


The Dialectic of The National Criminal Code and The Living Law: A Philosophical Approach to Contemporary Criminal Law

Dwinanda Linchia Levi Heningdyah Nikolas Kusumawardhani

Faculty of Law, Universitas 17 Agustus 1945 Semarang, Semarang, Indonesia.

 : dwinanda-linchialevi@untagsmg.ac.id

Corresponding Author*



Abstract

Introduction: This study examines the dialectical relationship between the National Criminal Code and the living law through the contemporary criminal law philosophy approach. The existence of the Criminal Code as a formal legal product of the state is often in tension with the customary law system and the values that live in pluralistic Indonesian society.

Purposes of the Research: This research aims to analyze the patterns of interaction, contradictions, and potential harmonization between the two legal systems.

Methods of the Research: Using juridical-philosophical research methods and legal hermeneutic approaches, this study explores the ontological, epistemological, and axiological dimensions of the dialectic.

Results Main Findings of the Research: The results of the study show that despite paradigmatic tensions, the two legal systems can run in a complementary manner through an integrated legal pluralism recognition mechanism. This research offers a new conceptual framework in understanding the nature of criminal law that is responsive to social change but still upholds legal certainty. The findings of the research have implications for the urgency of reformulating the Criminal Code that accommodates the living law while maintaining the fundamental principles of modern criminal law, especially legality, proportionality, and protection of human rights. This dialectical approach is an important foundation for the development of a contextual, fair, and sustainable Indonesian criminal law system.

Keywords: Criminal Code; The Living Law; Legal Dialectics; Legal Pluralism; Criminal Justice System.

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INTRODUCTION

Indonesia as a country of law has undergone various transformations in its criminal law system since independence to the reform era. The Criminal Code (KUHP) which is currently in force is a Dutch colonial heritage through the principle of concordance which has undergone several adjustments.¹ In the course of its history, the National Criminal Code continues to strive to be adapted to the values that live in diverse Indonesian society, or what is often referred to as *The Living Law*.² Dialectics between written laws (*Ius Constitutum*) with the laws that live in society (*The Living Law*) was the main focus of this study.³

As a country with a plurality of cultures, customs, and local wisdom values, Indonesia faces the challenge of harmonizing the demands of the universality of modern law with the particularity of local values. Contemporary criminal law philosophy offers a critical perspective to bridge the gap between the National Criminal Code as a positive legal

¹ Barda Nawawi Arief, "Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)," 2011.

² Neil O Littlefield, "Eugen Ehrlich's Fundamental Principles of the Sociology of Law," *Me. L. Rev.* 19 (1967): 1.

³ Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford Socio-Legal Studies, 2001).

product and *The Living Law* which develops dynamically in the social life of the community.⁴ According to Eugen Ehrlich, a good law is a law that corresponds to *The Living Law* that is the law that lives in society.⁵ This concept emphasizes that the effectiveness of the law lies in the extent to which it is able to accommodate the values and norms that have grown and accepted in society. In the Indonesian context, the renewal of the National Criminal Code must consider the socio-cultural context of the Indonesian people who adhere to the principles of Pancasila as the philosophy of the state.⁶

The dialectic between the National Criminal Code and *The Living Law* Creating a discourse space is important in the development of a responsive and contextual criminal law system.⁷ On the one hand, the National Criminal Code needs to have legal certainty as a formal legal instrument of the state, but on the other hand, the criminal law must also reflect the sense of justice that lives in society. Satjipto Rahardjo called it a "progressive law" that places law as an instrument to achieve substantive justice, not just procedural justice.⁸

In the reform of the National Criminal Code that has been carried out, there are efforts to accommodate the values of customary law and law that live in society.⁹ This can be seen from the recognition of the law that lives in society (*The Living Law*) as a basis for determining acts that can be punished outside the Criminal Code, as long as they are in accordance with the values of Pancasila, human rights, and general legal principles recognized by civilized society.¹⁰ However, the implementation of this recognition in judicial practice still faces various obstacles, both in terms of legislation, judiciary, and execution.

The approach of contemporary criminal law philosophy allows us to review and critically reflect on the dialectical relationship between the National Criminal Code and the National Criminal Code. *The Living Law*. Through philosophical studies, a more coherent basis of thought can be formulated between the formal criminal law system and the values of local wisdom. This is especially important in the context of Indonesia, which adheres to legal pluralism, where various legal systems (state law, customary law, religious law) coexist and interact with each other.¹¹

This study seeks to explore the dialectical relationship between the National Criminal Code as a positive law and *the living law* as a manifestation of the socio-cultural values of Indonesian society, through the perspective of contemporary criminal law philosophy. This research is expected to make a theoretical and practical contribution to the development of a more responsive, contextual, and fair Indonesian criminal law system.

METHODS OF THE RESEARCH

Juridical-philosophical research methods and hermeneutic approaches¹² Law, this research explores the ontological, epistemological, and axiological dimensions of the

⁴ B Arief Sidharta, "Refleksi Tentang Fundasi Dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia= Reflection Concerning the Foundation and Scientific Character of the Legal Science as the Basis for Developing Indonesia's National Legal s" (Universitas Padjajaran, 1996).

⁵ Eugene Ehrlich and Klaus A Ziegert, *Fundamental Principles of the Sociology of Law* (Routledge, 2017).

⁶ Moh Mahfud, *Politik Hukum Di Indonesia* (Lp3s, 1998).

⁷ S H Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Prenada Media, 2016).

⁸ Satjipto Rahardjo and Biarkan Hukum Mengalir, "Hukum Progresif Sebagai Dasar Pembangunan Ilmu Hukum Indonesia," in *Makalah Yang Disampaikan Pada Seminar Nasional Menggagas Ilmu Hukum Progresif Di Indonesia, Di Semarang*, 2004.

⁹ Yesmil Anwar, *Pembaruan Hukum Pidana: Reformasi Hukum* (Grasindo, 2008).

¹⁰ Arif Gosita, "Masalah Korban Kejahatan," *BUKU DOSEN-2009*, 2010.

¹¹ Soerjono Soekanto, *Hukum Adat Indonesia*, 2005.

¹² Norman K Denzin and Yvonna S Lincoln, *The Sage Handbook of Qualitative Research* (sage, 2011).

dialectic.¹³ As a juridical-philosophical research, this study pays attention to the philosophical and normative dimensions of the national criminal law system in relation to *The Living Law* as a manifestation of the values that live in society.¹⁴ This type of research includes normative legal research that focuses on the study of literature (*Library Research*), by examining primary, secondary, and tertiary legal materials.¹⁵ The primary legal materials used include the 1945 Constitution, the Criminal Code, the Draft National Criminal Code, and court decisions relevant to the recognition *The Living Law*. Secondary legal materials include books, scientific journals, research results, and articles related to the philosophy of criminal law and *The Living Law*. Meanwhile, tertiary legal materials include legal dictionaries and legal encyclopedias that provide additional information on primary and secondary legal materials.¹⁶ The data collection technique is carried out through document studies by searching, inventorying, and identifying legal materials relevant to the research object.¹⁷ This research also uses the *Content Analysis* to analyze the meaning and substance of the legal documents under review.¹⁸ Data analysis was carried out using descriptive-analytical and prescriptive-analytical methods.¹⁹ The descriptive-analytical method is used to describe and analyze the dialectic between the National Criminal Code and *The Living Law* from the perspective of contemporary criminal law philosophy. Meanwhile, prescriptive-analytical methods are used to provide theoretical arguments and justifications for how the national criminal law system should accommodate *The Living Law*.

RESULTS AND DISCUSSION

A. National Criminal Code: History And Characteristics

The Criminal Code that applies in Indonesia has a historical background as a Dutch colonial heritage through the principle of concordance of *Criminal Code* (WvS). Although it has undergone various changes and adjustments, the Criminal Code still retains its basic character as a legal product based on tradition *Civil Law* with legalistic-positivistic characteristics.¹⁹ Some of the fundamental characteristics of the National Criminal Code can be identified as follows: a) It is oriented to the principle of legality (*nullum delictum nulla poena sine praevia lege poenali*) which emphasizes that no act can be punished without criminal provisions in pre-existing laws and regulations; b) Adheres to a codification system that seeks to cover all provisions of material criminal law in one comprehensive and systematic book; c) It has an individual-retributive character in punishment, although it develops towards the acceptance of a *mixed theory* that combines aspects of retribution and purpose; d) It is written and formal, with an emphasis on legal certainty as the main value that must be guaranteed.²⁰

The National Criminal Code, like other written legal systems, often faces challenges in accommodating social dynamics and community developments that move faster than the

¹³ Peter Mahmud Marzuki, "Penelitian Hukum," 2013.

¹⁴ Bernard L Tanya, Yoan Nursari Simanjuntak, and Markus Y Hage, "Teori Hukum" (Genta Publishing, 2013).

¹⁵ Soerjono Soekanto, "Penelitian Hukum Normatif: Suatu Tinjauan Singkat," 2007.

¹⁶ Jonaedi Efendi, Jhonny Ibrahim, and Prasetijo Rijadi, "Metode Penelitian Hukum: Normatif Dan Empiris," 2016.

¹⁷ John W Creswell and J David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage publications, 2017).

¹⁸ Anthon F Susanto, *Ilmu Hukum Non Sistematis (Fondasi Filsafat Pengembangan Ilmu Hukum Indonesia)* (LoGoz Publishing, 2015).

¹⁹ Muhammad Akib, "Refleksi Pemikiran Hukum Moderen," *Jurnal Hukum Pro Justitia* 27, no. 2 (2009).

²⁰ Badan Pembinaan Hukum Nasional, PETUNJUK TEKNIS, and I BAB, "Kementerian Hukum Dan Hak Asasi Manusia Republik Indonesia," *Draft Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidana (KUHP)* 1, no. 1 (2015).

ability of legislation to respond to them. This is one of the factors that drive the gap between written law and the social reality that is developing in society.

B. The Living Law: Concept And Manifestation

Concept *The Living Law* was first introduced by Eugen Ehrlich, who defined it as "a law that lives and develops in society" (*the inner order of society*). Ehrlich emphasized that the real law of life is not merely written in law, but real law practiced in everyday social life. In Indonesia, the manifestation of *The Living Law* It can be seen in various forms: a) Customary law is still maintained and practiced by indigenous communities in various regions of Indonesia; b) Dispute resolution practices based on local *wisdom* that are still alive and recognized by certain communities; c) Religious norms are internalized and become part of the value system and sanctions in the religious community; d) Communal agreements (*Communal Agreements*) which is a reference in regulating behavior and conflict resolution.²¹

The living law has distinctive characteristics, including: it is communal, emphasizes social harmony, has flexibility in application, is oriented towards restorative conflict resolution, and often has a spiritual or metaphysical dimension. This characteristic is often contrasted with the formal-legalistic character of the Criminal Code.

C. Contemporary Philosophy of Criminal Law

The philosophy of contemporary criminal law is characterized by several characteristics and orientations that differ from the classical approach. Some important aspects of contemporary criminal law philosophy that are relevant to the dialectic of the Criminal Code and *the living law* include: a) Legal Pluralism (*Legal Pluralism*): Recognition of the coexistence of various normative systems within the same geographical area or community. This perspective opens up space for the recognition of the legitimacy of non-state legal systems;²² b) Restorative Justice (*Restorative Justice*): A shift from a retributive paradigm to an approach that emphasizes restoring the balance that is disturbed by criminal acts, by involving perpetrators, victims, and communities in the settlement process.²³ c) Progressive Law: The idea that law should be placed in a broader social context and oriented towards the achievement of substantive justice, rather than mere formal certainty. This approach emphasizes the importance of legal interpretation that is responsive to the needs of the community.²⁴ d) Critical Approach to Legality: Problematizing the rigid principle of legality by considering the dimensions of justice and socio-cultural context in the application of criminal law; e) Cultural Relativism in Criminal Contexts: The recognition that conceptions of crime and punishment are not universal, but are socially and culturally constructed, so they need to be sensitive to local contexts. This approach to contemporary criminal law philosophy offers a more comprehensive analytical framework in understanding the dialectic of the Criminal Code and *the living law*, while opening up the possibility of more substantive harmonization between the two.

D. Dialectic of The National Criminal Code and The Living Law

²¹ Reimon Supusesa, "Eksistensi Hukum Delik Adat Dalam Perspektif Pembaharuan Hukum Pidana Di Maluku Tengah," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 24, no. 1 (2012): 41–54.

²² Nur Rochaeti, "Implementasi Keadilan Restoratif Dan Pluralisme Hukum Dalam Sistem Peradilan Pidana Anak Di Indonesia," *Masalah-Masalah Hukum* 44, no. 2 (2015): 150–60.

²³ Muhammad Yahya and Deli Bunga Saravistha, "Implikasi Restorative Justice Pasca Undang-Undang Nomor 1 Tahun 2023 Tentang KUHP," *Jurnal Ilmiah Cakrawarti* 7, no. 2 (2024): 73–81.

²⁴ Ahmad Faisal, "Pemikiran Hukum Progresif Prof. Dr. Satjipto Rahardjo," *Journal of Cross Knowledge* 1, no. 2 (2023): 314–28.

The dialectic between the National Criminal Code and *The Living Law* can be identified in several areas of intersection that often give rise to tension or conflict:²⁵ a) Conception of Crime and Sanctions: There are fundamental differences in defining what is considered a crime and the appropriate sanctions. The Criminal Code adheres to a legal-formal definition, while *the living law* often uses the parameters of social harmony and cosmic balance; b) Legitimacy of Legal Sources: The Criminal Code places state legislation as the only source of legitimate criminal law legitimacy, while *living law* recognizes communal, religious, or cultural authority as a legitimate source of legitimacy; c) Enforcement Procedures and Mechanisms: The Criminal Code adheres to formal procedures carried out by state law enforcement officials, while *the living law* often applies settlement mechanisms involving customary, religious, or communal leaders with more flexible procedures; d) Criminal Objectives: The Criminal Code tends to be oriented towards retribution and deterrence, while *the living law* places more emphasis on the restoration of social balance and the reconciliation of parties to conflict; e) Individualism vs. collectivism: The Criminal Code adopts an individualistic view of criminal responsibility, while *the living law* often involves a dimension of collective or communal responsibility

This intersection has given rise to various cases that illustrate the complexity of this dialect, such as cases of mass judgment that are considered as a manifestation of "people's justice", customary sanctions execution practices that are considered to violate human rights, or the settlement of criminal cases through customary mechanisms whose legitimacy is then questioned in the formal legal system. The case study of the Intersection of the Criminal Code and The Living Law includes the following: a) The Stoning Case in Aceh (2010): The polemic of the application of the punishment of stoning to adulterers regulated in the Aceh Qanun Jinayat as a manifestation of the application of Islamic law, which has caused debate about its limits on the Criminal Code and the national constitution; b) Customary Settlement Cases in Papua: Various criminal cases in Papua that were resolved through the "burn stone" mechanism (*heat stones ceremony*) as a form of customary reconciliation, raise questions about *ne bis in idem* and the legitimacy of non-judicial settlements in the context of national criminal law; c) The case of caning in Sampang: The implementation of caning by the community against perpetrators of violations of religious norms is considered "vigilant" in the perspective of the Criminal Code, while being considered as the enforcement of legitimate norms in the community; d) Cases of Underage Marriage: The practice of underage marriage that is considered a customary tradition in some communities, but intersects with the provisions of the Criminal Code on sexual intercourse with children and the Marriage Law.

The above cases illustrate areas of tension between the Criminal Code and *the living law* that require a dialectical approach to achieve a just settlement that is accepted by various parties. The intersection between the Criminal Code and *the living law* not only presents practical problems in law enforcement, but also raises fundamental philosophical questions: a) Relativism vs. Moral Universalism: To what extent are the moral values that underlie criminalization universal, and to what extent should cultural relativism be accommodated?; b) The Legitimacy of Legal Pluralism: Should the recognition of legal pluralism be limited by certain standards (such as human rights), or should it be granted full autonomy in accordance with its local context?; c) The Tension between Certainty and Justice: How to balance the demands of legal certainty that are characteristic of the Criminal Code with the

²⁵ Dwinanda Linchia Levi Heningdyah Nikolas Kusumawardhani, "HUKUM PIDANA," *Yayasan DPI*, 2024.

need for substantive justice that is often the orientation of *living law*?; d) The Dilemma of Authority and Power: Who should have the authority to define crime and determine sanctions in a culturally and normatively plural society? e) Questions about National Legal Identity: How can the construction of an authentic national legal identity accommodate the plurality of legal traditions that exist in Indonesia's social reality?²⁶ This philosophical implication is an important foundation in developing a harmonization model that can bridge the gap between the Criminal Code and *the living law*.

E. Model of Harmonization and Integration of Challenges and Future Prospects

Restorative justice (*restorative justice*)²⁷ offers a paradigm that can bridge the gap between the Criminal Code and *The Living Law*, with the following characteristics: a) Orientation to Recovery: Focus on restoring the balance that has been disturbed by criminal acts, not solely punishing the perpetrator; b) Multi-Party Engagement: Involving perpetrators, victims, and communities in the settlement process, which is in line with the communal character of *the living law*. c) Procedural Flexibility: Allows for procedural adaptations according to the local context and case characteristics; d) Relational Dimension Recognition: Paying attention to the relational dimension of crime and rehabilitation, which is often a major concern in *The Living Law*.

This model has begun to be adopted in the Indonesian criminal justice system, especially through a diversion approach in the juvenile criminal justice system, which can be expanded as a model of harmonization of the Criminal Code and *the living law* more broadly. Efforts to harmonize the Criminal Code and *the living law* face various challenges that need to be overcome: a) Paradigmatic Resistance: The resistance of supporters of the legal-positivist paradigm to the recognition of legal pluralism, and conversely, resistance from traditionalists to codification and formalization; b) The Standardization Dilemma: Difficulties in formulating mutually acceptable standards to determine the legitimacy and limits of *the living law* that can be recognized in the national legal system; c) Implementation Complexity: Challenges in implementing theoretical harmonization models into concrete law enforcement practice; d) Instrumentalization Risks: There is a risk of instrumentalization *The Living Law* for certain political or economic interests that may obscure its authentic values²⁸ e) Institutional Capacity Limitations: Limitations in the institutional capacity to manage more complex and adaptive legal models compared to conventional codification models.

Despite the various challenges, there are positive prospects for the development of harmonization of the Criminal Code and *the living law*: a) Criminal Code Reform Momentum: The ongoing Criminal Code reform process provides momentum to integrate the perspective of legal pluralism and accommodate *the living law* more systematically; b) Strengthening Academic Discourse: The development of academic discourse on legal pluralism and socio-legal studies that can provide a theoretical foundation for innovative harmonization models; c) Constitutional Support: There is a constitutional basis that recognizes and respects the unity of customary law communities and their traditional rights,

²⁶ Dwinanda Linchia Levi Heningdyah Nikolas Kusumawardhani, "Sistem Penegakan Hukum Nasional Sebagai Bingkai Putusan Pengadilan Indonesia," *Jurnal Hukum STHG* 1, no. 1 (2018): 44–68.

²⁷ Dwinanda Linchia Levi Heningdyah Nikolas and Sumartini Dewi, "Dasar Konseptual Dan Implementasi Restorative Justice Oleh Polri Untuk Mewujudkan Tujuan Dan Fungsi Hukum (Kepastian, Keadilan Dan Kemanfaatan)," *UNES Law Review* 6, no. 2 (2023): 4197–4203.

²⁸ Yance Arizona, "Kedudukan Peradilan Adat Dalam Sistem Hukum Nasional," *Diskusi Tentang Memperkuat Peradilan Adat Di Kalimantan Tengah Untuk Penguatan Akses Terhadap Keadilan*, 2013.

which can be the basis for the recognition of *the living law*; d) Comparative Experience: The availability of a variety of comparative experiences from other countries that have developed models of harmonization of state law and non-state law, which can be a learning experience; e) Legal Reform Movement: The strengthening of the legal reform movement that emphasizes the importance of substantive justice and responsiveness to socio-cultural contexts.

CONCLUSION

The dialectic between the National Criminal Code and *the living law* is a phenomenon that is both a challenge and an opportunity in the development of an Indonesian criminal law system that is more fair and responsive to the socio-cultural diversity of society. The approach of contemporary criminal law philosophy opens up new insights in understanding the complexity of these intersections and offers a variety of harmonized models that can be developed. Some important points that can be concluded from this discussion include: The dialectic of the Criminal Code and *the living law* is not just a technical-juridical issue, but reflects fundamental questions about identity, authority, and legitimacy in the context of a pluralistic society. Models of harmonization that bridge the gap between the Criminal Code and *the living law* need to be developed taking into account the typical characteristics of the Indonesian context, without being trapped in an overly idealistic or reductionist approach. Principled approaches to legal pluralism, restorative justice, adaptive codification, and progressive jurisprudence offer a conceptual framework that can be integrated to produce a comprehensive model of harmonization. The challenge in harmonizing the Criminal Code and *the living law* requires a multidimensional response that involves paradigmatic, institutional, and operational aspects in the criminal law system. The prospect of developing a fair and responsive harmonization model is wide open, supported by the momentum of Criminal Code reform, the strengthening of academic discourse, and the constitutional foundation that recognizes legal pluralism. In the context of a culturally and normatively plural Indonesia, efforts to build a criminal law system that integrates universal and particular values are an inevitable challenge. The dialectic of the Criminal Code and *the living law*, if managed wisely, can be a catalyst for the development of a criminal law system that not only guarantees certainty, but also is responsive to the diversity and peculiarities of the socio-cultural context of Indonesian society.

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