Internalization of Constitutional Culture in the Formation of Fair Legislation in Indonesia

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Abstract- In the formation of legislation in Indonesia, the practices that have been carried out by the predecessors in implementing the Basic Law (The 1945 Constitution of The Republic of Indonesia) are often ignored by the later legislators. These practices are related to the constitutional culture. Meanwhile, constitutional culture is crucial and needs to be considered in every formation of legislation to provide justice for all levels of society. This study aims to determine the effect of internalization of constitutional culture on the formation of legislation by applying socio-legal research and using the statute approach, conceptual approach, historical approach, and sociological approach. The results of this study indicate that the internalization of constitutional culture in every political interaction especially in the formation of laws and regulations will direct each formulation of articles of the laws and regulations and bring them back to the goals of the State as stated in the fourth paragraph of the preamble of the Constitution, namely: ".....Protecting the entire Indonesian nation and the entire homeland of Indonesia, advancing public welfare, educating the nation's life, implementing world order based on independence, eternal peace, and social justice."

Index Terms- Internalization, Constitutional Culture, Formation of Fair Legislation

I. Introduction

According to Satjipto Rahardjo, the practices of the predecessor in implementing the Basic Constitution (The 1945 Constitution) have been ignored by the later legislators. The succeeding representatives disregard the constitutional culture that had always been considered by the previous senior politicians. "If the spirit of the state administrators, government leaders are individualistic, the Constitution is certainly meaningless in practice". This statement is part of the explanation stated in the Constitution. This affirmation shows that it is evident to pay close attention to the practices exercised by earlier representatives related to the cultural aspects of the constitution.[1] Therefore, the lack of attention of the later legislators to the relevant constitutional culture or cultural aspects in the formation of laws needs serious attention.

The amendments of the 1945 Constitution have emphasized the principle of the rule of law (rechtsstaat) which originally only existed in the explanation of the 1945 Constitution, became part of the body of the 1945 Constitution. This is stated in Article 1 paragraph (3) of the 1945 Constitution which reads "The State of Indonesia is a State Law".[2] The State Law means that law is placed as independent power; it must respect human rights and every government action and policy must be based on legal provisions (due process of law).

One of the government's actions and policies that have a lot of influence on people's lives is the formation of laws and regulations. Lawrence M. Friedman said that the components of the legal system include 3 things, namely:[3] 1) the structure; 2) the substance; and 3) the legal culture (legal culture). Those three components must go hand in hand, the structure must be strong, credible, accountable, and capable. The substance of the legal system must be in harmony with the community's sense of justice while the legal culture must support the enforcement of the law. If one of them is lame, the law can't be enforced.

Thus, it is reasonable to pay attention to the culture of the constitution in every formation of legislation in order to provide justice for the whole society.

II. Research Methods

This research is directed to be socio-legal research. Socio-legal research represents an interface with a context within which law exists. That is why when a socio-legal studies researcher uses social theory for analytical purposes; they are not aiming to pay attention to sociology or other social sciences, rather to the law and legal studies.[4]

Likewise, Bernard Arief Sidharta revealed that the development of legal knowledge always involves two aspects, namely the rule of law and facts (social reality). In the process of carrying out these two aspects, they interact with each other and they must be interlinked.[5]

Hamid S Attamimi stated that legal science has never been a purely normative science and has never been a purely social science because the law can come from both sollen-sein and sein-sollen. In principle, the law always contains aspects of ideals and

[1] Satjipto Rahardjo, 2006, *Membedah Hukum Progresif*, PT. Kompas Media Nusantara, Jakarta, p. 5.

[2] Indonesia, 1945 Constitution, Ps.1 Paragraph (3)

[3] Lawrence M. Friedman, The Legal System: A Social Science Perspective (New York: Russel Sage Foundation, 1975), p. 12-19

[4] Sulistyiowati Irianto, Meretas Jalan Keadilan Bagi Kaum Terpinggirkan dan Perempuan (Suatu Tinjauna Sicio-Legal). Pidato Pengukuhan Guru Besar Tetap dalm Ilmu Antropologi Hukum pada Fakultas Hukum Universitas Indonesia, 22 April 2019, p. 33.

[5] Bernard Arief Sidharta, Refleksi Tentang Struktur Ilmu Hukum, Bandung, Mandar Maju, 2000, p. 193.

reality, or in other words, the law contains normative and empirical aspects.[6]

In this research, several approach methods are used to the problem, namely: statute approach, conceptual approach, historical approach, and sociological approach. The data were collected utilizing a literature study of legal materials, both primary and secondary and also tertiary legal materials. The search for legal materials was carried out by collecting, reading, taking an inventory of the literature related to the problem to be studied, conducting interviews with legal experts, and reviewing the legislation that is the subject of this research problem and discussion.

The legal materials collected in this study were arranged systematically and logically, then analyzed qualitatively, then deductive conclusions were drawn through legal interpretation as the final result in writing this research.

III. DISCUSSION

Constitutional culture or more widely known as legal culture, according to Esmi Warasih, is related to the attitudes, views, and values of the community.[7] In his view, law enforcement is not something that stands alone, but it is interrelated with other social problems of society. This means that law is not only a value system but also law as a sub-system of a larger social system, namely the society where the law is enforced. Legal culture is one of the components that will determine whether the legal substance and procedural order are accepted by the community where the law is applied or enforced.

Meuwissen in his book "Vijf Stellingen over Rechtsfilosofie" (Five Theorems on Philosophy of Law) explains that law enforcement is defined as a human activity concerning the existence and enforcement of law in society. These activities include activities to form, implement, apply, discover, research, and systematically study and teach law. Legal enforcement can be divided into practical law enforcement and theoretical law enforcement.[8]

Meuwissen explained that what is meant by practical law enforcement are activities related to realizing the law in the concrete reality of everyday life. Practical law bearers include law formation activities, legal discovery, and legal assistance. While the development of theoretical law is an activity of the mind to gain intellectual mastery over the law or an understanding of the law scientifically, namely in a methodical-systematic-logical-rational way, argued and organized.[9]

The legal position which uses systematic, logical, and rational methods show that modern law is formed by itself and cannot be separated from the development of society including law formation activities which are efforts to create new laws in a general sense. The formation of law is generally related to the formulation of general rules, which can be in the form of additions or changes to existing rules. In addition, the formation of law can also arise from concrete decisions (precedence law or jurisprudence). It can also occur concerning concrete actions: with an action that occurs only once (einmalig) carried out by the competent authorities or central organs based on the constitution, for example.

The formation of the law referred to is not customary law, but rather a kind of precedent law that is not a judge's decision (niet rechterlijkeprecedentenrecht). Sidharta gave a concrete example, namely the action of President Soekarno in 1945 who appointed Sutan Sjahrir as Prime Minister who was responsible for the Central Indonesian National Committee (who was in charge of carrying out the functions of the House of Representatives), and with this action, he changed the presidential government system into a parliamentary government system without changing the constitution (UUD 1945).[10]

Nevertheless, it cannot be denied that legislation is the most important and also the most modern type of law formation. In it, an abstract attitude model is created, which in the future is expected to be used to solve concrete social problems. In applying it to concrete events, the generality of the law is realized into reality.[11]

In legislation, two central moments (principal elements) can be distinguished. The first is the political-ideal moment. With that, aspirations are included in the contents of the law. This relates to articulating or processing political goals (by politicians, state officials, jurists, etc.) so that certain political solutions are possible. Thus, creating legislation is a political act; legislation is the goal and result of political processes.[12]

As a political process, the formation of laws cannot be separated from political influence and interaction. So it is necessary to internalize the constitutional culture that comes from Pancasila (five basic principles) which is the source of all sources of state law in Indonesia. Based on the hierarchical theory of legal norms put forward by Hans Kelsen or known as the Stufenbau theory, a theory regarding the validity of legal norms, where the existence of lower norms is determined by higher norms, thus concrete norms apply based on abstract norms, while abstract norms apply based on the grundnorm or basic norms. Grundnorm is not capricious by nature. One of the figures who developed this theory was a student of Hans Kelsen, namely Hans Nawiasky. Nawiaky's theory is called theorie von stufenufbau der rechtsordnung. The arrangement of norms according to the theory is:[13]

1. Fundamental norms of the state (Staatsfundamentalnorm);
2. Basic state rules (staatsgrundgesetz);
3. Formal legislation (formell gesetz); and
4. Implementing regulations and autonomous regulations (verordnung en autonome satzung)

According to Nawiasky, the highest norm which Kelsen calls the basic norm (basic norm) in a country should not be referred to as staatsgrundnorm but Staatsfundamentalnorm, or the

[6] A. Hamid S Attamimi (1992) Pidato Pengukuhan Guru Besar. Universitas Indonesia, Jakarta,p. 18.

[7] Esmi Warassih,. 2010. Pranata Hukum, Sebuah Telaah Sosiologis, Badan Penerbit Universitas Diponegoro, Semarang,p. 83.

[8] Bernard Arief Sidharta, 2007, Meuwissen Tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum, PT. Refika Aditama, Bandung,p. viii.

[9] *Ibid*.

[10] *Ibid*. p. 9-10

[11] *Ibid.*

[12] *Ibid.*

[13] A. Hamid S. Attamimi, Op. Cit., p., 287.

state's fundamental norm. Based on the Nawiaky theory, A. Hamid S. Attamimi -compare it with Kelsen's theory and apply it to the structure of the legal system in Indonesia. Attamimi shows the hierarchical structure of the Indonesian legal system using Nawiasky's theory. Based on this theory, the structure of the Indonesian legal system is:[14]

1. Staatsfundamentalnorm: Pancasila (Preamble to the 1945 Constitution).
2. Staatsgrundgesetz: Body of the 1945 Constitution, Decree of the MPR, and the Constitutional Convention.
3. Formell Gesetz: Constitution.
4. Verordnung en Autonome Satzung: Hierarchically starting from Government Regulations to Regent or Mayor Decrees.

Withinternalization of constitutional culture in every political interaction in the formation of laws and regulations, then the formulations of articles in the formation of laws and regulations can be returned to the purpose of the state as stated in the 4th paragraph of the preamble to the Constitution, namely: "……Protecting the entire Indonesian nation and the entire homeland of Indonesia, promote public welfare, educate the nation's life, carry out world order based on independence, eternal peace, and social justice."

Internalization of constitutional culture is the process of enforcing the rule of law in the formation of laws and regulations. Every statutory regulation that is formed must reflect the objectives of the state as stated in the 4th paragraph of the preamble to the Constitution. The legislators must have constitutional awareness, namely understanding the intent of the constitution which will then be elaborated on in various laws and regulations.

Lon L. Fuller in his book Philosophy of Law published by Wadsworth/Thomson Learning, USA, in one of his writings entitled "Eight Ways to Fail to Make Law" captures the essence of the rule of law in the eight principles of legality or on the other hand, states that failure to create a rule of law can lead to caused by eight factors namely;[15] (i) there are no rules or laws that give rise to uncertainty; (ii) failure to publish or introduce the rule of law to the public; (iii) inappropriately applied retroactive rules. (iv) failure to create comprehensive laws, (v) establishment of rules that contradict each other; (vi) establishment of rules that include conditions that are impossible to fulfill; (vii) changes in rules quickly so creating ambiguity; (viii) there is a discontinuity between the rules and their implementation.

According to Fuller, the law is "an attempt to subject human attitude to the rule of law".[16] When lawmakers respect the eight principles of the rule of law, their laws can influence people's practical reasoning. Communities may consider legal requirements and prohibitions when negotiating how to act. When the rule of law is realized, people's hopes for harmony and justice will not be disappointed. So with such hope, the community will also obey the law, the hope for a law that is harmonious and just will give the community a reason to act following the rule of law or refrain from acting against the law.

IV. CONCLUSION

As a political process, the formation of laws cannot be separated from political influence and interaction. So it is necessary to internalize the constitutional culture that comes from Pancasila (five basic principles) which is the source of all sources of state law in Indonesia. With internalization of constitutional culture in every political interaction in the formation of laws and regulations, then the formulations of articles in the formation of laws and regulations can be brought back to the purpose of the state as stated in the 4th paragraph of the preamble to the Constitution, namely: "……Protecting the entire Indonesian nation and the entire homeland of Indonesia, promote public welfare, educate the nation's life, carry out world order based on independence, eternal peace, and social justice."

The formation of statutory regulations is an attempt to subject human attitude to the governance of rules. Legislation that is formed carefully and by what is expected by the community, namely regulations that are in harmony, based on procedures, and social justice will have a social impact in the form of an obedient attitude of the society towards the law.

REFERENCES

Attamimi A. Hamid S. (1992). Pidato Pengukuhan Guru Besar. Universitas Indonesia. Jakarta.

Feinberg, Joel dan Jules Coleman. 2004.Philosophy of Law, Seven Edition, Wadsworth/Thomson Learning. Belmont, USA.

Friedman, Lawrence M. The Legal System, New York: Rusell Sage Foundation, 1975. Diterjemahkan oleh M. Khozim. 2013. Sistem Hukum: Perspektif Ilmu sosial. Bandung: Nusa Media.

Irianto, Sulistyiowati. Meretas Jalan Keadilan Bagi Kaum Terpinggirkan dan Perempuan (Suatu Tinjauna Sicio-Legal). Pidato Pengukuhan Guru Besar Tetap dalm Ilmu Antropologi Hukum pada Fakultas Hukum Universitas Indonesia. 22 April 2019.

Murphy, Colleen. 2005.Lon Fuller And The Moral Value Of The Rule Of Law. Department of Philosophy University of North Carolina at Chapel Hill.

Rahardjo, Satjipto. 2006.Membedah Hukum Progresif. PT. Kompas Media Nusantara. Jakarta.

Sidharta, Bernard Arief. 2000. Refleksi Tentang Struktur Ilmu Hukum. Bandung. Mandar Maju.

_____. 2007. Meuwissen Tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum. PT. Refika Aditama. Bandung.

Warassih, Esmi. 2010. Pranata Hukum, Sebuah Telaah Sosiologis. Badan Penerbit Universitas Diponegoro. Semarang.

[14] *Ibid*., p. 359.

[15] Joel Feinberg and Jules Coleman, 2004, *Philosophy of Law*, Seven Edition, Wadsworth/Thomson Learning, Belmont, USA, p. 20-24.

[16] Colleen Murphy, 2005, *Lon Fuller and The Moral Value of The Rule of Law*, Department of Philosophy University of North Carolina at Chapel Hill, p. 240-241.

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