Criminalization of Cohabitation in the Perspective of Criminal Law Reform

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Abstract. In order to effectively discourse criminal law in Indonesia, the criminalization of cohabitation in the RKUHP must take into consideration the diversity of customs or laws that exist in a society; hence the criminalization of an act does not conflict with the will of the community and the objectives of legal development. Further to that, criminalization must contemplate cost-benefit analysis, results, and the principle of ultimum remedium in order to obtain public support. That is related to living together or in the bills of the criminal code it is called by the term everyone who stay in the same accomodation, act as a husband and wife without any official civil relation should only be left to the indigenous peoples in their respective regions. Moreover, Article 2 Paragraph (1) of the RKUHP already regulates the existance of the source of law that lives amongst the society. Indeed, in the RKUHP Article 2 Paragraph (2) regulates the conditions for the enactment of a law that lives in society as well, however, the criteria is still questionable. Therefore, the punishment for (living together) should be referred to as customary law in each region due to the fact that customary marriages are as well recognized by indigenous peoples. The sentence "outside of marriage" in Article 418 Paragraph (1) of the RKUHP gives rise to multiple interpretations of whether what is meant is marriage as regulated in the Marriage Law or including customary marriage as well. Criminal law is a reflection of a society that reflects the values that form the basis of that society. On the occasion of these values change, as well does the criminal law. Another expression states that the law is the spirit of nation (volkgeist), which further indicates that the law is not conceived by people but grows naturally in the midst of a nation.

Keywords: Criminalization, Cohabiting, Living Law

1 Introduction

Criminalization (criminalization) is one of the topics covered by the study of material criminal law (substantive criminal law), that either engages with the determination of an act as a criminal act (criminal offense or crime) that is criminally punishable sanctions. The definition of criminalization in the Big Indonesian Dictionary (KBBI) is "a process that shows behaviour that was not initially considered a criminal event but was later classified as a criminal event by the community" [1].

According to Sudarto [2] Criminalization can as well be interpreted as the process of determining that all actions of a person can be punished by the process of making regulations or laws thus these actions can be threatened with sanctions that can be punished.

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The value perspective as well be interpreted as criminalization, specifically a change in value caused by an act that was previously blameless and not criminally prosecuted turns into a despicable act and can be punished [3]. Legal politics is needed to make laws and regulations. According to Sudarto [4], Legal politics is a policy of the state through authorized bodies to enforce the specific legislation which are expected to be enforced to indicate the value that encompassed in society and to achieve the aspirations of the citizen.

Muladi [5] explain the benchmark guidelines on criminalization, they are:

1. Criminalization does not seem to cause overcriminalization in the category of misuse of criminal sanctions.
2. Criminalization is not ad hoc.
3. Criminalization encloses elements of victimizing either actual or potential.
4. Criminalization takes into account the analysis of costs, results, and the principle of ultimum remedium;
5. Criminalization produces regulations that are enforceable.
6. Criminalization is able to gain public support.
7. Criminalization encloses elements of sub-socialites causing danger to society, despite in the event that it is insignificant.
8. Criminalization enclose elements of victimizing, both actual and potential.
9. Criminalization takes into account the analysis of costs, results and the principle of ultimum remedium;
10. Criminalization produces enforceable regulations.
11. Criminalization is able to gain public support.
12. Criminalization encompasses elements of sub-socialite causing danger to society, despite in the event that it is insignificant.
13. Criminalization pays attention to every criminal regulation that limits the people and law enforcement officers to bring order.

The principle or basis for making regulations, policies, and decisions on social life is a basic understanding. Three principles of criminalization must be considered by the legislators in determining an act as a criminal act along with the threat of criminal sanctions, such as:

1.1 Legality Principle

According to JE Sahetapy, there are seven meanings of the principle of legality, such as:

1) Cannot be sentenced except based on criminal provisions according to law.
2) The implementation of criminal law cannot be based on analogy.
3) Customs cannot be punished.
4) There is no unclear formulation of the offense.
5) There is no unclear formulation of the offense.
6) There are no other crimes except those stipulated by law.
7) Criminal prosecution only in the manner prescribed by law [6].

In the meantime, according to Roeslan Salan quoting Antonie AG Pete explained that the function of the principle of legality in the context of criminalization is in order to secure the legal position of the people against the state and the function to protect members of the community from arbitrary actions by the government which is the legal political dimension of the principle of legality [7].

1.2 Subsidiary Principle

The principle of subsidiarity is that crime prevention in the criminal realm is placed as an *ultimum remedium* (ultimate weapon) as a penal instrument, not as a *primum remedium* (main weapon) to overcome the problem of crime. The principle of subsidiarity in the criminalization and decriminalization policy must be applied carefully. Firmly hence the effectiveness of the use of criminal law in crime prevention.

1.3 The principle of equality or similarity

The principle of equality aims to overhaul the criminal law system that is clearer and simpler. the principle of equality is not only an impetus for fair criminal law, but as well with reference to appropriate criminal penalties. What they have in common are simplicity and clarity. Similarity is simplicity and clarity. Simplicity and clarity will lead to order.

RKUHP Article 418 Paragraph (1) stipulates that "Everyone who lives together as husband and wife outside of marriage is sentenced to a maximum imprisonment of 6 (six) months or a maximum fine of category II." The provisions in this article are not regulated in the new Criminal Code that appears in the RKUHP.

Indonesians refer to couple that stay in the same accomodation which act as the husband and wife without having an official civil relation as cohabitation, a term that is used to describe people living together without being married. Cohabitation (*kumpul kebo*) is the term used to describe living together as husband and wife without matrimony. The term cohabitation is generally used when two unmarried people live together and are in romantic or intimate relationships. The couple usually engages in long-term or permanent sexual activity without matrimony. They usually have sexual intercourse outside of marriage on a long-term or permanent basis. Cohabitation (*Kumpul kebo)* began to be common in Western countries at the end of the 20th century, driven by changes in social views, specifically regarding marriage, gender roles, and religion. Nowadays, cohabitation in several regions and cultures is often part of the processing [8].

Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia reads, "The State recognizes and respects customary law community units and their traditional rights as long as they are thus far alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia as regulated in law". The provisions in this article mean that this recognition is given by the state as follows:

1. To the existence of a society and its customary rights;
2. The recognized existence is the existence of customary law community elements. It means that the acknowledgement is awarded to one by one of these elements and therefore the customary rights of the people should be of a specific character;
3. The customary law community is recognized;
4. At a particular environment as well;
5. The acknowledgement is offered without neglecting the measure of eligibility for following the level of the nation's civilized development and,
6. Such acceptance and respect may not decrease the value of Indonesia as a country in the form of the Unitary State of the Republic of Indonesia [9].

In this case, the state recognizes customary law and traditional community units as regulated in the 1945 Constitution of the Republic of Indonesia. Hence, all legal products under the constitution must as well recognize customary law as the provenance of law in Indonesia.

As an implementation of the provisions of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the RKUHP accommodates customary law (the law that acknowledged by the people) as the provenance of law as stipulated in Article 2 Paragraph

(1) of the RKUHP which reads "The provisions as referred to in Article 1 paragraph (1) does not reduce the enactment of the law that lives in a society which determines that a person deserves to be punished in spite of the fact that the act is not regulated in this law". By posting the law that acknowledge by the people as the provenance of criminal code, the criminal law must truly become a mirror or image of society as stated by AZ Abidin [10] particularly:

"Criminal law is a mirror of a society that reflects the values that form the basis of that society. On the occasion of values change, and criminal law as well changes. Criminal law is rightly referred to as one of the most faithful mirrors of a given civilization, reflecting the fundamental values on which the latter rest".

In Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it reads "Everyone has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law". The formulation of the offense in Article 418 Paragraph (1) of the RKUHP limits the implementation of the law that acknowledged by the people as the provenance of the law. Should Article 418 Paragraph (1) RKUHP not need to be formulated recurrently due to the reason it is as of now enclosed in Article 2 Paragraph (1) RKUHP which recognizes the law that lives in society as a source of law. This is in light of the fact that legally living in the community as well recognizes the existence of customary marriages with processions and procedures that implement in each region in Indonesia. For example, in East Nusa Tenggara (NTT) in general, before a church marriage is completed, it is preceded by a traditional marriage. And, in the event that the customary marriage has been completed, the two prospective brides can live together as husband and wife. Nevertheless, it is as well possible that other regions in Indonesia do not recognize this customary marriage, thus with the existence of this plural customary law, it is better to just formulate Article 2 Paragraph (1) of the RKUHP and eliminate the provisions of Article 418 Paragraph (1) of the RKUHP. In spite of the fact that Article 418 Paragraph (1) of the RKUHP is a complaint offense, in the event that this is normalized, it has the potential to be misused in the event that there is a misunderstanding between the two prospective brides and/or families in preparation for a church marriage in accordance with Law Number 1 of 1974 concerning Marriage.

The formulation of Article 418 Paragraph (1) of the RKUHP limits the implementation of laws that exist alongside the people. In spite of the fact that Article 2 Paragraph (2) of the RKUHP provides conditions regarding the enactment of the law that lives in society, particularly "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 in accordance with the values encompassed in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society." Nonetheless, these criteria are abstract and do not necessarily limit the laws that exist in an indigenous community unit.

2 Formulation of the Problem

How is the Criminalization of Cohabitation (*Kumpul Kebo)* in the Perspective of Criminal Law Reform?

3 Purposes

In order to find out the Criminalization of Cohabitation (*Kumpul Kebo)*from the Perspective of Criminal Law Reform.

4 Method

This research is normative law, particularly "legal research accomplished by examining library materials or secondary data alone, can be called normative legal research or library law research" [11].

Consequently, secondary data research can as well be referred to as library law research.

5 Finding and Discussion

5.1 The Criminalization of Cohabitation *(Kumpul kebo)* in the Perspective of Criminal Law Reform

As described in the background, *Kumpul Kebo* is not a juridical term; it is a practical term in society that is assigned to a couple who live together as husband and wife but who are not thus far bound by marriage or outside of marriage. This is regulated in Article 418 Paragraph (1) of the RKUHP. Sentences outside of marriage are multi-interpreted due to the fact that in customary law certain communities recognize the existence of customary marriages. Article 418 Paragraph (1) RKUHP contradicts Article 2 Paragraph (1) RKUHP which recognizes the law that acknowledged by the people as the provenance of law other than the law. Therefore, it is better to implement Article 2 Paragraph (1) of the RKUHP thus the sanctions for living together will depend on the customary law that lives in the local community while people recognize the existence of traditional marriages that have existed in the community for a long time, congregation together is not a criminal act. Criminal sanctions should be of a subsidiary nature and should not be the main choice, let alone congregation together in the context of customary law has gone too far into the realm of privacy.

The values that exist in society should represent a source of law hence when a formal legal product is developed and returned to the community, it can be accepted as a component of the community itself. As a possible consequence, the legal awareness which as well emerges from the community grows from within, ensuring that the law is mostly about coercion.

According to Moeljatno [12] The law in our country should be developed, stipulated, and implemented specifically in accordance with knowadays characteristics of Indonesia and the blossoming of Indonesian revolution. Good law and social justice are laws that are born, grow and develop from the nation itself. Thus, Von Savigny [13] once said:

"The law is a statement of the soul of the nation (volkgeist), according to the essence of the law is not conceived by people but grows by itself in the midst of a nation. But there is a universality in the legal system that applies in the world as well. Therefore, it is necessary to distinguish between legal politics, which concerns the meaning and spirit of a legal system, and legal techniques, which concern how to form laws".

As a matter of fact, the law is an integral part of a nation's culture. Due to the different histories and cultures, laws are different too.

Law in relation to the culture of a nation in its development is studied empirically in legal anthropology. The law is interpreted as that being related to cultural values as well as social norms along this context and social institutions, particularly in simple or primitive societies. Renewal of legal substance (material) must take into account numerous aspects including the law that lives in society.

This is as well stated in the results of the National Law Seminar I in letter c point (4) which emphasizes that

"Moreover to the written law, it is recognized that the unwritten law implements as long as it does not hinder the formation of Indonesian socialist society" [14].

5.1.1 Criminal law reform

Criminal code Politics should as well be called Criminal Code regulation/sanction Policy or Criminal Law Reform. Enforcing the Politics of Criminal Code means 'Enforce to implement the criminal code following the specific events whether present or in the next future. Therefore, it can be viewed from the aspect of legal politics.' The politics of criminal law can be interpreted as the way to find a good formulations of the criminal code for present time or the future [15].

Criminal politics is a cogent policy or effort to tackle crime [16]. Marc Ancel, as quoted by Muladi, defines it as the rational of the control organization of crime by society, in the interim G.Peter Hoefnagels explained with the following formula, "the science of responses, the method the prevent re-occurance of crime or any new method of crime act, a policy of marked people manner as crime and a rational total of the response to crime. Criminal policy is a rational endeavour to undertake crime which is part of the criminal justice system integral part of endeavours in order to protect society (social defence) and endeavours in order to achieve social welfare. The main purpose of criminal politics itself is to protect society and prosper society. Therefore, basically criminal policy is an integral part of social policy [17]. There are two main issues in criminal regulations, those are:

1. Type of action that should be sanctioned; and
2. Type of sanction that effective to be given for those who violate the law. [18].

According to Muladi and Barda Nawawi Arief, the analysis of these two central problems cannot be separated from the conception that criminal policy is an integral part of social policy. This means that solving the problems mentioned above must as well be directed to achieve certain goals of the social policy that has been set. Thus, criminal law policies, including policies dealing with the two central problems above, must as well be completed with a policy-oriented approach.

Based on this social policy-oriented approach, Sudarto argues that in dealing with the first central problem above, which is often referred to as the criminalization problem, the following points must be considered in essence:

a. The use of criminal law must take into account the objectives of national development, that is realizing a just and prosperous society that is materially and spiritually evenly distributed based on Pancasila; In connection with this, the (use) of criminal law is aimed at undertaking crime and enforcing a ban on the countermeasures themselves, with reference to the welfare and protection of the community.
b. Acts that are attempted to be prevented or overcome by criminal law must be "undesirable acts" such as actions that bring harm (material and spiritual) to the community members.
c. The use of criminal law must as well take into account the principle of "costs and results" (cost-benefit principle)

d. The use of criminal law must as well pay attention to the capacity or working power of law enforcement agencies, specifically that there should not be too much duty-free (overballasting).

In the opinion of the author, Sudarto's opinion above postulates that:

1. The use of criminal law must not be rushed or used only as a means of power, but the use of criminal law must be able to guarantee the welfare of the community as a whole in the sense of being physically and mentally.
2. The use of criminal law is not a tool for revenge but indeed in actions that bring harm to society
3. The use of criminal law must be effective and efficient and focus on state goals.
4. The use of criminal law must as well pay attention to the legal structure and legal culture hence there is a balance between the purpose/implementation of criminal law and the results achieved.

Sudarto further [19], put forward 3 (three) meanings regarding criminal policy or politics, they are:

1. In a narrow sense, it is the overall principles and methods that form the basis of reactions to violations of the law in the form of crimes.
2. In a broad sense, is the overall function of the law enforcement apparatus, including the workings of the courts and the police.
3. In the broadest sense (which he took from Jorgen Jepsen) is the overall policy accomplished through legislation from official bodies aimed at enforcing the central norms of society.

The politics of criminal law is part of the politics of national law. According to Sudarto, legal politics is an attempt to realize better regulations in accordance with the circumstances and situations at a time as well as the policies of a country through the competent bodies to formulate the desired regulations that are expected to be used to express what is enclosed in society and to achieve what is aspired [20]. According A. Mulder [21] "*Starfrechtspolitiek*" criminal law politics. pen) is a line of policy to determine:

a. How far the applicable criminal provisions need to be changed or updated
b. What can be done to prevent the occurrence of criminal acts
c. The way in which the investigation, prosecution, trial, and execution of a crime must be completed.

Law cannot be separated from human existence itself due to the reason basically humans exist, then law exists. Therefore, the law must be sourced from events related to humans thus the law is not a foreign object for humans. Good law is the law that lives in society at the present time. This means that the law must change in accordance with the laws that live in society and follow the changing times. Thus, the law can answer the needs of the community.

According to I Made Widnyana criminal customary law is:

"Living law are followed and obeyed by indigenous peoples continuously from one generation to the next. Violation of the rules of conduct is seen as being able to cause turmoil in society in light of the fact that it is considered to bother the cosmic balance of society. Therefore, the violators are given customary reactions, customary corrections, or customary sanctions by the community through their customary administrators" [22].

I Made Widnyana indeed intends to emphasize that customary law is a living law and will continue to develop from one generation to another without breaking or continuously respect and obeying. This respect for customary law as well arises from within without any external coercion due to the fact that the community considers that they are part of the customary law and vice versa (indivisible).

Hilman stated that:

"Customary criminal law is a living law and will continue to live as long as there is a human culture, it will not be withdrawn by legislation. If there is as well a law that abolishes it, it will be useless, despite the criminal law and legislation will lose its source of wealth, due to the reason customary criminal law is more closely related to anthropology and sociology than statutory law [23]*".*

Hilman's opinion is not much different from what I Made mentioned above, but Hilman affirms that customary law (living law) will never be shifted/eliminated by written regulations in light of the fact that basically, customary law is inherent in humans.

Customary law must be taken into account as a living fact in society. Thus, customary law is a determining factor both in terms of the formation and implementation of law in Indonesia. In this case, besides being an idea that must be realized in reality, Pancasila as well acts as a "reality", particularly the basic norms that become a measuring tool or filter on what can be accepted by the Indonesian legal system [24]. Hence, the reformulation of the principle of legality in the renewal of criminal law must pay attention to the values encompassed in the customary law.

The development of national law is continuously achieved from time to time without stopping to conceive a system/legal order (criminal law) that is Pancasila and in accordance with the spirit/soul of the Indonesian nation. It is undeniable that the current criminal law (KUHP) is dressed in red and white but has the body or spirit of colonialism. Hence, legal development (criminal) is an obligation to completely change the national criminal law to suit the spirit and spirit of the Indonesian nation based on Pancasila and the 1945 Constitution of the Republic of Indonesia. Hidjazie Kertawidjaja [25] stated that the development of national law must be based on and must not conflict with the philosophical basis of our country, Pancasila, and the Constitution.

More Hidjazie Kertawidjaja, stated that national law is a form of law that implements in our country which has the following characteristics and conditions:

1. Have their own personality, which is in accordance with the personality of the Indonesian nation.
2. Prioritizing legal unity and integrity.
3. Its contents or soul must be in accordance with and in tune with the awareness and legal life of the Indonesian nation.

The enactment of a national legal system must be the ultimate goal of endeavours to develop national law. This is based on the idea that every independent and sovereign country must have a national law both in the public and civil fields that reflect the personality of the soul and the outlook on life of the [26].

The development of a national legal system cannot be separated from the values that grow and develop in society, due to the fact that the community adheres to social values as guidelines for doing and not doing. As stated by Eugene Ehrlich that a good positive law is a law that conforms to "living law", reflecting the values that live in society [27].

Legal reform, specifically criminal law in Indonesia, is achieved through two channels, such as:

1. Conceiving laws with the intention of changing, adding to, and completing the current Criminal Code, and
2. Drafting the Draft Criminal Code (RUU-KUHP) which aims to replace the current Criminal Code and is a colonial legacy [28].
3. Basic Idea of Criminal Law Reform

Puchta, a disciple of Savigny once said that “The law grows together with growth and becomes strong together with the strength of the people, and in the end, it dies when the nation loses its nationality” [29].

As an institution, law is best suited to a nation if it is born as one that continues to evolve to match that nation’s personality.

Satjipto Rahardjo [30] argued that:

“.....law is not an absolute and final institution, in light of the fact that the law is in the process of continuing to be (law as a process, law in the making). In law enforcement, judges have a central role. In the law on judicial power, it is stated explicitly that judicial power is the power of an independent state to administer justice in order to uphold law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the State of Law of the Republic of Indonesia. In the administration of justice, judges implement abstract laws to concrete events. In the past, judges were only "mouthpieces of the law" (la bounche de la loi), due to their obligation only to implement the law according to its sound. But in its development in order to seek substantive justice, judges do not only play a role in implement the law in accordance with the article in the law but see the meaning enclosed in it by making numerous legal discoveries to be able to fulfil the community's sense of justice”.

The law must have the ability to free people from anxiety, fear, pessimism, and distrust of the law and its law enforcers. Rahardjo [31] stated that the law is for humans and not vice versa for humans for the law and the law does not exist for itself, but for something wider, they are human dignity, happiness and welfare, and human glory. Thus, it is the law that must be devoted to humans, not humans who must serve the law, and it is not in the right place to sacrifice humans for the sake of the law. According to Muladi, the purpose of criminal code is to preserve the rights of each individual and the communities from any crime or action.

Criminal law reform in Indonesia must be in line with the objectives of criminal law and in accordance with the soul and spirit of the Indonesian nation. Therefore, the standards of the state as outlined in the Preamble to the 1945 Constitution of the Republic of Indonesia must be the priority of any criminal law reform. Criminal law reform must be in synergy with development policies hence the law and development policy together conceive justice and the welfare of the Indonesian people as a whole and comprehensively.

The policies are taken by the Indonesian people in the context of implementing criminal law reform, through two channels, such as:

a. Renewal of criminal legislation which means changing, adding to, and completing the current Criminal Code.
b. Drafting the Draft National Criminal Code to replace the current Criminal Code [32].

6 Conclusion

The criminalization of cohabiting or in Article 418 Paragraph (1) of the RKUHP formulates that a couple who stay in the same accomodation act as huband and wife without any proper legal relation as a crime contrary to Article 2 Paragraph (1) of the RKUHP which recognizes the law that lives in society as a source of law. The prohibition of stay at once is a vague and multi-interpreted formulation due to the fact that certain communities recognize the existence of customary marriages. Living Law will continue to live as long as there is human culture, it will not be removed by legislation. If there is a law that repeals it as well, it will be conceived irrelevant, and despite the fact that statutory criminal law will lose its source of revenue, as well

since customary criminal law is more closely related to anthropology and sociology than statutory law.

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