

The Living Law in Indonesian Penal Code: A Combination of Legal Certainty and Justice

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This article considers the question of whether the concept of living law, which is not written, can be accommodated in Indonesian criminal law with the type of written law based on the principle of legality. Many people assume that living law contradicts legality because both have different goals; justice for the former and legal certainty for the latter. I argue that the concept of living law in the Indonesian Penal Code is not at all contrary to legality, but rather combines legal certainty and justice in the Indonesian legal system. They are studied based on aspects of legal substance, legal structure and a legal culture that places living law and criminal law in the right proportion in society.

Key words: *Living law, principle of legality, legal certainty, justice, legal system.*

Introduction

This article will explain a new perspective on the concept of regulating criminal law with a living law approach. This idea was adopted from the Draft of the Indonesian Penal Code that regulates unwritten living law into future criminal law arrangements (*ius constituendum*). In general, there are two main issues underlying the existence of the living law regulation in the Draft: the problem that the Penal Code cannot be applied dynamically to the development of society and that it does not reflect the nation's moral values.

First, Indonesia's current Penal Code has undeniably been implemented for a long time as the basis of the rules of criminal law. Historically, the Penal Code or *Wetboek van Strafrecht* (WvS), previously called *Wetboek van Strafrecht voor Nederlandsch Indie* (WvSNI), is a derivative of the Dutch WvS that was written in 1881 and then put into effect in the Netherlands in 1886. With the principle of concordance (adjustment), the Dutch Colonial

Government imposed the Penal Code through *Koninklijk Besluit* (King's Decree) No. 33 October 15, 1915 and started its implementation on January 1, 1918 (Bahiej, 2006). After the colonial period, the Penal Code was re-enacted in Indonesia with transitional rule as regulated in Article II of the 1945 Constitution of the Republic of Indonesia and remained in force until the present day (Bahiej, 2006).

The long history of the enactment of the Penal Code to date has made the national criminal law system considered to have failed to keep up with the community needs for criminal law enforcement. There are several provisions in the Code that have been declared no longer valid either because there are new rules that have replaced them or due to court decisions (Agustina, 2014), and some existing provisions are even considered ineffective if they are still implemented to the public. The development of society as part of social change shows that this problem becomes increasingly complex and dynamic as it results in newly discovered actions or crime unreachable by any Penal Code. Some actions that were once considered crimes are now not only sufficiently conventional as referred to in the provisions of the Penal Code, but they have also developed new forms of crime which should also be followed by existing criminal law provisions (Amrani, 2019).

Second, the Indonesian Penal Code is considered not to reflect the moral values of the nation. This happened because the Code was not born from the nation's main foundation, but was a Dutch colonial legacy that was reinstated in the Indonesian legal system based on transitional rules. As a consequence, some of the norms regulated therein are also not implemented sociologically in society. Thus, some of them that are currently in effect fail to give satisfaction to the community.

The issue of reforming criminal law with an approach to value is one of the main ways to carry out a review and re-evaluation (reorientation) of socio-political, socio-philosophical and socio-cultural values that underlie and provide content to the substantive norms of criminal law. Furthermore, the adopted approach to value must base itself on the views of life, ideology and Pancasila as the state foundation which has become the source of all sources of law, including criminal law (Arief, 2011). Based on the two problems above, the concept of living law regulation in the Draft of the Indonesian Penal Code can serve as a legal policy in tackling criminal law problems that are relevant to the development of society with its moral values. Therefore, this article will explain how the concept of living law and its relevance to the nature of fair and certain criminal law enforcement in the community.

The Relevance between Living Law and the Principle of Legality

The Principle of Legality in a Civil Law System

The nature of criminal law in a state with a civil law system is a guarantee of certainty based on written legislation, so that there is a close relationship between criminal law and the fundamental principle called legality. Indonesia with its criminal law, which is a legacy from the Netherlands based on the principle of concordance, re-enacts the Dutch Penal Code to its Penal Code. The latter also directly applies the principle of legality as regulated in Article 1 Paragraph (1) of the rule, which stated that “no act shall be punished unless by a prior statutory penal provision”. Based on the provision, it can be understood that the principle of legality intends to emphasise that written rules must be applied as the basis for the enforcement of criminal law in Indonesia.

The principle of legality relies on the idea that the purpose of criminal law is to provide certainty and enactment in general (national) (Renggong, 2014). In implementing the principle, there are four aspects that are strictly applied, those are: statutory regulations, retroactivity, *lex certa*, and analogy (Haveman, 2002). The four aspects are certainly interrelated, so the combination of the four at once is a necessity in understanding the true meaning of the legality principle (Haveman, 2002). These four aspects are often simply juxtaposed with criminal law in countries adhering to civil law systems with a mechanism that put more emphasis on written law, rather than on unwritten regulations. In the common law system, these four aspects can also be realised but in a slightly different manifestation, which is through an unwritten law (case law) with a court decision. The principle of legality in civil law is better known as *nullum crimen sine lege* and *nulla poene sine lege*. This principle is more suitable for written criminal law. The civil law countries (continental Europe) tend to apply the legality principle more rigidly than their common law counterparts. In continental countries, this principle serves as a tool for limiting state power. However in the common law, the principle is not so prominent because of the rule of law principle, but it still animates in court decisions.

Formal Legality and Material Legality

The principle of legality is certainly closely related to the characteristics of the formulation of certain acts in written laws. This also poses a limitation to implementing the principle of legality, because the nature of the principle is only able to reach the *mala prohibita* (criminal acts regulated in writing), but is unable to reach the *crimina extra ordinaria*, which is an act that deserves to be convicted, but not being criminalised. Furthermore, there will be more acts that cannot be prosecuted on the basis of the principle of legality (Amrani, 2019).

These problems have led to the birth of a principle of legality in the Draft of Indonesian Penal Code that is based not only on written law, but also on unwritten laws applicable within and inseparable from the community. In response to this condition, criminal law experts distinguish between formal legality principles (the legality principle that originates in written law) and material legality principles (the principle that provides space for living laws/unwritten laws) (Amrani, 2019). The provisions referred to in the Draft Penal Code are regulated in Article 1 and 2:

Article 1

- (1) No single act can be subject to criminal sanctions and/or actions except for the strength of criminal regulations in the laws and regulations that existed before the act was carried out.
- (2) In determining the existence of a crime, an analogy is prohibited.

Article 2

- (1) The provisions referred to in Article 1 paragraph (1) do not reduce the entry into force of the law that lives in the community, which determines that a person should be convicted even though such acts are not regulated in this Law.
- (2) The law that lives in the community as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and following the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights and general legal principles recognised by civilised society.

It appears that both of these provisions contain contradictory meanings, because the Code wants legal certainty that demands the source of written legislation as a basis for recognition of a crime on the one hand, but it also adheres to the law that lives in society (living law) as the basis for a crime on the other. This condition poses both theoretical and practical problems which include: firstly, the contradiction of the principle of material legality as a law of deviation from the principle of formal legality which in essence must come from written legislation; secondly, the unclear scope of the law that lives in society raises controversy about the extent to which this basis should be used in criminal law enforcement. The living law encompasses an overly broad scope, such as customary law, local law, traditional law, indigenous law and so on which in essence the whole law is unwritten; and thirdly, because of its unclear scope, as a consequence, there will be a plural application of law which may not only be related to criminal law but also can be resolved through criminal justice mechanisms.

Living Law v. Principle of Legality: Certainty or Fairness?

There is still an ongoing debate on the issue of the living law in criminal law among the public to this day. Moreover, the culture of criminal law that had already been around for decades in Indonesia is a legal system with written proof founded on the principle of legality. As the purpose of the principle is to guarantee legal certainty (Situngkir, 2018), the principle of legality has a very dominant role in criminal law enforcement. With the four characteristics of the legality principle described in the previous section, all these four aspects constitute the basis for the formation of a legal system that demands legal positivity by prioritising legal certainty over justice and expediency (Maxiener, 2007). Furthermore, legal certainty as a basis for consideration by the Court has played a key role in deciding many cases (Maxiener, 2007). In this case, it can be explained that for countries with the continental European system such as Indonesia it is indeed common to put their main basis for carrying out this principle on written statutory regulations (statute) (Maxiener, 2007).

The purpose of certainty in the legality principle illustrates that legal positivity in the form of written rules is the main reason for implementing the law itself (Maxiener, 2007). The legitimacy of law will always be determined using the rules that govern it. In line with the idea of the legality in the Indonesian Penal Code, it is stated that criminal law cannot be applied to any act that is not previously regulated in writing in the law (*Geen feit is strafbaar dan uit kracht van eene daaraan voorafgegane wettelijke strafbepaling*) (Situngkir, 2018; Lamintang, 2007). This assumption of legal certainty from the legality also confirms that the law must be accessible, comprehensible, clear and predictable (Mance, 2011), so as to make it easily enforced and thereby, people can know where they stand (Mance, 2011). With a clearly organised and detailed written form, the public will understand what things they are and aren't allowed to do (Mance, 2011).

In the end, the importance of legal certainty is also related to the burden of proof by the state so that it does not violate individual rights (Husak, 2008), so it is important to ensure that clear procedures exist in the implementation of criminal law. When the individual's right to the law is guaranteed, the law will indirectly provide a high level of objectivity in its implementation. To avoid the arbitrariness of the state apparatus in law enforcement, the authority of the apparatus is limited by laws and regulations so that the law gives more security to the public (Christianto, 2009). Under these conditions, apart from being a character of a continental European country, legal certainty as a reflection of the principle of legality is very important to make the law a means that is consciously and actively used to regulate society through the use of intentionally created legal regulations (Rahardjo, 1996). Including criminal law, the law is oriented as a forum to ensure certainty and provide predictability in people's lives, a means of applying sanctions, protecting against attitudes against criticism and efforts to distribute resources (Rahardjo, 1996).

However, aside from the many advantages of the written legal system, it also has shortcomings when it comes to ensuring justice in society. Law enforcement that is based simply on written rules will result in the law being static in dynamic conditions of society. Being implemented in a plural society in Indonesia, of course, the principle of legality will be faced with a variety of problems that are contrary to the development of society. An adage states that “laws which refer to the formulation of words cannot keep up with changes that occur in society, which must be controlled”. This is also called as “*de wet hinkt achter de feiten aan*” (Rahardjo, 2008; Mertokusumo, 2006). It has been proven, as in the previous sub discussion that many norms of the Penal Code have been abandoned for being lack of implementability in the community.

Conversely, the existence of living law gives the idea that the law must continue to move sweetly along with human development. Law is for humans, not the other way around (Sarmadi, 2012); so the existence of law must be a direct description of society itself. Such is the characteristic of the living law; that is intended to provide maximum opportunities for justice for every individual who adhere not only to the rules of written law. These advantages make the concept of living law quite relevant for Indonesia which has a plural legal style because of its ethnically diverse society.

As outlined along with the emergence of the concept of living law in the Draft of the Indonesian Penal Code, the existence of the principle of material legality serves as a new basis for upholding the rule of law in criminal law enforcement. The unwritten law that embraces the living law character will certainly change the criminal law system outlined in the written law. Living law with the aim of justice will provide a balance for law enforcement based only on written law. This has been in line with the pattern of Indonesian law in its constitution which explains that the state must guarantee the existence of customary law communities and their legal rights (Article 18b (2) of the 1945 Constitution; Nurdin & Nur, 2020). The living law characteristic referred to in the Penal Code is the concretisation of the constitutional mandate which actually represents a written legal system that is different from other similar types of systems.

Furthermore, the regulation of living law in the Draft of the Indonesian Penal Code means an effort to treat Indonesian traditional law as an inseparable part of written law even if the pattern is not regulated in writing. As stipulated in Article 2 of the Draft, the explanation of the provisions states that the living law in question is a customary criminal law (*adat* criminal law) that still applies and develops in the lives of people in Indonesia. The existence of customary criminal law in several regions in Indonesia is indeed not written but still applies as law in the area. To provide a legal basis for the application of criminal law (*adat* delict) in the Indonesian criminal justice system and to implement the regulations, the Draft also, in the

explanation of the same provisions, instructs the regulation of customary criminal law in the form of compilation of customary criminal acts by regional governments in their respective regional regulation (the commentaries of Article 2 of the 2019 Draft of the Indonesian Penal Code).

Upon knowing the purpose of living law in the Draft of the Indonesian Penal Code, we find a point of agreement between the concept of living law and the principle of legality adhered to in Indonesian criminal law, where the existence of a living law can still guarantee the principle of legality with its four characteristics (Haveman, 2002). Furthermore, about the goal of certainty in the principle of legality, living law as a representation of the goal of justice in society is a perfect complement to gain the intended legal benefits. The living law arrangement that forms the basis of the Penal Code will emphasise that Indonesia has a criminal act with a traditional character (*adat*). Inseparable from the written law, of course, the nature of living law regulation, by accommodating it in the provisions of the criminal law, aims to legally recognise that the existence of this form of law is important to consider in the criminal justice system. The spirit of a law is important so that the law does not only mean legislation, even though it is called living law. The criminal law will retain its written character without forgetting the legal style of the community itself as a close part of a legal system.

The Idea of Living Law in Indonesian Legal System

Renewal of criminal law is an inevitable necessity. It can be a solution to a small number of problems with the criminal law system, which has so far conflicted with living norms in society. The re-codification of criminal law through the Draft of the Indonesian Penal Code is a legal product prepared on the juridical, sociological and philosophical basis of the nation (Muhlizi, 2017). This includes the arrangement of living law in the Draft, which makes a new effort in achieving a national criminal law system oriented to justice in society.

After previously discussing a few living law issues within the framework of the Penal Code, a subsequent discussion on how to respond to living law implementation in the future is necessary. The inclusion of the idea of living law in the draft is an idea which is important to be accommodated on the one hand, but it poses a challenge in its empirical practice on the other. In such a context, a theoretical framework for legal system shows that the effectiveness of law enforcement can be measured on three main pillars which constitute a unified system to achieve certain goals, namely legal substance, legal structure and legal culture (Friedman, 1969a). The basic concept of the legal system theory starts from the paradigm that law must be seen as one system that influences another (Friedman, 1969a). Concerning the implementation of living law-based criminal law enforcement, the three pillars referred to

provide a measure for the execution of the provisions regarding this ideal law in the reality of criminal law enforcement.

Legal Substance

The legal substance is a discussion of a rule, norms and patterns of human behaviour in the system, or more clearly said as “law in books” which is a collection of values and legal norms that apply. Thus, the component of the legal substance is the actual product of the legal system which includes legal norms, both the regulations, decisions and so on that are used by law enforcers (structural components) and those who are regulated (Mertokusumo, 2010). Concerning the substitution of living law previously discussed, several criminal acts have been found to be sufficiently vague in their application because there are no concrete elements or criteria regarding what actions can be criminally based on the living law. Such conditions have a serious impact on law enforcement in meeting the burden of proof regarding an action that is normally oriented to the fulfilment of the offense element of a particular article. There is still no further regulation on the actions that are classified as well as how the offense element gives an idea of how vague the living law is. In this context, living law will be regulated further in the Regional Regulations of each region; therefore it is necessary to formulate at least three pillars of criminal law that can accommodate the proof of the substance of criminal law against this living law. Those are criminal act, criminal liability and punishment (Adji, 2016; Suartha et al., 2020).

Firstly, the idealism of the formation of a living law in the Penal Code is indeed something to be proud of, but that does not mean that the public can immediately accept these provisions. There are many contradictions in the use of criminal law in solving these problems are considered to have violated private rights and should not be a domain of criminal law which is repressive. Some of these provisions can at least be seen as a consequence of embracing the spirit of instilling the moral values of the nation in the provisions of criminal legislation. For that reason, the nuances built in the Penal Code on some of the concepts of criminal acts cannot be separated from the legal characteristics that base the enforcement of all forms of law in Indonesia.

Aside from the aforementioned issues, the condition of several offenses in the Penal Code which is currently still far from the nation’s moral values becomes the basis of how criminal acts should be arranged with nuances of the nation’s own values. Some of these provisions can be illustrated in the application of the types of criminal acts in living law and this certainly is one of the consequences of adhering to the principle of material legality. This offense is indeed often referred to as *adat* delict, which has been applied by indigenous peoples from the past until now, so that the enactment of living law in the Penal Code is

actually a form of implementing customary criminal acts which are formulated in written form.

Secondly, the study of criminal liability is an indivisible part of the previous discussion on the subject of criminal acts, both of which cannot be separated from one another. Criminal liability is the continuation of the objective reproach that exists in a criminal offense and subjectively qualifies for being convicted of such actions (Saleh, 1982). With such condemnable conditions of course the issue of criminal liability related not only to taking responsibility for one's actions because of the fulfillment of written elements about an act, but also for the conditions outside of which are regulated. They should also be taken into consideration in measuring the criminal liability. The concept of criminal liability actually involves not only legal matters, but also concerns moral issues or general morality adopted by a society or groups in society, so that criminal liability is achieved by fulfilling justice (Amrani & Ali, 2015).

The absence of the concept of criminal liability with the living law approach will have an impact not only on the perpetrators, but also on the culture of the community itself, because it requires a special approach to see and understand the context of the actions taken by the perpetrators in such conditions. Thus, this living law has a specific sectoral nature that is different from one another, so certain conditions that describe a legal event in the community is also very important to be accommodated in the concept of criminal liability.

Thirdly, the concept of punishment will explain the forms of misery (sanctions) imposed by the state on the offenders for the violations of criminal law over related regulations that govern them (Sudarto, 1981), so that it is usually likened to the reactions to offense displayed against offenders (Saleh, 1987). As for sentencing, it is a punishment mechanism that has been determined in the field of criminal law (Sudarto, 1981) or it can also be called simply as the process of determining the imposition of a crime against an offender proven to have violated criminal law (Setiady, 2010). Concerning punishment, the renewal of Penal Code in the Draft also accommodates additional punishment stipulate that one of the additional forms of punishment known is the fulfilment of local *adat* obligations (Article 66 (1f) of the 2019 Draft of the Indonesian Penal Code). The provision gives a new nuance in the form of punishment which can be used as an alternative to a person who commits a crime that is in contact with certain customary laws (*adat* laws).

At last, the provision regarding the fulfilment of local *adat* obligations is the idea that can be justified, because not a few forms of punishment currently stipulated in the Penal Code are often not in line with the interests of living law, so that their existence will provide new opportunities for the fulfilment of *adat* interests that get the impact of a particular crime. However, because the presence of this form of punishment is a consequence of the material

legality, it will be a problem when dealing with these types of criminal acts which have a very broad scope in each region and without exception to this, *adat* obligation will also be very much dependent on which *adat law* is violated. Another problem is that law enforcement officials who are not all familiar with all forms of *adat* obligations in each region have made it even more difficult to implement this type of punishment in the community. The issue of sentencing considerations in the Draft through the living law approach indeed confirms that local *adat* obligations must be carried out with the values of law and justice that live in the community. In this context, the Judge has the opportunity to decide on this form of punishment with a variety that is adjusted to the needs of the community.

Legal Structure

The legal structure component relates to institutions created by the legal system such as the police, prosecutors, courts or other law enforcement agencies in the system itself (Friedman, 2009). The legal structure is very closely related to the shape and position of legal institutions in the legal system itself, the legal structure can be described as "... a kind of cross-section of the legal system - a kind of photograph, which freezes the action" (Friedman, 1984). Provisions on living law for law enforcement officials are still new, so law enforcement with this new approach will also require considerable time until its implementation is truly effective as desired sometime later.

The law enforcement apparatus must orient their living law paradigm toward the consideration of the value of law and justice that lives in a society in addition to other considerations in general (Article 54 (1) of the 2019 Draft of the Indonesian Penal Code). With the current competencies of law enforcement officials, these considerations are not easy to implement because living law is quite varied with the standards that differ from one another. Such conditions will tend to be ignored in practice if law enforcement officials do not really pay attention to the various legal conditions in the community. Furthermore, discussion regarding the authority of law enforcement officers in the criminal justice system is inseparable from formal legal provisions attached to it, the Criminal Procedure Code. As a consequence of the implementation of the Draft with the living law approach, the Criminal Procedure Code as the implementing law should also ideally adopt the same approach. However, this living law approach is still unknown in the current Criminal Procedure Code. Therefore, this implies that the law enforcement adopted will also be very difficult in practice when it comes to the enactment of the Draft.

However, there is still hope to accommodate the living law paradigm in the Draft Penal Procedure Code which is still being discussed by the Government. In addition to proposals for accommodating the living law oriented provisions, there is a provision regarding law

enforcement officials that have been accommodated in the Draft Penal Procedure Code. This can also be maximised in the implementation of the *adat* criminal law as known in the Draft of the Indonesian Criminal Code, regarding the presence of Commissioner Judge in the criminal justice system (Article 1 (7) of the Draft of the Indonesian Penal Procedure Code). The provision regarding Commissioner Judge through his authority will provide a double examination even before entering the judiciary. The control given will have a significant impact if it is truly directed to fulfil the value of living law to achieve justice.

Legal Culture

The last component is legal culture, which means attitudes and values that have to do with the law or legal system. These attitudes and values affect behaviours related to law and legal institutions both positively and negatively (Friedman, 1969b). The component of legal culture is said to be ideas, attitudes, hopes and opinions about the law carried out by lawyers and judges (internal legal culture), as well as by society in general (external legal culture) (Friedman, 2009). As for the living law which is a concrete adoption of community culture, it certainly poses no complicated problem. This is because the provision was made in response to the culture of society which is accommodated and guaranteed through criminal law instruments so that the culture of the society in this context has been directly formed without significant problems.

However, even though it has been integrated into a culture of society, it would have a potential problem if the culture was included in the scope of criminal law that led to the imposition of punishment. The dilemma about the realm of living law with the issue of state intervention in its regulation is not a new discussion for the people. Furthermore, with the adoption of the living law in criminal law, at the same time it has been ensured that *adat* affairs are no longer the sole domain of *adat* itself, but rather there is state intervention to ensure the fulfilment of these customs. To answer this problem, both the culture of law enforcement officials and the general public must always be based on the principle of criminal law as *ultimum remedium* (Malander, 2013). That is because *adat* law also has its own criminal settlement mechanism, so that if it is not necessary to take criminal justice measures, the best alternative solutions outside of criminal justice with their respective *adat* law must be far prioritised. With this paradigm, then in addition to maintaining the spirit of criminal law as an *ultimum remedium*, justice aspired will also be realised.

Conclusion

The living law in the Indonesian Penal Code provides a new nuance in criminal law which is oriented towards the goal of legal certainty and justice. The purpose of legal certainty through the principle of legality that has been adopted by Indonesian criminal law is that all acts that

are considered as criminal acts must be regulated in written regulations, including living law which has unwritten characteristics. The living law regulation in the Penal Code will give more value to justice in the community, especially for indigenous peoples who are closely related to the law. In this context, the stipulation of the living law in written rules has created a linkage between certainty and justice in the criminal justice system which has a special pattern.

Furthermore, the living law regulation in the Indonesian Penal Code is indeed very unique, so that the idea should be justified both theoretically and practically in the Indonesian legal system which includes legal substance, legal structure and legal culture. First, in legal substance, living law must be regulated in a limited and clear manner both in terms of the criminal act, criminal liability and punishment. This limited and clear arrangement relates to the scope of the living law to be accommodated and how to implement it in the criminal justice system. Second, in legal structure, living law is related to how law enforcement officers are able to carry out their new functions in all living law cases. In connection with the work of law enforcement officers, the Code of Procedure Code must be able to ensure the implementation of living law in the criminal justice system, one of which is to maximise the control function of the Commissioner Judge. Third, in legal culture, criminal law, both in the culture of the community and law enforcement officials, should be the last resort after other legal measures (*ultimum remedium*), so that the settlement of customary disputes with its mechanism must be far more prioritised, thus, criminal law must not become an obstacle to the implementation of customary law itself.

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