

The Influence and Challenges of Legal Politics in the Adoption of Foreign Law in the Era of Modernization

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Abstract: This research explores the transplantation of laws, especially how the process of adopting foreign laws into the Indonesian legal system faces challenges in the era of modernization, which often clashes with the norms that exist in society. Legal transplantation means the transfer of the legal system from one country to another with different social contexts and legal systems, a phenomenon that is increasing as globalization progresses. Many countries adopt foreign laws to accelerate legal reform and meet international standards, but this process is not without its challenges. This often raises legal political problems, including the potential threat to national legal identity. The selection of foreign laws that are not careful can have a bad effect on our current legal system. In this study, readers are invited to understand the importance of legal political challenges and the transplantation of foreign laws that are included in our national law.

Keyword: Legal Politics, Modernization, Transplantation.

1. INTRODUCTION

This discussion is related to integration, which may not be much discussed about this issue. This discussion is still needed in today's era, namely modernization, but sometimes it is contrary to cultural norms in several countries.

In language, transplantation is a transfer or connection. If according to the legal context, this definition refers to the transfer of a law from one country to another country that has different social realities and legal systems. Frederick Schauer defined legal transplantation as "the process by which a law and legal institution developed within a country is then adopted by another country." The transfer of law involves not only the adoption of written rules but includes the appointment of the Legal institution associated with it.¹

In this era of globalization and modernization, the transfer or transplantation of foreign laws has become a phenomenon. Many countries that have implemented this system to accelerate legal reform can also harmonize with international criteria, and optimize legal jurisdiction. However, in carrying out, it must have its own challenges and impact, especially in legal politics that have an influence in terms of procedures and lawsuits in their perspective countries.

¹ Frederick Scauer, "The Politics and Incentives of Legal Transplantations", CID at Harvard University, Working Paper No. 44, 2000.

According to Soetandyo Wignjosoebroto, countries that are forced to transfer laws are like being trapped in a vicious cycle, where they face difficulty in releasing the state from colonial influence. This can happen because the new laws have not been prepared properly, while laws that are not in line with goals of state, because their spirit tends to oppress and exploit.

Realizing the resistance in Indonesia, the Dutch government implemented steps for deliberation, the forms of deliberation include: First, temporarily exempt the application of customary law as long as it does not violate the principles of European or Dutch law. Second, implement European law gradually.²

These problems also apply temporarily, from the point of view of techniques and ethics of making and income of legal politics, especially colonial law politics, are more inclined to be directed to assess the extent to which the laws formed have benefits and have a role in the process of changing society in accordance with their goals. Because the colonials tried to instill their influence in the hope that, if the colonial country became independent, the law that was transferred would remain and continue to be reproduced, both in policies in society and regulations at the level of the implementing institution.

Problem Formulation

Transplantation that occurs in many countries is an effort to realize the unity and goals of the state, but usually in this transplant it is only used as a transfer of law because there is no maturity in making new legal regulations from a country, some opinions say that the transplantation of this legal system aims to improve a legal system or also update it to be more accurate and efficient and keep up with the times, another goal is that legal superpower strengthened either in its application or in its creation which is carried out fairly and does not affect various parties.

From this description, it is very interesting to study because it is important to know how foreign law transplantation in this modernization era. In this paper, we focus on several discussions are about the dynamics of legal transplantation in Indonesia and legal transplantation in the national interest which will later be added to challenges faced in the application of foreign laws.

² Soetandyo Wignjosoebroto, "Transplantasi Hukum ke Negara-negara yang Tengah Berkembang. Terutama di Indonesia dalam hukum Paradigma, metode dan Masalah", Huma dan Elsam, Jakarta, 2022, hal. 135.

2. DISCUSSION

Dynamics of Legal Transactions in Indonesia

At the beginning of independence, most of the legal regulations that applied in Indonesia were in the form of colonial law adapted by the government. According to Sebastian Pompe, this adaptation process is divided into two types, namely: the full adoption of colonial law as national law, such as the application of the Civil Code in the second book which was enacted until repealed by the 1960 Law on the Law and the adoption of part of the colonial law rules as state law, especially in the economic sector used by the government to regulate trade and imports. For example, the nationalization of several Dutch companies around 1950, such as Javasche Bank and Koninklijke Paketvaart Maatschappij, was carried out based on the Dutch East Indies bankruptcy law regulated in Law No. 86 of 1958 on the Nationalization of Dutch companies. During the New Order period, the government also adopted a number of legal concepts in the field of industry from countries that implemented protective policies to encourage domestic industrialization as seen in Law No. 5 of 1984 on industry, where many articles were designed to protect domestic industry.

The adoption of law is a phenomenon that often occurs, where the rules of a country are applied through coercion from a third party, either as part of colonization or as a clause in trade agreements, support, alliances, or diplomatic justifications. Regulations from a country can enter other countries voluntarily, that is, imitating the legal regulations that apply in developed countries to be applied in countries that will make similar regulations, or it can also be by coercion, in that way there is usually economic pressure from the country that owes it or developed countries or in other ways.³

The transfer or transplantation of a law can occur through the imitation or quotation of the provisions of a system or legal regulations of one country by another country, as well as through the merger with the provisions of various laws of different countries. For example, the existing and has grown and established in Western European countries and America to be adopted so that there is an influence in and gives an impression on the legal system in the surrounding countries, even colonial countries also feel the influence. Imitation of the law can also occur when developing countries that are making legal improvements take part in the making of rules that apply in developed countries. In the process of improvement, a country may adopt some or

³ Zachari Elkins dkk, "On Waves, Clusters, Diffusion: a conceptual Framework", *Annals Aapss*, 2005, hal. 33

some certain aspects of the regulations that have been implemented in developed countries.

In this era, transplantation continues to occur either by force, adoption or imitation of the law, but this does not happen because of physical colonization from the state to other countries. However, the occurrence of this transplant is usually due to economic pressure, where a country sacrifices a strong legal system in order to adapt to the economic development desired by developed countries and of course there is an element of coercion on the part of developing countries. In the field of law related to business and the economy, for example in capital market regulations, regulations on money laundering, regulations on anti-monopoly, and regulations dealing with intellectual property rights.

British colonialist J.S. Furnivall argued that European societies applied their own laws in local communities to serve their economic interests. In the 19th century, indirect economic control through local governments or authorities was considered the cheapest way to ensure the sustainability of the European economy. In India, for example, the British government claimed the power of local kings as long as they supported the economic exploitation process carried out by the East India Company.

There are two main points raised by Watson regarding legal transplantation. First, he said that legal transplantation is a common thing and is used in practice. Second, that "transplantation of legal regulations is an ease in people's lives" has proven to be more accepted and has received important attention in discussions about transplantation of laws themselves.⁴

Another dynamic of transplantation in the era of globalization is the change in the pattern of relationships between individuals in various aspects of life, especially in the legal and economic parts, because previously limited to local (more concrete) reach, now it has expanded to the national, regional, and global levels.⁵

It can also be said that the transfer of laws in the economic sector is the most affected worldwide. Because the formation of laws does not always come from the will of the country itself, but there is a strong cause as part of the global community. On the other hand, the legal process known as "legal globalization" involves the transfer of legal consultants and legal systems from one country to another that has diverse legal regulations.

⁴ Alan Watson, "legal Transplants and Law Reform", Cambridge Law Jurnal, 1976, hal. 92

⁵ Wignjosoebroto, Opcit, hal. 158.

Legal Transparency in the National Interest and Its Challenges to Legal Politics

The transplantation of regulations or laws is a category of political and legal affairs of a country that is influenced by the political will of that country. This means that if the country wants a change in its legal regulation that is rapid and has an awareness of its role in the international community, then a legal transplant becomes a fairly important policy. Therefore, it is often started by the country so as not to be marginalized in world relations. This is different from the application of foreign laws which are more triggered by social, cultural and economic factors, in the country wants operational solutions that cannot be fulfilled by the existing legal system. In this condition, what happens is not a legal transplant but a legal loan.

Sulistiyono Adi noted that there are 43 laws and regulations in Indonesia in the economic sector that are the result of the transfer of laws and this phenomenon is expected to continue in the future. One well-known example of a transplant in Indonesia is the recognition of class action lawsuits in a number of Indonesian regulations, even though the lawsuit comes from the common law legal system. This challenges us to reflect again on what is meant by "National Law" or perhaps we need to adopt Prof. Koesnoe's view that Indonesian law is called "Hybrid Law", which is a system that combines various legal traditions side by side, where both civil law and common law can be found but each operates in different terms and scope.⁶

In the evaluation process that exists in the transplantation of the legal system, it begins with a philosophical interpretation, because the next step is to integrate foreign law into the national legal system which has its own structure and doctrine. Without a clear interpretation, we can be trapped in the capitalistic Western philosophical mindset, which does not take into account the importance of balance and harmony in the relationship between individuals and between the small world and the big world. In fact, for Indonesia, these relationships are based on very deep social and theological values.

Legal transplantation has two sides, namely positive and negative. If applied wisely, law transplantation can accelerate the adoption of certain norms that are in line with the expectations of the Indonesian nation and provide a strong legal basis to achieve the country's goals. However, if carried out carelessly, this process can cause problems such as the potential dominance of foreign legal systems that are contrary to our current legal values, namely Pancasila. In addition, foreign laws that are not in line with

⁶ Soetandyo, "Hukum Dalam Masyarakat, Perkembangan dan Masalah", Bayu Media Publishing, Malang, 2008, hal. 125.

Indonesia's social and social code cannot run well and in their application are also less than perfect.

If these things happen, the legal transplant process can lead to a negative impact on the national legal system, instead of bringing improvements. This is not because foreign laws themselves are good or bad, but rather because of a lack of wisdom in choosing and adapting their benefits for the benefit of the Indonesian people. Another challenge in the adoption of this law is that in law enforcement, law enforcement officials or the public are not ready to accept the new rules and the law enforcement apparatus is also not used to the regulations and needs to adapt to the new system which will later cause confusion or uncertainty in legal practice.

In the application of foreign law transplantation, of course, there are its own impacts and challenges. The impact and challenges in the adoption of this law are: the possibility of incompatibility with local culture and values. In the rules of the foreign legal system that are taken, they may not be in harmony with the customs or customary laws that apply in Indonesia. For example, rules related to intellectual property rights or collective or legal ownership in the population around the area. However, excessive adoption of foreign rules can lead to dependence on the legal systems of other countries, which has an impact on Indonesia's limited independence in designing national laws that are in accordance with local conditions. This dependence also carries the risk if there is a significant change in the legal policy of the country of origin that could affect the provisions that have been implemented in Indonesia. Another challenge faced is the readiness to implement laws adopted from outside. Foreign laws applied in Indonesia may require facilities and infrastructure that are not yet fully available, such as specialized expertise in understanding the regulations or technological infrastructure that supports more advanced law enforcement. This limitation of power can result in the application of the law that is not maximal and does not run effectively. The use of laws originating from abroad often causes conflicts with existing laws in Indonesia. This can lead to conflicts between two conflicting legal rules. In order to maintain the harmony of the legal system, adjustments or even changes to applicable national regulations are needed.

3. CONCLUSION

After independence, Indonesia adopted many colonial laws as the basis of national law, especially in the economic field. This practice continued during the New Orede period where protective legal policies were implemented to support the domestic industry. These

steps show the government's efforts to build a national legal basis that is relevant to the country's development and economic needs.

Legal transplantation is a fairly complicated process and has a big impact on a country's legal system. In Indonesia, the adoption of foreign laws is especially in the economic sector. Without careful thinking, there will be a risk in the transfer of this legal system which will later cause negative effects, especially if the foreign law adopted is not in accordance with local values and conditions or society. However, if applied wisely, legal transfer can accelerate legal reform, strengthen legal superpower and help developing countries adapt in the modernization era.

The success of law transplantation depends heavily on strong political support and philosophical adjustments so that the adopted law is in accordance with Indonesia's social and cultural values. Overall, the adoption of the law in Indonesia has a great influence on the country's legal system, so even though the adoption of the law can enrich the Indonesian legal system, there needs to be more attention related to local conditions and infrastructure readiness to ensure that its implementation runs well and is integrated.

BIBLIOGRAPHY

- Ahmad Fauzi dan Asril Sitompul, "Transplantasi Hukum dan Permasalahan Dalam Penerapan Di Indonesia", CV Pustaka Prima, Medan, 2020.
- Alan "legal Transplants and Law Reform", Cambridge Law Jurnal, 1976.
- Frederick Scauer, "The Politics and Incentives of Legal Transplantations", CID at Harvard University, Working Paper No. 44, 2000.
- Soetandyo Wignjosoebroto, "Hukum Dalam Masyarakat, Perkembangan dan Masalah", Bayu Media Publishing, Malang, 2008.
- Soetandyo Wignjosoebroto, "Transplantasi Hukum ke Negara-negara yang Tengah Berkembang, Terutama di Indonesia dalam hukum Paradigma, metode dan Masalah", Huma dan Elsam, Jakarta, 2022.
- Syahriza Alkohir Anggoro, "Transplantasi Hukum di Negara-Negara Asia: Suatu Perbandingan", Jurnal Indonesia Law Reform, Vol. 1 No. 1, 2021.
- Viona Wijaya, "Menghadapi Fenomena Transplantasi Hukum: Suatu Ajakan Untuk Menguatkann Jangkar Cita Hukum dan Tujuan Bernegara", Jurnal RechtsVinding Online, 2015.
- Zachari Elkins dkk, "On Waves, Clusters, Diffusion: a conseptual Framework", Annals Aapss, 2005.
- Zuhdi Muhdlor, "Kajian Politik Hukum Terhadap Transplantasi Hukum Di Era Global", Jurnal Hukum dan Peradilan, Vol. 5 No. 2, 2016.