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Conceptualization and Actualization of Law Living in Society on The Design of The Criminal Law Law Related to The Establishment of National Law

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Abstract

Good law is law that is in accordance with the law that lives in society (the living law) and is in accordance with the reflection of the values that apply in that society. On progress, the main regulations of criminal law in the future which have been formulated in theRKUHP hasaccommodate the living law as part of positive law as stated in Article 2 paragraph (1) RKUHP. This research analyzes thethe conception of the rule of law that lives in society as regulated in Article 2 Paragraph (1) of the RKUHP in the context of the formation of national law. The results of the study showthat dthe implication of the principle of material legality in the RKUHP is wrong. If the formulation of the principle of material legality in Article 2 paragraph (1) of this RKUHP is not abolished and is still maintained, then the Indonesian legal system will experience a setback. Therefore, the enactment of the living law in society (the living law) in the national legal system is sufficient only to serve as the basis for the formation of national law.

Keywords
pancasila; living law; formation of law.

I. Introduction

The development of national law must be based on values derived from Indonesian culture itself. Therefore, the most important basis used to explain the basic values for the formation of national law is none other than Pancasila which contains five precepts or basic values. These five basic values are considered a true reflection of the pluralistic Indonesian culture. That is, the five basic values become the source of the principles of national law, as well as the ideal (spiritual) basis for determining a legal norm.

The current government wants to convince the Indonesian people through the spirit of "Reaffirming the Ideological Way", namely Pancasila. In principle, there are three main meanings of the word ideology, namely ideology as false consciousness, ideology in the sense of neutral and ideology in the sense of unscientific beliefs.

Ideology in the first sense, namely as a false consciousness is usually used by philosophers and social scientists. Ideology is theories that are not oriented to the truth, but to the interests of those who propagate them. Ideology is also seen as a means of a certain ruling class or social group to legitimize its power. The second meaning is ideology in a neutral sense. In this case, ideology is the whole system of thinking, values, and basic attitudes of a particular social or cultural group. This second meaning is mainly found in countries that consider the existence of a "state ideology" important. Called in a neutral sense because good or bad depends on the content of the ideology. The third meaning, ideology as an unscientific belief, is usually used in positivistic philosophy and social sciences. All thoughts that cannot be proven logically-mathematically or empirically are an

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ideology. All ethical and moral issues, normative assumptions, and metaphysical thoughts fall within the realm of ideology.

There are two types of ideology as the ideology of a country. The two types are closed ideology and open ideology. Closed ideology is a teaching or worldview or philosophy that determines political and social goals and norms, which are ordained as truths that cannot be questioned anymore, but must be accepted as something that has been done and must be obeyed. The truth of a closed ideology should not be disputed based on other values or moral principles. Its content is dogmatic and a priori so it cannot be changed or modified based on social experience. Therefore, this ideology does not tolerate other worldviews or values. Open ideology only contains a basic orientation, while its translation into socio-political goals and norms can always be questioned and adapted to the moral values and principles that develop in society. Operational goals to be achieved cannot be determined a priori, but must be agreed upon democratically. By itself, open ideology is inclusive, not totalitarian and cannot be used to legitimize the power of a group of people. Open ideology can only exist and exist in a democratic system.

Pancasila can be said as the basic philosophy, outlook on life and ideology of the Indonesian state. In such a position, Pancasila also contains its legal ideals (rechtsidee). itself, which places it as the basic norm of the state (Grundnorm/ Staatsfundamental norm), as the source of all sources of law in Indonesia. Pancasila as the basic norm of the state can stand firmly when it is implemented by seeking inter-sila coherence, consistency with the products of laws and regulations, and correspondence with social realities.

In Article 1 paragraph (3) of the 1945 Constitution explicitly states that "the State of Indonesia is a state of law", then Article 27 paragraph (1) of the 1945 Constitution stipulates that "All citizens are equal before the law and government and are obliged to uphold the law and the government. that with no exceptions." From these provisions, it shows that the rule of law is a country that upholds law enforcement and justice to achieve national goals.

The formation of laws is part of legal development which includes the development of a national legal system. Legal development must be in harmony with current global demands, but must not abandon Indonesian national values. Such legal politics will make Indonesia a country that is not only advanced, just, and prosperous but also independent so that it is able to realize a nation's life that is equal and equal to other nations by relying on its own abilities and strengths. The development of the law can be achieved if the entire scope related to it can be used as a means to update the community (social engineering). However, Social engineering needs to be supported by an in-depth study of the living law and the level of community readiness in responding to the reforms that will be carried out. In the end, to carry out development and legal reform which is a system, planning is needed.

In general, the main regulation of criminal law that is still in force in Indonesia is the Criminal Code (KUHP), which was enforced based on Law Number 1 of 1946 in conjunction with Law Number 73 of 1958 concerning the Enforcement of the Criminal Code for the whole of Indonesia. Thus the Criminal Code as the main source of material criminal law which contains general rules of criminal law and formulations of certain criminal acts. In addition to the Criminal Code, the existence of criminal law is also contained in several laws and regulations that specifically regulate criminal acts, such as Law Number 35 of 2009 concerning Narcotics, Law Number 31 of 1999 concerning Eradication of Corruption Crimes, and other regulations.

In Article 1 paragraph (1) of the Criminal Code it is stated that "An act is not criminalized, except based on the strength of existing criminal legislation". These

provisions contain the meaning of the Legality Principle which is basically a manifestation of the limitation of the authorities not to act arbitrarily in the case of sentencing. Thus, every act or act that is qualified as a criminal offense must be fully stated in the legislation.

In legal science, it is explained that the law that regulates people's lives is not only contained in statutory regulations or written laws, but must also be interpreted as the law that lives in society. (The living law), such as: customary law, religious law, moral law and moral law, so that an act that violates the law living in society, even though it is not written in the laws and regulations, must be qualified as an act that violates the law. This statement is of course contradictory to the contents of Article 1 paragraph (1) of the Criminal Code above, which requires that the criminal law must be made in writing.

Understanding of the law must be interpreted broadly, not only to the laws and regulations, but also to other laws that regulate all aspects of people's lives, including socio-cultural and religious values. Good law is a law that is able to represent the values that exist in society, because the law is from and for the community. Law cannot be seen as a mere regulation without heeding the values that exist in society. This is in line with Romli Atmasasmita's opinion which states that "Good law is law that is in accordance with the law that lives in society (the living law) and is in accordance with the reflection of the values prevailing in that society".

On progress, the main regulations of criminal law in the future which have been formulated in theThe 2019 version of the Draft Law on the Criminal Code (RKUHP) has turned out to have beenaccommodate the law that lives in society (the living law) as part of positive law. This is as stated in Article 2RKUHPwhich reads:

(1)The provisions as referred to in Article 1 paragraph (1) do not reduce the enactment of the law that lives in society which determines that a person deserves to be punished even though the act is not regulated in this Law.

(2)The law that lives in society as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights human rights, and general legal principles recognized by civilized society.

With the provisions of Article 2 above, then a person should be convicted on the basis of law living in the community even though the act is not specifically regulated in the RKUHP. If you look at the Elucidation of Article 2 paragraph (1) of the RKUHP, it has been explained that what is meant by the law that lives in society which determines that a person deserves to be sentenced is "Customary Criminal Law". NextIt is explained that in order to provide a legal basis regarding the application of criminal law (customary offenses), it is necessary to affirm and compile by the government originating from the Regional Regulations of each place where the customary law applies.

Based on the description of the problems above, the author intends to conduct research and examine more deeply related to the conception of the rule of law that lives in society as regulated in Article 2 Paragraph (1) of the RKUHP in the context of the formation of national law. The research, willpoured into a study entitled: "Conceptualization and Actualization of Laws Living in Society in the Draft Criminal Code in Relation to the Establishment of National Law".

II. Research Method

This research is legal research with a typology of normative legal research or doctrinal research. The reason the researcher uses normative legal research is to produce new arguments, theories or concepts as practitioners in solving the problems at hand.

This study uses 3 (three) approaches, namely the conceptual approach, the philosophical approach and the comparative approach.(comparative approach).

The main stages of this research emphasize more on library research. The library research was conducted by examining secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials.

This study uses a literature study data collection technique (library research). Literature study was conducted to obtain general data by understanding theoretically the subject matter ofconceptualization and actualization of the law that lives in society in the RKUHP in relation to the formation of national law by explaining various problems that occur at the conceptual level according to those that have been identified.

The data collected through literature study was then analyzed qualitatively juridically. Qualitative data that have been collected are then grouped and linked to each other based on their nature to get a clear picture of the dataproblem to be studied. After that, analysis of interpretation and evaluation is carried out in the maximum level of data abstraction. Qualitative data analysis is carried out using norms, rules, theories and doctrines derived from the secondary data presented in order to answer problems related to the conceptualization and actualization of the law that lives in society in the RKUHP in relation to the formation of national law.

III. Result and Discussion

3.1 Laws that live in society as the basis for the formation of national law

The acknowledgment of the unwritten law was previously only explained or included in the General Elucidation of the 1945 Constitution number I which states: "...The Constitution also applies the unwritten basic law, namely the basic rules that arise and are maintained in the practice of state administration even though it is not written down".

Article 18B paragraph (2) Amendment to the 1945 Constitution states: "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law". According to this article, customary law that is recognized is customary law that is still alive, clear in its material and scope of indigenous peoples. From the provisions of the article, it can be understood that the 1945 Constitution prioritizes written law rather than unwritten law. This means that the acknowledgment of customary law that is still alive in the community in an area must be carried out with arrangements in (written) legislation.

Van Vollenhoven stated that customary law is part of the law that comes from customs, namely social rules that are made and maintained by legal functionaries and apply and are intended to regulate legal relations in society and have sanctions.

Satjipto Rahardjo as an expert in Sociology of Law argues that customary law is a law that is not made intentionally, which shows strong spiritual aspects and is closely related to the basics and structure of the local community. Meanwhile, Soepomo stated that non-statutory law is mostly customary law and a small part is Islamic law. The law includes law based on judge decisions which contain legal principles in the environment where he decides cases. Customary law is rooted in traditional culture. The law is a living law that comes from the real legal feelings of the people.

Customary law is the law that lives in society. Soepomo stated that customary law is a living law, because it embodies the real feeling of life of the people. In accordance with its nature, customary law continues to grow and develop like the community itself. From all of the above understanding, it can be seen that the living law is a law that is alive and

currently in a society, so that it does not require any more efforts to actualize it. The living law is not something static, but keeps changing from time to time. The living law is a law that lives in society, it may or may not be written.

Sociologically, the living law will always live on in society. In this regard, the following assumptions should be noted:

1. Unwritten law must exist because written law will not be able to regulate all the needs of society that need to be regulated by law,
2. In a society that is undergoing rapid social change, the role of unwritten law is more prominent than written law.
3. The problem is which is an unwritten law that is considered fair,
4. To ensure legal certainty, it is necessary to draw up written laws as much as possible. This does not mean that the situation must be so because in the field of public life, written law is primarily made to prevent the arbitrariness of the ruler.

When reviewing what is formulated above, there are at least 2 (two) elements of the concept, namely:

1. The law is incarnated from the real legal feelings of the people; and
2. Laws that grow constantly.

This concept is inseparable from the influence of the historical flow of jurisprudence, which was first proposed by Frederich Carl Von Savigny (1779-1861). He said that the law was incarnated from the soul of the people (volkgeist), where the law was not created but grew and developed with the people. The opinion that is not much different from what has been described above is what was put forward by a pioneer of sociology of law, Eugen Erlich who placed his volkgeist Von Savigny in the facts of law and the law that lives in society (living law of law). the people). Erlich was the first to use the term living law.

Borrowing Mohd's opinion. Mahfud. MD, the law is a political product that views the law as a formalization or crystallization of interacting and competing political wills. Thus the law in Indonesia is the law made by the executive and legislative institutions or other powers that are authorized to make laws in forming and implementing them whether everything is acceptable to the community, if not what efforts need to be taken so that the law is obeyed, obeyed and brings benefits to the community. and has a legal satisfaction value for the community. To achieve this goal, the law in Indonesia needs legal discovery, legal construction.

The role of judges in the formation of national law is considered very important to receive careful attention in the future, because the Indonesian legal system inherits the European legal tradition (civil law system) which places great emphasis on the formation of written regulations. In fact, due to the influence of the global economy which is dominated by the United States legal system, which is adopted in daily practice, many follow the logic of the "common law" legal system which prioritizes the role of judges (judge-made law). Even neighboring countries such as Malaysia, Brunei Darussalam, Singapore and the Philippines adhere to a "common law" tradition that is different from Indonesia.

In the civil law legal system, law is conceptualized as written legislation that has been codified completely and completely. The history of the birth of the law is only seen from the aspect of formal legality. The law only exists in formal statutory regulations whose formation process is through the legislative body, while the law that is born outside the legislative process must be considered as law that does not have the authority as a binding applied law.

Living legal values and a sense of community justice that are respected and valued collectively from generation to generation, as long as they have not been included in the

legal codification formulation, they still have no normative power that can be applied in case law. In the civil law legal system, the law is deliberately constructed in the form of a written formulation that is systematically arranged in the statutory law book, and judges are strictly bound to apply it as it is. It is closed for judges to interpret the law even though the law feels arid from the values of justice.

The legal system, has placed judges only as mouthpieces of the law or spokesman for the law, judges in carrying out the functions of judicial power do not have the competence to interpret the articles in the law, fair or unfair laws must be applied by judges. , even if it goes against belief and conscience. The following will describe 2 (two) judges' decisions, which relate to the living law or values that live in society:

1. Decision Number 247/Pid.B/2009/PN.Btg

The problem is that it is a habit for rural communities in Java who have narrow and landless land to grind/ngasak or take the remaining crops of rice, randu, clove leaves and other agricultural products. There is an unwritten agreement in Javanese society, especially in rural areas that taking the rest of the harvest does not include theft. Gresek/ngasak for the Javanese is defined as looking for leftovers. For Javanese people in rural areas, farming is not just a means of earning a living, but also has a social function. The judge's decision imposed a sentence on 4 (four) defendants each with imprisonment for 24 (twenty four) days cut off the detention period.

2. Case No.24/Pdt.G/2010/PN-Bireuen

The problem is that in the perspective of Aceh's customary law, the use of the right to lampoeh can then become an object of wealth in the form of a valuable and high-value fixed object, which in Acehnese society is called a boinah. Boinah is a result of business that has become an item that is not easily lost again. Boinah and the ground are attached, making it difficult to separate them. If the boinah is passed on to the descendants or to the heirs, the use of land rights is also inherited. In other words, useuha rights to legal community land can be hereditary, or can be transferred to other people with a number of ganto peumayah in return. The judge's decision stated that the plaintiff was the legal heir of the deceased,

3.2 Conceptualization of the Principle of Material Legality in the Draft Criminal Code in Relation to the Establishment of National Law

On progress,the main regulations of criminal law in the future which have been formulated in theThe 2019 version of the Draft Criminal Code (RKUHP) has turned out to beaccommodate the law that lives in society (the living law) as part of positive law. This is as stated in Article 2RKUHPwhich reads:

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(2)The law that lives in society as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights human rights, and general legal principles recognized by civilized society.

The provisions of Article 2 paragraph (1) of the RKUHP above are the principle of material legality, because these provisions provide a place for the living law in society (the living law) as part of the basis for criminal prosecution. With the provisions of Article 2 of the RKUHP, a person should be punished on the basis of law living in the community even though the act is not specifically regulated in the RKUHP.

If you look at the Elucidation of Article 2 paragraph (1) of the RKUHP, it has been explained that what is meant by the law that lives in society which determines that a person deserves to be sentenced is "Customary Criminal Law". NextIt is explained that in order to provide a legal basis regarding the application of criminal law (customary offenses), it is necessary to affirm and compile by the government originating from the Regional Regulations of each place where the customary law applies.

From the General Explanation of the RKUHP, it is illustrated that the thoughts of the RKUHP forming to include criminal law that lives in society into formal law, starting from the monodualistic balance, namely the principle of balance between the interests/protection of individuals with the interests/protection of the community and the balance between legal certainty and justice.

Thus, it can be concluded that according to the formulator of the RKUHP, the provisions of the formal legality principle (Article 1 paragraph (1)) prioritizing legal certainty and the principle of material legality (Article 2 paragraph (1)) promote justice. The principle of formal legality is more concerned with legal certainty over justice and the principle of material legality is more concerned with justice over legal certainty.

The principle of formal legality requires regulations before actions that are considered to violate the law occur, in other words showing legal certainty and overriding justice, this is because the criminal law process leads to criminal prosecution. The principle of legality is the main means to prevent the arbitrariness of the authorities in sentencing, in other words, all authorities of the authorities must be based on the laws and regulations that have been set. Thus, as a means of legal certainty for the people, this means that the principle of formal legality can be a means of realizing justice in sentencing.

The principle of material legality which recognizes the existence of customary law as unwritten law puts justice above legal certainty. It is difficult to imagine how the balance between certainty and justice can be realized if justice itself cannot be measured. It is appropriate that the purpose of law is justice, without justice as the ultimate goal, then the law will only be a means of justifying the arbitrariness of the majority or the ruling party against the minority or the controlled party. However, how to achieve justice above legal certainty if the concept of justice itself is not clear, there are many different views on justice from several legal theorists. Measures of justice can be "subjective" and "relative",

The emphasis on justice above, it is feared that legal certainty will provide justification for judges to deviate from legal certainty. Justice should contain elements of impartiality, honesty and fairness, equality of treatment and propriety on the basis of values developed and accepted by society. Another problem is whether by making the law that lives in society into a formal law, it can guarantee the fulfillment of a sense of community justice.

Quoting the formulation of legal philosophy from Teguh Prasetyo that the purpose of law is the creation of a peace based on a harmony between order and peace. The purpose of the law will be achieved if it is supported by legal duties, namely harmony between legal certainty and legal comparability, so that it will produce justice. Thus, justice is a legal goal that can be achieved with legal certainty.

Another reason the formulator of the RKUHP includes laws that live in the community is because there are many other actions that are considered by the community as evil acts but have not been accommodated in the RKUHP. Such thinking can be equated with the assumption that there are criminal extra ordinaria in the concept of the Ancient Roman era. In other words, there are still many crimina stellionatus (evil or evil deeds) that are not covered by the Criminal Code. Whereas in the RKUHP many new types of criminal

acts have been formulated. The new criminal acts include: marriage vows (who have sex with women with marriage promises which are later broken), cohabiting, and so on.

Basically the ultimate goal of criminal policy, namely the protection of society to achieve the main goal which is often referred to by various terms such as “happines of the citizens” (happines of the citizens); "a healthy and refreshing cultural life" (a wholesome and cultural living), "social welfare" or to achieve balance (equality). The protection of the community in question, of course, includes the interests of the perpetrators, victims, and the community. If there are still many crimina stellionatus that need to be punished if the act is violated, it can be done through criminal policy through the formation of laws with the aim of enforcing the basic norms of the community (including customary norms, customary criminal acts).

Through criminal policy, criminal law filters from the many actions that are disgraceful, immoral or detrimental to society, a number of actions that are made into criminal acts. It is impossible for all of these actions (which are disgraceful, immoral, or harmful) to be criminal acts. In this case, the RKUHP formulator as a policy maker must pay attention to 4 (four) things, namely: 1) The purpose of criminal law; 2) Determination of unwanted actions; 3) Comparison between means and results; and 4) The ability of law enforcement agencies.

Furthermore, related to the law that lives in the community, Article 2 paragraph (2) of the RKUHP does not provide a clear understanding of what is meant by the law that lives in the community. The RKUHP also does not provide a scope of law enforcement that lives in society. Article 1 paragraph (4) of the RKUHP stipulates that the legal limits that exist in society are those that are in accordance with the values of Pancasila and the principles recognized by the people of nations. However, this limitation does not provide legal certainty because it is still a multi-interpretation.

From the explanation of Article 2 paragraph (1) of the RKUHP there is only mention of customary criminal acts as living law in the community which must be compiled in the respective Regional Regulations where the law that lives in the community applies. This provision will create legal uncertainty which is contrary to the principle of legality itself, because in the process of law enforcement it will collide with customary law enforcement institutions in the regions.

Even though customary law is based on tradition which according to customary law applies, the settlement method will always be open and can always accept everything new, therefore new provisions will always grow. This is because what was agreed on yesterday is not necessarily in accordance with what was agreed today, as well as what will be agreed in the future, even though everything is guided by what was outlined from the ancestral period.

In addition, the law that lives in society is not certain, the nature of its provisions is always open to all events or actions that may occur, very different from the concept of the principle of legality which requires closed rules. What is important as a measure according to customary law is the sense of justice according to the legal awareness of the community in accordance with the development of circumstances, time and place. This shows the lack of certainty for the community. Thus, what is stated in the explanation of the RKUHP that the inclusion of living law in society will not interfere with the principle of legality is incorrect. In other words, the expansion of the principle of legality which includes laws that live in society is contrary to the meaning of the principle of legality itself.

It should be noted that the extension of the legality principle that gives place to living law (customary law), in Barda Nawawi Arief's view, is based on the following:

1. The existence of various national legislative product policies after independence;

2. Sociological study of the "characteristics" of sources of law/legality principles according to the views and thoughts of Indonesians that are not too formalistic and fragmentary/partial;
3. Various research results on customary law;
4. Scientific agreement/national seminar; and
5. Various results of comparative studies and international meeting documents/statements.

Although some criminal law experts consider that the regulation is an extension of the principle of legality. However, some consider this arrangement a setback. As a result, many debates arose among Indonesian jurists, even Dutch jurists. This debate seems to repeat the old debate when the Kingdom of the Netherlands was going to enforce the Criminal Code in the Dutch East Indies, namely whether it would apply to all levels of society in the Dutch East Indies or not. However, Van Vollenhoven strongly opposes if the Criminal Code is also applied to indigenous people.

IV. Conclusion

1. The living law in society (the living law) are the rules used in ongoing life relations, which are sourced from religious values, customs, habits, decency/morality, decency/ethics, expediency values and justice values of the local community. The application of the living law in society (the living law) in national law is one of the legal political problems faced in the framework of the formation of legislation by law-forming institutions (legislative-executive) as well as by judges in their decisions. The role of law-forming institutions (legislative-executive-judicial), is absolutely necessary by taking into account the values of unwritten law and the sense of justice that live in society, so that the resulting legal product or court decision can approach the value of justice, not just realizing legal certainty. Thus, the process of law formation by taking into account the living law in society is actually in accordance with the needs and developments that occur in the midst of the life of a justice seeking society in accordance with the values contained in Pancasila, the 1945 Constitution, the right to human rights, and general legal principles recognized by the communitycivilized.
2. The inclusion of the principle of material legality in the RKUHP is wrong. If the formulation of the principle of material legality in Article 2 paragraph (1) of the RKUHP is not abolished and is still maintained, it will be a disaster for the modern state of law and democracy in Indonesia. The world of Indonesian law will experience a decline, just like medieval conditions in Europe, where those who have the power of the majority, who feel they have the most legitimate morals and have the power to carry out punishments arbitrarily, so in this position what is at stake is the fate of human rights and human rights. the individual freedom of Indonesian citizens which will worsen. By incorporating the living law in society (the living law) into formal law, it implies that law enforcement that lives in society will be carried out by the state through the criminal justice system. If a violation occurs, it will be processed through a formal process of investigation, investigation, prosecution, examination in court and the implementation of a crime. This means that law enforcement officers (police, prosecutors, and judges) are needed who understand the law that lives in the society where they work, while law enforcement officers change from time to time.

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