

LEGAL CULTURE IN MULTICULTURALISM AND ITS ROLE IN LAW ENFORCEMENT IN INDONESIA

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Abstract: Multiculturalism in Indonesia can be considered not only as the ancestor's heritage that should be preserved but should also be the main asset in the attempt of nation building. However, incapability of optimizing multiculturalism can be largest constraint that foils the achievement of development objective. In this case, legal culture becomes the main key to utilizing multiculturalism as the main key to development. Legal culture made as a part of Indonesian legal system will make the society feels being the part of the law itself and willing to implement the rules of law contained because it is the law that had been institutionalized in the society's social life previously. The quality of legal culture highly determined the law enforce in Indonesia; for that reason the better the integration of legal culture into legal system in Indonesia, the better will be the quality of law enforcement, because basically through a good legal culture, the individual law enforcers will have high legal culture that will implement all rules of law without the will to break it occurring frequently so far. A high-quality legal culture will make judicature a legal process that prioritizing justice enforcement, law certainty, justice, social benefit, and social empowerment through the judge's verdict.

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A. Introduction

Multiculturalism in Indonesia has been considered as the lofty nation culture heritage that has been existing since Indonesia has not been established as an Indonesia country.² However, the assumption that multiculturalism is only a nation ancestor heritage that should be preserved should be changed because actually multiculturalism is a concept of diversity quality becoming the capital in building a plural nation with a variety of peculiarities within it. Multiculturalism-based development can be failed when it is not planned appropriately, because essentially multiculturalism requires empathy, solidarity, social justice, and justice in law.³

Referring to the elaboration above, a multicultural society development should be supported by, among others, legal justice concept. Law should always be associated with society wherever the law works; therefore legal development and legal knowledge in society life should consider the law and the realities of society, in order not to be separated from each other.

² Manneke Budiman, "Jatidiri Budaya Dalam Masyarakat Multikultural", A Paper presented in Seminar on Multicultural and Customary Law Revitalization in Cultural Perspective, Cultural and Tourism Department, Bogor December 18-20 2003.

³ *Ibid.*

Basically, law is not only legislation but also a symptom (phenomenon) in society life that can be seen through its citizen's conduct pattern. Thus, it can be said that law is affected by non-legal factors usually called legal culture. Then, legal culture makes law enforcement different between one society and another, in which basically there are 3 fundamental problems related to this legal culture: the problem in which law is a system, the problem of the law function in relation to legal culture, and the problem of legal culture's contribution to legal functioning.

Law in modern concept is used as a means of social engineering, but in fact it is not supported by social life in which law is applied so that it should be supported by the society's high legal consciousness. The reality we often found is that many inconsistency factors in law implementation and reluctance in applying the provision of law specified and other habits less supporting the compliance with law.

Law enforcement in Indonesia still holds on legal positivism concept. Discriminative judicature, the presence of legal and judicature mafia, and reengineering in judicature process are the portrait and reality in our state's law enforcement. Discriminative judicature

makes the law in this state just like what Plato has described that laws *are spider webs, they hold the weak and delicated who are caught in their meshes but are torn in pieces by the rich and powerful.*⁴

The use of *legis positivism* concept in Indonesian law is largely because the assessment of justice based on law is based on the legitimate legal norm, so that whether or not an individual is guilty is determined based on written law through the articles within it as the reference, rather than on the study on moral and social justice aspects. Regarding this, Friedman stated that there are three factors of legal system that should be interrelated to meet the moral and justice aspects in law: structure, substance, and legal culture factors.⁵ Furthermore, in his study, Barda Nawawi stated that the just law enforcement in Indonesia should involve, among others, the reform of legal culture aspect.⁶

From the elaboration above, it can be seen that law enforcement, in addition to be determined by rules of law

themselves, facility, and law enforcer's mental, is also highly dependent on the society's consciousness and obedience, either personally or in their own social community. Finally, it is up to human (cultural) element that determines the actual motif: *in the last analysis it is the human being that counts.* Thus, the presence of good and correct law does not automatically ensure the good and correct society life. The presence of police, public prosecutor, judge, lawyer as law enforcer directly and formally has not ensured the enforcement of law and the enactment of rule of law. The presence of parliaments does not automatically ensure that democracy grows, despite general election for electing them.

In addition, it is important to think of what infrastructures are needed to implement the rule of law well. Legal consciousness can also be improved by giving role modeling to the society through the role of law enforcers such as policy and judge, recalling that our society is still paternalistic in nature. If all of those factors above can be implemented well, the rule of law will of course be enforced because the society's legal consciousness had been built in such a way that minimizes the probability of conduct deviation inconsistent with the law.

⁴ Moh. Mahfud MD, "Keniscayaan Reformasi Hukum: Upaya Menjaga Jati Diri Dan Martabat Bangsa", Makalah dalam Konvensi Kampus VI dan Temu Tahunan XII Forum Rektor Indonesia (FRI) di Universitas Tanjungpura Pontianak, January 9, 2010.

⁵ M. Friedman, Lawrence. *The Legal System. A Social Science Perspective*, (New York: Russel Sage Foundation, 1986), p.17.

⁶ Supriyanta, "Demokratisasi Dalam Penegakan Hukum", *Wacana Hukum*, Volume.VII, Edition April 2008, p.93.

B. Problem Statement

Considering the elaboration above, to make the problem discussion more directed, the author limits the problem scope into the following:

Why is legal culture necessary in multicultural society?

How is the role of legal culture in law enforcement in Indonesia?

C. Discussion

1. Legal Culture in Multicultural Society

Legal culture is all factors determining the legal system to get its place in society culture logically; at this level, the term culture is defined as a whole social value related to the law itself.⁷

The interaction process between law and society will run more smoothly when the law enacted is the element constituting the traditional institution prevailing within society. The members of society generally tends to behave according to the entrenched behavioral frame or pattern and when unlawful action occurs, the members of society usually treat it according to normative system they have learnt in the social and cultural framework.

The law developed is finally highly determined by legal culture constituting values, perspective and attitude of corresponding society. When legal culture is ignored, it can be ensured that the modern legal system will be failed as characterized with the appearance of following phenomena (symptoms): information error about the rule of law's content to be delivered to society, the difference between what the law wants and the practice undertaken by the society. The society prefers to behave according to their life values and ideology.

The society's trust in the law enforcers in the term of criminal law enforcer in Indonesia considered as poor should be repaired and restored with some improvement in structural and substance aspects of law along with the presence of legal culture. It is this legal culture aspect that plays a very important role in criminal law enforcement in Indonesia. Lawrence M. Friedman explained that the concept of legal culture is human's attitude to law and legal system – trust, value, thinking and expectation. In other word, legal culture is a social thinking circumstance and social power determining how the law is used, avoided or misused, so that without legal culture, the legal system will be helpless.⁸

⁷ Soerjono Soekanto, *Hukum Dan Masyarakat*, (Universitas Airlangga: Surabaya, 1977), p.2.

⁸ Achmad Ali, *Keterpurukan Hukum di Indonesia (Penyebab dan Solusinya)*, (Jakarta, Ghalia Indonesia, 2003), p.9.

This legal culture element includes opinion, habits, way of thinking, and way of acting among the law enforcers and society, with legal culture, so that legal system will lose its power as Lawrence M. Friedman suggests that *"without legal culture, the legal system is meet-as dead fish lying in a basket, not a living fish swimming in its sea"*. A description on legal culture in the elements of legal system is the legal structure like a machine producing something, legal substance is like the product produced by machine and legal culture is everything or everyone deciding to operate the machine and to limit the machine use.

Satjipto Rahardjo suggested that in the attempt of reforming Indonesian law, we should pay attention thoroughly to the problems of nation behavior, legal life not only pertaining to technical law affairs, such as legal education but also pertaining to broad education and building of individual and social behavior.⁹

The quality of legal culture determines the quality of law enforcement. No matter how well the rule of law is developed and how detailed the organizational institution and management is organized, the operator is human being living in certain culture. When the culture had not changed yet, the rule and system

will not run as expected. The integration of Indonesian society's legal culture into legal system in Indonesia becomes more important recalling that the penal code prevailing in Indonesia recently is still one of rules of law inherited from the Dutch Colonialist deriving from continental law (civil law system) strongly influenced by the tenet showing individualism, liberalism and individual right).¹⁰ It is very different from legal culture of Indonesian nation upholding social values. If this Penal Cod is forced to be enacted later, the conflict of values and interests appearing will likely generate new crimes.

Indonesian nation's legal culture upholding moral, religion, and culture is reflected on the principles of Pancasila as an ideology, ontologically, epistemologically and axiologically stemming from the noble values upheld and practiced by Indonesian nation (people). Legal system in Indonesia should be created consistent with the legal culture based on Pancasila as a legal culture and ideology ontologically, epistemologically and axiologically stemming from the noble values upheld and practiced by Indonesian nation and based on the sociological jurisprudence, the good law should be consistent with the one living within

⁹ Satjipto Rahardjo, *Membedah Hukum Progresif*, (Jakarta: Penerbit Buku Kompas, 2008), p.5.

¹⁰ Ahmad Bahiej, *Sejarah dan Problematika Hukum Pidana Materiel di Indonesia*, Sosio-Religia, Vol. 5 No. 2, Februari 2006, p.16.

society. Society should also participate in building legal culture in the attempt of criminal law enforcement in Indonesia manifested in society's consciousness and compliance both individually or in its own social community.

2. The Role of Legal Culture in Law Enforcement in Indonesia

Law in Indonesia is often criticized in relation to law enforcement, law consciousness, quality of law, vagueness of various law related to the law operation process and the poor application of various rules. Many legal observers and activists stating that law that should be a means of society reformation, has changed into a kind of murdering machine because of chaotic and disorganized law.¹¹

The sufficiently important element in law enforcement is human element itself, law consciousness aspect. Because of human element of its society's law consciousness aspect, we try to understand and highlight the individual human beings creating its legal culture. The society's high legal culture is the society not tending to break the law although no law enforcer seeing them. Or, it is the society not utilizing law to achieve objective for its individual's or group's interest, moreover the society tending to avoid or to misuse

law deliberately for certain objective that is finally unjust for other society. So, the law enforcement amid society needs justice enforcement. Harming the justice feeling of some society will harm the order and the stability of entire society because the feeling of justice is the element inherent to human being since he/she was born.

The society's law consciousness factor plays a very important part in the attempt of enforcing law, because it is this perspective that should be organized to make the law supremacy run well. Law enforcer is essentially the interaction between various human behaviors representing the different interest in the frame of mutually approved rule. For that reason, law enforcer is not only considered as the process of applying law as the legalist suggests, but also involves human behavior dimension. In such the understanding, we can find out that the always prominent legal problem is that of "law in action" rather than "law in the books".¹²

Referring to that statement, the court as the main representation of law enforcer's face is required to bring about law certainty, justice, social benefit and social empowerment through its judge's

¹¹ Ibid.

¹² Zudan Arif Fakrulloh, "Penegakan Hukum Sebagai Peluang Menciptakan Keadilan", *Jurisprudence*, Vol. 2, No. 1, Maret 2005: 22-34.

verdict.¹³ Judicature process is not only a process of examining and trialing completely based on positive law merely because it will result in the rigid law enforcement, without discretion and tending to ignoring the society's feeling of justice because it emphasizes more on law certainty. Judicature process should be the one involving society behaviors and operating in certain social structure.

Judge or law enforcer often "plays with rule and procedure". The law is not implemented for the sake of achieving welfare and justice, but for the sake of achieving the justice the law enforcer and the indicted want with the excuse of written law. Meanwhile, law, citing Satjipto Rahardjo's opinion, is not a paper document project, but cultural and anthropological projects with spirit of justice. For that reasons, reading and understanding it as dry and linear sentences can bring about disaster. The logic of justice cannot be found immediately by reading rule, but a deeper contemplation and understanding is needed on what is written. It is because, behind the rule of law there is the spirit of soul, the justice becoming the main mission of law, called also as law conscience.

Here law is undertaken and practiced differently from the way of applying the letters of rule only, but looking for and finding the actual meaning of a written regulation. Thus, the verdict taken is actually the one with conscience and objectivity. As Paul Schoten suggests, law exists in the law, but it remains to be found. It is because law is not a phone book containing only the list of rules and articles, but something replete with meaning and value. The legal verdicts departing only from what included in written regulation generally result in dry verdict, with less consciousness and without moral value. Thus, the result often makes many parties disappointed.

Satjipto Rahardjo suggests that justice is no longer like a blind man always bumping into the stupid power system and rotten mental among state apparatus and law enforcers. It means that system and supporting set has been worn out to care about the conscience when defending the people's interest. The state and its apparatus are not like what philosopher Nietzsche says, like the coldest monster because it operates by stealing the populations' property with any excuse.

Injustice or failure situation realize justice through law becomes one point of problem that should be dealt with and the

¹³ Ibid.

state has had blue print to realize what the founder of this nation idealized. However, corrupt mental and moral and neglect or disrespect to Indonesian law and objective of law having good law order are the representation that law enforcer is Indonesian character and self-identity corresponding to what contained in Pancasila and Preamble of 1945 Constitution, with this situation and condition, norm and rule have shifted to egoistic and individualistic feeling without thinking of others and it this injustice value that will improve anarchism action, violence clearly not in line with the character of nation having the principle of discussion for consensus completely as contained and implied in the content of Pancasila.

The factors resulting in the difficulty of law enforcement in Indonesia, when studied or analyzed in-depth, there are at least seven factors inhibiting the law enforcement in Indonesia:

1. The weak political will and political action of this state's leaders, to be the law as the commander of government organization. In other words, law supremacy is still limited to rhetoric and political jargon echoed during campaign.
2. The existing legislation today still reflects more the ruler's political interest than the people's interest.

3. The low moral integrity, credibility, professionalism, and law consciousness of law enforcers (judge, public prosecutor, police officer and advocate) in enforcing the law.
4. Limited infrastructure and facilities supporting the smoothness of law enforcement process.
5. Society's low consciousness level and legal culture and less respect to law
6. Paradigm of positivist-legalist law enforcement emphasizing more on the achievement of formal justice than on substantial justice.
7. Policy made by the stakeholders in dealing with law enforcement is still partial, patchy, incomprehensive and systematic.

Until today, the law enforcement process is still opaque. It occurs due to the long process of the past political system putting the law as political subordination. The justice system is not independent and partial to many interests with excuse. Law reform conducted until today has not resulted in justice for all members of society. Justice is still shadowed with interest and collusion element of the justice enforcers in the state with social justice for every Indonesian people. Thus, the intervention with law is still inevitable. It affects the mentality of law enforcer. Meanwhile, the moral mentality is the power of law enforcer as the basis of its

professionalism. Indonesian law enforcers have moral and bravery in enforcing the law supremacy minimally. Thus, many legal cases are solved unsatisfactorily for many parties or harmfully to other parties.

D. Conclusion and Recommendation

1. Conclusion

From the explanation above, the following conclusions can be drawn:

- a. Legal culture plays a vital and very important role in law enforcement in Indonesia because law is highly determined by legal culture constituting values, ideology and attitude of the corresponding society. If legal culture is ignored, the modern law system would be failed and new problems would result. In law enforcement attempt in Indonesia, there should be an improvement in the quality of legal culture's role, among others, through working culture and professional behavior of law enforcers, education and building the broad individual and social behavior among not only the law enforcers but also all of society and government elements.
- b. Law enforcement should be implemented based on the law explored, developed from the values contained in our homeland in the form of law consciousness and ideal (*rechtidee*), moral ideal, individual and nation independence, humanity, peace,

political ideal and state objective and reflecting the life values existing within society and values contained within Pancasila. In the presence of legal culture's role stemming from the noble values upheld and practiced by Indonesian people, the law enforced becomes an effective and efficient means of protecting the society's interest and of supervising the society.

2. Recommendation

- a. Law empowerment should be directed to the compatibility of law to values embraced by members of society, because there are values supporting the legal culture firmly.
- b. As long as the members of society still turn to their leaders, the successful legal habituation will always be related to the justification of role modeling given by their leaders.
- c. Recalling the importance of legal culture's role in the criminal law enforcement in Indonesia, the writer recommends the reform of legislation related to criminal law, particularly Penal Code (KUHP) to do immediately because Indonesian Penal Code still prevailing today is the one inherited from Dutch Colonialist that is considered as no longer consistent with the legal culture stemming from noble values upheld and practiced by Indonesian

people. In the attempt of reforming the law, the new Penal Code would be created later corresponding to the legal culture growing and developing within the society corresponding to sociological jurisprudence thinking, that the good law should be consistent with the law living within society.

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