

## Criminalization of Criminal Acts Based on Living Law in Regional Regulations in Indonesia

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### Abstract

*Indonesian criminal law is guided by the principles of justice, humanity and legal certainty. Some of these principles are universally accepted and applied at both national and international levels. From a historical perspective, Indonesia also adheres to multicultural principles which emphasize the philosophy of pluralism in the modern criminal legal system. However, in fact, the current reform of modern criminal law has many obstacles and challenges, where the principle of legality is sometimes not in line with the principles of living law, the application of criminal law based on local wisdom is still partial so there is room for the community to resolve the case there is no crime through local culture. Research purposes, want to know the existence of living laws (living law) seen from the perspective of sociological jurisprudence and national criminal law, also want to know the reformulation of crime-based crimes living law through regional regulations in Indonesia. Research methods, in the form of research normative law with a philosophical approach (philosophical approach) law, conceptual approach (conceptual approach), case (case), and the historical approach (historical approach). Results Study, shows that the national criminal law has progressively adapted to the values, social norms, culture, dynamics and social change, including the harmonization of criminal law regulations national with living laws (living law) as well as adapting social norms to developments and changes crime in society. Reformulation of criminal acts in regional regulation emphasizes the existence of principles of living law in the formulation of regional laws and regulations, the formation of law regions are adapted to the development of variations in crime in local communities, Local criminal law is a relevant solution in handling criminal cases faced by people in an area.*

**Keywords:** *Criminalization, Criminal Acts, Living Law Regional Regulations.*

### Introduction

The development of Indonesian law cannot be separated from international law. Because most of the legal regulations in force in Indonesia are the result of international conferences, as well as the results of Dutch legal heritage such as private law (*privaatrecht*) and public law (*publiekrechtelijke handeling*). The legacy of Dutch colonial legal products sometimes causes problems, where the Criminal Code or "National Criminal Code of the Indies" applies often ignores the development of living law in society.

Through the principle of legality which is oriented towards legal certainty, the Indonesian legal system recognizes the existence of living law in society, especially customary law limited to customary rights and traditional rights, not recognition of the validity and function of living law in resolving criminal cases. The rejection of living law as an instrument of punishment is not without reason, but rather based on the provisions of the principle of legality which recommends that "no act is permissible without the provisions of the law.

The affirmation of the principle of legality that every act must be based on the provisions of the law. This means that society may not use other legal systems, other than the provisions of the official state law regulated in statutory regulations. John Austin, law is a sovereign command and there is no law other than written law (*positive*). Eugen Ehrlich refused John Austin, because law is not just written law (*law in books*) or a sovereign command, but law exists together with the soul of society (*law in action*).

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Legal sociologists define living law as law that is born and grows together with society, law is part of a cultural product, because living law is in harmony with the inner attitude of society itself. Therefore, the current Indonesian criminal law policy accommodates living law through Law Number 1 of 2023 concerning the Criminal Code, through the expansion of the meaning of the principle of legality (principle of legality) the validity of the principle of formal legality (criminal law) does not reduce the validity of living law in society, meaning that in material terms, current criminal law determines that the basis for criminalizing an act is not only because of the law, but also based on the rules of law that live in society (unwritten law). As the affirmation of the meaning of the principle of legality (principle of legality) in Article 2 paragraph (1) of the Criminal Code states that a person deserves to be punished even if the act is not regulated in statutory regulations.

Many previous studies explain the efforts adjustment of positive law with living law in society. As research, Citranu on the Ngaju Tribe of Central Kalimantan, the results of his research showed that criminal acts regulated in positive law are also regulated in the norms of the Ngaju Tribe, where drug offenders and victims of sexual violence must be rehabilitated and given customary sanctions. Asliani Harahap in her research revealed that national criminal law in the aspect of criminal law reform should be adjusted to the laws that exist in society. Meanwhile, research by Ade Irawan and Margo Hadi Pura shows that the new Criminal Code regulates living law in society as an extension of the principle of legality, including containing sanctions and how to implement them.

Although many previous studies have explained the balance between positive law and living law in society, there have not been many previous studies that have focused on criminalization of criminal acts based on living law through regional regulations in Indonesia. This study sees the importance of criminal law to be more responsive to social developments, including the legal culture that develops in the lives of people who are sourced from the values of local wisdom of the Indonesian nation.

### *Methods*

This research is a normative legal research, which looks at the law from the text of statutory regulations. (lex) also looks at the laws that govern society and the opinions of experts on the values that grow and develop in the lives of society. The approaches used are the philosophical approach, the statute approach, the conceptual approach, the case approach, and the historical approach. Data sources are carried out through literature study in the form of primary and secondary legal materials. Data analysis by describing and analyzing information using logical sentences based on legal sources that have been collected, then analyzed systematically and in depth, so as to produce conclusions that provide answers to the problems or questions of this research.

## **Results and Discussion**

### The Existence of Living Law (Living Law) Perspective of Sociological Jurisprudence and National Criminal Law

The existence of living law has become an object of study and debate in various legal circles, especially within the framework of sociological jurisprudence and national criminal law studies. The concept of living law emphasizes that law is not only seen from written rules (law in books) alone, but must also be seen from the norms, values, and legal practices that develop in society. Within the framework of sociological jurisprudence studies, living law is seen as a reflection of the social, cultural and political dynamics of a particular society. Meanwhile, in the context of national criminal law, living law is law that continues to develop in the life of society and always adapts to the modern criminal law system.

For this reason, researchers will examine the position of living law, by exploring the principle of living law and analyzing its implications from a sociological jurisprudence perspective, including reviewing its relevance to national criminal law. Through literature searches and conceptual analysis, the position of living law from a sociological jurisprudence perspective has an important role in shaping and strengthening social control, meaning that law is not only understood at the level of formal legal institutions and rules, but is

also strengthened by non-formal social norms and controls. Thus, law as a system of social control highlights the complexity and mechanisms of law enforcement and its influence on social behavior.

Sociological jurisprudence as the branch of legal philosophy has studied and examined the causal relationship between law and society, where the meaning behind the essence of law arises from the customs of society, then becomes a value that continues to develop in the life of society. The Sociological school of thought considers that law exists because it is to be obeyed and accepted universally, so that what is called law must not exceed the limits of the values of wisdom in society itself. Sociological jurisprudence views living law as an orderly social system and structure. In addition, it also connects the inconsistency between the stigma of positive law and the condition of society. In this situation, a connection is found between the certainty of positive law and living law in society.

Roscoe Pound, a legal expert, stated that the center of study of the sociological jurisprudence school is law as an empirical phenomenon or fact. Roscoe Pound explains the meaning of empirical phenomena or facts, it can be seen how the function of law is placed on the soul and desires of society. Based on this view, researchers understand that sociological jurisprudence aims to show the existence of strong integration and relevance between legal certainty and living law, legal certainty can be in the form of the role and responsive attitude of society in the formation of law.

The dialectic between legal positivism and historical understanding gave birth to the sociological jurisprudence school. The positivism understanding places law as a formal system of rules whose validity is determined by the power or state institutions, as John Austin, law is a sovereign command. In contrast, the historical understanding of law emphasizes the historical and social role in the formation of law and the development of law. Eugen Ehrlich is one of the figures in the school of thought sociological jurisprudence criticizing the implementation of positive law, according to him, positive law when carrying out its function is considered less than optimal, appears rigid, and is not dynamic.

Ehrlich states that the true law is the law that grows within the family, then develops in the social structure to form values and public awareness without any coercion. Even though in principle, positive law rejects the existence of customary law in society. However, Mochtar Kusumaatmadja is in line with what is meant. Eugen Ehrlich said that positive law should be able to consider the existence of law that grows in the customs of society considering that this law is always obeyed and accepted consciously by society without being forced by anyone.

From the point of view sociological jurisprudence, is a logical reason why many Indonesian people respect, obey and comply with the living law. Because living law is a legal structure that grows and develops in harmony with the soul of the community itself without any coercion in any form. Living law is embedded in everyday life, and has become part of the soul of the nation so that it is very easy for society to always adapt to social, cultural, political, religious and community developments. In the context of beliefs, customs and culture, society often becomes a reminder to act and behave. This should be a reflection of every implementation of the law so that the positive legal order can be adjusted to the living law in society.

Meanwhile, the position of living law from a legal perspective national criminal law, show that one of the characteristics of a state based on law is the creation of a sense of justice, benefit and legal certainty. Gustav Radbruch in his theory of the triad of rule of law states that the characteristic of a state based on law (rechtstaat rule of law) is the realization of legal justice. Artidjo Alkostar, believes that "society has a collective awareness to be treated fairly by the law. According to Eugen Ehrlich, legal justice does not only lie in laws and judges' decisions, but justice arises along with the feelings and beliefs of society itself. In addition, there are also those who believe that living law in society cannot be separated from the laws inherited from previous people who are always oriented towards the past, so they are less appropriate to be applied in modern life and the era of globalization like today.

Such a view, may be right, may also be wrong, is considered right because living law attached to traditional characteristics, while globalization emphasizes total change, including changes in the legal, economic, political and social systems. On the other hand, this view is not entirely correct, because there are several

legal rules and statutes that have been adjusted to living law in society, such as in Article 2 of Law Number 1 of 2023 concerning the Criminal Code. Article 2 explains that living law in society is law that is still valid and developing in the lives of Indonesian society. It is further explained that the validity of living law containing "customary crimes" needs to be accommodated by the regional government through regional regulations (Perda).

Article 2 of Law Number 1 of 2023, provides space for living law to apply in writing (positive) and unwritten (traditional), meaning that national criminal law views the existence of living law as not something static, undeveloped, but rather living law is a dynamic law, changing along with the development of customs, and values that exist in local communities. In this context, "customary crimes" or "actions" that are contrary to the beliefs or beliefs of the community require formulation and renewal at the regional level to be in accordance with the current legal reality.

### *Criminalization of Criminal Acts Based on Living Law Through Regional Regulations in Indonesia*

Dynamic law always follows developments and changes in community life, meaning that law and society balance each other. Law is not static and rigid, but law always follows and adapts to the needs of society. Criminalization of living law-based crimes in regional regulations is the right step to bring about significant changes in the national criminal law system. Law Number 1 of 2023 concerning the Criminal Code is still questioned by some people, especially the issue of articles containing "customary crimes" in criminal law, therefore, there needs to be a formulation of criminalization of living law-based crimes in regional regulations because the phrase of the articles in Law Number 1 of 2023 concerning the new Criminal Code contains "customary crimes" as the basis for criminalization. As in Article 2 of Law Number 1 of 2023 concerning the new Criminal Code, which reads as follows.

"The provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law in force in society which determines that a person should be punished even though the act is not regulated in this law;

The laws that live in society as intended in paragraph (1) apply in the place of that law and as long as they are not regulated in this law and are in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights and other principles. general law recognized by civilized society."

The explanation of Article 2 of the Criminal Code above is actually not questionable because the provisions in the Article are clear enough, namely explaining the existence of criminal acts based on the laws that exist in society.(living law)This crime is known as a customary crime (customary crime), in the input"customary crime" in the new Criminal Code for the purpose of adapt to the sense of justice that exists in the life of society itself.

If we examine the explanation of Article 1 paragraph (1) First, the importance of upholding the principles and values contained in community life, meaning that not all legal rules are understood only in written law, but the law includes the scope of customs, traditions, values and norms accepted in society. Second, in the context of law enforcement, "a person deserves to be punished" as stated in Article 597 paragraph (1) of Law No. 1 of 2023 that "every person who carries out an act which according to the law prevailing in society is stated as a prohibited act, is threatened with criminal punishment." Article 12 paragraph (1) also states that "a criminal act is an act which by statutory regulations is threatened with criminal sanctions and/or actions."

In addition, there is also much state recognition of the existence of local communities as a living legal entity.(living law)in society. So to determine the criteria for living law(living law)In society, it is necessary to find a basis for formulating a living criminalization law.(living law) reviewed from the following aspects:

*Pancasila Values*

Understanding values the living (living law) in society, Pancasila is certainly a reflection of the principles and source of all sources of law. Frans Magnis-Susino, in Nurfatimah and Dewi stated "the existence of Pancasila is in the highest position of all existing legal rules. Pancasila is a reflection of values for the sustainability of the Indonesian nation and state where life in it includes various tribes, groups, religions, groups, cultures, and races. With this pluralistic nature, Indonesia lives together to build an independent life identity.

Hans Kelsen, in his hierarchical theory of the formation of legal norms (stufenufban theory), explains that legal norms hierarchically consist of fundamental norms (staatsfundamental norm), basic state rules (staatsgrundgesetz), formal laws (formal gesetz), and implementing regulations for autonomous rules (verordnungs en autonome satzung). Staatsfundamental norm is the basis for the formation of the Constitution, Laws and several other rules below it. Stufenufban theory, sees the values and norms contained in Pancasila as staatsfundamental norms which then give birth to principles and rules (measures) in behaving about what is right and what is wrong. The values and norms contained in Pancasila must be implemented in daily life in order to create a life that is harmonious, balanced and in accordance with the identity and culture of the Indonesian nation.

*1945 Constitution*

The unity of law that lives in society (living law) is hereinafter referred to as customary law, namely the law that regulates a group of people who have the same feelings and fate. Living law establishes social institutions that are recognized by certain traditional societies. Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution (UUD) explain that "the state recognizes and respects the unity of customary law communities 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." The provisions of Article 18B indicate constitutional recognition of the existence of living law in society.

The Provisional People's Consultative Assembly (MPRS) of the Republic of Indonesia also issued Decree No. II/MPRS/1960 which regulates "the principles of national legal development that are in line with the state's direction based on living law in society" in addition, it also regulates efforts for homogeneity in the legal field in order to accommodate social values and norms so that they continue to exist and live in the Republic of Indonesia.

*Human Rights*

Customary law and human rights are two entities that have deep cultural roots and human values. Both are present as normative frameworks which then shape behavior and relationships in society. Living law in society is a representation of the cultural heritage and traditions of a particular society. Meanwhile, human rights form a universal principle that upholds the dignity, honor and freedom of every individual in national and state life.

Indonesia as a country with a diverse character will culture, customs are obliged to maintain diversity, harmony, economic progress, and protection of local community rights in any form. One of the instruments that regulates living law along with the traditional rights of local communities is regulated in Article 18B paragraph (2) of the 1945 Constitution, which is then also regulated in the omnibus law, which states that :

Indigenous peoples' rights can be recognized, respected, and given protection appropriate to their local context. This will provide stronger legal guarantees for indigenous peoples to maintain their traditions while contributing to national development.

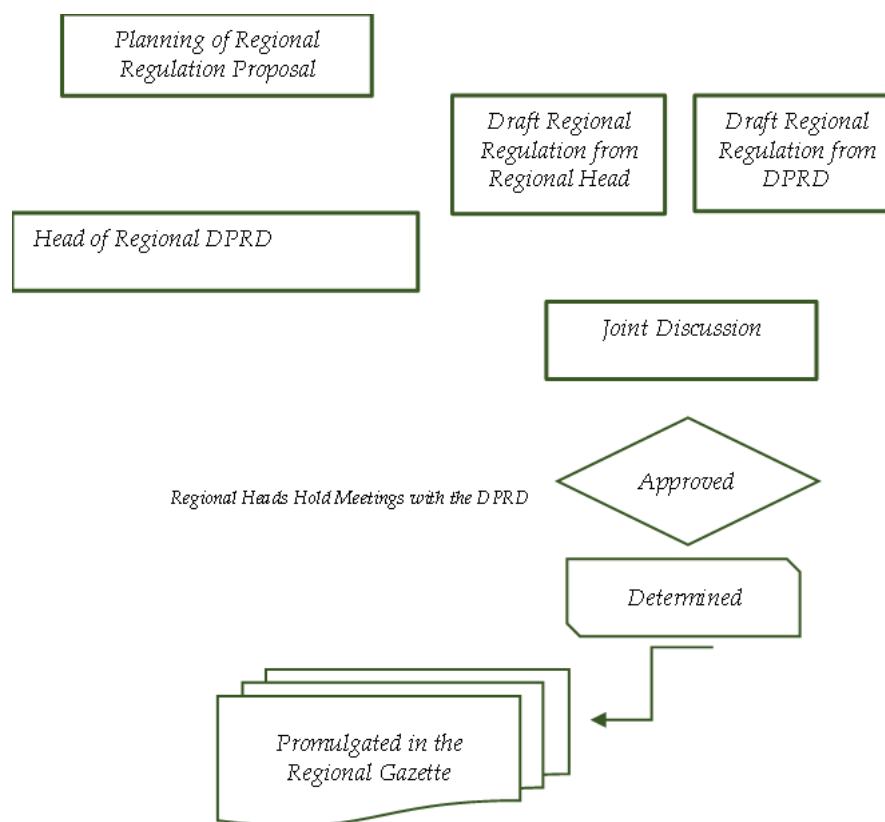
Omnibus law also set out a framework that allows indigenous peoples to choose the option that best aligns with their values, such as active participation of indigenous peoples, civil society organizations, and legal experts is essential in ensuring that the interests and rights of indigenous peoples are guaranteed.

*Formation of Regional Regulations*

To ensure the sustainability and efforts to maintain the characteristics of local culture of the Indonesian people. It is necessary for living law to be ratified in the form of Regional Regulations (Perda), meaning it is important to carry out the process of planning and drafting regional regulations in the regional legislation program (Prolegda). Article 1 number 10 of Law Number 12 of 2011 concerning the Formation of Legislation states that prolegda is the initial stage of forming a rule, this stage is made in a structured, integrated, and systematic manner.

Article 239 paragraph (1) of Law Number 23 of 2014 concerning regional government states that the stages or planning for compiling regional regulations are carried out in the regional regulation formation program (Propemperda). Based on the law, there are several things that must be done in the preparation of regional regulation proposals, including planning, the formation of regional regulations is carried out by the Regional People's Representative Council (DPRD), within a certain period of time the regional head determines the priority scale when designing regional regulations, the formation program is determined by the DPRD.

Regarding the legislative program, it is regulated in Article 32, Article 41 of Law Number 12 of 2011 which is the legal basis for the coordination mechanism for the preparation of regional regulations in the scope of regional government and the legislative scope or the Regency and City DPRD which is then positioned as the Regional Regulation Formation Agency (Bapemperda). The important thing that this body does is to accommodate all aspirations, both aspirations from factions and aspirations from the community, which of course are directly related to the substance of the discussion of the regional regulation. The process of forming regional regulations can be seen in Figure 1.



**Figure 1. Process of Forming Regional Regulations**

Based on Figure 1, it can be seen that the process of forming regional regulations begins with the Planning for the Implementation of the Regional Regulation Formation Program (Propemperda) by the Regional Head and DPRD, then the Regional Regulation Draft (Raperda) stage, approved by the DPRD and stipulated by the Regional Head, then promulgated in the regional gazette.

## Conclusion

Based on the discussion above, it is concluded that the criminalization of criminal acts based on living law through regional regulations in Indonesia, First, from the perspective of sociological jurisprudence, there is an affirmation that law is not only seen from written rules (law in books) alone, but law must be seen from the side of facts (law in action) where norms, values, and legal practices exist in the life of society. Sociological jurisprudence, considers living law to be a reflection of the social, cultural, and political dynamics of a particular society. Second, from the perspective of National Criminal Law, the implementation of living law stated in Law Number 1 of 2023 concerning the Criminal Code. This is regulated in articles containing "customary crimes" the provisions of Law No. 1 of 2023 indicate the existence of the implementation of living law (living law) in society, namely determining whether someone deserves to be punished even though the act is not regulated in this law, in addition to that, the basis for the validity of living law is also seen from the reflection of the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, Human Rights, and General Legal Principles recognized by civilized society. Therefore, as a real manifestation of the state's legal policy, there are also various policies and legal instruments related to "crimes living law" In the National Criminal Law system, it is necessary to conduct discussions at the regional level to determine the program and plan for the formation of regional regulations (perda) which regulate "crimes" in living law (living law) in Indonesian society.

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