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REVIEWING THE IMPLICATIONS OF THE LIVING LAW AS AN EXPANSION OF THE LEGALITY PRINCIPLE IN THE CRIMINAL CODE

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Abstract

The reforms made to the Criminal Code are an achievement that must be appreciated by all Indonesian people, considering that the current Criminal Code is a legacy from the Dutch Government, so it contained therein is oriented towards Western values. Meanwhile, the Criminal Code, which the legislature of Indonesia has created, contains values following the Indonesian Nation. However, legislators' decision to include living law in the Criminal Code has brought several implications for developing criminal law in Indonesia because Indonesian criminal law also adheres to the principle of legality. The type of this research is socio-legal studies. The legal materials are collected using literature studies with the statute and conceptual approaches. Furthermore, the data processing technique has been collected using the deductive method. This article was written using a qualitative analysis method. This study aims to determine the implications of applying living law as a basis for punishment as regulated in Article 2, paragraph 1 of the new Criminal Code. The results of this study, it is known that sentence based on living law will have the impact on legal uncertainty, the duality of customary law, and requires law enforcement officers who are understand regarding the law which lives in where he is in charge because the state carries out its enforcement through the criminal justice system. The recommendation based on this research is to respect the living law by protecting the existence of indigenous people through formal arrangements in regulation forms.

A. INTRODUCTION

Criminal Code or Wetbook van Strafrecht (WvS), currently in force in Indonesia, is a remnant of the Dutch colonial period. Based on age, the Criminal Code is already classified as an ancient regulation because it has been applied in Indonesia since 1918[1], meaning it has been valid for 105 years. The values contained therein are still oriented towards the importance of individualism/liberalism[2] , so several articles are not in harmony with the noble values of Pancasila. Prof. Dr. H. R. Benny Riyanto, SH., M.H, Professor of Semarang State University (UNNES), the Criminal Code (WvS) does not reflect the nation's cultural values or Pancasila as the basic philosophy of Indonesia. Pancasila is the basis of the state or ideology that has been finalized, so Pancasila should have become the basic norm in drafting regulations in Indonesia.[3] Therefore, appropriate for Indonesia to form a new Criminal Code to accommodate the community's needs for laws that continuously follow the development of science and technology. That is the Criminal Code which is by the values and culture of the Indonesian nation.

According to Sudarto, there are three reasons for the Indonesian Nation to have a self-made National Criminal Code. First, for political senses, it is reasonable if the Republic of Indonesia, which has become an independent state, has a national Criminal Code that is self-produced and can become a national pride—the second is the sociological reason. The Criminal Code that applies in a form is a reflection of the cultural values of a nation. Third, for practical reasons, reforming the Criminal Code is urgently needed in current practice because the number of law enforcement officers who understand the WvS is relatively tiny. So far, the WvS has been translated as a reference, so there are differences in views and interpretations between one translator and another.[4] Same opinion with Deputy Minister of Law and Human Rights Eddy O.S. Hiariej said that there are at least three central values behind the formation of the new Criminal Code. First, it must adapt to the times, be oriented toward modern criminal law, and guarantee legal certainty. In his opinion, Criminal Code that applies nowadays does not ensure legal confidence because the Criminal Code was translated differently by legal experts.[5]

The urgency for changing the old Criminal Code into a self-made National Criminal Code, said Prof. Benny, was also due to a shift in the justice paradigm. The justice paradigm used to be retributive, whereas justice nowadays is corrective for criminals, vital for victims, and rehabilitative for both victims and criminals. In addition, the new Criminal Code also accommodates cultural and national values and includes the norms that protect Pancasila.[6]

Finally, after more than 100 years of using the Dutch-era Criminal Code, Indonesia succeeded in passing a new Criminal Code. However, the Criminal Code (KUHP), which will be applied effectively in 2026, has invited pros and cons in various social circles for the new

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[1] Humas BPHN, "RUU KUHP Disahkan Menjadi Undang-Undang," Badan Pembinaan Hukum Nasional Kementerian & HAM RI, 2023, https://bphn.go.id/publikasi/berita/202212061210189/ruu-kuhp-disahkan-menjadi-undang-undang.

[2] Joko Sriwidodo, "Politik Hukum Rancangan Perubahan KUHP," *ERA HUKUM* 18, no. 1642 (2020): 1–42.

[3] Reenee WA, "KUHP Baru Wujud Reformasi Sistem Hukum Pidana Yang Sesuai Dengan Nilai-Nilai Bangsa," Jurnal Redaksi, 2023, https://jurnalredaksi.com/index.php/2023/01/18/kuhp-baru-wujud-reformasi-sistem-hukum-pidana-yang-sesuai-dengan-nilai-nilai-bangsa/.

[4] Sriwidodo, "Politik Hukum Rancangan Perubahan KUHP."

[5] Kementerian Hukum dan HAM RI Biro Humas, Hukum dan Kerjasama, "3 Alasan Penting Perlunya Pembaharuan KUHP," 2022, https://kemenkumham.go.id/berita-utama/3-alasan-penting-perlunya-pembaharuan-kuhp.

[6] WA, "KUHP Baru Wujud Reformasi Sistem Hukum Pidana Yang Sesuai Dengan Nilai-Nilai Bangsa."

regulated provisions. One is related to living law as an extension of the legality principle. The legality principle as stipulated in Article 1 Paragraph 1 of the Criminal Code, "No action may be subject to criminal sanctions and/or criminal act, except for the force of criminal regulations in the laws and regulations that existed before the act was committed" has experienced an expansion in The new Criminal Code because living law (the law that lives in society) has been regulated as a source for imposing a sentence on someone even though the act is not held in the Criminal Code (article 2 paragraph 1 of the Criminal Code). At the same time, the purpose of the legality principle is to enforce legal certainty and prevent the arbitrariness of the authorities.[7]

Regarding the previous statements, the former Supreme Court Justice, Prof. Komariah E. Sapardjaja, argued at the National seminar "Responding to the RKUHP Discussion" held by the Criminal Law and Criminology Society in collaboration with the Faculty of Law, University of Padjadjaran Bandung, the provision of Article 2 paragraph (1) of the RKUHP which has legally become the Criminal Code now is contrary to Article 1 paragraph (1) of the Criminal Code because the basic premise of Article 1 paragraph (1) is a written law while Article 2 paragraph (1) is an unwritten law. According to him, this is cons with the principle of legality.[8] This is the same with Teguh Prasetyo's opinion regarding the definition of the principle of legitimacy that people cannot be punished except based on criminal provisions according to written law. There is no application of criminal laws based on analogy. People cannot be punished based on habit. There may not be formulations of delicts that are unclear, there is no retroactive power, there are no other crimes except those determined by law, and criminal prosecution is only according to the method selected by law.[9] The difference between living law and the principle of legality in written law will complicate the law enforcement process against criminals.

On the other hand, Criminal Law Specialist and lecturer in Business Law at BINUS, Ahmad Sofian, highlighted that criminal acts based on living law could fulfill a sense of justice in society. Courts can also play a role in implementing customary law in a region. For example, if a violation occurs, the judge can give a penalty of "fulfillment of customary obligations."[10] Thus, based on the description of the pros and cons of living law as an extension of the legality principle above, if the provisions of Article 2 Paragraph 1 of the new Criminal Code are maintained in the Criminal Code, it will undoubtedly bring several legal implications so that according to the Author, Article 2 paragraph 1 of the new Criminal Code still needs to be reviewed. This article examines the impact of implementing living law (the law that lives in society) as an extension of the principle of legality in imposing crimes as stipulated in Article 2, paragraph 1 of the new Criminal Code.

B. RESEARCH METHODS

This article was researched using socio-legal studies. The essence of *Socio-Legal Studies* is to answer and explain various legal issues with an interdisciplinary theoretical and methodological approach. *Socio-Legal Studies* become an umbrella for legal sociology, legal anthropology, legal politics, gender and law, legal psychology, and others.[11] The

[7] Teguh Prasetyo, *Hukum Pidana* (Jakarta: Rajawali Pers, 2020), 31.

[8] Mohammad Maulana Kusumawardhana. "Asas Legalitas Dikesampingkan Oleh Living Law Dalam RKUHP," accessed May 5, 2023, https://www.hukumonline.com/berita/a/asas-legalitas-dikesampingkan-oleh-living-law-dalam-rkuhp-lt573c44539f5d0.

[9] Prasetyo, *Hukum Pidana*.

[10] Shinta, "Living Law Dalam RKUHP," YLBHI, 2019.

[11] Fakultas Hukum Universitas Indonesia, "Socio-Legal Studies (Hukum Dan Masyarakat)," 2021, https://law.ui.ac.id/hukum-dan-masyarakat/.

characteristics of socio-legal research methods can be identified through the following two things. First, socio-legal studies carry out textual studies, articles on laws and regulations, and policies that can be critically analyzed and explain their meaning and implications for legal subjects (including marginalized groups). In this case, it can be explained the definition contained in these articles harm or benefit certain community groups and in what way. Therefore, socio-legal studies also deal with the heart of the problem in legal studies, namely discussing the constitution to law and regulations at the lowest level, such as village regulations. Second, socio-legal studies develop various "new" methods that combine legal techniques and social science, such as qualitative socio-legal research and socio-legal ethnography—collecting legal materials through a literature study on primary and secondary legal materials with theoretical approaches: statute and conceptual.

The data collection technique in the literature study method is carried out by collecting and studying library materials (literature and regulations) and other written materials related to the discussion material to support the discussion of writing this article. Furthermore, the data processing technique has been collected using the deductive method. The deductive data processing technique discusses general things to a specific conclusion.[12]

The statute approach is carried out by examining the form of statutory regulations, examining the content material, and studying the ontological basis of law, the philosophical foundations of law, and the system of law from statutory provisions.[13] This approach is used to study the material of primary law. Meanwhile, the conceptual approach is an approach that examines and explores concepts and the experts' opinions[14] relating to the principle of legality and living law sourced from secondary legal materials in the form of books, journals, articles, research results, and so on. This article was also written using a qualitative analysis method which is a way that allows researchers to elaborate on the data obtained comprehensively, and the results of the description become more accountable.[15]

C. ANALYSIS AND DISCUSSION

1. History, Philosophy, and Procedures for Drafting the Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code

The idea of forming a National Criminal Code appeared over a half-century ago during the First National Law Seminar in Semarang in 1963. The main reason for the formulation of the Criminal Code at that time was because the Criminal Code was currently a product of the colonial government, so several articles were considered to have tendencies for the interests of the colonial government. Based on the results of this seminar, several inputs for forming an original Indonesian Criminal Code draft to expand several criminal offenses, especially those relating to state security, the economy, and morality[16] , because the Criminal Code in its development is considered incomplete or unable to accommodate various problems and

[12] Ryan Monoarfa, "Partisipasi Publik Dalam Pembentukan Peraturan Daerah," *Lex Administratum* 1, no. 2 (2013): 114–23.

[13] Peter Mahmud Marzuki, *Penelitian Hukum*, Revisi (Jakarta: Kencana Prenada Media Group, 2013), 11.

[14] Mawardi Khairi, "Partisipasi Masyarakat Dalam Upaya Penegakan Hukum Peraturan Daerahpersepektif Teori Negara Hukum," *Selisik* 3, no. 5 (2017): 79–102.

[15] Sriwidodo, "Politik Hukum Rancangan Perubahan KUHP."

[16] Achmad Hanif Imaduddin, "Sejarah Panjang Pengesahan RKUHP Lebih Dari 5 Dekade," 2022, https://nasional.tempo.co/read/1668881/sejarah-panjang-pengesahan-rkuhp-lebih-dari-5-dekade.

dimensions of the development of new forms of crime which are in line with the development of thoughts and aspirations of the community's needs.[17]

Based on the results of the First National Law Seminar in 1963, the government formed a drafting team for the RKUHP in the 1970s or 1980s. Initially, the drafting team was chaired by Prof. Soedarto. The members are Prof. Roeslan Saleh, Prof. Moeljanto, Prof. Satochid Kartanegara, Prof. Oemar Seno, and J.E. Sahetapy. At that time, the drafting team for the RKUHP agreed not to make the Criminal Code from the beginning but to re-codify it from the Dutch East Indies Criminal Code. After the RKUHP had been formulated for more than 30 years since 1963, the Head of the RKUHP drafting team at that time, Mardjono Reksodiputro, gave the complete draft of the RKUHP to the government or the Minister of Justice, Ismail Saleh at the end of 1993. In 2013, the Legislative discussed the RKUHP intensively. On June 5, 2015, President Joko Widodo issued a Presidential Letter regarding the government's readiness to discuss the RKUHP. The government agrees that the discussion period is two years or will be completed in 2017. However, the RKUHP has yet to be ratified.[18] In fact, in 2019, there were 24 draft Criminal Code Bills (RUU).[19] Finally, after a long process, the government can ratify the new Criminal Code in 2022. Suppose the activities of the First National Law Seminar in Semarang in 1963 are counted as the forerunner to formulating the RKUHP. In that case, this legal product can be said to be the most extended drafting law in the history of Indonesia, more than half a century.[20]

The philosophical basis for establishing a national criminal law to replace the Criminal Code inherited from the Dutch East Indies colonial government was to realize the NKRI's national criminal law based on Pancasila and the UUD 1945 and the general legal principles recognized by the people of nations. National criminal law must be adapted to legal politics, conditions, and the development of social, national, and state life, which aims to respect and uphold human rights based on the Belief in One Almighty God, just and civilized humanity, Indonesian unity, democracy led by wisdom, wisdom in deliberations/representation, and social justice for all Indonesian people. National criminal law material must also regulate the balance between public or state interests and individual interests, between the protection of perpetrators of criminal acts and victims of criminal acts, between elements of action and mental attitudes, between legal certainty and justice, between written law and the law that lives in society, between national values and universal values, and also between human rights and human duties.

However, even though the new Criminal Code has gone through a long process of legal drafting, starting from the planning, preparation, discussion, approval, to promulgation, which took a very long time, the enactment of the Criminal Code still has not received with full support from the public, even though according to Yasonna Laoly, Indonesian Minister of Law and Human Rights, the recently ratified Criminal Code has been discussed in a transparent, thorough and participatory manner. The government and DPR have accommodated various inputs and ideas from the public. The Criminal Code Bill has been socialized to all stakeholders in all corners of Indonesia.[21] Public participation is an important point that is regulated in the making of laws. Based on Law No. 12 of 2011 concerning the

[17] Randy Pradityo, "Menuju Pembaharuan Hukum Pidana Indonesia: Suatu Tinjauan Singkat (Towards Criminal Law Reform of Indonesia: An Overview)," *Legislasi Indonesia* 14, no. 02 (2017): 133–44.

[18] Achmad Hanif Imaduddin, "Sejarah Panjang Pengesahan RKUHP Lebih Dari 5 Dekade."

[19] Tim Publikasi Hukumonline, "Perjalanan Panjang Penyusunan RUU KUHP," 2022, https://www.hukumonline.com/berita/a/perjalanan-panjang-penyusunan-ruu-kuhp-lt63a3f0d1edb02/..

[20] Achmad Hanif Imaduddin, "Sejarah Panjang Pengesahan RKUHP Lebih Dari 5 Dekade."

[21] Humas dan Protokol BPHN, "RUU KUHP Disahkan Menjadi Undang-Undang," 2022, https://bphn.go.id/publikasi/berita/202212061210189/ruu-kuhp-disahkan-menjadi-undang-undan.

Establishment of Legislation (PPP), the public can give input orally and/or in writing. Such information can be made through public hearings, working visits, outreach, and/or seminars, workshops, and/or discussions.[22]

The obligation to involve public participation in forming regulations can be interpreted in two ways. Those are the right to be heard (right to be heard) and the right to be considered (suitable to be considered). The government and the Legislative must ensure that public participation in drafting the RKUHP is accommodated as a serious consideration so that the RKUHP gains proper legitimacy because the RKUHP will apply to all Indonesian people, so discussion of the RKUHP should be inclusive and involve a wider range of people, especially vulnerable and the most vulnerable groups in society affected by the enactment of the RKUHP.[23] Head of Public Relations, Law and Cooperation Bureau of the Ministry of Law and Human Rights, Heni Susila Wardoyo, realized that not all layers of Indonesian society could be reached, educated, and understand the changes in this design. However, the public can also take the initiative to find out information about the Criminal Code Bill, for example, through the Ministry of Law and Human Rights website, which contains the records of the discussion of this legal draft.[24]

Pros and cons in the public domain regarding the new Criminal Code must be responded to with various explanations that the public can understand by opening the most expansive possible space for discussion. Submission of consistent input from civil society regarding the revision of the new Criminal Code must be carried out so that more and more parties understand the deficiencies in the new Criminal Code so that it can be corrected immediately for the criminal law reference that is just and capable of protecting the human rights of every citizen.[25] The Indonesian Minister of Law and Human Rights also appealed to parties who disagree with the Criminal Code Bill to convey it through the correct mechanism by filing a lawsuit to the Constitutional Court.[26]

2. Living Law (Law that Lives in Society)

Each community environment has its law that grows and develops as a guideline for the behavior of the local community. This law is the living law in the usual form of beliefs, customs, and others. The living law has a role that is no less important than positive law in managing a social life.[27] The living law has developed and grown since the society was formed. The living law was born from the social life of the community, which is materially practiced continuously, and then the community obeys it based on moral duty, not because coercive by the sovereign. The sources of the living law can be derived from habits/traditions, customs, religion, and so on. So, it does not only refer to customary law. Therefore, it is wrong

[22] Adhi Wicaksono, "KUHP Dinilai Cacat Prosedur Jika Tak Libatkan Partisipasi Publik," 2022, https://www.cnnindonesia.com/nasional/20220617130035-20-810202/kuhp-dinilai-cacat-prosedur-jika-tak-libatkan-partisipasi-publik.

[23] STH (Sekolah Tinggi Hukum) Indonesia Jentera, "Pernyataan Sikap Bersama Terkait Proses Pembentukan Dan Pembahasan Rancangan Kitab Undang-Undang Hukum Pidana (RKUHP) Naskah 2019," 2019, https://www.jentera.ac.id/kabar/pernyataan-sikap-bersama-terkait-proses-pembentukan-dan-pembahasan-rancangan-kitab-undang-undang-hukum-pidana-rkuhp-naskah-2019.

[24] Kementerian Hukum dan HAM RI Kanwil Lampung, "Keterbukaan Publik Dalam Penyusunan RUU KUHP, Prioritaskan Jaminan 'Kepastian Dan Keadilan,'" 2021.

[25] Lestari Moerdijat, "Buka Ruang Diskusi Untuk Jawab Pro Kontra KUHP Di Masyarakat," 2022, https://www.mpr.go.id/berita/Buka-Ruang-Diskusi-untuk-Jawab-Pro-Kontra-KUHP-di-Masyarakat.

[26] Humas dan Protokol BPHN, "RUU KUHP Disahkan Menjadi Undang-Undang."

[27] Syofyan Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)" 13, no. 26 (2017): 201–16.

if there is a view that states that in traditional society, there are no rules of behavior called law.[28]

Living law is based on the view that when individuals form groups, they need rules of the game, guidelines, demands, and instructions for action. Humans are cultured, rational creatures, so they will continuously develop cultural institutions to prevent societal conflict.[29] Cicero said, "Where the Society Is, there is law."[30] Eugen Ehrlich first used the term "he was living law as" This view can be interpreted that living law is law centered on society, not the state. Therefore living law is not limited to customary law only but includes religious law.[31] According to him, society is the primary source of law. The law cannot be separated from society. Based on this basis, Eugen Ehrlich stated that the living law is a law that dominates life itself even though it has not yet been incorporated into a legal proposition.[32]

From this opinion, it can be seen that The living law is a set of provisions that were born simultaneously with the birth of society. The law cannot be separated from society. The community forms law and the function of law is to serve the interests of society. Therefore, state law is not independent of societal factors. State law must pay attention to the living law who has lived and grown in community life.[33] The law reflects the soul of a nation that is unique and different from others.[34]

The essence of living law is the law that adheres to or applies in society. Based on the study of legal pluralism, it is known that state law is not the only law that monopolizes people's behavior. Customary law, religious law, custom, or hybridization, among them in daily life, equally affect community relations. With its supremacy, state law is the most substantial binding power. When someone is indicated to have violated the law, the police (state representation) can quickly take action. However, state law is very rarely found in daily life except for encounters with matters of civil transactions, criminal offenses, or people administration. The laws most closely related to daily life are other laws outside the state law.[35]

3. The Implications of Implementation The Living Law (Law that Lives in Society) As a Basis for Imposing a Criminal Act on Article 2 Paragraph 1 of the Criminal Code

Living law was incorporated into formal law through Article 2 Paragraph 1 of the Criminal Code by legislators due to several reasons. One of those reasons is that living law is considered more able to guarantee the realization of a sense of justice because, in daily life, there are still some other actions that are considered by the community as criminal acts but have not been regulated in the Criminal Code. However, incorporating laws that live in society into written regulations such as the Criminal Code as the basis for imposing a sentence will undoubtedly have significant implications for the law in Indonesia. Moreover, Indonesia

[28] Ade Mahmud, "Problematika Asset Recovery Dalam Pengembalian Kerugian Negara Akibat Tindak Pidana Korupsi," *Jurnal Yudisial* 11, no. 3 (2018): 347, https://doi.org/10.29123/jy.v11i3.262.

[29] Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)."

[30] Tim Hukumonline, "91 Adagium Hukum Terkenal Yang Wajib Dipahami Anak Hukum," 2023, https://www.hukumonline.com/berita/a/adagium-hukum-lt619387d0b9e9c/?page=2.

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

[32] Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)."

[33] *Ibid.*

[34] I*bid.*

[35] Sulistyowati Irianto, "Living Law Dalam Rancangan Hukum Pidana," Accessed March 15, 2023. http://bphn.go.id/data/documents/materi_cle_8_yg_ke-2prof_dr_sulistyowati_irianto.pdf.

is a constitutional state by Article 1, paragraph 3 of the UUD 1945. The implications of regulating the living law in the Criminal Code are :

a. Arranging Living law (unwritten law) into a standard legal form implies that the state will carry out law enforcement that lives in society through the criminal justice system.

Living law in the Criminal Code means that enforcement of the offenders will be carried out through the criminal justice process, such as investigations and prosecution by the Public Prosecutor, examination by judges in court, and execution. Thus, to enforce the living law, law enforcement officials (police, prosecutors, and judges) must understand the rules that live in the community where they serve. In practice, if you look at Article 2, paragraph 1, the Criminal Code will be difficult to implement because it requires law enforcers who understand local customary law. Besides that, regarding making the indictment, the Public Prosecutor also needs clear elements to describe the crime.[36]

b. Criminalize an act that creates legal uncertainty.

The efforts of the legal drafter to include the living law in the written law were feared it could become an opportunity for arbitrariness by law enforcement officers and criminalize several actions so that they cannot guarantee the realization of a sense of legal certainty in society. As stated by Prof. Rato, Article 2 of the RKUHP which has now legally become the Criminal Code, must be rejected because the legal subject is unclear with an unlimited scope. It should also be remembered that even on the side of the road, there is a living law or people's law. The formulation of this article is like a 'hole or trap' that is ready to accept anyone who falls into it.[37] Even though Article 2 Paragraph 2 of the Criminal Code has provided limitations on "*living law*" in the form of values that are by the values of Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles that the people of nations recognize, however, this limitation cannot provide legal certainty because it is still multi-interpreted.[38]

According to Prof. Sulis, it must be clear what living law means because, in practice, it can be used to legalize the politicization of identity and is misogynistic. According to him, policymakers should not insist on including ethical, moral, or religious elements in state law because the two of them will decay if they are put together. The law must also be formulated by considering the experiences and realities of women and vulnerable groups such as indigenous peoples, low-income people, and minority groups.[39] Incorporating non-state law into the legal system as a basis for prosecution by the state can also lead to the co-optation of customary law by law enforcement officials and traditional elites. In practice, this situation can make it difficult for justice seekers because of the Indonesian criminal law system's weak legal certainty and consistent stance. On the other hand, it is feared that the writing of customary law will lead to regional regulations (Perda) and regional policies in the name of living law, providing space for abuse and persecution at the local level.[40]

c. Duality of customary law

[36] "Asas Legalitas Dikesampingkan Oleh Living Law Dalam RKUHP."

[37] Shinta, "Living Law Dalam RKUHP."

[38] Tody Sasmitha Jiwa Utama, "'Hukum Yang Hidup' Dalam Rancangan Kitab Undang-Undang Hukum Pidana (Kuhp): Antara Akomodasi Dan Negasi," *Masalah-Masalah Hukum* 49, no. 1 (2020): 14–25, https://doi.org/10.14710/mmh.49.1.2020.14-25.

[39] Shinta, "Living Law Dalam RKUHP."

[40] Utama, "'Hukum Yang Hidup' Dalam Rancangan Kitab Undang-Undang Hukum Pidana (Kuhp): Antara Akomodasi Dan Negasi."

Article 2, paragraph 3 of the Criminal Code stipulates that government regulations regulate the procedures and criteria for establishing laws that live in society. The explanation section states that the Government Regulation is a guideline for local government in selecting laws that live in a society in Regional Regulations. It shows that the purpose of regulating the living law is not to respect and recognize local mechanisms in resolving a case but to make it easier for judges to find and use customary law in deciding cases.[41] Snouck Hurgronje argues if the codification of living law (customary law) is carried out, the law will lose its adaptive and dynamic characteristics.[42] This dynamic means that living law is always responsive to various changes around it.[43]

This effort will only make customary law a dead law', which Ehrlich uses to describe a law that has lost meaning by being uprooted from its social associations. Frans and Keebet von Benda Beckmann saw that such a design had encouraged the duality of customary law in its form as a construction of the state and legal experts; and as living customary law. The state's version of customary law will certainly not erase the existence of customary law that has been in force and internalized in people's behavior. Thus, this duality potentially confuses law enforcement officers when the two versions of customary law contradict each other. Law enforcement officers must find and explore laws that live in society. On the other hand, law enforcement officers are also obligated to obey the customary law written in regional regulations. The first option requires law enforcement officers who understand the local order where customary law grows and the courage to set aside regional rules. Meanwhile, the second option ignores the local demand that applies in society.[44]

Suppose you look at the current Criminal Code. In that case, the laws in a society (living law) are not used as positive law because customary law has its authority and stands alone in handling every case among certain indigenous people.[45] Violating customary law is enough to be given moral sanctions applied in the local community and share punishment because customary law cannot be regulated collectively in a state of various customs and ethnic groups such as Indonesia.[46] In addition, customary law is not a fixed or frozen law. This law encounters with the other laws, transforming into new "hybrid" laws. Customary law has even spread far along through the migration of its indigenous people to a borderless area and to form a new community. They construct the identity of "biculturalism" in a new place. On one side, it keeps activating old customary values and laws, especially related to life cycle events such as birth, marriage, death, inheritance, and natural resource ownership relationships in the native village. On the other hand, they also adopt various values, laws, and lifestyles of a new place to live. Each society produces its type of laws. Each community always reflects local laws following the culture of their respective communities. Thus, every society always makes different legal traditions that grow and develop in the cultural life of other communities.[47] Efforts to codify customary law will reduce the customary law itself.[48]

Honoring customary law should be done by substantially glorifying indigenous people and recognizing their existence. The State of Indonesia is not the only nation, there are small

[41] *Ibid.*
[42] *Ibid.*
[43] Nurlaila Isima, "Urgensi Pengakuan Hukum Yang Hidup Pada Masyarakat Dalam Asas Legalitas Ditinjau Dari Perspektif Sosiologi Hukum," *Jurnal Interdisiplin Sosiologi Agama* 2, no. 1 (2022): 29–36.
[44] Utama, "'Hukum Yang Hidup' Dalam Rancangan Kitab Undang-Undang Hukum Pidana (Kuhp): Antara Akomodasi Dan Negasi."
[45] Rofiq Hidayat, "Polemik Living Law, Muncul Gagasan Kompilasi Hukum Pidana Adat," 2019.
[46] "Asas Legalitas Dikesampingkan Oleh Living Law Dalam RKUHP."
[47] Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)."
[48] Sulistyowati Irianto, "Living Law Dalam Rancangan Hukum Pidana."

ethnic-based nations within, and some have their religions and beliefs. Acknowledging is the most important and essential, including not forcing them to register themselves like an ordinary organization and to admit their witness in the court even though they are not sworn in because only six kinds of official religious scriptures are provided. Formalizing customary law in the Criminal Code is not a solution to humanizing indigenous people. In addition, efforts to map and identify indigenous people in Indonesia are also not an easy matter because indigenous people's identities and laws are not single and uniform. The developments and changes in customary law and indigenous people also cannot be restrained.[49] Therefore, the state should take a step against living law's existence: to provide comprehensive recognition and protection to the indigenous people rather than regulate living law into formal law such as the Criminal Code.

D. CONCLUSION

Living law is a set of rules that were born simultaneously with the birth of society (taken from the social life of the local community), which are materially practiced continuously. Then the community obeys it based on moral obligation. The implications of regulating living law into written law, such as the Criminal Code, is a basis for imposing a sentence on someone who has violated the rule that lives in society. First, the law enforcement that lives in society will be carried out by the state through the criminal justice system so that it requires law enforcement officers who understand the law that lives in the community where the apparatus is assigned because the living rule only applies in a particular region and the other areas, there is other living law. In addition, another impact is legal duality and criminalization, an act that causes legal uncertainty.

Therefore, living law does not need to be formed into a written law because the essence of living law itself is an unwritten law. It is a law that is recognized and applied in people's lives. Punishment for its violations is sufficient through moral sanction from the local community. Meanwhile, steps should be taken to protect and respect living law, protecting indigenous people's existence through formal customary law community arrangements in the written law.

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[49] *Ibid.*

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