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The Implementation of Friedman's Theory in the Context of the Legal System in Indonesia

[1]Febrian, *[2]Nurhidayatuloh, [3]Mada Apriandi Zuhir, [4]Annalisa Y

Abstract--- *Discussion of the legal system is a complex matter. It is because analyzing the legal system which is applied in a country is not enough just to look at it only from the surface where this is often stated by Indonesian legal scientists who only analyze the legal system only as a form and legal rules without looking at the background of these rules and their relation to society. Therefore, in this paper, it will be discussed comprehensively what and how the legal system in Indonesia runs especially after the reform which happened in 1998. Surely, this is by looking at the context and its implementation using the viewpoint of Lawrence M. Friedman's Theory. The reason for using this theory is because this theory looks at the legal system with a very comprehensive perspective, especially in the context of the legal system in Indonesia which has high complexity. The method used in this research is the normative legal method using Friedman's theory. The results of this study are that the legal system is interpreted as a process starting from what is done by legal institutions and how to implement it in the form of actual actions in a social system whose raw materials are from the community, process them and then produce an output that can be applied in society. Then there are three important points of view in examining the legal system in Indonesia, namely legal structure, legal culture, and legal substance that apply in this country.*

Keywords: *Indonesia; Legal Culture; Legal Structure; Legal Substance; Legal System.*

I Introduction

There are several established legal systems in which legal experts distinguish them in terms of their origin, history, and methods of application. One prominent classification carried out by Marc Ancel distinguishes these legal systems into five, namely: the systems of Continental Europe and Latin America, the Anglo-American System or common law system, the systems of the Middle East, Far East System, and the Socialist Countries System. (Ward & Ancel, 2001) Besides, there are also groupings conducted by Rene David into four systems, namely: the Romano-Germanic Family, the Common Law Family, The Family of socialist law, and conceptions of law and other social order (family law of religion and traditional law) (Farikhah, 2018). The grouping by the two legal scientists mainly became a reference by legal experts afterward, including legal experts in Indonesia.

When researching what is meant by the legal system and how the legal system in the Indonesian context works, there will be many definitions by both first-generation legal scientists and second-generation Indonesian legal experts. The term generation is embedded by Jimly Asshiddiqie, a law professor in Indonesia, who classifies groups of legal scholars receiving their legal education before independence until the beginning of

[1] *Faculty of Law, Universitas Sriwijaya, Palembang 30139, Indonesia*
[2] *Faculty of Law, Universitas Sriwijaya, Palembang 30139, Indonesia*
[3] *Faculty of Law, Universitas Sriwijaya, Palembang 30139, Indonesia*
[4] *Faculty of Law, Universitas Sriwijaya, Palembang 30139, Indonesia*

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independence, with legal scholars receiving their education after the first generation. The most striking difference is that this first-generation group was generally educated in the atmosphere of Continental European law, particularly Dutch law. On the other hand, the second-generation group obtained a wider and diverse source of information(Asshiddiqie, 1988) not only educated in the atmosphere of Continental European law. Some legal scientists of these generations include Soerjono Soekanto, Soetandyo Wignjosoebroto, and Jimly Asshiddiqie himself.

One opinion that arises about the scope of the legal system is Soerjono Soekanto's opinion in which he disagrees with the term sub-system, which is applied to the discipline of law. Soekanto further agrees that in the realm of legal science, the most appropriate designation is inter-subsystem law. Soekanto has the reason that it is because certain legal boundaries also govern other sub-systems in society. From this opinion, it can be concluded that the law is society, and society is the law. Law is a society from a certain point of view because law arises in society and regulates society to achieve peace(Soerjono Soekanto, 1987).

Slightly aside from Soekanto's view, Atmadja has a different opinion by saying that a legal system is an entire legal norm constituting an organized unity, and consists of several subsystems. Those subsystems are interrelated and influential, such as the sub-system law of state administration, state administrative law, criminal law, civil law, law, trade, economic law, international law, and so on(Atmadja, 1984). From the formulation of the legal system above, it can be understood that the legal system in Indonesia must always be based on grundnorm or in the Kelsen language "static" norm(Eekelaar, 1967) or basic norms(Harris, 1971). In the context of Grundnorm in Indonesia, namely Pancasila, the 1945 Constitution, and general principles of law(Atmadja, 1984).

In contrast to the two opinions above, a veteran US scientist, Lawrence M. Friedman, defines "legal systems are a part of political, social, and economic development" (Friedman, 1969). In this case, Friedman put the law as an object that cannot be separated from political, social, and economic development. It means that the legal system is not independent, but there is a mutually influential relationship with other contexts, and the most obvious is the social, political, and economic context.

It seems that Jimly's tendency is more inclined to agree with Friedman's opinion even though some additions need to be adjusted to the Indonesian context. Jimly further emphasized the inevitability that the legal system in Indonesia cannot be separated from the development of the legal culture that is happening in this country. Values, principles, and ideals become inseparable elements of Indonesian society when discussing legal culture. However, Indonesia must find the 'rhythm' or 'pattern' of the development of the legal culture in its own historical experience rather than draw on or be influenced by other people's cultures whose values are culturally different. Although there is a separate note that emphasizes the legal culture in Indonesia, Jimly also does not deny that the effects of international relations also need to be an essential concern in shaping the legal character of this nation(Asshiddiqie, 1988).

Therefore, departing from these legal scientists' points of view in understanding the legal system in Indonesia, in this paper, the parameters of the legal system will be used in the outline, which has been stated by Lawrence M. Friedman. It is because Indonesian law scientists, in general, have opinions that strengthen Friedman's opinion, that in the legal system there are three crucial elements, namely: structure, substance, and

legal culture. From Friedman's point of view, the writer tries to give a clearer picture and analyze these three aspects in the context of the Indonesian legal system.

II Literature Review

There are several writings which have specifically discussed the problems of the legal system in Indonesia. Wirataman's article which concerns about good governance in overcoming the weaknesses of the legal system in Indonesia. He concluded that good governance can also have a negative side in the legal system in Indonesia such as legislation products that favor the free market and weaken human rights guarantees(Wiratraman, 2013). He further assumes that although the conclusions of his research are not popular and tend to be contrary to the concept that is becoming an idol, this research can add to the alert for policymakers to always be careful in formulating future legal policies. Then Taufiq et al. also touched on the issue of legal culture and legal substance in Indonesia where he assumed that the local wisdom possessed by Indonesia varied so that it could cause uncertainty in the legal system. Therefore he offers a dispute resolution system in Indonesia by absorbing local wisdom that lives in the community as a source of law that has been applicable in the realm of implementation (Taufiq, Sarsiti, & Widyaningsih, 2016).

Another noteworthy work that discusses the legal system is the article of Hamdan Zulva, former Chairman of the Constitutional Court of the Republic of Indonesia, in which he stated that so far the development of law in Indonesia after the reform has not yet found its ideal form. Although in practice Indonesia has experienced development, the ideals of law cannot be simply measured through the large number of legal products(Indrastuti, Jaelani, & Nurhidayatuloh, 2019) made by the legislature as well as the formation and revitalization of new legal institutions. He added that the way to measure the success of the law in a country is in terms of implementing law enforcement which can create justice for all people. Therefore, the main focus that should be done to achieve good law is to reform the judiciary institution and the implementation of law enforcement that can provide justice for the entire community(Zoelva, 2015).

From some of the scientific works mentioned above, it can be concluded that the writing about the legal system in Indonesia has indeed been done several times by several Indonesian legal scientists and even some former judges of the Indonesian Constitutional Court have also written several scientific papers on the legal system in Indonesia. However, the focus of this article is different from some of the existing works in which this scientific workplace more emphasis on a more comprehensive lens on the legal system in Indonesia, namely by not looking at one legal perspective only, but this paper looks at once from legal culture, a legal substance, and legal structure.

III Methodology/Materials

This research uses normative (Soejono Soekanto, 2013) or doctrinal (Bambang Sunggono, 1997) legal method. This method aims to examine certain development in the Indonesian legal system primarily in the context of legal development in Indonesia following the amendment of the 1945 Constitution. Besides, Friedman’s theory is also used as a viewpoint related to legal structure, a legal substance, and legal culture to

view Indonesia's context. Both primary and secondary legal material sources related to the agreement will be analyzed with the descriptive-qualitative data analysis.

IV Results and Findings

4.1 Legal Structure

What is the legal structure? Friedman, in this matter, has explained further what is meant by the legal structure. In detail, there are three elements of legal structure, namely institutions, forms, and processes. The manifestation of the three elements includes, but not limited to, the number and types of courts, the presence or absence of the constitution, federalism or pluralism, the distribution of powers of judges, legislators, governors, kings, state apparatus(Friedman, 1969).

What about the Indonesian context? The legal structure in this context includes the institutional aspect, which is related to the process of institutionalizing legal functions and the mechanism of relations between institutions and between legal functions. In a broad sense, the process of institutionalizing this legal function includes law-making, implementation, and law enforcement(Asshiddiqie, 2012).

The first is concerning the formation of law-making institutions. Law-making institutions or rule-making bodies in the Indonesian context can be distinguished through the legal products they form. According to Law Number 12 of 2011 concerning the Formation of Legislation, it is stated that the hierarchy of regulations is the 1945 Constitution, Decree of the People's Consultative Assembly, Law or Government Regulation instead of Law, Government Regulations, Presidential Decree, Provincial Regulations, and the Regency or City Regulations. In the context of the legislative hierarchy, it has implications for the regulatory body. The institution which has the function to form or amend the 1945 Constitution is the People's Consultative Assembly (MPR). Under the 1945 Constitution, institutions having functioned as legislative or quasi-legislative bodies are the Republic of Indonesia House of Representatives, Provincial House of Representatives, Regency or City House of Representatives, and the Village Consultative Body. These institutions have product laws, provincial regulations, district or city regulations, and village regulations in sequence. Basically, in Law Number 12 of 2011, there is never any discussion about village regulations. However, with the enactment of Law Number 6 of 2014 concerning Villages, the provisions of the lowest statutory regulations are no longer Regency or City Regulations but Village Regulations made by the Village Consultative Body together with the Village Head. Then the executive body that has the authority to set independent regulations is the president, governors, regents, mayors, and village heads(Asshiddiqie, 2012).

Second is concerning agencies for performing law. In this category, it covers all types and types of positions in all domains of legislative, executive, and judiciary powers, where their function is the executor who carries out the applicable laws and regulations. These implementing institutions exist in each of those institutions, such as administrative matters or staff whose responsibility lies with the leader of the institution. All officials and staff are only puppets from scenarios already available, as provided for in the legislation(Asshiddiqie, 2012).

Third is law enforcement institutions. Law enforcement institutions in Indonesia are also divided based on their respective functions. Like the preliminary investigation and investigation functions that are institutionalized in many agencies, namely the police, the Corruption Eradication Commission (KPK), and the Civil Servant

Investigator (PPNS) found in approximately 52 agencies. The prosecution function is institutionalized within the Republic of Indonesia Prosecutor's Office and the KPK. The function of justice carried out by judicial bodies such as the Supreme Court and the Constitutional Court. The mediation function is organized by the mediators. The defense function is organized by advocates. Correctional functions are organized by the Correctional Institution(Asshiddiqie, 2012).

In practice, the role and function of the existing legal structure in Indonesia do not run well as expected. It is inseparable from the lack of legal, institutional independence, and intervention in the judicial power(Adegbite, Oduniyi, & Farinde, 2019), which violates the principles of impartiality in the justice system, which results in the degradation of the people's trust in these institutions. However, until now, there are still efforts to improve the legal system in Indonesia that can be seen in the national mid-term and long-term development programs. The programs include institutional strengthening in court institutions by increasing the professionalism of judges and judicial staff, simplifying the justice system, increasing transparency so that the judiciary can be accessible to the broader community(Fendri, 2011).

Besides, a more significant problem is the issue of judges' competence who still tend to be textualists. They are supposed to be positioned as people who are given the task of finding law in the sense that the judges implement the law on actual events(Mertokusumo, 1986) cannot carry it out maximally. It indicates that the legal system in Indonesia in the judicial context is still very strongly influenced by positivistic doctrine. However, the thing that needs to be taken into account is the role of judges who are expected to become a "legal renewal" that can translate and bridge the legal facts in court to the facts in society. So that what is intended here is contextual justice, not merely textual justice(Gofar, 2017).

4.2 Legal Culture

Legal culture is the values and behavior that bind the system together(Friedman, 1969). It can be in the form of ideas, values, behavior, and opinions of a person in a society related to law and the legal system. In this case, legal culture can be interpreted as a source of law that is a norm that forms legal norms where this norm has an impact on legal norms that exist in society. (Friedman, 1994) Then, what about the legal culture of the modern era today? Friedman stressed that the legal culture of the modern era is now cross-cultural. Because the modern world is now borderless where communication, ideas, fashion, ways of thinking, and ways of behaving are no longer looking at national borders, this also has implications for its legal culture. It is what in Friedman's language, the modern legal culture is cross-borders(Friedman, 1994). Therefore Friedman distinguishes legal culture into two categories, namely "internal legal culture" and "external legal culture," where the difference between the two is internal legal culture refers to the ideas and practices of legal professionals in a particular area. On the other hand, external legal culture places more emphasis on the opinions, interests, and influences brought by more full social groups into law(Nelken, 2004).

In-state practice, especially in Indonesia, the cultural dimension has a crucial role. It influences the other dimensions because, in this legal culture, there is a set of values that form the basis of policy formulation and law-making as a code of conduct in social life that reflects noble values Indonesian society that has lasted hundreds of years. The example is the principle of Bhinneka Tunggal Ika. It is the philosophy of Indonesian life in the form of togetherness values in differences. These life values become the ideal pattern of the local people of

Indonesia, where these ideas are reflected in the outlook on life, ideals, norms, and behavior of the Indonesian people(Sesse, 2013).

Then, it cannot be denied that the pattern of Indonesian legal culture is Pancasila. Therefore, the outlook on life, legal ideals, legal norms, behavior, and life goals of the Indonesian people are contained in Pancasila. To emphasize this approach, finally, a policy was taken to develop the law in which the cultural dimension became a legal development sub-system in Indonesia. Four things are crucial in the development of law in Indonesia. The first is the development of a legal culture that is directed to shape the attitudes and behavior of community members and state administrators under the values and norms of the Pancasila, so that awareness, obedience and legal compliance increase and human rights(Nurhidayatuloh et al., 2019) are increasingly respected and protected. The second is regarding the awareness to respect and protect human rights as a practice of the Pancasila and the 1945 Constitution. It is done with the enlightenment of human dignity and to advance the general welfare and enlighten the life of the nation. The third is focusing on the creation of peace, order, and the establishment of a just law to foster national discipline. Fourth is concerning the emphasis on legal awareness of the state administrators and also the community through education, counseling, socialization, role models(Sesse, 2013).

4.3 Legal Substance

Legal substance, according to Friedman, is the output of the legal system itself. This substance includes the content or material in the form of, but not limited to, rules, doctrines, laws, judges' decisions, and other similar provisions. In this case, the legal system intended by Atmadja as disclosed above that the legal system includes grundnorm basically by Friedman is classified into the legal substance. However, is the legal substance only limited to those rules?

In the matter of legal substance, this is not as simple as discussing the issue of what is the content and form of legislation in force in Indonesia. Furthermore, it needs to be traced within the background of Indonesian law. Until now, Indonesia has three major legal systems as the source of law, namely the Western legal system, which in this case is Dutch inheritance law, the Middle East Law System, which in this case is Islamic law, and the last is Adat law.

The enactment of these three legal systems is what Soetandyo refers to as legal transplants, namely national law that is enforced through the transplantation process to particular socially and culturally different societies. Therefore, the law cannot be quickly accepted by the wider community, and what happens as a result of the transplant process is legal gaps. Just like what happened in Indonesia where the Dutch colonizers applied their law in Indonesian territory, which was substantially unknown to the Indonesian people so that the legal gaps could eventually lead to chaos in the rule of law(Wignjosoebroto, 2012). In this case, borrowing the term Robert Seidman, an American professor, referred to as the law of the non-transferability law(Seidman & Seidman, 1996), i.e laws originating from a society formed based on different socio-cultural contexts will not be applied just like that to a group of people with other socio-cultural(Wignjosoebroto, 2012).

The legal gaps still occur after seventy-five years of Indonesian independence. Several Dutch laws are still in effect today, such as the Penal Code, Civil Code, and other rules that are inherited from the Netherlands. Not only with Dutch law, but legal gaps also occur between Islamic law and Adat law. They have been widely discussed by Dutch legal scholars such as Snouck Hurgronje, Cornelis van Vollenhoven with Receptie Theory up

to Indonesian law scholars such as Hazairin and Sayuti Thalib with Theory Receptie a Contrario.(Wahyudi, 2007) Some examples of significant problems that still become problems between Adat law, Islamic law, and Western law are the problems of inheritance, polygamy, and adultery. These problems arise because the law in force in Indonesia is not entirely derived from the values that live in Indonesian society.

Besides, the legal system in Indonesia indeed recognizes the principle of fiction of law, which means that everyone is considered to know the law. Nevertheless, do not forget, when examined in history, this principle turned out to originate from the teachings of ignoratio iuris, which means that no one can deny the enactment of the law imposed on him by the proposition that he is unaware of the existence of the law. This principle comes from a tradition where the rule of law is the result of the positivizing of traditions that have been known and practiced by the community. So even though the person has never read the rules, at least he can be sure to know the substance of the rules from the traditions prevailing in his environment(Wignjosoebroto, 2012). However, what if the law substance is not derived from traditions or norms existed, applied, and last for a long time in that society? Until now, this logic reason has been ignored, so even though legal transplants occur, the fiction of law still applies in Indonesia.

Indonesia has adopted a civil law system. This legal system is a Dutch inheritance where the main principle of this legal system is to promote the law in written form as outlined in the form of a law. Meanwhile, unwritten law is not recognized as law as well as regulations made other than by the state are also not referred to as law but only limited to the morale prevailing in the society. Nevertheless, in practice, does this apply? In this case, Jimly elaborated Friedman's legal substance into five forms of legal value documents.

First is the legal substance in the form of written and unwritten documents. This document includes the 1945 Constitution, laws, regulations under laws, international treaties(Nurhidayatuloh et al., 2020), general legal principles, written or unwritten Adat law in village regulations. Second is a document in the form of a court decision in the form of a final judgment or a quasi-judicial body's decision. The third is the official legal document outlined in the form of administrative decisions such as the State Administration Decree (KTUN). Fourth are legal documents in the form of policy rules, such as presidential instructions and circulars. Finally, there are legal documents in the form of work contracts or civil contracts made by the state concerning domestic and foreign corporations where the contract is legally binding(Asshiddiqie, 2012).

V Conclusion

From this explanation, it can be concluded that in a more modern sense, in reality, the legal system does not only cover the content of the law or its legal institutions. However, more than that, the legal system is the process of what legal institutions do and how they do it. The system is more interpreted as an actual act in a social system that takes its raw materials from the community, processes it further, and then produces an output that can be applied in society.

In discussing the legal system in Indonesia, three essential matters, which are the primary considerations, are the structure, culture, and legal substance. In terms of legal structure, some institutional aspects and functions must be considered, especially in terms of law-making bodies, implementing institutions, and enforcement institutions. Law-making bodies in Indonesia are dominated by legislative institutions such as the Republic of

Indonesia House of Representatives, Provincial House of Representatives, Regency/City House of Representatives, and Village Consultative Bodies. Nevertheless, not only to that extent, but the executive body also has a significant role in shaping legislation such as the president, governor, and regent or mayor. Aside from being a law-making body, the executive is also a law enforcement institution. Finally, there are law enforcement institutions. In Indonesia, law enforcement institutions are divided into functions such as the preliminary investigation and investigation by the police, the prosecution function by the prosecutor and the judicial function carried out by the Supreme Court and the Constitutional Court.

Second is legal culture. Broadly speaking, the legal culture in Indonesia is the values contained in Pancasila, so that the outlook on life, legal ideals, legal norms, behavior and life goals of the Indonesian people are contained in Pancasila. Then the last is the legal substance. The issue of legal substance needs to be read more comprehensively where the legal substance said by Friedman must also be harmonized with the Indonesian context. So, in this case, the legal substance in the Indonesian legal system includes not only written laws as stipulated in legislation but also includes unwritten laws such as Adat law.

With the outbreak of Indonesia's reforms in 1998, there were immediately significant changes to the legal system in Indonesia. This can be seen clearly from changes in the Indonesian constitution where significant changes are in the legal structure and legal substance that has followed the development of a more democratic era. This can be seen from the amendments to the 1945 constitution that better accommodate global values such as the addition of more complete human rights material and harmonized with internationally accepted human rights principles. Besides, in terms of the legal structure, there are several additional legal institutions which initially provided a loophole in the legal vacuum such as the birth of a judicial commission, the corruption eradication commission, the ombudsman, and most importantly, the birth of the constitutional court as the only judicial institution given the authority to interpret the 1945 Constitution and resolving legal disputes up to the issue of impeachment of the head of the State for the sake of impartial justice.

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