

IMPLEMENTATION OF POSITIVE LAW IN THE LEGAL SYSTEM IN INDONESIA

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Abstract

The application of positive law in the Indonesian legal system is a manifestation of the principle of a state based on law, which prioritizes certainty through written legislation. This article aims to examine the implementation of written law in Indonesia by focusing on two main issues: (1) the effectiveness of the hierarchy of laws and regulations in ensuring legal certainty, and (2) the factors that cause the gap between written legal rules (*das sollen*) and law enforcement practices in the field (*das sein*). This article shows that although the hierarchical structure has been expressly regulated in Law No. 12 of 2011, its effectiveness is still hampered by the phenomenon of hyper-regulation and disharmony between sectoral regulations that trigger legal uncertainty. In addition, the gap between *das sollen* and *das sein* is triggered by the weak moral integrity of law enforcers and the legal culture of society that is not yet fully aligned with the text of the law. Suggestions are the need to strengthen *the executive review* and *judicial review mechanisms* to synchronize overlapping regulations, as well as restructuring the development system for law enforcement officers to bridge the value of substantive justice with the text of positive law.

Keywords: Positive Law, Legal System, Legal Certainty.

I. INTRODUCTION

Indonesia constitutionally affirms itself as a state of law (*rechtsstaat*), as stipulated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. In the *civil law tradition* adopted, positive law (*ius constitutum*) or written law established by state authorities is the main instrument in creating order and legal certainty (Putuhena, 2013). Theoretically or *das sollen* , the application of positive law should provide universal and predictable legal protection, where each lower regulation is in line with higher norms to ensure regulatory harmony. However, in reality or *das sein* , the Indonesian legal system still faces major challenges in the form of "regulatory obesity" which triggers overlapping norms between agencies. In addition, there is a wide gap where positive law which is rigid and legalistic often fails to reach the sense of substantive justice that is developing in society, coupled with the integrity constraints of law enforcement officers in the field.

Previous researchers have conducted studies on these dynamics, which serve as the theoretical foundation for this article. Nur Talita Prapta Putri and Ananda Aulia argue that the legal system can be influenced by the state's political power, given that positive law is the result of legislation enacted by authorized state bodies (Putri & Aulia, 2023). This demonstrates that legal formation depends on the governing body. This can lead to abuses in regulation-making due to vested interests underlying the decisions of the regulators. Research by Slamet Suhartono explains that the problematic application of positive law is generally found in the form of a lack of positive legal norms, vaguely formulated positive legal norms, and conflicts in positive legal norms (Suhartono, 2019). Meanwhile, Nurfaqih Irfani argues that efforts to find answers to the problem of norm conflicts in legislation are often carried out using the principles of norm conflict, namely the principles of *lex superior derogate legi inferiori* , *lex spscialis derogate legi generali* , and *lex posterior derogate legi priori* (Irfani, 2020). The validity of national law depends heavily on the harmony of the hierarchy of laws and regulations. Furthermore, the effectiveness of positive law is determined by the integration of existing regulations, the professionalism of law enforcement officers, and public legal awareness. In practice, law enforcement should not be

limited to administrative procedures alone, but must remain oriented toward achieving the value of justice. Upholding the supremacy of national law requires consistency in the hierarchy of laws to ensure their constitutional validity. However, the success of positive law rests not solely on regulatory texts but on the dynamic synergy between the quality of law enforcement officers and the legal culture of society. Its implementation must transcend the barriers of legalistic formalities so that the law does not become merely a rigid procedure but remains a living instrument in realizing substantive justice. Based on this background, this article will focus its analysis on two main research questions: First, how effective is the hierarchy of laws and regulations in ensuring legal certainty? Second, what factors contribute to the gap between written legal regulations and law enforcement practices in the field?

II. DISCUSSION

A. Effectiveness of the Hierarchy of Legislation in Guaranteeing Legal Certainty.

Article 1 paragraph (3) of the Constitution of the Unitary State of the Republic of Indonesia states that Indonesia is a state of law, and Article 28 D paragraph (1) of the Constitution affirms that it guarantees the right to fair legal certainty. The characteristics of a state of law are: the supremacy of law, equality before the law, the principle of legality, limitations on power, an independent executive organ, a free and impartial judiciary, state administrative courts, state constitutional courts, protection of human rights, democratic in nature, a means of realizing state goals, and transparency and social control (Asshiddiqie, 2005). A state of law emphasizes the importance of legal certainty which requires the law to be clear, stable and predictable. In Indonesia's positive legal system, the hierarchy of laws and regulations is the backbone of legal certainty. Based on Law Number 12 of 2011, the order of regulations is arranged to create harmony so that there is no conflict between one norm and another. Article 7 of the Law explains the types and hierarchy of laws consisting of: a) The 1945 Constitution of the Republic of Indonesia; b) Decrees of the People's Consultative Assembly; c) Laws/Government Regulations in Lieu of Laws; d) Government Regulations; e) Presidential Regulations; f) Provincial Regulations; g) Regency/City Regulations. Regulations stipulated by the Regional Consultative Assembly, People's Representative Council, Regional Representative Council, Supreme Court, Constitutional Court, Financial Audit Agency, Judicial Commission, Bank Indonesia, Ministers, Agencies, institutions or commissions of the same level established by Law or the Government on the order of Law, Provincial Regional People's Representative Council, Governor, Provincial Regional People's Representative Council, Regency/City Regional People's Representative Council, Regent/Mayor, Village Head or those of the same level, are recognized and have binding legal force as long as they are ordered by higher laws and regulations.

The effectiveness of this hierarchy is theoretically guaranteed by the principle of *Lex Superior Derogat Legi Inferiori*, where lower regulations must comply with higher regulations. Law No. 12 of 2011 serves as a guideline for the formation of every legal product, from Regional Regulations to Government Regulations, to have a clear reference to the Law or the 1945 Constitution (Ulya, 2021). Legal certainty is achieved when legal subjects know exactly which rules apply and feel protected by the consistency of these norms. However, the effectiveness of this hierarchy is often compromised by the phenomenon of "regulatory obesity." Currently, Indonesia faces a major challenge in the form of numerous sectoral regulations born of sectoral egos between institutions or ministries. Overlapping norms often occur horizontally (between regulations of equal standing). For example, regulations in the investment sector often conflict with regulations in the environmental or agrarian sectors. Although their hierarchical positions are clear, the lack of synchronization of substance at the technical level creates confusion for law enforcers and the public, ultimately distorting the value of legal certainty itself.

To prevent this overlap, the Indonesian legal system provides mechanisms for *Executive Review* (harmonization at the government level) and *Judicial Review* (testing by the Supreme Court and Constitutional Court). The latest strategy, *the Omnibus Law method*, also attempts to synchronize thousands of articles across various laws. However, the effectiveness of this method depends heavily on the thoroughness of academic writing to avoid creating further confusion within the positive legal structure (Fauzan et al., 2022). To ensure that this structure is effective and does not cause legal chaos, in addition to the principle of *Lex Superior Derogat Legi Inferiori*, which states that higher regulations override lower regulations, in a hierarchical context, this is the main control mechanism so that Regional Regulations (Perda) or Ministerial Regulations do not conflict with the Law or the Constitution. The principle of *Lex Specialis Derogat also applies. Legi Generali*, where a specific rule overrides a general rule, is crucial for resolving conflicts between two equivalent rules with different regulatory scopes. The principle of *Lex Posterior Derogat Legi Priori also applies*, stating that a new rule overrides an older one if both regulate the same object.

For example, the effectiveness of these three principles is severely tested in land disputes. Law No. 5 of 1960 concerning Basic Agrarian Regulations (UUPA) is the law that governs agrarian law in Indonesia. However, when the Forestry Law or the Law on Conflicts of interest frequently arise in mining. In practice, ministerial regulations frequently arise whose substance contradicts the UUPA. Theoretically, based on the principle of *Lex Superior*, these ministerial regulations should be null and void if they restrict rights guaranteed by law. However, the phenomenon of hyperregulation in Indonesia often makes it difficult to enforce these principles automatically without a lawsuit to the Supreme Court, so legal certainty for land rights holders is often affected by the dynamics of sectoral regulations.

B. Factors Causing the Gap between *Das Sollen* and *Das Sein*

The *das sollen-das sein* gap is a situation where written regulations do not operate according to the objectives designed by the lawmakers. *Das sollen* represents the ideal-normative dimension, while *das sein* represents the reality of implementation (Lobubun et al., 2022). This gap will persist even in a healthy legal system, but at a certain level that does not undermine legal certainty. The *das sollen-das sein* gap is a problem in the operationalization of positive law. This means that the failure to implement the law stems not only from the behavior of implementers, but also from inoperable norms and a system that does not support consistent implementation. Within Friedman's framework, legal effectiveness is determined by the interaction of substance, structure, and legal culture. The gap between "*das sollen*" and "*das sein*" indicates a lack of synchronicity in these components (Ahadi, 2022). Therefore, the factors causing the gap need to be systematically mapped through these three dimensions. At the substantive level, vague, multi-interpretable, and disharmonious norms lead to inconsistent application. At the structural level, weak institutional coordination and selective enforcement exacerbate inconsistencies. At the legal culture level, low compliance and the normalization of legal negotiations reduce the binding power of positive law. These three factors are not mutually reinforcing, so the gap becomes recurring and difficult to overcome if solutions are directed only at one aspect. Because the problem of this gap stems from systemic roots, the solution must also be systemic, targeting the substance, structure, and legal culture.

The first discussion of implementation gaps must begin with the substance of the norms. In terms of substance, gaps in the implementation of positive law often stem from the weak quality of the norms. Norms that are vague, open to multiple interpretations, or lacking operational parameters, open up wide interpretations, leaving implementation dependent on the interpreter's subjectivity (Sutrisno, 2020). Conceptually, legal certainty requires clear and predictable norms, but in hyperregulation, norms are often formulated in an open, technocratic, or even contradictory manner. Such norms do not provide consistent guidance for officials and the public. For example, under *das sollen*, the Basic Agrarian Law mandates land registration to ensure legal certainty. However, under *das sein*, the implementing regulations for land registration are often considered complex and expensive by grassroots communities, resulting in much land still controlled based on customary rights (Girik/Petuk) that have not been converted into official positive law certificates. Thus, substantive factors are the primary cause of implementation gaps. Vague, open-ended, and disharmonious norms lead to inconsistent implementation and trigger selective cases. To reduce disparities, reforms cannot simply improve law enforcement but must also improve the substantive quality of norms by clarifying their formulation, establishing implementation parameters, controlling delegation, and ensuring harmonization of technical regulations. However, even good norms are insufficient if institutional structures are unable to manage their consistent implementation; therefore, structural factors are the next topic of discussion.

The legal structure encompasses regulatory bodies, implementing bodies, and law enforcement bodies that enforce norms in practice. In legal system theory, structure is the "operational engine" of norms, as the quality of norms is only meaningful if institutions and officials are able to implement them consistently and accountably (Susylawati & Musawwamah, 2023). However, in practice in Indonesia, the wide gap between written law and its implementation is often due to the low moral integrity and professionalism of law enforcement. When officials adopt a legalistic-formalistic approach, focusing solely on text without considering a sense of justice or even engaging in corrupt practices, the objectives of written law will never be achieved. This situation is exacerbated by structural issues such as weak cross-sectoral coordination and overlapping authority, which further increase the discretionary power of officials in determining legal application standards. Weak institutional coordination leads to inconsistent implementation standards (Banola et al., 2025). Within the same field, officials from different institutions may adopt different approaches because they adhere to their respective sectoral regulations. Weak regulatory harmonization also leaves implementers in the field confronted with conflicting norms. In such situations, officials tend to choose the norms that are easiest to implement or most

practically advantageous, thus weakening consistency of implementation. In concrete implementation, law enforcement factors are evident in the emergence of the land mafia phenomenon, a clear example of the gap between *das sein* (the principle of law). Unscrupulous land officials who abuse their authority to issue duplicate certificates demonstrate that the integrity of officials is more important than the text of the law itself. Well-written positive laws are often defeated by maladministration. Cases like these demonstrate how the weak integrity and professionalism of officials, exacerbated by structural gaps and regulatory disharmony, open up space for deviant law enforcement practices.

Therefore, strengthening institutional structures must go hand in hand with improving the moral integrity and professionalism of law enforcement. These efforts include improving cross-sector coordination, standardizing implementation standard operating procedures (SOPs), auditing enforcement consistency, and strengthening officer accountability. Without officers with integrity, improvements to the substance of norms and institutional structures will be ineffective, as the law remains susceptible to selective and unfair application. In addition to the substance and structure of law enforcement, gaps in implementation are also influenced by legal culture, namely how society and officials view the law, which can strengthen or weaken the binding power of positive law. Legal culture is a crucial element in determining whether norms are obeyed, respected, or negotiated. In the Indonesian context, legal culture is evident in the differences between *living law* (law that lives within society) and national positive law. This difference, exacerbated by low legal literacy and public distrust of legal institutions, often leads to laws being perceived as mere formalities on paper (Pahlevi, 2022).

As Friedman argued, legal culture reflects the attitudes, values, and perceptions of both society and officials toward the law. Within the framework of the *das sollen–das sein gap*, this condition influences the level of compliance and patterns of community relations with the state. When positive law is not understood or trusted, communities tend to revert to norms deemed more socially legitimate, thus forming a culture of selective compliance with state law (Murlinus, 2023). In practice, this phenomenon is clearly visible in rural communities, who adhere more to customary law regarding land boundaries than to official BPN markers. This gap often triggers conflict when companies holding concessions based on positive law confront local residents claiming customary land based on customary law. This situation demonstrates that written norms are not always the primary standard of behavior, as communities adhere more to living law, which is considered fair and relevant to their social reality.

This situation ultimately creates negative habits in how society views the law. Laws are often perceived as "manipulated" or negotiable, especially when influential individuals or financial interests are involved. When the public sees that rules are not enforced fairly and consistently, trust in the law declines. Many people then believe that success no longer depends on obeying the rules, but rather on connections and backdoors. This mindset also affects law enforcement. Amid conflicting regulations and low public trust, officials may view the law merely as procedures to be adjusted, rather than as guidelines that must be upheld. Ultimately, a vicious cycle emerges: uneven law enforcement makes the public even more reluctant to comply, while low compliance actually leads officials to enforce the law selectively. Thus, improving legal culture is a crucial part of making improvements. This effort is not sufficient by simply providing legal counseling or education; it must also be accompanied by firm and transparent enforcement of the rules. Trust in the law will only be restored if state institutions operate honestly and transparently (Firnanda & Romadhon, 2022). Compliance with the law can only grow when the public truly sees that the rules are enforced fairly, consistently, and without favoritism.

Based on this description, it appears that the gap between *das sollen* and *das sein* is not a single issue, but rather the result of a complex interaction between weaknesses in normative substance, institutional structural problems, and a legal culture that does not yet support compliance with positive law. Because the root of the problem is systemic, the strategy for addressing it cannot be pursued partially or sectorally. Therefore, efforts to bridge the gap between *das sollen* and *das sein* must be directed towards an integrative approach, namely simultaneously targeting the dimensions of substance, structure, and legal culture. Within this framework, solution-oriented steps are needed that not only emphasize formalistic law enforcement but also encourage substantive justice, strengthen institutional governance through bureaucratic reform and digitalization, and foster a culture of compliance based on legal awareness. Such an approach is a prerequisite for positive law to exist not merely as written norms but to truly function as an instrument of social justice in practice. To bridge the gap between *das sollen* and *das sein*, several solution steps are needed, namely implementing a progressive legal approach in the form of encouraging law enforcers, especially judges, to not only be "mouthpieces of the law" (*la bouche de la loi*), but to carry out legal discoveries (*rechtsvinding*) that prioritize substantive justice over formal procedures. In addition, bureaucratic reform and digitalization are needed to strengthen electronic-based law

enforcement systems (such as e-court and transparency of investigations) in order to minimize personal interactions that have the potential to cause deviations. Then, it is necessary to improve the Legal Culture through massive socialization and meaningful public participation in every formation of positive law, so that the community feels ownership and complies with these rules not because of fear of sanctions, but because of an awareness of the value of justice. For the land sector, Judges in land disputes should not only look at the formal (legalistic) validity of the certificate, but must also look at the actual physical control and good faith of the parties to achieve substantive justice. Bureaucratic Reform and Digitalization (Electronic Certificates) are needed: the implementation of electronic land certificates aims to minimize physical interaction between law enforcement and applicants, in order to close the gaps in extortion and document falsification which have been the main causes of the imbalance between regulations and reality. In addition, it is necessary to improve legal culture through Complete Systematic Land Registration (PTSL) because PTSL is a real solution to bring customary law into the positive legal system en masse, so that the gap between the reality of land control and state administration can be minimized.

III. CLOSING

A. Conclusion

Based on the discussion that has been outlined, several conclusions can be drawn as follows:

1. The effectiveness of the hierarchy of laws and regulations as stipulated in Law No. 12 of 2011 theoretically guarantees legal certainty through the application of the principle of *Lex Superior Derogat Legi Inferiori*. However, at the operational level, this hierarchy has not been fully effective due to the phenomenon of hyper-regulation and sectoral ego. This is clearly seen in land law, where there is an overlap between the UUPA and sectoral regulations (forestry/mining), so that legal principles such as *Lex Specialis* and *Lex Posterior* are often difficult to implement without going through a lengthy adjudication process.
2. The gap between *das sollen* and *das sein* in Indonesia is caused by complex obstacles in legal substance, low integrity of law enforcement, and clashes between community legal culture and national positive law. In the case of land, written laws that aspire to comprehensive certification often clash with the reality of "land mafia" practices and the strong physical control of land based on poorly administered customary law.

B. Suggestions

As a solution step to strengthen the implementation of positive law in Indonesia, the author makes several suggestions:

1. Strengthening Regulatory Synchronization: The government needs to accelerate the implementation of the One Map Policy and tighten the *Executive Review mechanism* in the formation of regulations under the Law in order to minimize horizontal disharmony between ministries, especially in the management of natural resources and land.
2. Digital-Based Law Enforcement Reform: Accelerating the digitalization of legal administration (such as electronic land certificates and *e-courts*) is necessary to limit the scope of law enforcement officers who abuse their authority, while simultaneously bridging the gap of *das sein* through a more transparent and accountable system. Legal practitioners, especially judges, are advised not to be fixated solely on rigid statutory texts, but also to be bold in making legal discoveries that pay attention to substantive justice for the lower classes who are often administratively weak but strong in physical and moral control.

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