THE ACCOMMODATION OF SOCIAL AND CULTURAL FORCES IN THE DECISION-MAKING PROCESS BY JUDGES IN INDONESIA

Ade Saptomo
Faculty of Law, Universitas Pancasila, Jakarta, Indonesia
Email: adesaptomo@univpancaila.ac.id

Abstract

This paper aims to explain the accommodation of social and cultural forces in the legal verdict-making process by judges in Indonesia. A good legal verdict is a legal decision resulting from structural interactions between the arguments of attorneys, lawyers, advocates, witnesses, expert testimonies, and other parties regulated in certain Acts related to the legal cases filed in the court. However, the good process of social interaction requires the accommodation of social forces (social value) and cultural forces (cultural value) of the community where the case occurs. Lately, the response has developed in the midst of a society where the legal verdict by judges in Indonesia does not reflect justice. Justice in society can only be fulfilled in the legal verdict-making process. The question to be asked is whether or not the judge discovers the legal values implemented in society. Discovering the legal values that live in such a society in accordance with legal and normative theories is also regulated in Article 5, paragraph 1 of Judicial Power Act No. 48/2004.

Keywords: Social and cultural forces, Judges, Court decisions, Indonesia

Abstrak

Tulisan ini bertujuan untuk menjelaskan akomodasi kekuatan sosial dan budaya dalam proses pengambilan keputusan hukum oleh hakim di Indonesia. Putusan hukum yang baik adalah putusan hukum yang dihasilkan dari interaksi struktural antara dalil-dalil para kuasa hukum, advokat, advokat, saksi, keterangan ahli, dan pihak-pihak lain yang diatur dalam undang-undang tertentu yang berkaitan dengan perkara hukum yang diajukan di pengadilan. Akan tetapi, proses interaksi sosial yang baik memerlukan akomodasi kekuatan sosial (*social value*) dan kekuatan budaya (*cultural value*) masyarakat di mana kasus tersebut terjadi. Belakangan ini, respon berkembang di tengah masyarakat dimana putusan hukum oleh hakim di Indonesia tidak mencerminkan keadilan. Keadilan dalam masyarakat hanya dapat dipenuhi dalam proses pengambilan keputusan hukum. Pertanyaan yang harus diajukan adalah apakah hakim menemukan atau tidak nilai-nilai hukum yang berlaku dalam masyarakat. Menemukan nilai-nilai hukum yang hidup dalam masyarakat tersebut sesuai dengan teori-teori hukum dan normatif juga diatur dalam Pasal 5 ayat 1 UU Kekuasaan Kehakiman No. 48 Tahun 2004.

Kata kunci: Kekuatan sosial dan budaya, Hakim, Keputusan pengadilan, Indonesia

A. Introduction

In an effort to understand deeply what the social forces and cultural forces are, we need to first understand what the legal culture is. In legal and cultural discussions, there are at least three related keywords, namely culture, law, and legal culture. The first word, we must differentiate culture. At least, the term 'culture' has divided into two main views. Among them, there is a group distinguishing between culture and culture. For example, Djojodigoeno MM (1958) in his book *Principles of Sociology*, and a group that explores the word culture as a development of compound words *budhi-daya* which means the power of budhi, for example PJ Zoetmulder (1951) in his book *Cultuur, Oost en West* as quoted by Koentjaraningrat (1986).

The reason, word culture comes from the Sanskrit word buddhayah, which is the plural form of budhi which means budhi or

reason/intellect. Thus, culture can be interpreted as things that are concerned with reason/intellect.Thus; culture is the power of *budhi* the form of creativity, taste, and intention. Whereas culture is interpreted as the result of creativity, taste, intention itself. But there are also scholars who do not distinguish between the meaning of culture and culture, especially undergraduate ethology, on the grounds that culture is the basic word of culture and culture while the culture itself is interpreted as things related to culture.

In the perspective of "ke-Indonesia -an", culture itself comes from two syllables budhi and daya. Budhi is interpreted as good, subtle, beautiful, subtle, and polite. Daya is interpreted as a strong power, strength. Thus, culture is interpreted as good-minded, subtle, beautiful, polite power. At this point, culture can be interpreted as a set of thoughts, ideas, ideas the good one. Sociologically, culture is defined as a set of values, norms, community norms that serve as guidelines for thinking, speaking, behaving, acting for the majority of citizens in daily life. Then, understanding the law. Law was generally understood prescriptively as a set of written or unwritten rules or norms, which categorize right or wrong behaviour, obligations and rights. This understanding holds that law is best understood as an autonomous system, which is officially sanctioned and logically consists of rules and procedures.

In addition, legal culture - legal culture itself consists of two words which are Legal and Culture, and whether legal culture then can be simplified as culture added to law. If culture is added to law, it means the definition of legal culture is the definition of culture as explained above, combined with the definition of law as previously mentioned. If the legal culture is a culture plus law, then the understanding becomes ideas, thoughts, and acting on a law that contains a set of rules that provide categorical attributes an act of right-wrong, good-bad, rights. If this is the certain case, what is meant by legal culture is similar to positivistic ideas. This paper aims to analyse legal culture in the position of cultural understanding. This is so considering the legal culture is actually a unified understanding.

B. Discussion

1. Culture, Local Wisdom and Judicial Process

Discussing on the legal culture in Indonesia is influenced by the concept of legal culture introduced by Lawrence M. Friedman, a judge in the United States. Shortly, since the beginning of Lawrence M. Friedman introducing the concept of legal culture. The concept often becomes an exciting and long debate between American and European lawyers especially Germany. Initially, Friedman himself referred to introducing the concept of legal culture to reinforce previous views that the law is best understood and described systemically where law is one of the other elements that function functionally with each other.

As system law intended Friedman also consists of some elements, namely legal substance, legal structure, and legal culture. In the element of legal substance, the law referred is interpreted as a judge's legal decision, the substance of the legal decision the judge referred to proof of wrong and right actions. Chronologically, the judge's decision is the final result of a dynamic process long before, namely the interactional process.

Thus, Friedman understands the law adopting a system model, there are inputs, processes, outputs, and outcomes. Conversely, suppose he law is understood positivistic as a set of rules or written and unwritten norms that categorize behaviour as right or wrong, duties and rights. In that case, such understanding is classified as a conventional idea that making distance and widening the space between justice desired by the community and the contents of the law itself, even more emphasizing that there is no connection between law in theory and law in practice. Friedman's view thus affirms itself about the importance of a socio- cultural perspective for studying the law, and this is used as a long discussion considering that socio- cultural studies of law in the United States have received insufficient attention and have even been marginalized in several law schools and universities. This long conversation took place because Friedman had carried out studies in a tradition which actually had strong roots in

European Continental countries, especially Germany. For example, Friedrich Carl von Savigny (1831), in the 19th century, has described that law is understood as one of the most important manifestations of a people's soul (volksgeist) and it continues to coexist in a folk culture.

Von Savigny view was considered against the codification of German law at that time. According to him, codification is not a suitable instrument for the development of legal Germany at that time remembers the law is a product of the people's life and the law is a manifestation of the soul of the people. According to him, the law has a source that comes from the general awareness of the people of the local community. At this point, von Savigny considers that the best law is a law that accommodates and comes from public awareness.

With the same meaning but in a different way Oliver Wendell Holmes, as a jurist and judge, also has a view that is not much different. According to him, the law is best understood as an anthropological document. That is, the law was born, grew, and developed attached to local communities. In fact, in classical sociological works, such as Emile Durkheim and Max Weber also placed the law at the centre of social life rather than placing it to the periphery as was common in America.

The two scholars analyzed the law as an expression of social power in the transformation of modern society and as a channel device for developing social sensitivity or sensitivity. These ideas received strong opposition from positivists who held the view that law was best understood as an autonomous system, which was officially sanctioned and logically consisted of rules and procedures. In a cultural context, the definition of legal culture can be refined into a set of values, ideas, norms that serve as guidelines for thinking, speaking, behaving, and acting in accordance with what is expected by most residents of the local community. That means the legal culture of society is a set of values, ideas, norms that are built by the culture and power of the citizens of the local community and have been internalized into a mindset for generations and serve as a guide that connects legal regulations at the theoretical level on the one hand and behaviour or concrete actions at the practical level on the other hand that are expected by the community.

The last conceptual understanding is more rooted in shared normative values that are born and built up during the process of society itself formed and internalized into the life of the community as long as the development of the community itself takes place. This means that the birth of a legal culture is derived from internal processes during the development of the community, and during that interaction between citizens and between residents and citizens from outside takes place to form behaviours that are increasingly patterned and finally the pattern of action is considered as correct and used as a guideline for acting by most residents. Thus, the legal culture can be defined as set values.

Indonesia as a nation unit consists of ethnic groups from Sabang to Merauke which occupy the distribution of large and small Nusa Tenggara whose numbers are more than 13,670. Legal culture is a set of shared normative values obtained from the whole local culture called the Indonesian nation. Ideologically, legal culture of Indonesia that was meant by Sukarno called Pancasila and is recognized as the pinnacle of the culture of Indonesia. The juridical consequences, the whole legal product that regulates the dynamics of the life of the Indonesian nation should be the actualization of the principles of Pancasila.

If so understanding, when laws, such as laws enacted will receive most of the residents, and if it is not accepted to mean the possibility of a truncated line (disconnection), as well as legal decisions of judges. Therefore, in the context of legal politics, if there is a set of legislation from the colonial state or from another country, it will at least be adjusted to the principles of the Pancasila. Similarly, social, cultural, political, economic and legal activities are always referred to in the principles of the Pancasila. Moreover, the current era of globalization which opens open space to interact with other countries, discussion of Asian legal culture, especially adult Indonesia is increasingly becoming

important. The discussion of this matter is very relevant to the movement of globalization considering that in cultural countries such as Japan itself which bases harmonious values not a few legal issues are directed to a formal settlement process that ends in the results of losing and winning or wrong and right actions. At the same time, there is another discussion stating that the practice of Western Law said as uncultured (acultural), is not authentic (unnative).

The emergence of these uncultured or non-native views is actually increasingly apparent when globalization itself begins to spread to developing countries. In fact, a number of practitioners in developing countries also often say that using their own culture will be better and more appropriate than others to solve a problem because the law is original. The foundation of their thinking is that it is better to base on the local culture where legal issues occur than the culture of each individual country involved. That is, Europe is not Asian, and Asian is not Europe, because there are clear norms.

In the Indonesian context, Pancasila was defined by Lawrence M. Friedman as the legal cultural core. Based on this theory, Pancasila is a legal culture Indonesia which contains Indonesian values that must be used as input to the operation of the legal structure in Indonesia according to the plot described above. Moreover, when the attributes of globalization such as individualistic, capitalistic, and hedonistic increasingly spread to the middle of Indonesian society, we as part of Indonesian society increasingly become aware of how important local culture is, while affirming both our local and their culture.

The emergence of a strong desire to return to local culture cannot be avoided as a paradox of globalization that we accept ourselves. Moreover, politically in law, the nuances of regional autonomy are increasingly moving to the lower layers of society. Of course, down there, that is, the local community is actually full of local (micro-culture) culture urging to be used as a guideline to act. For example, in Javanese culture, the spirit of togetherness (holo bis kuntul baris, gotong royong, work together), a culture of dispute resolution / conflict (menang tanpa ngasorake, winning without acclaiming), and consensus (berembug).

Then, the question is what the content of local culture is. There are three levels of culture to answer the contents of the intended local culture, namely the level of individual, communal, and national culture. At the first level, culture is defined as individual beliefs and values in society. For example, besides Indonesia, it is also Japan which emphasizes harmony in interpersonal relations, Ahimsa (anti-violence) in the Indies society, and consensus in Indonesia. At the third level, the law is the culture of a nation. At this level the national culture is officially preferred in the form of institutions. But in the practice of Indonesian legal politics, there is "temporary compulsion" to use or borrow the legal culture of other countries because the country itself has not formally established the law. In such a state of legal emptiness, it is politically bridged on the basis of a legal principle that the old law is still valid as long as it has not been regulated by the new one. Thus, emptiness does not occur.

2. The Accommodation Social and Cultural Forces in Judge Decision-Making

One thing that needs to be observed is that not all products of State law that are prepared based on standard procedures can be implemented or can be applied to one concrete legal problem that occurs in regions which are very thick, such as natural resource conflicts and land disputes. Often happens in the community. Another thing that also needs serious attention is the ethics of concrete legal cases carried out by Indonesians, the location of the incident also in the territory of Indonesia, but the procedure of settlement and legal basis used as a consideration to punish on the basis of legal sources of culture outside state law.

Therefore, several concrete legal cases that occurred some time ago, for example, insulting the President is no longer appropriate if the articles of the Criminal Code (KUHP) are used which in fact the substance of the articles has cultural roots that were originally intended to protect the Queen in a kingdom. Thus, the meaning can be captured from the origin of the

Criminal Code as it contains translations of legal culture Strafsrecht from the Netherlands. That is, the Queen is different from the President; her country is different where one is in the form of the monarchy, kingdom and republic form of states. Likewise, the pattern of elections up to what is meant becomes the head of leadership, one on the basis of descent according to the cultural order of the local community, while the other according to democratic bases according to the polity order in general.

The logical thing in applying the articles of the Criminal Code is a number of articles in the book at the contents are adapted to the conditions of the Indonesian culture so that the substance can be expected to touch and finally approach the justice of the Indonesian people. If it is not done, it will add a long list of legal cases that are queued to be resolved in the general court process or submitted to the Indonesian Constitutional Court for judicial review.

Legal culture referred to as described in the previous paragraph is not readily available as well as a set of documents stored in the library of legislation that if we need to just take the necessary laws, the existence must be explored in the community. Article (27) of Law of No. 14, 1970 on the Principles of Judicial Power, as corrected Act No. 35 of 1999 and subsequently replaced Law No. 48 of 2009 on Judicial Power, as Article 28 Paragraph (1). The said article said that "Judges must explore, follow, and understand the legal values and sense of justice that live in society. Now the question is, why do judges have the obligation to explore, follow and understand the legal values that live in society and how to dig them.

To answer the questions raised, starting the answer refers to the meaning of Article 22 of the General Bepalingen (AB) mentioned that the judge who refused to settle a case on the grounds that the rules does not mention, unclear or incomplete, then he can be punished for refusing to prosecute. The meaning is that the judge is indeed obliged to examine and hear cases submitted to him. This principle is held firmly by the judge so that the judge is deemed to know the law for a case of concrete law submitted to him. This principle is in principle the doctrine commonly known as the principle of Ius Novit Curia usually interpreted to mean Diang g ap judges know the law. But in reality, it is very possible that a law consisting of a set of normative rules is incomplete or that the law has not yet been regulated. If this happens, there are three alternative approaches, as follows:

1. The legalistic approach, if in the case of concrete law faced by the law or the law already exists and is clear, then the judge prescriptively only needs to apply the law in question;
2. In cases of concrete laws whose laws are not or are unclear, the judge must find the law by interpreting the laws or laws that are still vaguely referred to through interpretation methods that are common in the study of law;
3. In cases of concrete laws whose laws do not yet exist or laws have not yet been regulated, the judge must find the law by exploring, following and living the legal values that live in society.

Number two and three above, based on the assumption that in reality there are no perfect and complete laws to completely regulate the activities of human life. In an effort to uphold justice and truth the judge must be able to make legal discoveries (rechtsvinding). Thus, the judge has the authority to find the law and even create a law (judge made law), especially against concrete legal cases whose laws are still vague or even that have not yet been legally enforced, but have entered the court.

If the legal value in question has been found and formulated in such a way that it is subsequently set forth as a basis for consideration in the process of making a decision to settle the case that is being tried. The legal value is positioned as a law (major premise) to resolve a case of concrete law or principal case (minor premise) and set out in a ruling as a clone. In examining and adjudicating concrete legal cases that do not yet have legal ruling or for asserting and thickening their beliefs in developing arguments for legal decisions, judges are

obliged to multiply the legal values that are alive and still be maintained in the midst of society. Legal values that live among others: the values of religion, values customs that are still well preserved, the cultural community, especially where the case law of the concrete case.

Even if it is legal, but the law is already worn, the judge has the authority to deviate apart from the living law and written legal provisions. To do that, if the law is already worn and outdated, it can no longer meet social justice demands by postulating the institution of "contra legem". The judge, in the use of agency contra legem, should be sufficient considerations of legal basis clear and sharp, taking into account the various aspects of life. The judges' decision containing considerations alone but carefully based on the authority granted by article 22 AB, later became the basis of the decision of other judges to judge cases that have elements that are the same and, subsequently as a source law in court, which Friedmann as one of the legal forces.

In addition to legal forces, there are social forces in the form of a set of legal values that live in the midst of society, referred to as legal culture. Legal culture contains a set of common values as the right thing by most citizens and guides the community. The shape is diverse, with old expressions, proverbs, proverbs, and others that are still alive and preserved in society. The judge who served in the State Court are derived from different parts of the background of cultural life, then served in other regions that have not known their legal culture in depth; they must decide on the case based on Article 28 paragraph (1) of Act No. 48 of 2009.

C. Conclusion

If we follow and examine the legal verdict of judges handling a corruption case, for example, often popping diverse views. Lately, there is a growing perception in the midst of society, such as some have suggested that the legal verdict of the judges does not reflect the community's sense of justice due to the light jail sentence. This view is indeed still often heard; considering the expectations of the wider community will be fulfilled, a sense of justice is so great. No matter how small the public response to the judge's legal verdict cannot be ignored, considering that became one of the targets of the ruling law judges, in general, are people, especially justice seekers. Suppose there is a sharp difference between the expectations of the wider community on the one hand and on the other side of the judge's legal decision. Does the judge not explore the legal values that live in society.

Exploring the legal value of living in such a society is in accordance with the teachings of good legal theories as developed by Jeremy Bentham, Frederick Karl von Savigny, Sir Henry Maine, Nathan Roscoe Pound, and Leopold Pospisil. Below are the criteria for good law in the view of these scholars. For example, Leopold Pospisil argues that law is good, but the material must reflect the behavior of legal users and have four elements, namely the existence of authority, the characteristics of universality, obligations, and the imposition of sanctions. Thus, the most important legal source is not from a country (positivistic) but from the behavior of the community, and the law must be able to accommodate community pluralism.

Similarly, Friedrich Carl von Savigny considers that a good lawyer should be from the community's customs, habits, and willingness that is realized through legal representative institutions so the produced law can meet the people's will to fulfill their social life. In line with that, Sir Henry Maine stated that law always follows the development of the community's social life. Jeremy Bentham also said that the law that is built must be able to realize a system of rules that has the least risk to people's lives. John Rawls, who developed the idea Jeremy Bentham, the farther forward the theory of justice (theory of justice) that the most important purpose of the law is to realize and ensure justice for the community.

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