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CONTRADICTIVE LEGAL ARRANGEMENTS REGARDING THE EXPLANATION FORMULATION OF ARTICLE 2 PARAGRAPH (1) OF LAW NUMBER 1 OF 2023 CONCERNING THE CRIMINAL CODE

Eko Ari Wibowo[1], Nafi'uddin Fauzi Mahfudh[2]
Faculty of Law, AAS Indonesia Institute of Business Technology
Jl. Hamzah Raya, Dusun III, Gumpang, Kartasura District, Sukoharjo Regency, Central Java 57169
E-mail;ekoari766@gmail.com

Abstract

The law that lives in society is basically an original legal value of the Indonesian nation, so it is fitting that the law that lives in society has a place in the criminal law system in Indonesia. The formulation policy is basically part of the law enforcement system. With the presence of the formulation of the law that lives in society in the provisions of Law Number 1 of 2023 concerning the Criminal Code, it makes law enforcement that has traditional values in future legal practices. However, with the presence of the explanation of the formulation of Article 2 Paragraph (1) it turns out that it has attracted a little attention from the author to discuss the essence of a living law. In this study the author uses a normative-juridical method, with descriptive analysis. In the results of the study, the provisions of the living law have been formulated systematically, starting from the Constitution of the Republic of Indonesia, Law Number 48 of 2009 concerning Judicial Power and Law Number 1 of 2023 concerning the Criminal Code. Then the contradiction in the existing legal regulations in the Explanation of Article 2 Paragraph (1) lies in the formulation of the sentence fragment that "Regional Regulations regulate the customary criminal acts." The author suggests that in the future the existing law in the regulation of regional regulations does not need to mention each customary crime one by one, but is sufficient to summon traditional community leaders during the trial to assess whether the actions committed by the defendant constitute a customary crime or not. However, the proof until the decision is still submitted to the judge through the criminal justice system.

Keywords: *Formulation Policy, Criminal Law, Living Law.*

Abstract

The law that lives in society is basically an original legal value of the Indonesian nation, so it is appropriate for the law that lives in society to have a place in the criminal law system in Indonesia. Policy formulation is basically part of the law enforcement system. With the presence of living legal formulations in society in the provisions of Law Number 1 of 2023

concerning the Criminal Code, law enforcement will have traditional values in future legal practices. However, with the presence of an explanation of the formulation of Article 2 Paragraph (1), it turns out that it has attracted the author's attention a little to discuss the essentials of a living law. In this research the author used a normative-juridical method, with descriptive analysis. The research results show that living legal provisions have been formulated systematically, starting from the Constitution of the Republic of Indonesia, Law Number 48 of 2009 concerning Judicial Power and Law Number 1 of 2023 concerning the Criminal Code. Then the contradiction in the existing legal regulations in the Elucidation of Article 2 Paragraph (1) lies in the sound of the formulation in the sentence that "Regional Regulations regulate customary criminal acts". The author suggests that in the future the existing law in regional regulations does not need to mention these customary offenses one by one, but it is sufficient to summon traditional community leaders during the trial to assess whether the actions committed by the defendant constitute a customary offense or not. However, the evidence and decision are still handed over to the judge through the criminal justice system.

Keywords; *Policy Formulation, Criminal law, Living Law.*

A. INTRODUCTION

1. BACKGROUND

Indonesian social history at this time still needs to be written by people, especially the social history of Indonesian law, which will explain the relationship between law and society in the development of history.[1]Even if we look at the long journey of the Indonesian nation, the country has taken a decision that Indonesia is a country based on law.

Law as a system of norms that applies to Indonesian society, is always faced with dynamic social changes along with changes in community life, both in the context of individual, social and national political life.[2]The idea that the law must be sensitive to developments in society and that the law must be adjusted or adapt to changing circumstances actually exists in the minds of the Indonesian people.[3]

As a nation based on the rule of law, everything is based on law. Throughout Indonesia's long history, even before written law existed, customary law (unwritten law) existed. Nevertheless, this customary law, or living law, remains in effect in the regions where

[1]Satjipto Rahardjo, 2009, Law and Social Change: A Theoretical Review and Experiences in Indonesia, Yogyakarta, Genta Publishing, p. 77.
[2]Ilhami Bisri, 2024, Indonesian Legal System: Principles & Implementation of Law in Indonesia, Jakarta, Raja Grafindo Persada, p. 125.
[3]Mochtar Kusumaatmadja In ? Ilhami Bisri, 2024, Loc-Cit, p. 125.

it exists. This means its application is tailored to each region and is not enforced nationally, with the assumption that each region has its own unique problem-solving procedures.

The legal regulations that exist within a national legal framework, such as in the history of criminal law enforcement using criminal law derived from the Dutch legacy, in this case the WvS "Wetboek Van Strafrecht," mean that the position of living law is not covered in its formulation. Thus, the WvS only regulates written law, or in this case, the application of the principle of formal legality. This means that the principle of formal legality is a principle that stipulates that recognized law is law that has been written down in a statute. Therefore, living legal regulations could not be accommodated at that time.

However, with the issuance of Law Number 1 of 2023 concerning the Criminal Code, a regulation emerged in its formulation, Article 2 Paragraph (1), which includes living law as part of the formulation of national criminal law, which is commonly referred to as the principle of material legality. This principle has provided room for maneuver in the enforcement of national criminal law. Where this principle is an embodiment of living law in society, especially in the territory of Indonesia.

When discussing customary law in Indonesia, it is generally accepted that customary law is a priority in legal proceedings. This is in line with Indonesian legal culture and tradition, which emphasizes resolving disputes as much as possible, unless the consequences are fatal, or in other words, if the loss incurred by an act is small, the resolution focuses more on a customary-oriented resolution that results in reconciliation between the victim and the perpetrator. Furthermore, an act that is not included in written regulations but is recognized by a customary community can be enforced in that community. Conversely, if an act is not recognized in written law but is not considered a reprehensible act within the community, the community will not insist on criminal sanctions.

Customary law is a legal norm whose existence is still recognized by the community where it exists, even if it is unwritten. According to Soerjono Soekanto, if these customs are investigated, they will reveal sanctioned regulations, namely rules that, if violated, have consequences, and those who violate them can be prosecuted and then punished.[4]This complex of customs is mostly not written down, not codified and is of a coercive nature and has sanctions (hence the law), so it has legal consequences, this complex is called customary law.[5]Customary law in its implementation in a place cannot be separated from the indigenous

[4]Soekanto, 1981, Reviewing Indonesian Customary Law, Jakarta, Rajawali, p. 18.
[5]Soekanto, 1981, Loc-Cit, p. 18.

community, meaning that customary law without the existence of indigenous communities is difficult to implement and even cannot be implemented, because the implementation of customary law can only occur when there is a group of people who recognize the existence of customary law, so that its implementation can be carried out by the community where the law applies. Customary law communities are also called "traditional communities" or the indigenous people, while in everyday life they are more often and popularly referred to as "indigenous communities".[6]According to Soetandyo Wignjosoebroto, in pre-modern society, when life was still on a local, homogeneous, and exclusive scale and importance, which is why it is more appropriate to be termed 'community' rather than society or 'political state', what is called 'law' is generally unwritten and exists as general principles in the memories of community members, maintained from generation to generation as a tradition believed to originate from ancestors. This is what is called tradition or moral life of a community, which in the study of legal sociology is often also called folk law and in legal science is called customary law or customary law.[7]

Developing laws that live within Indonesian society (customary law) is actually a necessity, because the customary laws that the Indonesian people possess are actually values that originate from Indonesian society itself.[8]Building law within an Indonesian context is fundamentally not an easy task. Considering the long journey of the Indonesian Criminal Code Bill from its initial drafting to its enactment, it has taken approximately 65 years. Furthermore, considering the early years of Indonesian independence, it took approximately 78 years for the Indonesian people to have their own Criminal Code. Therefore, the emergence of a legal formulation policy that is alive within society, as outlined in the provisions of the National Criminal Code, is something we should all be grateful for. This is because, in its drafting, the National Criminal Code has been adapted to the conditions of the Indonesian nation, which has recognized the existence of living law in society, or in this case, customary law.

The law that lives in society based on the provisions of the formulation of Article 2 Paragraph (1) in Law Number 1 of 2023 concerning the Criminal Code for the author does not cause legal

[6]Laksanto Utomo, 2016, Customary Law, Jakarta, Raja Grafindo Persada, p. 1.
[7]Soetandyo Wignjosoebroto, 2013, Law in Society, Yogyakarta, Graha Ilmu, pp. 1-2.
[8]Ahmad Irzal Fardiansyah, Sigit Suseno, et al., 2019, Recognition of Customary Criminal Law in Indonesia, Jurnal Bina Mulia Hukum, Volume 4, Number 1, September 2019, p. 133, Inhttps://jurnal.fh.unpad.ac.id/index.php/jbmh/article/view/69/24, Accessed on Monday, November 11, 2024, at 10:22 WIB.

problems. However, after examining the contents of the explanation of Article 2 Paragraph (1) which reads as follows;

Explanation of Article 2 Paragraph (1);

"What is meant by 'living law in society' is customary law that determines that someone who commits a certain act is worthy of punishment. Living law in society in this article relates to unwritten law that still applies and develops in the life of society in Indonesia. To strengthen the implementation of living law in society, Regional Regulations regulate these customary crimes."

If we examine together the results of the explanation of Article 2 Paragraph (1) above, especially the sentence in bold, that in order to strengthen the implementation of the law that lives in the community, regional regulations regulate customary criminal acts. It is as if the explanation of Article 2 Paragraph (1) above shows another form of the existence of customary law that is not codified into a norm that seems to have to be conceptualized in a legal codification or a norm written in statutory regulations. Thus, a very wild interpretation will occur regarding the explanation of Article 2 Paragraph (1) which means that existing provisions seem to have to be written in a law. This is certainly interesting to discuss and packaged in an article. So in writing this journal, the author intends to write about the CONTRADICTIVE LEGAL REGULATIONS THAT ARE IN USE REGARDING THE EXPLANATION FORMULATION OF ARTICLE 2 PARAGRAPH (1) OF LAW NUMBER 1 OF 2023 CONCERNING THE CRIMINAL CODE.

2. FORMULATION OF THE PROBLEM

a. How is the legal formulation policy that is alive in the legislation in Indonesia?
b. How is the legal contradiction that exists in society in the formulation of the explanation of Article 2 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code?

B. RESEARCH METHODS

The research method in this study is a normative-juridical research method. Normative legal research can also be described as doctrinal research or, in terms of legal dogmatics. In normative-juridical research, data sources are taken from reference books, journals, and other legal writings that are bibliographic in nature. Furthermore, the juridical approach emphasizes the aspects of legislation. Therefore, normative-juridical research will include an analysis of legal theory juxtaposed with legal norms. The analysis in this study is descriptive. In descriptive analysis, the analysis in this study takes the form of a description of existing theories and legislation.

C. RESULTS AND DISCUSSION

1. LEGAL FORMULATION POLICIES THAT ARE LIVING IN LEGISLATION IN INDONESIA

Formulation policy is essentially a component of the law enforcement system. Formulation policy is a policy oriented toward the development of legal products. In criminal law, formulation policy is similarly an effort to recognize an act that was previously not a criminal act as a criminal act and/or a process of recognizing norms through legal codification. As stated by Barda Nawawi Arief, the legislative/formulation/making of laws and regulations is essentially a process of law enforcement "in abstracto."[9] This legislative/formulation process is a very strategic initial stage of the "in concreto" law enforcement process.[10]At the level of the national legal system in Indonesia, the contents of living law have been formulated or in this case the position of customary law has essentially been recognized in the legal formulation in Indonesia, which includes the following;

a. The law that lives in the formulation of the 1945 Constitution of the Republic of Indonesia.

The Constitution of the Republic of Indonesia is essentially a fundamental rule for the laws and regulations under it. This means that in the application and/or preparation of laws and regulations, the rules under the Constitution should not contradict each other. This means that the implementation of laws and regulations must be systematic, so that the implementation of a regulation can be harmonious. The formulation of law that lives in society or in this case is also called customary law in the 1945 Constitution has been formulated in the provisions of Article 18B Paragraph (2) as follows;

Article 18B Paragraph (2);

"The state recognizes and respects customary law communities and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia, as regulated by law."

The formulation of Article 18B Paragraph (2) has an important meaning regarding the existence of customary law in the national legal system. With the formulation of Article 18B Paragraph (2) it has indirectly opened up the opportunity for a

[9]Barda Nawawi Arief in Ridwan, 2012, Criminal Law Formulation Policy in Combating Corruption Crimes, Jurnal Law Reform, Vol. 8 No. 1 of 2012, p. 81, inhttps://ejournal.undip.ac.id/index.php/lawreform/article/view/12418, Accessed on Wednesday, November 13, 2024, at 9:12 WIB.

[10]Ridwan, 2012, Loc-Cit, p. 81.

statutory regulation under the basic law to be formulated and/or the existence of customary law can be applied in national law enforcement. Thus, it is appropriate that customary law is formulated in the provisions of the principle of material legality as regulated in Article 2 Paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code.

b. The law that lives in the formulation of Law Number 48 of 2009 concerning Judicial Power.

The formulation of living law in the formulation of Law Number 48 of 2009 concerning Judicial Power has provided space for judges in deciding cases to explore living law. The regulations regarding this living law can be seen in the provisions of the formulation in Article 5 Paragraph (1) as follows;

Article 5 Paragraph (1);

"Judges and constitutional judges are obliged to explore, follow and understand the legal values and sense of justice that exist in society."

The provisions of the formulation of Article 5 Paragraph (1) provide legal implications that in law enforcement a judge must not allow legal values and the sense of justice that live in society to be ignored. This means that in law enforcement, legal values and the sense of justice that live in society can be conceptualized as a norm that lives in society. In the explanation of the formulation of Article 5 Paragraph (1) in Law Number 48 of 2009 concerning Judicial Power, it can be seen as follows;

Explanation of Article 5 Paragraph (1);

"This provision is intended to ensure that the decisions of judges and constitutional judges are in accordance with the law and the public's sense of justice."

Law enforcement in Indonesia must be based on the law, meaning that every legal decision must be aligned with the public's sense of legal certainty and sense of justice. This sense of justice in society will ultimately give rise to a meaning that identifies law enforcement with beneficial value.

c. The law that lives in the formulation of Law Number 1 of 2023 concerning the Criminal Code.

The law that lives in criminal law is called the principle of material legality, the principle of material legality is a principle that contains provisions of living law. The principle of material legality can be interpreted as a principle of balance over the application of the principle of formal legality, where the principle of legality is a principle in criminal law that explains that "no act can be subject to criminal sanctions and/or actions, except by the power of existing laws and regulations before the act was

committed". The principle of formal legality has been regulated in the provisions of the formulation of Article 1 Paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code. The law that lives in the formulation of Law Number 1 of 2023 concerning the Criminal Code has been regulated in the provisions of Article 2 Paragraph (1) as follows;

Article 2 Paragraph (1);

"The provisions as referred to in Article 1 Paragraph (1) do not reduce the validity of existing laws in society which determine that a person deserves to be punished even though the act is not regulated in this Law."

The formulation of Article 2 Paragraph (1) above has shown that a person deserves to be punished even though in this case (the Criminal Code) does not regulate such actions as long as the action is considered a deviant act according to the law that exists in society. The living law here can be conceptualized as a law that exists in society or in other words as a concept of customary law. According to Soepomo, an expert in Indonesian customary law after Van Vollenhoven and Ter Haar, stated that "custom is deeply rooted in traditional culture, customary law is a living law because it embodies the true feeling of law. In accordance with its nature, customary law continues to grow and develop like life itself."[11]

2. THE CONTRADICTIONAL LOCATION OF LIVING LAW IN SOCIETY IN THE EXPLANATION FORMULATION OF ARTICLE 2 PARAGRAPH (1) OF LAW NUMBER 1 OF 2023 CONCERNING THE CRIMINAL CODE

Living law is essentially an unwritten legal norm, yet its existence can be felt in society. Discussing living law in society provides a very broad perspective, because living law in society varies across regions in Indonesia. Even when we examine the implementation of living law in society, it is clear that living law cannot be enforced nationally; it only applies within that region. In a sense, living law in society can also be referred to as customary law. Even in criminal law, living law can be referred to as customary criminal law. Customary criminal law is a legal system implemented

[11]Soepomo in Luthfie Sulistiawan, 2023, The Influence of Legalization of Living Law in Society in the Criminal Code on the Geopolitical Stability of Indonesia, Journal of the Indonesian National Resilience Institute Volume 11 No. 3, p. 180, Inhttps://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://jurnal.lemhannas.go.id/index.php/jkl/article/download/477/311/&ved=2ahUKEwjvh6ST4-mJAxWdyjgGHcCiFlQQFnoECBwQAQ&usg=AOvVaw2ydCB8RfLbg7Guvi2gPPLO, Accessed on Wednesday, November 20, 2024, at 9:03 WIB.

within a society to regulate behavior deemed to violate customary norms.[12]

Customary law is a translation of the Dutch word adat recht.[13]This nomenclature was first introduced scientifically by Prof. Dr. C. Snouck Hurgronje, in his book De Etjehers, who mentioned the term customary law as adat recht, namely to name a system of social control that exists in Indonesian society.[14]In principle, Lilik Mulyadi stated that the terminology of customary law in Indonesia is the same as customary crime or criminal customary law, the origins of which actually come from customary law which consists of customary criminal law and customary civil law.[15]**C. Van Vollenhoven**states that what is called customary law (adatrecht) is the adat samenstel van voor inlanders en vreende oosterlingen geldende gedragregels, die eenerzijds sanctie hebben (customary law is the whole set of rules of conduct that apply to native Indonesians that have coercive measures and are not codified).[16]

According to Soekanto, in his book Reviewing Indonesian Customary Law, he states that, "These complexes are mostly not written down (written down), not codified (ongecodificeerd), and are of a coercive nature (dwang), have sanctions (therefore law) which have legal consequences (rechtsgevolg), this complex is called customary law (adatrecht)".[17]According to Yulies Tiena Masriani, customary law is the totality of positive behavioral rules which on the one hand have sanctions and on the other hand are not codified.[18]

According to MM Djojodigoeno in his book, the principles of customary law, defines customary law as law that does not

[12]Tri Astuti Handayani and Andrianto Prabowo, 2024, Analysis of Customary Criminal Law in National Criminal Law, Ius Publicum Law Journal, Vol. 5 No. 1 April 2024, p. 91, Inhttps://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://journal.umelmandiri.ac.id/ojs/index.php/jiu/article/download/95/78&ved=2ahUKEwjglaijndOJAxXjUGwGHcWWL7UQFnoECAoQAQ&usg=AOvVaw2ydHZVpn161RqQA9hl8rYJ, Accessed on Monday, November 11, 2024, at 9:51 WIB.
[13]A. Suriyaman Mustari Pide, 2017, Customary Law Past, Present, and Future, Jakarta, Kencana, p. 1.
[14]A. Suriyaman Mustari Pide, 2017, Lo-Cit, p. 1.
[15]Lilik Mulyadi in Hadibah Z. Wadjo, 2022, Application of Customary Law in the Settlement of Children's Cases, Indonesian Legal Development Journal, Volume 5 Number 1 of 2022, p. 4, Inhttps://ejournal2.undip.ac.id/index.php/jphi/article/view/15853/8543, Accessed on Saturday, November 2, 2024, at 11:26 WIB.
[16], C. Van Vollenhoven in Mahdi Syahbandir, 2010, Position of Customary Law in the Legal System, Kanun No. 50 April 2010 Edition, p. 3, Inhttps://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://jurnal.usk.ac.id/kanun/article/download/6285/5176&ved=2ahUKEwjB4rvm1byJAxUuTmwGHXNpI_EQFnoECA8QAQ&usg=AOvVaw0gF6FVyeGyAx1TIaakACqH, Accessed on Saturday, 2 November 2024, at 10:22 WIB.
[17]Soekanto in Hendra Nurtjahjo and Fokky Fuad, 2010, Legal Standing of Customary Law Community Units in Litigation at the Constitutional Court, Jakarta, Salemba Humanika, p. 11.
[18]Yulies Tiena Masriani, 2017, Introduction to Indonesian Law, Jakarta, Sinar Grafika, p. 134.

originate from regulations.[19]According to Supomo, customary law is defined as law that is not written in legislative regulations (unstatutory law) which includes living regulations which, although not stipulated by the authorities, are nevertheless obeyed and supported by the people based on the belief that these regulations have legal force.[20]He further said that in the new legal system, it would be good to avoid misunderstandings, the term customary law is used as a synonym for unwritten law in legislative regulations (unstatutory law), laws that exist as conventions in state legal bodies (Parliament, provincial councils, etc.), laws that arise from judges' decisions (judge made law), laws that exist as customary regulations that are maintained in social life both in cities and in villages (customary law), all of these are customs or unwritten laws referred to in Article 32 of the 1950 UUDS.[21]According to Zainal Asikin, although customary law exists in traditional societies, what is amazing is that the development of customary law in Indonesia is so rapid that it is even so strongly embraced and obeyed by society.[22]

The state's recognition of living law or customary law in Indonesia is stated in the provisions of Article 18B Paragraph (2) which reads;[23]

Article 18B Paragraph (2);

"The state recognizes and respects 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, as regulated by law."

The state's recognition of the existence of living law or existing law has basically been formulated in the provisions of Article 18B Paragraph (2). Thus, it is fitting that living law or in this case part of customary law should also be formulated in the provisions of criminal law in Indonesia, the formulation of which has been included in the principle of material legality which is stated in the provisions of Article 2 Paragraph (1) in the provisions of Law Number 1 of 2023 concerning the Indonesian Criminal Code, which states that;

[19]MM Djojodigoeno In Umar Said Sugiarto, 2017, Introduction to Indonesian Law, Jakarta, Sinar Grafika, p. 116.
[20]Supomo in Soerojo Wigjodipoero, 1987, Introduction and Principles of Customary Law, Inti Idayu Press, Jakarta, p. 14.
[21]Supomo in Soerojo Wigjodipoero, 1987, Loc-Cit, p. 14.
[22]Zainal Asikin, 2012, Introduction to Indonesian Legal System, Jakarta, Raja Grafindo Persada, p. 167.
[23]See the provisions of Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

Article 2 Paragraph (1);

"The provisions as regulated in Article 1 Paragraph (1) do not reduce the validity of the law that exists in society which determines that a person is worthy of being punished even though the act is not regulated in this Law."

In the provisions of Article 2 Paragraph (1) above, it is a positive part of the legal policy that accommodates the existence of customary law. This means that the mention is not oriented towards each type of customary criminal act, but rather emphasizes the emphasis on the existence of customary law which is general in nature. This means that this customary law is comprehensive in nature in the national scope even though the application of the type of custom depends on the customary violation where the act was committed. According to Sukanto, customary law is defined as a complex of customs which are mostly not written down, not codified and are coercive in nature, have sanctions, so they have legal consequences.[24]Even though customary law (the type of customary act) is not written down, it still has legal sanctions if the customary law is violated. So far, the formulation of Article 2 Paragraph (1) has not had any legal problems.

However, if we look at the formulation of the Explanation of Article 2 Paragraph (1) in the provisions of Law Number 1 of 2023 concerning the Criminal Code, there is an interpretation from the author which is contradictory as follows:

Explanation of Article 2 Paragraph (1);

"What is meant by 'living law in society' is customary law that determines that someone who commits a certain act is worthy of punishment. Living law in society in this Article relates to unwritten law that still applies and develops in Indonesian society. To strengthen the validity of living law in society, Regional Regulations regulate these customary crimes.

This contradiction is evident in the sentence that states that Regional Regulations regulate customary crimes. This sentence can be interpreted as meaning that customary law in each region will be regulated specifically. This specificity, in this case, leads to the formulation of regulations regarding the types of customary crimes/customary offenses. This will then be formalized in a regional regulation. Thus, these customary offenses will take on a new form or existence through their written existence in the regional regulation. This indirectly diminishes the dignity of

[24]Sukanto in Soerojo Wigjodipoero, 1987, Op-Cit, p. 14.

customary law, which is essentially an unwritten provision or type of customary offense recognized within the community, and if violated, will have legal consequences in the form of specific customary sanctions.

Then the author's suggestion regarding living law/customary law related to customary crime/customary offenses, there is no need to include it in regional regulations regarding various types of criminal acts in a region/customary offenses, because customary law is a legal regulation whose existence is indeed unwritten but recognized by the local community. This means that the sound of the customary law is enough to be recognized in the National Criminal Code until the regional regulations that recognize the existence of the customary law but do not need to be written down one by one the types of customary criminal acts. From the other side, a question will arise then how can someone know that what he violates is part of customary law while the act is not written in the legislation? To answer it is easy, namely by presenting a number of community leaders/customary leaders in a place where the living law/customary law applies, as customary leaders to assess whether an act is part of a violation of custom/customary law/customary offense in a certain place or not. If so, then the act deserves criminal sanctions as the custom determines the sanctions. However, if the act is not part of a customary crime as is the case in that area, then the perpetrator or person suspected of committing the customary act must be released based on the consideration of local customary leaders who state that the act is not part of a customary crime, so that the act will not be subject to criminal sanctions. Therefore, the person must be released.

The author's opinion above certainly raises the question, how does the criminal justice system/law enforcement function in court? In this case, when a customary violation/customary criminal act/customary offense occurs, the criminal justice system continues to operate, only in the law enforcement process, it must involve customary community leaders as part of customary law enforcement whose nature is to provide an assessment of an act that can explain that an act is a form of customary criminal violation, so that the judge can dig for further evidence to clarify a case, especially in the implementation of the criminal justice system involving community leaders/customary figures. After the evidence has been collected, the judge can then decide the case clearly for the sake of creating justice in society.

D. CLOSING

1. Conclusion.

a. Legal Formulation Policies That Live in Legislation in Indonesia

The formulation policy is essentially part of the national law enforcement system. The formulation policy can be said to be a process of legal codification in the national legal system. The formulation policy related to the living law in the legislation in Indonesia has been formulated in several provisions of legislation, which include the following; that the living law formulation policy is in the 1945 Constitution of the Republic of Indonesia, specifically in the provisions of Article 18B Paragraph (2). Then on the other hand, the living law formulation policy is also contained in Law Number 48 of 2009 concerning Judicial Power, specifically in the provisions of Article 5 Paragraph (1). Then most recently, the living law formulation policy has been accommodated in Law Number 1 of 2023 concerning the Criminal Code, specifically the provisions of Article 2 Paragraph (1). By formulating the living law in society in every Law, it is hoped that in future legal practice it can provide a greater sense of justice for justice seekers in the criminal justice system in Indonesia.

b. The Contradictory Position of Living Law in Society in the Formulation of the Explanation of Article 2 Paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code

Article 2 Paragraph (1) in the formulation provisions of Law Number 1 of 2023 concerning the Criminal Code basically does not have any legal problems. However, with the emergence of the explanation of the formulation of Article 2 Paragraph (1), the living law has a technical obstacle in determining a customary crime that must be included in the provisions of the Regional Regulation where the living law in this case the customary crime is located. So that the spirit of the living law in this case if it is oriented towards customary crimes, the value of the spirit of customary law will become unclear. Because living law arises in society and blends with society, so it will be more effective if the one who determines whether an act is a customary crime or not is a local customary community leader.

BIBLIOGRAPHY

A. Suriyaman Mustari Pide, 2017, Hukum Adat Dahulu, Kini, Dan Akan Datang, Jakarta, Kencana.

Hendra Nurtjahjo Dan Fokky Fuad, 2010, Legal Standing Kesatuan Mayarakat Hukum Adat Dalam Beperkara Di Mahkamah Konstitusi, Jakarta, Salemba Humanika.

Ilhami Bisri, 2024, Sistem Hukum Indonesia Prinsip-Prinsip & Ilmplementasi Hukum Di Indonesia, Jakarta, Raja Grafindo Persada.

Laksanto Utomo, 2016, Hukum Adat, Jakarta, Raja Grafindo Persada.

Satjipto Rahardjo, 2009, Hukum Dan Perubahan Sosial Suatu Tinjauan Teoritis Serta Pengalaman-pengalaman Di Indonesia, Yogyakarta, Genta Publishing.

Soekanto, 1981, Meninjau Hukum Adat Indonesia, Jakarta, Rajawali.

Soerojo Wigjodipoero, 1987, Pengantar Dan Asas-asas Hukum Adat, Inti Idayu Press, Jakarta.

Soetandyo Wignjosoebroto, 2013, Hukum Dalam Masyarakat, Yogyakarta, Graha Ilmu.

Umar Said Sugiarto, 2017, Pengantar Hukum Indonesia, Jakarta, Sinar Grafika.

Yulies Tiena Masriani, 2017, Pengantar Hukum Indonesia, Jakarta, Sinar Grafika.

Zainal Asikin, 2012, Pengantar Tata Hukum Indonesia, Jakarta, Raja Grafindo Persada.

Ahmad Irzal Fardiansyah, Sigit Suseno, Dkk, 2019, Pengakuan Terhadap Hukum Pidana Adat Di Indonesia, Jurnal Bina Mulia Hukum, Volume 4, Nomor 1, September 2019, Dalam https://jurnal.fh.unpad.ac.id/index.php/jbmh/article/view/69/24 , Diakses Pada Hari Senin, 11 November 2024, Pukul 10;22 Wib.

Hadibah Z. Wadjo, 2022, Penerapan Hukum Adat Dalam Penyelesaian Perkara Anak, Jurnal Pembangunana Hukum Indonesia, Volume 5 Nomor 1 Tahun 2022, Dalam https://ejournal2.undip.ac.id/index.php/jphi/article/view/15853/8543 , Diakses Pada Hari Sabtu, 2 November 2024, Pukul 11;26 Wib.

Luthfie Sulistiawan, 2023, Pengaruh Legalisasi Hukum Yang Hidup Dalam Masyarakat Pada UU KUHP Terhadap Stabilitas Geopolitik Indonesia, Jurnal Lemhannas RI Volume 11 No. 3, Dalam https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://jurnal.lemhannas.go.id/index.php/jkl/article/download/477/311/&ved=2ahUKEwjvh6ST4-mJAxWdyjgGHcCiFlQQFnoECBwQAQ&usg=AOvVaw2ydCB8RfLbg7Guvi2gPPLO , Diakses Pada Hari Rabu, 20 November 2024, Pukul 9;03 Wib.

Mahdi Syahbandir, 2010, Kedudukan Hukum Adat Dalam Sistem Hukum, Kanun No. 50 Edisi April 2010, Dalam https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://jurnal.usk.ac.id/kanun/article/download/6285/5176&ved=2ahUKEwjB4rvm1byJAxUuTmwGHXNpI_EQF

noECA8QAQ&usg=AOvVaw0gF6FVyeGyAx1TIaakACqH , Diakses Pada Hari Sabtu, 2 Vovember 2024, Pukul 10;22 Wib.

Ridwan, 2012, Kebijakan Formulasi Hukum Pidana Dalam Penanggulangan Tindak Pidana Korupsi, Jurnal Law Reform, Vo. 8 No. 1 Tahun 2012, Dalam https://ejournal.undip.ac.id/index.php/lawreform/article/view/12418 , Diakses Pada Haru Rabu, 13 November 2024, Pukul 9;12 Wib.

Tri Astuti Handayani Dan Andrianto Prabowo, 2024, Analisis Hukum Pidana Adat Dalam Hukum Pidana Nasional, Jurnal Hukum Ius Publicum, Vol. 5 No, 1 April 2024, Dalam https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://journal.umelmandiri.ac.id/ojs/index.php/jiu/article/download/95/78&ved=2ahUKEwjglaijndOJAxXjUGwGHcWWL7UQFnoECAoQAQ&usg=AOvVaw2ydHZVpn161RqQA9hl8rYJ , Diakses Pada Hari Senin, 11 November 2024, Pukul 9;51 Wib.

Sumber Undang-undang;

Undang-undang Dasar Negara Republik Indonesia Tahun 1945.

Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana