

THE EXISTENCE OF LIVING LAW IN CRIMINAL LAW REFORM: EXPANSION OF THE PRINCIPLE OF LEGALITY

Itok Dwi Kurniawan

Faculty of Law, Sebelas Maret University
Jl. Ir Sutami No. 36 A Kentingan, Jebres, Surakarta, Indonesia
E-mail: itokdwikurniawan@staff.uns.ac.id

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Abstract

The implementation of WvSvNI as a rule of criminal law in Indonesia after the proclamation of independence of the Republic of Indonesia automatically enforces the principle of formal legality embedded in it. The principle of formal legality is rigid because it places criminal law as the only basis for punishing someone's actions for an act regulated therein. The principle of formal legality also negates the existence of living law in Indonesian society, which is often known as customary law. Criminal law reform through the ratification of the National Criminal Code seeks to integrate living law as a source of criminal law. This article will discuss issues related to the existence of living law (Adat law) in the renewal of national criminal law. The method used in this legal research is a normative legal research method with a statutory approach. The results of this study indicate that the inclusion of living legal provisions (Adat law) into criminal law is an effective effort to achieve comprehensive justice for the Indonesian people, the actual form of which is to protect society (especially victims) from actions that are detrimental to themselves. Society is protected from not only mala prohibita acts but also extraordinary criminal acts, one of which is customary crime.

Keywords: Criminal Law; Legality Principle; Living Law.

A. Research Background

Indonesia, as a law state in the early days of its independence, did not yet have legal rules governing criminal law. Filling the legal vacuum in terms of criminal law rules, the Indonesian government at that time adopted a policy to re-enact *Wetboek van Strafrecht voor Nederlandsch Indie* (WvSvNI), the Dutch colonial heritage

criminal law rules. The Indonesian government reinstated the WvSvNI by adjusting several norms that were no longer suitable for the independent Indonesian nation.

The adjusted WvSvNI was translated into Indonesian and enforced as the National Criminal Code. At that time, there was no official translation of the WvSvNI, which was made into the National Criminal Code, so several versions of the translated Criminal Code appeared. Several versions of the translation are translations from R. Soesilo, Moeljatno, Andi Hamzah, and the National Legal Development Agency.¹

However, along with the development of the times, dynamic laws and philosophical, sociological and juridical conditions which began to change over time, the Dutch Heritage Criminal Code was deemed necessary to be renewed; this was to accommodate the values of society so that they were in accordance with the time, in addition to being the legal identity of the Indonesian nation in order to have a more sovereign law, this is also what is known as an effort to reform the law. In its development, Indonesia itself has issued many laws that contain new criminal provisions that are not contained in the Criminal Code, along with sanctions that have come to be known as Special Crimes, but these laws are not codified like the Criminal Code.

One of the consequences of maintaining WvSvNI as the National Criminal Code is the passing of the formal legality principle promoted by WvSvNI. The principle of legality has a fundamental position and is, therefore, one of the most essential principles in criminal law. This principle, among other things, regulates what and how an action or deed can be categorized as a crime and based on what reason. The introduction of the principle of legality in law originally functioned normatively to set standards for a person's behaviour so that it could be categorized as a crime (delict) or not. However, in its development, the principle of legality is also used by the

¹ Lidya Suryani Widayati, "Pidana Tutupan dalam RUU KUHP: Dari Perspektif Tujuan Pemidanaan, Dapatkah Tercapai?", *Jurnal Negara Hukum*, Vol. 10, No. 2, 2019, p. 238.

authorities to determine arbitrary legal policies. In its development, this normative character of the principle of legality has weaknesses due to its absolute nature.² The legality principle of criminal law in Indonesia is regulated for the first time in Article 1 paragraph (1) of the Criminal Code, which is a legality principle derived from the translation of *Wetboek van Strafrecht voor Nederlandsch Indie* (WvSvNI). Article 1, paragraph (1) of the Criminal Code stipulates that no one can be convicted or subject to action unless the act committed has been determined as a criminal offence in the laws and regulations that were in effect at the time the act was committed. The formulation of the legality principle in Article 1 paragraph (1) The Criminal Code is the basis or legitimacy in imposing criminal sanctions on anyone who commits a crime.³

The principle of legality of criminal law is the application of criminal law or criminal law legislation relating to time. If an act (*feit*) that fulfils the formulation of an offence was committed prior to the entry into force of the relevant provisions, then not only cannot be prosecuted for the act but absolutely cannot be blamed for the said act. In accordance with its formulation, the principle of legality requires the prior arrangement of an act according to the rules of criminal law before blaming the person who did it.⁴ The principle of legality is often seen as a provision that is absolutely considered correct so that formally must represent a sense of justice in society. Therefore, the provisions in the law must be enforced somehow and must be treated as representative of justice values. The consequence of this mindset and paradigm is, of course, a different perception exaggerating by assuming that the law is the law and the law is the same as the law. The formalistic paradigm in viewing this law has resulted in

² Deni Setyo Bagus Yuherawan, 2014, *Dekonstruksi Asas Legalitas Hukum Pidana: Sejarah Asas Legalitas dan Gagasan Pembaharuan Filosofis Hukum Pidana*, Setara Press, Jakarta, p. 32.

³ Kristiyadi, "Pergeseran Asas Legalitas dalam Pembaruan Hukum Pidana Indonesia", *Jurnal Dunia Ilmu Hukum*, Vol. 1, No. 1, 2023, p. 25.

⁴ Danel Aditia Sutingkir, "Asas Legalitas dalam Hukum Pidana Nasional dan Hukum Pidana Internasional", *Soumatera Law Review*, Vol. 1, No. 1, 2018, p. 26.

increasing difficulty in finding true justice. What exists is justice that is formal, narrow, and rigid, namely justice that does not represent all rights and interests, including the rights of victims, perpetrators, the State, and society.⁵

The principle of formal legality has such rigid characteristics, and in practice, it actually hinders the process of achieving justice for society, especially for victims who seek justice.⁶ The limitations of the formal legality principle contained in the WvSvNI are placing written criminal laws as the only source of law to convict someone. According to the science of criminal law, acts that are prohibited by law and categorized as criminal acts are called *mala prohibita*. Meanwhile, acts outside the provisions of the criminal law are called criminal extra-ordinaria. Thus, the principle of legality can only cover actions that are included in the category of *mala prohibita* and cannot cover actions that are included in criminal extraordinary. Then a question arises: What if the act of extraordinary crime caused such great harm to the victim? The principle of material legality certainly cannot cover these actions, and this becomes a problem in fulfilling justice for the wider community.

In connection with the limitations of this legality principle, Nyoman Sarikat Putra Jaya said that the principle of legality, which in essence contains the principle of *lex temporis delicti*, only gives protection for individual perpetrators and less protection community/community groups become victims of criminal acts, so access to obtain justice for victims, especially the collective victim is hampered.⁷ In connection with the limitation of the legality principle, the renewal of criminal law with the formulation of the National Criminal Code in its development expanded the legality principle, which previously only adhered to the formal legality principle,

⁵ Derry Angling Kesuma and Yuli Asmara Triputra, "Dekontruksi Terhadap Asas Legalitas, Perimbangan Perlindungan Terhadap Kepentingan Pelaku dan Korban Tindak Pidana", *Viva Themis*, Vol. 1, No. 1, 2018, p. 36.

⁶ Vincentius Patria Setyawan, "Asas Legalitas dalam Perspektif Filsafat Hukum", *Justitia Et Pax*, Vol. 37, No. 1, 2021, p. 128.

⁷ Deni Setyo Bagus Yuherawan, "Ketiadaan Fungsi Asas Legalitas dalam Hukum Pidana Untuk Melindungi Kepentingan Korban", *Arena Hukum*, Vol. 6, No. 1, 2013, p. 25.

coupled with the application of the material legality principle, namely based on unwritten legal provisions.

Currently, the new National Criminal Code has been ratified and promulgated to become Law Number 1 of 2023 Concerning the Criminal Code. However, it has only officially taken effect within a transitional period of 3 (three) years since it was stipulated, so it will only officially take effect in January 2026. The period of applicability of the new Criminal Code is regulated in Article 624. Article 1, paragraph (1) of the Criminal Code recognizes the principle of legality, namely, the concept which states that an act can only be subject to sanctions if there are provisions governing it. However, Article 2 of the National Criminal Code discusses the exclusion of the principle of legality by providing a regulation that the principle of legality adopted in Indonesian criminal law does not reduce the validity of the law that lives in society, even though the law does not provide regulation of the crime, provided that it must be in harmony with the values of contained in the basic norms, constitutions, human rights, and legal principles recognized by civilized societies.

The National Criminal Code accommodates living legal provisions aimed at paying respect to indigenous people who still exist in Indonesia and the living legal rules they promote. The respect for indigenous people in the National Criminal Code is motivated by the spirit of criminal law renewal towards national criminal law.⁸ Bearing in mind that before the Indonesian nation proclaimed its independence on August 17, 1945, the Indonesian nation already had the original rule of law, namely the law that lives in society that originates from the values that the Indonesian people firmly hold. After the independence of the Indonesian State, the law that lived in the realm of criminal law was sidelined by the formal legality principle promoted by the WvSvNI. The principle of formal legality places written criminal law rules (in the form

⁸ Vincentius Patria Setyawan, "Pemaknaan Asas Legalitas Materiil dalam Pembaharuan Hukum Pidana Indonesia", *Gudang Jurnal Multidisiplin Indonesia*, Vol. 1, No. 1, 2023, p. 13.

of laws) as the only source of law that legitimizes the implementation of material criminal law.

According to Barda Nawawi Arief, with the provisions of Article 1 paragraph (1) of the Criminal Code, as if it were a criminal law unwritten life in society deliberately put to sleep or turned off. The unwritten criminal law was put to sleep during the colonial era, which is understandable because it is in accordance with the Dutch legal politics at the time. However, it would be very, very odd if the policy was also implemented after independence. With the existence of the principle of formal legality, the unwritten/living law has never been explored and revealed in detail, and the surface is intact, especially in the practice of criminal justice.⁹ Therefore, in the politics of national law, specifically in the effort to renew the Criminal Code, there is a balance principle, namely between the principle of legal certainty and the principle of fairness in formulating policy in the renewal of criminal law.

Provisions regarding living law then become pros and cons in society because they are still considered to have multiple interpretations and are unclear. On the one hand, living law provides more opportunities for indigenous people to apply the law to them, but on the other hand, living law is also a concern that will lead to the powerlessness of customary law. In the view of groups that support the existence of living law provisions, they argue that in some parts of Indonesia, unwritten laws apply in an area and are seen as able to provide a greater sense of justice than the application of criminal sanctions. In addition, living law is believed to be the embodiment of the wisdom of the Indonesian people. However, different responses from groups who oppose the existence of Article 2 of the National Criminal Code with concerns that the

⁹ Barda Nawawi Arief, 2011, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Citra Aditya Bakti, Bandung, p. 122-123.

inclusion of legal rules that live in the National Criminal Code is contrary to the provisions of the principle of legality and has the potential to harm legal certainty.¹⁰

After studying the pros and cons of incorporating legal provisions in criminal law, this article will examine how living law is integrated into the reform of national criminal law. The analysis will focus on the role of living law (customary law) within the Indonesian legal system, as well as its presence in society (customary law) in the context of the renewal of national criminal law.

B. Research Method

This research uses a normative research method, which is legal research conducted by examining library materials (secondary data) that include: legal principles, legal systematics, the level of vertical and horizontal synchronization, legal comparison, and legal history.¹¹ This research examines legal materials related to the principle of legality in criminal law, particularly in connection with the expansion of the principle of legality in criminal law reform. The approach used in this research is a statutory approach, where normative legal research will analyze various legal provisions that are central to the theme of the research.¹² This research also uses a conceptual approach, which is a type of approach in legal research that provides an analytical perspective on solving problems in legal research, viewed from the aspects of the legal concepts underlying the issues, or even from the values contained in the formulation of a regulation related to the concepts used.¹³ This research examines the concept of the principle of legality and the development of the concept of the principle of legality in criminal law reform.

¹⁰ Nella Sumika Putri, “Memikirkan Kembali Unsur ‘Hukum yang Hidup dalam Masyarakat’ dalam Pasal 2 RUU-KUHP Ditinjau Asas Legalitas”, *Indonesia Criminal Law Review*, Vol. 1, No. 1, 2021, p. 61.

¹¹ Joannedi Efendi & Johnny Ibrahim, 2016, *Metode Penelitian Hukum: Normatif dan Empiris*, Kencana, Jakarta, p. 129.

¹² *Ibid*, p. 132.

¹³ Peter Mahmud Marzuki, 2017, *Penelitian Hukum*, Kencana, Jakarta, p. 135.

C. Research Result and Analysis

1. The Existence of Living Law in the Indonesian Legal System

In the 1945 Constitution of the Republic of Indonesia, it has been emphasized that the State recognizes customary community units, clearly stated in Article 18B paragraph (2) of the 1945 Constitution, which states that the State recognizes and respects customary law that is still alive if it is in accordance with the development of society and the principles of the State. The Unitary Republic of Indonesia, where recognition of these customs must also be accompanied by protection of traditional rights within them. The State recognizes the unity of indigenous people not only because of Indonesian local wisdom but also to give appreciation for being able to maintain personal identity as an indigenous people and regional identity as a unit of indigenous people. In the midst of the challenges of changing times, it is not an easy thing to maintain temporary uniqueness beyond luxury.

Indigenous people are a group of people or a unit of several individuals who have lived vertically for generations in a geographical area and have an ancestral history that is one genealogy and are connected and have a unified cultural identity, similarity of residence, customary norms, close relationship with nature, and shared solid value systems. Upheld, all of which are regional characteristics. Those who are part of an indigenous community are generally part of the lineage of parents who are also part of the indigenous community, and they will also give birth to those who will become part of the indigenous community as well, meaning that it is scarce for outsiders to become part of an indigenous community. That is also one of the reasons why a custom is so highly respected in specific communities.

One of the elements that exist in indigenous people is the presence of customary law, namely values that are alive and upheld by traditional groups in an unwritten way but are believed to be accurate. In contrast, positive law must go

through various stages to be recognized, from planning, drafting, absorbing aspirations, discussions, ratification, and promulgation to dissemination, which later the text of the law must be in written form to be recognized as applicable law, customary law applies. It is believed that it is hereditary and related to the norms of life of indigenous people, and usually, there is no written text in the law, but indigenous people will memorize what must be done, what is allowed and what is forbidden to do.

The values that live in this society are basically part of the national development program, namely the formulation of Indonesian cultural values for the order of economic, political, and legal life in the framework of developing Indonesian national culture.¹⁴ The law on indigenous people refers to "disturbed balance". Where if an indigenous people disturb the balance of indigenous people, then the person concerned will receive sanctions. Customary criminal law, in general, has simple provisions, where if, according to conscience and customary beliefs, an act violates a prohibition or leaves an order, then it is considered disturbing the balance of Adat. Customary criminal law is usually not codified (unwritten) even though there is now a codification of customary law in some indigenous people in Indonesia.¹⁵

Indigenous people and customary law also have an organ similar to a judicial institution whose job is to resolve every customary case committed by its citizens. Customary sanctions are usually applied as well to give the offender a sense of remorse and ensure that the offender does not repeat his actions. Traditional heads or traditional elders generally carry out these traditional justice institutions as people who are believed to have more knowledge about Adat and who are even believed to be liaisons between the community and mystical elements in indigenous people.

¹⁴ R Mayasari Eka, "Tantangan Hukum Adat dalam Era Globalisasi Sebagai *Living Law* dalam Sistem Hukum Nasional", *Journal Equitable*, Vol. 2, No. 1, 2018, p. 94-112.

¹⁵ Asliani Harahap, "Pembaharuan Hukum Pidana Berbasis Hukum Adat", *Jurnal Edutech*, Vol. 4, No. 2, 2018, p. 4.

In contrast to the national criminal justice system, customary law enforcement will generally be opened by traditional elders to hold deliberations to find a solution. The parties will present the main issues, attended by other indigenous people or representatives of indigenous people groups, to jointly provide the best solution to the problem and state whether those who allegedly violated the custom actually violated it or not. All parties presents have the same rights and status, and parties present can put forward arguments for the best settlement, different from the criminal justice system contained in the Criminal Procedure Code, where only judges, public prosecutors, attorneys, defendants, witnesses and experts can speak, in customary courts the general public can also speak.

Customary sanctions, although they may differ in each community, are usually social, such as being ostracized, ridiculed, exiled, or the most severe, being expelled/expelled from the customary community unit. There are no criminal sanctions in it. However, the provisions of customary law, both in the system of settlement and sanctions, are always different for each customary group, each in its way according to the values of the norms upheld. Through Article 18B paragraph (2), the State also recognizes customary law and provides opportunities for indigenous people to settle cases according to custom without the need to be brought to a public court.

The goal is to prioritize the welfare of indigenous people. Often, customary sanctions can prove to be more effective than criminal law sanctions, and the State acknowledges that decisions made by customary institutions in resolving disputes are final and binding on the parties involved, without the need for a court ruling. However, the State also ensures legal protections for indigenous communities. If they choose not to resolve a matter through customary means, the case can still be

brought before the court, with the aim of safeguarding legal certainty and protecting the rights of the community.

In addition to the provisions of Article 18B paragraph (2) of the 1945 Constitution, there is also Article 28I paragraph (3) of the 1945 Constitution, which also recognizes the existence of indigenous people and explains that the identity and culture of traditional communities and their rights must be maintained in the nation's civilization. Ratification of the existence of indigenous people is also explained in Article 32, paragraphs (1) and (2), which states that the State guarantees the rights of the community to maintain and develop cultural values and regional languages as part of national cultural wealth.

The three articles of recognition in the 1945 Constitution for indigenous people are the fruit of advancing thought in the amendments to the 1945 Constitution as an effort to realize Indonesia as a constitutional state. With the 1945 Constitution, Indonesia aspires to become a country that does not only rely on written law alone but must also recognize unwritten law to accommodate the value of justice in society.¹⁶

With the acknowledgement of customary law and indigenous people in the 1945 Constitution, it is evident that Indonesia maintains the values of local wisdom so that it continues to develop despite changing times. This is also a commitment to safeguarding its ancestral heritage as a national culture that has particular and unique characteristics. Recognition and protection like this need to be done in order to prevent the extinction of local and national identities that could one day be threatened by global modernization. It is undeniable that humans and civilization must continue to develop according to the demands of the times, not just accept a

¹⁶ Tongat, *et. al.*, "Hukum Yang Hidup dalam Masyarakat dalam Pembaharuan Hukum Pidana Nasional", *Jurnal Konstitusi*, Vol. 17, No. 1, 2020, p. 157.

new culture. Instead, you must sacrifice the culture that has become your identity, and this is where the role of the State is needed.

As a further effort on this mission, because the 1945 Constitution only regulates general matters that are still abstract, for its implementation procedures, derivative regulations are needed as guidelines for the implementation of customary law protection so that it does not erode over time because Indonesia is a country of laws, then this effort it must also go through the legal system that applies according to the Indonesian positive legal system so that its power is binding on a country, the legal systematics meant in this case is the drafting of a law that is able to accommodate customary interests as substantive rules that are more detailed in the mandate of the 1945 Constitution, and here also the role of the State is needed.

In practice, in real life on the ground, the authority of customary law is limited to actions that are considered customary violations committed in customary areas and by sections of indigenous people. This also means that the law that lives within society is shaped by beliefs considered sacred in indigenous communities. As a result, other community groups may hold different views, where actions that are prohibited in one society might not be seen as unlawful in their own area.

2. The Existence of Living Law in the Reform of National Criminal Law

In the Criminal Code that is currently in effect, there is no regulation regarding laws that live in society. The Criminal Code adheres to the principle of legality in which only actions that are regulated as criminal acts by law can be criminalized against the perpetrators, meaning that even though the general public considers an act as an act that is not commendable but has not been regulated in law, the act in question cannot be convicted.

This provision is contained in Article 1 paragraph (1) of the Criminal Code, which states that an act cannot be punished before it is regulated by law; this is a good goal in order to protect the rights of citizens. Obviously, with this provision, which is the principle of legality, only cases that do violate the law can be punished, and even then, as a last resort for solving problems. Furthermore, as an effort to provide guarantees of legal certainty, Article 1 paragraph (2) of the Criminal Code explains that the lowest sentence must be applied to the accused if, during the examination period, there is a change in the law related to a crime, this provision is also to provide the best for the perpetrator, can be punished but still guarantee legal rights. During the 77 years since Indonesia's independence, Indonesia still adheres to the Dutch-era Criminal Code, which was adopted and translated into Indonesian. Even though the National Criminal Code was drafted a long time ago, the ratification has not been completed because there are still pros and cons to several contents of the National Criminal Code in society.

Renewal of criminal law in Indonesia has been proclaimed for a long time, so it is considered a necessity that has urgency, considering that the Criminal Code, which has been in force since Indonesia's independence, is only a legacy of the Netherlands, which was agreed to apply as Indonesian positive law through Law Number 1 of 1946 and Law No. 73 of 1958. Given this, efforts to reform the criminal law at least contain the following foundations:¹⁷

- a. Political basis, in the form of a sense of national pride by having its own Criminal Code;
- b. Sociological basis, in the form of global social demands to have a Criminal Code that characterizes national values;

¹⁷ Muladi, 1990, *Proyeksi Hukum Pidana Materiil Indonesia di Masa Datang: Pidato Pengukuhan Jabatan Guru Besar Ilmu Hukum Pidana*, Universitas Diponegoro, Semarang, p. 2.

- c. Practical foundation, in the form of possessing the original Indonesian Criminal Code; and
- d. Adaptive foundation in the form of the national Criminal Code is expected to adapt to the times.

Among the forms of renewal in criminal law is the inclusion of new legal matters or provisions, such as provisions regarding living law, which were not previously included in the current Criminal Code. The provisions regarding living law are contained in Article 2 of Law Number 1 of 2023 concerning the Criminal Code, which stipulates that the principle of legality does not simultaneously reduce the recognition of living laws in society; the meaning of living laws in society is norms relating to laws that stated that it is still valid or developing in the social order in an area or known as customary law. In the elucidation of Law Number 1 of 2023 concerning the Criminal Code, it is also stated that in order to provide clarity on the application of customary criminal law or customary offences, it is necessary to regulate in more detail by the Regional Government through Regency/City Regional Regulations which cover customary territories. This detail contains primary material related to the origin of customary territories, the scope of customary territories, the boundaries of customary territories, the peculiarities and uniqueness of customs, governance and life of indigenous people, traditions and customs, as well as legal values that live in a society which are classified as acts of local customary punishment that only applies to the area and the provisions of the sanctions in accordance with the customs of the local indigenous people. However, the principle of legality and the prohibition of criminal analogy must still be considered. Furthermore, paragraph (2) explains that the law that lives in a place must be in accordance with Pancasila and the 1945 Constitution of the Republic of Indonesia and pay attention to human rights values, as well as legal principles that are recognized by civilized society.

At first, the provisions of Article 1 paragraph (1) of the Criminal Code adopted from the Netherlands resulted in unwritten laws that lived in society as if they had never existed; they did not consider unwritten criminal laws in the colonial era to be considered normal, because part of politics Dutch colonial law at that time. However, it is not appropriate if these provisions are also maintained in the current era.¹⁸ During the colonial period, colonizers sought to fully control their territories, often disregarding, or undermining the noble values upheld by the local populations. However, once Indonesia was able to establish its own government, it should have made a more deliberate effort to recognize and incorporate these indigenous values into its legal system. In the process of reforming its criminal law, Indonesia has continued to uphold the principle of formal legality, which is rooted in the Dutch Criminal Code. At the same time, it has expanded this principle by giving greater recognition to unwritten laws, such as customary delicts, thereby acknowledging them as a legitimate basis for punishment when an act constitutes a violation of customary law.¹⁹ Customary offences that live in society must be maintained to maintain the identity of a community; because Indonesia is a legal state, the initial effort should have been to build the legal system referred to in a law first.

Customary offences have at least 4 (four) essential elements, which include:²⁰

- a. There are prohibited acts committed by members of the indigenous people;
- b. This action is contrary to the norms believed in the customary law community unit;
- c. This act is considered to be able to disrupt the balance in people's lives and

¹⁸ Barda Nawawi Arif, 2011, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Citra Aditya Bakti, Bandung, p. 122-123.

¹⁹ I Dewa Made Suartha, "Pergeseran Asas Legalitas Formal ke Formal dan Material dalam Pembaharuan Hukum Pidana Nasional", *Yustisia Jurnal Hukum*, Vol. 9, No. 1, 2015, p. 239.

²⁰ Setiadi, 2008, *Intisari Hukum Adat Indonesia dalam Kajian Kepustakaan*, Alfabeta, Bandung, p. 21.

- d. This action resulted in a response from the community in the form of customary sanctions.

With the implementation of legal arrangements that live in Law Number 1 of 2023 concerning the Criminal Code, legally, the court has additional rights to examine cases that are considered contrary to cultural values that are upheld by a community group (*Adat*), where the imposition of sanctions against these violations can be added by customary sanctions as believed by the customary community unit. As stipulated in Article 601 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code, which states that someone who intentionally or because of ignorance has committed an act prohibited by customary law can be subject to criminal sanctions, this is also what later becomes a debate or polemic in the body of society because, on the one hand, this enactment can further strengthen or enhance the position of customary law in national law because the sanctions are contained in court decisions so that they have permanent and binding legal force. On the other hand, there are concerns that including this provision may undermine the essence or meaning of customary law, as not every judge handling a case will necessarily come from the customary area and have a deeper understanding of the local customs in question. This raises the risk of misinterpretation of the customary law provisions.

Customary criminal sanctions are contained in Law Number 1 of 2023 concerning the Criminal Code in the criminal paragraph, where Article 64 recognizes what is called additional punishment, which is further clarified in Article 66; one form of additional punishment is mentioned in paragraph (1) letter f namely fulfilment of local customary obligations. It means judges can provide additional sanctions for indigenous people who commit customary violations with obligations according to their respective customs, and this provision is in line with Article 601 paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code, which states

that crimes against customary violations are carried out in the form of fulfilling obligations custom. That is the system of implementing customary sanctions that apply in accordance with Law Number 1 of 2023 concerning the Criminal Code, which contains provisions regarding the laws that live in it.

Living law reflects the condition of a society, which is considered a rule that is run by that society.²¹ However, it does not stop there. There is still conflict in society because they see the inclusion of this norm as not guaranteeing the protection of Adat. There are even some groups who think that customary law can only be resolved by traditional elders who have a high understanding of the applicable customary law. Furthermore, Article 96, paragraph (1) states that the crime of fulfilling local customary obligations is applied to violations of law that live in the community and can only be applied if it has been previously regulated in local customary law. Then continued in paragraphs (2) and (3) explaining that if the perpetrator is unable to fulfil customary obligations, he can be replaced with a category II fine of Rp10.000.000,- (ten million rupiah) as a form of compensation for losses due to customary violations committed. So, in practice, additional customary punishment is prioritized first to carry out customary obligations, and then, if the perpetrator is unable or unable to do so, it can be replaced with a criminal penalty of compensation.

Furthermore, Article 97 states that provisions for customary punishment can still be carried out if they are still alive in society, even though they are not strictly regulated in the law. Furthermore, to ensure that a norm is declared as a living law, it must be included in a derivative legal product in the form of a regional regulation. The regional regulation states that the recognition of an indigenous community unit does not contain customary criminal provisions. If this provision has been issued,

²¹ Ahmad Rif'an and Ilham Yuli Isdiyanto, "Dediametralisasi *Living Law* dan Kepastian Hukum dalam Pasal 2 RKUHP", *Ahmad Dahlan Legal Perspective*, Vol. 1, No. 1, 2021, p. 22.

then it is clear that the law believed by new communities is considered part of the expansion of the principle of legality if their customary community units have been recognized through a Regional Regulation of the Regency/City area that overshadows these indigenous people.

Regulations regarding living law in the National Criminal Code actually have positive values, including being able to strengthen the values of the Indonesian people, then aiming for law enforcers to prioritize legal justice and as a counterweight to the principle of legality.²² Living law or customary law has a strong position, both philosophically, sociologically and juridically.²³ This reflects the evolution of Indonesian state law, as the thinking of the nation has become more inclusive, including the rural communities that have long upheld their customary laws. As a result, there should be a stronger emphasis on recognizing their position within Indonesian positive law, which should be reflected in the reform of criminal law. In fact, all law can be considered a product of culture, meaning that the development of law is always intertwined with the cultural journey, with the law evolving alongside societal cultural shifts. This is a real-world application of the concept of law within society. Every community will shape and reflect its own legal system based on its unique culture. It can be said that each society has its own "law of life," which has evolved since the formation of the community, emerging from the interactions and relationships within that group, and continues to be practiced over time. Ultimately, the community follows these rules out of moral awareness and a conscious commitment to uphold them.²⁴

²² Eddy O. S. Hiariej, "Pertentangan Asas Legalitas Formil dan Materiil dalam Rancangan Undang-Undang KUHP", *Jurnal Penelitian Hukum*, Vol. 2, No. 1, 2015, p. 30.

²³ Rahmat Abdulah, "Urgensi Hukum Adat dalam Pembaharuan Hukum Pidana", *Fiat Justisia Jurnal Ilmu Hukum*, Vol. 9, No. 2, 2015, p. 168-181.

²⁴ Syofyan Hadi, "Hukum Positif dan *The Living Law* (Eksistensi dan Keberlakuannya dalam Masyarakat)", *DiH: Jurnal Ilmu Hukum*, Vol. 5, No. 2, 2018, p. 259-266.

Everyone who commits an act that harms another person must be subject to criminal sanctions, not limited to actions regulated by criminal law. Punishment for acts that violate the provisions of customary law is necessary in order to achieve comprehensive justice for society. The principle of legality of criminal law, in this case, must also have an extroverted character in protecting the broader community. This reflects the core concept of the principle of legality, which aims to protect society, not only by holding offenders accountable but also by safeguarding the rights of victims of criminal acts.²⁵

The linkage of law and culture is indeed a necessity in a rule of law that adheres to the principles of civilized humanity, where the favorable laws that are created must always be in line and harmony with the social values of society in order to create order and justice in the development of law. This is in line with Eugen Ehrlich's philosophy of law, sociological jurisprudence, which views law as a social reality, so that law must reflect the values that live in the society where the law exists. This aligns with the application of law that reflects the living legal norms within society, which are now incorporated into the National Criminal Code. In the case of customary crimes, customary justice institutions currently serve as an alternative, providing indigenous communities with the option to resolve issues through legal mechanisms specific to their areas that are perceived to offer a sense of justice. However, the use of these alternative mechanisms must be based on the mutual agreement of the parties involved. The inclusion of criminal provisions that reflect societal norms represents a form of legal reform, contributing to the nationalization of customary criminal law. This allows indigenous communities in Indonesia to have a solid foundation for behavior and accountability regarding actions considered customary violations or crimes.

²⁵ Fransiskus Saverius Nurdin, "Rekonstruksi Asas Legalitas dalam Hukum Pidana Berdasarkan Prinsip Keadilan", *Refleksi Hukum*, Vol. 1, No. 1, 2016, p. 9.

D. Conclusion

From the discussion of the research results, the following conclusions can be drawn, the State recognizes and protects the existence of customary community units, and has even permitted the application of customary law to communities for a long time in accordance with their respective unwritten customary regulations. Recognition of customary community units is stated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In addition to Article 18B, the 1945 Constitution also contains 28I paragraph (3) and Article 32 paragraphs (1) and (2), which explicitly recognize the existence of indigenous people in Indonesia. The law that lives on in the National Criminal Code is contained in Article 2 of the National Criminal Code, which is considered an extension of the principle of legality; this provision automatically regulates additional punishment in accordance with customary law where the offender is in indigenous people. The inclusion of provisions regarding living law in the National Criminal Code can increase the State's recognition and protection of customary laws that are in harmony with the character of the Indonesian nation.

Bibliography

Books

Arief, Barda Nawawi, 2011, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Citra Aditya Bakti, Bandung.

Joanedi Efendi & Johnny Ibrahim, 2016, *Metode Penelitian Hukum: Normatif dan Empiris*, Kencana, Jakarta.

Peter Mahmud Marzuki, 2017, *Penelitian Hukum*, Kencana, Jakarta.

- Muladi, 1990, *Proyeksi Hukum Pidana Materiil Indonesia di Masa Datang. Pidato Pengukuhan Jabatan Guru Besar Ilmu Hukum Pidana*, Universitas Diponegoro, Semarang.
- Setiadi, 2008, *Intisari Hukum Adat Indonesia dalam Kajian Kepustakaan*, Alfabeta, Bandung.
- Yuherawan, Deni Setyo Bagus, 2014, *Dekonstruksi Asas Legalitas Hukum Pidana: Sejarah Asas Legalitas dan Gagasan Pembaharuan Filosofis Hukum Pidana*, Setara Press, Jakarta.

Journals

- Abdulah, Rahmat, “Urgensi Hukum Adat dalam Pembaharuan Hukum Pidana”, *Fiat Justisia Jurnal Ilmu Hukum*, Vol. 9, No. 2, 2015.
- Eka, R Mayasari, “Tantangan Hukum Adat dalam Era Globalisasi Sebagai *Living Law* dalam Sistem Hukum Nasional”, *Journal Equitable*, Vol. 2, No. 1, 2018.
- Hadi, Syofyan, “Hukum Positif dan *The Living Law* (Eksistensi dan Keberlakuannya dalam Masyarakat)”, *DiH: Jurnal Ilmu Hukum*, Vol. 5, No. 2, 2018.
- Harahap, Asliani, “Pembaharuan Hukum Pidana Berbasis Hukum Adat”, *Jurnal Edutech*, Vol. 4, No. 2, 2018.
- Hiariej, Eddy O. S, “Pertentangan Asas Legalitas Formil dan Materiil dalam Rancangan Undang-Undang KUHP”, *Jurnal Penelitian Hukum*, Vol. 2, No. 1, 2015.
- Kesuma, Derry Angling and Yuli Asmara Triputra, “Dekonstruksi Terhadap Asas Legalitas, Perimbangan Perlindungan Terhadap Kepentingan Pelaku dan Korban Tindak Pidana”, *Viva Themis*, Vol. 1, No. 1, 2018.
- Kristiyadi, “Pergeseran Asas Legalitas dalam Pembaruan Hukum Pidana Indonesia”, *Jurnal Dunia Ilmu Hukum*, Vol. 1, No. 1, 2023.
- Nurdin, Fransiskus Saverius, “Rekonstruksi Asas Legalitas dalam Hukum Pidana Berdasarkan Prinsip Keadilan”, *Refleksi Hukum*, Vol. 1, No. 1, 2016.
- Putri, Nella Sumika, “Memikirkan Kembali Unsur ‘Hukum Yang Hidup Dalam Masyarakat’ dalam Pasal 2 RUU-KUHP Ditinjau Asas Legalitas”, *Indonesia Criminal Law Review*, Vol. 1, No. 1, 2021.

Rif'an, Ahmad and Ilham Yuli Isdiyanto, "Dediametralisasi *Living Law* dan Kepastian Hukum dalam Pasal 2 RKUHP", *Ahmad Dahlan Legal Perspective*, Vol. 1, No. 1, 2021.

Setyawan, Vincentius Patria, "Asas Legalitas dalam Perspektif Filsafat Hukum", *Justitia Et Pax*, Vol. 37, No. 1, 2021.

_____, "Pemaknaan Asas Legalitas Materiil dalam Pembaharuan Hukum Pidana Indonesia, *Gudang Jurnal Multidisiplin Indonesia*, Vol. 1, No. 1, 2023.

Suartha, I Dewa Made, "Pergeseran Asas Legalitas Formal ke Formal dan Material dalam Pembaharuan Hukum Pidana Nasional", *Yustisia Jurnal Hukum*, Vol. 9, No. 1, 2015.

Sutingkir, Danel Aditia, "Asas Legalitas dalam Hukum Pidana Nasional dan Hukum Pidana Internasional", *Soumater Law Review*, Vol. 1, No. 1, 2018.

Tongat, *et. al.*, "Hukum Yang Hidup dalam Masyarakat dalam Pembaharuan Hukum Pidana Nasional," *Jurnal Konstitusi*, Vol. 17, No. 1, 2020.

Widayati, Lidya Suryani, "Pidana Tutupan dalam RUU KUHP: dari Perspektif Tujuan Pemidanaan, Dapatkah Tercapai?", *Jurnal Negara Hukum*, Vol. 10, No. 2, 2019.

Law and Regulations

The Law of Republic Indonesia Number 1 of 2023 concerning the Indonesian Criminal Code (Republic of Indonesia State Gazette of 2023 No. 1).