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DESCRIPTIVE OF QUANTITATIVE DATA | RESEARCH ARTICLE

Enforcement of the Principle of Legality to Living Law as Legal Basis in the Positivism of Displacement Customary Law

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Abstract: Living law is an inseparable part of the Indonesian criminal law system. However, in perspective of legality principle, living law causing pros and cons. The idea of regulating the living law in Indonesian, as the basis for criminal prosecution, for unregulated act is still debated. The issue that will be analysed in this article is how to apply living law/adat law as a basis for prosecuting criminals related to the existence of legality principle and, how to measure the enforcement of living law in criminal process. Based on the analysis using the principle of legality, it can be concluded that living law, as basis for prosecution, is contrary to principle of legality and protection of human rights. The enactment of living law can potentially create legal uncertainty and abuse of power by the government. Law enforcement against living law is also difficult to implement, because it is tied to the four indicators. Therefore, the living law provision better not be placed as part of general principles in the Indonesian Penal Code Bill. Keywords: Code Bill; Legality principle; Living law.

Keywords: Living Law, Principle of Legality, Article 2 RKUHP.

1. INTRODUCTION

Indonesian criminal law does not merely create new criminal acts (criminalization) but also has an impact on customary law, the norms that apply today. This can be seen through the Draft Criminal Code (RKUHP) which still leaves many problems, one of which is the controversy contained in article 2 of the RKUHP regarding the validity of living law. Substantially states that a person can be punished for an act committed, even though there are no written rules governing the act as long as the act is considered contrary to the values that live in the living law society and there is no clear existence to determine a living value in society, and there is also no sovereign institution that is legitimate enough to determine whether something is a living value in society or not. In the principle of legality of modern criminal law or The Principle of Legality as contained in article 1 paragraph 1 of the Criminal Code states "an act cannot be punished, except based on existing statutory provisions". Meanwhile, theoretically, the principle of legality can be seen from the legendary opinion of Von Feuerbach stating "nullum delictum nulla poena sine praevia lege poenali" which means "there is no crime and no punishment without being based on the regulations that precede it. With the existence of a legal basis for written laws and regulations, it will guarantee legal certainty and prevent arbitrary punishment by officials or the government.

The controversy over the validity of Article 2 of the RKUHP related to the validity of current living law has not found a meeting point. The existence of Article 2 of the RKUHP maintains the validity of living law based on the idea that in several regions of the country there are still unwritten legal provisions, which are alive and apply as law in the area and are considered to better fulfill the

sense of justice that lives in society. Living law is a manifestation of the characteristics of the Indonesian nation and rejects the existence of Article 2 of the RKUHP. The background to this rejection is based on the placement of living legal rules in the RKUHP which contradicts the provisions of Article 1 of the RKUHP and Article 1 of the Criminal Code which are currently in effect, namely the principle of legality. As a consequence of the inclusion of customary law and customary law perspectives in the RKUHP, the inventory of customary law presents it in the form of Regional Regulations (Perda). This Perda is a reference for judges and other law enforcers in determining what can be considered living law in society. This is believed to strengthen the validity of state law because its enforcement is supported by the state. The formulation of the Draft Law also believes that this action will better guarantee the sense of justice in society. The placement of provisions on the validity of living law is part of Book I of the RKUHP which regulates the principles of criminal law, raising a problem that needs to be studied. The RKUHP itself emphasizes that it will not set aside and will continue to guarantee the validity of the principle of legality and prohibits any analogy in Article 2 of the RKUHP regarding the validity of living law. If we look at the formulation of Article 2 of the RKUHP, there are two main problems that will be reviewed in this article, namely, First, how to apply living law in society as a basis for prosecuting criminal acts in relation to the principle of legality and second, how to measure the implementation of living law in the law enforcement process.

2. RESEARCH METHODS

This research is normative legal research or doctrinal research. The reason researchers use normative legal research is because it produces new arguments, theories or concepts as practitioners in solving the problems faced. This research uses an approach, namely a conceptual approach, philosophy and a comparative approach. The main stages of this research emphasize more on library research. Library research is carried out by examining secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. This research uses a library research data collection technique. Library studies are conducted to obtain general data by theoretically understanding the main discussion of the conceptualization and actualization of living law in society and its relation to the RUKHP in the formation of national law by explaining various problems that occur at the conceptual level according to what has been identified.

The approach of this research is critical and deductive. Critical and deductive thinking is a way of thinking that in a study understands the concept of a problem and can be solved and the conclusion drawn from something that is general in nature that has been proven to be true and the conclusion is intended for something that is specific, this analysis is intended to provide arguments for the results of the research that has been done.

3. Results and Discussion

3.1. *The Position of Living Law In Society in The Reform of Criminal Law is Reviewed From Perspective and Theory Aspects.*

The draft law has been ratified, although the RKUHP will be in effect for the next 3 (three) years, there has been much debate over the birth of the RKUHP. Meanwhile, in a country of law, the law enforcement process is very important so that justice can be achieved, because the law enforcement process is a focal point in determining whether a law has run well and has achieved its goals. The law that lives in society (living law) will be faced with theoretical provisions. According to legal expert John Austin, "the law that lives in society is still experiencing a lot of intellectual debate over the

renewal of national criminal law. The entry of living law in society provides renewal of national criminal law which is feared to create a perspective on the RKHUP as quoted, Budi Suhariyanto stated, the plan to reform criminal law that juxtaposes the principle of legality with recognition of living law in society is not without problems. However, in this context, deviations from the *lex certa* principle are very likely to occur. Objections from several parties to the principle of material legality which allows the use of living law in society as a source of positive law. The Institute for Criminal Justice Reform (ICJR), an independent research institute focusing on criminal law reform and legal justice in general in Indonesia, has expressed several objections to the adoption of living law in society as a source of positive law in the Draft of Indonesia's new Criminal Code.

Several notes submitted by the Institute for Criminal Justice Reform (ICJR) regarding the inclusion of living law in society as formulated in Article 2 of the Draft Criminal Code include the following;

1. The formulation of Article 2 of the RKUHP above is considered to deviate from the provisions of Article 1 of the RKUHP or the principle of legality, thus, the RKUHP firmly ensures that the provisions of the principle of legality are no longer the main ones in criminal law, because these provisions can in fact be violated.
2. In the explanation of the formulation of the RKUHP, it is stated that the law that lives in society is customary law.

The problem is, the majority of customary laws in Indonesia are unwritten, and it must be noted that customary law does not separate criminal law and civil law. This means that criminal law can be unwritten and violate the principle of *lex scripta*. In addition, the article also violates the principle of legality which prioritizes legal certainty. The principle of legality only recognizes written law. Meanwhile, the law that lives in society is unwritten so that it contains uncertainty that offends the principle of legality. In this case, legal positivism assumes that law must be separated from morality. The concept of law as a state or ruler's order made in the form of a law is an effort made to reduce other powers outside the state as the holder of the authority of the law. Therefore, legal positivism does not provide space for customary law within the framework of the state legal system or national legal system. Legal positivism only sees law as a positive text, while its symbolic reality has been removed. Law becomes an isoteric area, regardless of its social context. The basis of this legal positivism thinking gives rise to textual pragmatism in law enforcement. The concept of separation of law and morality as stated in the constructed narrative, legal positivism is certainly not in line with thinking in Indonesia which always emphasizes the value aspect in legal development, especially in the perspective of law that lives in a society that is full of moral values as a reflection of the culture of society. Meanwhile, Islamic law as an inseparable part of the law that lives in society (living law) has experienced a degradation of its role in the renewal of national criminal law, especially in the reception theory (receptie theory). In the perspective of reception theory, the existence of Islamic law as a living law in society is even more pathetic. Essentially, this theory postulates that the law that lives and applies to the Indonesian people regardless of the religion they adhere to is customary law.

3.2. *Paradigm and Praxis Issues in the New RKUHP*

Historically, the concept of living law emerged in an era where the positive legal paradigm was developing rapidly. Living law is a response to legal positivism that reduces law to merely written law formulated by the state and ignores living law in the midst of society. However, there are several things that the author made in the transfer in the new Criminal Code. First, paradigmatically there is

consistency from the law makers when formulating the Criminal Code. Based on the principle of legal certainty regulated in Article 28D of the 1945 Constitution, Indonesia applies the principle of civil law. Only written law that is determined through national legislative procedures can be considered law. That is why a judge cannot make law, other than that stipulated in positive law. This is certainly different from the working principle of living law because it is not written, so what plays a role in determining it is honesty to speak based on the conscience of the people who consider and believe that certain social control mechanisms are applicable laws. This type of law is only applied in countries that adhere to the principle of common law, where a judge has the flexibility to make laws based on his investigation of the laws recognized by every member of society. Second, the conceptual problem when living law is integrated into the national criminal system. The Criminal Code explains that criminal acts include two things at once, namely crimes and violations. Consequently, every violation of customs, lifestyles and all other informal norms can be called a criminal act. Third, the use of living law in the national legal structure has been accommodated proportionally in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which states that a constitutional judge is obliged to explore and follow the legal values and sense of justice that live in society. In law enforcement, the use of living law is more negative than positive. This means that judges can ignore positive legal provisions (negative action) if the decision made has the potential to offend the sense of justice in society. The problem is, in providing criminal enforcement against actions that are punishable according to living law, it is a positive action.

3.3. Living Law as the Basis for Criminal Prosecution of Acts not Regulated by Law.

The principle of legality is the main principle in criminal law which functions to provide protection for human rights recognized by the constitution. Although not expressly stated in the 1945 Constitution, the provisions on the principle of legality can be interpreted from the sentence "Everyone has the right to recognition, guarantee, protection, and certainty of fair law and equal treatment before the law" contained in Article 28D paragraph (1) and Article 28I paragraph (1) of the 1945 Constitution. Based on Article 28I of the 1945 Constitution, the non-retroactive principle which is part of the principle of legality is included in nonderogable rights, or human rights that cannot be reduced under any circumstances.

Legal norms on the principle of legality are contained in the constitution and are then reaffirmed through Article 4 of Law No. 39 of 1999 concerning Human Rights (UUHAM), especially regarding the right not to be prosecuted on the basis of retroactive law. Recognition of the principle of legality in the context of human rights is influenced by Indonesia's participation as a ratifying country of the International Covenant on Civil and Political Rights (ICCPR) which is contained in Article 15 paragraph (1) namely "No one can be found guilty of a criminal act for committing or not committing an act which did not constitute a criminal act at the time it was committed, either under national or international law and it is not permissible to impose a heavier penalty than the penalty in force at the time the crime was committed. If after a crime has been committed a provision appears with a lighter penalty, then the perpetrator must benefit from the provision. Criminal acts are closely related to the limitation of a person's human rights, Article 73 and Article 74 of the Human Rights Law state that restrictions and prohibitions on human rights can only be carried out through and based on law. This is in line with the provisions of Article 1 number 2 of Law Number 15 of 2019 which amends Law Number 12 of 2011 concerning the Formation of Legislation (UUP), which states that legislation is a written regulation containing generally binding legal norms and is formed or stipulated by state institutions or authorized officials through procedures stipulated in legislation. This is in line with the opinion of Thomas Aquinas, that laws that are not made by a sovereign government are not laws that

reflect justice. Furthermore, the Constitutional Court Decision No. 003/PUU-IV/2006 of July 25, 2006, in its considerations, emphasized the existence of the principle of legality by stating that the principle of legality contained in Article 1 paragraph (1) of the Criminal Code is a demand for legal certainty where people can only be prosecuted and tried on the basis of a written statutory regulation (*lex scripta*) that already exists. In law enforcement, the existence of the principle of legality is also recognized in Article 3 of the Criminal Procedure Code (KUHP) which also states that trials (criminal procedural law) are only carried out in accordance with the methods determined by law. The existence of the principle of legality today, starting from the constitution to the realm of material and formal law, shows that the Indonesian legal system does not only place the principle of legality within the framework of criminal law alone, but has become a basic norm that is part of human rights and is protected by the constitution. So that violations of the validity of the principle of legality are considered contrary to the constitution. The application of living law as the basis for criminal prosecution. In the Indonesian criminal law system based on the description above, it can be concluded that it is not only contrary to the principle of legality but also contrary to human rights. Returning to the RKUHP, Article 1 of the RKUHP on the principle of legality has made the law the main source of law in determining whether an act is a criminal act. This provision is then emphasized in Article 12 paragraph (1) of the RKUHP that "a criminal act is an act that is threatened with criminal sanctions and/or actions by statutory regulations" in addition to being declared a criminal act, an act that is threatened and/or actions by statutory regulations must be unlawful or contrary to the laws that exist in society. Therefore, the existence of Article 2 of the RKUHP is inconsistent and mutually negates the provisions of Article 1 and Article 12 of the RKUHP. Although the constitution on the one hand recognizes the principle of legality in the form of a non-retroactive principle, on the other hand, the existence of indigenous peoples is also recognized in Article 18b paragraph (2) of the 1945 Constitution where the state recognizes and respects the units of indigenous legal communities along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia, which are regulated in law. Furthermore, Article 28I paragraph (3) of the 1945 Constitution states that cultural identity and the rights of traditional communities are respected in line with the development of the times and civilization. Therefore, if we want to maintain the validity of living law in the Indonesian criminal law system, living law cannot be used as a basis for prosecuting or convicting someone but can be placed as a basis for interpreting the law, making living law part of the source of law or part of the interpretation of law will not reduce the existence of the validity of living law. As a national philosophy, living law is part of legal dogmatics. Living legal norms should be part of the process of forming law. Living law (custom) in this case becomes part of the sociological factors that are used as considerations for the makers of criminal law in formulating prohibited acts.

3.4. *The Living Law as the Basis for Transfer*

As a basis for transfer, the living law is regulated in Article 2 paragraph (1) which states that the provisions referred to in Article 1 paragraph (1) do not reduce the validity of the living law in society which determines that a person should be punished even though the act is not regulated in statutory regulations". This provision has implications for the expansion of the interpretation of the principle of legality which has been regulated in the Criminal Code (KUHP) which is currently in force. Previously, it was only based on the principle of Formal Legality (Article 1 of the old Criminal Code), the Draft Criminal Code provides an entry point for the application of the principle of material legality. In a more concrete illustration, a person can be punished based on unwritten law which is also known as the law that lives in society. Then Article 2 paragraph (2) states that the living law applies only to the

extent that the law is in force and as long as it is not regulated in this Law and in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society". Based on this formulation, the validity of the living law is limited by space (place), the constitution, values adopted by the Indonesian nation and the RKUHP itself. The living law is also used as a basis for criminalization in Article 12 paragraph (2). This article emphasizes that "to be declared a criminal act, an act that is threatened with criminal sanctions and/or actions by statutory regulations must be unlawful or contrary to the law that is in force in society". Through Article 12 paragraph (2), violations of the living law are constructed separately from the element of being unlawful. This means that the element of being against the law is no longer an absolute element in determining a criminal act, even though there is no element of being against the law, either formally or materially, in the perpetrator's actions. The act can be considered a criminal act if it is contrary to the laws that apply in society.

3.5. *Selective Reconstruction of Customary Law*

As stated in the previous section, there are three patterns of living legal arrangements in the Draft Criminal Code. From these patterns, it shows the orientation of the use of living law for basic criminal punishment and forms of criminal or customary obligations in other words, living legal provisions and terms related to the article allow someone to be sentenced to a sentence. Meanwhile, there is not a single provision that expressly regulates living law as an effort to reduce criminal penalties or release from criminal penalties. The formulation of the draft law to make living law the basis for transfer and at the same time, ignore it as the basis for releasing or reducing criminal penalties is a selective reconstruction. This shows that efforts to recognize living law are not based on the spirit and understanding of legal pluralism.

3.6. *Implications of Living Law Placement in the Criminal Law Bill*

From the perspective of legal pluralism, the partial reconstruction of living law in the RKUHP has at least two implications. With the current regulatory orientation, living law actually confirms the state's dominance over customary law. The interpretation of customary law in the criminal process becomes the exclusive discretion of law enforcers. This situation will open up opportunities for state arbitrariness regarding the regulation of living law in the RKUHP, requiring follow-up in the form of writing customary law in Regional Regulations. This action has the potential to create the quality of customary law and create uncertainty in its use. The provisions of Article 2 paragraph (2) of the Criminal Code Number 1 of 2023 contain guidelines for determining customary criminal law whose application is recognized by the 2023 Criminal Code. However, it is necessary to pay attention to Article 2 paragraph (3) which stipulates that provisions regarding the procedures and criteria for determining living law in society are regulated by government regulations. These government regulations serve as guidelines for regions in determining living law in society and regions.

4. CONCLUSION

The author concludes that in article 2 of the RKUHP concerning living law, living law in society must be in accordance with the provisions of the legislation and the principle of legality. In the RKUHP, living law teaches us that efforts to incorporate actually strengthen the dominance of the Indonesian state over the administration of the state to be used as a state philosophy. The principle of legality has made the law the main source of law in determining whether an act is a criminal act. For this reason, as an Indonesian nation, the author hopes that all people will participate in the design of the RKUHP so that the government does not act arbitrarily in issuing a regulation without

considering the interests of its nation. Article 2 paragraph (3) of the Criminal Code Number 1 of 2023 stipulates that "further provisions regarding living law as referred to in paragraph (1) and paragraph (2) are regulated in government regulations". This government regulation functions as a guideline and technical basis in the application of living law as a source of criminal law. However, until now, there has been no information regarding government regulations that specifically regulate this implementation. Article 2 paragraph (3) of the 2023 Criminal Code, this regulation will be enforced to detail how customary law or living law can be used as a basis for prosecution and still comply with modern legal principles, including the principle of legality. When the government regulation is issued, the following matters are expected to be explained.

1. Recognition Criteria: What are the criteria that must be met by living law to be recognized and applied as a legal basis in criminal cases.
2. Limitations and scope: Limitations of the application of living law, for example, geographical area, types of acts regulated by customary law, and parties subject to the law.
3. Alignment with national law: How are living law mechanisms considered and aligned with national law, especially in terms of the principle of legality.
4. Sanctions and enforcement processes: How are sanctions and law enforcement based on living law implemented, and who has the authority to enforce the law.

This government regulation will be very important to ensure that the application of living law remains within a clear corridor and does not conflict with the legal system that is already in place.

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