

The Living Law's Relationship With State Law In The Judge's Decision: Indonesian Legal Pluralism



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Abstract: *The plurality that Indonesia has creates legal pluralism where there are more than one law in force, state law as a legislative and living law product as a law that lives and develops in the community for generations. In the judicial process both laws can be used as a legal source for judges in deciding cases. This research includes legal socio-research which aims to analyze the living law as a legal source of judges and the relationship between state law and the living law in judges' decisions with a perspective of legal pluralism. Judges can use the living law as a source of law by making legal discoveries. The relation between state law and the living law in a judge's decision is a synergic, interactive relationship as an effort to overcome the legal gap between law in the books and law in actions with the main goal of realizing a substantive justice decision.*

Keywords: *the living law, source of law, judge's decision.*

I. INTRODUCTION

Society is a social system where members live together and interact with each other. As a means to regulate relations between community members, a law is needed which is a rule so that people's lives run orderly and orderly (Thompson et al., 2016). There is a close relationship between law and society because the law is basically inherent in social life (Nonet et al., 2017; Hunt, 1993). Law in the context of its formation can be categorized into written law and unwritten law. Written law is a law made by an authorized institution or often referred to as state law, whereas unwritten law can be a law that grows, lives in society (Jenkins, 2003). Both written law and unwritten law generally have the purpose of determining and regulating relations between community members. Written and unwritten legal categorization as described above in practice can be found in the Indonesian legal system. As a country that embraces the civil law, the system in this context is used in relation to legal substance (Brouwer, 2018). The reality of a pluralistic Indonesian society raises legal pluralism which is generally interpreted as a diverse legal system in a country. This legal pluralism is

characteristic of the Indonesian legal system because it is closely related to having a wide variety of cultures, tribes, customs, in fact the law cannot be separated from the reality of people's lives. Legal pluralism in Indonesia can be observed from the existence of state law and law that live in the community or called the living law (Lukito, 2012). The living law is a law that is born, grows, lives and cannot be removed simply because it is a plurality identity that Indonesia has. The implementation of law at the practical level cannot be separated from legal pluralism because it is a characteristic of the development of national law, including those relating to law enforcement in Indonesia.

In the context of law enforcement, the judiciary has a large role with the judge as a vital component. On the one hand the task of the judge is to examine and decide cases so that they have relevance to the legal sources used, whereas on the other hand the source of law that exists is not only state law but also can be in the form of the living law as the implication of legal pluralism in Indonesia. Therefore in this study focused on how the living law is used as a source of judicial law and how is the relationship between state law and the living law in judicial legal considerations in a legal pluralism approach.

II. RESEARCH METHODOLOGY

This research can be categorized into the field of social legal research and is a blend of doctrinal research and non-doctrinal research. Use of doctrinal research with the aim of knowing the application of the living law in judicial legal decisions (Muhdlor, 2012). The law in this matter is conceptualized as a decision by a judge in concreto, whereas non-doctrinal research places the results of observations on social realities related to the relation of state law and the living law in the judge's decision. The data used in this study are primary data and secondary data. Primary data is empirical data obtained directly from information sources, while secondary data is data obtained through library materials, including judge decisions that are relevant to research.

III. RESULTS AND DISCUSSION

A. The living law as a legal source for judges in deciding cases

Indonesia as a plural country cannot be denied that it contains the living law as a law that grows and lives in society. Eugen Erlich (1989)

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gives the meaning of the living law is that the living law dominates people's lives, even though the living law is not always transformed into a formal, legal proposition (see also. Hertogh, 2008; Nelken, 2008). The living law reflects the values of its people. Moreover, the living law can be known only from a test of court decisions, a closed investigation of the contents of business documents and others, and above all the living law can be seen from observations of people.

The living law is a law that grows, lives in Indonesian society whose existence is recognized today. In the formation of national law, the living law occupies a vital position considering that it contains values, norms and rules that live in society. This can be observed in Article 2 paragraph (1) of the Criminal Procedure Code which states that the provisions of article 1 (1) relating to the principle of legality do not reduce the validity of living laws in the community which stipulates that someone deserves to be convicted of the law. Furthermore in Article 2 paragraph (2) of the Criminal Procedure Code, it is explained that the enactment of the law that lives in the community as long as it is in accordance with the values contained in the Pancasila, Human Rights and general legal principles which are acknowledged by the peoples of nations. The enactment of the law in the Civil Law shows that the living law has an important role in the formation of national law.

In the context of judges, the living law is accommodated in Article 5 of Law No. 48 of 2009 concerning Judicial Power which states that judges and constitutional judges must explore, follow and understand the legal values and sense of justice in society. The formulation of this article clearly shows that the living law can be used as a legal source for judges in deciding cases. The complexity of the cases faced by judges in practice is not necessarily followed by the regulation or in other words cases that have to be decided by judges may not be available. Faced with this reality, judges are required to make legal discoveries by using the living law. The discovery of law by judges is to explore the values that exist in society and can be used as a source of law in deciding a case. Because the living law is basically a manifestation of the value of legal values, values that live and develop in Indonesian society which have their own characteristics compared to the laws of legislative products. As a living law, this living law can be referred to as a reflection of the soul of the Indonesian people whose existence exists for generations. The use of the living law is one form of legal discovery, especially if in deciding cases there is a discrepancy between the value of values contained in positive law with moral and justice values that are believed by the community.

B. Relation of the living law with law in a judge's decision: legal pluralism approach

Discussing the living law cannot be separated from legal pluralism which is characteristic of Indonesian law. Legal pluralism can simply be associated with the existence of two or more legal systems that apply as the reality of a pluralistic Indonesian society. The meaning of legal pluralism according to Gurvitch (1973) refers to the presence of different legal arrangements. Vanderlinden interpreted legal pluralism as a situation where one can choose between more than one rule of law (von Benda-Beckmann & Turner, 2018). Meanwhile,

Merry (1988) explained that legal pluralism is a legal system coexist in the same social field. In the arena of legal pluralism there is state law on the one hand and on the other hand is people's law which in principle does not originate from the state, which consists of customary law, customary habits or other social conversion conversions which are seen as legal (Irianto, 2017).

The meaning of legal pluralism as described above places the living law as part of the Indonesian legal system. In this legal pluralism there is a relationship between state law and the living law which is a local law as a characteristic of Indonesia. The relationship between the law of the country and the living law has an important role considering the reality that laws still exist in the community, including values, habits, and habits. The approach of legal pluralism in a global perspective shows the importance of seeing actors who cause law to move and contextualize with globalization of law (Irianto, 2009). Referring to the legal pluralism approach in a global perspective, one of the actors who have an important role is the judge (for the discussion of the judge role, see. Milligan, 2006). The duty of judges has to do with legal pluralism considering that on the one hand there are laws which are state laws while on the other hand there is the living law as the second local law which can be used as a legal source in legal considerations of a case. The source of legal law used by judges in practice is more law-oriented because of the legal tradition of civil law which is still strong in the judicial process. The use of the law as the main legal source in practice is not always appropriate given the complexity of the cases faced by judges. In this context, judges can use the living law as a source of law in consideration of case law. By using the living law, the judge is not merely positivistic in nature but also considers the values that live and exist in the community. This can be done by judges considering that the law that exists is not only state law but also local law, one of which is in the form of the living law as a form of legal pluralism in Indonesia. The approach of pluralism in a global perspective does not intend to provide legal boundaries or dichotomy, but in the perspective of how to interact, the relationship between state law and the living law is a local law. In the context of judges, the centralization of legal resources limited to state law is not always appropriate because in the community there is a living law in which contains living values that are also worth considering. This strong relationship between state law and the living law is also an effort to overcome the legal gap that occurs between law in the books and law in action.

IV. CONCLUSION

The reality of legal pluralism in Indonesia reflects the living law and state law that can be used as a legal source for judges in deciding cases. The Living law as a law that lives in the community can be used as a source of law if it contains values that are in accordance with Pancasila, Human Rights and general legal principles. The relationship between the living law and state law in the perspective of legal pluralism can be observed with how the interaction, the relationship between state law and the living law as local law.

The living law in the context of a judge's decision can be used as a source of law outside the law of the country with the main goal of realizing substantive justice.

The relation between state law and the living law in judicial legal considerations basically aims to realize a substantive justice decision. There is not a judge's decision which is only based on procedural justice, namely by upholding the rules of the state law but also considering the values in the community, especially with regard to the value of justice. In addition, in the legal pluralism approach, the relationship is not only seen as a dichotomy between state law and the living law as local law but both of them have synergistically interactive relations that can be used as a source of judicial law in deciding cases.

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