

Wacana kepastian hukum dalam penegakan hukum refleksi kritis terhadap legisme dan legalitas = Discourse on legal certainty in law enforcement critical reflections towards legism and legality

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Abstrak

Klaim kepastian hukum yang diusung oleh gagasan legisme dan legalitas telah menjadi sebuah keyakinan umum di kalangan yuris. Dalam sejarah pemikiran hukum, gagasan legisme ini mendapat pendasaran filosofisnya dari teori kontrak sosial Montesquieu, Rousseau dan Cesare Beccaria. Sementara legalitas sendiri mendapat pendasaran filosofisnya dari gagasan Montesquieu tentang peran hakim yang dibatasi hanya sebagai penyuar isi undang-undang dan metode hukum yang positivistic dari Beccaria karena menolak interpretasi akan hukum (undang-undang). Oleh sebab itu, dengan cara demikian, harapan akan kepastian hukum niscaya dapat dicapai.

Disertasi ini mencoba menelusuri pemikiran ketiga filosof itu secara utuh, dan berkesimpulan kalau legisme dan legalitas tak pelak lagi hanya mengambil sebagian kecil dari gagasan ketiga filosof secara positivistic, padahal mereka malah menganjurkan hukum yang pasti itu justru berdasarkan kehendak bersama dan rasa kemanusiaan, dan hukum (undang-undang) dapat diabaikan jika ia bertentangan dengan kehendak bersama dan rasa kemanusiaan.

<hr>Claims on legal certainty which is brought by the idea of legism and legality has become a common opinion among jurists. In the history of legal thought, the idea of legism gets its philosophical grounding thorough the social contract theory from Montesquieu, Rousseau and Cesare Beccaria. Whilst the legality itself gets its philosophical grounding from Montesquieu's idea on the role of the judge which is restricted only to as a voice for law and from legal method of Beccaria which positively rejects the method of legal interpretation. Therefore, through such methods, such expectations on legal certainty will undoubtedly be able to achieve.

This dissertation tries to trace the three philosopher's thought as a whole, and concludes that ideas of legism and legality inevitably only take a small portion from these three philosophers in positivistic approach, though they certainly do encourage that the law is actually based on a common will and humanity, and the law may be ignored if it is contrary to the general will and humanity.