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URGENCY OF LIVING LEGAL RECOGNITION IN CRIMINAL LAW REFORM IN INDONESIA

Arti Penting Pengakuan Hukum yang Hidup dalam Pembaruan Hukum Pidana di Indonesia

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Abstract
This article aims to provide a prescription regarding the urgency of living legal recognition society in the principle of legality viewed from the perspective of legal sociology. Indonesia is a country that uses criminal law inherited from colonial products. At that time, there was an ideology of individuality, which is still the case today using the new colonial Criminal Code. With the principle of legality still in effect, then it has a big influence on the existence and development of law in Indonesia, especially in relation to existing customary law. This is because the laws that live in society are original Indonesian laws and constitute of Indonesian national identity. So this recognition is not only related to legal recognition but also recognition of Indonesia's pluralistic society. Until now, the idea of legal recognition that lives in society is reflected in the thoughts of academics' thoughts on the principle of material legality. The principle of material legality in basically it is unknown in the European world, because it is the result of people's thoughts Indonesia about the wisdom tribes and nations in Indonesia. The principle of material legality is tried outlined in the Concept of the Criminal Code. Even though it's new tt is only hoped that the draft will soon be ratified by law makers.

INTRODUCTION

The principle of the application of criminal law according to time is contained in Article 1 paragraph (1) of the Criminal Law Code, which states: "No action is permitted punished, but rather based on the strength of the criminal provisions in the existing law prior to that action." In criminal law, this principle is known with the "principle of legality" or "principle of legality", is a very principle fundamental in Criminal Law because it is a form of protection agains individuals, especially perpetrators of criminal acts, in ensuring justice and legal certainty (Setyawan, 2021). This principle of legality is formulated in Latin: "Nullum delictum, nulla poena, sine praevia lege poenali", which means that an action cannot punished, unless based on the strength of the provisions of criminal law has existed before. The Latin term is also often used: "Nullum crimen sine lege." stricta", which can be interpreted as: "There is no offense without strict provisions". Hazewinkel-Suringa uses the Dutch words "Geen delict, geen straf zonder een voorfgaande strafbepaling" for the first formula and "Geen delict zonder een precieze wettelijke bepaling" for the second formulation (Vincentius Patria Setyawan, 2023).

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This principle of legality has been applied in various countries that use law criminal law that has been codified in a "wetboek" like other countries adheres to the Continental European legal system. This principle is also contained in the Universal Declaration of Human Rights 1948 (Article 11). The principle of legality is used formal, giving rise to consequences for the judge, where the judge decides its decisions are always bound by the law (Widayati, 2011). The judge didn't have one freedom in interpreting the law while in article 20 AB it is stated that judges must judge based on the law.

On the one hand, this principle has benefits for personal interests, however as a consequence of the existence of this legality principle, the legality principle is lacking protect collective interests (collective bealngen), because of this principle describes those who can be punished as those who commit an act which the law (existing regulations) expressly calls a violation public order (Tahir, 2018). Besides that, the principle of legality will be an obstacle for judges to punish someone who has committed a criminal act, however This act has not been regulated in law. It's not perfect the implementation of criminal law so far in judicial practice can still be overcome, namely by giving authority to judges in the application of criminal law customs regarding prohibited acts. Such actions is not or has not been threatened with the Criminal Code.

As we know, this principle was born in that era is the culmination of the development of the notion of individuality towards the law, and laws that provide full guarantees for personal and momentary freedom. That is a very individualistic view of law, so of course the principle of legality this is maintained. Indonesia is a country that uses criminal la a legacy of colonial products which at that time had an ideology of individuality, where did it arrive now we still use the new colonial Criminal Code. With the principle of legality still in effect, it has a big influence on the existence of and development of law in Indonesia, especially in relation to customary law which exists. Indonesia is a country with very diverse cultural traditions, However, the consequences for customary law are eve within customary law actions are prohibited, but cannot be punished, because of the regulations

unwritten form. This is a consequence of the implementation of the principle of legality which requires that only written law can be the basis for criminal imposition.

METHOD

This article was written using normative legal research methods (Sonata, 2015). Normative legal research in this article will discuss legal principles, namely the basis for the formation of legal rules (Jonaedi Efendi dan Johnny Ibrahim, 2018). A very important legal principle in criminal law is the principle of legality. Renewing legality principles in Indonesia should accommodate living law provisions.

The legal materials used in this research are primary legal materials and secondary legal materials (Adiyanta, 2019). The technique for collecting legal materials uses library research. The legal material analysis technique uses deductive syllogism (Fajar ND & Achmad, 2007). Deductive syllogism is drawing conclusions through reasoning from the major premise to the minor premise and obtaining a conclusion (Sulaiman, 2018).

RESULT AND DISCUSSION

Hans Kelsen said the meaning of justice is legality, where something General rules are fair if they are applied in accordance with written rules regulates them, and is equally applicable to all similar cases. Principle of legality built with the aim of legitimizing the law within the government's power to create a rule of law where the meaning is a state based on law; The law guarantees justice and protection for everyone in the territory the country concerned (Sanjaya, 2021).

All state activities are based on law or within context of the Indonesian Legal State, namely a State Based on Pancasila and Laws A Constitution that upholds human rights and

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guarantees all citizens. The state has the same position in law and government and is obligatory upholding the law and government with nothing but According to Moeljatno, The principle of legality contains 3 (three) meanings, namely: (Abdullah & Achmad, 1983)

1. There are no actions that are prohibited and are punishable by crime has not yet been stated in a statutory regulation.
2. To determine the existence of a criminal act, analogies must not be used.
3. Criminal law rules do not apply retroactively.

Even though the formula is in Latin, the provisions, according to Andi Hamzah, does not originate from Roman law. Roman law did not recognize the principle of legality, both during the republican period and after. The formula was created by Paul Johann Aslem von Feuerbech (1775-1833), a German criminal law expert in his book "Lehrbuch des peinlichen Rechts" in 1801. So it is a product classical teachings at the beginning of the nineteenth century (Beccaria) (Takdir., 2013).

Von Feuerbach's adage can be divided into three principles such as: formulated by W.A. van der Donk, namely nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali. It turns out that this adaqium application has various views on "nulla poena sine lege", that in the basics. On the one hand, on the one hand, the emphasis is more on political principles for the people receive guarantees from a fair government (Monstesquieu and Rousseau), and on the other hand focuses on legal principles which are divided into emphasis o criminal procedural law with the aim of regulations being established in advance so that individuals receive protection and law implementers are bound by those regulations, and which the most famous is the focus which focuses on material criminal law with the intention that every definition of a criminal act and its punishment is based on on existing legislation (Beccaria and von Feurbach).

The principle of legality I the current Indonesian Criminal Code has disadvantages. Weaknesses of the application of the principle legalities include:

1. The law cannot accommodate the sense of justice demanded by society;
2. The laws that are formed are always outdated, because they are not can keep up with the pace of developments and developing technology so fast;
3. Laws cannot always solve all problems emerging society;
4. Laws cannot be perfect, as they sometimes are uses unclear/vague terms, so the judge needs to provide interpretation;
5. Laws cannot regulate all aspects of internal life society, thereby allowing a legal vacuum to occur.

For Andi Hamzah and Loebby Loqman, even though according to Article 1 paragraph (1) The Criminal Code in Indonesia adheres to the principle of legality, but in the past when it still existed Swapraja courts and customary courts, made possible by Law Number 1 Drt of 1951 Article 5 paragraph (3) point b, the judge imposes a prison sentence maximum 3 (three) months and/or a maximum fine of five hundred rupiah for acts which according to living law should be considered offenses that do not yet exist the equivalent in the Criminal Code. If viewed from history, the Code of Laws The Criminal Code (KUHP) began to be implemented in all regions in Indonesia with the existence of Law Number 73 of 1958 concerning Declaring the Applicability of Laws Law Number 1 of 1946 of the Republic of Indonesia concerning Criminal Law Regulations For the entire territory of the Republic of Indonesia, and amending the Constitution Criminal Law.1 Basically, the Criminal Code applies to the entire region Indonesia is a colonial legacy originating from Wetboek van Strafrecht voor Nederlandsch Indie (Staatsblad 1915 No 732), so that it can understood if the principles and basics of criminal law and colonial criminal law still survive with Indonesian blankets and faces. The implementation of the Criminal Code is unique in itself when in fact Indonesia already has one own law, long before the Dutch came and introduced the Criminal Code in Indonesia (Leonard, 2016).

Daniel S Lev, described the legal conditions in Indonesia before the meeting with the west as follows: “Before then many different legal orders existed, independently within a wide variety of

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social and political systems". Orders Law existed in Indonesia long before it met modern law. Indonesian people have lived with it for hundreds of years. Local order These, as Lev wrote, are scattered in various ways in each each political and social system. The legal order that Lev refers to later known as customary law. The term customary law (English: adat law; Dutch: the recht custom) itself was first introduced by the orientalist Christiaan Snouck Hurgronje (1857-1936) in the book De Atjehers/The Acehnese published in 1893. Since the Dutch left modern law for Indonesia, the Indonesian people then began to legalize in two ways: modern law and customary law (Pujilestari et al., 2014).

Efforts, desires and recommendations to explore and use Indonesia's original laws have basically existed since post-independence Indonesia. These efforts can be traced from the writings of legal experts and documents national legal seminars as well as Draft Laws (RUU) regarding Principles and Basic Basics of Criminal Law. Article 5 regarding legality in the bill states: "The court can only qualify an act as an act criminal if the legislator or unwritten law is the one who lives within Indonesian society and which does not hinder the development of a just and prosperous society has determined that action as a criminal offense and threatens him with a criminal offense."

From this article it is known that the formulation of an act as a criminal act carried out by two institutions: the legislator and the unwritten law live among Indonesian society. Efforts to explore customary law. The benefits of unwritten law in Indonesia do not stop with the era of experts law (academics) after independence but continues to be carried out continuousl in the context of reforming criminal law. This can be seen, for example, in the inauguration speech of Professor Barda Nawawi Arief, according to him, one of the alternative studies which is very urgent and in accordance with the idea of national legal reform is study of the legal system that exists in society.

Barda Nawawi Arief added three reasons for the need to study law Criminal law from a legal perspective that lives in society is as follows:

1. Higher Education (Faculty) of "Law" is not a Faculty of Law, then what should be studied is not only written law (UU) but also unwritten laws or laws that live in society.
2. As an objective scientific institution, a law faculty should be also study the concept/system of law (criminal) from various families law. So it is not only oriented towards the Criminal Code (WvS) which is included "Civil Law System" ("The Romano-Germanic Family"), but also can "turning" or orienting towards other, closer legal families with the characteristics of legal sources in Indonesia, namely the legal familytraditional and religious law.
3. Related to the development of the expanded concept of the New Criminal Cod formulation of the principle of legality in Article 1 (1) of the Criminal Code in material terms with emphasized that the provisions in Article 1 (1) do not reduce it the application of laws that live in society. This means, necessary prepared a "new generation" who is expected to know and understand legal intricacies that live in society (both its value system, principles and norms and so on).

This can then lead to a conclusion that social structure can also be a determining factor in law and society. Because of society In fact, it also helps shape the law by giving it social meaning. The principle of legality contained in the Criminal Code is clarified in the draft Criminal Code Bill by adding several things such as recognition of customary law, analogies are prohibited in determining criminal offenses and explaining in more detail the changes laws and regulations governing criminal acts.

Customary law is dynamic. This dynamic means that customs always exist is responsive to changes that occur around it. There is a difference between the meaning of living law and law in action. Both both do not accept the concept that the law is as it is pronounced in the regulations. However, what is called law in action remains starting from the pronunciation of the regulations, only then look further Next, what is the reality with these pronunciations? Living law departs from a

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wider phenomenon of social life than that. This is reflected in Article 2 paragraphs (1) and (2) of the Criminal Code Bill reads as follows:

Paragraph (1)

The provisions as intended in Article 1 paragraph (1) do not reduce the enactment of laws that live in society that determine that a person deserves to be punished even if the act is not regulated in legislation.

Paragraph (2)

The application of laws that live in society as intended in paragraph (1) as long as it is in accordance with the values contained in Pancasila, human rights, and general legal principles recognized by the people of the nation.

In contrast to the legality principle currently in effect, in the Draft Criminal Code the principle legality experiences material expansion by recognizing living law in society (unwritten law) as a basis for determining whether or not whether an act is punishable. So the recognized source of law is law Written law is law and unwritten law is living law in society (customary law). Indonesia is a rule of law country. In explanation The 1945 Constitution states that "Indonesia is a country based on law (Rechstaat), not a state based on mere power (Machstaat). This matter shows that the law referred to here is not only internal the meaning of written law, but in a broad sense. Acknowledgment of Unwritten law can also be interpreted as law.

Indonesia consists of thousands of islands, inhabited by various kinds and shapes ethnic group. Every tribe and community group has laws and legal applications different ways to regulate relationships or interactions between members and protect personal and collective interests. Most of the laws used are: unwritten law, both customary law and religious law.

CLOSING

Some of the things above are important reasons for the need for recognition laws that live in society in criminal law in Indonesia. This matter because the laws that live in society are original Indonesian laws and is the identity of the Indonesian nation. So this recognition is not only related to legal recognition but also recognition of a pluralistic society Indonesia.

Until now, the idea of legal recognition that lives in society is reflected from the thoughts of academics regarding the principle of material legality. Principle of legality materiel is basically unknown in the European world, because it is the result of thought Indonesian people about the wisdom of tribes and nations in Indonesia. Principle of legality The material is tried to be stated in the Concept of the Criminal Code. Even though it is only a draft, it is hoped that it will soon be approved by the makers Constitution.

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