

Recognition And Position of Customary Criminal Law in The New Indonesian Criminal Code

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Abstract

Customary Criminal Law in Indonesia is a manifestation of the living law that has long been rooted in the life of society. This law functions to maintain balance and social harmony, in contrast with positive criminal law which is oriented toward punishment. The existence of customary criminal law in the history of Indonesian law has often been marginalized by the codification of colonial legal heritage. However, with the birth of the New Criminal Code (Kitab Undang-Undang Hukum Pidana / KUHP) through Law Number 1 of 2023, Customary Criminal Law gains legitimacy through recognition of the “Law that Lives in Society.” This article aims to analyze the recognition of Customary Criminal Law in the new KUHP and its position within the National Criminal Law system. The research was conducted using a normative juridical method through statutory, conceptual, and comparative approaches. The study results show that although the new KUHP provides legitimacy for Customary Criminal Law, there are still major challenges, including the potential for disharmony with the Principle of Legality, Protection of Human Rights, and Legal Certainty. Therefore, clear implementation guidelines are required so that Customary Criminal Law can truly become an inclusive instrument of justice.

Keywords: Customary Criminal Law, New Criminal Code, Living Law.

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Introduction

The Indonesian criminal law system since the beginning of independence has been heavily influenced by the *Wetboek van Strafrecht voor Nederlandsch-Indië* (WvS) or the old Criminal Code, which was a product of Dutch colonialism. This codification, which took effect in 1918, had a positivistic character and emphasized the rigid principle of legality, namely *nullum delictum nulla poena sine praevia lege poenali* (no crime and no punishment without a prior penal law). As a result, criminal justice in Indonesia became oriented toward written law, ignoring the legal realities that live in society. This condition caused customary criminal law, which had been rooted for hundreds of years, to often be marginalized and only recognized as customary law without binding force in the national legal system.

In fact, customary criminal law has a much deeper social function. It does not merely punish the perpetrator of a crime but is oriented toward restoring social balance and harmony in society. Sanctions in customary law are often restorative in nature, such as compensation, apologies, or customary rituals, aimed at repairing the broken relationship between the perpetrator, the victim, and the community. This differs from the conventional criminal law approach, which is more focused on retribution through imprisonment. This view is in line with the concept of living law conveyed by Satjipto Rahardjo (2006), that the law that lives in society has strong legitimacy because it arises from values and norms genuinely lived by the community.

The need to accommodate customary law is increasingly urgent in line with the times. Ismaidar (2016) emphasized that living law must not be neglected in the Indonesian criminal justice system because it reflects the nation's identity and local wisdom. The development of pluralist criminal law—acknowledging the existence of various legal systems—becomes a necessity so that national law does not become a foreign entity in its own society, which in the end could erode public trust in the judicial system.

After the reformation era, the wave of recognition of customary law grew stronger. The Constitution, through Article 18B paragraph (2) of the 1945 Constitution, acknowledges the existence of customary law communities. This recognition is reinforced by several laws and court decisions, such as Law Number 6 of 2014 on Villages which grants authority to villages to regulate their customary affairs, and Constitutional Court Decision No. 35/PUU-X/2012 which fundamentally changed the status of customary forests from state forests. Ismaidar (2017) noted that the era of regional autonomy opened greater opportunities for customary criminal law to revive and become an integral part of the legal system, although its implementation in practice still faces various obstacles.

The birth of the New Criminal Code (KUHP) through Law Number 1 of 2023 is the most significant historical milestone. For the first time, customary criminal law is explicitly recognized as a source of criminal law through Article 2 paragraph (1), which states that a person can be punished if they commit an act that, according to the “Law that Lives in Society,” is considered a criminal act. This recognition shows the direction of national legal development that is more progressive and contextual, seeking to bridge the gap between the state's formal law and the practical customary law.

Nevertheless, this recognition is not without challenges. Barda Nawawi Arief (2010) had long warned that incorporating non-positivistic values into criminal law codification would bring about harmonization issues. These challenges mainly relate to how to ensure that the application of customary criminal law is consistent with the principles of legal certainty,

legality, and human rights (HAM). Ismaidar (2019) specifically emphasized that the protection of vulnerable groups, such as women and children, in customary communities is crucial so that customary law is not instead used to legitimize discrimination or rights violations.

Therefore, a comprehensive analysis of the recognition and position of customary criminal law in the new KUHP is necessary. This study is not only academically important to explore the theory of legal pluralism but also practically crucial as a foundation for establishing proper implementation guidelines. Without clear guidance, the recognition of customary law could potentially create uncertainty and injustice. This research is expected to provide real contributions to ensuring that customary criminal law truly becomes an instrument of inclusive and equitable justice.

Research Methodology

This research uses a normative juridical method with several approaches:

1. Statutory approach: Reviewing Law No. 1 of 2023 on the Criminal Code, the 1945 Constitution, the Human Rights Law, and the Village Law.
2. Conceptual approach: Examining the theory of *living law* (Rahardjo, 2006), the principle of legality (Hamzah, 2008), and legal pluralism (Arliman, 2022).
3. Comparative approach: Comparing the recognition of customary criminal law in Indonesia with Malaysia, as studied by Ismaidar (2020).

Primary legal materials include legislation and court decisions, while secondary legal materials include legal literature, books, and scientific journals. The analysis is conducted qualitatively to draw descriptive-analytical conclusions.

Discussion

4.1 Recognition of Customary Criminal Law in Law Number 1 of 2023 (New KUHP)

The recognition of Customary Criminal Law in the New KUHP is an important breakthrough. Article 2 paragraph (1) of Law No. 1 of 2023 states that a person may be punished if they commit an act which, according to the “Law that Lives in Society,” is deemed a criminal act. According to Wantu (2021), this marks a paradigm shift in national criminal law from a rigid system to a more flexible and accommodative one. Customary criminal law is no longer *extra-legal* but becomes part of the positive legal system.

However, this recognition is still accompanied by limitations. Article 2 paragraph (2) stipulates that the law that lives in society may only be applied insofar as it is consistent with Pancasila, the 1945 Constitution, human rights, and general principles of law recognized by civilized nations. These limitations are important to prevent the application of customary law that contradicts universal values, such as gender discrimination or violations of children’s rights. This is in line with Ismaidar (2018), who emphasized that the recognition of customary law must be oriented toward restorative justice, not merely legitimizing customary practices that may conflict with human rights.

4.2 Position of Customary Criminal Law in the National Legal System

The position of customary criminal law in the national legal system is as a complementary source of law. In other words, customary criminal law does not replace written law but complements it in certain contexts. Judges may refer to customary law when an act disturbs public order but is not explicitly regulated in the Criminal Code.

From the perspective of legal pluralism, this recognition reflects the reality that Indonesia is a multicultural state with various legal systems coexisting, as explained by Arliman (2022). Ismaidar (2020) also showed that both Indonesia and Malaysia accommodate customary law as part of their national legal systems to maintain the social legitimacy of criminal law. However,

this position raises problems of legal certainty. There is not yet a standard mechanism for proving the existence of a customary norm, which may complicate its application by judges.

4.3 Challenges in Implementing Customary Criminal Law

The recognition of Customary Criminal Law in the New KUHP faces several challenges:

1. **Principle of Legality:** Traditionally, the principle of legality rejects punishment without written law. Andi Hamzah (2008) explained that this principle is the main pillar of modern criminal law. With the recognition of customary law, this principle becomes more flexible. However, this flexibility can create legal uncertainty if clear procedures are not established.
2. **Human Rights Protection:** Customary communities are often in vulnerable positions. Therefore, the implementation of customary criminal law must ensure the protection of the rights of women, children, and minority groups.
3. **Procedural Standardization:** National guidelines are needed for judges, prosecutors, and law enforcement officials in proving and applying customary criminal law. Without such guidelines, interpretations could vary widely across regions.
4. **Potential Norm Conflicts:** At times, customary law may conflict with national law. For example, cases of domestic violence which, in some customary communities, are considered family matters, whereas the Criminal Code regulates them as serious criminal offenses.

4.4 Prospects for the Application of Customary Criminal Law

Despite many challenges, the prospects for the application of customary criminal law are quite promising. Its recognition in the New KUHP shows the direction of national legal development that is more pluralist and contextual. In addition, customary criminal law can strengthen the restorative justice approach that is currently being promoted by the government. With the support of additional regulations, implementation guidelines, and training for law enforcement officers, customary criminal law can become an instrument of substantive justice that not only punishes but also restores

Conclusion

The New Indonesian Criminal Code (KUHP) recognizes Customary Criminal Law through Article 2 paragraph (1) as the “law that lives in society.” This recognition is a progressive step that enriches the National Criminal Law system.

The position of Customary Criminal Law in the national legal system is as a complementary source of law, not a substitute. However, its application is limited by the values of Pancasila, the 1945 Constitution, human rights, and universal legal principles. The main challenges are maintaining harmony with the principle of legality, ensuring human rights protection, and safeguarding legal certainty.

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