ability to fulfill these obligations. Many verses show a balance between justice and God's commands. Therefore, the principle of justice in practice can act according to time and space. When there is a

⁶⁴ Muhammad Erwin, *Filsafat Hukum: Refleksi Kritis Terhadap Hukum Dan Hukum Indonesia* (Kencana 2016) 295. Lihat pula Catur Yuniarto, 'Prophetic Law Paradigm: A Synthesis of Thoughts of Legal Philosophy Development' (2019) 1 Journal of Transcendental Law 104.

⁶⁵ Wolfgang Friedmann, *Teori Dan Filsafat Hukum Telaah Kritis Atas Teori-Teori Hukum* (PT Raja Grafindo Persada 1990) 345.

⁶⁶ Positivism legal school thinks that it is necessary to separate strictly between law and moral (between law which is applied and the realistic law, *das Sein* dan *das Sollen*). See Darji Darmodiharjo and Shidarta, *Pokok-Pokok Filsafat Hukum: Apa Dan Bagaimana Filsafat Hukum Indonesia* (Gramedia Pustaka Utama 1995) 113–114.

change, difficulties become concessions, then the allowance is limited to meeting primary or secondary needs.⁶⁷

Analytic positivism focuses on the analysis of law, and the relations of law based on a strict division of what is real and what should be, which is why it is separated from justice. Pragmatic positivism views social facts as an element that determines the concept of law. For analytic positivism, law means an order from the ruler, which brings stability. Meanwhile, pragmatic positivism considers that law is subject to societies demands, which causes it to always change according to changes that occur in society.⁶⁸ Thus, it can be understood that legal positivism is a victim of tension and conflict. In simple terms, it can be drawn from the common thread that positivism, in its most traditional definition of the nature of law, is interpreted as positive norms in a concrete legislative system. It is certainly different from the philosophy of prophetic law which is precisely the embodiment of religious moral norms.

The existence of legal science as basic knowledge is not only to penetrate the world of law in the positivism paradigm of the colonial legacy, but also to develop laws based on divine values. Ideas about an alternative epistemology of legal science in Indonesia must continue to be developed along with the development of science, especially in the field of legal science. Longing for peace of mind, religious values and God is a strong influencing factor. The prophetic paradigm itself is built on a sense of faith in God and this belief is the basis for belief in the Apostles, holy books, angels, and the Last Day so that in the end, this faith will produce goodness.⁶⁹

That the legal paradigm is not just a matter of power as we have understood it so far, but there is something spiritualistic and transcendental, related to prophetic values. Prophetic philosophy actually emerged from criticism of the increasingly positivism tendency of social science.

Positivism emerged when natural scientific methods were adopted in social science so that social phenomena were no longer considered as products of human activity but as natural events. Social symptoms are accepted as is, value-free. Prophetic philosophy can

⁶⁷ Juhaya S Praja, *Filsafat Hukum Islam* (PT Lathifah Press 2009) 74.

⁶⁸ Taryono Taryono and Arie Purnomosidi, 'Development of National Law in Perspective Transcendental Paradigm' (2019) 1 Surakarta Law and Society Journal 88.

⁶⁹ Absori et.al., *Pemikiran Hukum Profetik: Ragam Paradigma Menuju Hukum Berketuhanan* (Ruas Media 2018) 14–15.

also be a counter narrative against western political philosophy which has a humanist flavor. Political work originates from man, by man, and for man.⁷⁰

Prophetic law discourages other concepts. Law is not just a human affair, but as a manifestation of divinity. Prophetic law rests on transcendent humanism, the law that grants grace to all (*rahmatan lil alamin*). In relation to law as a subject as well as as a recipient of the mandate to conduct these transcendent dimension laws, humans can reorient subjective thinking to an objective way of thinking, conduct theorizing in addition to using doctrinal normativity, change a historical understanding to historical, and formulate general revelation formulations into specific and empirical formulations.

In order to form the concept of prophetic law to be more applicable, it is necessary to formulate how this concept can be put into practice in creating a just law that makes humans happy as the underlying concept rests on three pillars of prophetic law. 1) Humanitarian law as an ontological basis; 2) Legal liberation (Emancipatory law) as an epistemological basis; and 3) transcendental law as an axiological basis.

First, Humanitarian law. Basically, the concept of humanitarian law has manifested itself in the popularized protection theory. Mochtar Kusumaatmaja in the teachings of the Guardian theory, stated that implementation in a national legal order must be characterized by responsiveness to developments and aspirations of community expectations. In other words, law is aimed at creating humane or humanist social conditions, so as to enable social processes to take place naturally. Literally, in the true concept of humanitarian law, every human being has ample opportunity to develop all of his potential both physically and mentally in a holistic manner. The efforts to realize this concept as expressed by Sidharta include: first, order and order that give rise to reflexivity; two, serene peace; third, justice which includes distributive, commutative, indicative, and protective justice; fourth, humane welfare and social justice; and fifth, building high morals based on the One Godhead.⁷¹

Second, Emancipatory law. Regarding the law that liberates or emancipates, true peace and justice will be realized when every citizen can freely and responsibly express his thoughts which will ultimately free him from false bonds that can destroy the peace of the law both physically and mentally. Setiadi stated that the criminal law that is shackling and applicable in Indonesia is "pseudo law." It is based on the assumption that in the

⁷⁰ Nur, *Op. Cit.*, 151–152.

⁷¹ Bobby Briando, 'Prophetical Law: Membangun Hukum Berkeadilan Dengan Kedamaian' (2017) 14 *Jurnal Legislasi Indonesia* 325, 330.

United Nations (UN) congress on The Prevention of Crime and the Treatment of Offenders, it is often stated that the current criminal law system, especially those originating from the colonial period, is generally outdated and unjust, as well as out of mode and unreal (outdated and not suitable to reality).⁷²

Third, Transcendental law. In the history of the journey to find a divine order or law in Indonesia, such a quest has actually been conducted by previous saints. It is as explained by Mahfud MD who stated that the guardians have explained the laws of *Tawhid* (Divine) to the community through cultural channels. For instance, Sunan Kalijaga, he preached with puppets all night long, but when it came to dawn, he invited him to rest, because he wanted to do the morning prayers first. When the audience asks, what is prayer? the Sunan explained it. Then, many in the audience stated that they converted to Islam. Mahfud further said that Sunan Kalijaga himself created a puppet story with the substance of *Tauhid*, which is the play "*Jimat Kalimosodo*", which consists of the *syahada* (Declaration words to convert to Islam) sentence. With this step, a vertical consciousness (*hablun minallah*) will emerge as the main part of life and living, which is believing that the Essence of the Most Everything, which is the Supreme Being and the Most Noble, is none other than the Lord of the Universe.⁷³

It means that in a multicultural country such as Indonesia, the cultivation of Islamic law can be done through *maqashid al-syari'ah*, which is laws or rules that are not rigid in the text so that laws can change according to changing times, places, and cultures. Current legal needs with the reality of multiculturalism are certainly different from the needs of the past and in other places. This can be used as a basis in forming a just law which is embedded in the elements of a peaceful and divine local culture.

In order for law to touch aspects of divinity, culture and statehood, prophetic law can become the basis for what is called the Three Pillars System of Modern Integrative Law. The concept was built in order to integrate cultural diversity, customs, and beliefs in godliness. Umar said that diversity is a necessity and offers potential which, if it is empowered in a balanced and integrative manner in a national legal system, it is able to build a holistic modern law in the future. This concept is very strategic, if used in the face of today's globalization era, which tends to prioritize utility and end results. Furthermore,

⁷² *Ibid.*, 330–331. See also Yuniyanto, *Loc. Cit.*

⁷³ *Ibid.*, 331–332. See also Wardiono, *Loc. Cit.*

this concept can at least be a filter for the entry of foreign values that are incompatible with Indonesia's.⁷⁴

By borrowing terms conveyed by prophetic social science, it can be said that the positive legal position is a place for instrumental values, which bridges between basic values and practical values. One of the basic values is religious-transcendental values, in the form of divine values. This basic value becomes a guiding star like an instrumental value in regulating the behavior of "people" as legal subjects. Dogmatic legal science or positive law sow the seeds for the presence of transcendental value. (read: divinity) but it also opens the door equally wide for immanent value that comes from concrete events. Ideally, behavior of the legal subjects must be in line with the instrumental value that positive law carries. Hence, existing positive law needs to be reconstructed with transcendental religious values as the basis of prophetic law.⁷⁵

The constitutional state of Pancasila actually contains religious-transcendent-based legal practices. It can be observed in the contents of the Pancasila and UUD 1945 (1945 Constitution). The constitutional state of Indonesia has not purely adopted the *rechtstaat* concept of the rule of law in countries that adhere to the civil law legal system, nor the concept of rule of law in countries that adhere to the common law system, but instead adhere to and applying a rule of law concept which is adapted to the condition and spirit of the Indonesian nation, which is the concept of a rule of Pancasila law on the basis of religiosity.⁷⁶

Given the concept of a religious legal state, Pancasila, was born due to the encouragement of all elements of the Indonesian nation to liberate themselves from colonialism. The desire for independence as stated in the preamble of paragraph II of the 1945 Constitution is an example of the pillar of liberation in a prophetic paradigm. The pillars of humanization and transcendence can also be observed from other paragraphs in the Preamble to the 1945 Constitution and its articles. It means that transcendent religious values, which become the basis of prophetic law, are in line with the construct of the Pancasila rule of law, which are *Ketuhanan yang maha Esa* (Almighty Godhead), *kemanusiaan yang adil dan*

⁷⁴ *Ibid* 331. See also Siti Zuliyah and Triwahyuningsih Triwahyuningsih, 'Moral Aspect in the Law Enforcement in Indonesia: Prophetic Perspective', *Annual Civic Education Conference (ACEC 2018)* (Atlantis Press 2018).

⁷⁵ Shidarta, 'Hukum Profetik: Antara Humanisasi, Liberasi, Dan Transendensi' <[https:// business-law.binus.acid/](https://business-law.binus.acid/)>.accessed 15 Mei 2019. See also Nehru Asyikin, 'Legal Politics of Bureaucratic Reform in Really Good Governance According to Prophetic Law' (2020) 28 *Legality: Jurnal Ilmiah Hukum* 81; Despan Heryansyah and Muhammad Hidayatullah, 'Problems of Law Enforcement and Ideas of Paradigm Prophetic in Indonesia' (2018) 1 *Jambi Law Journal* 91.

⁷⁶ Yopi Gunawan and Kristian, *Perkembangan Konsep Negara Hukum Dan Negara Hukum Pancasila* (Refika Aditama 2015) 92. Lihat pula Thontowi, *Loc. Cit.*

beradab (fair and civilized humanity), *persatuan Indonesia* (Indonesian unity), *kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan perwakilan* (democracy led by wisdom in representative deliberations), and *keadilan sosial bagi seluruh rakyat Indonesia* (social justice for all people of Indonesia).⁷⁷

E. Conclusion

Based on the above study, conclusions emerge from this paper. First, it is very urgent to make a philosophical criticism of the positivism paradigm today. This argument is based on the positivism paradigm that has taken the law away from transcendent religious values, so that it is far from the content of morality. Transcendental philosophy actually emerged from the criticism of the increasingly positivism materialistic-secularistic tendency of social science. In the paradigm of prophetic law, law is not just a human affair, but as a manifestation of divine values. Law rests on the pillars of humanization, liberation and transcendence, so that the law is able to give mercy to all (*rahmatan lil alamin*). Second, critical-constructive prophetic law seeks to shift the pendulum of legal science into the development of legal science based on transcendental religious values. The application of this effort in the context of Indonesia is to synergize the three pillars of prophetic law (humanitarian law, emancipatory law, transcendental law) with the basis of the Pancasila state of law. Pancasila state of law does not purely adopt the concept of *rechtstaat* state of law in countries that adhere to the civil law legal system, or the concept of rule of law in countries that adhere to the common law legal system, but instead adheres to and applies the concept of a rule of law which is rooted in the soul of religious Indonesian nation. The synergy of prophetic law and the foundation of the constitutional state of Pancasila will further strengthen the Indonesian law. It is because the prophetic basis for the constitutional state of Pancasila is none other than that of divinity, humanity, unity, democracy, and justice.

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⁷⁷ Teguh Prasetyo and Arie Purnomosidi, *Membangun Hukum Berdasarkan Pancasila* (Nusa Media 2014) 48.

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