ESTABLISHMENT OF NATIONAL LEGAL SYSTEM IN POLITICAL LAW PERSPECTIVE: (POLITICAL LAW OF LEGISLATION IN SUBSTANTIVE ISLAMIC VALUES IN NATIONAL LAW ESTABLISHING)

Afri Yendra
PPSDM Kemendagri Reg. Bukittinggi Sumatera Barat
email: yendra_afri@yahoo.co.id

Abstract: Establishing national laws by integrating the objectives of establishment of national laws and uniting it by taking into account the cultural diversity of the population; the main diversity and priority of concern is the diversity of Religion. Indonesia has a population whose majority are Muslim sociologically is a presentation of the soul Indonesian people, so it would be nice if the politics of Islamic law becomes a reference for Indonesian law to be applied in Indonesian positive law. The main of Establishment of Political Law is that there are Islamic values in every National Law, so legal drafters who have Islamic Values are needed. It also needed the participation of Islamic Universities in preparing legal drafter.

Keywords: Politic, Law, Legal drafter

Introduction

“…..The character of legal products constantly changes in line with the development of political configurations...[1], each state has the will to form a law that is deemed suitable and able to accommodate and follow changes experienced by society, namely law taken from the values adopted by the people in the state as a reflection of “Law is the Soul of the Community”. That is what is known as the Law Politics.

The will of the state is expressed in the form of national legal politics, namely a statement of the will of the state authorities regarding the laws that apply nationally and in which direction the adopted legal system will be developed.[2]

“…Establishing national laws by integrating the objectives of establishment of national laws and uniting it by taking into account the cultural diversity of the population...” [3] the main diversity and priority of concern is the diversity of Religion. The guideline that can be used in establishing national law is to seek unity if possible, allow diversity if the situation requires, but nevertheless prioritize certainty, (unity whenever possible. Diversity where desirable, but above all certainty) [4]

Laws No. 23 of 2014 states that the Republic of Indonesia consists of Provinces and Provinces consisting of Regencies or Cities, and those consisting of Districts and Districts consisting of villages. Indonesia is a large country consisting of various tribes, religions and cultures inhabiting regions, so that diversity cannot be avoided. In theory, there is a possibility of diversity, but like a house, an Indonesian nation that has diversity such as pillars, walls, floors and others, this is certain that it stands in strengthening Indonesia as state law.

Strong legislation; it will strengthen a State Law (rechtsstaats) because it was established with a major milestone. According to Julius Stahl, the concept of State Law which he called as 'rechtsstaat' included four important elements, namely: Protection of human rights; Division of power; Government based on law; State Administrative Court. [5] While Dicey outlines the existence of three important characteristics in each State Law which he calls the term “The Rule of Law”, namely: Supremacy of Law, Equality before the law, Due Process of Law.[6]

With regard to the State of Law in the constitution explicitly states Indonesia is a State of Law [7]. Prof. Padmo mentioned that Indonesia is a State Law with the formulation “Rechtstaat” [8]… namely the pattern taken does not deviate from the definition of State Law in general (genusbegrib) [9], an ideal country in the 20th century. [10] Law experts call it as Indonesian State Law or Pancasila State Law where the State is based on Pancasila Values.[11] Pancasila State Law is based on the
principle of kinship.12 Pancasila State Law is the main rule of State Law with believe in the one Supreme God.

As mentioned above, legislation is one of the main pillars of the building of State Law. Establishing the law must be based on archipelago insight which means establishing national law by integrating the goal of establishment of national laws that unite with regard to cultural diversity....."[13] the main one is Religion.


'System' comes from Latin, which is 'systema', which means the whole or a combination of the whole, the whole organization[14]. The System for Establishing Legislation is the whole of the establishment of laws starting from principles, processes and procedures, to drafter - to the formation of laws and their implementation and evaluation to produce better legislation.

In legal politics, legal drafting is always influenced by politics. Law is a political product that views law as a formalization or crystallization of political wills that are mutually integrated and competition for integration and political competition that causes law to be a form of conflict. This is identified as forming the character of Indonesia's current legal products. So is the case with legal drafting; political nuances are very noticeable and obvious so there is a correlation of political configuration in the law.

Political and Legal Configuration [15], is one of the topics discussed in the book of Politik Hukum in Indonesia by Mahfud MD. Based on the chosen perspective in this study, it can be seen that in the pull-off relationship between politics and law, the law that is affected by politics.[16]

In its development, Islamic law (Fiqh) became the choice of the people because theologically the teachings were based on beliefs and gave peace to the adherents. With the acceptance of these teachings, the community willingly and obediently and submissively follows the teachings of Islam in various dimensions of life. [17] Thus, understanding and practicing the teachings of Islam has become the norm and ultimately becomes an institutionalized legal system in the form of a judicial system, [18] which was originally developed in a very simple form, called the institution of Tahkim.[19]

The first step of how political law in Islam is able to give intrinsic values in the substance of national law is to strengthen Islamic values in legal drafting in Indonesia. It is undeniable that political influence in the law can be seen in all systems for legal drafting starting from the principles, procedures for establishing and enforcing the legislation. It is necessary to find an appropriate formulation to unite the diversity of laws that give rise to national laws that can be implemented voluntarily by the community. Among the best solutions is the preparation of legal drafter with a background in Islamic Law. Then the role of Islamic institutions or universities is specifically in the State Administration.

I.C.van der Vlies in his book entitled “Het wetsbegrip en beginselen van behoorlijke regelgeving”, dividing the principles in establishing of State regulations (beginselen van behoorlijke regelgeving) into formal and material principles.

Formal principles include: The principle of clear purpose; The principle of the right organ or institution; The principle of the need for regulation; Principle of implementation; and consensus principles; while material principles include: the principle of correct terminology and systematics; The principle of recognizable; The principle of equal treatment under the law; The principle of legal certainty; and the principle of law enforcement according to individual circumstances.

The formation of legislation must fulfill the principle of material substance. The good laws and regulations mentioned in Article 6 Laws No. 12 of 2011 are related to the material content of laws and regulations that must fulfill the principles[20] namely protection [21], humanity [22], nationality [23], kinship [24], archipelago [25], bhinneka tunggal ika [26], justice [27], equality in law and government [28], order and legal certainty [29]; and/or balance, suitability and harmony [30].

In the establishment of legislation in Indonesia, the principle of establishing laws and regulations mentioned in Article 5 Verse 1 Laws No. 12 of 2014 [31] mention that “In establishing legislation, it must be carried out based on the principle of Legal Drafting, which includes: a. clarity of purpose [32]; b. the right institutional official [33]; c. comforty between types, hierarchies, and
material content [34]; d. implementation [35]; e. usefulness and usability [36]; f. clarity of formulation [37]; and g. openness [38].

Hamid S. Ontamimi argues that the establishment of appropriate Indonesian laws is as follows:

a. the ideals of Indonesian Law, which is none other than Pancasila which applies as a "guiding star".
b. The state principle is based on a law that places the Law as a distinctive regulatory tool in the primacy of law, and the principle of the Government based on a Constitutional System that places the Law as the basis for the implementation of government activities, and c. other principles, namely the principles of the State based on the law that places the law as a distinctive regulatory tool are in the primacy of law and the principles of government based on a constitutional system that places laws as the basis and limits the government activities.

Politics of Islamic Law and the Concept of Legal State

The politics of Indonesian law as State Law begins with talks on it. Speaking of the concept of State Law, first we must understand the meaning of the concept and the rule of law. Concepts are abstract elements that represent classes of phenomena in one field of study so that they are abstract elaborations of theory. [39] In the process of systematization and structuring, a number of general rules or legal definitions are formed or formulated [40] or legal concept [41]. The drafting and existence of general rules and understanding in the law is needed to enable or facilitate the processing of mass legal material in processing the systematization and structuring of the legal materials. [42]

"Historically, the concept of the rule of law has several forms; like the rule of law according to the Qur'an and Sunnah or Islamic nomocracy; the rule of law according to the Continental European concept called rechtsstaat; the rule of law according to the Anglo Saxon concept (rule of law); the concept of socialist legality; and the concept of Pancasila state law. The rules of law concepts have their own historical dynamics.

There are several principles of the rule of law, first: the Islamic Nomocracy. The basic principles of the rule of law in Islamic countries are as follows: the principle of power as: trusteeship; deliberation; justice; equation; the recognition and protection of all human rights; judicial independent; peace; welfare; and the principle of obedience to the people

Second is the Western Concept. The idea of a legal state or rechtsstaat became popular again in the 17th century as a result of the socio-political situation in Europe which was dominated by absolutism. The smart and rich groups or Menschen von Besit und Bilding were oppressed by the nobility who grew the concept of etatism (l’etat cets moi).

Third is Socialist Legality. Socialist legality is a concept adopted in communist / socialist countries to balance the concept of the rule of law. The law is put under socialism. Law is a tool to achieve socialism. Individual rights can be channeled to the principles of socialism, even though these rights deserve protection, according to Jaroszinsky quoted by Oemar Seno Aji.

Fourth is Pancasila State Law. The idea of the first legal state was introduced into the Dutch East Indies administration through Regeringsreglement (RR) in 1854. The idea was stated in articles 79, 88 and 89. Article 79 implies the principle of division of power. Article 99 instructs the implementation of the legality principle in the process of punishment. Article 89 prohibits convictions that cause a person to lose his civil rights.

Indonesia which has a majority Muslim population sociologically is a presentation of the soul of the Indonesian people, so it would be nice if the politics of Islamic law becomes a reference for Indonesian law to be applied in Indonesian positive law. The enactment and application of Islamic law depends on the political will of the authorities, so that the state holds a monopoly right in enforcing the law in the midst of people's lives through justification and legislation of state power which is a key tool for the application of Islamic law in Indonesia. [43]

Conclusion

1. Establishing national laws by integrating the objectives of establishment of national laws and uniting it by taking into account the cultural diversity of the population; the main diversity and priority of concern is the diversity of Religion.
2. Indonesia has a population whose majority are Muslim sociologically is a presentation of the soul of Indonesian people, so it would be nice if the politics of Islamic law becomes a reference for Indonesian law to be applied in Indonesian positive law.
3. The main of Establishment of Political Law is that there are Islamic values in every National Law.
4. Legal drafters who have Islamic Values are needed.
5. The participation of Islamic Universities in preparing the draft law.

References

[7] See article 1 verse (3) Law on The 1945 Constitution of the Republic of Indonesia
[9] Ibid.
[10] Ibid.
[15] Ibid p. 15
[16] Ibid p. 20
[18] Ibid.
[21] “Principle of protection” is that each Content Material of Laws and Regulations must function to provide protection to create public tranquility.
[22] “Principle of humanity” is that each Content Material of Laws and Regulations must reflect the protection and respect for human rights and dignity for every citizen of Indonesia proportionally.
“Nationality principle” is that each Content Material of Laws and Legislation must reflect the diverse nature of Indonesian nation while maintaining the principle of the Unitary State of the Republic of Indonesia.

“Principle of kinship” is that each Content Material of Laws and Legislation must reflect deliberation to reach consensus in every decision making.

“Principle of archipelago” is that each Content Material of Laws and Regulations takes into account the interests of the entire territory of Indonesia and regional legislation is part of the national legal system based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

The principle of Bhinneka Tunggal Ika” is that the Content Material of the Laws and Regulations must pay attention to the diversity of the population, religion, ethnicity and class, the special conditions of the region, and the culture in the community, nation and state.

“Principle of justice” is that each Content Material of Laws and Regulations must reflect proportional justice for every citizen.

“The principle of equality in law and government” is that each Content Material of the Laws and Regulations may not contain laws that are discriminatory based on background, among others, religion, ethnicity, race, class, gender, or social status.

“The principle of order and legal certainty” is that each Content Material of the Laws and Regulations must be able to create order in the community through guaranteeing legal certainty.

“Principle of balance, suitability and harmony” is that each Content Material of Laws and Regulations must reflect balance, suitability, and harmony, between individual interests, society and the interests of the nation and state.

Article 5 Laws No.12 of 2011 states that “In establishing the Laws and Regulations must be carried out based on the principle of Establishing a good Legislation, which includes: a. clarity of purpose; b. the right forming institution or official; c. compatibility between type, hierarchy, and material content; d. can be implemented; e. usability; f. clarity of formulation; and g. openness.

“Principle of clarity of purpose” is that every Establishment of Legislation must have clear objectives to be achieved. See the explanation of article 5 Laws No. 12 of 2011.

“The right institutional principle” is that every law must be made by an authorized state institution or legislator. The legislation can be canceled if it is made by an unauthorized state institution. See the explanation of article 5 Laws No. 12 of 2011.

“The principle of conformity between types, hierarchies, and material content” is that legislation must pay attention to the proper material content in accordance with the type and hierarchy of legislation. See the explanation of Article 5 of Laws No. 12 of 2011.

“Principle of implementation” is that every Establishment of Laws and Regulations must take into account the effectiveness of the legislation in the community, philosophically, sociologically and juridically. See the explanation of Article 5 Laws No. 12 of 2011.

“The principle of usefulness and usability” is that legislation is made because it is really needed and useful in regulating the life of the community, nation, and state. See the explanation of Article 5 Laws No. 12 of 2011.

“The principle of clarity of formulation” is that legislation must meet the technical requirements for drafting legislation, systematics, choice of words or terms, and legal language that is clear and easy to understand so as not to cause various kinds of interpretations in its implementation. See the explanation of Article 5 Laws No. 12 of 2011.
“Principle of openness” is that the establishment of legislation starting from planning, compiling, discussing, ratifying or stipulating, and promulgating is transparent and openness. Thus, all levels of society have the widest opportunity to provide input in the establishment of legislation. See the explanation of Article 5 Laws No. 12 of 2011.


The drafting and existence of general rules and understanding in law is needed to enable or facilitate the processing of mass legal material in processing systematization and structuring the legal material. Arief sidharta, *Refleksi Tentang ilmu Hukum*, Mandar Maju, Bandung, 2000, p.154

Radbruch distinguishes two types of legal concepts, namely legally relevant concepts and genuine legal concepts, the second is legal concepts. The legally relevant concept is a concept which is a component of the rule of law, especially the concept used to describe the situation of facts in relation to the provisions of legislation explained by interpretation. For example the concept of facts such as objects, carrying away or taking, purpose or purpose, etc. The definition of legal concepts is a constructive and systematic concept that is used to understand a legal rule, for example the concepts of rights, obligations, legal relations, legal institutions, engagement, marriage, inheritance, buying and selling, etc.

B. Arieh sidharta, *Refleksi Tentang ilmu Hukum*, Mandar Maju, Bandung, 2000, p.154