

THE MATERIAL CONTENT OF REGIONAL REGULATIONS AS THE CONCRETIZATION OF THE LIVING LEGAL SYSTEM IN SOCIETY (ADAT LAW) BASED ON ARTICLE 2 OF THE INDONESIAN PENAL CODE (KUHP) 2023

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ABSTRACT

Article 2 of Law Number 1 of 2023 regarding the Criminal Code (“**KUHP 2023**”) not only leaves problems in the context of legality, but also includes mechanisms for the law enforcement process, particularly regarding the measurement of the applicability of Indonesian customary law (“**Adat Law**”) through regional regulations. One issue that has arisen is the lack of standardized content material that must be regulated in regional regulations in order to determine the applicability of Adat (criminal) Law. This article will analyze to what extent the standard of “law that applies in the place where the law lives” and to what extent the regional regulation regulating “living law” in the perspective of law enforcement prosecutes the perpetrator. The results show that regional regulation can be used as a basis for determining the recognition of Adat Law, but there is no common standard for how to recognize Adat Law under regional regulation. As the concrete of Article 2 Indonesian Penal Code 2023, regional regulation must explicitly regulate the scope of Adat Law (criminal) application related to territorial, personal and protection principles. Meanwhile, in the case of the prohibition act and penal sanction, it needs further studies because Adat Law has no separation between criminal and civil matters.

Keywords: adat law; criminal act; indonesian penal code 2023; regional regulation.

INTRODUCTION

The discourse on the renewal of Indonesia’s criminal law through the Criminal Code Bill (“**RKHUP**”), which has been approved and enacted through Law Number of 2023 regarding the Criminal Code (“**KUHP 2023**”), still leaves many controversies to this day. One of the articles that has received much attention is Article 2 of KUHP 2023 regarding the living legal system in society, which is then narrowed and limited to Indonesian customary law (“**Adat Law**”).¹ The existence of KUHP 2023, which still included Article 2 as one of the accommodated articles, consequently, the government and legislature must consider how to concretize “the living law in society”. In addition to reviving the customary justice (“**Adat Judicature**”) and Adat Law compilation, the possibility of enforcing Adat Law according to KUHP 2023 Design Team is through the enactment of regional regulation (*peraturan daerah*) that provides customary criminal act that still applies in the local area.²

The proposal to use regional regulation as the basis for implementing Adat Law, fundamentally, has been justified and strengthened through Constitutional Court Decision Number 35/PUU-X/2012 regarding the constitutionality review of Article 1 Number 6, Article 4 paragraph (3), Article 5 paragraph (1), Article 5 paragraph (2) and (3) on Law Number 41 of 1999 regarding the Forestry (“**Forestry Law**”). Although the Forestry Law itself has stated that regional regulations determine the

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¹ RKUHP, 28 August 2019 version.

² Marcus Priyo Gunarto, “Asas Legalitas, Kriminalisasi, Pemidanaan dalam R-KUHP Serta Dampaknya Terhadap Hukum Pidana Nasional”, delivered at the Seminar and Workshop of RKHUP entitled “Mewujudkan Pembaharuan Hukum Pidana Melalui R-KUHP yang Berkeadilan, Demokratis dan Responsif Pada Perkembangan Tindak Pidana”. Koalisi Perempuan Indonesia, Kamis-Jumat, Jakarta, 15-16 Maret 2018.

recognition of the existence and the removal of Adat Law societies (“**Adat Law Societies**”).³ Regional regulation based on Law Number 9 of 2015 regarding the Second Amendment to Law Number 23 of 2014 regarding the Regional Government (“**Regional Government Law**”) are legal regulations formed by Regional House of Representatives (“**DPRD**”) together with Governor in the level of province, and by the DPRD of the Regency/City together with Regent/Mayor in the Regency/City. The material content of regional regulations based on Law Number 15 of 2019 in conjunction with Law Number 12 of 2011 regarding the Formation Laws and Regulation (“**P3 Law**”) may contain materials related to implementation and delegated tasks, as well as accommodating special conditions of the region and/or further elaboration of higher laws and regulations. Additionally, regional regulations may include criminal offenses with a maximum penalty of six imprisonments or a maximum fine of IDR 50 million.⁴ Based on this provision, it may be interpreted that the regulation of Adat Law communities is subject to customary criminal act through the regional regulations.

However, the fundamental issue of using regional regulations as the basis for implementing Adat Law is the measure of the validity of Adat Law itself. Article 67 of Forestry Law states that Adat Law Societies is recognized if it meets the following elements: (1) its community is still in the form of a group (*paguyuban*); (2) there is an institution in the form of customary authority; (3) there is a clear customary legal area; (4) some customary laws and instruments, especially customary courts, are still obeyed.; and (5) it still collects forest products in the surrounding forest area for daily needs. Article 2 paragraph (2) of KUHP 2023 states that one of the measures of the validity of the law that exists in society is its application in the legal area in which it exists.⁵

The difficulty faced in implementing “living law” is the limitations/scope of applying such living law. Neither current laws nor KUHP 2023 has provided uniform and precise measures (standards) regarding the validity of which Adat Law or Adat Law Societies is recognized as the entity referred to in Article 2 of KUHP 2023. If we look at the limitations set by KUHP 2023, the main measure for recognition of Adat Law is the region or territorial boundaries.⁶ Furthermore, until now, Indonesia has not fully mapped out a clear picture of indigenous communities that are still “alive”, except for those whose existence has been formalized through laws.

The lack of sources and data regarding the applicable Adat Law will pose a separate issue in enforcing criminal law. The measure of applicability becomes an important matter that lawmakers should carefully consider to determine to what extent Adat Law can be applied in prosecuting perpetrators of criminal acts, especially from the perspective of jurisdiction, particularly territorial, personal, and protection. Moreover, the measure of applicability is also needed to provide legal certainty for citizens and to prevent discrimination by the state against indigenous peoples.

³ Article 67 of Forestry Law.

⁴ Article 15 paragraph (1) and (2) of P3 Law; Article 238 of Regional Government Law.

⁵ Nella Sumika Putri, “Memikirkan Kembali Unsur “Hukum Yang Hidup dalam Masyarakat” Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas”, *Indonesia Criminal Law Review*, Vol. 1 No. 1, 2021, p.68, <https://scholarhub.ui.ac.id/iclr/vol1/iss1/5/>.

⁶ Article 2 paragraph (2) of KUHP 2023. The explanation states that “applies within the legal system where it exists” applies to anyone who commits a customary criminal act in that area.

This writing is a conceptual piece that attempts to describe the concretization of the application of Article 2 of the 2023 Criminal Code through regional regulations related to the material content that must be contained in regional regulations to be used to prosecute crimes. Based on the background description above, the problem that will be discussed in this article is how the practice and measure of “law applicable in the place where the law lives”, as well as the extent to which the material content of regional regulations in regulating the law that lives in society, are viewed from the scope of the application of the law for criminal prosecution.

RESEARCH METHOD

This research is a juridical-normative study. Data is collected through document studies of legal regulations, including the Criminal Code, Criminal Code 2023, Law No. 1/Drt/1951, Human Rights Law, Forestry Law, and court decisions, particularly those related to the applicability of customary law, as well as literature studies of secondary data in the form of primary, secondary, and tertiary legal materials obtained from books, journals, and news articles. The analysis used in this study is descriptive, which means describing a phenomenon or situation.⁷

DISCUSSION

Practice and Measurement of “Law That Applies in the Place Where it is Enforced”

In the criminal realm, aside from Law Number 1/Drt/1951 regarding Temporary Measures for the Implementation of the Unity of State Power Structure and Civil Court Proceedings, the legal justification of Adat Law in resolving criminal issues can be found in Article 103 of the Village Law. Article 103 of the Village Law regulates the authority of the Adat Village to resolve custom disputes based on the Adat Law that applies in the Adat Village, which includes criminal issues. KUHP 2023 further strengthens the justification for applying Adat Law in criminal matters. Article 597 of the KUHP 2023 states that anyone who performs an act considered prohibited by the law that lives within society is subject to criminal punishment. The criminal penalty imposed by the KUHP 2023 fulfills the obligation of local customs.⁸ The main issue in implementing Adat Law (criminal law) is determining which Adat Law is still applicable and can be used as the basis for criminal prosecution.

The recognition of Adat Law Societies is spread across various legal regulations and court decisions. The legal basis for implementing customary law, which originated from the colonial era and still applies today, is Article 131 paragraph 2 sub b of the IS. Constitutional recognition is based on Article 18B paragraph (2) of the 1945 Constitution, in which the state recognizes the validity of customary law as long as it is 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 the law. In addition, the

⁷ Sri Mamudji, *et.al*, *Metode Penelitian dan Penulisan Hukum*, Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta, 2005, p.4.

⁸ Article 66 paragraph (1) letter (f) of KUHP 2023.

validity of Adat Law can be found in the explanation of Article 6 paragraph (1) of Law Number 39 of 1999 regarding the Human Rights, which states that “customary rights” still exist and are highly respected within the indigenous communities are valid, as long as they do not conflict with the principles of a legal state that are centered on justice and the welfare of the people.

The validity measurement of Adat Law may also be found in Article 203 paragraph (3) of Regional Government Law, which states that the unity of the customary law community is a customary law community along with its traditional rights as long as they are still alive and recognized by the regional regulation. Based on this provision, the standard of recognition for indigenous communities can be interpreted as a guarantee of recognition and respect for customary law if it meets the following conditions: firstly, the condition of reality, meaning that customary law is still alive and in accordance with the development of society; secondly, the condition of ideality, meaning that it is in accordance with the principles of the Unitary State of the Republic of Indonesia, and its validity is regulated by law.⁹

In addition, the measurement of recognition of indigenous communities can also be found in Forestry Law; Law Number 18 of 2004 regarding the Plantations (“**Plantation Law**”); Law Number 32 of 2009 regarding the Environmental Protection and Management (“**Environmental Protection and Management Law**”); and Law Number 6 of 2014 regarding the Villages. However, the criteria for recognizing indigenous communities according to these four laws differ. The Forestry Law, Plantation Law, and Environmental Protection and Management Law have cumulative recognition requirements, while the Village Law has alternative requirements.¹⁰ The common criteria that may be found in all four laws are:

- a. The community is still in the form of a legal community/group (*paguyuban/rechtsgemeenschap*);
- b. There are institutions in the form of traditional authorities;
- c. There is a clear customary law jurisdiction;
- d. There are legal institutions, especially customary courts, that are still obeyed.

There are differences in each criterion for recognizing indigenous communities, depending on the purpose of each law, which are:

- a. Still collecting of forest products in the surrounding forest area for daily needs (Forestry Law);
- b. There is recognition through regional regulations (Plantation Law);
- c. The group of people has lived for generations in a certain geographical area; there is a strong connection with the environment; and a value system that determines traditional economic, political, social, and legal institutions (Environmental Protection and Management Law);
- d. A community whose members have a shared sense of belonging within a group; traditional wealth and/or property (Village Law).

⁹ Marco Manarisip, “Eksistensi Pidana Adat dalam Hukum Nasional”, *Lex Crimen* Vol.I/no.4/Okt-Des/2012, p. 30, <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/900>.

¹⁰ Kunia Warman, “Peta Perundang-undangan tentang Pengakuan Masyarakat Hukum Adat”, <http://procurement-notices.undp/>, p. 10, [24 April 2022].

Other than formal measures through legislative policies, another measure used to determine the recognition of Adat Law is through court decisions. These decisions include, among others, Constitutional Court Decision Number 31/PUU-V/2007, which interprets Article 18B paragraph (2) of the 1945 Constitution in conjunction with Article 41 paragraph (1) letter b of Law Number 24 of 2003 regarding the Constitutional Court ("**Constitutional Court Law**"), regarding the position of Adat Law Societies, namely:

- a. Adat Law Societies is considered *de facto* still alive, whether it is territorial, genealogical, or functional, which at least contains elements:
 1. The existence of a community whose members have a sense of group identity (in-group feeling);
 2. The existence of customary governance institutions;
 3. The existence of customary wealth and/or traditional objects;
 4. The existence of customary legal norms; and
 5. In particular, for a territorial customary law community, there is also the element of a specific territory.
- b. Adat Law Societies and its traditional rights are considered appropriate for the development of the Adat Law Societies: Its existence has been recognized based on applicable laws as a reflection of the development of ideal values in contemporary society, both in general and sectoral laws such as in the field of agrarian, forestry, fisheries, and other regulations.
- c. The substance of those traditional rights is recognized and respected by the members of the relevant Adat Law Societies as well as the broader society, and it does not conflict with human rights.

Furthermore, Constitutional Court Decision Number 35/PUU-X/2012 strengthens the recognition of indigenous communities by establishing the following criteria:

- a. 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;
- b. Customary forests are designated as long as the Adat Law Societies in question still exists, and their existence is recognized.

As an implication of the Constitutional Court's Decision Number 35/PUU-X/2012, several implementing regulations on the existence of indigenous communities were issued. These provisions include the Minister of Home Affairs Regulation Number 52 of 2014 regarding the Guidelines for Recognition and Protection of Indigenous Peoples, which mandates local governments to establish the existence of indigenous communities through Regional Head Decisions. Article 5 of the Ministry of Environment and Forestry Regulation Number P.21/MenLhk/Kum.1/4/2019 regarding the Community Forests and Customary Forests regulates the designation of customary forests located within forest areas after the Regional Government recognizes the indigenous communities through regional regulations. In contrast, customary forests located outside forest areas designated after the

Regional Government recognizes the indigenous communities through Regional Regulations or Regional Head Decisions. Long before the above Constitutional Court decision was issued, Article 67 paragraph (2) of Forestry Law had stated that regional regulations determine the recognition and removal of indigenous communities.

Nevertheless, various local regulations at the provincial, city, and district levels have also regulated the recognition of indigenous communities and their requirements. Provincial Regulation of Central Kalimantan Number 16 of 2008 regarding the Customary Institutions recognizes the customary institution "Kademangan". Provincial Regulation of Central Kalimantan Number 1 of 2002 regarding the Recognition of Indigenous Peoples throughout Central Kalimantan Province. Based on such regulation, the recognition of indigenous peoples is measured if they meet at least two (2) requirements:

- a. Customary institution or its customary authority;
- b. Clear customary jurisdiction;
- c. The existence of customary law that still applies and regulates community life;
- d. The community's way of meeting their daily needs still depends on forest production activities in the surrounding forest area.

Regulation Number 15 of 2017 regarding the Recognition and Protection of Indigenous Peoples in Landak District also provides requirements for obtaining recognition as indigenous peoples:

- a. There is a community whose members have a group feeling;
- b. There are institutions within its customary authority;
- c. There is a clear customary jurisdiction; and
- d. There are customs and legal instruments that are still obeyed.

The above description shows that various legislative products and court decisions have recognized the existence of indigenous communities along with their recognition criteria through regional regulations. However, there is still no uniform indicator for recognizing indigenous communities. This lack of uniformity can be one of the inhibiting factors in determining the existence of recognition of indigenous communities. In addition to other inhibiting factors, for example, in the process of recognizing indigenous communities based on the Ministry of Home Affairs Regulation Number 52 of 2014 regarding the Guidelines for Recognition and Protection of indigenous communities, which consists of identification, verification, validation, and determination processes that require a very long time.¹¹ This lack of uniformity will result in legal uncertainty in determining the validity of indigenous communities, including the potential for discrimination against indigenous communities.

¹¹ Ikhsana Indah Barnasaputri, "Jalan Panjang Pengakuan Masyarakat Hukum Adat Melalui Peraturan Daerah: Beberapa Persoalan yang Belum Selesai, *Notaire*, Vol. 4, No. 1, February 2021, p. 4-5, <https://e-journal.unair.ac.id/NTR/article/view/22805>.

The Material Content of Regional Regulations as a Concretization of “Living Law” Based on Article 2 KUHP 2023

Paragraph (2) of Article 2 of KUHP 2023 mentions the limit of the application of living law, which is limited to the place where the law is alive. The interpretation of the the limit of the place where the law is alive certainly requires a clear rule to determine the firm boundaries of the application of living law. If interpreting this provision aligns with the scope of criminal law by place, consisting of territoriality, personality, interests, and universality principles. The regulation of the scope of criminal law is aimed at determining to what extent a country's court has jurisdiction or authority to prosecute a case.¹²

If using the concept of Adat Law Societies, the living space for Adat Law Societies is a unit of natural landscape or ecological unity determined and marked by natural boundaries, such as river basins, bays, and currents. These signs or natural boundaries function based on physical, social, cultural, religious, and economic characteristics to maintain their existence. Therefore, in the content of regional regulations governing the recognition of indigenous communities related to the basis of criminal prosecution under Article 2 of KUHP 2023, territorial boundaries, including individuals who commit crimes, must be clearly regulated. This territorial boundary determines the limits of the legal (criminal) jurisdiction where Adat Society Law can be applied. Thus, the prosecution can be determined for legal subjects who violate customary law (criminal) rules in an Adat Law Societies area.

The placement of the territoriality principle content is needed explicitly, just like the territoriality principle recognized in criminal law, which is a manifestation of state sovereignty, in this case, for Indigenous communities, for anyone who commits a criminal act in the indigenous community's area. One case that can be used to apply customary law based on territoriality is the case of a foreign national from the Czech Republic suspected of desecrating a sacred place in the Monkey Forest Ubud Tourism Attraction Area, where the perpetrators eventually mediated with the local indigenous communities. The mediation resulted in the perpetrators being banned from returning to their country before attending the “*guru piduka*” ceremony held by the Prajuru of Padang Tegal Village. Although no customary criminal sanctions were imposed, this case can be used as a basis that customary law can be applied to anyone who violates customary rules, even if they are not members of the indigenous communities.¹³

The material content on the recognition of Adat Law not only needs to regulate the area of its application but also include the subjects of law who can be prosecuted for violating Adat Law or to whom the Adat Law can be applied. As is known, Adat Law is often referred to as unwritten law, which

¹²Topo Santoso, “Asas Teritorialitas dalam Hukum Pidana Indonesia: Pengertian dan Perkembangannya”, *Jurnal Hukum Pidana & Kriminologi*, Vol. 1, No. 1, October 2020, p. 19, <http://jurnalmahupiki.org/ojs/index.php/jhpk/article/view/1>.

¹³Diah Gayatri Sudibya, *et.al*, “Penerapan Sanksi Adat dalam Penistaan Tempat Suci di Desa Padang Tegal, Kecamatan Ubud, Kabupaten Gianyar, Kertha Wicaksana: Sarana Komunikasi Dosen dan Mahasiswa, Vol. 15, No. 1, 2021, p.23, <https://www.ejournal.warmadewa.ac.id/index.php/kertawicaksana/article/view/2820>.

can be interpreted as someone being subject/obedient to Adat Law as a whole.¹⁴ It is related to the position of humans in Adat Law as the primary members of society, where humans live to achieve the community's goals.¹⁵ The description of what is meant by Adat Law Societies according to Soepomo and MS Kaban is divided into:¹⁶

- a. Based on a kinship relationship (genealogical);
- b. Based on the environmental area (territorial); and
- c. Based on a combination of genealogical and territorial factors.

These criteria are adopted by the Environmental Protection and Management Law and the Village Law in determining the recognition of indigenous communities. This is also explained in the Constitutional Court's interpretation of Article 18B (2) of the 1945 Constitution, which states that one of the criteria is the existence of a community whose members have a sense of belonging as a group due to shared values.¹⁷ As a subject, indigenous communities are described in great detail in Law Number 27 of 2007 regarding the Management of Coastal Areas and Small Islands ("**PWPPK Law**"). This law states that Adat Law Societies are a group of coastal communities who have traditionally lived in a certain geographic area due to their ties to their ancestral origins, their strong relationship with coastal and small island resources, and their system of values that determines economic, political, social, and legal institutions.¹⁸

The restriction regarding the subject of law that may be prosecuted based on customary law should be included in the contents of regional regulations. Restrictions through criteria related to the subject of law are also related to the extent to which someone must comply with Adat Law (criminal law). For comparison, Article 5 paragraph (1) of the scope of implementing Islamic law based on Qanun Number 5 of 2000 states that Islamic law applies to every person or legal entity domiciled in Aceh. The limitation on the subject in Qanun can be seen in Aceh Qanun Number 6 of 2014 regarding Jinayat Law ("**Jinayat Law**"). Article 5 of the Jinayat Law provides limitations on the validity of the Qanun, namely for:

- a. Every Muslim who commits a crime in Aceh
- b. Every non-Muslim who commits a crime in Aceh together with Muslims and voluntarily submits to the Jinayat Law;
- c. Every non-Muslim who commits a crime in Aceh that is not regulated in the Criminal Code or other provisions outside the Criminal Code but regulated in the Qanun; and
- d. Business entities were conducting business activities in Aceh.

¹⁴Otje Salman, *Rekonseptualisasi Hukum Adat Kontemporer*, Alumni, Bandung, 2011, p.8.

¹⁵Helnawaty, "Hukum Pidana Adat dalam Pembaharuan Hukum Pidana Nasional", *Bina Mulia Hukum*, Vol. 6, No. 2, December 2017, p. 151-152, <https://fh-unkris.com/journal/index.php/binamulia/article/view/79/69>.

¹⁶Johan Erwin Isharyanto, "Eksistensi dan Pengaturan Kesatuan Masyarakat Hukum Adat sebagai Subyek Hukum Tatanegara", *Jurnal Hukum dan Dinamika Masyarakat*, Vol. 16, No. 1, 2018, p. 59, <http://jurnal.untagsmg.ac.id/index.php/hdm/article/view/846/854>.

¹⁷Ernawati dan Baharudin, Erwan. "Dinamika Masyarakat Hukum Adat dalam Sistem Ketatanegaraan di Indonesia" *Hukum dan Keadilan*, Vol 6 No 2, September 2019, p.62, <https://ejurnal.stih-painan.ac.id/index.php/jihk/article/view/63/37>.

¹⁸Basrin, Erwin, "Rasionalitas Hak Adat atas Perairan Laut, <https://akar.or.id/rasionalitas-hak-adat-atas-perairan-laut/>, [20 April 2022].

Based on the above explanation, the legal subject of QJinayat in Aceh is every individual and business entity within the territorial jurisdiction of Aceh. The first requirement for individuals who commit violations under Qanun Jinayat must be Muslim. Non-Muslims can still be prosecuted if they commit offenses with Muslims, submit to Qanun, and commit criminal acts regulated by Qanun but not by positive law.

Regional regulations as a concrete manifestation of Article 2 of KUHP 2023 must explicitly state the criminal legal subjects, whether it only applies to indigenous communities or can also be applied to every individual and/or business entity that submits to customary law (criminal). The submission to customary law must also be further explained and discussed, including if the legal subject does not submit to the applicable customary law, it must also be explicitly stated whether the legal subject can still be punished under the applicable positive law.

Based on the principle of active nationality, according to Article 5 Indonesian Criminal Code (“**KUHP**”), criminal provisions in Indonesian legislation can also be applied to Indonesian citizens who commit crimes outside the territory of Indonesia. Lawmakers must also clearly specify in the content of regional regulations regarding the application of customary law in the regional regulations, whether it also applies to members of the indigenous community who violate customary law outside their customary area, as well as the limitations of its enforcement. As an example, the application of sanctions in the Dayak community in Bonsor Binua Sakanis Dae, which applies to all individuals who are bound by blood and kinship ties, so even if they make mistakes or violations outside the Bonsor Village, the people of Bonsor will still receive the customary sanctions that apply in their lives.¹⁹ Another example related to the principle of personality is the case of murder committed by Sadim, a resident of Cikeusik Baduy Dalam, against the victim Kamsina and injuring Yadi and Aisah. The murder and assault committed by Sadim were outside the Baduy Dalam area, precisely in Citebang Village, Sukajaya Village, Sobang District, Lebak Regency. Although Sadim has been sentenced to 7 months and 8 days in prison for violating Article 351 paragraph 3 of the KUHP by the Rangkasbitung District Court, Sadim is still held accountable for Adat (criminal) Law in Baduy Dalam.²⁰ Similar to the Dayak community in Bonsor, the principle of active personality is inherent in indigenous community members, even if the act is committed outside their customary area. A clear criterion of who can be prosecuted based on Article 2 of KUHP 2023 can facilitate law enforcement officers in the mechanism of proof. It can provide legal certainty for every citizen.

In addition to the territorial and personal principles, one of the fundamental principles of prosecuting criminal acts is the principle of protection. The principle of protection, also known as the passive nationality principle, is the principle that criminal law applies according to or based on the

¹⁹Efriani, Jagad Aditya Dewantara, *et.al*, “Eksistensi Adat dalam Keteraturan Sosial Etnis Dayak”, *Refleksi Hukum*, Vol. 6, No. 1, 2021, p.101, <https://ejournal.uksw.edu/refleksi-hukum/article/view/4874>,

²⁰Ferry Fathurokman, “Hukum Pidana Adat Baduy dan Relevansinya dalam Pembaharuan Hukum Pidana”, *Jurnal Law Reform*, Vol. 5, No.1, April 2010, p.13.

legal interests protected by a country that is violated outside its territory.²¹ For instance, in the case of Edy Mulyadi, who was accused of insulting the Dayak community in Kalimantan,²² the act of insult was conveyed through a video uploaded on social media (Twitter). The words used in the video were considered insulting to the Dayak community. In this case, Edy Mulyadi did not commit the act of insult in Kalimantan or the territorial area of the Dayak community, and he is not a member of the Dayak indigenous community. However, his actions disturbed the legal interests of the Dayak community.

Lastly, what needs to be further discussed regarding the material of Adat Law (criminal law) is about the acts and criminal sanctions to be imposed. Should it be regulated as material in regional regulations or not? It is because the RKHUP entirely leaves the prohibited acts to the Adat Law of each region. Adat Law does not clearly distinguish between criminal and civil law.²³ Adat Law is not limited to customs with legal consequences but also customs that do not have legal consequences.²⁴ The absence of this separation results in no principle differences in the procedure for resolving Adat Law violations. Therefore, Adat Law violators can be prosecuted based on both criminal law norms and civil law norms.²⁵ Suppose lawmakers want to separate Adat Law violations in a separate and distinct legal rule and separate between Adat Law violations that receive criminal sanctions and Adat Law that receive civil sanctions. In that case, a more in-depth study is needed to determine what constitutes customary criminal acts and what does not.

Formalizing customary criminal acts through regional regulations will encounter several obstacles. In addition to the absence of a clear separation between criminal and civil norms, not all customary norms are written down, making it difficult to formulate customary criminal offenses as currently known. While, on the one hand, this formalization may provide clarity, it may also have a philosophical impact on the reduction of the values of Adat Law itself. Therefore, the inclusion of the formulation of offenses and their penalties as material content of regional regulations must be further studied unless the lawmakers agree not to include it in the regional regulations.

CLOSING

Recognizing indigenous communities through regional regulations is a policy that has been justified through legislation and the Constitutional Court's decisions. Article 2 of KUHP 2023, which regulates the application of the law that exists within society and is narrowed down to customary law, can use regional regulations as a form of legitimacy for recognizing indigenous communities. However, there needs to be a uniform measure regarding the standards for recognizing indigenous communities, including the scope of applying customary law as a basis for prosecuting criminal

²¹ Fitri Wahyuni, *Dasar-Dasar Hukum Pidana Indonesia*, PT Nusantara Persada Utama, Tangerang Selatan, 2017, p.31.

²² <https://www.kompas.tv/article/254680/kecam-pernyataan-edy-mulyadi-aliansi-masyarakat-dayak-kalimantan-siapkan-hukum-adat>, [25 April 2022]. Edy Mulyadi is a senior journalist who once ran as a legislative candidate from the Social Justice Party.

²³ Helnawaty, *Op.Cit*, p.149.

²⁴ Lilik Mulyadi, "Eksistensi Hukum Pidana Adat di Indonesia: Pengkajian Asas, Norma, Teori, Praktik dan Prosedurnya," *Jurnal Hukum dan Peradilan*, Vol. 2, No. 2, July 2013, p. 231-232, <https://jurnalhukumdandanperadilan.org/index.php/jurnalhukumperadilan/article/view/115>.

²⁵ *Ibid*.

offenses. Several materials that must be included in the regional regulations as the basis for applying customary law include the regulation of the area of jurisdiction (territoriality principle), legal subjects (personal principle), protection principles, and the urgency of incorporating customary criminal offenses into the Regional Regulations.

Since KUHP 2023 will be enforced three years after its promulgation, the regional regulation regarding customary criminal offenses must be immediately implemented to prevent legal gaps. However, further studies are needed to standardize the materials contained in the regional regulations, considering indigenous communities' various interests and characteristics so that their rights are not violated and remain protected.

REFERENCE

Book

- Mamudji, Sri, *et.al. Metode Penelitian dan Penulisan Hukum*. Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005.
- Salman, Otje. *Rekonseptualisasi Hukum Adat Kontemporer*, Bandung: Alumni, 2011
- Wahyuni, Fitri. *Dasar-Dasar Hukum Pidana Indonesia*, Tangerang Selatan: PT Nusantara Persada Utama, 2017.

Journal

- Barnasaputri, Ikhana Indah. "Jalan Panjang Pengakuan Masyarakat Hukum Adat Melalui Peraturan Daerah: Beberapa Persoalan yang Belum Selesai", *Notaire*, Vol. 4, No. 1, February 2021.
- Ernawati dan Baharudin, Erwan. "Dinamika Masyarakat Hukum Adat dalam Sistem Ketatanegaraan di Indonesia", *Hukum dan Keadilan*, Vol 6 No 2, September 2019.
- Efriani, Jagad Aditya Dewantara, *et.al*, "Eksistensi Adat dalam Keteraturan Sosial Etnis Dayak", *Refleksi Hukum*, Vol. 6, No. 1, 2021.
- Ferry Fathurokman, "Hukum Pidana Adat Baduy dan Relevansinya dalam Pembaharuan Hukum Pidana", *Jurnal Law Reform*, Vol. 5, No. 1, April 2010.
- Helnawaty, "Hukum Pidana Adat dalam Pembaharuan Hukum Pidana Nasional", *Bina Mulia Hukum*, Vol. 6, No.2, December 2017.
- Manarisip, Marco. "Eksistensi Pidana Adat dalam Hukum Nasional", *Lex Crimen*. Vol. I, No. 4, October-December 2012.
- Lilik Mulyadi, "Eksistensi Hukum Pidana Adat di Indonesia: Pengkajian Asas, Norma, Teori, Praktik dan Prosedurnya", *Jurnal Hukum dan Peradilan*, Vol. 2, No. 2, July 2013.
- Putri, Nella Sumika. "Memikirkan Kembali Unsur "Hukum Yang Hidup dalam Masyarakat" Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas", *Indonesia Criminal Law Review*, Vol. 1, No. 1, 2021.
- Santoso, Topo. "Asas Teritorialitas dalam Hukum Pidana Indonesia: Pengertian dan Perkembangannya", *Jurnal Hukum Pidana & Kriminologi*, Vol. 1, No. 1, October 2020.

Sudibya, Diah Gayatri, *et.al.* "Penerapan Sanksi Adat dalam Penistaan Tempat Suci di Desa Padang Tegal, Kecamatan Ubud, Kabupaten Gianyar, *Kertha Wicaksana: Sarana Komunikasi Dosen dan Mahasiswa*, Vol. 15, No. 1, 2021.

Isharyanto, Johan Erwin. "Eksistensi dan Pengaturan Kesatuan Masyarakat Hukum Adat sebagai Subyek Hukum Tatanegara, *Jurnal Hukum dan Dinamika Masyarakat*, Vol. 16, No. 1, 2018.

Other Resources

Gunarto, Marcus Priyo. "Asas Legalitas, Kriminalisasi, Pemidanaan dalam R-KUHP Serta Dampaknya Terhadap Hukum Pidana Nasional", *Makalah*, delivered at Seminar & Workshop RKUHP entitled "Mewujudkan Pembaharuan Hukum Pidana Melalui R-KUHP yang Berkeadilan, Demokratis dan Responsif Pada Perkembangan Tindak Pidana". Koalisi Perempuan Indonesia, Kamis-Jumat, Jakarta, 15-16 March 2018.

"Kecam Pernyataan Edy Mulyadi Aliansi Masyarakat Dayak Kalimantan Siapkan Hukum Adat, <https://www.kompas.tv/article/254680/kecam-pernyataan-edy-mulyadi-aliansi-masyarakat-dayak-kalimantan-siapkan-hukum-adat>.

Basrin, Erwin, "Rasionalitas Hak Adat atas Perairan Laut, <https://akar.or.id/rasionalitas-hak-adat-atas-perairan-laut/>.

Warman, Kunia, "Peta Perundang-undangan tentang Pengakuan Masyarakat Hukum Adat, <http://procurement-notices.undp/>.