# The Paradigm of The Principles of Legality in Indonesian Criminal Law is Reviewed From Law Number 1 Of 2023 Concerning the Criminal Law Book

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## ABSTRACT

Criminal law that adheres to the basic principle of the principle of legality as the basis for imposing a crime as embodied in Article 1 paragraph (1) of Law Number 1 of 2023 of the Criminal Code (New Criminal Code). The expansion of the meaning of the principle of legality can be seen in Article 2 of the new Criminal Code, namely that a person can be prosecuted and punished based on the laws that exist in society (living law) even though their actions are not prohibited by law. This change is aimed at integrating living law as an instrument in achieving substantive justice in Indonesia. This research will examine the application of the principle of legality in Indonesian criminal law and the legal formulation that lives in society in the new Criminal Code. This research uses normative juridical methods and a conceptual approach which is carried out by elaborating on statutory regulations related to living law using concepts, theories and doctrines that have developed in contemporary criminal law scholarship to produce a synthesis that shows the correlation and relevance of these regulations. towards the goal of substantive criminal law reform. The research results show that the Legality Principle is a principle where a criminal act can only be punished if there are regulations that regulate it before the criminal act occurs. The principle of legality was chosen as a perspective because it is the main pillar in the modern criminal law system which guarantees legal certainty. Apart from that, the living legal formulation in the Criminal Code is in accordance with the concept of the principle of legality, which is demonstrated through the process of institutionalization and normatization of customary law in the form of regional regulations. The mechanism for institutionalizing customary law attributed to the National Criminal Code in Government Regulations makes customary law a source of certain norms, but has its own law enforcement procedures carried out by customary law communities.

Keywords: Criminal Law, Principles of Legality, Criminal Law Books

## ABSTRAK

Hukum pidana yang menganut prinsip dasar tentang Asas legalitas sebagai dasar penjatuhan pidana sebagaimana yang terejawantahkan dalam Pasal 1 ayat (1) Undang-Undang Nomor 1 Tahun 2023 Kitab Undang-Undang Hukum Pidana (KUHP baru). Perluasan makna asas legalitas dapat dilihat di dalam Pasal 2 KUHP baru yaitu seseorang bisa dituntut serta dipidana berdasarkan hukum yang hidup dalam masyarakat meski perbuatannya tidak dilarang di dalam undang-undang. Perubahan ini ditujukan guna mengintegrasikan hukum yang hidup sebagai instrumen dalam mencapai keadilan substantif di Indonesia. Penelitian ini akan mengkaji mengenai penerapan asas legalitas dalam hukum pidana Indonesia dan formulasi hukum yang hidup di masyarakat dalam KUHP baru. Penelitian ini menggunakan metode yuridis normatif dan pendekatan konseptual yang dilakukan dengan mengelaborasi peraturan perundang-undangan terkait dengan hukum yang hidup menggunakan konsep, teori, dan doktrin yang berkembang dalam keilmuan hukum pidana kontemporer untuk menghasilkan sintesis yang menunjukan korelasi dan relevansi pengaturan tersebut terhadap tujuan pembaruan hukum pidana yang substantif. Hasil penelitian menunjukkan bahwa Asas Legalitas adalah asas di mana suatu perbuatan pidana hanya dapat dijatuhi pidana jika telah ada aturan yang mengatur sebelum perbuatan pidana tersebut terjadi. Asas legalitas dipilih sebagai cara pandang karena

merupakan pilar utama dalam sistem hukum pidana modern yang menjamin kepastian hukum. Selain formulasi hukum yang hidup dalam KUHP telah sesuai dengan konsep asas legalitas, yang ditunjukan melalui proses pelembagaan dan normatisasi hukum adat dalam bentuk peraturan daerah. Mekanisme pelembagaan hukum adat yang diatribusikan oleh KUHP baru dalam Peraturan Pemerintah menjadikan hukum adat sebagai sumber norma yang berkepastian, namun memiliki prosedur penegakan hukum tersendiri yang dijalankan oleh masyarakat hukum adat.

Kata Kunci: Hukum Pidana, Asas Legalitas, Kitab-Kitab Undang Hukum Pidana

## A. BACKGROUND

The consequence of being a legal state is that all of its people are protected by law, as is Indonesia as stated in the ideals of the Indonesian nation in the 1945 Constitution of the Republic of Indonesia (UUD 1945), namely to protect the entire Indonesian nation and all of Indonesia's blood and to promote general welfare, educate the nation's life, and participate in implementing world order based on freedom, eternal peace and social justice. One of the characteristics of a rule of law state is that it recognizes the principle of legality in its constitution. In Article 28 I paragraph (1) of the 1945 Constitution after the fourth amendment it states "the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not being prosecuted on the basis of retroactive law is a human right that cannot be reduced under any circumstances." The principle of legality is also a general principle in criminal law in force in Indonesia, the legal basis for which is Article 1 paragraph (1) of the Criminal Code: "no act can be punished except on the strength of criminal regulations in existing legislation, before the act is committed".

These two articles clearly state that the principle of legality applies.[1] This general provision regarding the principle of legality can actually be excluded in the circumstances referred to in article 1 paragraph (2) of the Criminal Code: "If after the act is committed there is a change in the legislation, the rules that are lightest for the defendant are used." In countries that adhere to an individualistic ideology, this principle of legality is maintained, whereas in many socialist countries this principle is no longer adhered to, such as the Soviet Union, which abolished it in 1926. Therefore, previously Article 14 (2) of the 1950 UUDS mentioned this rule, that The principle of legality also includes unwritten legal rules. Meanwhile, the Criminal Code only uses statutory words which mean formal (written) principles of legality.

The legal accommodations that exist in the new Criminal Code produce fundamental paradigmatic gaps in the principle of legality. Previously, the principle of legality was an important pillar formulated in Article 1 Paragraph (1) of the Criminal Code, which explicitly stated that: "No act can be punished, except on the strength of criminal regulations in existing legislation, before the act is

[1] Moeljatno. (2002). Asas-asas Hukum Pidana. Jakarta. PT Rineka Cipta. 25.

committed."[2] The phrase in the principle of legality departs from the postulates of L.A. von Feurbach, namely "nullum delictum nulla poena sine praevia lege poenali", there is no punishment without prior regulation in valid law. The interpretation of 'existing laws' or 'valid laws' refers to laws and regulations issued by the state as the sole authority that can monopolize law enforcement and create social order through law enforcement officials. The state does not tolerate the enforcement of laws outside of the provisions of statutory regulations, so that law enforcement efforts from sources other than laws issued by the state are not officially recognized and have no legal force.[3]

The implementation of law in the Indonesian criminal law system produces a number of fundamental discourses. There is a dichotomous condition in the source of punishment, so that the principle of legality in the Criminal Code has been expanded into the principle of formal legality and the principle of material legality.[4] In the context of law enforcement, dichotomy can potentially give rise to symptoms of legal uncertainty, and is one of the latent problems that was previously overcome using a monoplastic approach to the principle of legality. Therefore, the elaboration of living law in the new Criminal Code is an open space that needs to be constructed through a number of relevant legal scientific approaches and analysis.

## B. RESEARCH METHODOLOGY

The writing in this research uses normative juridical methods and conceptual approaches.[5] A conceptual approach is carried out by elaborating on statutory regulations related to living law using concepts, theories and doctrines developed in contemporary criminal law scholarship to produce a synthesis that shows the correlation and relevance of these regulations to the goals of substantive criminal law reform.

The research was carried out using literature study, through objective elaboration of primary legal materials in the form of statutory regulations, and review of secondary materials from journals, books and literature relevant to the research topic to produce a research synthesis that is credible and academically accountable, comprehensive in nature, systematic and integrated.[6] This research analysis was carried out qualitatively to elaborate in depth and comprehensively the legal political dimensions

[2] Mashuril Anwar. (2020). Holistic Paradigm Contradiction of the Ultimate Principle of Remedium Against the Principle of Legality in Environmental Criminal Law Enforcement. Administrative and Environmental Law Review, 1(1), 43–52, https://doi.org/10.25041/aelr.v1i1.2083

[3] Vincentius Patria Setyawan. (2021). Asas Legalitas dalam Perspektif Filsafat Hukum. Justitia et Pax, 37(1), https://doi.org/10.24002/jep.v37i1.3276.

[4] Yehezkiel Genta. (2019). Reinterpretasi Makna Asas Legalitas sebagai Bentuk Pengakuan Hukum Pidana Adat dalam Upaya Menjamin Hak Asasi Masyarakat Adat. Padjadjaran Law Review, 7(1).

[5] Kornelius Benuf dan Muhamad Azhar. (2020). Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer. Gema Keadilan, 7(1), 20–33, https://doi.org/10.14710/gk.2020.7504.

[6] Soerjono Soekanto dan Sri Mamudji. (2003). Penelitian Hukum Normatif : Suatu Tinjauan Singkat. Jakarta: PT. RajaGrafindo Persada.

of the legal recognition that exists in the National Criminal Code by paying attention to the principles of justice and legal certainty.

## C. FINDING & DISCUSSION

### 1. Principle of Legality in Indonesian Criminal Law

The principle of legality is a product of revolutionary thought that emerged as a reaction to the absolutism of European monarchical power at the end of the Renaissance and Aufklarung.[7] This principle is the anti-thesis of the legal principle of the Ancient Roman era, namely crimina extra ordinaria or crimes that are not mentioned in the law.[8] Criminal extra ordinary has an unlimited scope, and is generally imposed on acts that are considered evil or criminal acts that are not mentioned in the law. Along with the era of monarchy which placed the king in absolute power, this principle gave legitimacy to the carrying out of arbitrary punishments, resulting in suffering and a crisis of justice.

The principle of legality was formulated by von Feurbach at the beginning of the 19th century, in the book Lehrbuch des Peinlichen Rechts (1801) which explained the adegium nullum delictum nulla poena sine praevia lege poenali, or that an act cannot be punished except on the strength of criminal regulations in legislation that existed before the act was committed.[9] Feurbach's writing also complements the criticism of absolutism in judicial power previously pioneered by Montesquieu in L'esprit des Lois (1748) and J.J Rousseau in Die Contract Social. Prior to Feurbach's formulation, the principle of legality also obtained a partial form in Article 8 of the Declaration des droits de L'homme et du citoyen (1789) which emphasized that nothing could be punished other than because it was regulated in a valid law. Both the principles in the French declaration and Feurbach's writings conclusively require the prohibition of an act to be regulated in a valid law, before it can be used as a basis for punishment.[10]

Long before this principle emerged, an English philosopher, Francis Bacon (1561-1626) had introduced the adage "moneat lex, priuquam feriat", meaning: the law must provide a warning before realizing the threat contained in it.[11] Thus, the principle of legality requires that provisions containing

[7] Andri Yanto. (2021). Mazhab-Mazhab Hukum: Suatu Pengantar Memahami Dimensi Pemikiran Hukum. Yogyakarta: Segap Pustaka

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

[9] Muhammad Zakaria Wirabakto. (2022). A Juridical Analysis of the Comparison of Legality Principle in the Indonesian Criminal Code (WvS) and the Draft of New Indonesian Criminal Code (National Criminal Code). Budapest International Research and Critics Institute Journal 5(1), 3030–40, https://doi.org/DOI: https://doi.org/10.33258/birci.v5i1.3946.

[10] Johari, dkk. (2023). Kedudukan Asas Legalitas dalam Pembaharuan Hukum Pidana di Indonesia. Cendekia: Jurnal Hukum, Sosial, dan Humaniora, 1(1).

[11] M. Karfawi, (1987)“ Asas Legalitas dalam Usul Rancangan KUHP (Baru) dan Masalah-masalahnya.” Jurnal Arena Hukum, 9-15.

prohibited acts must be written down first. In the civil law system tradition, there are four aspects of the principle of legality that are strictly applied, namely: statutory regulations, retroactivity, lex certa, and analogy. Regarding these four aspects, according to Roelof H. Haveman, although it might be said that not every aspect is that strong on its own, the combination of the four aspects gives a more true meaning to the principle of legality.[12]

The principle of legality is the principle that determines that every criminal act must be determined by the rules of law (Article 1 paragraph (1) of the Criminal Code).[13] The principle of legality was built with the aim of legitimizing the law within the government's power in order to create a rule of law. This means that the state is based on law. The law guarantees justice and protection for all people within the territory of the country concerned. All state activities must be based on law. In the Indonesian context, the country is based on Pancasila and the Constitution (UUD). Pancasila and the Constitution guarantee the equal position of every citizen before the law and government, and are obliged to uphold the law and government without exception.

Historically, the existence of the legality principle in Article 1 Paragraph (1) was adopted from the ideas of the French Penal Code which was formulated in WvS-NI by the Dutch East Indies government which had experienced colonialism by France during the time of Napoleon Bonaparte. The principle of legality in Article 1 Paragraph (1) of the Criminal Code, which is also still maintained in the New Indonesian Criminal Code with the addition of Paragraph (2) to emphasize that analogies are not permitted, has three forms of meaning.[14] First, the categorization of acts that are prohibited and punishable by crime must be included in statutory regulations. This meaning is in accordance with the legacy of the civil law tradition which prioritizes lex scripta (written law) as a valid source of law. Second, the application of criminal law must not be carried out using analogies or metaphors. The flexibility of norms is carried out by interpretation, but not by analogy that analogizes an act to another act that is punishable by crime. Third, criminal law cannot apply retroactively, because criminal acts must be preceded by law. The new provisions regarding punishment in the law cannot be used to criminalize someone who committed the crime before the law was enacted.[15]

The principle of legality in criminal law is a very fundamental principle. This principle of legality will determine whether a criminal law regulation can be applied to the criminal act that occurred. So, if a criminal act occurs, it will be seen whether there are legal provisions that regulate it

[12] Roelof H. Heveman. (2002). The Legality of Adat Criminal Law in Modern Indonesia. Jakarta. Tata Nusa. 50.
[13] Moeljatno, (2015).*"Asas-Asas Hukum Pidana",* Jakarta: Rineka Cipta, Cet. IX. 5.
[14] Nella Sumika Putri. (2021). Memikirkan Kembali Unsur 'Hukum Yang Hidup dalam Masyarakat Dalam Pasal 2 Rkuhp Ditinjau Perspektif Asas Legalitas. Indonesia Criminal Law Review, 1(1).
[15] Vincentius Patria Setyawan. (2023). Pemaknaan Asas Legalitas Materiil dalam Pembaruan Hukum Pidana Indonesia. Gudang Jurnal Multidisiplin Ilmu, 1(1), Hal. 13–15, https://doi.org/10.59435/gjmi.v1i1.3.

and whether the existing regulations can be treated against the criminal act that occurred.[16] The principle of legality in Article 1 paragraph (1) of the Criminal Code reads "no act can be punished except on the strength of criminal regulations in existing legislation, before the act is committed". From this formulation, the principle of legality requires: (i) prohibited acts must be formulated in statutory regulations, (ii) these regulations must exist before the act is carried out. The principle of legality contained in article 1 paragraph (1) above has long been applied in Indonesian positive criminal law, but is seen as containing weaknesses due to its rigid and formalistic nature. Actions that are deemed formally to have fulfilled the formulation of the law are declared as criminal acts. Apart from that, all good deeds, even if they are light, are still considered criminal acts. Therefore, an effort to reform criminal law in Indonesia is needed.

## 2. Legal Formulation that Lives in Society in the New Criminal Code

Criminal law reform essentially contains the meaning of an effort to review and reassess in accordance with the central socio-political, socio-philosophical and socio-cultural values of Indonesian society which underlie social policy, criminal policy and law enforcement policy in Indonesia.[17] Efforts to reform Indonesian criminal law have a meaning, namely creating a national criminal law codification to replace the criminal law codification which is a colonial legacy, namely Wetboek van Strafrecht Voor Nederlands Indie 1915, which is a derivative of Wetboek van Strafrecht Netherlands in 1886.[18] From the above , contained the determination of the Indonesian people to realize a reform of criminal law which can be interpreted as an effort to reorient and reform criminal law in accordance with the central socio-political, socio-philosophical and socio-cultural values that underlie and provide an aspect to the content normative and substantive criminal law that is aspired to. Barda Nawawi Arief stated the definition of criminal law reform, namely[19] "Criminal law reform essentially contains the meaning of an effort to reorient and reform criminal law in accordance with the central socio-political, socio-philosophical and socio-cultural values of Indonesian society which underlie policy social, criminal policies and law enforcement policies in Indonesia".

Barda Nawawi Arief emphasized the meaning and essence of criminal law reform as follows:[20] Viewed from a policy approach point of view: a) As part of social policy, criminal law reform is part of efforts to overcome social problems (including humanitarian problems) in order to achieve/support national goals (community welfare and so on); b). As part of criminal policy, criminal law reform is

[16] Mahrus Ali, (2012).“*Dasar-Dasar Hukum Pidana”,* Jakarta: Sinar Grafika. hal. 59.
[17] Barda Nawawi Arief, (2010). “*Bunga Rampai Kebijakan Hukum Pidana*. Jakarta: PT. Kencana Prenada Media Group, cetakakan kedua. hal. 30.
[18] Muladi, (2005) “*Lembaga Pidana Bersyarat”*. Bandung: Alumni, cetakan ketiga. hal. 4.
[19] Barda Nawawi Arief, *Op.Cit.* hal. 33.
[20] *Ibid*, hal. 29.

part of efforts to protect society (especially crime prevention efforts); c) As part of law enforcement policy, criminal law reform is part of efforts to renew legal substance in order to make law enforcement more effective. Furthermore, seen from the value approach perspective, criminal law reform is essentially an effort to review and re-evaluate (reorient and re-evaluate) the socio-political, socio-political, socio-philosophical and socio-cultural values that underlie and provide content to the content. normative and substantive criminal law that is aspired to. It is not a renewal (reform) of criminal law, if the value orientation of the criminal law that is aspired to (for example the newest Criminal Code) is the same as the value orientation of the old criminal law inherited from the colonialists (old Criminal Code or WvS).

The problem in reforming Indonesian criminal law is related to where the source for the formulation of the latest Criminal Code comes from. Where the sources of Indonesian criminal law, especially its legal principles, come from Continental Europe and more than 80 countries in the world adhere to it. Even though in Indonesia there are unwritten laws, such as customary law, Islamic law, and there are also laws originating from the Anglo Saxons which apply in England and former British colonies.[21]

Deconstruction of the principle of legality, with recognition of the reality of customary law has basically been known since the enactment of Law no. 1 Drt of 1951 concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts. Article 1 Paragraph (3) sub b emphasizes the principle of accommodating the applicability of customary criminal acts whether existing or not in comparison with articles in the Criminal Code.[22] However, the recognition principle regulated in Law no. 1 Drt of 1951 is not interpreted as a form of accommodation to Indonesian legal pluralism, on the contrary, it is a 'practical effort' carried out by the government in order to fill legal gaps and criminalize unlawful acts that have not been regulated in the old Criminal Code. The realization of this provision is the gradual elimination of Swapraja Courts in the regions, thereby making the legal unification process run more quickly. From a political-legal perspective, Indonesia's security, economic and political situation at the beginning of the independence period can be accepted as a strategic effort to maintain national stability and guarantee legal order in society.

The normative determination of Article 2 Paragraph (1) of the National Criminal Code which confirms the validity of living law as an alternative source of punishment other than law, changes the understanding of the principle of legality in the Indonesian criminal law system. The decision to narrow down the definition of living law as customary law shows the legal ratio of changes to the Criminal

[21] Monang Siahaan, (2016). *"Pembaharuan Hukum Pidana Indonesia"*. Jakarta: Grasindo, 2016, hal.3.
[22] Nella Sumika Putri. Loc. cit.

Code to limit the scope of legal breadth which can give rise to conflicting norms and uncertainty. As emphasized by Eugene Ehrlich, living law has the meaning of "..the law that dominates life itself, even though it has not been printed in legal propositions".[23] This view stands on the idea that living law is law that applies and develops in society, even though it is not recognized or codified in writing. From a legal perspective, this definition has a very broad scope, due to the formation of pluralistic norms. At least, there are several sources of norms that are recognized in general legal principles, including religious norms, customs, morality, decency and legal norms.[24] The phrase 'customary law' in the explanation of Article 2 of the Criminal Code limits this expansion by only giving recognition to customary law according to its normative definition.

In legal construction in Indonesia, the meaning of customary law does not rely on free interpretation.[25] Article 18B of the 1945 Constitution confirms that "the State recognizes and respects the units of the Customary Law Community and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the Law". The existence of customary law can only be recognized after there previously existed a customary law community, as part of traditional rights

The construction of Article 2 Paragraph (1) of the Criminal Code which determines the application of customary law cannot be interpreted immediately. To be enforceable, customary law must be owned by a social entity in the form of a customary law community, and fulfill the elements of a customary offense.[26]

There are four important elements in determining customary offenses, including the following:

1. There is an act carried out by an individual, group or traditional administrator;
2. The act is contrary to the norms of customary law applicable in the region or within the scope of the indigenous community group;
3. The act is deemed to cause commotion, unrest or disruption to the lives of indigenous peoples;
4. To this act, there was a reaction in the form of customary sanctions.

The institutionalization of customary law through the formation of customary law communities is a limitation to prevent the expansion of the legal interpretation that lives in Article 2 Paragraph (1) of the Criminal Code. This limitation is important to ensure legal certainty and prevent punishment for acts that are not prohibited by law or customary law, or acts that are punished based on one's own will

[23] Nurlaila Isima. (2022). Urgensi Pengakuan Hukum Yang Hidup Pada Masyarakat Dalam Asas Legalitas Ditinjau Dari Perspektif Sosiologi Hukum. Jurnal Interdisiplin Sosiologi Agama, 2(1).

[24] A.C Diala. (2017). The concept of living customary law: A critique. The Journal of Legal Pluralism and Unofficial Law, 49(2), 143 65, https://doi.org/10.1080/07329113.2017.

[25] Andri Yanto. (2020). Kamus Ilmiah Populer. Jakarta: CV Bukupedia Indonesia.

[26] N Amalia, dkk. (2018). Adat Court Judge: Tradition and Practice of Dispute Resolution Between Societies in Aceh. Journal of Law, Policy and Globalization, 77(11).

(eigenrechting).[27] This institutionalization is in line with the vision of progressive law taught by Satjipto Raharho, who believes that living law should be integrated and institutionalized in a new legal order. The pursuit of justice and substantive benefits through the institution of living law is carried out without abandoning the principle of legality as the main pillar in criminal law which guarantees certainty and equal standing before the law (equality before the law).

The expansion of the principle of legality into the principle of formal and material legality places living law as a source of punishment whose existence is legally recognized by the state. A person can be punished based on actions that are considered a violation or crime against the social norms of society, even though it is not regulated by law.[28] In this case, living law is applied to accommodate the interests of customary law communities to carry out traditions and customary laws in their territorial areas, so that good principles of respect and inclusiveness are achieved. Through the institutionalization process of customary law communities, the dualism of sources of criminal law does not conflict with the principle of legality, because customary law will first be 'filtered' and 'normatized' through the process of forming regulations that regulate the technicalization of its application. An important challenge faced is the process of transitioning customary law into a source of criminal law which is positioned simultaneously with the Criminal Code, which requires an assessment of the norms and values developing in society in order for them to be implemented. There are limitations to the scope of application of customary law which are different for each region, both in terms of territorial aspects (where it applies) and the legal subjects that are bound by that customary law.

The sense of justice in society needs to be considered because the law was created for society so that it not only realizes justice according to law but also justice according to society. Reforming the national criminal law is essentially an effort that directly concerns the honor and dignity of the Indonesian nation and state and is a basic means for achieving national goals. The principle of legality was built with the aim of legitimizing the law within the government's power in order to create a rule of law. This means that the law provides guarantees of justice and protection for all people within the territory of the country concerned. Likewise, in criminal law, the principle of legality determines the enactment of criminal law regulations.[29]

However, basically with the issuance of Law no. 1 of 2023 concerning the Criminal Code is a progressive legal step in Indonesia. This latest Criminal Code provides legal space for laws that live

[27] Andri Yanto, dkk. (2023). Implikasi Resentralisasi Kewenangan Pertambangan Timah Terhadap Potensi Pendapatan Daerah di Bangka Belitung. Jurnal Interpretasi Hukum, 4(2), 344–57, https://doi.org/10.55637/juinhum.4.2.7756

[28] Vincentius Patria Setyawan. Loc. Cit.

[29] Mahrus Ali, *Op.Cit.* hal. 59.

in society.[30] The laws that live in this society are customary laws or customs that are not written down but are practiced by prioritizing the wisdom of the local community. Article 2 paragraphs (1), (2), and (3) are closer to restorative justice (RJ). Just as RJ approaches conflict resolution by holding mediation between victims and defendants, customary law also does the same thing. Indeed, the challenge for the future is how to write down customary law in detail, which so far has prioritized the element of "collective feelings". Because however, customary law is broader than just written rules that simplify problem solving.

Even though it has been mentioned above that the standard values and norms that live in local communities are still protected in order to fulfill the sense of justice that lives in certain communities, this of course still requires time for further study and socialization in each region. This means that local governments are required to make government regulations. The Government Regulations in this provision are guidelines for regions in determining the laws that live in society in Government Regulations.

Therefore, the material of national criminal law must also regulate the balance between public or state interests and individual interests, between protection of perpetrators of criminal acts and victims of criminal acts, between elements of actions and mental attitudes, between legal certainty and justice, between written law and existing law. living in society, between national values and universal values and between human rights and human obligations.

Apart from that, it is a common concern that in future practice, Law no. 1 of 2023 concerning the Criminal Code will be faced with the question of detailed implementation. This means that all parties involved in implementing this law must learn together, especially investigators, prosecutors and judges, must learn again about how customary laws vary in each region or the laws that exist in society. The laws that live in society as intended apply in the place where the law lives 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 legal principles. generally recognized by the people of the nation. Every person who commits an act which according to the laws existing in society is declared a prohibited act, is threatened with criminal action.

Then, Law no. 1 of 2023 concerning the Criminal Code still opens up academic and empirical discussions regarding the involvement of parties with different ethnicities or regional elements in a case. In that sense, which customary law or "law that lives in society" must be applied because it will demand a sense of justice which in the principle of legal certainty has been written in such a way.

[30] Prayitno, Bastiaji. dan Cecep Miptahudin, (2021). *"Kepastian Hukum Akta Perdamaian Yang Dibuat oleh Notaris Dengan Mengesampingkan Perbuatan Tindak Pidana"*, (Tangerang: PAMULANG LAW REVIEW, VOLUME 4), hal. 189.

However, the sense of justice will tend to differ from one party to another. In reality, in several regions in the country, there are still unwritten legal provisions, which exist and are recognized as law in the area concerned, which determine that violations of the law are worthy of punishment. When we talk about "feelings" they are abstract and impossible to measure or assess.

By incorporating laws that live in society (unwritten laws) into formal laws, it has the implication that enforcement of laws that live in society will be carried out by the state through the criminal justice system. If a violation occurs, it will be processed through a formal process, including inquiry, inquiry, prosecution/examination in court and criminal execution. This means that law enforcement officers (police, prosecutors and judges) are needed who understand the laws that exist in the society where they work.

The Center for Traditional Law Studies 'Djojodigoeno', Faculty of Law, Gajah Mada University and the Civil Society Coalition Reject Living Law in their Brief paper, "Living Law in the Draft Criminal Code Law" highlight that Law no. 1 of 2023 concerning the Criminal Code has weaknesses in the legal construction that lives in society. The weakness of this construct is that it is limited to the basis for imposing a crime but does not free the perpetrator from the crime or lighten the criminal sanctions.[31] Apart from that, the institution mentioned above also highlights that the regulation of Living Law in the Criminal Code contains at least four fundamental weaknesses, namely: inconsistency of terms, appropriation and abuse of customary law by the state, written customary rules are no longer in the category of Living Law, vulnerable to distortion. because of unequal social relations and the insurrection of traditional elites and intermediaries.[32]

From the explanation above, this paper is of the view that the application of the principle of legality in the latest Criminal Code requires pre-conditions. This means that even though the Criminal Code was published in 2023, it will only come into force in 2026. So that in the next two or three years, regional governments are required to prepare sufficient human resources and modalities to make this latest "KUHP" program a success. Apart from that, customary law has been included in the latest Criminal Code so that it is nationally binding.[33] This means that customary law contains legal certainty. However, due to the conflict between article 1 paragraphs (1) and (2) and article 2 paragraphs (1), (2), and (3), normatively it still contains problems. In the context of a complex problem that involves legal

[31] Pusat Kajian Hukum Adat "Djojodigoeno' (2020) Fakultas Hukum Universitas Gajah Mada dan Koalisi Masyarakat Sipil Tolak Living Law, "*Brief paper: 'Hukum Yang Hidup' Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana",* Jakarta, hal. 6.

[32] *Ibid*, hal. 7

[33] Chadijah, Siti., (2019) *"Pengaturan Delik Adat Dalam Rancangan KUHP sebagai bagian dari Ius Constituendum"*, Tangerang, Pamulang Law Review, hal. 104.

elements that exist in society, what the mechanism for implementing law enforcement is, is still a special problem that needs to be studied.

## D. CONCLUSIONS AND RECOMMENDATIONS

The principle of legality is the principle where a criminal act can only be punished if there are regulations governing it before the criminal act occurs, in other words this definition is in line with what is stated in Article 1 paragraph (1) of the Criminal Code which states that there is no such act. can be punished except on the strength of criminal provisions in existing legislation, before the act is committed (nullum delictum nulla poena sine praevia lege poenali). The objectives to be achieved from the principle of legality are to strengthen legal certainty, create justice and honesty for defendants, make the deterrent function of criminal sanctions more effective, prevent abuse of power, and strengthen the rule of law. This principle is indeed very effective in protecting the people from arbitrary treatment by power, but it is felt to be less effective for law enforcers in responding to the rapid development of crime in Indonesia, especially contemporary crimes.

Living legal accommodation is an important exponent in the reform of Indonesian criminal law through the enactment of Law no. 1 of 2023 concerning the Criminal Code (KUHP). This accommodation is formulated in Article 2 Paragraph (1) which confirms that the application of the principle of formal legality does not reduce the application of the principle of material legality, with living law as a legitimate source of punishment. By using the perspective of the principle of legality, it is known that the application of customary law as a format for living law does not conflict with the guarantee of legal certainty, as long as the mechanism used is the institutionalization of customary law through customary law communities as in Constitutional Court Decision No. 35/PUU-X/2012. To be implemented, customary law must be regulated in a definite mechanism and codified in the form of regulations. Enforcement of criminal law based on customary law must be carried out by institutions within the customary law community. With this formulation, the new criminal law system constructed in the National Criminal Code can balance certainty, justice and expediency as the orientation of integrative and holistic law enforcement objectives. In future developments, it is recommended that legal formulations that live in government regulations and regional regulations must be carried out carefully and cautiously. Living law is an important instrument that can guarantee whether or not the principle of material legality can be implemented. For this reason, the government needs to inclusively include customary law communities to explore living legal values and prepare strategic mechanisms to accommodate them in an integrative manner in national criminal law.

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