

Living Law in The Perspective of Progressive Law: The Urgency of Its Regulation in The Draft Indonesian Criminal Code

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Abstract

The discussion on the Indonesian Criminal Code continues and cannot be separated from criticism by various parties. One of the arrangements that has received criticism is regarding living law in society (living law). On the one hand, this regulation emphasizes the existence of living law which is the character of the multi-cultural Indonesian nation. On the other hand, this arrangement is considered to have no legal certainty. This research examines in depth how the urgency of setting living law in the Indonesian criminal law code, as well as examines the existence of this living law in the perspective of progressive law. The research was designed with a normative juridical method. The approach used is a statutory approach and a conceptual approach. The results of the study show that living law arrangements in the criminal law code are very important to provide legal certainty for the existence of indigenous and tribal peoples in Indonesia. Living law arrangements are also in line with the spirit of progressive law enforcement. For law enforcers, especially judges, this arrangement reinforces the provisions of Article 5 paragraph 1 which requires judges to explore, follow and understand legal values and a sense of justice that lives in society.

Keywords: Living Law, Progressive Law, Criminal Code

Abstrak

Pembahasan Rancangan Kitab Undang-Undang Hukum Pidana Indonesia terus berlanjut dan tidak lepas dari kritik oleh berbagai pihak. Salah satu pengaturan yang memperoleh kritik ialah mengenai hukum yang hidup dalam masyarakat (living law). Disatu sisi, pengaturan ini mempertegas keberadaan living law yang merupakan karakter bangsa Indonesia yang multi-kultural. Dilain sisi, pengaturan ini dinilai tidak berkepastian hukum. Penelitian ini mengkaji secara mendalam bagaimana urgensi pengaturan living law dalam kitab undang-undang hukum pidana Indonesia, serta mengkaji keberadaan living law ini dalam perspektif hukum progresif. Penelitian didesain dengan metode yuridis normatif. Pendekatan yang digunakan adalah pendekatan perundang-undangan dan pendekatan konseptual. Hasil penelitian menunjukkan bahwa pengaturan living law dalam rancangan kitab undang-undang hukum pidana sangat penting untuk memberikan kepastian hukum terhadap eksistensi masyarakat hukum adat di Indonesia. Pengaturan living law juga selaras dengan semangat dalam penegakan hukum progresif. Bagi penegak hukum khususnya hakim, pengaturan ini mempertegas ketentuan Pasal 5 ayat 1 yang mengharuskan hakim untuk menggali, mengikuti, dan memahami nilai-nilai hukum dan rasa keadilan yang hidup dalam masyarakat.

Kata Kunci: Living Law, Hukum Progresif, RKUHP

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Introduction

Law in its general sense is the whole of the rules and principles that function as tools or means of development in the sense of channelling the direction of human activity in the direction desired by development or renewal (Radbruch

2003). In the new paradigm, law is no longer seen as an independent entity, but must be able to interact with other entities with the main objective of adopting existing interests in a society that continues to move dynamically. One of the reasons for this movement is the current of globalization.

Globalization triggers rapid social change. Rapid social change as a result of the modernization process has the potential to cause social unrest and social tension. Changes in the value system rapidly demand new norms of social life (Muladi and Medis 1997). This situation demands an open law towards the development and dynamics of society in the era of globalization. Modernization and globalization are not optional, but are phenomena that must be faced (change is not optional) and cannot be avoided. Both of these are natural things that arise immediately due to the complexity and heterogeneity of human relations as a social problem as a result of the invention of modern technological tools (Muladi and Medis 1997).

The increasing process of modernization due to the discovery of modern communication and information technology tools, the issue of modernization is becoming global and giving rise to a new phenomenon in the form of globalization. This phenomenon requires changes in the structure of legal relations, new legal substance and legal culture which are often entirely new. Without a change in the legal system there will be dangers to peaceful life in various social lives, everything will become uncertain and disorderly and the feeling will not be protected (Muladi and Medis 1997).

Facing globalization which is increasingly rapidly entering the foundations of social, national and state life, Anthony Giddens thinks of a "third way" as a third choice between socialism and capitalism, or between state intervention and the free market. The world at the end of the 20th century is characterized by "manufactured uncertainty" (Giddens 2013), a time filled with uncertainty. This situation was not brought about by nature, but by man himself thanks to the technology he created. Included in this case its influence on the order of people's lives and triggering cultural acculturation. The influence of such cultural acculturation gives a perception of the law itself and also of its existence (Christianto 2020).

The rapid development of technology has contributed to changes in people's behavior. In the end this has an influence on various types of new crimes or variations of various existing crimes. This can be seen in the current conditions, that there are more and more criminal law laws that criminalize acts such as: criminal acts of sexual violence, pornography, and various types of criminal acts related to information and other electronic transactions. It becomes a necessity

that criminal law must continue to move dynamically. Academic studies will also encourage and close the gap between *das sein* and *das sollen* (Raharjo, Saefudin, and Fidiyani 2018).

Criminal law is part of the overall law that applies in a country, which establishes the principles and rules for determining which actions have been prohibited and accompanied by criminal threats, determines when in what cases those who have committed criminal acts can be subject to punishment as has been threatened, and determine in what way the imposition of said punishment can be carried out if there is a person suspected of committing a crime (Moeljatno 2002). So that it can be said that criminal law according to Mertokusumo's opinion is referred to as *ultimum remedium* which means as the last tool (Mertokusumo 2007).

Criminal law is part of the overall law that applies in a country that has a rule of law. Law is coercive and binding, so it has consequences from its implementation. These consequences are in the form of sanctions both criminal sanctions and action sanctions (*maatregel*) (Ramadhani and Barda Nawawi Arief 2012). If we look at the history of criminal law in Indonesia, criminal law is a legacy of Dutch colonial law which was applied in Indonesia when the Dutch colonized Indonesia for 350 years. As a result, Indonesian criminal law is still using Dutch heritage criminal law whose product is *Wetboek van Strafrecht* (WvS) or the Criminal Code. In connection with these facts, the reform of criminal law in the context of creating a national criminal law system is very important and urgent to put forward (Siregar 2012).

Therefore, at this time an effort has begun to be made to reform the criminal law which in essence contains several meanings, an attempt to carry out a review and reassessment in accordance with the central socio-political, socio-philosophical and sociocultural values of Indonesian society which underlies social policy, criminal policy. and law enforcement policies in Indonesia (Arief 2010). The effort to reform Indonesian criminal law has a meaning, namely to create a codification of national criminal law to replace the codification of criminal law which is a legacy of the Dutch colonial, namely *Wetboek van Strafrecht Voor Nederlands Indie* 1915, which is a derivative of *Wetboek van Strafrecht Netherlands* in 1886 (Muladi and Medis 1997). As mentioned above, it contains the determination of the Indonesian people to realize a criminal law reform which can be interpreted as an effort to reorient and reform criminal law in accordance with the central socio-political, socio-philosophical and socio-cultural values that underlie and provide a side to normative content. and the desired substance of criminal law. The inclusion of the principle of material legality in the Criminal

Code was continued by adhering to the nature of violating material law, in addition to being against formal law (Suartha 2015). Efforts that are currently being made by the Indonesian government are drafting the Criminal Code which is a form of renewal of Indonesian criminal law. Apart from that, the fact that there are more and more new crimes that have emerged at this time that have not been regulated in the Criminal Code also makes the Criminal Code weak in dealing with these new types of crimes. In other words, the Criminal Code seems outdated and often creates a legal vacuum for new types of crimes. This condition can certainly endanger the criminal law enforcement process .

Legal renewal including criminal law is a necessity, because the ever-changing need for justice in society must be accommodated. However, in the Criminal Code (KUHP), which is currently under discussion in the DPR, there are still articles that are being questioned by civil society, because they are worried that they will have an excessive criminalization effect. Several legal institutions have conducted studies on the important articles of the RKUHP and their defense (Irianto 2021).

One of the points in the renewal is to include "living law in society" or what is known as living law. The editorial of the arrangement is contained in the formulation of Article 2 of the RKUHP as follows:

Article 2

- (1) The provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law that lives in society which determines that a person should be punished even though the act is not regulated in this Law.
- (2) The law that lives in the community 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, and general legal principles recognized by civilized society.

Regarding this article, various groups provide different arguments. Former Chief Justice Prof. Komariah E Sapardjaja is of the opinion that the provisions of Article 2 paragraph (1) of the RKUHP are contradictory to Article 1 paragraph (1) of the RKUHP. This is because the rationale for Article 1 paragraph (1) of the RKUHP is a law. Whereas Article 2 paragraph (1) of the RKUHP is actually an unwritten law. Meanwhile, Sulistyowati in her article argued that if living law were simply equated with customary law, then that is precisely where the problem lies. Customary law is not a frozen law, but encounters a meeting with other laws,

transforming to give birth to "hybrid" law which is always new. Customary law has even spread far along with the migration of its supporting indigenous people to a borderless area and to form a new community. They construct the identity of "biculturalism" in a new place. On the one hand, it still activates old customary values and laws, especially related to life cycle events: birth, marriage, death, inheritance, even the ownership relationship of natural resources in the village of origin. But on the other hand they also adopt a variety of values, laws, lifestyles of new residences. It is not easy to identify, to make a mapping of customary laws throughout the vast archipelago, especially with the romantic perspective of old customs. Van Vollenhoven once made a map of indigenous peoples by dividing the Dutch East Indies into 19 customary territories. However, it was criticized as a product of mere imagination and fiction, because it was based more on stories from Indonesian students who studied in Leiden at that time. Customary law is far more complex than it is codified. Especially at the present time, efforts to re-codify it will actually reduce customary law (Lintang, Martufi, and Ouwerker 2021).

Pros and cons in setting living law cannot be avoided. However, in scientific discussion criminal law, especially in Indonesia, cannot be separated from progressive law. Progressive law is a legal development thought initiated by Prof. Satjipto Rahardjo, is of the view that law is formed for humans, not humans for law. His rationale is that current legal studies have reached deep ecology which is fundamental to anthropocentrism thinking. An understanding that is centered on humans so that humans are considered to have the ability to create, taste, language, work, and intention to the extent permitted by the Kholiq. So that the law does not decide what it wants without learning from the environment. The view of humans as Kholifah fil ardh forms the basis that God greatly glorifies His creation with glory and respect. So that man-made laws should not reduce glory and respect to the extent of what is said in the law.

Based on the description above, this article discusses the living law arrangements in the Indonesian Criminal Code in a comprehensive manner. What is the urgency and how, when viewed from a progressive legal perspective, will it provide a lot of good or vice versa.

Research Problems

1. What is the regulation of living law in the new Indonesian criminal law code?
2. How is the regulation of living law in the criminal law code in the perspective of progressive law?

Discussion

1. living Law arrangements in the Indonesian Criminal Code

Law is an important pillar in maintaining order, security and peace in the social system which is a relationship between individuals or among each other. With rules, there is a barometer to judge an action, whether the action or actions can be justified in the social system or vice versa will cause disorder. These rules basically aim to achieve harmony and security in society as much as possible, so that no one's interests are harmed by one another, there is no injustice between people, and the fabric of social relations can run well (Amin and Huda 2021; Baek, Han, and Seepersad 2020; Ibrahim 2020).

Indonesia itself has a very diverse way of looking at law, because the geographical shape of the archipelago has given birth to various cultures and perspectives on things, including the perspective on law. The community has its own way of interpreting the law, such as Balinese society with a village system, *kala*, *patra* which is more flexible, of course, different from the Bedouin community, which is more sacred with the principle that short ones should not be connected, long ones should not be cut. Here, each community determines its character and characteristics. the law itself. These various forms and types of society then show special or distinctive characteristics according to the way their cultural views have been institutionalized since ancient times and have been carried out by these groups of people for generations (Yudho and Tjandrasari 2017). This is where what is called the legal position in the sense of *volkgeist* or the soul of the nation must be understood in its entirety, both from the ontological, historical, and legal gene aspects (Isdiyanto 2018).

Law cannot be separated from people's lives because society itself is the origin of the purpose of forming the law. More specifically, the law basically arises due to the existence of relations within society to maintain order in the relations of society itself (Syamsudin 2008). This has become an adage echoed by Marcus Tullius Cicero who famously said "*ubi societas ibi ius*" or translated in Indonesian "Where there is society there is law". The correlation between law and society is an eternal correlation that cannot be separated because society itself is a 'legal subject'. It is not surprising then that society is referred to as a fabric of rules, which means a network of rules where the law is born as a rule that regulates the relations of social life (Mebri 2017).

In Indonesia itself efforts to accommodate living law by including in the formulation of Article 2 RKUHP, that the law that lives in society determines that a person should be punished even though the act is not regulated in law, whereas in Article 2 Paragraph (2) the law that lives in in society as referred to in Article 2

Paragraph (1) applies in the place where the law lives and as long as it is not regulated in 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.

The complete formulation in the Indonesian Criminal Code is as follows:

- (1) The provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law that lives in society which determines that a person should 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 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, and general legal principles recognized by civilized society.

In his explanation what is meant by "the law that lives in society which determines that someone deserves to be punished" is customary criminal law. The law that lives in the community in this article relates to the law that is still valid and developing in people's lives in Indonesia. In certain areas in Indonesia there are still unwritten legal provisions that live in society and apply as law in that area, which determines that a person should be punished. To provide a legal basis regarding the application of customary criminal law, it needs to be confirmed and compiled by the government originating from the regional regulations of each place where customary criminal law applies. This compilation contains laws that live in society that qualify as customary crimes. Such a situation will not rule out and still guarantee the implementation of the principle of legality and the prohibition of analogy adhered to in this Law (Bello 2012; Bui 2020; H. W. Lee and Kim 2020; M. Y. K. Lee and Lo 2020).

Meanwhile, in the elucidation of Paragraph (2) it states that in this provision what is meant by "applies in the place where the law lives" applies to Everyone who commits a customary crime in that area. This paragraph contains guidelines in establishing customary criminal law whose validity is recognized by this Law.

Questioning this, Sulistyowati Irianto argues, that living law is not just an ordinary term, but is the main concept studied historically in various branches of legal science such as legal anthropology. In essence, living law is a law that adheres to or applies in society. In the study of legal pluralism, it is understood that state law is not the only law that monopolizes the behavior of citizens. In everyday reality, there are customary laws, religious laws, habits, or a hybrid between them, which are equally effective in relations between citizens. State law with its supremacy is indeed the strongest binding power. As soon as someone is indicated

to have violated the law, the police (representation of the state) can immediately arrest him. However, state law is rarely encountered in daily life except for encounters with population administrative matters, civil transactions or criminal offenses. The law that is closest to everyday life is actually other laws outside of state law (Carozza 2008).

Recognition of living law which is a source of Indonesian law has also been recognized constitutionally as well as several laws, including; Article 18b Paragraph (2) of the 1945 NRI Law, Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power, Article 103 letters d and e of Law No. 6 of 2014 concerning Villages, and Article 6 of Law no. 39 of 1999 concerning Human Rights clearly stipulates the recognition of local wisdom, customs and rights of origin. Furthermore, when there is a negation of the law that lives in society, it will raise conflicts about the meaning of legal certainty itself. Currently, the Republic of Indonesia's newest RKUHP provides more legitimacy to living law, namely by incorporating laws that exist in society as criminal law. The formulation can be rigidized by including the provisions of customary criminal law in the form of regulations in each area where the living law applies.

The above argument provides an illustration that speaking of living law should not be translated narrowly into customary law as explained in the KUHP. However, if it is not formulated in positive legal norms, this will provide loopholes that make it easier for authorities or law enforcers to "play" the law and prolong unfair law enforcement practices.

2. Living Law in the perspective of Progressive Law

This understanding of progressive law is no different from what Philippe Nonet and Philip Selznick introduced, which is called responsive law. According to him, law functions as the protection of human interests, where the purpose of the legal system requires the fulfillment of 3 (three) elements which are always the foundation of law, namely justice (*gerechtigheit*), certainty (*rechtsicherheit*) and expediency (*zweckmassigkeit*) (Otje 2009).

Law in its general sense is the entirety of the rules and principles that function as tools or means of development in the sense of channeling the direction of human activity in the direction desired by development or renewal (Radbruch 2003). In the new paradigm, law is no longer seen as an independent entity, but must be able to interact with other entities with the main objective of adopting the interests that exist in society. In a responsive law, there is wide open space for dialogue to provide discourse and the existence of pluralistic ideas as a reality. Therefore, responsive law is no longer based solely on juridical considerations, but

rather tries to see an issue from various perspectives in order to pursue what is called "substantive justice". The concept of responsive legal development was formulated by Philippe Nonet and Philip Selznick. Historically, responsive legal theory was the main objective of legal realism and sociological jurisprudence. This legal theory wants law to be more responsive to social needs, to achieve this goal they encourage the expansion of other fields that are legally related (Nonet and Selznick 2003).

The existence of responsive legal theory brings "new hope" to law in Indonesia. Law enforcement, which so far tends to be positivism, produces legal products that have low effectiveness in society. The presence of responsive legal theory has provided new hope for a law enforcement orientation that is more responsive to the values that exist in society.

Philippe Nonet and Philippe Selznick distinguish three basic classifications of law in society, namely: law as a servant of repressive power (repressive law), law as a separate institution capable of taming repression and protecting its own integrity (autonomous law), and law as a facilitator of various responses to social needs and aspirations (responsive law) (Nonet and Selznick 2003).

Responsive law is result oriented, on goals to be achieved outside of law. In responsive law, the legal order is negotiated, not won through subordination. The hallmark of responsive law is to seek the implied values contained in regulations and policies. In this responsive legal model, they express disagreement with the doctrine which they consider to be a standard and inflexible interpretation. Legal products that have a responsive character are made in a participatory process, that is, they invite as much participation as possible from all elements of society, both in terms of individuals and community groups and must also be aspirational in nature which originates from the wishes or wishes of the community. This means that the legal product is not the will of the authorities to legitimize their power. The purpose of law must really be for the welfare of society in the greater interest, not for the benefit of those in power.

Meanwhile, progressive law was initiated by Satjipto Rahardjo, starting from a basic assumption, law is an institution that aims to deliver people to a just and prosperous life and make people happy. The law does not reflect law as an absolute and final institution, but is determined by its ability to serve humans (Rahardjo 2009).

The idea of promoting progressive national legal development actually departs from the concern that practical legal science places more emphasis on the paradigm of regulation, order and legal certainty, which in fact does not touch the paradigm of human welfare itself. Satjipto Rahardjo said that the difference lies in

practical legal science which uses a regulatory paradigm (rule), while progressive legal science uses a human paradigm (people). The acceptance of the human paradigm brings progressive legal science to pay attention to behavioral factors (behavior, experience) (Rahardjo 2006a).

For progressive law science, law is for humans, while for practical legal science, humans are more for law and legal logic. Therein lies the enlightenment by progressive legal science. Because progressive jurisprudence prioritizes human beings, progressive jurisprudence does not act submissively or simply submit to existing laws, but instead acts critically (Rahardjo 2006b).

The law should be able to keep up with the times, be able to respond to changing times with all the foundations in it, and be able to serve the interests of society by relying on the moral aspects of the human resources of the law enforcers themselves (Rahardjo 2009). The law uncovers and explores various failures of modern law which are based on the positivistic, legalistic and linear philosophy to answer various legal issues.

Progressive law contains the spirit of liberation, namely liberation from the legalistic and linear conventional legal tradition. For progressive law, the process of change is no longer centered on regulations, but on the creativity of legal actors to actualize law in the right space and time. Progressive law actors can make changes by making creative interpretations of existing regulations, without having to wait for regulatory changes.

Progressive law, like *interessenjurisprudenz*, never negates existing regulations as is possible in the *frei rechtslehre school*. Even so, it is not like legism which fixes rules as a fixed price or analytical jurisprudence which is only concerned with a logical-formal process. Progressive law embraces, both regulations and social reality/needs as two things that must be considered in every decision (Tanya, Simanjuntak, and Hage 2013).

Progressive law as well as *interessenjurisprudenz* and legal realism, have the same spirit and goal, namely placing human interests and needs as the main goal of law. Satjipto Rahardjo argues that law enforcement is more than just applying laws and procedures (black letter law), because the quality and intensity of law enforcement can vary, therefore it is necessary to enforce the immoral law, namely the mobilization of all spiritual potential within oneself, thus giving rise to vigilante law enforcement (fighters) in the sense of carrying out the law with spiritual intelligence (Raharjo, Saefudin, and Fidiyani 2018).

The formulation of Article 2 of the Criminal Code accommodates law enforcement by prioritizing aspects of justice as the spirit of the law itself. Thus the enforcement of the principle of legality is still carried out but in the sense of

the principle of material legality by not only upholding the written law, but also participating in upholding legal values that live in society (living law). The paradigm of legal certainty as the main goal of law enforcement with a formal legality pattern in the Criminal Code has undergone a fundamental shift in the paradigm of the Criminal Code, namely from a formal understanding to a material understanding. Because real legal certainty must not ignore the law that lives in society (living law) because it will cause injustice, criminal law enforcement must also accommodate the existence of noble values that live in Indonesian society in order to provide justice (Demir 2021).

Based on this, if it is related to the living law, then both of them have the same breath, the same spirit. Living law originating from Volgeist is oriented towards fulfilling human needs in the area where the law applies. So that in this way the regulation of living law can become the basis for law enforcers, especially judges to be able to uphold progressive laws, penetrate the boundaries of rigidity in the formulation of existing articles by exploring the "living law" in depth.

Conclusion

Living Law arrangements in the RKUHP are regulated in Article 2. "The living law in society determines that a person should be punished" is customary criminal law. The law that lives in the community in this article relates to the law that is still valid and developing in people's lives in Indonesia. Its validity includes acts committed where the "living law" applies.

The regulation of living law is the basis for law enforcers, especially judges, to be able to uphold progressive laws, break through the boundaries of rigidity in the formulation of existing articles by exploring the "living law" in depth.

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