

RESEARCH ARTICLE

The Position of Adat Law in the Indonesian Criminal Code Which Adheres to Legality Principle

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ABSTRACT

On 6 December 2022, it was approved that law number 1, the year 2023 about Indonesia's criminal code (KUHP) has been implemented since the day of approval. This is an effort of legal politics to solve the problems in the community nationally and patriotically. In law number 1, the year 2023 which still adheres to the principle of legality has become a problem where the principles are different from the Adat (customary) law which is written. The position of Adat law should be elaborated concretely so that multi-interpretation does not happen because Indonesia is an archipelago meaning that it has many islands with various tribes and cultures. Besides, the mechanism guideline for the system of the Adat criminal court has not been adjusted yet. With the case in mind, the researcher used normative juridic methodology to identify the research questions using a conceptual approach related to the position of Adat Law in law number 1, the year 2023 that adheres to legality principle, analyze the implementation of legality principle, and the regulations related to the current problems. The data gathered were primary data, secondary, and tertiary. The findings showed that it was important to be concerned about the society's aspirations in making operational procedures from the various policymakers including the Adat community, Adat authority, the organization of Adat law, and the activists of Adat law. That should be done to make sure that involving Adat Law in the National Law system can represent the spirits and wishes of Indonesians to reach Expediency, Justice, and Certainty for the people.

Keywords: *The Principle of Legality, Adat Law, Adat People, Legal Objective.*

INTRODUCTION

As the world advances, crimes are becoming more varied. In criminal law, legality principle is the fundamental principle for the implementation of criminal law (Hamzah, 2017). The discussion of legality principles implementation in Indonesia's criminal court is controversial because some argue that the principles are not relevant to the current situation. They mentioned that the development of crimes was complicated which made the principle of legality possible to be manipulated by the criminals. However, the implementation of law number 1, the year 2023 about the criminal code on 6 December 2022, which still attached the principle of legality and considered the existing norms in the

community, is a positive way to complete Indonesia's law system. This step was seen as an attempt to adapt the law to represent the need for an independent community.

Based on Tody Sasmitha's book, entitled "*Between Adat law and living: an illusion of customary law incorporation into Indonesia Penal system*", it was stated that involving Adat law in the new criminal code is an attempt to liberate the Indonesian community structure of colonialism. As mentioned in the previous paragraph Indonesians saw Adat law as a motivation to act more that represented the identity of up-to-date Indonesia's criminal law (Utama, 2021). Speaking of Adat law, Indonesia is an archipelago country and it caused the various Adat laws in every place. Besides, there is also a value that should be obeyed but not always in the form of writing. This could be a contrast with the principle of legality that is positive (written law).

In this context, the implementation of Adat law in the criminal court system caused a vital issue for criminal law and court. The issue was in Article 2 section 3 that the operational procedure and the criteria of legal determination in the society were not accommodated yet. In line with the issue, based on the principle of legality, a decision should have legal certainty. When the decision was produced, it would not be withdrawn for no reason if the formal and material requirements were fulfilled with the annotation that the decision was not made of violence or negligence. A legal certainty should complete philosophical values, justice, and certainty to make a decision ("Hukum Indonesia di Masa Depan - Ibnu Sina Chandranegara, dkk," t.t.). The involvement of Adat Law in the latest Indonesian Criminal Code was in line with the theory of Gustav Radbruch to reach a harmonical law consisting of certainty, expediency, and justice for all Indonesians.

Adat law is a heritage tradition, local norms that are heterogeneous. According to Soerojo Wignjodipuro, Adat law is a group of norms from the community's justice feeling that keeps growing including rules of conduct in their daily life and some of them are mostly unwritten, valued, and obeyed by the community because it has personal law consequences (*Pengantar dan asas-asas hukum adat / Soerojo Wignjodipoero. | OPAC Perpustakaan Nasional RI.*, t.t.). Besides, Adat law is characterized as flexible, communal, territorial, and relevant to society and culture. Soepomo concluded that Adat law is the united community's spirit in a communal structure that regulates people through certain norms. The main goal is to maintain physical and spiritual balance among individuals, groups, and environments based on their beliefs and natural involvement. Society's stabilization is viewed as part of nature's harmony and violence against Adat law is considered a problem for nature's order that should be avoided to prevent the infliction of community and individual (Zulfa, 2011).

Adat law has a role and function in society as a justice enforcer, formal law complement, and culture maintenance. The presence of Adat law in Indonesia's constitutional framework has an important impact on the process of drafting the written law for this country. As the prior system that has been existed for a long time and unwritten, Adat law has become a starting point and model for developing national law. This has a significant part in the evolution of Indonesia's constitution and greatly influences the process of other written laws (Saleh, 2013). This was proven by the involvement of law number 1; the year 2023 and it was an attempt to remove the influence of colonialism because the criminal code (KUHP) was a Dutch product. Besides, supporting the balance of Adat criminal law with the need for legal certainty in this constitutional country is necessary.

The legality principle was produced by Paul Johan Anslem Von Feurbach (1775-1833), a bachelor of criminal law from Germany in his book *Lehrbuch des penlichen recht* in 1801. As written by Eddy O.S Hiariej who cited Bambang Poernomo's statement, what was formulated by Feurbach contained a deep meaning and in Latin referred to *nulla poena sine lege; nulla poena crimine; nullum crimen sine poena legali* (Hiariej, 2009). Each sentence has a meaning of *nulla poena sine lege* "no penalty without law" meaning that no one can be charged, sentenced, prosecuted, adjudicated, or punished without proceeded criminal law stipulations, and it showed that the authorities cannot do something illegally without law, the authorities should conduct based on their procedures that have been determined in the current laws.

Based on the concept of legality principle, it was emphasized that every legal action should be based on clear and current laws. In the context of law article 2 number 1, the year 2023 that admits and protects Adat law, this is a clear acknowledgment of Adat law that should be in line with the current law and cannot contradict the principles of national law. The acknowledgment and legal protection should be done publicly, consistently, and based on the justice and certainty principle. So, the implementation of Article 2 should make sure that the acknowledgment of Adat law does not only match the legality principle, but also supports the formation of a fair, inclusive, and relevant law system with the existing values in Indonesia.

In law number 1, the year 2023, article 2, Adat law is acknowledged and protected as an integrated part of the cultural properties. The law article highlighted the significance of Adat law in the social life of the community and the need for law number 1, the year 2023 to be implemented by the legal agencies, such as the court, police, and local government to guarantee the effective legal protection. This research was done to evaluate the relevance of law number 1, the year 2023 with the norms of national law including justice principle, legal certainty, and human rights. The lack of Adat law explanation and rejection of Adat law acknowledgment should be overcome by strengthening the cultural identity and involving the Adat community in the legal process. The evaluation of this law is required to give suggestions for future implementation and understand the impacts on the national law system and Adat society in Indonesia.

METHODOLOGY

This research applied a normative juridical approach which was in the form of perspectives and descriptive. Therefore, this study was based on the legal concept, regulations, and other legal materials. This study also identified comprehensively the legal principle including Adat law, the implementation of it in law number 1, the year 2023, and legal improvement for integrated law criminal court in Indonesia. The methodology covered methodic identification of laws, doctrine, and concepts aiming to spot the weaknesses, suggest a modification for legal concepts, and give meaningful perceptions to improve law enforcement in Indonesia. Besides, this study used literature reviews and normative juridical perspectives to evaluate the involvement concept of Adat law in law number 1, the year 2023 that adheres to the legality principle for reaching a legal harmony.

The analysis included a deep understanding of the concept of the legality principle and its future implementation.

FINDINGS AND DISCUSSION

3.1 The Implementation of Article 2 in Law Number 1, the Year 2023 regulating Adat Law Position in the Context of Legality Principle

Criminal law is an important aspect of the law system in a country that determines norms of behavior by stating what can or cannot be done and giving a warning penalty for those who infringe the norms. A criminal penalty is applied if the perpetrators are proven infringing the law and after some appropriate processes of inquiry, investigation, and trial. The sentence can be in the form of prison, fine, or another form that is based on the law's stipulation (Moeljatno, 2015). The research of Indonesia's latest criminal code (KUHP) in the context of Law Number 1, the Year of 2023 is an attempt to synchronize criminal law and the existing laws in Indonesia's community.

The legality principle is fundamental for the implementation of criminal law since the principle is just like pillars that sustain a building. The legality principle has become the main principle for criminal court because this principle was basically from 'legal certainty' aiming to protect the legal objectives and human rights that would be put in trial to make it steady and not being influenced by situation and anyone. The legality principle should be attached to the criminal court because it is just like a soul to a body. In other words, a criminal court system without the legality principle will not move even if it is forced to. If the criminal court system is forced to move, then it would be 'an undead' or 'zombie' that has no direction to move and even scare other people (Bernard L. Tanya, 2014).

Law Number 1, the Year of 2023 is a recodification law functioned as *lex generalis*. This happened due to the decolonization of social principles involvement as the prosecution rules and highlights the codification characteristic of Indonesia's criminal law. From Indonesia's criminal code reform, the legality principle develops from formal character into materials, by acknowledging Adat law as the prosecution background for a crime even though it was not regulated yet in the laws (*PERLUASAN ASAS LEGALITAS FORMIL KE ASAS LEGALITAS MATERIIL DALAM KUHP NASIONAL: KONTROVERSI SERTA EKSISTENSINYA - Fakultas Hukum*, t.t.). The formal Legality Principle is a certainty value of Indonesian, even though this country has prior legal certainty in the society. However, this certainty is not always written in the formula as what the formal legality principle wanted. There are five reasons for the base of the formal legality principle becoming the material legality principle and the reasons are through comparative analysis, consensus on national seminars, theoretical frameworks, national legislative policies, and consensus on international documents (Fadlilah dkk., 2022). As mentioned by Sidharta the development of the formal legality principle into the material legality principle is done by acknowledging Adat law values to handle the relevant infringement in the community which aims to seek justice that is more substantial rather than just to complement (Sidharta, 2016).

The improvement of the legality principle in the national criminal code from formal character to material, from the concept that nothing can be sentenced without prior law, now becomes an option in law article 2 section (1). Even though it was controversial due to the reduction of Adat law's real meaning into written law and the ambiguous process in criminal law. Article 2 in Law Number 1, the Year 2023 showed a significant change in the acknowledgment and legal protection of Adat law in Indonesia. By strengthening the legal framework and adopting the legality principle, the law article emphasized the government's commitment to protect the cultural variety and customs and also gave legal certainty to Adat society. This procedure is not taken only for the documentation but also plays a concrete step in strengthening the acknowledgment and protection of Adat law as a vital property to Indonesia's social justice.

It should be noted that the confusion in the process of the trial between the district law court and Adat law court based on Law Number 1, the Year 2023 became the main challenge in implementing Adat law in Indonesia. Even though the laws emphasized the commitment to the legality principle, they did not give proper procedures for the trial process. This could result in uncertainty in enforcing the laws, especially in deciding where the prosecution should be done. With the potential confusion and conflict that can happen, the government should take serious steps.

Arranging the procedural guidelines: The government makes a practical procedure to guide all parties clearly about the acknowledgment and protection of Adat law based on the legality principle.

Empowering Adat court institution: Increasing the role and authority of the Adat court in adjudicating some crimes related to Adat law and making sure that making decisions should be based on valid law principles.

The need for Adat law education: Education programs for judges, lawyers, and law enforcers should be enhanced to improve the understanding of legality principles in the context of Adat law.

3.2 The Implementation of Article 2 in Law Number 1, the Year 2023 regulating Adat Law Position in the Context of Legality Principle

Article 2 of Law Number 1, the Year 2023, specifically regulates the acknowledgment and value of Adat law. This stipulation is a legislative step aiming to integrate Adat norms into the national laws. Therefore, this acknowledgment showed the importance of valuing tradition and local culture in the context of Indonesia's modern law and reflected the commitment to maintain the balance of national law and Adat law (Aldi & Putra, 2023). This law article was acknowledged as long as follows the national law principles and human rights. This represents an inclusive approach that values the existing Adat law in the context of modern law.

From the era of colonial to the independence, the acknowledgment of Adat law has undergone many changes. In the beginning, Adat law was neglected and considered lower than national law. However, as time goes by, the awareness of cultural identity has made a change in acknowledging Adat law.

In Indonesia, there are at least three vital categories in the historical period of Adat law. The periodic are shown below (Slamet Widodo, 2023).

The development of Adat law: The historical progress and development of Adat law existed before the Hindu era.

The acknowledgment in Science: The history of how Adat law developed from unrecognized law to be known as a part of academic.

The position in legal politics: The historical position of Adat law as a political issue in the law system of Indonesia has been discussed in this periodic.

Besides, the 1945 Constitution of the Republic of Indonesia emphasized that the country admitted the united Adat community. This was mentioned in article 18B, section (2) 1945 Constitution of the Republic of Indonesia (UUD 1945), stating that “The country recognizes and respect entities of the Adat law societies as well as their traditional rights to the extent they still exist and are under the development of the society and the principle of the Unitary State of the Republic of Indonesia”. The acknowledgment of Adat law should be followed by the protection of traditional rights that exist inside of it (Irawan & Pura, 2023).

As time goes by, Indonesia has left colonial law and integrated Adat law into the national law system. The shifting paradigm aims to build a national character that adheres to Indonesia’s law, creates a beneficial condition for substantive justice, and challenges the drafting of the implementation. Even though facing many complexities, the drafting process of Indonesia’s new criminal code (KUHP) over 63 years has produced significant improvement in the law system. This transformative journey marked intentional change from the colonial law paradigm, then adopted a hard-working framework that was relevant to Indonesia’s principles. The shifting has shown Indonesia’s commitment to practical justice and defense in facing law reform (Faisal dkk., 2024).

On the other side, facing a challenge after combining Adat law with the national law system was also complicated. This was caused by the basic theory of Adat law that focused on the community’s concerns and national law focused more on rights and individual freedom. The difficulty in harmonizing the two systems was influenced by the limited comprehension of Adat law by the authorities. Besides, the adoption of the Adat law was resisted by society’s rejection of that usually used national law. Another challenge included gender issues and human rights that were viewed differently by Adat law and international standards. However, admitting Adat law can give support for local cultural identity and enrich the national law perspectives with unique values. With a careful and inclusive approach, the integration of both law systems can be done effectively.

The implementation of Adat law can offer proper and relevant solutions for societies’ Adat compared to national law. For example, the mechanism solution for disputes that adhere to the community is often more inclusive and relevant to the local values. The community-based approach has been implemented in societies that are prone to conflict effects. This approach could be an effective way to create a harmonic environment (Adiansah dkk., 2021).

Legality principles in criminal law are necessary basic principles (Eddy O.S. Hiariej, 2009). The principle of legality states that a criminal action can only be sentenced with proceeded criminal law stipulations. This modern criminal law prevented arbitrary sentences, made sure the certainty, and protected individual rights by determining that only

criminal action that was prohibited by the laws could be sentenced. The stipulations were different from the concept of Adat law because the law was often changeable and unwritten, which was different from the legality principle with legal certainty (Adiansah dkk., 2021).

Based on the previous discussion, this research suggested a solution to run a dialog involving various parties, including the Adat law model, academics, and policymakers, to combine the concept of Adat law that is flexible to the clarity principle required by the legality principle in modern criminal law. In this process, the concern was still on cultural values and local needs and making sure that justice principles and human rights were still maintained. Wider education about Adat law can also be important to improve public understanding between law enforcers and common society so that it can reduce uncertainty and tension between the two law systems. With a continuous and inclusive approach, there should be a solution that accommodates both systems of law fairly and makes sure that the individual rights and justice in the law enforcement.

Speaking of education, this is shifting the foundation from the bad to be better becoming the key to wealth and a robust economy. To reach the dream, education has become a basic need that cannot be changed. Through education, every individual can improve their potential and excellence to reach their dreams. By local wisdom-based education, it was important to value and follow traditional norms without changing them. This approach was in line with law number 20, the year 2003 about the National Education System that helped Adat societies by giving directions and support to maintain their cultural identity (Fikriya, 2022).

Facing the challenges in combining Adat law with the national law frameworks required concrete steps that valued local cultural ethics and also concerned with the principles of human rights. By focusing on detailed regulation drafting, the direct involvement of Adat Societies in the legislative process, improvement of law enforcers' understanding of Adat law, and attempt to unite legality principles to Adat law through an inclusive approach, possibly created balanced legal frameworks and supported fair law enforcers in Indonesia.

CONCLUSION

The implementation of Article 2 in Law Number 1, the Year 2023 about the position of Adat law has marked an important change in the acknowledgment and protection of Adat law in Indonesia. By involving the legality principle as the framework, this procedure reflected the country's commitment to strengthen the legal framework that admitted the rights of Adat societies. However, the challenge of the uncertainty process in the court requires an effort to draft the operational procedures, and improvement the institution of Adat court, and Adat law education. It was expected that implementing law article 2 could give clear advantages for cultural variety and social justice in Indonesia. Article 2 in Law Number 1, the Year 2023 described a real way of acknowledging and integrating Adat law into the national law frameworks of Indonesia. Nevertheless, the implementation still faced some problems in law and society. The involvement of Adat law in the national law system required a careful approach that considered the needs and local values while ensuring social justice and legal certainty. The conclusion of challenges and opportunity analysis in the

implementation of the legality principle was the need for collaboration between the legality principle and Adat law with adaptive and inclusive policy. Thus, it can create legal frameworks that integrate Adat law principles with the principles of national law which later will produce more effective and fair law enforcers for Indonesians.

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