

**DEVELOPMENT OF PERSPECTIVE CRIMINAL LAW
INDONESIAN NOBLE VALUES**

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Abstract

The existence of criminal law is to protect and maintain central values in society. As an independent nation, the applicable criminal law should be in accordance with the noble values that live and develop in Indonesian society. KUHP (WvS) is a product of western colonial law, of course it carries the spirit of colonialism, individualism, and liberalism that is not in accordance with the noble values of an independent Indonesian nation. The development of Indonesian criminal law must be based on Indonesian philosophy, spirit, and values, in terms of ideology (Pancasila), religious/religious, social, political, economic, and cultural aspects that live and develop in society (customary law). Nor should it ignore international developments, because the Indonesian state is part of a civilized international community. Colonial inheritance criminal law that adheres to the teachings of positivist legal law, must be integrated with the teaching of legal historism which is a legal understanding that is considered appropriate and adhered to by the people of Indonesia, so that in Indonesia there is an unwritten criminal law (customary criminal law).

Keywords: *Legal Development, Criminal Law, Living Law, Indonesian Values.*

A. INTRODUCTION

The essence of legal development is the promotion and renewal of the law.¹ In the development of Indonesia's national legal system must be followed by the development, renewal or guidance of the substance of the legal system. The substance of the legal system will determine the extent to which the national legal system of Indonesia reflects the new Indonesia and is able to serve the needs of the new Indonesia. Thus in the development of the national legal system must include

¹ S.R. Nur. 1985. Membina Hukum Adat Menjadi Hukum Penghayatan Pancasila Dalam Bidang Hukum dalam buku Karya Ilmiah Para Pakar Hukum. Bunga Rampai Pembangunan Hukum Indonesia. Bandung: Eresco. Page. 195.

the development of the form and content of the legislation,² and this is the domain of legislation policy.

We are well aware that many legislative policy products, which are the laws in force in Indonesia, still do not reflect the noble values that are embraced and live in Indonesian society, including the values of religiosity (justice), justice, humanism, institutionalism, decency, civilization and benefit. These values are implicitly found in the principles of the Pancasila and the 1945 Constitution, as well as "in" the awareness of community law. This section (*legal substance*) is the main target of legal development, although legal development also includes two other fields, namely law enforcement officials (*legal structure*) and legal culture. And at the level of practice, the construction of legal structure, both concerning moral and professional quality, is very important, because he is a player of the operation of this law. Based on the description, the focus in this issue is **the Development of Indonesian Criminal Law has the perspective of Indonesia's High Value.**

B. DISCUSSION

Making legislative policies, must be based on the vision³ and mission of the Indonesian people. The vision of the Indonesian nation is to realize an Indonesian society that is democratic, fair, competitive, advanced and prosperous, in the Republic of Indonesia which is supported by healthy, independent, faithful and pious Indonesian people, noble, loving the motherland, aware of the law and the environment, mastering knowledge knowledge and technology, have a high work ethic and discipline.

In the constellation of legislative policies within the scope of criminal law, **Muladi and Barda Nawawi Arief** stated, "*seen as a unified process in the framework of setting a criminal provision in a law, the legislative policy stage is the*

² Bagir Manan. 2005. Sistem Peradilan Berwibawa (Suatu Pencarian). Yogyakarta: FH UII Press. Page. 157-158.

Lihat juga pendapat Von Savigny yang dikutip Theo Huijbers. 1990. Filsafat Hukum dalam Lintasan Sejarah. Yogyakarta: Kanisius. Page. 114, which states, law is a statement of the soul of the nation - *Volggeist* - because basically law is not made by humans but grows in society, which is born, develops, and disappears in history. In law enforcement, it is also necessary to consider the ideals of the nation and the values contained in the nation.

³ Menurut John Kotter Seperti dikutip oleh M Deden Ridwan dan M Nuhadjirin. 2003. Membangun Konsensus: Pemikiran dan Praktik Politik Akbar Tandjung. Jakarta. Pustaka Sinar Harapan. Page. 232. Vision is "an interesting and logical (rational) future reality picture".

most strategic stage".⁴ Arranging a law, so that the rule of law can be effective in the sense of having a positive impact, according to **Soerjono Soekanto** as quoted by **Barda Nawawi Arief**, must pay attention to four things, one of which is *the positive written law that exists must have a level of vertical and horizontal synchronization in harmony*.⁵

However, it must be realized that the law is a political product, which is very colored by various interests, especially the interests of the actors making it, namely the House of Representatives (DPR)⁶ and the President, and also other forces owned by the state or outside that, like social, political, economic, and other forces. The law (*legislative policy*) must be seen as a site of struggle between the forces. He was not in a vacuum at all.

Bagir Manan⁷ said, as a product - especially the legal method is none other than the will of the maker or the person who gave birth to it. When the law is or becomes one of the functions of power - and this is increasingly dominant - the law is nothing but the embodiment of the will or desire of the forces that determine or are dominant at a particular time or time. So the level of legal empowerment as a product will be determined by the nature and style of the dominant forces which not only influence determining the level of legal empowerment alone. In this context, often heard expressions such as "*political will*" or more extreme, the law is merely the will of the ruling (command of the sovereign of the adherents of the legal positivism), some even say, the law is a mere instrument of power (as said by Marxisme).

On the basis of such understanding above, therefore, by the DPR and the Government, it is often used as a justification for the existence of the substance of the law which is far from the expectations of the public (*less accountable to the public, while the DPR was born to represent the people*), and the process of discussion is not transparent and walk for too long.⁸ However, it must be endeavored

⁴ Muladi dan Barda Nawawi Arief. 1998. Teori-teori dan Kebijakan Hukum Pidana. Bandung: Alumni. Page. 173.

⁵ Barda Nawawi Arief. 1994. Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara. Semarang: C.V. Ananta. Page. 117-118.

⁶ Erni Setiowati, Rival Gulam Ahmad, Soni Maulana Sikumbang. 2003. Bagaimana Undang-undang Dibuat. Jakarta: The Asia Foundation dan PSHK (Pusat Studi Hukum dan Kebijakan Indonesia). Page.11-12.

⁷ Bagir Manan. Op-Cit. Page. 168.

⁸ Irma Hidayana (Ed.). 2005. Panduan Praktis Pemantauan Proses Legislasi. Jakarta: PSHK (Pusat Studi Hukum dan Kebijakan Indonesia). Page. XVI.

that the legislative policy in the form of the law is a quality political product, in the sense that it can be accountable to the public, both in the process of making it and in its form and substance. To produce a responsive legislative product in accordance with the wishes of the people, of course by increasing people's participation in drafting the law, it is not enough to be represented only by the DPR or the Regional Representative Council (DPD). In making laws there must be a clear mechanism, there needs to be a public hearing so that people participate in it.⁹ It is necessary to socialize the bill that is being drafted so that the public knows and can provide input and criticism.

Many of the DPR's product laws have been identified as not having gone through adequate stages of academic discussion (academic concepts), but are only discussed in and by the proposing department and then directly submitted to the DPR, or proposed by the DPR without first being discussed in academic discussions. So that many laws, both form and substance, do not reflect responsive¹⁰ and quality legislative products. This fact is not in line with the spirit of national law reform, which must be in favor of the interests of the people and justice, including the development of law relating to the following matters:¹¹ 1) Businesses consisting of activities to improve, reduce, add to the applicable law or replace it with new ones according to the needs, situation and conditions in Indonesia; 2) Meet certain requirements that support the development of truth, justice, and people's welfare based on the 1945 Constitution as a practice of Pancasila; 3) Development of certain philosophical, ethical, and juridical grounds; 4) Development of appropriate language in legislation, so that it can be understood and lived by many people as subjects and objects of law, so that it supports its application; 5) Procurement and participation of law enforcement tools that understand and live up to the meaning of law as a means and basis for the development of truth, justice and welfare; 6) Understanding and appreciation of legal reforms as a form of manifestation of human

⁹ Amir Syamsuddin dan Nurhasyim Ilyas. 2000. Perilaku Aparat Penegak Hukum. Jurnal Keadilan Lembaga Kajian Hukum dan Keadilan. Vol. 1 No. 1 Desember 2000. Page. 27-28.

¹⁰ Hukum Responsif (responsive law), menurut **Nonet dan Selznick**, adalah hukum yang berfungsi sebagai bentuk respon terhadap kebutuhan dan aspirasi sosial (law as a facilitator of response to social needs and aspirations). Dalam A.A.G. Peters dan Koesriani Siswosoebroto (Ed.). 1990. Hukum dan Perkembangan Sosial. Buku Teks Sosiologi Hukum. Buku III. Jakarta: Sinar Harapan. Page. 166-169.

¹¹ Arief Gosita. 2000. Reformasi Hukum Yang Berpihak Kepada Rakyat dan Keadilan (Beberapa Catatan). Jurnal Keadilan. Lembaga Kajian Hukum dan Keadilan. Vol 1 No. 2 Desember 2000. Page. 51.

welfare services. The law must be able to support services to fellow human beings who have problems in various fields of livelihood and life.

In updating national law, it is necessary to pay attention to and fulfill certain conditions so that legislative policies are responsive to the needs and awareness of the legal community. As for the requirements which can also be used as a gauge for the quality of legislative products, according to Arief Gosita, are as follows:¹² 1) Positive Rational; 2) Can be accounted for; 3) Useful; 4) Develop a sense of togetherness, harmony, unity, and unity; 5) Developing the truth, justice and welfare of the people; 6) Stipulating the perspective of interests that are regulated/served and not the perspective of interests that govern/serve; 7) As a practice of Pancasila; 8) Based on law integrally; 9) Based on ethics; 10) Developing the relevant human rights and obligations; 11) Cannot be used as a legal basis for abusing position, authority, power, and power for personal or group interests; 12) Develop a response/justice that restores; 13) It is not a victim factor; 14) Not a criminogen factor; 15) Support the application of management elements: cooperation, coordination, integration, synchronization, and simplification; 16) Based on an exact image of the object and subject of law, as a human being of the same dignity and status; 17) Developing five senses, namely sense of belonging, sense of responsibility, sense of commitment, sense of sharing, and sense of serving.

With a different formula, **Lon Fuller** in his book *The Morality of the Law*, argues that the ideals of the rule of law so that rules are fair. On his bePagef various principles have been developed as guidelines in making law, so that the fair nature of the legal rules can be encouraged. The principles referred to are: 1) There must be rules as guidelines in making decisions. Fuller also spoke of the requirements for generality. Giving legal form to the authorities means that authoritative decisions are not made on an ad hoc basis (temporary) and on the basis of a free policy, but on the basis of general rules. 2) Rules which become guidelines for authority must not be kept secret, but must be announced. 3) Rules must be made to guide future activities. They should not be made retroactive. A special application of this requirement is the principle of criminal law *nulla poena sine lege* (there is no penalty without a rule of law). 4) Laws must be made in such a way that it can be understood by ordinary

¹² Ibid. Page. 52-53.

people (desire for clarity), 5) Rules must not conflict with each other. 6) Rules may not require behavior that is beyond the ability of the affected parties. In other words, the law must not order something that is not possible. 7) In law there must be firmness. The law must not be changed every time so that people can no longer orient their activities to it. And 8) There must be consistency between the rules as announced and the actual implementation.¹³

However, it needs to be realized, that the quality of legislative policies produced by the DPR and the President (Government), is very dependent on the quality of the members of the legislative body (DPR) and the Government itself. **Anton F. Susanto** said that in the formation of laws by institutions that are authorized to form the law can not be separated in relation to personal life, character, nature and other social problems. There are several things that affect the process of the formation of law and the implementation of law, namely: 1) his personality; 2) its social origins; 3) his own level of development; 4) economic interests; 5) political beliefs; and 6) view of life.¹⁴

In the above constellation, the general election of legislative members and presidential elections becomes very crucial. Because if those chosen are not among the people who have good quality related to the 6 things above, then the products or legislative policies that they will produce will also not have good or adequate quality too.

According to **G.P. Hoefnagels**, legal policy is an integral part of social policy; or in other words, social policy encompasses legal policy, which in full is said to be a law enforcement policy.¹⁵ So thus, the legislative policy and law enforcement policy is part of social policy.¹⁶

In **Sudarto's** view, legal politics or legal policy is an attempt to realize good regulations in accordance with the circumstances and situations at one time.¹⁷ On another occasion he defined legal politics as the policy of the competent bodies to

¹³ A. A. G. Peters dan Koesriani Siswosoebroto (Ed.). 1990. Hukum dan Perkembangan Sosial. Buku Teks Sosiologi Hukum. Buku III. Jakarta: Sinar Harapan. Page.61-62.

¹⁴ Anton F. Susanto. 2004. Wajah Peradilan Kita. Konstruksi Sosial tentang Penyimpangan, Mekanisme Kontrol dan Akuntabilitas Peradilan Pidana. Bandung: PT. Refika Aditama. Page. 48.

¹⁵ G.P. Hoefnagels. 1978. The Other side of Criminology. Holland: Deventer-Kluwer. Page. 57.

Lihat dalam Barda Nawawi Arief. 1998. Op-Cit.

¹⁶ Barda Nawawi Arief. 1998. Ibid.

¹⁷ Sudarto. 1981. Hukum dan Hukum Pidana. Bandung: Alumni. Page. 159.

establish the desired regulations which could be expected to be used to express what is contained in society and achieve what is aspired.¹⁸ Whereas social policy, according to Barda Nawawi Arief, is all rational efforts to achieve community welfare and at the same time include community protection. So in terms of "*social policy*" as well as including "*social welfare policy*" and "*social defense policy*".¹⁹

Barda Nawawi Arief, once put forward three meanings regarding criminal policy, namely:

- a. In the strict sense, is the whole of the principles and methods that form the basis of a reaction to a violation of the law in the form of a criminal;
- b. In a broad sense, is the overall function of the law enforcement apparatus, including the workings of the court and police;
- c. In the broadest sense (which he took from Jorgen Jepsen), is the whole policy, which is carried out through legislation and official bodies, which aim to establish the central norms of society;
- d. On another occasion he put forward a brief definition, that criminal politics is "a rational effort from the community in tackling crime".²⁰

In combating crime it is necessary to pursue an integrated policy approach, in the sense of:²¹

- a. There is integration between criminal politics and social politics;

¹⁸ Sudarto.1983. Hukum Pidana dan Perkembangan Masyarakat. Bandung: Sinar Baru. Page. 20.

See also Padmo Wahyono. 1986. Indonesia Negara Berdasarkan Atas Hukum. Jakarta: Ghalia Indonesia. Page. 160.

"National legal politics is a basic policy that determines the direction, form and content of the law to be formed. Another aspect of the legal pulitik is about the values, determination, development, and giving form".

See also Moh. Mahfud. MD. 1998. Politik Hukum di Indonesia. Jakarta: Pustaka LP3ES Indonesia. Page. 7-9.

"Political law as legal policy (legal policy) which will or has been implemented nationally by the government.

See also Syofrin Syofyan dan Asyhar Hidayat. 2003. Hukum Pajak dan Permasalahannya. Bandung: Refika Aditama. Page. 4-5

"Political law is national is a statement of the will of the state through legislators (legislative), carrying out legal policies to form a legal choice that is applicable and developed in accordance with state objectives based on policies that will or have been implemented by the government"

¹⁹ Barda Nawawi Arief. 1996. Bunga Rampai Kebijakan Hukum Pidana. Bandung: PT. Citra Aditya Bakti. Page. 30.

²⁰ Ibid. Page. 29.

²¹ Ibid. Page. 23-24.

See also Siswanto Sunarso. 2005. Wawasan Penegakan Hukum di Indonesia. Bandung: PT. Citra Aditya Bakti. Page. 8-9.

- b. There is an integration between overcoming crime with "*penal*" and "*non-penal*".

Criminal law policy, according to **Marc Ancel**, is "a science as well as an art that ultimately has a practical goal to enable positive legal regulations to be better formulated and to provide guidance not only to legislators, but also to the courts that apply the laws and also to the organizers or executors of court decisions".²² In line with opinion, **Sudarto** said that implementing criminal law politics means holding elections to achieve the best results of criminal legislation, in the sense of meeting the conditions of justice and usability. On another occasion he stated that carrying out the politics of criminal law means, efforts to realize the criminal law regulations in accordance with the circumstances and situations at a time and for the future.²³

Whereas **A. Mulder**, who uses the term "Strafrechtspolitik", defines it as a policy line to determine:²⁴ a) how far the applicable criminal provisions need to be changed or updated; b) what can be done to prevent criminal offenses; c) the manner in which investigations, prosecutions, justice and criminal conduct must be carried out.

According to **Barda Nawawi Arief**, criminal law reform essentially contains meaning, an effort to carry out the reorientation and reform of criminal law in accordance with the central values of socio-political, socio-philosophical, and socio-cultural of Indonesian people which underlie social policies, policies criminal and law enforcement policies in Indonesia.

Thus in the renewal of criminal law (including formal criminal law), it must be taken with a policy-oriented approach ("policy-oriented approach"), because it is essentially only a part of a policy step or "policy" (namely part of law / law enforcement politics, criminal law politics, criminal politics, and social politics), and at the same time value-oriented approach, because in every policy also contains value considerations.

So the meaning and nature of the renewal of criminal law as follows:

1. From a policy approach perspective: *As part of social policy, criminal policy, and law enforcement policies,*

²² Barda Nawawi Arief. 1996. Ibid. Page. 4.

²³ Ibid. Page. 27-28.

²⁴ Ibid. Page. 28.

2. From the standpoint of the value approach:

Renewal of criminal law is essentially an attempt to review and re-orient (re-orientasi and re-evaluate) socio-political, socio-philosophical, and socio-cultural values that give content to the normative and substantive content of criminal law (material and formal) who aspires. It is not a renewal (reform) of criminal law, if the orientation of the ideals of criminal law aspired to be the same as the orientation of values from the old criminal law of colonial heritage.²⁵

So in making criminal law policies, both policies in the field of material criminal law and formal law must be carried out integrally/comprehensively through a policy approach and value approach. Because if not, then the criminal law policy will not be effective in preventing crime, and more broadly protect the public from crime.

In a different terminology, because it is actually focused on renewing material criminal law, but according to the author it is also appropriate to reform/making formal criminal law policy, **Muladi**²⁶ provides a benchmark of characteristics that must be considered in making a future criminal law policy, namely:

First, the coming national criminal law must meet sociological, political, practical, and also within Indonesia's ideological framework.

Second, future national criminal law must not neglect aspects related to the human condition, nature, and Indonesian traditions.

Third, the coming national criminal law must be able to adjust to the universal tendencies that grow in the association of civilized society.

Fourth, because the criminal justice system, criminal politics, and law enforcement politics are part of social politics, the future national criminal law must pay attention to preventive aspects;

Fifth, the coming national criminal law must always be responsive to the development of science and technology in order to increase the effectiveness of its functions in society.

In line with the above thought, efforts to function for criminal law functionalization must also seriously consider: National development goals, Actions

²⁵ Ibid. Page. 31.

²⁶ Muladi. 1990. Proyeksi Hukum Pidana Materiil Indonesia di Masa Datang. Pidato Pengukuhan Guru Besar FH UNDIP. Semarang. 24 Pebruari 1990. Page. 3.

that are endeavored to be prevented or which will be overcome by criminal law must be undesirable actions. The use of criminal law must take into account the cost and benefit principle; and The use of criminal law must also pay attention to the work capacity or capacity of law enforcement agencies, namely not to exceed the overload of duties.²⁷

As is known, which is the basic rules and principal of positive criminal law (KUHP) is the Penal Code which is a memorandum of the legacy product of the Dutch Colonial government in 1915 which came into force in 1918 under the name *Wetboek van Strafrecht Nederland Indie (WvS NI)* with several changes, including with Law No. 1/1946, Law No. 73/1958, Law No. 1/1960, Law No. 16 / Prp / 1960, Law No. 18/1960, Law No. 1 / PnPs / 1965, Law No. 7/1974, Law No. 4/1976, Law No. 3/97, Law No. 27/1999, Law No. 20/2001, Law No. 21/2007.

The Criminal Code is a criminal law product that adheres to positivistic legal teachings (**legal positivism**), this is proven by the adoption of the principle of legality as the most important and fundamental principle in our criminal law (Article 1 of the Criminal Code). The Criminal Code does not actually recognize the validity of customary criminal law (unwritten law), a person can only be convicted if it violates the laws (written rules) that existed before the act was committed. If the act committed is not/has not yet been prohibited in criminal law, even though the act is very evil and is contrary to customary law or a sense of community justice or values that live in the community, the perpetrator still cannot be convicted.

In short sentences it can be said that according to Article 1 of the Criminal Code, living law (unwritten law or customary law) cannot be used as a source of criminal law.²⁸

The reality of the law above disturbs the sense of justice in the community, therefore although the existence of the principle of legality in the Criminal Code is not disturbed (amended), but with a number of laws and regulations the existence of customary (criminal) law is recognized in the practice of criminal law.

²⁷ Sudarto. 1986. *Hukum dan Hukum Pidana*. Bandung: Alumni. Page. 36-40.

See also Barda Nawawi Arief. 1996. *Op-Cit*. Page. 33-34.

²⁸ Barda Nawawi Arief. 2006. *Perkembangan Asas-Asas Hukum Pidana Dalam Konsep Kuhp (Perspektif Perbandingan Hukum Pidana)*, Bahan Refreshing Course "On The Same Root and Different Development", kerja sama FH UNDIP dan ASPEHUPIKI, di Hotel Graci., Semarang. 15-17 April 2006.

Starting with entry into force Law No. 1/Drt/1951 which mandates judges to pay attention to the law that lives in the community (customary law) as a basis for punishment for an act that has no comparison/equivalent in the Criminal Code/other written legislation Article 5 (3) sub b of Law No. 1/Drt/1951.

Also reaffirmed in Law No. 14 of 1970 concerning the Basic Provisions of Judicial Power, which in one of the articles stated that "judges in deciding cases must pay attention to the law that lives in the community". In Law No. 4 of 2004 the last was replaced with UUNo. 48 of 2009 concerning Judicial Power, it was also reaffirmed.

Thus "values or law that live in society" which of course are based on Indonesian values continue to be recognized in the Indonesian state of law, as evidenced by the existence of several positive legal provisions as follows: 1945 Constitution Article 18 B paragraph (2) (result of the amendment), 1945 Constitution Article 28 I paragraph (3) (result of the amendment), Law No. 48 of 2009 concerning Judicial Power, Article 50 (1), Law No. 48 of 2009 concerning Judicial Power Article 5 (1), Law No. 38 of 2004 concerning the Prosecutor's Office, Article 8 (4).

The regulations above are a number of the legal basis for the adoption of customary (*criminal*) law as a source of criminal law. That is, the principle of legality of Article 1 of the Criminal Code no longer applies absolutely, but it is accompanied by the enactment of customary law or unwritten law, although formally no changes have been made to Article 1 of the Criminal Code.

Projection of the Position of Indonesian Values in the Future Criminal Law in the 2015 Draft Criminal Code Bill, which is now being discussed by the DPR-RI, has long been fought by the public as a product of spirited law and reflects the values of Indonesia as an independent state product based on Pancasila and the 1945 Constitution. After a long discussion since the 1960s, the concept of the National Penal Code which is now the Penal Code Act has accommodated ideas / ideas on the importance of a mono-dualistic balance between the application of the principle of legality as a fundamental principle in criminal law that adheres to the understanding of positive law (legal positivism) as it is now applies (KUHP / WvS NI), by applying legal norms that live in the community (customary law / unwritten norms) on the other side. This means that the views of the drafters of the Criminal Code Bill have

shifted from the legal positivism teachings which were previously held by the Criminal Code (WvS-NI) to **the schools of history (legal historicism)**.

The legal phenomenon does not stand alone. It is united in the character of the people thanks to the unity of the people themselves. The law did not arise by chance, but was born from the inner consciousness of the people. That is why the law develops according to the development of the people, and eventually disappears when the people lose their nationality.

For the School of History, law is like a living organism. Its life develops like an organism and continues to be strengthened through empirical imagination that takes place from time to time.²⁹ The idea of mono-dualistic balance which accommodates the balance of the application of the principle of legality and unwritten law as a source of criminal law has been proposed long ago in the Criminal Code Concept (material of the Criminal Code Bill).

According to **Barda Nawawi Arief**,³⁰ in the Criminal Code Concept, the source of law or the basis for legality to declare an act as a criminal offense, is not only based on the principle of formal legality (based on the law) but also based on the principle of material legality, namely by giving place to "living law/unwritten law". The expansion of the principle of material legality that gives place to living law as the source of this law, is based on: (a) the existence of various national legislative product policies after independence; (b) a sociological study of the "characteristics" of legal sources/principles of legality according to the views and thoughts of Indonesian people which are not too formal and fragmented/partial; (c) various results of customary law research; (d) scientific agreements/national seminars; and (e) various comparative study results and international meeting documents/statements.

The Penal Code Bill still adheres to the principle of legality as the main principle of criminal law as emphasized in **Article 1 of the Penal Code Bill**. However, it is different from the principle of legality in the current Penal Code. Which applies **written law** and **living law in the community (adat law)** as a source of criminal law simultaneously, this is confirmed in Article 2 paragraph (1) of the

²⁹Bernard L. Tanya. 2013. Filsafat Hukum. Bahan Kuliah Program Doktor Ilmu Hukum UMS. Surakarta.

³⁰Barda Nawawi Arief. Op-cit.

2015 Criminal Code Bill.³¹ Although the Penal Code Bill provides a place for living law as a source of law, the Penal Code Bill also provides limits to the validity of the living law as regulated in Article 2 paragraph (2) of the 2015 Penal Code Bill.³²

Article 2 paragraph (2) of the Criminal Code Bill is expected to be a criterion or guideline for judges in establishing "living law in society" as a source of law (a source of material legality). Criteria (1) departs from "national guidelines" (values / principles of Pancasila) and criteria (2) departs from "international guidelines" (referring to the term "*the general principles of law recognized by the community of nations*" in Article 15 paragraph 2 of the ICCPR).

That is a glimpse of the prospect of the position of noble values of Indonesia (unwritten law/customary law) in the renewal of Indonesian criminal law. Although there is only one or two amendments to the Criminal Code Bill, it has a strategic and philosophical value because it has given place to the application of noble values of Indonesia (customary criminal law) in Indonesian criminal law.

C. CLOSING

Building a criminal law in Indonesia means building a legal system (criminal) in Indonesia, which means developing the substance of criminal law (material and formal), legal structure (official criminal justice system/law enforcement officers), and legal culture. Development of legal substance - without intending to reduce the role of other fields - is a very important and fundamental activity, especially in the field of criminal law which has harsh characteristics (often said to be "cruel") compared to other legal fields. Therefore, in the development of Indonesian criminal law, attention must be paid to all aspects, namely ideology (Pancasila), religion, social, politics, economy, culture that live and develop in society (customary law). It should not even ignore international developments, because the Indonesian state is a part of a civilized international community. The Criminal Code, which adheres to the principle of absolute legality, follows the doctrine of legal positivism, which does not give place for the enactment of unwritten law (customary law) as a source of criminal law. However, there are philosophical basic changes that lead to the adoption of the teachings of legal historism by making unwritten laws that live in the

³¹ Ibid

³² Ibid

community (customary law) as the basis of criminal law, including Article 18 B (2), 28 I (3) of the 1945 Constitution, Law No. 38 of 2004 concerning Prosecutors' Office, Law No. 48 of 2009 concerning Judicial Power. The upcoming renewal of criminal law (RUU KUHP), the law that lives in society (noble values of Indonesia), has an affirmation of its validity as a source of criminal law, in addition to the enactment of the principle of legality. This means that the Draft Criminal Code bill adheres to the teachings of legal historism, although it does not completely abandon the character of positivism legal teachings.

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