THE EXISTENCE OF LIVING LAW AT THE NEW KUHP IN THE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

This paper explores the existence of Living Law that has become positive law in Indonesia, through the New Criminal Code in Law No.1 of 2023. The interesting thing in this Criminal Code Law is the concept of legalizing Living Law in article 2 will directly affect to the opertionalization of Criminal Justice Syatem. The method use in this research is qualitative method with subjects on elements of the criminal justice system with the approach of statute and literature review. The result of this research are: 1) The concept of living law in Article 2 of the Criminal Code Law is defined as customary law which will be legalized in the form of a Regional Regulation, 2) The embodiment of customary law as a regional regulation will bring it into the realm of politics, namely it is formed by the local government and ratified by the legislature (DPRD), 3) There is a need for in-depth inventory and research on customary law which will be legalized and implemented by legal institutions and need to clarify the role of the criminal justice system in the implementation of customary law.

Keywords: Existence, Living Law, New KUHP, Criminal Justice System

INTRODUCTION

Previously, the passage of the Criminal Code Bill sparked controversy due to several articles deemed contentious (Sitompul and Zuhriah, 2023). However, beyond these controversies and following subsequent revisions, The New Criminal Code (New KUHP) has been ratified by the President and the Indonesian Parliament (DPR RI) with the anticipation that it will function effectively, fairly, and comprehensively safeguard human rights (HAM). Its enactment stands as a significant milestone, representing a crucial step towards strengthening the criminal justice system in Indonesia (Malau, 2023). Nevertheless, the formalized and conditional incorporation of customary criminal law, along with the introduction of limitations on its applicability (Yoserwan, 2023), necessitates a reconfiguration of the operationalization of the criminal justice system in Indonesia.

Indonesia currently has the New Criminal Code in Law No.1 of 2023. It replaced the *Wetboek Van Strafrecht* (WvS) which from 1946 to the present believed outdated and does not fulfill a sense of criminal justice with dignity of Indonesian life. The New Criminal Code *(KUHP)* will be used three years after it promulgated in January 2023, it means that it will be enforced in January 2026. Even though this New Criminal Code (further will be written as "New KUHP") has passed long discussions, but still leaves a lot of polemics.

One of these provisions is found in Article 2, which encompasses living law as an extension of the principle of legality. The complete text of Article 2 in the New KUHP is as follows:

1. The stipulation referred to in Article 1, Paragraph (1), does not diminish the validity of the law that exists within society (living law), which mandates the punishment of an individual even if the action is not regulated within this Law.
2. The law that prevails within the community, as mentioned in Paragraph (1), applies in instances where the prevailing law is not regulated within this Law, while aligning with the values encapsulated in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and fundamental legal principles acknowledged within the global community.
3. Provisions pertaining to procedures and criteria for the establishment of laws that subsist within society are stipulated by governmental regulations.

The law that prevails within society, often referred to as living law, is expounded in Article 2, Paragraph 1, which specifically designates living law as customary law. The full elucidation of Article 2, Paragraph 1, reads as follows:

> "The concept of the law that prevails within society pertains to customary law, which establishes that individuals who commit specific actions warrant punitive measures. This concept of the law that prevails within society, as delineated in this article, pertains to unwritten legal norms that remain valid and continually evolve within the lives of Indonesia's populace. To fortify the legitimacy of this law that subsists within the community, regional regulations are established to oversee these customary offenses."

Due to the diversity of cultures in Indonesia, it is feared that the inclusion of living law in the New KUHP will cause problems such as narrated by Suartha (2015), who in essence stated that juxtaposing the principle of legality with the living law is not without problems. The limitation of criminal acts is expanded, not only on stated in the law but also according to customary criminal law either written or unwritten. In this context deviations from the principles of lex certa is very likely to happen. Customary Law is usually unwritten. If we find written customary law, then this is a recorded customary law (*beschetegen Adat Recht*) and documented customary law (*Documentereerd Adat Recht*). In general, recorded customary law are the product of research by experts. Meanwhile documented customary law is the recording of customary law carried out by functionaries or officials.

Several researchers have addressed the issue of the existence of Living Law within the positive law in Indonesia. For instance, Prianter Java Hairi (2016) has examined the consideration of regulating living law as a principle of material legality in the new Criminal Code (KUHP) due to reasons of recodification and decolonization, especially since living law in Indonesia has often been marginalized outside the formal principle of legality. Another study focused on the legal construction and implications of living law in the draft Criminal Code (RKUHP) was analyzed by Musmuliady, Jubair, and Aminuddin Kasim (2022). They asserted the inclusion of living law in the RKUHP along with Local Regulation based on local living law substance, and its

implications necessitate the dissemination of legal knowledge and training to all elements across sectors, including customary legal communities. Furthermore, Ade Irawan and Margo Hadi Pura (2023) conducted a more juridical analysis of the position of Living Law in the Indonesian Criminal Code (KUHP), and their findings explained that Living Law has been recognized and enshrined in Article 18B paragraph (2), Article 28I paragraph (3), Article 32 paragraph (1) and (2) of the 1945 Constitution.

Based on the aforementioned explanations, it is evident that Living Law within the Criminal Code (KUHP) has established its position within Indonesia's positive legal framework, encompassing regulatory aspects, legal construction, and its contextual relevance. In contrast to earlier research endeavors, the current study places its focus on delving into the essence of the existence of Living Law as delineated in Law Number 1 of 2023, specifically addressing the Criminal Code's role within the broader context of the Criminal Justice System. This approach stems from the fact that previous discourse encountered instances of resistance marked by rhetorical strategies such as euphemism and dysphemism during the discourse surrounding the Criminal Code Bill (Tenrirawe, Lukman, Said, 2022). This paper, furthermore, serves as a bridge addressing the intricate interplay between criminal law and administrative law—an aspect that in the study conducted by Naibaho, Harkrisnowo, Suhariyono, and Wibisasana (2021) appeared to be ambiguously defined, and even exhibited instances of incongruence and inconsistency in formulating punitive measures.

RESEARCH METHOD

The research methodology employed in this study is a qualitative descriptive approach, focusing on the elements of the criminal justice system and utilizing statute analysis and literature review as its guiding framework. The study commenced by identifying several issues pertaining to the old and New Criminal Code (New KUHP), followed by the selection of relevant literature addressing the existence of Living Law within the framework of the New KUHP. The data utilized encompassed legislative documents, in addition to pertinent books and scholarly journals. Subsequently, a methodical analysis was conducted in alignment with the research objectives, specifically concerning the substantive facets of the existence of Living Law within the positive legal framework in Indonesia.

DISCUSSION

The implementation of the New KUHP in Indonesia significantly influences the formulation of specialized criminal legislation, thus emphasizing the urgency of the implementation of national criminal law that can accommodate diverse societal interests (Nugroho, 2017). The revitalization of criminal law must encompass substantive, procedural, and implementation-related enhancements, as the outdated former Criminal Code is no longer relevant to address intertwined contemporary challenges. Furthermore, the old Criminal Code does not align with fundamental values, socio-philosophical, socio-political, and socio-cultural norms. Consequently, the old Criminal Code, stemming from colonial legacy, fails to represent a comprehensive criminal legal system due to the removal of specific articles or offenses. This has consequently led to the emergence of new laws beyond the Criminal Code, regulating specialized offenses and provisions (Irawatu, 2019). Therefore, the enactment of the New KUHP bears the responsibility to accommodate societal interests based on the principle of legality.

The promotion of living law within the New KUHP initiates the state's effort to incorporate non-state law into the national legal system (Utama, 2020). Beyond that, the old Criminal Code is related to substantive penalties of death, imprisonment, detention, and fines, which were formulated to be considered aligned and harmonious with the severity of crimes and offenses. However, it also encompasses the application of penalties that are deemed outdated, inappropriate, and unrealistic (Sitepu, 2019). This underpins the emergence of the New KUHP, which was initially born from the commitment of the Indonesian Parliament (DPR RI) and the government during the 2014-2019 period as part of the National Legislation Program (Prolegnas). According to Suparji (2016), the KUHP reform should address three main issues: criminal acts, criminal responsibility, and punishments, as well as treatments. Hence, the implementation of the New KUHP can fill the gaps that existed before. For instance, the research conducted by Rado and Alputila (2022) discussing the customary legal values of *Kei Larvul Ngabal* and *Sasa Sor Fit* that are binding to their respective communities can serve as considerations to contribute to the ius constituendum in future criminal law, as the practical existence of such legal practices does not undermine the essence of the principle of material legality within the New KUHP.

The enactment of the New New KUHP constitutes a highly significant stride in fortifying Indonesia's criminal legal system, while taking into account the challenges of effectiveness, oversight, and periodic review (Malau, 2023). The signing of the New KUHP on December 6, 2022, marks a noteworthy achievement for Indonesia. While not all perspectives of human rights within the human rights conventions can be fully integrated due to the diverse landscape, the universal value of human rights must be upheld (Arsetyo, 2023). Consequently, the implementation of the New KUHP as Law No. 1 of 2023 concerning the Criminal Code can potentially exert an impact on the forthcoming societal landscape.

It is important to note that, as per Soekanto (1981), customary law is defined as "a complex of customs which are generally not written down, not codified and coercive in nature, have sanctions so they have consequences." According to Soepomo (1993), a prominent figure in Indonesian customary law, succeeding Van Vollenhoven and Ter Haar as an expert in the field, "custom is deeply ingrained in traditional culture; customary law is a living legal system as it embodies the genuine legal sentiments of the people. In line with its inherent nature, customary law perpetually undergoes growth and development, akin to the trajectory of life itself." Thus, it can be deduced that, in a general sense, customary law is unwritten law. Notwithstanding, indigenous communities still hold the belief that there exist regulations binding their surroundings, necessitating adherence under threat of sanctions for violations. This delineates a distinct junction at which the intersection of anthropology and law becomes evident.

In Liberia, there exists a tribe known as the Gola tribe, which articulates a perspective on the law likening it to a chameleon – a creature that assumes different forms in varying environments – and can only be comprehended by those versed in its intricacies. The Gola Tribe's reference to the law pertains to the domain of legal application and practitioners. This implies that legal principles diverge across cultures, much like the adaptable nature of a chameleon (Maskur, 2012: 173). Indeed, it holds true that customary laws exhibit variation and evolution over time. Consequently, potential challenges may arise if customary law is codified within regional regulations. Such instances have occurred in prior regulatory frameworks. According to data furnished by

the Ministry of Home Affairs in 2016 (Setkab.go.id, 2016), a total of 3,143 regional regulations were revoked by the central government due to perceived obstruction of investment and intolerance.

Another issue arises from the fact that subsequent to the annulment of numerous regional regulations, the authority to repeal such regulations became subject to judicial review by the Constitutional Court. As a result, the Central Government currently lacks the jurisdiction to invalidate regional regulations. This situation leaves us confined within the bounds of the Rule of Law principle, explicitly enshrined in Article 1, Paragraph 3 of the 1945 Constitution, which designates Indonesia as a nation governed by the rule of law. In accordance with this principle, all actions undertaken by state administrators and citizens must conform to the prevailing laws. Furthermore, concerning the criminal justice system in Indonesia, the rule of law's commitment to justice is underscored in the articulation of Article 24, Paragraph (1), wherein it asserts that "The power of the judiciary is an independent power to administer justice in upholding the law and justice." Additionally, Article 28D guarantees the right of every individual to receive protection and a fair assurance of legal certainty, affirming that "Everyone has the right to recognition and fair legal certainty, as well as equal treatment before the law."

Being a rule of law nation, it is imperative to ensure a sense of justice within society while concurrently upholding security and order through the enforcement of criminal law. The transformation of customary law into regional regulations has the potential to potentially give rise to conflicts in the future if the strategy is not precisely formulated.

Key considerations in the implementation of living law through regional regulations include:

1. The formulation of the substance of customary law holds the potential to introduce new challenges in law enforcement. By being incorporated into Regional Regulations, Article 2 of the New Criminal Code (New KUHP) appears to necessitate collaboration between law enforcement entities at the national, regional, and local levels, as well as involving local law enforcers affiliated with customary institutions. This dynamic has the potential to engender confusion to the extent that clarity in law enforcement becomes elusive, potentially leading to overlapping jurisdictions.
2. The intrinsic essence of customary law is oral and unwritten. Endeavors to articulate the unwritten customary laws within Regional Regulations run the risk of diluting the inherent nature of unwritten customary law.
3. Discrepancies may arise between the substance of the norms enshrined in the New KUHP and those of customary criminal law. The prospect of conflicts between the provisions of the New KUHP and customary criminal law, particularly within the sphere of criminal law enforcement, looms. In the event of such conflicts arising in the future, how will they be resolved? Additionally, which legal principles will be invoked to address these issues?
4. There exists the potential for the emergence of criminalized arrangements grounded in Regional Regulations on the premise that customary law is deeply entrenched within society. This potential for criminalization could materialize due to the involvement of the DPRD (regional legislative body) and local governments in the drafting of Regional Regulations.

Criminalization is a facet that must be circumvented during the course of criminal law reform. Moreover, the implications stemming from the inclusion of living law within Article 2 of the New Criminal Code (New KUHP) necessitate the following measures:

1. Comprehensive socialization and legal training spanning various sectors, encompassing law enforcement officials, local government bodies, and the involved customary law communities.
2. The compilation of an inventory encompassing both extant and discontinued customary law arrangements within the community.
3. Undertaking studies and research, including qualifications pertaining to the customary law community, to ensure the formulation of pertinent and applicable customary law norms within regional regulations. This measure holds significance to ensure that only the customary law norms that genuinely persist and find application within society are integrated.

The implementation of Living Law as Regional Regulations is inevitable. Nevertheless, the elucidation of these three aforementioned points serves as a significant consideration, ensuring the effective execution of the living law concept within Article 2 of the Criminal Code Law. The recognition of living law as a principle of material legality within the New KUHP has garnered attention in the history of the Indonesian Criminal Code, stemming from the idea encapsulated within the concept of living law in Article 2 of the Criminal Code Law, defined as customary law to be legitimized in the form of Regional Regulations.

The incorporation of customary law within a regional regulation will situate it within the realm of politics, as it is crafted by the local government and subsequently endorsed by the legislative body (DPRD). From this, it can be inferred that the formulation of positive law must also align with democratic political configurations. Such a reality constitutes an integral facet of Indonesia's existence as a democratic state. It is important to note that the establishment of regulations concerning customary law by local governments should adhere to the aforementioned three principles: socialization and legal training, compiling an inventory, conducting studies and research on customary law, and elucidating the role of the criminal justice system in the execution of customary law.

CONCLUSION

The conclusions drawn from this paper are that the existence of living law within the New Criminal Code (New KUHP) obtains legal status through its formulation by Regional Governments and subsequent ratification by the Regional Legislative Council (DPRD). Prior to this, during its formation, it must undergo a series of holistic and comprehensive socialization and legal training activities across various sectors, involving law enforcement officials, local governments, and pertinent customary law communities.

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