INDONESIAN LEGAL SYSTEM STRUGGLE: A Lawful Plan in Order to Create Happiness for the People

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A. Historical Aspects and Socio-Cultural Basis: A Portrait of Legal Politics

Article 1 (3) of the 1945 Constitution of the Republic of Indonesia affirms: "The State of Indonesia is a state of law", Recognition as a state of law implies that in the life of society, nation and state, law is something that is "supreme", and is used as a reference value in an effort to realize national goals as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia.

Historically, before being amended in the Explanation section, the term rule of law was called Rechtsstaat, the implied meaning of the change, so that the legal system embraces in a balanced way the good side of the conception of Rechtsstaat and the Rule of Law (RoL) in order to guarantee legal certainty and uphold substantial justice and the importance of upholding the principle of benefit, namely a law that does not cause damage or harm to the community, nation and state[2].

The struggle of the legal system, however, gives meaning, that the law is constantly evolving from time to time in accordance with human civilization. In the historical legal school, law is not static, although it is acknowledged that its development is very slow. It grows together with the growth of the people, becomes strong with the power of the people and eventually disappears when a nation loses its nationality. A nation must not lose its own law because if a nation has lost its law, then it has lost its power and in the end the nation collapses.

Law as a social rule or norm cannot be separated from the values that apply in society, it can even be said that the law is a reflection and concretization of the values that exist at one time in society. This means that the law will more or less follow the values that become the common consciousness of certain people and apply effectively in regulating their lives. The same thing happens in legal politics, which is a legal policy that is to be implemented or implemented nationally by a certain state government.

Taking into account such a context, the legal politics of one country is different from the legal politics of another country. This difference is caused by differences in historical background, world view, socio-cultural, and political will of each government. In other

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[2] . *Rechstaat* emphasizes more on written law (civil law) and legal certainty. Truth and justice are based on formal standards, the emphasis of law enforcement is legal certainty. While the Rule of Law (RoL), is a term for the rule of law in the Aglo Saxon region, which emphasizes the importance of unwritten law (common law), legal truth and justice are not merely written in written law, can grow and live in traditions.

words, legal politics is local and particular (only applies to and for certain countries), not universal (applies to the whole world). However, this does not mean that the legal politics of a country ignores the political and political realities of international law.[3]

From the legal politics of a country, the development of its legal system can be traced its scope and direction (vision). Starting from this formulation, significant problems to be raised are as follows: How to realize a Legal System that Makes People Happy from a Legal Political Perspective?

The Nature of the Legal System: A Complex Entity.

The national legal system is formed from two terms, system and national law. The system is adapted from the Greek systema which means a whole which is composed of many parts (whole composed of several parts).,[4] or relationships that take place between units or components on a regular basis (an organized, functioning relationship among units or components). The basic understanding contained in the system concerns the existence of a purpose, as a whole, interacting with a larger system, transformation, their compatibility with each other (connectedness), the existence of a unifying force that binds the system.

Relying on the characteristics of a system above, the legal system in general can be interpreted as a collection consisting of various elements namely norms, principles, concepts, theories that are interrelated with one another and influence each other in one legal building.

The operation of a law cannot be separated from the existence of a legal building. As a systematic building, it has several important things as supports, namely structures, categories, concepts. These three elements occupy the fundamental substance in which the law works and then plays a role. Both structures and categories that are in a system itself in order to become law remain alive in a community environment and at the same time unite the community itself to remain in the system. The existence of structures and categories proves the existence of a patterned unit.

Stufenbau theory from Hans Kelsen can be used to justify this by assuming that there is a Grundnorm that is at the top of the levels or categories that are below it. Grundnorm is like the fuel that drives the entire system, and consequently binds and complements each other. Based on the theory of Stufenbau Hans Kelsen, the higher the position in the

[3] . Sunaryati Hartono, *Politik Hukum Menuju Sistem Hukum Nasional*, Alumni Bandung, 1991, halaman 61

[4] . Istilah system pada mulanya hanya dipakai di kalangan ahli manajemen. Lihat William A. Shrode dan Dan Voich, Jr. *Organization and Management: Basic Systems Concepts*, Malaysia: Irwin Book Co., 1974, halaman. 155.

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Stufenbau theory from Hans Kelsen can be used to justify this by assuming that there is a Grundnorm that is at the top of the levels or categories that are below it. Grundnorm is like the fuel that drives the entire system, and consequently binds and complements each other. Based on the theory of Stufenbau Hans Kelsen, the higher the position in the normative order, the richer the moral content or general principles, and the lower the position, the more concrete and thin the moral content.[5], explained, the political subsystem has a greater concentration of energy than the legal subsystem. This results in when the law deals with politics, then it is in a weaker position. The political subsystem has a higher level of determination than the legal subsystem, because law is the result or crystallization of interacting and competing political wills.

From this basic assumption, the writer wants to say that the law should not be taken for granted without considering the non-legal background which is then very determinant in influencing the form and content of a particular legal product.

If you look at the legal process, it turns out that Indonesia does not yet have a representative national legal system. A lot of tug-of-war and patchwork of idealized legal

[5] . Satjipto Rahardjo, *Pemanfaatan Ilmu-Ilmu Sosial Bagi Pengembangan Ilmu Hukum*, Genta Publising, Yogyakarta, cetekan ke-III, 2009, halaman 156.

substance have been done, however, the format of law with a national structure in Indonesia is still being sought and discussed.

Considering that legal development involves responding to various specific problems, including reconstructing and re-functioning law and legal institutions so that they can meet the needs of not only the government but also the community. ensure the legal system can run well. The area of legal system development must also be drawn as wide as possible not only on State law but also non-State law to provide the widest possible alternative to the pluralistic Indonesian society to obtain substantive justice.

Characteristics of Democracy and Indonesian Law: A Not Easy Choice

Afan Gaffar as stated by Arief Hidayat, Democracy contains two dimensions of understanding. The first is "normative democracy" or what a country should ideally do, which is usually translated into the constitution of each country. And the second is "empirical democracy" or what actually happens in the political life of a country or democracy in its embodiment in practical political life or procedural democracy. What is clear is that the people in power in a democracy are the people or demos, both at the agenda setting stage, namely the stage to choose what issues will be discussed and decided, as well as at the stage of determining the outcome or decision making.

There are four indicators to determine whether a government system is democratic or not, namely: accountability, rotation of power, open political recruitment, general elections, and enjoying basic rights.[6].

There are five essential characteristics of a democratic state, namely the rule of law, a government under real control of the people, free elections, the principle of majority and the guarantee of democratic rights. In more detail, Mariam Budiardjo, argues that democracy includes concepts such as accountability, competition, participation and protection of human rights. Considering that basically democracy does not only include a general election mechanism to achieve/maintain power (as Schumpeter said), but also elections are actually held to respect civil liberties.[7]

Considering that every nation and state is unique because both are embedded in certain habitats, both physical and social (peculiar form of social life), it is understandable that although the understanding of democracy is universal, in its implementation there is the possibility of adapting to or being influenced by values. local value. This is what causes differences in the implementation of democracy in each country. Likewise, the Indonesian nation and state have a distinctive political culture in practicing a democratic

[6] . Arief Hidayat, ***Bernegara Itu Tidak Mudah: Dalam Perspektif Hukum dan Politik***, Pidato Pengukuhan Jabatan Guru Besar, Universitas Diponegoro Semarang, halaman 21
[7] Saafruddin Bahar, HAM dan Demokrasi, Komans HAM, Jakarta, 1997, halaman 341

system of government, so that democracy in Indonesia is a democracy that is divine, civilized democracy which should be better than democracy practiced in other countries.

Democracy is a value system and political system that has been tested and recognized as the most realistic and rational for realizing a just, egalitarian and humane social, economic and political order. Democracy is so tested and undeniable that many authoritarian and totalitarian rulers refer to the system they have built as power and a democratic system. By authoritarian rulers, democracy is often manipulated only in procedural-formal practice, but substantively democracy is not visible.

Democracy has an important meaning for the people who use it, because with democracy the people's right to determine the course of the state organization can be guaranteed. Therefore, almost all the meanings given to the term democracy always give an important position to the people, although operationally the implications in various countries are not always the same and are configurative depending on political power.

Referring to John Henry Merryman, Abdul Hakim Garuda Nusantara suggested three kinds of legal traditions which were then linked to the national legal development strategy[8]. In the contemporary world, according to him, there are three main types of legal traditions, namely the continental legal tradition (civil law), the customary law tradition (common law), and the socialist law tradition.

Related to law as a political product, the political process in a society has two kinds of legal development strategies which ultimately have implications for legal products, namely orthodox legal development strategies, the role of state institutions (government and parliament) is very dominant and monopolistic in determining the direction of legal development. On the other hand, the responsive legal development strategy that has a major role is the judiciary and the broad participation of social groups or individuals in society.

The consequences of the two strategies produce a different legal product. In the first strategy, namely the law produced is positivist-instrumentalist, namely the law that functions as a powerful tool for the implementation of state ideology and programs. Things like this are a real embodiment of the socio-political vision of the parties holding state power. The continental legal tradition (civil law) and the socialist legal tradition (socialist law) adhere to this model of legal development strategy.

Meanwhile, a responsive legal development strategy will produce laws that are responsive and accommodating to the demands of various social groups and individuals

[8] Abdul Hakim Garuda Nusantara, Politik Hukum Indonesia, YLBHI, Jakarta, Halaman 26

in their society. This model of legal development strategy is widely adopted in countries with a common law legal tradition.

History shows that most of the implementation of these legal development strategy models is the result of a political process. This means, the implementation of the strategy is highly dependent on the results of political interaction among the social groups in it.

Our choice of law is not a dichotomy between Rechtsstaat and the Rule of Law (RoL), but a cumulative conception, so that there is no uncertainty in the law. The combination of these two conceptions is appropriate for Indonesia, which has a very diverse society. Mahfud MD borrowed the prismatic term from Fred W. Riggs, referring to the term prismatic law, namely a way of ruling that does not take one of them, absolutely categorically, but takes good elements from different concepts.[9]

Furthermore, in the relationship between law and society, the two are like two sides of a coin, ubi societas ibi ius (where there is society there is law), the two cannot be separated. Laws that are not known and are not in accordance with their social context and there is no effective communication about their demands and reforms for citizens will not work effectively. In relation to development, there are 4 (four) legal functions in development, namely: (1) Law as a keeper of order and security; (2) Law as a means of development; (3) Law as a means of upholding justice and; (4) Law as a means of public education[10].

Legal Drafts That Make the People Happy: Armed with Progressive Law.

Considering legal politics which also talks about "determining which law will be enforced", According to Satjipto Rahardjo, there are several basic statements that appear in legal politics, namely: (1) what goals are to be achieved with the existing legal system; (2) what methods and which are considered the best to be used to achieve these goals; (3) when the law needs to be changed and in what ways it should be done; and (4) can be formulated a standard and established pattern, which can help us decide the process of selecting goals and ways to achieve these goals properly.[11]

There is a close relationship between politics and law, especially at the level of goals. Both of them, with their respective specifications, have the aim of creating certain social conditions, which are expected to be in accordance with what the community aspires to. The development of a national legal system must contain Pancasila values with a family spirit and do not prioritize individual interests. There are at least four guiding principles

[9] . Moh. Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu*, Jakarta: PT.RajaGrafindo Persada, 2009, halaman 96-97.
[10] . Sunaryati Hartono, *Politik Hukum: Problematika Pembangunan Hukum Nasional*, Grarsindo, Jakarta, 1999, halaman 165.
[11] . Satjipto Rahardjo, *Ibid.*, hlm. 352-353.

in making state policy as a legal policy, namely: (1) Maintaining the integration or integrity of the nation and state both ideologically and territorially; (2) Based on efforts to build the principle of democracy (people's sovereignty) and the principle of nomocracy (state of law) at the same time, as an inseparable unit; (3) Based on efforts to build general welfare and social justice for all Indonesian people; (4) Based on the principle of a civilized theocracy[12]

Furthermore, in relation to the rule of law that makes the people happy, Satjipto Rahardjo[13] asserted: The rule of law that makes the people happy also tends to become a progressive legal state, seen from the initiatives that always come from the state.

To realize such a state, the state will always actively take the initiative to act. It is not the people who have to "beg" to be served by the state, but it is the state that actively comes to the people. The Indonesian state of law has the burden and moral commitment to actively "go to the field" (formative action) to create happiness for the people of Indonesia.

Running an Indonesian legal state is carrying out state activities that have a conscience, so that every actor in a state office is required to find out what the conscience of the state is attached to the tasks and work they carry out. Caring is the essence of work that animates the implementation of the work, namely passion, empathy, dedication, commitment, honesty and courage. The results of work are not only measured in terms of quantity, but also quality, because they are based on a "moral description". With these guidelines and spirit, the Indonesian legal state will truly become Indonesia. .

The orientation of legal development must shift towards the basic idea of progressive law[14], which is based on the basic assumption that law is for humans and not vice versa, law is not an absolute and final institution, but as a moral and conscientious institution. Separating law from humanity comes at a price, the human factor in law has been neglected for too long to give more space to law.

Progressive law departs from a maxim that law is an institution that aims to deliver humans to a just, prosperous life and make humans happy. Therefore, the law is not the goal of humans, but the law is only a tool, accepted as an absolute and final institution, but is largely determined by its ability to serve humans. In such a context, the law is always in the process of becoming (law as a process, law in the making) whose quality of perfection can

[12] Arief Hidayat, Op cit, halaman 43

[13] Satjipto Rahardjo, Negara Hukum Yang Membahagiakan Rakyatnya, Genta Publising Yogyakarta, 2009, halaman: 107

[14] The idea of progressive law was initiated by Prof. Satjipto Rahardjo, some of his works can be traced, such as: (1) Teaching Order Finding Disorder: (2) Progressive Law (Exploring an Idea), (3) Legal Studies: Search, Liberation and Enlightenment.

be verified into factors of justice, welfare, concern for the people. When the positive law paradigm rests on legislation, progressive law emphasizes more on behavioral factors. The idea of progressive law is to place law as an institution that aims to deliver humans to a just, prosperous life, and make humans happy or can be called pro-people and pro-justice law..

Conclusion

Indonesia has Pancasila and the 1945 Constitution of the Republic of Indonesia which are the basis for the formation of a national legal system, so that the laws resulting from the political process do not only contain mere political interests, but must be in accordance with the law as a tool to achieve the goals of the Indonesian state. Therefore, the orientation of legal development must be based on the basic assumption that law is for humans and not the other way around, law is not an absolute and final institution, but rather as a moral and conscientious institution, in order to create happiness for the people..

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