

The Role of Indonesian Legal Politics in the Development of the Indonesian Criminal Law System Based on the Fourth Principle

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Abstract

The source of Indonesian criminal law comes from the Criminal Code (KUHP) whose formation is carried out by political institutions based on the aspirations of the people in accordance with the fourth principle of Pancasila or in other words, the formation of criminal law is inseparable from legal politics. This research is important to study with the aim of knowing the role of legal politics in the formation of the Indonesian criminal law system based on the fourth precept of Pancasila. The research method used is normative juridical research method using statutory approach, case approach, comparative approach, conceptual approach. The results of this study show that legal politics is the basic policy of state administrators in the field of law that will, is and has been in effect, which originates from the values prevailing in society. Legal politics cannot be separated from the formation of the Indonesian criminal law system, because the formation of criminal law is carried out by the legislative body that represents the aspirations of the community. The role of legal politics in the enforcement of the criminal law system in Indonesia is to realize the objectives of the law, namely providing justice, certainty, and expediency.

Keywords

The political role of law; Development of the legal system; Fourth principle

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1. INTRODUCTION

Indonesia is a pluralistic country with racial, ethnic and cultural diversity. This diversity means that Indonesia must maintain a balance in regulating and providing guidance in social life. Referring to this, Indonesia has formulated a legal basis to minimize conflicts and resolve problems that occur. In response to this, the government issued and established legal products such as laws to regulate the legal system in Indonesia. The legal system of a country can be formed through the development of legal values prevailing in society (Baharuddin Badaru, 2023). The affirmation that Indonesia is a state of law is contained in Article 1 paragraph (3) of Chapter I of the Third Amendment to the Constitution (1945) which states that "Indonesia is a State of Law". This means that Indonesia is a country based on law



(*rechtsstaat*) and not power (*matchstaat*) and the government is based on a constitutional system and not based on absolutism (*unlimited power*) (Marbun, 2014).

The formulation of laws must be guided by Pancasila as the staatsfundamental norm of the Indonesian nation which is a source of guidance in national and state life, including as a source of law and law enforcement. In the Preamble to the 1945 Constitution, Paragraph IV clearly states that Pancasila is the basic or fundamental norm of the Unitary State of the Republic of Indonesia, so logically Pancasila is the soul of every norm in the law. So the formation of laws must be guided by Pancasila values and the implementation of norms in law enforcement must be oriented towards justice based on Pancasila (Umara et.al, 2021). The legal system must at least contain elements including: (1) laws or regulations stipulated by the legislative body; (2) decisions of judicial institutions, traditions and principles recognized by judicial institutions with legally binding effect; and (3) various types of legal institutions that determine and implement legal principles and decisions (Marbun, 2014).

Law Number 73 of 1958 states the application of Law Number 1 of 1946 concerning Criminal Law Regulations for the entire territory of the Republic of Indonesia. The development of Indonesian law is still guided by the general rules of criminal law regulated in Book I of the Criminal Code (Mudzakkir, 2008). Criminal law is defined as suffering that is deliberately inflicted by the state on an individual or several people as a result of actions that according to criminal law rules are prohibited acts (Sriwidodo, 2019). Criminal law in general has a formulation that at least contains: (1) the legal subject that is the target of the norm (*addre saat norm*); (2) prohibited acts (*strafbaar*), whether in the form of doing something (commission), not doing something (omission) and causing consequences (events caused by the behavior); and (3) criminal threats (*strafmaat*) as a means of enforcing the implementation or compliance of these provisions.

Based on the Criminal Code (KUHP), it is stated that criminal law threats are generally grouped into main crimes and additional crimes. The main penalties consist of the death penalty, imprisonment, imprisonment and fines. Meanwhile, additional crimes include confiscation of goods, revocation of rights, and announcement of the judge's decision (Sriwidodo, 2019). Criminal law politics has the aim of punishment to be directed at protecting society from crime as well as balance and harmony in life in society by taking into account the interests of society or the state and for victims or perpetrators. In reality, currently there is still a conflict between the Indonesian criminal law that is enforced and Pancasila as the basis of the state. This also raises a lot of debate between experts and is discussed in various seminars, discussions or workshops. This is further exacerbated by the regulation of criminal law carried out in laws outside the Criminal Code which forms a new criminal law system and is different from the Criminal Code which is known as the criminal law system outside the Criminal Code (Kementerian Hukum dan HAM Badan Pembinaan Hukum Nasional, 2010).

These problems give rise to problems that cannot be controlled, giving rise to serious problems in the practice of criminal law enforcement. This is especially true in determining criminal threat instruments in providing criminal sentences. The impact will create criminal legal conditions that are not in accordance with the norms contained in Pancasila, which will give rise to excessive criminalization. Apart from that, there is also often duplication of norms with different criminal threats because the rules in different laws are enforced by different agencies. This of course contradicts the practice of the values contained in Pancasila as a source of material law. Material sources of law are factors that facilitate the formation of law, for example social relations, political power relations, socio-economic situations, traditions (religious views, morality), international developments and geographical conditions (Bo'a, 2018).

Consistent and integrated law enforcement is essential for the realization of the pillars of justice and legal certainty. Such law enforcement will lead to benefits for the community. Basically, crime prevention through criminal law policy is an integral part of efforts to protect society (*social defense*) and efforts to achieve (*social welfare*). It can be said that the ultimate goal or the main goal of criminal politics is the protection of society to achieve social welfare. The formation of the law itself carried out by political institutions must also contain the principles of building the rule of law with justice (Moh. Mahfud MD, 2010). Soedarto said that legal politics is a policy of the State through authorized State bodies to establish the desired regulations, which are expected to be used to express what is conceived in society (Abdul Manan, 2018). Pancasila as the source of all sources of law in relation to Indonesian legal politics is as a guideline for the formation of laws and regulations. The 4th Pancasila principle, namely Democracy led by wisdom in deliberation / representation, is the basis for the formation of the criminal law system in Indonesia through lawmakers who represent the aspirations of the people.

This research is different from previous studies, where there are several studies that the authors can describe as a comparison of this research. Among them are research conducted by Aristo Evandy A. Barlian and Anissa D. Permata Herista entitled Development of the Indonesian Legal System Based on Pancasila Values as the Nation's Political Ideology. This research discusses the formation of Indonesian law in accordance with Pancasila, and the development of Indonesian law is a development priority in all aspects in Indonesia because it must be carried out systematically, comprehensively, and continuously both in terms of substance, structure and culture in accordance with the concept of Pancasila values in order to realize state goals so that the development of the Indonesian nation continues to improve. Then the research conducted by Sopiani and Zainal Mubaroq with the title Legal Politics of the Formation of Legislation After the Amendment to Law Number 12 of 2011 concerning the Formation of Legislation. This research discusses the subject matter of new arrangements related to the procedure for the formation of laws and regulations as stipulated in Law Number 15 of 2019 and the

legal politics of the formation of laws and regulations according to this amendment law. While this research discusses something new, namely the role of legal politics in the formation of the Criminal law system in Indonesia and is based on the content of the fourth principle of Pancasila.

Based on the description above, the formation of the criminal law system in Indonesia is inseparable from legal politics based on Pancasila. The purpose of this study is to determine the role of Indonesian legal politics in the formation of the Indonesian criminal law system based on the fourth principle of Pancasila. This research is important to be studied more deeply in order to find out how the influence of the fourth principle of Pancasila on the formation of the Indonesian legal system, especially in criminal law.

2. METHOD

This writing uses normative juridical research methods through an approach based on the main legal material by examining theories, concepts, legal principles and legislation (Ronny Hanitijo Soemitro, 1994). Research using the normative juridical method is legal research which is carried out through research on library materials or secondary data as the main material for research by conducting a search for regulations and literature that are related to the subject matter being studied (Soerjono Soekanto and Sri Mamudji, 2001). In this research, a normative juridical approach method is used in which secondary sources of material are examined in the form of theories, regulations and legal rules using a statutory approach (state approach), case approach, comparative approach, conceptual approach (Peter Mahmud Marzuki, 2009). The data sources used in writing this scientific article are secondary data sources. Secondary data sources are data obtained or obtained from library materials or literature related to the object of research (Ishaq, 2016). This research is presented qualitatively using the descriptive analysis method by describing the data to explain the problems obtained in the form of explanations based on laws and regulations, legal theories and the practice of implementing positive law and ending in a specific conclusion.

3. FINDINGS AND DISCUSSION

Law is a determinant of politics, and is also related to democracy in the sense that political activities are regulated and must be subject to legal rules. It is also said that politics determines the law, because the law is the result of the crystallization of political wills that interact and even compete with each other. Politics is understood as a set of meanings or values and choices taken from society to justify the functioning of the social order. Politics is also understood as a process of resolution of collective problems to fulfill collective policies in social life related to values and choices for society in achieving a goal. Values in politics cannot be separated from ideology which is a source of values and ideals that are actualized through political institutions or certain group organizations (M. Shohibul Itmam, 2013).

Meanwhile, legal politics is the basic policy of state policy organizers in the field of law that will, is and has been in effect, which derives from the values prevailing in society to achieve the aspired state goals. The politics of law of a country is different from other countries, this is in accordance with the historical background, outlook on life, socio-culture and political will of each country (Hafid Zakariya, 2016).

Law is the most important system in the exercise of institutional power. Law enforcement is a bridge or entrance to achieve the goal of justice. If justice has been upheld without any public upheaval, it is certain that law enforcement with justice has been realized, but if it is not enforced based on justice, then law enforcement has not been implemented optimally. Law enforcement is a series of processes of elaborating legal ideas and ideals that contain moral values such as justice and truth into concrete forms, in realizing it requires an organization such as the police, prosecutors, courts and correctional institutions as classic elements of law enforcement established by the state, in other words that law enforcement essentially contains the supremacy of substantial values, namely justice (Anita, 2022). Law enforcement does not only include law enforcement, but also includes peace maintenance. The people involved in this law enforcement problem in Indonesia include the police, judges, prosecutors, lawyers and correctional or prisons (M. Hesein Maruapey, 2017).

Basically, case resolution methods can be resolved in two ways, namely litigation and non-litigation. In general, if a case occurs, it will be resolved through litigation or court, but there are times when problems that are resolved through litigation encounter several obstacles, such as resolving cases that take quite a long time and sometimes they actually give rise to new problems. Non-litigation is an effort to resolve cases outside of court.

In criminal cases, if we prioritize legal certainty then everything written in the law with all its criminal sanctions, every action will be subject to criminal sanctions. In using criminal law tools, Barda Nawawi (2005) reminds us that there are five principles of limitation that should receive attention, one of which is:

"Do not use criminal law to achieve a goal that can be achieved more effectively with other, lighter means."

Barda Nawawi's explanation provides information to law enforcers that criminal law instruments are the last resort in resolving criminal cases. In the Indonesian criminal law system, as a source of material criminal law, the Criminal Code is a legacy from the Dutch colonial era which was used as a source of material law so that there is no legal vacuum. The pattern of the Criminal Code inherited from the Dutch colonial era which prioritizes corporal punishment for every criminal act is no longer relevant today. Currently, progressive law is an idea initiated by Prof. Satjipto Rahardjo is of the view that law is formed for humans, not humans for the law. This means that the law must pay attention to the symptoms that arise in society.

In the new Criminal Code drafted by the DPR, it has been published as Law Number 1 of 2023, which contains a restorative justice component. The new Criminal Code is indeed a matter of debate in itself, but it must be understood that the Indonesian nation must have a new Criminal Code as the identity of the Indonesian nation. The new Criminal Code is an important step in modernizing the criminal law system in Indonesia, with the aim of increasing the effectiveness of law enforcement and ensuring justice in the handling of criminal cases (Parningotan Malau, 2023). The political role of the DPR is indeed not perfect, but what is of note for the Indonesian nation is that politically, the DPR has been able to create a criminal law order which is the identity of the Indonesian nation.

After the passing of the Criminal Code Law in early 2023, optimism regarding criminal law with a Pancasila legal principle has increased because the substance in the Criminal Code Law has been adapted to the legal culture of the Indonesian nation. The new Criminal Code is based on neo-classical thinking that maintains a balance between objective and subjective factors (Adi Mansar & Ikhsan Lubis, 2023). In this context, this includes the concept of restorative justice which has also been formulated in the Criminal Code Law. The idea of restorative justice in the Criminal Code Law, apart from efforts to build Indonesian legal ideals, also seeks to provide corrections to the criminal justice system which emphasizes the punishment of perpetrators, not the recovery of victims. The emphasis on punishing perpetrators only tends to simplify criminal problems because criminal problems do not only end when the perpetrator is imprisoned. The resolution of criminal matters must be complex where there is a meeting point between the legal interests of society, victims and perpetrators of criminal acts (Flora, 2022). A legal order must be built based on existing basic norms, and the basic norm of the Indonesian nation is Pancasila.

The highest legal order in Kelsen's view culminates in basic norms or *grundnorms*, namely in the form of a constitution, but the constitution referred to is in a material sense, not a formal constitution. So the *grundnorm* (basic norm) is the cause for the enactment of all legal norms below it. In various literature written by Indonesian legal scholars, *grundnorms* are defined as "basic norms"; "basic state norms"; "fundamental norms of the state"; and "highest norm". Norms in the introduction to legal science are explained as guidelines/benchmarks/measures regarding how someone should behave/behave in life together.

The DPR, especially with the restorative content contained in the new Criminal Code, is able to accommodate the basic values of the Indonesian nation. Before the DPR included restorative justice in the new Criminal Code, law enforcement officials, including the police, prosecutors and courts, had already practiced restorative justice, which we know as restorative justice. Restorative justice is an effort made by law enforcers to resolve cases peacefully. Apart from having a function in preventing and eradicating criminal acts of corruption, this approach can be used as a means of optimizing the return

of losses to the state. The restorative justice approach is an alternative case resolution and this approach has developed in common law countries.

The establishment of the criminal law system has reflected that its implementation is closely related to legal politics. Legal politics continues the development of law by trying to eliminate as much tension as possible between positivity and social reality. The politics of law makes an *iusconstituendum* (law that will apply), and seeks that the *iusconstituendum* will later apply as an *iusconstitutum* (expected law). With the urgency of legal politics, it is expected that the development of laws and regulations will be more sensitive to the development of Indonesian society. Legal products are used as guidelines for regulating all aspects of life in the political, social, cultural, security and economic fields. Thus, with a good reference from the legislation can overcome the problems or dichotomies experienced by the community (Indri Astuti, 2014).

For the Indonesian people, the values of Pancasila are placed as a paradigm of legal politics. Indonesian legal politics based on Pancasila, requires the development of democratic life in national legal life. This is in accordance with the fourth principle of Pancasila. There are several directions of legal politics regarding the enactment of national law, namely the principle of concordance which applies western law to national law. Basically, legal politics leads to the greater interests of the nation, namely the realization of justice for the entire Indonesian nation based on Pancasila and the 1945 Constitution (Amran Suadi, 2016). Pancasila itself as the basis of the state is not merely the idea of the founding fathers, but Pancasila is a value that lives in the archipelago which is characteristic of the values that grew in the lives of the ancestors and ancestors of the Indonesian people.

The role of legal politics in upholding the criminal law system in Indonesia refers to the purpose of the law itself. When law enforcement officials already know the purpose of the law, then applied in solving cases, it is related to the existence of irregularities and the interests of other parties are likely to be avoided, considering the purpose of the law is basically as a means of enforcing justice. As for more clearly the purpose of the law as follows:

1. Ethical Theory, the purpose of law is to enforce justice;
2. Utility Theory, the purpose of law is to realize what is useful or useful for others;
3. Protection Theory, the purpose of law is to provide protection or to protect society in other words to protect humans in an active sense (creating safe conditions in society), and passive (preventing arbitrary actions).

The legal objectives of the Republic of Indonesia according to positive law are contained in the fourth paragraph of the 1945 Constitution, where the law maintains peace and holds a balance between society and law enforcement. So that in essence the purpose of law is to provide justice, certainty, and

benefits (Andri Raharjo, 2016). The 1945 Constitution also reflects some of the noble ideals of the Indonesian nation contained in Pancasila.

Political law is a line or policy to determine the law that should apply in the country. In a democratic country, the consideration in the formation and determination of criminal law comes from and is the aspirations of the community channeled through representatives of the people who are then processed so that as an output in the form of criminal law regulations. Maintaining the existence of legal politics in the development of the criminal law system really requires the values contained in Pancasila, and especially the fourth Precept. This is why legal politics is important, in order to maintain the values that live in society and the objectives of Indonesian law can be achieved in the enforcement of Indonesian Criminal law.

4. CONCLUSION

A country's legal system can be formed through the development of legal values that apply in society. Indonesia, as a state of law, in the formulation of its legislation is guided by Pancasila as the basic norm of the Indonesian state which is a source of guidance in the life of the nation and state. The source of Indonesian criminal law is the Criminal Code which was later replaced by Law Number 1 Year 2023 as the New Criminal Code. This new Criminal Code is an important step in modernizing the criminal law system in Indonesia, with the aim of increasing the effectiveness of law enforcement and ensuring justice in handling criminal cases. In the formation of the criminal law system, the role of legal politics based on the fourth principle of Pancasila is needed. Legal politics is the basic policy of state policy organizers in the field of law that will, is and has been in effect, which comes from the values prevailing in society to achieve the aspired state goals. The role of legal politics in the enforcement of the criminal law system in Indonesia, refers to the purpose of the law itself. Where the legal objectives of the Republic of Indonesia according to positive law are contained in the fourth paragraph of the 1945 Constitution, where the law maintains peace and holds a balance between society and law enforcement. So that in essence the purpose of law is to provide justice, certainty, and expediency.

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