



Legal Certainty in the Integration of the New Criminal Code and Customary Criminal Law

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ABSTRACT

This research is motivated by Article 2 paragraph (1) of the new Criminal Code which explains that the law that develops in society is an additional provision after the Criminal Code. This has caused a lot of debate and controversy because the new Criminal Code and customary criminal law have different characteristics. The formulation of the problem in this study is the relevance of values between the new Criminal Code and customary criminal law and how legal certainty is in the effort to integrate the two laws. This research uses normative juridical and legal approaches. The research was carried out by studying the literature on laws and regulations as primary legal materials equipped with journals and books as secondary legal materials. This study produces a concrete comparison between the values contained in the new Criminal Code and the values in customary criminal law which are contradictory. Another result of this study is the explanation of legal certainty in the integration of the new Criminal Code and customary criminal law where legal certainty is not found in the unification effort. With these problems, mediation between the community and law enforcement has emerged to create national unity and form rules based on the culture of the Indonesian people.

Keywords: Legal Certainty, Integration, New Criminal Code, Customary Criminal Law.

INTRODUCTION

Integration is an effort to blend several things to become a whole and binding unit. Integration is indispensable to find a middle ground between two or more things that are different from each other. In law, integration has an important role in uniting and connecting various elements in the legal system that lives and develops in society. Some communities have their habits which are then used as unwritten rules that bind the community from generation to generation. These communities are often known as indigenous peoples and the rules they make are called “Customary Law”. The term customary law is a translation of a Netherlands term, namely “Adatrecht”. Customary law was invented because of the political and legal pressure that wanted to force the people of Indonesia to submit to Western law at



that time.¹ On the other hand, Indonesia is a country with the motto “*Bhinneka Tunggal Ika*” which means different but still one. This is due to the very diverse culture of Indonesia, of course, this has implications for the rules they use in their daily lives. The rules they make sometimes discuss private (civil), criminal (criminal) law, or other things related to their lives. It is impossible if the delicacies that they have made and adhered to so far have been abolished simply with the birth of a national regulation, namely the Criminal Code. In its history, indigenous peoples in Indonesia existed long before the Netherlands colonized Indonesia. According to the adagio from Marcus Tullius Cicero who said “*Ubi Societas Ibi Ius*” means that the Indigenous people of Indonesia at that time already had their own legal rules because where there was a community there must be a law.

At the beginning of the 20th century, the government of the Netherlands East Indies felt the need for rules regulating criminal acts, so in 1918 the first Criminal Code in Indonesia was born which underwent several revisions and improvements over time to adjust to the life of the people of Indonesia. The Criminal Code is a law and regulation that regulates criminal acts and also sanctions against criminal offenders. The main purpose of the Criminal Code is to protect the public from criminal acts and maintain security and public order in the community. However, the Criminal Code has experienced several challenges and controversies. Some people consider that the Criminal Code still does not provide adequate protection for human rights, especially those of indigenous peoples. They also consider that the articles in the Criminal Code are still too broad to create cavities that are vulnerable to abuse by rulers and law enforcement officials.²

Since Indonesia's independence in 1945, the reform of the criminal law has continued to be pursued with the encouragement of a strong sense of nationalism to have a criminal law that is in harmony with Pancasila and the 1945 Constitution. The first step is to replace the Criminal Code inherited by the Netherlands with a new law or codification of the law as a whole with an ad hoc initiative or the establishment of a special criminal law outside the Criminal Code. The government's efforts in designing the codification of criminal law, which

¹ dkk Soetoto, Owan Hermansyah., Erwin., *BUKU AJAR HUKUM ADAT* (Malang: Madza Media, 2021).

² Parningotan Malau, “Review of the New Criminal Code (KUHP),” *AL-MANHAJ: Journal of Islamic Law and Social Institutions* 5, no. 1 (2023): 837–44, <https://doi.org/10.37680/almanhaj.v5i1.2815>.



over time underwent many revisions, eventually resulted in a new draft of the Criminal Code which was decided to become law, namely Law No. 1 of 2023 concerning the “Criminal Code” or better known as the new Criminal Code. In the formation of new laws and regulations, it is inseparable from several elements of requirements that must be followed, namely having to consider philosophical, normative, and sociological (practical) aspects. Philosophical demands the conformity of the rule of law with the philosophy of the Indonesian nation. In sociology, adaptation to the circumstances and situations of society is very important. Meanwhile, from a normative perspective, the reform of criminal law must be in line with the fundamental principles of criminal law. Before colonialism existed, Indonesia already had its legal system, namely customary law. Therefore, in the reform of criminal law, the existence of criminal customs cannot be ignored but must be considered because only the characteristics of customary law are compatible with the philosophy and culture of the Indonesian nation.³

Through Law, Number 1 of 2023 concerning the Criminal Code, the role of indigenous peoples and the application of the law are again strengthened by the state. Article 2 of the Criminal Code states, "The provisions as referred to in Article 1 paragraph (1) do not reduce the applicability of the law that lives in a society that determines that a person should be punished even if the act is not regulated in this Law". In this case, living law is interpreted as customary law. This recognition is important because some cases that have been accommodated in national law derived from customary law are only civil matters, not criminal ones.⁴ On the other hand, the article is considered an article that annuls the monopolistic characteristics of the principle of legality and provides space for the enactment of laws that live in the criminal law system in Indonesia. The law that lives and develops always changes over time according to the development of society. Of course, this is different

³ Nurjanah Lahangatubun Rama Tene, Damianus, Andi Mulyono, “Implications of the Application of Customary Criminal Law in the Settlement of Criminal Acts after the Reform of Indonesia’s National Criminal Law,” *Manokwari College of Law* 22, no. 2 (2023): 29–41.

⁴ and Rengat Indragiri Hulu Adib, Mochamad, Zain Hakim at the Court, Rengat State, Class II, Jl Raya Belilas, Pamatang Reba, “THE ROLE OF CUSTOMARY VILLAGE IN FORMULATING AND IMPLEMENTING CRIMINAL PROVISIONS DERIVED FROM THE LIVING LAW OF THE COMMUNITY AS STIPULATED IN THE NEW CRIMINAL LAW CODE” 12 (2023).



from the national criminal law which tends to be based on legal certainty based on a rational and generalist perspective.⁵

In a previous study by Yoserwan (2023) on the existence of customary criminal law in national criminal law after the ratification of the new Criminal Code, it was shown that customary criminal law is constitutionally recognized in laws and regulations. However, there are many unclear regulations regarding customary criminal law regulations in the new Criminal Code. Customary criminal law is only seen as the second source of law after the new Criminal Code with the promulgation of Article 2 paragraph (1) of the new Criminal Code which creates a contradiction between recognition and restriction. In essence, customary law as a living and applicable norm binds its society with recognition or without recognition. Customary law is still often considered a victim of subordination and marginalization of national law. That ambiguity is the subject of discussion in this study. So it can be concluded that there are two points of problem formulation, namely

1. What is the relevance between the values of customary criminal law and the new Criminal Code?
2. How does the principle of legal certainty apply in the integration between the two laws?

The purpose of this study is to provide an overview of the legal perspective on the conformity between the values of customary criminal law and the new Criminal Code and also to provide an overview from the point of view of the principle of legal certainty towards the New Criminal Code which contains the Customary Criminal Law in it.

METHOD

The writing in this study uses a normative juridical method with the problem of vague norms in the subject matter of discussion and by taking a legal approach. The research was carried out using literature studies through an objective elaboration of primary legal materials, namely laws and regulations, and a review of secondary legal materials from journals, books, and literature that are relevant to the subject of discussion. This research analysis was carried

⁵ Anugrah. t.t. Sahtia Magala, "Legal Accommodation Living in the New Criminal Code Indonesia According to the Perspective of Progressive Law," n.d., <https://doi.org/10.56444/sh>.



out qualitatively to elaborate a legal perspective in-depth and comprehensively on the principle of legal certainty in the new Criminal Code.⁶

RESULTS AND DISCUSSION

Indonesia consists of thousands of tribes and cultures that are unique to each region it occupies. Customary criminal law provides dispute resolution to Indigenous peoples by using the rules in each respective region. Criminal law reform in Indonesia has been Indonesia's ideal so far. This reform not only includes the development of legal institutions but also includes aspects of legal substance and culture derived from cultural values that affect the criminal legal system.⁷

During the reform period, the existence of customary criminal law was manifested in several laws and regulations, namely Law Number 21 of 2001 concerning Special Autonomy for Papua Province, Law Number 48 of 2009 concerning Judicial Power, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System and Law Number 6 of 2014 concerning Villages. The recognition is carried out sectorally, namely in the jurisprudence regulated regarding civil law which is used as a basis for deciding criminal cases. However, it is felt that this recognition is still insufficient and is considered contrary to the principle of legality in the old Criminal Code, which does not require the existence of customary law.⁸

The discussion explained the reasons and purposes of recognition of the law that lives in society as a reference for determining whether a person can be punished. Furthermore, the discussion related to the formulation of the problem regarding the main problem of this research.

⁶ Burhan. Ashshofa, *Metode Penelitian Hukum*, Ketujuh (Jakarta: Rineka Cipta, 2013).

⁷ Ermania Widjajanti Hisroh Komeni, Wirdi, "Inaccuracies in the Application of Customary Criminal Law in Article 2 of the New Criminal Code: A Perspective on the Theory of Legal Certainty," *Trisakti University* 4, no. 3 (2024): 1051–59.

⁸ Adib, Mochamad, Zain Hakim at the Court, Rengat State, Class II, Jl Raya Belilas, Pamatang Reba, "THE ROLE OF CUSTOMARY VILLAGE IN FORMULATING AND IMPLEMENTING CRIMINAL PROVISIONS DERIVED FROM THE LIVING LAW OF THE COMMUNITY AS STIPULATED IN THE NEW CRIMINAL LAW CODE."



A. Relevance between Customary Criminal Law Values and the New Criminal Code

Customary law is the original Indonesian law that reflects the culture of the Indonesian nation which can strengthen the sense of self-respect, national integrity, sense of nationality, and also a sense of pride in the Indonesian nation. Customary Law has its characteristic style compared to other laws.

1. Religious

This pattern shows that the customary law society as a whole believes in the existence of a supernatural world that is religious, meaning that the legal behavior and rules are based on the teachings of God Almighty.

2. Traditional

This illustrates that customary law in Indonesia has been hereditary from the time of our ancestors until now still valid and maintained by the indigenous people.

3. Changeable and customizable

This pattern makes customary law change. However, the change does not eliminate the old customary provisions. Customary law can change according to circumstances, time, and place.

4. Not codified

Customary law is unwritten, although some are also recorded as regional regulations. This means that customary law is not codified in the form of legislation so the provision only applies to certain areas where the provision is made.

From the customary law, there are several kinds of provisions, including provisions that discuss criminal acts. Man commits an action that is considered wrong so punishment is made for the person who commits the act. From there, customary criminal law emerged which regulates criminal acts along with their sanctions.⁹ Customary criminal law has several characteristics. These characteristics are characteristic of customary criminal law. Then how do these values fit with the values contained in the laws and regulations, in this case, the new Criminal Code which was passed through Law Number 1 of 2023?

⁹ Sriwidodo, Joko, *INDONESIAN CRIMINAL LAW STUDY 'Theory and Practice* (Yogyakarta: Kepel Press, 2019).



Indonesia is a country that adheres to the civil law system where the main source of law is written regulations, namely laws and regulations, especially those that regulate criminal acts. The regulation is known as the national criminal law. This national criminal law is formed by the House of Representatives together with the President. The form of the law is the law. The national criminal law is contained in the Criminal Code and special laws.¹⁰ With the integration between the new Criminal Code and customary criminal law, there must be conformity or relevance about the values contained in both. The following is a comparison table of values in the new Criminal Code and customary criminal law:

New Criminal Code	Customary Criminal Law
<i>Codified</i> Criminal law provisions are written in the form of laws	<i>Uncodified</i> The provisions of criminal law are unwritten but live and develop with the community
<i>Slow development</i> It is necessary to go through several stages that are quite long to make changes	<i>Grow quickly</i> Tends to be more flexible and changeable over time
<i>Uphold the principles of legality and culpability</i> Only acts that are expressly regulated, whether intentionally or negligently, are punishable	<i>Non-prae-existente</i> Criminal acts refer to disturbing the balance of society whether or not there are rules that regulate it and whether it is done intentionally or negligently.
<i>No need to complain</i> Criminal acts can be in the form of complaints, complaints, or others, such as being caught and so on to be handled.	<i>Complaint deliberations</i> The criminal act must be in the form of a complaint to be handled
<i>Strengthening human rights protections</i> Criminal law provisions position human rights as the highest value	<i>Traditional magical religious</i> The provisions of the criminal law place elements of hereditary culture, beliefs, and

¹⁰ Sriwidodo, Joko.



	teachings of ancestors at the highest level
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Table 1. *Comparison of the Values of the New Criminal Code and Customary Criminal Law*
Source: Processed by the Researcher himself

From the table above, it can be concluded that the values between the new Criminal Code and customary criminal law have significant differences, causing obstacles in efforts to integrate the two. Values are a very important component in the construction of legal norms because they are the moral and ethical principles that are the basis for a law. Values have a great influence on all elements of the law, namely in making laws, judges' decisions, and also law enforcement. Therefore, in the discussion in this sub-chapter, it can be concluded that the relevance of values between the new Criminal Code and customary law is still lacking, so there is a need for further integration efforts to realize a multicultural criminal law that can provide a sense of justice for all Indonesia people.

B. Legal Certainty in the Integration of the New Criminal Code and Customary Criminal Law

The unification of two different things is not an easy effort, especially in the field of criminal law which involves justice for all levels of society. The criminal law that develops in Indigenous peoples is often referred to as customary criminal law.¹¹ They have adhered to these legal provisions for generations. On the one hand, they live under the protection of the state where the state has national rules that regulate criminal law in Indonesia. The rules used by the state have many differences from the customary criminal law rules that develop in the community according to their respective regions.¹² Customary criminal law was born like the birth of an unwritten legal rule where the regulation of human behavior at one time acquired a

¹¹ Tolkah Tolkah, "Customary Law Existency in The Modernization of Criminal Law in Indonesia," *Varia Justicia* 17, no. 1 (2021): 72–89, <https://doi.org/10.31603/variajusticia.v17i1.5024>.

¹² Rizkan Zulyadi and Universitas Medan Area, "The Existence of Customary Criminal Law in the New Criminal Code Rizkan Zulyadi," no. April (2024): 76–85.



legal nature. The occurrence of customary law violations is at the same time the birth of customary criminal law.¹³

The recognition of customary criminal law in Article 2 paragraph (1) of the new Criminal Code, has caused a lot of friction among legal experts. Characteristically, the new Criminal Code and customary law are two different and contradictory things. The new Criminal Code is a set of written rules with a tendency to the theory of "*legal positivism*". Meanwhile, customary law is a set of unwritten rules that are based on the theory of "*living law*" where the law lives and develops with society. The turmoil appeared in the discussion of legal certainty in the Customary Criminal Law outlined in the new Criminal Code. Customary Criminal Law is considered to not have clear and definite rules, so the legal certainty of these rules should be questioned. *Jan M. Otto* expressed an opinion as quoted by Sidharta, that legal certainty has several requirements that must be met:¹⁴

1. There are clear or clear, consistent legal rules issued by the government of the country,
2. Government agencies apply the rule of law consistently and submit to it,
3. The majority of citizens agree with the content and therefore it is necessary to adjust their behavior to the rules,
4. The existence of independent and impartial judges by consistently applying the rule of law when deciding cases,
5. The judicial decision was concretely implemented.

From these five conditions, it can be understood that the legal rules that can provide legal certainty are those that are born from the culture of the community and reflect the values that exist in the community¹⁵ Meanwhile, *Gustav Radbruch* believes that there are 4 (four)

¹³ Soetoto, Owan Hermansyah., Erwin., *BUKU AJAR HUKUM ADAT*.

¹⁴ Diya Ul Akmal, "Indonesian State of Law Is an Aspired Concept," *Nurani Hukum* 4, no. 1 (2021): 77, <https://doi.org/10.51825/nhk.v4i1.9265>.

¹⁵ Hisroh Komeni, Wirdi, "Inaccuracies in the Application of Customary Criminal Law in Article 2 of the New Criminal Code: A Perspective on the Theory of Legal Certainty."



basic things about legal certainty that can be an indicator of a rule in providing good legal protection to its community:¹⁶

1. The law is positive, meaning that the law is a law,
2. The law is based on facts, meaning that the law must be based on reality,
3. Facts must be formulated in a clear way and system to avoid multiple interpretations or mistakes in meaning,
4. The law must not be easily changed.

Gustav, It is assumed that legal certainty is a product of a law that is more specific than legislation. Positive laws that regulate human interests in society must always be obeyed even though they are felt to lack justice. When customary crime is integrated with national law by making customary crime an alternative if the New Criminal Code does not regulate special issues, then the problem is about uncertainty in the customary law. This happens because the norms in customary crimes are recognized *de facto*, but in their implementation, they are not able to provide justice by the principles of justice contained.¹⁷

A criminal law system that can provide legal certainty must be built from the principle of legality. It can be said that the principle of legality contains several principles.

1. The principle of *non-retroactivity*, an act is not punishable except for the force of criminal regulations according to pre-existing laws,
2. The principle of prohibition of the use of analogs, provisions in the criminal law should not be applied to a specific concrete case based on analogs,
3. The principle that the penalty must be imposed based on the provisions of the law and not based on custom,
4. The principle of the formulation of the law must be clear so that it can be used as a handle by the community.

¹⁶ Zahrah Salsabillah Ashari, "Exceptio Dilatoria in the Indonesian Context : Implementation of Justice and Legal Certainty from Radbruch ' s Perspective," 2024.

¹⁷ Hisroh Komeni, Wirdi, "Inaccuracies in the Application of Customary Criminal Law in Article 2 of the New Criminal Code: A Perspective on the Theory of Legal Certainty."



From the explanation above, a common thread can be drawn that the rule of law must be based on the principle of legality by formulating clear rules to be able to provide legal certainty for the community. If we talk about legal certainty in the integration of the new Criminal Code and the Customary Criminal Law, there has not been a common point in the design of the new Criminal Code that can include elements of customary criminal law. Many people think that customary criminal law in the Criminal Code is only a complementary spice, not the main basic ingredient for the formation of national criminal rules.

These problems can be overcome by taking a middle ground between indigenous peoples. Transparency and social concern for vulnerable communities also need to be improved so that the law is a complete unit and can provide the fairest justice for the people of Indonesia. Of course, this is not easy to realize, but the mediation process between Indigenous peoples can reflect a sense of national unity and can give perspectives on criminal law from various directions. In this way, it will be easy to obtain an agreement to form multicultural criminal law provisions and provide a sense of justice for all levels of society, especially Indigenous peoples. The law is a tool to unite society, not a tool to divide society that causes people to become victims of marginalization so that people feel alienated in their own country.

CONCLUSION

The integration between the new Criminal Code and customary criminal law is the first step to forming a regulation on criminal acts and sanctions that reflects the multicultural culture of the Indonesian nation. In its implementation, of course, there are many disputes and oppositions. The national criminal law regulated by the new Criminal Code and the customary criminal law regulated based on the culture of Indigenous peoples in each region have different values. The lack of relevance of values between the two makes it difficult to achieve integration. In addition, customary criminal law is considered not to provide clear rules because it is unwritten and tends to develop rapidly so that there is no strong grip on the community. It is the same as customary criminal law but does not have legal certainty in it. In realizing legal certainty, the principle of legality is very important to consider considering that an act can be said to be a criminal act if there are already rules that regulate it.



The steps that must be taken to solve these problems are to mediate with indigenous peoples as a form of unity and to formulate criminal rules that are composed from the perspective of all directions from the perspective of Indonesian society. Taking the middle way by opening wide communication between law enforcement and the community is a mustily thing to implement considering that Indonesia is a country with diverse ethnicities and cultures where rules that live and develop in society (customary law) have existed long before colonization by foreign nations.

Suggestion

This research is one of the steps to realize a law-literate Indonesian society and avoiding apathy towards indigenous peoples who are considered victims of marginalization by state rulers through the formation of biased regulations and far from fair. Readers can take the essence of this research that the formation of the new Criminal Code is still far from perfect and fair, so it is necessary to research further so that no community is harmed by the new rules when they come into effect later.

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