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Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila

Aris Hardinanto [a b]✉, Barda Nawawi Arief[b], Joko Setiyono [b], Zico Junius Fernando [c], Nahdiya Sabrina [d]

[a] Faculty of Law, Universitas Trunojoyo Madura, Indonesia
[b] Faculty of Law, Universitas Diponegoro, Semarang, Indonesia
[c] Faculty of Law, Universitas Bengkulu, Indonesia
[c] Faculty of Law, Universitas Merdeka Malang, Indonesia

✉ corresponding email: aris@trunojoyo.ac.id

Abstract

The government is trying to reform national law in the field of criminal law by drafting a Criminal Code Bill (RUU KUHP) to replace *Wetboek van Strafrecht*. The culmination of this preparation was the promulgation of the Criminal Code Bill on January 2, 2023, through Law No. 1 of 2023 concerning the Criminal Code (KUHP). However, there are not many articles that discuss the process and critical analysis of living law formulation as stated in the provisions of Article 2 of the Criminal Code and their explanations. The research method used was

legal research with statute, historical, comparative legal, and conceptual approaches. The results of this research conclude that the living laws are formulated inconsistently in terms of scientific substance. In order to make this formulation can realize justice based on Pancasila, it can be achieved in several ways. First, there is a need to reinterpret living legal concepts by involving experts in customary law, legal anthropology, legal sociology, and interdisciplinary legal researchers. Second, redefining the meaning of law that lives within the body of the Criminal Code is not limited to customary law, especially the principle of legality, but also includes customary law and traditional laws in traditional societies. Third, formulating formal law/criminal procedural law as the enforcer of material criminal law/National Criminal Code by re-establishing and recognizing customary courts in the Indonesian criminal justice system whose application in society is to realize the fifth principle of social justice for all Indonesian people from Pancasila.

Keywords *Criminal Code, Living Law, Customary Criminal Law*

Introduction

Criminal law reform is a reform that includes three important aspects. First, the formulation of acts that can be punished or acts that are criminalized (*criminal acts*). Second, mistake (*criminal responsibility*), and the last is the crime itself.[1] In looking at the reasons for reforming criminal law, these three things can be viewed from socio-political aspects, socio-philosophical and socio-cultural reasons.[2]

Criminal law must not ignore aspects related to human conditions, nature, and Indonesian traditions because the law originates from the unique culture of society.[3] In the study of law and society,

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1 Barda Nawawi Arief, *Tujuan Dan Pedoman Pemidanaan* (Semarang: Pustaka Magister, 2022), pp. 4-5.

2 Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Jakarta: Kencana Prenada, 2018), p. 29.

3 Muchamad Iksan and Sri Endah Wahyuningsih, "Development of Perspective Criminal Law Indonesian Noble Values," *Legal Standing : Jurnal Ilmu Hukum* 4, no. 1 (2020): 178–92. *See also* Endang Nur Ulfah. "Urgensi Pembaruan Kitab

there is a rule that states that good law must reflect four things, namely values, culture, customs, and agreements of that society.[4] In this framework, considering the existence of criminal law outside the law in the form of customary law, the steps taken by the Government through the Drafting Team for the Criminal Code Bill (RUU KUHP) are to formulate in the Criminal Code Bill the provision that customary law is one of the sources of criminal law.[5] The purpose of formulating customary law as a source of criminal law in the Criminal Code Bill is to recognize the validity of customary law which determines that a person's local customs are worthy of punishment if the act has no equivalent in the legislation.

One of the unique things about customary law is that it can be a source of positive law, but at the same time, customary law can function as a source of negative law, in the sense that these values can be used as a justification that eliminates the unlawful nature of actions or functions as light reasons for punishment and conversely can make the reasons for punishment more serious.[6] The mention of customary (criminal) law as one of the sources of Indonesian criminal law is contained in the provisions of the Criminal Code (hereinafter referred to as the National Criminal Code) which was passed on January 2, 2023 and became effective on January 2, 2026.[7]

Article 2 of the National Criminal Code, in substance, contains an affirmation that the principle of legality in Article 1 of the National Criminal Code does not reduce the validity of living law which

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Undang-Undang Hukum Pidana: Analisis Kajian Perkara Nomor 46/PUU-XIV/2016." *Indonesian Journal of Criminal Law Studies* 1, no. 1 (2016): 72-86.

4 Nella Sumika Putri, "Memikirkan Kembali Unsur 'Hukum Yang Hidup Dalam Masyarakat' Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas.," *Indonesia Criminal Law Review* 1, no. 1 (2021): 60–72.

5 Helmalia Cahyani et al., "Kebijakan Pasal-Pasal Kontroversial Dalam RUU KUHP Ditinjau Dari Perspektif Dinamika Sosial Kultur Masyarakat Indonesia," *Journal of Law, Administration, and Social Science* 2, no. 2 (2022): 81–90, https://doi.org/10.54957/jolas.v2i2.175.

6 Muladi, *Proyeksi Hukum Pidana Materiil Indonesia di Masa Datang* (Semarang: Diponegoro University, 1990), p. 16.

7 Zico Junius Fernando, Sri Wulandari, and Panca Sarjana Putra, "Potential Overcriminalization in Religious Offenses : A Critical Analysis of The Formulation of The New National Criminal Code (Law 1 Number 2023)," *Jurnal HAM* 14, no. 3 (2023): 205–16.

determine that a person deserves to be punished even though the act is not regulated in the Criminal Code. Provisions regarding living law apply where the laws live. The guidelines provided by the National Criminal Code so that living law can still be accommodated are that living law is still valid as long as it is not regulated in the National Criminal Code, and is in accordance with the values of Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights human beings, as well as general legal principles recognized by the people of nations.[8]

Several studies identified by the authors primarily examine customary criminal law from the perspective of its substance as formulated in the Draft Criminal Code (RKUHP) and various criminal law textbooks. These studies generally analyze the persistence of customary law within society, the political trajectory of national criminal law as part of broader legal reform efforts, and the incorporation of customary criminal law as a source of criminal law in the National Criminal Code (KUHP).[9] Additionally, these works explore the expansion of the principle of formal legality into the principle of material legality as embodied in the RKUHP[10], as well as the broader concept of criminal law pluralism. This includes discussions on customary criminal law that have historical roots dating back to the Dutch East Indies colonial period.[11]

Based on the review of these studies, the authors note an absence of analysis regarding the legal history of the formulation of customary criminal law within the National Criminal Code (KUHP) that draws upon contemporaneous sources from the period of its drafting. A thorough understanding of the historical context and intellectual framework underlying the formulation of living legal provisions is

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[8] Anugrah Sahtia Magala, "Akomodasi Hukum Yang Hidup Dalam Kuhp Baru Indonesia Menurut Perspektif Hukum Progresif," *Spektrum Hukum* 20, no. 2 (2023): 115–27.

[9] Akhmad Khalimy, "Makna Aturan Peralihan sebagai Politik Hukum RUU KUHP (Transformasi dari Hukum Kolonial ke Hukum Nasional)." *Jurnal Hukum Progresif* 8, no. 2 (2020): 121-136.

[10] Lidya Suryani Widayati, "Perluasan asas legalitas dalam RUU KUHP." *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 2, no. 2 (2016): 307-328.

[11] Yana Sahyana, "Pembangunan Hukum Pidana: Pluralisme Hukum dalam RKUHP." *Jurnal Konstituen* 2, no. 1 (2020): 47-61.

essential to fully appreciate the background and rationale embedded in these laws.

Without a comprehensive examination of the drafting process, there is a risk of misinterpreting these provisions due to a lack of insight into the historical and conceptual foundations of their formulation in the KUHP. However, this does not imply that the current formulation of living law within the KUHP is beyond critical examination. One notable issue is the mechanism by which the government defines the criteria for living law through Regional Regulations (*Peraturan Daerah* or Perda), despite the fact that, substantively, living laws originate from societal norms and practices rather than government directives. In light of these considerations, the key research question is as follows: *How can living law be formulated in a manner that upholds the principles of justice and aligns with the spirit of Pancasila?*

The legal research in this article uses statute, historical, comparative legal and conceptual approaches.[12] According to Peter Mahmud Marzuki, a statute approach means reviewing all laws and regulations related to the legal issue being handled.[13] In the context of writing this article, this means an examination of the legal formulation that exists in Law No. 1 of 2023 concerning the Criminal Code. A historical approach to a statutory provision is carried out by examining the background of what was studied and the development of regulations regarding the issue at hand.[14] Still, according to Peter Mahmud Marzuki, this is necessary when a researcher wants to reveal the philosophy and thought patterns that gave rise to something being studied as long as the aim of uncovering the meaning is relevant.[15] Based on this, it can be concluded that legal research with a historical approach is an approach that explores the background and mindset of the emergence of a legal rule from its compilers.[16]

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[12] Zico Junius Fernando et al., "Robot Lawyer in Indonesian Criminal Justice System: Problems and Challenges for Future Law Enforcement," *Lex Scientia Law Review* 7, no. 2 (2023): 1–24.

[13] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenadamedia Group, 2023), p. 133.

[14] Peter Mahmud Marzuki., p. 134.

[15] Peter Mahmud Marzuki., p. 135.

[16] Erdianto Effendi et al., "Trading in Influence (Indonesia): A Critical Study," *Cogent Social Sciences* 9, no. 1 (2023): 1–13.

A comparative approach means comparing existing laws in one country with other countries regarding the same/comparable matters.[17] The legal existence of Indonesian criminal law is similar to that of South Korea, New Sudan, and Jordan. The South Korean Criminal Code contains customary law as unwritten law about its nature as being against material law in its negative function. In the country of New Sudan, especially in the Criminal Code and Criminal Procedure Code, living law in the form of tradition and customary law is formulated as a source of material and formal criminal law. The same thing is also found in the Jordanian Criminal Code which makes traditions and customs a reason for expunging crimes. Lastly is the conceptual approach, namely an approach that departs from the doctrines that develop in legal science. Understanding these doctrines is the basis for forming arguments.[18] Linguistically, living law itself is a translation of Eugen Ehrlich's legal doctrine (*leben recht*/living law). Therefore, to understand the substance of living law, it is necessary to read and study the legal doctrine based on the original literature and then use it as a basis for reviewing the living law formulation in the Criminal Code to determine the accuracy of using these terms.

The legal materials used in research are primary and secondary legal materials. The primary legal material is in the form of legislation, namely Emergency Law No. 1 of 1951, Law No. 1 of 2023 concerning the Criminal Code, the South Korean Criminal Code, the New Sudan Criminal Code, and Criminal Procedure Code, the Jordan Criminal Code, the decision of the Supreme Court of the Republic of Indonesia No. 93 K/Kr/1975 and No. 666 K/Pid/1984. Meanwhile, secondary legal materials are legal books including research reports, seminars, symposiums, and legal workshops. The use of secondary legal materials is to trace the development of customary criminal law formulations using contemporary legal historical sources in the form of criminal law study reports, seminars, symposiums, and workshops organized by the National Legal Development Agency (hereinafter referred to as BPHN), as well as criticizing the consistency between basic ideas and

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[17] Akhmad Akhmad, Zico Junius Fernando, and Papontee Teeraphan, "Unmasking Illicit Enrichment: A Comparative Analysis of Wealth Acquisition Under Indonesian, Thailand and Islamic Law," *Journal of Indonesian Legal Studies* 8, no. 2 (2023): 899–934.

[18] Peter Mahmud Marzuki, *Penelitian Hukum.*, p. 136.

development of living legal formulations. According to Mardjono Reksodiputro, there are fifteen volumes of the parliamentary report on the drafting of the Criminal Code Bill which are kept by BPHN, and seven other materials were used by the drafting team to draft the Bill[19], In this research, the authors managed to gather only seven out of the twenty-three contemporaneous sources related to the drafting process of the Criminal Code Bill (*Rancangan Kitab Undang-Undang Hukum Pidana*, RKUHP) as identified by Mardjono Reksodiputro. These sources include parliamentary reports on the legislative process, as well as records from criminal law studies, seminars, workshops, and symposiums. Additionally, non-legal reference materials utilized in the analysis include the *Kamus Besar Bahasa Indonesia* (Big Indonesian Dictionary, KBBI) and the *Van Dale Woordenboek* (Van Dale Dictionary).

History of Living Law Formulation in the National Criminal Code

Indonesian law recognizes the existence of non-statutory law which originates from customary law, including customary criminal law.[20] It is a fact that in general customary law continues to apply alongside the law as long as it does not conflict with the 1945 Constitution.[21] The application of customary criminal law before the passing of the National Criminal Code was contained in Emergency Law No. 1 of 1951 concerning Temporary Measures to Implement the Unity Structure of Power and Procedures of Civil Courts which provides the basis that criminal law in Indonesia recognizes the existence of written criminal law as stated in Article 1 paragraph (1) of the Criminal Code-WvS (principle of formal/general legality). Regarding the provisions of the Emergency Law, Soepomo gave the interpretation that apart from written law, there are other living laws. This law is called living law, while the name of punishment based on living law is called

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[19] Mardjono Reksodiputro, *Pembaharuan Hukum Pidana* (Jakarta: Center for Justice and Legal Services, University of Indonesia, 1995), p. vii and 2-3.

[20] Tolkah Tolkah, "Customary Law Existency in The Modernization of Criminal Law in Indonesia," *Varia Justicia* 17, no. 1 (2021): 72–89.

[21] Harniwati Harniwati, "Hukum Adat Di Era Modernisasi," *Journal of Global Legal Review* 2, no. 1 (2024): 41–52.

customary law.[22] Looking at the dichotomy created by Soepomo, Soepomo implicitly sees living law in its broadest sense, while he sees customary law as only relating to punishment because apart from written law in the form of statutes that have criminal sanctions, only customary law has punishment for custom violations.

The existence of pluralism in criminal law does not bring different meanings to an act that is considered disgraceful in society. The most obvious example is regarding adultery.[23] Article 284 of the Criminal Code-WvS criminalizes someone who commits adultery between a man and a woman where one or both of them are bound by marriage. Indeed, the provisions of Article 284 of the Criminal Code-WvS do not define adultery but instead contain elements of acts that fall into the category of adultery. The word adultery in the translation of Article 284 of the Criminal Code-WvS is a translation of the Dutch term overspel as stated in Article 241 Strafrecht (Sr., Dutch Criminal Code). In Dutch, the term *overspel* means *sex met een ander and de echtgeno(o)t(e) of de vaste partner*[24] (a sexual relationship carried out with someone other than one's legal partner). Provisions of Article 241 Sr. on May 6, 1971 (*inzake overspel is vervallen bij de wet van* 6 May 1971, Stb. 291) were removed from Sr. because it is considered no longer relevant and entered too much into someone's private realm. Another reason is that based on research from J. M. van Bemmelen, since the eighty years this article was promulgated in Sr., there have only been seven or eight cases.[25] It cannot be traced with certainty why the private translators of the Criminal Code-WvS translated overspel as adultery in the context of the mind of the people of the Dutch East Indies who had their meaning regarding the act of adultery.

In the Indonesian context, what is meant by adultery is the act of sexual intercourse between a man and a woman who are not bound by a marriage relationship. Another definition is the act of sexual intercourse between a man who is married to a woman who is not his

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[22] R. Soepomo, *Kedudukan Hukum Adat Dikemudian Hari* (Jakarta: Pustaka Rakjat, 1959), p. 29.

[23] Ina Heliany et al., "The Pluralism of Indonesian Criminal Law: Implications and Orientations in the Post-New Criminal Code," *SASI* 29, no. 3 (2023): 514–23.

[24] Van Dale Woordenboek, https://www.vandale.nl/gratis-woordenboek/nederlands/betekenis/ overspel#. Accessed January 18, 2023

[25] Zitting 1970-1971, *Memorie van Toelichting* Nr. 3, p. 5

wife, or a woman who is married to a man who is not her husband.[26] Based on the definition in the KBBI, in Indonesia, adultery is divided into two, the first definition is defined as adultery in a narrow sense, while the second is a definition of adultery in a broad sense. The Criminal Code-WvS only covers adultery in the narrow sense, namely if one or both of the perpetrators are married. An example of the difference in the meaning of adultery between the Criminal Code-WvS and customary criminal law in society is reflected in the case law of the Supreme Court of the Republic of Indonesia No. 93 K/Kr/1975 and No. 666 K/Pid/1984.

One of the efforts to reform criminal law, especially in reformulating the principle of legality in Indonesia, began with the drafting of the Criminal Code Bill.[27] This effort was marked by the formal and material formulation of the principle of legality in the bill, namely the inclusion of customary law as a source of law. This means, in line with Barda Nawawi Arief, the principle of legality is seen as a matter of source/legal basis for declaring an act a criminal act (as a basis for criminalization).[28] Efforts to balance the principles of formal legality and the principles of material legality are outlined in the bill as a consequence of accommodating unwritten laws. The presence of this formulation shows that Indonesian people's thinking is not too formalistic and separate.[29] The starting point for the need to accommodate customary law provisions as a source of Indonesian criminal law comes from Soepomo's opinion in 1947[30], after that were the resolution of the National Law Seminar I in 1963, the resolution of the National Law Seminar III in 1974, and the National Law Seminar VI in 1994 in their development.

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[26] Kamus Besar Bahasa Indonesia Daring, https://kbbi.kemdikbud.go.id/entri/zina. Accessed January 18, 2023.

[27] Kartini Mallarangan, "Reconstruction of the Legality Principle: The Essence of the Pancasila Spirit in Criminal Law Reform," *Rechtsidee* 8 (2021): 10.21070/jihr.v8i0.782, https://doi.org/10.21070/jihr.v8i0.782.

[28] Barda Nawawi Arief, *Perkembangan Asas-asas Hukum Pidana Indonesia: Perspektif Perbandingan Hukum Pidana* (Semarang: Diponegoro University Publishing Agency, 2020), pp. 4-5.

[29] Barda Nawawi Arief, *Bunga Rampai Hukum Pidana*, p. 76.

[30] Soepomo, *Bab-bab Tentang Hukum Adat* (Jakarta: Balai Pustaka, 2013), p. 19.

The first Criminal Code Bill was drafted after the First National Law Seminar in 1963 (known as the 1964 Criminal Code Bill). The prototype of the bill is the Bill on the Principles and Basics of Criminal Law and Indonesian Criminal Law. At the congress of the Association of Indonesian Law Scholars (PERSAHI). Specifically, this bill was drafted to replace the provisions of BOOK I of the Criminal Code-WvS. Moeljatno gave a quite scathing response to the Criminal Code Bill drafted by the team of the Minister of Justice at that time[31], after responding to the draft, no news was heard of again.[32] The formulation of the principle of legality in the Criminal Code Bill drafted by the team at that time was as follows:

> *Article 2*
> *The Indonesian Criminal Code and Criminal Law system consists of these basic principles and basics, plus all regulations, whether written or not, which contain legal rules whose confirmation is accompanied by criminal threats.*

In connection with the court's task in qualifying acts as criminal acts originating from customary law, there are the following signs:

> *Article 5*
> *The court can only qualify an act as a criminal act if the legislator or unwritten law that exists in Indonesian society and which does not hinder the development of a just and prosperous society has determined the act to be a criminal act and threatens it with punishment.*

The second Criminal Code Bill was drafted in 1968 by the National Law Development Institute Planning Agency and the Review Team for the Criminal Code Bill Book 1. This second bill was known as the 1968 LPHN Criminal Code Bill. The formulation of the principle of legality in the bill was as follows:

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[31] Moeljatno. PERSAHI Congress Preliminary in Surabaya July 15, 1964 *Atas Dasar atau Asas-asas Apakah Hendaknja Hukum Pidana Kita Dibangun?* (Gadjah Mada University Crime Section, 1964), p. 1.

[32] Sudarto, *Hukum Pidana dan Perkembangan Masyarakat* (Bandung: Sinar Baru, Bandung, 1983), p. 96.

Article 3
No person for his or her actions can be criminally prosecuted or punished except in accordance with the law that existed at the time the act was committed.

The formulation of the 1964 and 1968 Criminal Code Bills above regarding the principle of legality is quite interesting. A person can be punished based on the legal provisions that existed at the time the act was committed, meaning that it does not always have to be based on the law alone, but also the living laws as long as these laws are still alive and do not hinder the development of a just and prosperous Indonesian society. It seems that the formulation of the principle of legality in the 1964 and 1968 Criminal Code Bills by including the word "law" in the formulation, follows the results of the first national seminar in the field of criminal law literally by adapting the standard Indonesian language structure even without the additional diction "customary". After the 1968 Criminal Code Bill was drafted, in 1971, the Criminal Code Law Drafting Team from the National Legal Development Agency (LPHN) began reviewing the 1964 Criminal Code Bill and completed its work in 1972. Specifically relating to customary criminal law, according to Sudarto, the formulation in the 1972 Criminal Code Bill still recognizes the existence of customary criminal law as stated in previous bills.[33]

From 1973 to 1975, several research and seminars related to customary and criminal law were held. From January to March 1973, research was conducted on the island of Bali regarding the influence of Hinduism on criminal law by a research team from the Faculty of Law and Public Knowledge, Udayana University. The results of the research are then sent to LPHN. In this report, it was found that the existence of customary criminal law on the Bali Island is unmatched in the Criminal Code-WvS, namely:

1. Logika Sanggraha: a man impregnates a woman but does not want to marry her. The basis of customary criminal law is the Adi Agama Book chapter Logika Sanggraha jo. Emergency Law No. 1 in 1951;

[33] Sudarto. *Suatu Dilemma Dalam Pembaharuan Sistim Pidana Indonesia.* (Semarang: Center for Law and Society Studies, Faculty of Law, Diponegoro University, 1974), p. 24

2. Amandel Sanggama: a wife who leaves her husband who is still married. The basis of customary criminal law is the Customary Law of Amendel Sanggama jo. Emergency Law No. 1 in 1951;
3. Gamie Gemana: sexual relations between those who have close blood relations. The basis of customary criminal law is Peswara 1927 and Law No. 1 in 1951;
4. Salah Kerama: sexual relations between humans and animals. The basis of customary criminal law used is the condemnation of the village community for the act;
5. Derati Kerama: sexual relations between a man and a married woman;
6. Taking someone else's wife away;
7. Wakparusia: uttering dirty words directed at someone;
8. Demolition of graves.[34]

The National Law Seminar III was held on April 11-15, 1974, one of the results of the seminar also included living laws to be researched.[35] From January 15 to 17, 1975 a Seminar on Customary Law and National Legal Development was held in Yogyakarta. One of the conclusions of the seminar relating to the role of customary law in legislation is that laws should be made that contain the basic principles of statutory law that can regulate legal politics, including the position of customary law.[36] On March 17 to 19, 1975, a Symposium on the Influence of Culture/Religion on Criminal Law was held. This symposium specifically contains the views of criminal law experts regarding the relationship between customary and criminal law. The conclusion of this symposium strengthens the need for the inclusion of customary criminal law in the Criminal Code Bill about the renewal of national criminal law. One of the conclusions of the symposium which is rarely discussed in books regarding criminal law and the Criminal Code Bill is as follows:

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[34] Udayana University Faculty of Law and Public Knowledge Research Team, *Laporan Penelitian Pengaruh Agama Hindu Terhadap Hukum Pidana* (Jakarta: National Legal Development Agency, 1973), pp. 29-34.

[35] BPHN, *Seminar Hukum Nasional Ke-III Tahun 1974: Buku Ke-III Pembahasan* (Jakarta: National Legal Development Agency, 1974), pp. 139-163.

[36] BPHN, *Seminar Hukum Adat dan Pembinaan Hukum Nasional* (Jakarta: National Legal Development Agency, 1975), p. 251.

> Modernization gives rise to criminal side effects that must be accommodated in criminal law. Apart from that, it can also remove the criminal nature of a criminal act which was originally a criminal act. In taking into account the influences of culture and religion in reforming criminal law, it is necessary to create religious offenses and offenses related to religion as well as customary offenses by paying attention to the emphasis of their appearance in each sub-culture. The legal basis for prosecuting and punishing acts that are not formulated in law but are not desired by religion or customs that live in society is the principle: "No one because of his actions can be prosecuted or punished except in accordance with the law that existed at the time the act was committed".[37]

The conclusion of the symposium is interesting because the editorial used is "*based on the law that existed at the time the act was committed*". In principle, the conclusion of the symposium is in line with the results of the first national legal seminar, the 1964, 1968, and 1972 Criminal Code Bills, which used the diction "*law*" which can mean law in the form of legislation or customary law. This means that from the 1964 Criminal Code Bill to 1975, the drafters of the Criminal Code Bill and criminal law experts agreed that the correct diction to be formulated in the Criminal Code Bill to recognize legal sources in the form of laws and customary criminal law was to use the diction "*law*" in general. In the authors' opinion, this formulation is simpler but precise and solid in substance.

The 1980/1981 Criminal Law Research Team began working to determine the direction of legal politics and the development of national criminal law. According to the team, Indonesian criminal law politics requires the formation of a National Criminal Code.[38] There is no indication in the report of the 1980/1981 Criminal Law Research Team regarding articles relating to customary criminal law, it seems that the team is more focused on studying the types of crimes in Book II of the

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[37] BPHN, *Simposium Pengaruh Kebudayaan/Agama Terhadap Hukum Pidana* (Jakarta: National Legal Development Agency, 1975), p. 129.

[38] BPHN, *Himpunan Laporan Hasil Pengkajian Bidang Hukum Pidana Tahun 1980/1981* (Jakarta: National Legal Development Agency, 1985), p. 15.

1971/1972 Criminal Code Bill.[39] Sudarto argued that at the National Criminal Law Reform Symposium from August 28 to 30. 1980 which was held in Semarang, he was still discussing the philosophy of criminal law development in Book I of the 1968/1972 Criminal Code Bill.[40] Based on this chronology, it is very likely that in Book I, which contains customary criminal law as a source of criminal law, there will be no significant changes.

From December 13 to 15, 1982, a Workshop on Renewing the National Criminal Law Codification, Book I, was held. In the workshop report, Book I underwent editorial changes but essentially remained the same, especially about customary criminal law as a source of criminal law. More details as follows:

> Chapter 1
> Applicability of Criminal Laws and Regulations
> 01. Applicability of Criminal Laws and Regulations According to Time
> Article 1.01.01
> (1) No person may be prosecuted or sentenced to a crime, except in accordance with existing criminal laws and regulations that apply to him;
> (2) To determine the existence of a criminal act, analogies may not be used:
> (3) Criminal laws and regulations do not apply retroactively;
> (4) The provisions in paragraph (1) do not reduce the validity of laws that according to local customs are worthy of punishment and which have no equivalent in these laws and regulations.

Budiarti representing the government (Ministry of Justice) in his paper at the workshop did not explain much about the reasons for changing the editorial provisions of customary criminal law from the Criminal Code Bill of 1964, 1968, to 1980/1981 which were

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[39] BPHN, "*Himpunan Laporan Hasil Pengkajian Bidang Hukum Pidana Tahun 1980/1981"*, pp. 80-100.

[40] BPHN, *Simposium Pembaharuan Hukum Pidana* Nasional (Jakarta: Badan Pembinaan Hukum Nasional, 1986), p. 61.

formulated generally using the diction "law" to become the provisions of Article 1.01.01 paragraphs (1) and (4). Indeed, Budiarti's explanation in substance is not much different from the basic ideas or ideas behind the recognition of customary criminal law in the Criminal Code Bill.[41] In this workshop, the phrase "living law" first appeared in the Criminal Code Bill, which will later continue to be used to refer to customary criminal law that exists in Indonesian society. This can be interpreted explicitly as meaning that the government as a party was the first to interpret living law, namely customary law, in the Criminal Code Bill until it was later ratified as the Criminal Code on January 2, 2023.

Muladi, regarding customary criminal law in the Criminal Code Bill, gave the following response in the plenary session of the workshop:

> From the formulation of article 1.01.01 paragraph 4, it appears that what is adhered to is the teaching of material unlawfulness, namely whether an act is unlawful or not, not only in written law but must be seen in the application of unwritten legal principles.[42]

Regarding Muladi's response to the paper presented at the plenary session, Budiarti gave a response, namely:

> As stated by Prof. Oemar Senoadji, S.H. The meaning of the principle of legality is now a problem, namely in the formal and material sense. This is also based on practice, a case law that applies customary criminal law that is felt to be fair by the people of that area.[43]

The provisions of customary criminal law in the Criminal Code Bill contain an affirmation that Indonesian criminal law adheres to the teaching of the nature of violating material law. Indeed, it is not

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[41] BPHN, *Lokakarya Masalah Pembaharuan Kodifikasi Hukum Pidana Nasional Buku I* (East Jakarta: National Legal Development Agency, Ministry of Justice, 1984), pp. 9-11.

[42] BPHN, *Lokakarya Masalah Pembaharuan Kodifikasi Hukum Pidana Nasional Buku I*, p. 26.

[43] BPHN, *Lokakarya Masalah Pembaharuan Kodifikasi Hukum Pidana Nasional Buku I*, p. 30.

explained what type of material unlawful nature is in the discussion of the Criminal Code Bill, but from the substance, it can be concluded that the material unlawful nature has relevance to customary criminal law to determine whether an act is a criminal act is the material unlawful nature in its positive function. This means that since the 1982 Criminal Code Bill, it has been understood that the inclusion of customary criminal law editorials is based on the nature of being against material law, not in the 1999/2000 Criminal Code Bill as is the opinion of Nyoman Serikat Putra Jaya.[44] The division of legal sources in the form of laws and customary criminal law then underwent formulation developments, essentially not changing much until the 1989/1990 Criminal Code Bill. According to Budiarti, in substance, the formulation of the principle of legality in the 1989/1990 Criminal Code Bill is as follows:

> A person cannot be punished except based on criminal provisions in pre-existing legislation. However, the provisions mentioned above do not reduce the validity of the existing law which determines what, according to local custom, a person should be punished for, if the act has no equivalent in the statutory regulations. So, in principle, written and codified legal principles are adhered to, but as exceptions, unwritten legal principles are still possible, accompanied by certain conditions.[45]

The substance of customary criminal law continues to exist with several editorial adjustments. Even though the formulation is different from the initial bill of the Criminal Code Bill, the political direction of criminal law in drafting the National Criminal Code remains the same, accommodating customary criminal law provisions. During the discussion in the DPR, there was an explanation based on the proposal of the drafting team (Muladi) as follows:

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[44] Nyoman Serikat Putra Jaya, *Relevansi Hukum Pidana Adat dalam Pembaharuan Hukum Pidana Nasional* (Bandung: Citra Aditya Bakti, 2005), p. 133.

[45] BPHN, *Laporan Hasil Pengkajian Bidang Hukum Pidana Tahun 1988/1989-1989/1990* (Jakarta: National Legal Development Agency, 1991), p. 16.

> What needs to be emphasized is the compilation by the government through their respective regional regulations to eliminate doubts as if this is an unwritten law that violates the legality of legal certainty. This compilation is to conform to the principle of legality. Only on page 5 did I propose that the word "with" be removed, so this provision means that the value standards are local wisdom in the form of standard values and norms that live in society. It is important to emphasize that customary criminal law is local wisdom that must be adopted and still protected to provide a greater sense of justice[46]…The living laws in this article relate to laws that are still valid and developing in the life of the Indonesian legal community. In certain areas in Indonesia, there are still unwritten legal provisions that live in society and apply as law in that area. In the field of criminal law, this is known as customary criminal law. To provide a legal basis regarding the application of customary criminal (offense) law, it needs to be confirmed in this Law and compiled by the government in the form of a Presidential Regulation originating from each regional regulation. This compilation contains living laws that qualify as customary crimes. The compilation must also be oriented towards the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society.[47]

The explanation from the BPHN website as a means of socializing the Criminal Code Bill is as follows:

> What is meant by "*laws existing in society that determine whether a person deserves to be punished*" is customary criminal law. The living laws in this article relate to laws that are still valid and developing in society in Indonesia. In certain areas in Indonesia, there are still unwritten legal provisions that

[46] The Parliamentary Report of the DPR and Government Criminal Code Bill Preparation Meeting February 5, 2018.

[47] The Parliamentary Report of the DPR and Government Criminal Code Bill Preparation Meeting May 30, 2018.

> exist in society and apply as law in that area, which determine whether a person should be punished. To provide a legal basis regarding the application of customary criminal law (customary offenses), it needs to be confirmed and compiled by the government originating from the respective regional regulations where customary criminal law applies. This compilation contains living laws that qualify as customary crimes. Circumstances like this will not override and still guarantee the implementation of the principle of legality and the prohibition on analogies adopted in this Law.[48]

In September 2019 the bill was brought to a meeting of the House of Representatives (DPR) and would have almost been approved at the Level I Meeting if there had not been massive rejection in several cities. The impact of this massive rejection of the Criminal Code Bill was postponed for further discussion. Discussions between the government and the DPR began again with the inclusion of the Criminal Code Bill in the 2023 Priority National Legislation Program (Prolegnas). The September 2019 bill was revised in 2022 to become the June 6, 2022 bill.[49]

The bill for June 6, 2022, was revised again to produce the Criminal Code Bill for July 4, 2022. On November 9, 2022, a Hearing Meeting (RDP) was held in the DPR to discuss the Criminal Code Bill. In the RDP, the Criminal Code Bill used was a refinement of the text of the Criminal Code Bill of July 4, 2022. A follow-up to the meeting on November 9, 2022, was held again on November 24, 2022. One of the important discussions relating to customary criminal law was changes to the definition and explanation of Article 2 of the National Criminal Code.

Article 2 of the November 9, 2022 bill, specifically, the Government and the DPR states that living law is customary law, so criminal acts are called customary crimes. Meanwhile, in the bill of November 24, 2022, the explanation regarding customary criminal law

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[48] National Legal Development Agency, http://partisipasiku.bphn.go.id/ruu-kuhp/339/hukum-yang-hidup-dalam-masyarakat-living-law, accessed January 20, 2023.

[49] The author obtained all the limited meeting materials analyzed in this article from DPR Commission III as the team drafting the Criminal Code Bill from DPR.

was revised to simply state customary law. However, both have a common thread that the living legal term is customary (criminal) law. In other words, in essence, according to the government and the DPR, the existing law is the same as customary law. The results of the discussion of the meeting materials on November 24, 2022, resulted in the Criminal Code Bill of November 24, 2022. One of the significant changes in the Criminal Code Bill is the addition of paragraph (3) to article 2 regarding Government Regulations (*Peraturan Pemerintah* or PP) as an instrument regulating legal criteria that live in society.

Indeed, there is no further explanation in the meeting materials for the reasons for the PP as a guide for determining the criteria and determinants for drafting the Regional Regulation in the explanation, considering that not all sources of customary law are fully included in the Regional Regulation except only recognizing the existence of traditional communities and customary law in it. An easy example is to refer to research reports on customary (criminal) law in Bali. Even though it is not stated in the Regional Regulation, because it is written in religious books or *awig-awig* outside of legislation, it is recognized as a source of customary criminal law.

The emergence of the PP as determining the criteria and procedures for determining living law in the Regional Regulations at the meeting between the Government and the DPR during the drafting of the Criminal Code Bill can be suspected for several reasons, namely:

1. This provision is the result of a compromise on the part of the Government which wants the formulation of Article 2 regarding living law to remain and some members of the DPR want restrictions;
2. So that there are restrictions regarding what kind of living law can appear in regional regulations, starting from when the living law was born to how it is practiced to this day;
3. Anticipate that areas where there is no longer a living law do not compete to make it seem as if there is a living law in that area so that it is promulgated in a Regional Regulation. So the PP as a central regulation needs to exist to serve as a guideline for determining criteria and legal applications that meet fundamental regional needs.

Based on the explanation above, a common thread can be drawn that the formulation of customary (criminal) law as a living law as one

of the determinants of whether an act can be punished even though it is not listed in the Criminal Code is based on the resolution of the First National Law Seminar in 1963 and several National Law Seminars thereafter, as well as Customary Law Seminar. The aim was formulated in the Criminal Code to place living law as a source of criminal law outside of written criminal law to accommodate living legal values in society that have existed since the era of colonialism in the Dutch East Indies.

Critical Study of Living Law Formulation as Customary Law in the National Criminal Code

Customary law, often translated from the term *adatrecht*,[50] is a concept interpreted variably by scholars, with no universally accepted definition. Mahadi highlights several prominent opinions on the nature of customary law, each emphasizing distinct aspects of its characteristics.[51] J.H.P. Bellefroid, for instance, describes it as life rules respected despite not being promulgated by the government, laying the foundation for understanding its societal origins. Building on this idea, Van Vollenhoven introduces the element of sanction, highlighting the enforceability that distinguishes it from mere custom. In a similar vein, H. Guyt focuses on its unwritten nature, emphasizing its informal transmission, which aligns with M. Slamet's assertion that customary law is uncodified and largely unwritten.

Further, Ter Haar and Holleman expand the discussion by identifying written *Swapradja* regulations as integral to customary law, bridging the gap between unwritten customs and codified elements. This perspective resonates with Supomo's view of customary law as distinct from legislative regulations, underlining its organic evolution outside formal statutes. Soekanto complements this by describing customary law as a complex of customs, mostly unwritten and uncodified, reiterating its informal character while acknowledging its systemic nature.

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[50] Bono Budi Priambodo, "Positioning Adat Law in the Indonesia's Legal System: Historical Discourse and Current Development on Customary Law," *Udayana Journal of Law and Culture* 2, no. 2 (2018): 140–64.

[51] Mahadi, *Seminar Hukum Adat dan Pembinaan Hukum Nasional,* pp. 132-135.

Djojodiguno offers a nuanced take, defining customary law as norms that do not originate from formal regulations, which aligns with Kusumadi Pujosewojo's interpretation of customs recognized as law through authoritative decisions. This idea is further refined by Moh. Koesnoe, who highlights the role of customary law as a direct expression of the community's sense of justice and propriety, emphasizing its deep connection to societal values. Lastly, Hazairin encapsulates the essence of customary law as a societal conception of decency, tying it back to the moral and ethical framework within communities.

These diverse perspectives collectively underscore that customary law is a body of written or unwritten norms rooted in the practices and values of customary societies, existing independently of formal laws created by governmental or legislative authorities.

The term living law comes from Eugen Ehrlich's publication in the form of a book in German with the title *Grundlegung der Soziologie des Rechts* in 1913. In this book, Ehrlich uses the term *Leben Recht.* When the book is translated into English, the original term is automatically translated into English to become Living Law, then in the Indonesian translation, it becomes living law. Elwi Danil argues that in compiling a national criminal code, it should be prepared based on reflection on the living law as stated by Ehrlich because good positive law is a law that reflects the values that live and develop in society.[52] Thus, it is strongly suspected that the legal terms that live in society are taken from the terms that were put forward by Ehrlich in his book.

Ehrlich argues that law is located in the social relations of a society in a particular area. In this society, not only state law (positive law) applies, but other laws are not positive laws that are also implemented by a society, some of which are even coercive. Ehrlich's opinion regarding living law is in full as follows:

> The living law is the law that dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages, and all associations, not only of those that the law

[52] Soerjono Soekanto, *Identifikasi Hukum Positif Tidak Tertulis Melalui Penelitian Hukum Normatif dan Empiris* (Jakarta: Ind. Hills-Co, 1988), p. 45.

> has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved.[53]

Ehrlich emphasizes that in a society's social environment, other meta-juridical elements also apply because they factually contain observations, trade, traditions, customs, and other related things that are practiced and even have long been abandoned or rejected by society. Furthermore, Ehrlich is of the view that social reality in society also has a significant role because society carries it out, in his book he argues:

> The living law is not part of the content of the document that the courts recognize as binding when they decide a legal controversy, but only that part which the parties observe in life[54]

According to Werner Menski, what Ehrlich explained was narrowly interpreted as actual law. In fact, according to Menski, living law according to Ehrlich is a complex mixture (amalgam) between existing regulations as outlined as positive law, social norms, and other things that influence its performance.

> Living law is a complex amalgam of rules laid down as official law and social and other norms that affect their operation. Living law is thus never just 'custom' of the law as officially laid down by the state, but the law as lived and applied by people in different life situations as an amalgam.[55]

According to Menski, Ehrlich's explanation of the terms and concepts above is not without opposition, one of which is that Ehrlich is seen as confusing the position of custom as a source of law with custom as a type of law. According to Ehrlich's opponents, custom is increasingly losing its significance in modern society. Based on this, Ehrlich's positioning of custom as a source of law is an exaggeration.[56]

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[53] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New Jersey: Transaction Publishers, 1975). p. 493.

[54] Eugen Ehrlich., p. 497.

[55] Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia dan Africa* (Cambridge: Cambridge University Press), p. 96.

[56] Werner Menski., p. 97.

However, according to Menski, this is not appropriate for several reasons. First, living law according to Ehrlich is not the same as custom (Ehrlich's 'living law' however is not the same as 'custom'). Second, society can also recreate its customs based on or influenced by positive law. Finally, as the main point, amid positive law, this does not mean that norms in society will lose their function because society can modify the laws of the lawgivers to become living laws. (modify the law made by the law-giver into living law).

Experts have different views regarding the meaning of law in society. Leopold Pospisil means that living laws originate from actual behavior, not from officially recognized theories outlined in scientific texts.[57] Bronislaw Malinowski argues that living laws are abstract rules (written or memorized) that aim to decide or resolve disputes informally.[58] Another thing stated by Mahadi, according to him, the living law is a written or unwritten order where the order is carried out, and obeyed relatively, because of certain things the order is in accordance with inner and outer manifestations.[59] Sulistyowati Irianto interprets living law as the law that is adhered to or applies in society[60], not only state law but also the norm system outside the state with all the processes and actors within it.[61] Based on the opinion of Eugen Ehrlich, Leopold Pospisil, Bronislaw Malinowski, Mahadi, and Sulistyowati Irianto, the five of them do not require the existence of a customary law community for the existence of living law but have a broader scope relating to the factual practice and enforcement of law in an area. In this way, the living law is broader in scope than just customary law in customary law communities. Based on the description above, the living law is a law, both written and unwritten, non-state which has a binding nature and is practiced in the society concerned.

If you compare Eugen Ehrlich's direct description with the legal interpretation that lives in society with customary law. First, living law

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57 Leopold Pospisil, *Hukum dan Ketertiban* (Sala: Ramadhani, 1984), p. 51.

58 Leopold Pospisil, p. 51

59 Mahadi, *Seminar Hukum Adat dan Pembinaan Hukum Nasional*, p. 143.

60 Sulistyowati Irianto, "Hukum yang Hidup dalam Rancangan Hukum Pidana", *KOMPAS Online,* https:/kompas.id/baca/opini/2022/hukum-yang-hidup-dalam-rancangan-hukum-pidana, accessed January 27, 2023.

61 Sulistyowati Irianto, *Hukum yang Bergerak*, Yogyakarta: Pustaka Obor, 2009, p. xiii.

according to Eugen Ehrlich never categorizes customary law as living law, according to Ehrlich custom is one part of living law. Second, customs in society can originate from positive law, so according to Ehrlich society can create its customs when the society carries out practices at the social level of positive law. Third, the mention of customary law as living law on the basis that it is equally dynamic and therefore responsive also needs further reconsideration, because customary law in an area is not always alive. When customary law is no longer used/abandoned, customary law dies. This means that customary law does not always live in society so it is not appropriate in terms of being called living law.

Narrowing living law, namely customary law or customary criminal law, in law, is reducing the essence of living law itself, resulting in a degradation of meaning. Another thing is, that living law does not have a specific dichotomy like Western law. The dichotomy of law consists of criminal law, civil law, state administration, customs, state administration, and others that adhere to the perspective of Continental European countries as a consequence of Indonesia being colonized by the Dutch. As explained by Ehrlich, Pospisil, Malinowski, and Mahadi the living law transcends it all. Indonesian people have laws that live in their respective environments even though they are not included in the structured customary law community environment.

Traditional society in Java recognizes the term "*sepikul segendong*" as the amount of inheritance in inheritance law, society in Madura has a living law which is reflected in the expressions *bhuppa', bhabhu', ghuru*, and *rato'* related to the hierarchy of social obedience towards both parents in the form of father and mother, teacher, and ruler/government. As a third example in Indonesia, Indonesian society generally recognizes deliberation and consensus when faced with a problem that requires a solution. As a comparison, the formation of laws that exist in communities without customary law communities is Pasargada law[62], a region in Brazil where laws formed by local

[62] Pasargada is a pseudonym given to the region by Boaventura de Sousa Santos while conducting research in Brazil. Pasargada is a favela or squatter village formed in the middle of a Brazilian city. *See* Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in Paradigmatic Transition* (Semarang: Diponegoro University Law Doctoral Program, 2005).

communities adaptively exist due to the absence of state laws that cover them, especially about land law.

Not all examples of living law are accompanied by criminal sanctions, and therefore, it cannot be assumed that all living law constitutes customary criminal law. A key aspect of customary criminal law is that its sanctions extend beyond general social sanctions, reflecting a distinct legal character. To accurately interpret the legal provisions found within society, it is essential to return to the original essence of the concept and its foundational meaning. Accordingly, living law should be understood as a form of non-state law practiced within a community, originating from the norms and traditions of the people in a specific region.

Based on the explanation above, living law should not be conflated with criminal law, which is a type of public law enacted by the state. In the context of legal formulation, as outlined in Chapter 1.E. Explanation No. 177 of Law No. 12 of 2011 on the Formation of Legislative Regulations, explanatory sections are not intended to serve as a legal basis or to contain normative provisions. Consequently, when the explanatory section of the Criminal Code stipulates that the legal basis for interpreting living law is customary law, it creates a conflict with the principles of legislation.

Furthermore, the promulgation of living law through regional regulations (*Peraturan Daerah*, or Perda) leads to the positivization of non-state law, which undermines the fundamental essence of living law. The defining characteristic of living law is its status as non-state law—law that derives its validity independently of state recognition or enforcement. Customary law, as a form of living law, operates autonomously within indigenous communities and does not rely on formal codification or state acknowledgment for its legitimacy. This perspective aligns with Sudarto's assertion that customary criminal law, as part of the original legal system of indigenous communities, remains effective irrespective of its inclusion in the Criminal Code. Unless external factors inhibit its application, customary law continues to function as a living expression of community norms and values.[63]

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[63] Sudarto, *Hukum Pidana 1: Edisi Revisi* (Semarang: Sudarto Foundation, 2018), p. 23.

On the one hand, in the realm of customary law, such a formulation can take away the independence of customary law communities which have their absolute authority in determining their customary law because of the dynamic nature of this law. So, the logical consequence of such a formulation is that it has the potential to harm justice for customary law communities. Indeed, there is a Constitutional Court decision No. 35/ PUU-X/2012 which states that the confirmation and abolition of customary law communities is determined by regional regulations and further provisions are regulated in the PP, but this is not appropriate if it is linked to the recognition of the existence of customary law which was born without the existence of state positivity.

The state becomes the central point of authority without paying attention to the existence of customary law communities as customary legal authorities with their independence. Customary law communities have their legal values that apply and are binding on them. The involvement of customary law communities and customary law experts in drafting the provisions of Article 2 of the Criminal Code and their explanations also did not appear in the parliamentary report of drafting the Criminal Code Bill. Even though their opinions as subjects and objects of law need to be heard, their opinions as related parties. The only source related to the involvement of "customary law experts" is the conclusion of the Seminar on Customary Law and National Legal Development which called for the inclusion of customary law in the national Criminal Code.

Another thing is that by narrowing living law to customary law alone, the state appears to provide different treatment between customary law communities and other communities that also have living non-state law. As is known from the results of the VI National Law Seminar, in society, apart from customary law, there is customary law and this law is included in the living law. In this case, the consistency of the meaning of living law is tested, is it just customary law or does it include customs and laws from other traditional societies? It should be noted that with the state's entry into force recognition and criteria for customary law, customary law communities[64] has the potential to be

[64] The definition of Customary Law Community (MHA) can refer to the Explanation of Article 67 paragraph 1 of Law No. 41 of 1999 concerning Forestry,

harmed due to state interference in determining the criteria and application of these laws which previously belonged absolutely to customary law communities.

The dynamic character of customary law develops in accordance with the development of the customary law community itself. Even the slightest form of positivization of non-state law has the potential to hamper this dynamism because it is impossible to make regional regulations effectively and efficiently in a short time. From the perspective of legal pluralism, the obligation to promulgate the criteria and application of customary law only shows the existence of relative legal pluralism. The state dominates and even has hegemony over customary law communities. As a result, justice is hampered from being realized, even though the intention is to recognize customary law as a source of law for justice itself. The main impact is that social justice in one of the principles in Pancasila will not be possible to achieve because such a formulation harms the principles of social justice for all Indonesian people, in this context the customary law community.

To realize consistency in living law formulations in accordance with Pancasila, especially the fifth principle which contains the basic ideas of social justice, this can be realized in at least several ways.

First, if it is consistent with the national statement regarding living law, it is necessary to re-interpret the concept of living law in this formulation by involving experts in customary law, legal anthropology, legal sociology, and interdisciplinary legal reviewers. It is also necessary to refer to the results of National Law Seminars I, III, and VI because living law is not only limited to customary law. At the VI National Law Seminar, the conclusion section included living laws other than customary law in the form of customary law[65], also research from Muh. Afif Mahfud, Erlyn Indarti, and Sukirno explain the existence of living laws from non-customary law communities in the form of traditional

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Article 1 number 22 of Law No. 17 of 2019 concerning Water Resources, Article 1 number 33 of Law No. 1 of 2014 concerning Law concerning Amendments to Law Number 27 of 2007 concerning Management of Coastal Areas and Small Islands, and Article 1 number 31 of Law No. 32 of 2009 concerning Environmental Protection and Management.

[65] BPHN, *Seminar Hukum Nasional Keenam Tahun 1994 Buku I* (Jakarta: National Legal Development Agency, 1995), pp. 446-448.

laws from traditional communities, in this context from the Bajo tribe.[66] So, on this basis, the living law formulation must be reinterpreted as a law, both written and unwritten, non-state, which has a binding nature and is practiced in the society concerned. In some cases, customary law communities and traditional communities have their customary laws and traditional laws in their territory in determining whether an act is reprehensible or not, even though it is determined in the Criminal Code as a criminal act.

Second, society has its criteria regarding the nature of violating material law in positive and negative functions. For example, in the watermelon theft case carried out by Basar and Khalil in Kediri.[67] Formally, this act is a criminal act, but for the people of the area, if someone takes a watermelon to eat on the spot then this act is not a criminal act because it has become a habit. This means that there is a legal culture that is carried out by the community based on customary law in Kediri. Likewise, in Bali, there is a customary law community that has customary law, if a man promises marriage as an empty promise so that he can have sex with a woman but denies it, Based on Balinese customary law the man can be punished.

Customary law and law of habit can eliminate the unlawful nature of actions. As a comparative reference for criminal law, in the South Korean Criminal Code, there is a reason for justifying an act due to business traditions and social rules, which in Indonesian criminal law is known as material unlawfulness in its negative function. This unlawful nature is based on living laws in the form of business traditions and social rules of society. The details of these provisions are as follows:

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[66] Muh Mahfud, Erlyn Indarti, and Sukirno Sukirno. "Constructing Order in the Use of Land in Coastal Water for Bajo Tribe Residence." *Proceedings of the 2nd International Conference on Law, Economic, Governance, ICOLEG 2021, 29-30 June 2021, Semarang, Indonesia*. 2021.

[67] KOMPAS, "Pencuri Semangka Divonis 15 Hari Penjara", *KOMPAS,* March 11, 2023. Retrieved from https://regional.kompas.com/read/2009/12/16/13074643/~Regional~Jawa.

Article 20
Justified Actions
An act carried out in accordance with the law or in line with customary practice or other acts which do not damage public morals cannot be punished.[68]

The South Korean Criminal Code does not specify the types of business traditions that can be accepted as elements of material unlawfulness in its negative function. Regarding social rules in society, there was also no detailed and written explanation. Based on this, elements of business practices and social rules in society are returned to the general traditions and customs of society in a region in South Korea. Apart from South Korea, another country that makes living law unlawful in its negative function of action is Jordan. In Jordan's Criminal Code, the details are as follows:

Article (62)
1. *An act allowable by the law is not considered a crime.*
2. *The law allows:*
    a. *Forms of discipline exercised on children by their parents, as sanctioned by general custom;*
    b. *Acts of violence occurring during sports if rules of the game were taken into account;*
    c. *Surgical operations and or medical professional treatments when carried out with the consent of the patient or his legal representative or in cases of emergency.*

Article (433)
Whoever knowingly deceits a contracting party, whether about the nature, primary characteristics, composition, quantity of goods; or quantity, category, or source of valuable elements in cases where the identification of type and source is the main cause for the contract as identified by agreement or customs; shall be punished by imprisonment from a month to a year and a fine

[68] Andi Hamzah, *KUHP Republik Korea Sebagai Perbandingan* (Ghalia Indonesia, Jakarta, 1987), p. 59.

> *from five to fifty dinars (JD5-50), or by one of these two penalties.*[69]

Jordanian Criminal Code article 62 paragraph two letter a eliminates the actions of parents to discipline their children as a criminal offense if the action is carried out based on general custom in society. The diction used in the Arabic text of the Jordanian Criminal Code as the original general custom editor uses *al 'urf al 'alam* which means general customs. Article 433 of the Jordanian Criminal Code in the original redaction to translate the English word customs is *al 'adat*[70] which means traditions. This means that in the Jordanian Criminal Code, the living law can eliminate an act which is a criminal act originates from traditions and customs. Based on a comparative study of criminal law, it can be concluded that living law consists of two types, namely customary law and traditions.

Third, the National Criminal Code as material criminal law needs an instrument to enforce this law because material criminal law and formal criminal law are a unit or package that cannot be separated. This means that if in the National Criminal Code, there is criminal law material to living law, then it is necessary in the criminal procedural law to formulate criminal procedural law living law. The concrete form is the re-establishment of customary courts. The formation of customary courts from a comparative criminal law aspect is not something new at all. The purpose of this formation is that if there is a case related to non-state law, the district court can hand over and transfer it completely to the customary court to examine and adjudicate based on the law that lives in the community of that area.

Other provisions regarding living laws are contained in the New Sudanese Criminal Code. In it there is a formulation regarding living law in the form of customary law and habit as one of the sources of law that is used as a consideration for punishment:

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69 *See* Jordanian Penal Code Amendments of 2022.

70 Penal Code No. 16 of 1960 (as last amended by Law No. 8 of 2011), available online in Arabic at https://www.wipo.int/wipolex/en/text/338407, accessed January 2, 2024.

Section 3- Punishment of Offences Committed within the New Sudan:

1. *Every person shall be liable to punishment under this Code for every act or omission done within the New Sudan contrary to its provisions;*
2. *In the application of this Code, courts may consider the existing customary laws and practices prevailing in each area.*

The legality principle of the New Sudan Criminal Code accommodates customary laws and practices that already exist in the community of a region. This means that when the New Sudanese Criminal Code is applied as a basis for adjudicating a matter, the application of customary law and traditions cannot possibly be abandoned. One of the articles in the New Sudanese Criminal Code that considers the existence of living law in the form of custom is regarding murder. In the New Sudanese Criminal Code Article 251, anyone who commits murder can be punished with the death penalty or life imprisonment and can also be subject to a fine. However, if the family or closest relatives of the victim choose compensation based on the customary law "*diyat*" (for customary blood compensation "*dia*"), the court can hand down a decision based on that compensation in the form of a criminal substitute for the death penalty in the form of imprisonment for not more than 10 years or with a fine or with both.

The provisions of the New Sudan Criminal Code are more dynamic because the state transfers the authority and independence of customary law and traditions existing in the area through the courts, without the need for the state to positivize these customary laws and traditions in the form of state law. The existence of provisions that hand over live legal cases to customary courts in a region without the need to include the type of criminal offense in the legislation means that the independence of customary law communities and traditional non-customary law communities in New Sudan continues to receive proper respect. In the field of procedural law, Article 130 paragraph 2 of the Sudanese Criminal Procedure Code reads "*in clauses (b) and (c) of sub-section (1) the term 'Court' includes every Civil, Criminal or Customary Law Court*". Criminal Code of Jordan and New Sudan clearly use traditions and customs as a source of law in their criminal codes. The

source of law in their Criminal Code is unwritten law originating from Islamic law. In the context of Indonesian criminal law, unwritten sources of criminal law are called the principle of material legality and the principle of *afwezigheid materiele wederrechtelijkheid* (AVAW).

Based on this comparative study, the Criminal Procedure Code Bill (RUU KUHAP) should also recognize customary courts as courts that can decide based on living law even though customary courts are not identical to adjudicating customary law only in the future. The customs and laws of traditional society can be judged in it.

Indeed, the establishment of customary courts is contrary to the intentions of the creators of the National Criminal Code. Enny Nurbaningsih as the government team explained in the Criminal Code Bill meeting that even though there were provisions regarding living law in the form of customary law, there was no intention for the drafting team to revive customary courts.

> *This is not intended to animate the customary courts themselves, no. So, there is no procedural law that stands alone. This is one with judicial regulations in general.*[71]

The authors argue that the intention of the team drafting the Criminal Code Bill which does not want the emergence of customary courts must be ruled out as long as the legal objectives of social justice, as stated in the fifth principle of Pancasila, for customary law communities are fulfilled. The values of customary law, traditions and Islamic law that have been practiced by society will be well protected. Because Pancasila is the philosophical foundation of the Indonesian nation which must not be deviated from. So far, customary courts are not under the Supreme Court as intended in Article 18 of Law 48 of 2009 concerning Judicial Power. Submitting criminal acts related to living law to the district court as the only means of seeking justice only makes customary law and traditional non-customary law communities that have their own "*procedural law*" increasingly marginalized because their independence and authority are taken over by the state.

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[71] The Parliamentary Report of the DPR and Government Criminal Code Bill February 5, 2018.

Conclusion

The living law formulation as customary law in the National Criminal Code is formulated inconsistently with the meaning of living law itself, so there needs to be a reformulation and re-interpretation. This can be achieved in several ways. First, there is a need to reinterpret the concepts of living law by involving experts in customary law, legal anthropology, legal sociology, and interdisciplinary legal researchers. Second, redefining the meaning of law that lives within the body of the Criminal Code is not limited to customary law, especially the principle of legality, but also includes customary law and traditional laws in traditional societies. Third, formulating formal law/criminal procedural law as an enforcer of material criminal law/National Criminal Code by re-establishing and recognizing customary courts in the Indonesian criminal justice system whose application in society is to realize the fifth principle of social justice for all Indonesian people from Pancasila.

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