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# PROBLEMS OF CRIMINAL APPLICATIONS LAW IN THE LIFE OF INDONESIAN COMMUNITIES AND CULTURES

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## Abstract

*Early January 2023, the President of the Republic of Indonesia ratified the R-KUHP to become Law Number 1 of 2023 concerning the Criminal Code. The new Criminal Code will be enforced in three years, with the agenda of socializing it to all law enforcement officials, and also to all Indonesian people. This study wants to explore the use of the Criminal Code with the various problems that accompany it, during an independent nation. The enactment of the Criminal Code raises its own problems for Indonesian religious people based on the first precepts of Pancasila and having an eastern culture. The method used in this research is doctrinal research or normative legal research and is supported by empirical legal research. The novelty of this study is an analysis of the problems with the application of the Criminal Code so far to strengthen the enforceability of the new Criminal Code which will be implemented in the next three years. Research results are, the problem with the application of the Criminal Code as a form of material criminal law has an impact on all aspects. First, the aspect of legal education where knowledge about criminal law reform is not beneficial due to the maintenance of the Criminal Code, from the judicial or law enforcement aspect, the Criminal Code also continues to be used and even becomes the basis for considering the general rules of Book I of the Criminal Code, as long as it is not regulated in laws and regulations outside the Criminal Code. The validity of the Criminal Code from the perspective of religious law and customary law has gaps that cause problems, such as the adultery article in the Criminal Code which has different meanings and principles from those stipulated in religious law and customary law. The principle of "no excuse", which is implied in the Criminal Code, does not reflect the religious and cultural character of the Indonesian people by prioritizing the concept of forgiveness.*

***Keywords: Criminal Code; Culture; Problematic; Religious***

## 1. INTRODUCTION

The position of the Criminal Code or law number 1 of 1946 concerning criminal law regulations, is very irrelevant anymore in Indonesia, a country that has been independent since 1945. Since 1964, Indonesian criminal law experts began compiling formulations, ideas, concepts, and ideas in the draft national criminal law code. The draft that has been prepared for a long time is still an ideal that is expected to be realized, by early 2023 through the ratification of the R-KHUP to become a law, namely Law number 1 of 2023 the book of criminal law laws. The R-KUHP has gone through such a long process that it was finally born safely.

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Waiting for the birth of a baby in a mother's womb is an analogy that is always used by Barda Nawawi Arief, one of the drafting teams of the R-KUHP. It's like a baby in the womb of a mother, who has been in the womb for a long time, but is not immediately born according to the normal phase that should be, that is, around 58 years of the R-KUHP, she is in the womb of the "motherland".

The process of achieving approval of a draft into law is not an easy matter for the drafting team of the R-KUHP. Rejection from several elements of society also accompanied this ratification process. This rejection comes from members of the public who have undoubted intellectual power, practitioners, ordinary people, politicians, students, and others. The recodification of the old Criminal Code (UU number 1 of 1946) into the National Criminal Code has been carried out in such a way as to adapt the conditions of the Indonesian people who are religious, national and cultured with their various customs. The Indonesian nation which upholds religious, moral, social, cultural and national values that is also adaptive to globalization that does not conflict with Pancasila and the 1945 Constitution, is very irrelevant in defending the Criminal Code from the Dutch colonial heritage, which has different characteristics from the personality of the Indonesian nation with customs. east.

Article 284 of the old Criminal Code which discusses the crime of adultery is one of the articles in the Criminal Code that is deemed inappropriate applied in Indonesia. The Criminal Code confirms that adultery, which is one of the crimes of decency, can be punished if the perpetrator is married, subject to Article 27 BW, as well as a complaint offense.[1] Adultery in the perspective of Islamic criminal law is confirmed in Surah Al-Isra verse 32:

وَلَا تَقْرَبُوا الزِّنٰٓى اِنَّهٗ كَانَ فَاحِشَةً ۗوَسَاۤءَ سَبِيْلًا

*"And do not come near to adultery; surely it has been an obscenity and odious as a way."*

Seeing the problems of adultery regulation from two different perspectives rule of law, between the Criminal Code and Islamic law regarding the same act, namely adultery. Adultery from the perspective of indigenous peoples is no less important to get the spotlight. Behavior that is considered reprehensible by the community, even though the act has not been regulated by law is considered a violation.

The spirit of revenge or retention brought by the Criminal Code in imposing criminal penalties through the articles set out in it. The absence of criminal guidelines in the Criminal Code is currently a separate problem that requires clarity of direction and purpose of giving criminal sanctions to someone who commits a crime.

The application of the principle of formal legality also has its own problems with the existence of a law that lives in society. The principle of formal legality in the Criminal

[29] Syamsul Huda, "Zina dalam Perspektif Hukum Islam dan dan Kitab Undang-Undang Hukum Pidana", *Hunafa: Jurnal Studia Islamika"*, 12 no. 2 (2015): 377-397, https://doi.org/10.24239/jsi.v12i2.401.377-397.

Code seems to be a weapon of destruction of living law, both from the perspective of religious, customary, and social norms in Indonesian society.

The drafting of the new Criminal Code aims to replace the Criminal Code inherited from the Dutch colonial government *(Wetboek van Strafrecht voor Nederlandsch-Indie) (Staatblad 1915;732)* with all amendments that are still valid under Article II of the Transitional Rules of the 1945 Constitution. This Criminal Code applies as positive law nationally based on Law No. 1 of 1946 concerning Criminal Law Regulations Jo Law Number 73 of 1958 which later in its development has undergone several changes.[2] At the beginning of 2023, the R-KUHP was ratified to become Law Number 1 of 2023, but the implementation of this rule can only be implemented in three years.[3] During this transitional period, the old Criminal Code is still in use, both for cases that have been processed, as well as for crimes that occurred during this transitional period, if the regulations governing the crime are more favorable to the suspect and the accused.[4] This means that the old Criminal Code is still used in cases like this, during the three-year transitional period.

The Criminal Code has been amended several times, but these changes are only partial and have not been amended as a whole. The positivistic values in the Criminal Code are still strong today, even though the spirit of change has started since the Age of Independence. It is very ironic, in the midst of a society that is so plural in terms of customs and culture as well as a society whose religion is also civilized, the old Criminal Code is still being defended for various reasons.

Demonstrations by students took place in Jakarta, Bandung, Yogyakarta, Malang, Balikpapan, Samarinda, and Purwokerto. The demonstrators rejected the ratification of the revision of the Corruption Eradication Commission Law and the Draft Criminal Code.[5] The Student Executive Board as a forum for conveying student aspirations, each throughout Indonesia has previously threatened to stage demonstrations as a form of rejection.[6] The target of the demonstration is the government, through the House of Representatives/ People's Consultative Assembly as the legislature which will ratify each draft regulation. The Student Executive Board, as a student alliance, demanded not

[2] These changes include, among others, Law No. 1/1960, Law No. 16 Prp. 1960, Law Number 2 of 1964, Law Number 1 of PNPS of 1965, Law Number 7 of 1974, Law Number 4 of 1976, Law Number 27 of 1999, Law 3 of 1997 which was replaced by Law Number 11 of 2012, and Law Number 3 of 1971 which was replaced by Law Number 31 of 1999 jo. Law Number 20 of 2001.

[3] Humas Kemenko Polhukam, RI, 'Di Depan Para Jaksa, Menko Polhukam Minta untuk Persiapkan Diri Saat KUHP Baru Berlaku', Kementerian Koordinator Bidang Politik, Hukum, dan Keamanan, 2022. https://polkam.go.id/di-depan-para-jaksa-menko-polhukam-minta-untuk-persiapkan-diri-saat-kuhp-baru-berlaku/#: ~ :text = Para % 20Jaksa % 20sudah % 20punya % 20KUHP,Kejaksaan % 20RI % 2C % 20di % 20Hotel % 20Grand.

[4] Article 618 Law Number 1 of 2023: At the time this Law came into force, Criminal Acts that were in the process of being tried used the provisions of this Law unless the Laws governing such Crimes were more favourable to the suspect or defendant.

[5] Addi M Idhom, 'Penyebab Demo Mahasiswa Hari Ini Dan Respons Jokowi Soal RUU KUHP', *Tirto.Id*, 2019, https://doi.org/https://tirto.id/penyebab-demo-mahasiswa-hari-ini-dan-respons-jokowi-soal-ruu-kuhp-eiAV.

[6] Reno Ensir, 'Mahasiswa Ancam Gelar Aksi Tolak RKUHP', CNN Indonesia, 2021, https://www.cnnindonesia.com/nasional/20210610102147-20-652515/mahasiswa-ancam-gelar-aksi-tolak-rkuhp.

only the Draft Criminal Code which was rejected for ratification, but also other draft regulations such as the Land Bill, a draft of Labor law, and the revision of the Mineral and Coal Law.[7]

According to Barda Nawawi Arief,[8] the essence of criminal law reform is closely related to the background and urgency of the criminal law reform itself. The urgency of holding criminal law reforms can be viewed from the socio-political aspect; social philosophy; and socio-cultural or from various policy aspects which include social policy; criminal policy; and law enforcement policies.

The type of research in this paper uses the type of doctrinal research or normative legal research and is supported by empirical legal research. According to Soetandyo Wignjosoebroto, legal research in its classical concept is basically an effort to find answers to the question "what legal decision must be taken to punish a particular case". As long as the law is said to be a norm, whether it has been formed and has a positive form *(ius constitutum)* or one that has not been positive *(ius constituendum)*, during that time this legal research must be said to be normative research.[9] Normative legal research or library law research is legal research conducted by examining library materials or secondary data.[10] The approach in this study uses a statutory approach and a conceptual approach. Data obtained from field research is primary data, namely data obtained directly from respondents and sources, and is used to support secondary data. Primary data (field data/empirical data) were collected from interviews with several respondents, namely parties related to the Drafting Team of the Criminal Code. Data analysis was carried out by reviewing all available data, which had been processed from various sources, both from laws and regulations, academic texts and draft laws, and the results of interviews with the parties. Conduct a search and inventory of the articles of the Criminal Code which are considered not in accordance with the condition of the personality of a sovereign, religious, and civilized nation. Then analyze and explain the discrepancy. Likewise with articles that are considered crucial and controversial in the draft of the Criminal Code, by conducting similar analyses and explanations. From the existing data, data reduction was carried out by making abstractions, checking the validity of the data, and interpreting the data. Interpretation is used to find the meaning behind the descriptive analysis. The role of resource persons based on their expertise can assist researchers in explaining as well as strengthening the positioning of the findings and analysis of researchers on the problems studied. The focus of the

[7] Fellyanda Suci Agiesta, 'Penolakan RKUHP & Ancaman Demo Besar-Besaran Mahasiswa', Merdeka. Com, 2019, https://doi.org/https://www.merdeka.com/peristiwa/penolakan-rkuhp-ancaman-demo-besar-besaran-mahasiswa.html.

[8] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana, (Perkembangan Penyusunan Konsep KUHP Baru)*, (Jakarta: Kencana, 2008), 25-26.

[9] Soetandyo Wignjosoebroto, *Hukum Konsep dan Metode,* (Malang: Setara Press, 2013), 77.

[10] Salim HS, Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis, Dan Disertasi*, Edisi ketiga, (Depok: Rajagrafindo Persada, 2014), 12.

problem in this study is how is the suitability of the Criminal Code with the religious and cultural character of Indonesian society.

Based on the results of research conducted by Syamsul Huda, the focus is on comparing adultery crimes regulated in the Criminal Code and Islamic Law. The results of his research found that young couples who are not yet legally married, and who commit adultery, cannot be subject to criminal sanctions under Article 284 of the Criminal Code. The Criminal Code only ensnares perpetrators of adultery who are subject to Article 27 BW or are in a legal marriage bond. In addition, if the husband or wife of the adulterer permits his partner to commit adultery, then Article 284 cannot prosecute him. This is a consequence of a complaint offence that is binding on Article 284 of the Criminal Code. Meanwhile, in the view of Islamic law, every sexual relationship outside of a valid marriage bond is categorized as an act of adultery.[11]

Then the results of research from Murtir Jeddawi and Abdul Rahman found several facts that occurred in indigenous peoples, they argued that customary law and national law should support and complement each other in the life of society and the nation. The application of customary law and its implementation in society, especially village communities, is very important and central, to keeping pace with the pace of globalization which of course has positive and negative influences.[12] Based on the description above, the authors argue that the law that lives in society is still relevant to be applied, at least the values contained in the law of life can be elaborated with conventional law, in the era of globalization as it is today.

Based results of research conducted by Togat, et al. First, the contribution of living law in society in the renewal of criminal law is theoretically strengthened. Second, the legal contribution that lives in society in the reform of criminal law also obtains justification not only by national legal instruments, but also by international legal instruments.[13] This means that the validity of living law still has an existence both in national law and in international law or in the international community.

The novelty of the research entitled Problems of the applicability of criminal law books in the life of Indonesian religious and cultural communities is knowledge about the suitability of the Criminal Code with the religious and cultured character of Indonesian society. This research simultaneously analyzes and reveals that the R-KUHP which has been passed into Law Number 1 of 2023 is appropriate and is urgently needed by the Indonesian people who are free, civilized, religious and cultured. Refusal from several parties regarding the ratification of the new Criminal Code, regarding the substance of several articles, which are considered controversial and cannot be enforced in a

[11] Syamsul Huda, *Op., Cit*.

[12] Murtir Jeddawi, Abdul Rahman, "Identifikasi Hukum Adat yang Masih Berlaku dalam Penyelesaian Perso-alan Sosial di Desa Kawo Kabupaten Lombok Tengah", *Jurnal Konstituen*, 2 no. 2 (2020): 89-100. https://doi.org/10.33701/jk.v2i2

[13] Togat, et.al, Hukum yang Hidup dalam Masyarakat dalam Pembaharuan Hukum Pidana Nasional, *Jurnal Konstitusi*, 17 no. 1 (2020): 157-177, https://doi.org/10.31078/jk1717.

democratic country, is feared to result in a policy of cancelling the new Criminal Code. The Criminal Code will only be applied in 3 years, so there is still room for cancellation and it can be done. This research is one of the efforts of the author, to analyze the urgency of this new Criminal Code to be implemented in Indonesia, and it is very irrelevant if we continue to use the old Dutch colonial Criminal Code.

## 2. ANALYSIS AND DISCUSSION

### 2.1 The Application of the Criminal Code to Indonesian Religious People and Cultured

As social beings *(zoon politicon)*, people interacting with each other often cannot avoid conflicts of interest between them. Conflicts that occur can cause losses because they are accompanied by violations of the rights and obligations of one party to another. Such conflicts cannot be left unchecked, but require legal means to resolve them. In such circumstances, the law is needed to overcome the various problems that occur. As the expression *"ubi societas ibi ius"* or where there is society there is law, the existence of law is indispensable in regulating human life. Without law, humans will be wild, and whoever is strong wins. The purpose of law is to protect human interests in defending their rights and obligations.[14]

Starting from the description above, the need for criminal law enforcement is also something that cannot be ignored in the community. Every day Indonesia faces various problems with criminal law in the midst of society. The current Criminal Code is considered inappropriate and unable to reach the development of society and the development of increasingly diverse crimes. The Criminal Code is one of the systems of law enforcement itself, therefore in order to seek criminal law reform, one of these systems must be addressed immediately.

Talking about the Draft Criminal Code, until now seven decades have passed since the start of a corpus-magnum in the form of drafting the Criminal Code Draft. The draft of the Criminal Code is an ancient legacy that has been produced by its designers consisting of academics and legal practitioners since the mid-1960s. History records that the head of the drafting team was Prof. Sudarto. Successively, this team was chaired by Oemar Seno Adjie, Roeslan Saleh, Mardjono Reksodiputro, and Prof. start. On the last drafting team, Barda Nawawi Arief led the team for Book I, while Muladi Start for Book II.[15] The R-KUHP has been passed into Law number 1 of 2023 but will be effective for the next three years.

Currently, special types of crimes are regulated separately outside the Criminal Code through various laws and regulations. For example, human rights crimes, terrorism, and

[14] Bambang Sutiyoso, *Op., Cit.*

[15] Hanifah Syifa, 'Inilah Para Pakar dan Profesor yang Menyusun RKUHP', *Merdeka.Com*, 2019, https://doi.org/https://www.merdeka.com/peristiwa/inilah-deretan-profesor-dan-pakar-hukum-yang-menyusun-ruu-kuhp.html.

so on. However, the regulation on specific criminal acts in the new Criminal Code is still considered necessary to exist as a lex-generalis, to emphasize that the provisions outside the new Criminal Code are further specialized regarding these criminal acts. The term open codification is often used in this context, namely where the new Criminal Code is a codification, but in certain cases, the possibility of regulation is opened, especially outside the Criminal Code.

The considerations that form the basis of the new Criminal Code include:

a. Whereas, in realizing national law reform efforts based on Pancasila and the 1945 Constitution, as well as respecting and upholding human rights, among others, it is necessary to draft a national criminal law to replace the Criminal Code (Wetboek van Strafrecht) as a product of government law in the Dutch East Indies colonial era;
b. That the material of the national criminal law must be adapted to legal politics, circumstances, and the development of the life of the Indonesian nation and state.

The R-KUHP, which has been envisioned for its implementation in Indonesia since the 1960s, was previously rejected by demonstrators. The rejection by the community, especially the students that occurred which caused the R-KUHP to be postponed for approval at that time, was solely due to the demonstrators' ignorance of the substance of the articles which they considered inappropriate and detrimental to society if the R-KUHP was ratified. The new Criminal Code has been the ideal of an independent nation for a long time, with the issuance of Law Number 1 of 2023, reform of the national criminal law has finally begun to be achieved. So far, the application of the Criminal Code/Law No. 1 of 1946 has been realized that it is far from the legal values of life that apply in a religious and cultured society.

Local wisdom consists of two words, namely wisdom and local. In general, local wisdom can be understood as local (local) ideas that are wise, full of wisdom, and of good value, which is embedded and followed by members of the community.[16]

*Local wisdom* is conceptualized as local policy, local knowledge, and local intelligence. Local wisdom is the attitude, view, and ability of a community in managing its environment, spiritually and physically which gives the community the endurance and power to grow in the area where the community is located. In other words, local wisdom is a creative answer to a local geographical, historical and situational situation.[17]

*Local wisdom* is defined as a human effort by using his mind (cognition) to act and behave toward an object or event that occurs in a certain space. Wisdom can be interpreted as wisdom in using his mind toward something.[18]

*Local wisdom* is explicit knowledge that emerged in a fairly long period along with human civilization. The process of civilization that is so long and then inherent in society

[16] Rina Rohayu Harun, et.al, *Hukum Dan Illegal Logging: Penyelesaian Illegal Logging Berbasis Kearifan Lokal Pati Ongong di Kabupaten Sumbawa*, (Surakarta: Muhammadiyah University Press, 2020), 32.
[17] *Ibid*.
[18] *Ibid*.

makes local wisdom potential energy that is not only a reference for one's behavior but further than that that local wisdom is capable of dynamizing the life of a society full of civilization.[19]

In detail, the existence of local wisdom in various communities in Indonesia has been able to solve social problems for decades to centuries. An orderly life, peace, and justice are felt by the local community. Without written laws, they are able to survive as long as a human civilization in the area still exists and develops. Regularity without written law can be carried out wisely, and public awareness grows by itself like autonomous consciousness, without any coercion.

This is very different from what was felt before the R-KUHP was passed into Law Number 1 of 2023, the old Criminal Code tended to be positivistic. The characteristics of the old Criminal Code that we have used so far (before the ratification of the R-KUHP became Law Number 1 of 2023) include :

The characteristics of the current Indonesian Criminal Code include:[20]

a. The principles of criminal law are dominated by the classical post-revolutionary school of France as the criminal law of acts (Daad-strafrecht) which does not take into account the human aspects/human rights of the individual perpetrators;
b. The general minimum limit for sentencing (child criminal law) is not regulated;
c. Philosophy, guidelines, and goals of punishment are solely oriented backward or on retaliation on the basis of a rigid "retributive justice" philosophy;
d. Humanity considerations after the emergence of the modern school (Daad-strafrecht), are fragmentary;
e. Crime victim factor is not considered;
f. The particularistic aspects of Indonesian culture are sidelined;
g. Laws that live in society / customary law are marginalized outside the principle of formal legality;
h. The function of law in the form of legal certainty overrides justice and expediency;
i. The death penalty stands out as the main crime.

The understanding of legal principles in various kinds of literature put forward by experts can be found, among others:

a. Bellefroid states that the principle of general law is a basic norm that is translated from positive law and which legal science does not ascribe to more general rules. The principle of law is the deposition of positive law in society.
b. Van Eikema Hommes stated that legal principles are the basics or directions in the formation of positive law. Legal principles should not be considered as concrete legal

[19] *Ibid*.
[20] Abubakar Ali, "Urgensi Penyelesaian Kasus Pidana Dengan Hukum Adat", *Madania*, XVIII no.1 (2014), 57–66. https://ejournal.iainbengkulu.ac.id/index.php/madania/article/view/11.

norms but should be viewed as general principles or guidelines for applicable law. The formation of practical law needs to be oriented to these legal principles.

c. Paul Scholten argues that the principle of law is the tendencies that are signaled by a moral view on the law, are general characteristics with all their limitations as a general trait, but which should not exist.
d. Sudikno Mertokusumo stated that legal principles are general and abstract basic thoughts because legal principles are the broadest basis for the birth of legal regulation, and legal regulations can ultimately be returned to these principles. In addition, the legal principle deserves to be referred to as the principle of the birth of legal regulations or the legal ratio of legal regulations. With the principle of law, the law is not just a collection of rules due to the content of values and ethical demands.

The definition of legal discovery put forward by experts is as follows:

a. Paul Scholten argues that the discovery of law by judges is something other than just the application of rules to events, sometimes and often happens that the rules must be found, either by way of interpretation or by way of analogy or rechtssvervijning (legal concrete).
b. John Z Laudoe, stated that legal language is the application of provisions to facts and these provisions must sometimes be formed because they are not always found in existing laws.
c. Sudikno Mertokusumo, argues that legal discovery is a process of law formation by judges or other legal officers who are given the task of applying the law to concrete legal events. In other words, it is a process of concretization or individualization of general legal regulations (das sollen) by remembering certain concrete events (das Sein).

When a new type of crime occurs that is not previously regulated in the Criminal Code, judges tend to put forward Article 1 of the Criminal Code which affirms "No action can be punished on the strength of the criminal rules in the existing legislation before the act is committed". For example, in cases of terrorism and cases of human rights violations in Indonesia, where the rules regarding these acts have not been accommodated in the Criminal Code, the State is required to immediately prosecute the perpetrators by making new rules and then applying them retroactively. At that time, the pros and cons of applying the retroactive principle were lively and caused a lot of debate, in various circles, including the media. On the one hand, the victimized community hopes for justice by agreeing to the application of the retroactive principle. Meanwhile, human rights observers do not agree because the application of the retroactive principle is considered a violation of human rights because it is contrary to the principle of legality. The principle of legality is considered a fundamental principle that cannot be ruled out.

Another no less attention-grabbing is judge Bismar Siregar who uses an analogy in the case of a woman who felt cheated by her lover because he had promised to marry the woman before the woman gave up her virginity. The youth was sentenced by Bismar Siregar as a judge in the first instance court, but at a later stage, the decision was annulled. Even though the act is not contained in the Criminal Code, it is a disgrace in the eyes of the community. Judges should not only be trumpets or binoculars of the law but can further mobilize all abilities to make legal discoveries and explore local values that live and develop in society.

In the 1945 Constitution Article 18 (2) explicitly stated that *"Indonesia recognizes the existence of customary law and its traditional rights"*. The same thing can also be found in Article 8 paragraph (4) of Law Number 16 of 2004 where *"The prosecutor always acts according to the law by heeding religious norms, courtesy, and decency also obliged to explore and uphold human values that live in a society"*. Furthermore, Article 5 of Law Number 48 of 2009 confirms that *"Judges and constitutional judges are obliged to explore, follow and understand the legal values and sense of justice that live in a society"*. Then, Article 10 of Law Number 48 of 2009 confirms that *"The court's decision must not only contain the reasons and basis for the decision but also contains certain articles of the relevant legislation or unwritten legal sources that are used as the basis for judging"*.

From the above description, the existence of a law that lives in society, namely local wisdom, is recognized for its existence. In addition, it is not excessive if local wisdom is adopted in the Draft of the Criminal Code in order to create a just and civilized society, as long as the local wisdom does not conflict with Pancasila and the 1945 Constitution.

The urgency of the enactment Draft of the Criminal Code increasingly urges the government to immediately ratify the Draft of the Criminal Code. However, until now, the Draft Criminal Code is still under discussion between the drafting team and the House of Representatives of the Republic of Indonesia. This discussion will take a long time, because currently what is being discussed is still at the level of Book I of the Criminal Code Draft on general provisions which include the principles that will be used after the new Criminal Code is ratified. Meanwhile, the draft consists of two books, namely Book I on General Provisions and Book II on Crimes and Violations. Until now, no one has been able to confirm when the draft of the Criminal Code has been discussed and passed into law.

For example, in the *Hooge Raad* decision, on 23rd, 1921 in the case of stealing electricity. When *Hooge Raad* decided that electricity was an item that could be stolen, there was a drafted law that stated that the act could be criminalized. The interpretation of the 1921 *Hooge Raad* decision is actually an analogy, where "electricity" is analogous to "goods". However, because the Criminal Code prohibits analogies, extensive interpretation is used.[21]

[21] *Ibid*, hal. 118.

The next example is regarding the act of *"black magic"* which is not regulated in the Criminal Code but is now included in the Draft of the Criminal Code. Therefore, the judge can decide on cases of witchcraft as a form of offense or crime that can be punished based on futuristic interpretations with reference to the Draft Criminal Code.[22]

Local wisdom is something that can be found in the community, one of which is in Tepal Village, Sumbawa Regency. The local wisdom of *Sorong sala'* in Tepal Village is the embodiment of peace, as a solution to the existence of a conflict or friction that occurs between communities. In this condition, the community prioritizes peace in society rather than resolving it through state law.[23] Minor matters that can be resolved peacefully for the sake of creating a restorative society will be an option for the community in order to restore balance, harmony, and of course the preservation of local wisdom.

The theories that the author uses in this research are as follows:

a. Von Savigny-Volkgeist-Germany
   *"Good law is that expresses volkgeist".*
   *A good law is a law that expresses its people.*
b. Von Vollen Hoeven-adatsrecht-Indonesie
   *"Good law is a law that expresses the rechtadat (local society)".*
   *The law must express local culture/customs.*
c. Ade Saptomo
   *"Good law is a law that accommodates the social and cultural force where its existence"*
   *A good law is a law that accommodates the socio-cultural where the law is located.*

### 2.2 Criminal Code in the Implementation of Law Enforcement

Theoretically, according to Aharon Barok, judicial power is [24] *"The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind*." Then, a judge who interprets and applies the substance of the constitution in the case being tried is *"a partner to the authors of the constitution".* Therefore, of all the texts of the provisions contained in the constitution, it is judges who consider their meaning. The constitution formulates an ideal that will be realized, the permanent judge determines the ideals of the broad framework of the role of a constitution in modern life. Judges must ensure the continuity of the substance of the constitution. In addition, that democracy is not only the majority rule but also the rule of values, including the protection of human rights. Therefore, according to Aharon Barok, *"The judicialization of politics will continue. The non-justiciability of legal aspects of politics will decrease".*[25]

[22] *Ibid*.
[23] Rina Rohayu Harun, et.al, *Op., Cit*.
[24] Andi Hamzah, *Asas-Asas Hukum Pidana*, (Jakarta: P.T. Yarsif Watampone, 2005), 177.
[25] *Ibid*, 311.

According to Jan Rammelink, it is impossible for a criminal judge when deciding cases in court to apply criminal legislation without using interpretation. This interpretation can then give birth to jurisprudence which will become a source of law. Manfred Simon's term, in this case, the court becomes quasi-legislative because what is actually meant by the term intentional, error, resulting, coercive power (overmatch), or against the law *(Wederrechtelijkheid)* needs interpretation. Furthermore, judges in criminal law must also be recognized as playing a role in seeking and finding the law.[26]

Judges must make decisions based on the law and use them as a starting point in the trial but not as an ending point. A good judge opens their eyes and sees the legal system in all nuances, provisions, and basic values. In the context of the framework, generally, good judges give meaning to the text of the law in their decisions. A good judge will not make a decision just by knowing and basing it on the text of the law. Judges must recognize the community, problems, and aspirations. A good judge does not look rigidly at the provisions of what is regulated in the constitution, law, or agreement that must be interpreted. The judge looked at the text of the Act as a whole.[27]

R-KUHP which has been passed through Law Number 1 of 2023, accepts the principle of legality in a non-absolute manner. Article 1 of the draft explains that the provisions on the principle of legality will not reduce the enactment of the law that lives in a society that determines that a person deserves to be punished even though the act is not regulated in laws and regulations. However, as long as it is in accordance with the values of Pancasila and legal principles recognized by the people of nations, the principle of unwritten law is acceptable. In the draft general explanation, it is stated that[28] The new Criminal Code also recognizes that there are criminal acts based on the law that live in society or previously known as customary crimes to better fulfill the sense of justice that lives in society. It is a fact that in some areas of the country, there are still unwritten legal provisions, which exist and are recognized as law in the area concerned, which determine that violations of the law deserve to be punished. The judge in this case can determine the sanction in the form of fulfillment of Local Customary Obligations, which must be carried out by the perpetrators of criminal acts.

Indigenous peoples resolve disputes and conflicts through deliberation or kinship with consideration, and agreements that will be made benefit both parties. The discussion aims to create peace and stability in society so that balance and survival in society can run well.[29]

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[26] Jan Rammelink, *Hukum Pidana: Komentar atas pasal-pasal terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*, (Jakarta: Penerbit Gramedia, 2003), 45.

[27] Aharon Barak, *The Judge In a Democracy*, (Princeton: Princeton University Press, 2006), 308.

[28] General explanation of Law Number 1 of 2023.

[29] Ali Abubakar, "Urgensi Penyelesaian Kasus Pidana dengan Hukum Adat", *Madania*, XVIII, no. 1 (2014), 4. See also in Rina Rohayu Harun, et.al, The Values of Sorong Sala' Tradition As a Solution to Develop Islah for the Generation in the Covid-19 Era, *Istinbath Jurnal Hukum dan Ekonomi Islam*, 20 no. 2 (2021), 315-330. https://doi.org/10.20414/ijhi.v20i2.389.

In article 27 of Law No. 14 of 1970, Indonesia has determined that judges are obliged to explore, follow and understand the legal values that live in society. Former chairman of the Supreme Court, Purwoto S. Gandasubrata, said that "to explore and find legal values that are good and true in accordance with Pancasila and according to the law of civilized nations"..."[30] Starting from this, the mandate regarding the recognition of living legal values has been entrusted through the law of judicial power. Considerations from the living legal aspects must be explored, followed, and understood by judges in giving legal considerations and decisions.

The character of the Indonesian people prioritizes deliberation in solving the problems they face and apologizing to fellow human beings, which is also in line with the religious character of the community. The value of this teaching can be used by judges in giving forgiveness or *rechterlijk pardon* to someone, of course by looking at considerations from the aspect of balance, for example between the individual and the victim. At least there is room for forgiveness given by the judge to the defendant, taking into account the balance aspect, considering that the Indonesian nation is a religious nation, a reflection of the first precepts of Pancasila, and its eastern customs open room for forgiveness.

Based on an analysis of the validity of the Criminal Code so far, or prior to the ratification of Law Number 1 of 2023, it can be argued that the Criminal Code contradicts the principles or values that live in society. Ratification of the R-KUHP to become Law Number 1 of 2023, must continue to be guarded during the effective period to be enforced, namely the next three years. Law number 1 of 2023, even though it has been ratified, is still being rejected by the public. The press council was one of the parties that wanted the RKUHP to be reviewed before it was ratified, because several articles in the RKUHP at that time restricted press freedom and had the potential to criminalize the press. Students in several regions in Indonesia have also demonstrated against the ratification of the R-KUHP into law, and even asked the president to cancel the ratification. One of the reasons is because several articles in the R-KUHP restrict freedom of thought and opinion as these rights are protected by the constitution, then students worry about criticizing the performance of the president and vice president, as well as criticizing the government from the regional to central levels.

The case of Ferdy Sambo, which has recently received public attention, is the District Court's verdict against Ferdy Sambo, which sentenced him to death for the premeditated murder of Joshua Hutabarat. Prior to the ratification of the R-KUHP, many parties were still questioning whether the death penalty was retained in the R-KUHP at that time, on the grounds that capital punishment violated human rights. At that time, the R-KUHP maintained that capital punishment was no longer the main punishment, but alternative punishment. However, after it was passed into law and also related to the FS case, it was

[30] Purwoto S. Gandasubrata S.H., *Tugas Hakim Indonesia*, in Selo Sumardjan, Guru Pinandita: *Sumbangsih untuk Prof. Djokosoetono, S.H.,* (Jakarta: Lembaga Penerbit Fakultas Ekonomi Universitas Indonesia, 1984), 516.

assumed that the R-KUHP was hastily passed for political purposes against FS and other defendants. FS who has been sentenced to death, allegedly by some parties the death penalty will only be a formality, because later the death penalty will be reviewed after 10 years of the convict carrying out his sentence, if the convict has behaved well, then the death penalty can be replaced with life imprisonment or 20 years imprisonment. The series of reasons against the renewal of the penal code are lacking in reason and are like a justifying reason that makes it appear that the R-KUHP or what has become the new Criminal Code today, is anti-human rights.

Such assumptions must be addressed with continuous outreach to the community on an ongoing basis. Society needs a rule that is based on a historical and philosophical basis that is in accordance with the personality of the Indonesian nation. Defending the Criminal Code that we have been using, and rejecting the new Criminal Code / Law number 1 of 2023 is a setback to the way of thinking of a nation that is free from all colonialism, in accordance with the opening mandate of the 1945 Constitution.

## 3. CONCLUSION

The Criminal Code that was in effect so far (before the ratification of Law Number 1 of 2023), has a gap with the religious and cultured personality of the Indonesian nation. The concept of the principle of material legality which is not owned by the Criminal Code opens up space for paralysis for the legal values of life in society. The spirit of reform towards reforming the national criminal law has been answered with the issuance of Law Number 1 of 2023. Opposition to the ratification of the new Criminal Code is still occurring, and criticism of articles which are still considered controversial and detrimental to society. The opportunity for the old Criminal Code to remain in force can be analyzed from Article 618 of Law Number 1 of 2023 which provides space for criminal acts that are in the process of using provisions unless the laws governing these crimes are more profitable for suspects or defendants. Then Article 624 confirms that this law takes effect after 3 (three) years from the date of promulgation. This means that there is a transition period that must be passed until finally the new law can be effectively enacted. Research on the problems of the application of the Criminal Code prior to the ratification of the new Criminal Code, which is inconsistent with national identity, is still relevant for the study. Rejections against the ratification of the new Criminal Code from several elements of society, do not lose the essence and spirit of reforming the criminal law which has been the goal since the independence of the Republic of Indonesia, especially aspiring to reuse the Criminal Code/Law No. 1 of 1946.

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