

Analysis of the Existence of Living Law in Renewing the Legality Principles of Criminal Law

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Article Info	Abstract
Received: March 01, 2024	The principle of legality in criminal law reform has expanded. Initially, the principle of legality only laid down positive law as the basis for punishing someone, and now it is supplemented by living law. This article will analyze the existence of living law in criminal law reform. This article was written using normative legal research methods with a statutory approach. The result of this research is that the recognition of living law in Article 2 of the New Criminal Code creates challenges and opportunities for the Indonesian criminal law system. This integration supports restorative justice and reflects the country's cultural diversity, but also requires careful handling of legal certainty and the principle of legality. There is a need for an appropriate resolution mechanism to accommodate the application of living law in criminal law, so that legal inequality does not occur.
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INTRODUCTION

Renewal or reform of criminal law in Indonesia is an attempt to replace criminal law originating from the Dutch colonial period, especially the Criminal Code (KUHP). Criminal law reform does not only include the development of legal institutions, but also includes aspects of legal substance, institutions and culture which are the result of a legal system in the form of criminal law regulations, as well as attitudes and cultural values that influence the implementation of the legal system (Setyawan, 2021).

Efforts to reform criminal law in Indonesia have been ongoing since Indonesia's independence, driven by the spirit of nationalism which desires to create criminal law that is in line with Pancasila and the 1945 Constitution. This reform process is carried out systematically and integrated, aiming to replace the colonial Criminal Code with a new legal codification, as well as ad hoc through the establishment of special criminal laws outside the Criminal Code. The government has attempted to develop a codification of this new criminal law, by forming various committees tasked with formulating the draft Criminal Code which was finally formalized into Law no. 1 of 2023, known as the New Criminal Code (Vincentius Patria Setyawan, 2023).

Article 2 of Indonesia's new Criminal Code is often the focal point in discussions about the integration of customary criminal law with the national legal system. The background to this article is closely related to the desire to create a legal system that recognizes and respects the diversity of customary laws that exist in various regions of Indonesia. In a historical context, the original Criminal Code was inherited from the Dutch colonial legal system, which did not specifically accommodate the principles of customary law that applied in the archipelago.

With the introduction of Article 2 of the new Criminal Code, there is a real effort to adapt the national criminal law system to the pluralistic social and cultural realities of Indonesia. This article aims to provide space for the recognition and application of customary criminal law in law enforcement, as long as it does not conflict with basic human rights values and universal legal principles. This marks a significant shift from a monolithic and uniform approach to criminal law towards a more inclusive and pluralistic one.

Reforms in criminal law that integrate the principle of legality with recognition of the laws that apply in society are not free from challenges. The expansion of the boundaries of criminal acts includes not only those regulated by law, but also following customary law, both written and unwritten. In this situation, the risk of violating the *lex certa* principle is very possible (Faisal & Rustamaji, 2021).

The application of customary criminal law in Article 2 of the Criminal Code creates new dynamics in the Indonesian criminal law system, especially related to the principle of legality. The principle of legality, which demands that an act can be punished only if it has been previously established in law as a criminal act, is a fundamental principle in criminal law. This research aims to analyze how recognition of customary criminal law interacts with the principle of legality, considering that customary criminal law is often unwritten, dynamic and varies between indigenous communities. Based on the background above, this article will discuss the implications of the application of customary criminal law in Article 2 of the Criminal Code on the principle of legality in the Indonesian criminal law system.

METHOD

This article was written using a normative legal research method which studies the principle of legality as a fundamental principle in criminal law. The research approach used is a statutory approach. The legal materials used in this research are primary legal materials and secondary legal materials. The technique for collecting legal materials uses literature study, while the technique for analyzing legal materials uses deductive analysis with syllogisms.

RESULTS AND DISCUSSION

Snouk Hurgronje, a legal expert from the Netherlands, introduced the term "adatrecht" through his work entitled "De Atjehers". In his research, Snouk Hurgronje explored the customs of the Acehese tribe. Then, Van Vollenhoven also applied the term "adatrecht" in his study of the traditions and customs of various ethnic groups in Indonesia (Firdaus, 1977). Van Vollenhoven defines customary law as a collection of rules regarding behavior that apply to native and foreign Eastern people, which has two main aspects: first, as legal rules with sanctions contained therein, and second, because they are rooted in customs in society, these rules do not made in written form so it is not codified (Zaelani, 2020).

Lilik Mulyadi also defines customary criminal law as actions that go against the justice and decency that prevail in society, resulting in disruption of peace and social balance. In Mulyadi's view, customary law, as original Indonesian law, contains noble values respected by Indonesian society, which, if violated, can disrupt social life. Even though it is not written or codified, customary law still has binding force in its application because it reflects the values of justice that have been mutually agreed upon by the community (Mulyadi, 2016).

The implementation of customary offenses in the national criminal law shows an effort to fill the legal vacuum to handle offenses that are not regulated in the Criminal Code, but are regulated in customary law as customary offences. It recognizes the importance of maintaining and respecting customary values in the national criminal law system,

demonstrating efforts to integrate customary justice within the formal criminal law framework (Setyawan, 2020).

Mardjono Reksodiputro believes that the legitimacy of customary law as a source of criminal law can be seen through the judge's efforts to seek justice. The justice sought by judges does not only come from the provisions of positive laws and regulations, but also comes from the values that exist, grow and develop in the lives of Indonesian society.

Deviations from the principle of *lex certa*, which emphasize that the formulation of criminal offenses must be clear, are one of the challenges in the integration of customary law, because customary law is often unwritten and dynamic, with interpretations that can vary. This problem complicates the process of determining whether a customary offense can be recognized as a criminal offense in national criminal justice, considering the diversity of interpretations that may arise in various regions which have their own customary characteristics (Setyawan & Rhiti, 2022).

Customary law in Indonesia's national criminal law acts as an element that supports flexibility and adaptation of criminal law to the values and social norms that apply in indigenous communities. This requires a sensitive and inclusive approach to ensure that the integration of customary law not only strengthens the criminal law framework, but also respects and preserves local wisdom.

Currently, Indonesia has passed Law Number 1 of 2023 concerning the Criminal Code as a replacement for *Wetboek Van Strafrecht (WvS)* which has been in use since 1946. *WvS* is considered outdated and no longer reflects the sense of justice and dignity of the Indonesian people. This new Criminal Code will come into effect three years after it is promulgated in January 2023. The process of discussing this new Criminal Code went through various long discussions full of polemics, one of which was the inclusion of the concept of law that lives in society (living law) in Article 2, which can give rise to contradictions. with the principle of legality stated in Article 1.

By implementing the expansion of the legality principle, the latest Criminal Code applies living law as a manifestation of the expansion of the legality principle. This is explained in Article 2 paragraphs (1) and (2) which states:

1. The provisions as intended in Article 1 paragraph (1) do not reduce the validity of laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this law;
2. The laws that exist in society as intended in paragraph (1) apply in the place of that law and as long as they are not regulated in this law and are in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society;
3. Provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations.

The application of laws that live in society, as described in Article 2, still creates confusion which has the potential to result in unfair sanctions enforcement in practice. Sudargo Gautama revealed that the lack of clarity in the formulation of this article could have an impact on social relations between indigenous communities who have their own legal regulations.

The principle of legality states that "*Delictum Crimen Nulla Poena Sine Praevia Lege Poenali*", which is a classic expression from Von Feuerbach and is freely translated as no punishment without the criminal law in force before the action is committed, is related to the contents of Article 1 paragraph (1) of the new Criminal Code.

The recognition of customary law in Article 2 of the new Indonesian Criminal Code has significant implications for the principle of legality in the national criminal system. The principle of legality, which emphasizes that no action can be punished unless it is determined by law, underwent a broadening of interpretation with this recognition.

Article 2 of the new Criminal Code accommodates existing laws in society, including customary law, as a basis for prosecution and punishment. This marks a significant transition from the traditional strict, code-oriented understanding of legal principles towards a more flexible and inclusive approach.

Apart from that, the integration of customary law in the national criminal law system also has an impact on the law enforcement process. By recognizing customary law, law enforcement practices are expected to become more adaptive to local contexts, which may require training and adjustments for law enforcement officers to understand and apply customary norms effectively in the judicial process. This requires a system capable of accommodating legal plurality, where customary law and national law can operate in parallel or integrated, depending on the specific context of the case.

The recognition of customary law in the new Criminal Code also reflects respect for the diversity of culture and legal traditions in Indonesia, which can increase the legitimacy and relevance of the criminal law system in the eyes of society. This allows the legal system to be more responsive to local needs and justice, which can support social acceptance of criminal law and strengthen compliance with the law. From this discussion it can be seen that there needs to be a clear and effective mechanism to resolve potential conflicts between customary law and national law, especially when there is a discrepancy between customary norms and the principles of modern criminal law, including human rights and international standards of justice. This mechanism must ensure that recognition of customary law does not override the need for justice, legal certainty and protection of individual rights.

CONCLUSION

The recognition of customary law in Article 2 of the New Criminal Code creates challenges and opportunities for the Indonesian criminal law system. The recognition of customary criminal law in Article 2 of the new Criminal Code shows that the integration of customary law into Indonesia's national criminal law system is an important step that reflects the country's social and cultural diversity. This recognition not only maintains traditional and customary values that are deeply rooted in society, but also facilitates a justice approach that is more restorative and responsive to local social dynamics.

The integration of customary criminal law into the national legal system brings challenges, especially related to legal certainty and the principle of legality. Legal certainty, which is the main pillar in the principle of legality, can be disturbed by the nature of customary law which is often unwritten and varies between indigenous communities. Therefore, a careful approach is needed to balance respect for local traditions with the need for clear and defined legal certainty in the criminal law system.

Strengthening the integration of customary criminal law in the Indonesian criminal law system includes developing effective conflict resolution mechanisms between customary law and national law to avoid ambiguity and overlap. In this case, legislative institutions must accommodate the creation of relevant Government Regulations and Regional Regulations to regulate customary law and conflict resolution mechanisms.

In addition, ongoing dialogue between customary law experts, legal practitioners and indigenous communities will support ongoing adjustments and updates to criminal law. This will ensure that the criminal justice system remains relevant and responsive to social and cultural change.

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