

## Investigating the Existence of Gorontalo Customary Law in the National Criminal Code

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### ABSTRACT

*Through Article 2 paragraph (1) of Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (National Criminal Code), customary law opportunities are open to existing through the prerequisites contained in the Explanation to Article 2 paragraph (1). For this reason, this study aims to determine the opportunities for the existence of Gorontalo customary law through the prerequisites contained in the Explanation of Article 2 paragraph (1) of the National Criminal Code. This research uses normative legal research methods with a statutory approach and conceptual approach and uses primary, secondary and tertiary legal materials. The legal material is then analyzed qualitatively using grammatical, systematic, and historical interpretations. The results showed that Gorontalo customary law exists through the presence of several regional regulations, including (1) Gorontalo Provincial Regulation Number 2 of 2016 concerning the Implementation of Customary Institutions; (2) Gorontalo Mayor Regulation Number 10 of 2020 concerning the Implementation of the Dulohupa Customary Institution of Gorontalo City; and (3) Regional*

*Regulation of Bone Bolango Regency Number 8 of 2020 concerning the Implementation of Customary Institutions. Furthermore, through regulations at the regional level, Gorontalo customary law is also present through concrete events such as the management of customary institutions carried out periodically. Based on this, the regulation of concrete norms related to acts prohibited under living law in regional regulations as required by the Explanation to Article 2 paragraph (1) of the National Criminal Code will have a very large opportunity.*

***Keywords: Gorontalo Customary Law; Living Law; National Criminal Code***

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## **I. INTRODUCTION**

The law that lives in society or living law has its place in the Law of the Republic of Indonesia Number 1 of 2023 concerning Us Criminal Law (National Criminal Code), which was stipulated and promulgated on January 2, 2023, and will be valid for 3 (three) years from the date of promulgation. Through Article 2 paragraph (1) of the National Criminal Code, it is affirmed that the provisions stipulated in Article 1 paragraph (1) of the National Criminal Code do not reduce the enactment of laws living in a society that determines that a person should be punished even though the act is not regulated in the National Criminal Code. In the next paragraph, it is further elaborated that the law that lives in the community applies in the place where the law lives and as long as it is not regulated in the National Criminal Code and follows the values contained in Pancasila, the Constitution of the Republic of Indonesia (UUD 1945), human rights (HAM), and general law principles recognized by the community of nations. Article 1, paragraph (1) of the National Criminal Code confirms that no act can be subject to criminal sanctions and/or actions except for the strength of criminal regulations in laws and regulations that existed before the act was committed. In short, the provisions in Article 1 paragraph (1) of the National Criminal Code regulate the principle of legality in the formal sense. Meanwhile, the provisions in Article 2 of the

Criminal Code, paragraphs (1) and (2), regulate the principle of legality in a material sense.

The principle of legality in the formal sense means that the Criminal Code, in determining the source of law or the basis for the impermissibility of an act, departs from the establishment that the main source of law is the law or written law. The principle of legality in the material sense requires that even though an act is not regulated in laws and regulations, based on living law that the act is prohibited according to the law that lives in that society, the act should be punished.<sup>1</sup>

The principle of material legality was born from efforts to reform the development of criminal law in Indonesia to create an aspired society. The principle of material legality provides space for customary law in force among indigenous peoples to be recognized before national law. The formulation of the principle of material legality is an effort to fulfill the need to provide space for customary law in the community.<sup>2</sup>

Historically, adopting laws that live in society as a source of positive law in Indonesia has begun with the issuance of Law Number 19 of 1948 concerning the Composition and Power of Judicial and Prosecutorial Bodies. In the provisions of Article 10, paragraphs (1) and (2) of the law, it is affirmed that matters that according to law living in a sinful society and so on must be examined and decided by the power holders in that society remain with them to be examined and decided. Furthermore, this provision in no way reduces the right of litigants to advance their cases at any time before the judicial body conducting public courts, both before and after the intended decision.<sup>3</sup> The provisions of the Article form the legal basis for the enactment of customary courts. This situation coincided with the transfer of power from Soekarno to Suharto with the enactment of the Emergency Law of the Republic of Indonesia

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<sup>1</sup> Tabiudan, Ramadan and Eddy OS Hiariej. "Pertentangan Asas Legalitas Formil dan Materiil dalam Rancangan Undang-Undang KUHP." *Jurnal Penelitian Hukum*, Vol. 2, No. 1, 2015, pp. 28–36, <http://etd.repository.ugm.ac.id/penelitian/detail/57697>.

<sup>2</sup> Priscilia, Erika, et al. "Kajian Yuridis Filosofis Pembaharuan Asas Legalitas dalam Pembaharuan Konsep KUHP." *Diponegoro Law Journal*, Vol. 8, No. 2, 2019, pp. 1061-1077. <https://ejournal3.undip.ac.id/index.php/dlr/article/view/25411/22722>.

<sup>3</sup> Tongat, et al. "Hukum yang Hidup dalam Masyarakat dalam Pembaharuan Hukum Pidana Nasional." *Jurnal Konstitusi*, Vol. 17, No. 1, 2020, pp. 157-177, <https://doi.org/10.31078/jk1717>.

Number 1 of 1951 concerning Temporary Measures to Organize the Unity of Power Structure and Procedure of Civil Courts.<sup>4</sup>

The principle of legality in the material sense regulated in Article 2, paragraphs (1) and (2) of the National Criminal Code, opens up space for living law spread in several regions in Indonesia. Living law itself can be interpreted through the opinion of Eugene Ehrlich, who states that living law is defined as "the law that dominates life itself, even though it has not been printed in legal propositions". Based on this view, it can be interpreted that living law is a law centred on society, not on the state. Therefore, living law is not limited to customary law alone but includes customary and religious law (*Shari'ah*). However, later the framers of the law agreed that the living law in the National Criminal Code is customary law.<sup>5</sup>

Based on the fact that the living law stipulated in Article 2, paragraphs (1) and (2) of the National Criminal Code is customary law, it is interesting to look further at the customary law in question, at least to see the opportunity that the customary law will apply based on the provisions in the National Criminal Code. Especially if you look at the fact that the enactment and promulgation of the National Criminal Code is the success of the Indonesian government in reforming the criminal law that has been difficult to realize for years, especially against *lex generalis*, this is important because referring to Muladi's views regarding the main thoughts or signposts in the reform of national criminal law, one of the most important points is that criminal law reform must not ignore aspects related to the human condition, nature and traditions of Indonesia while still recognizing the law that lives in society both as a source of positive law and as a source of negative law.<sup>6</sup> In other words, the values that live in society can contribute as values that erase or negate the unlawful nature of actions regulated in law

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<sup>4</sup> Ramadhan, Choky. "Konvergensi Civil Law dan Common Law di Indonesia dalam Penemuan dan Pembentukan Hukum." *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, Vol. 30, No. 2, 2018, pp. 213-229, <https://doi.org/10.22146/jmh.31169>. See also in Siong, Han Bing. "The Japanese Occupation of Indonesia and the Administration of Justice Today: Myths and Realities." *Bijdragen Tot de Taal-, Land- En Volkenkunde*, Vol. 154, No. 3, 1998, pp. 416-456, <https://www.jstor.org/stable/27865441>.

<sup>5</sup> Putri, Nella. "Memikirkan Kembali Unsur 'Hukum yang Hidup dalam Masyarakat' dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas." *Indonesia Criminal Law Review*, Vol. 1, No. 1, 2021, pp. 60-72, <https://scholarhub.ui.ac.id/iclr/vol1/iss1/5>; See also in Singh, Sahib. "Eugen Ehrlich's 'Living Law' and Its Legacy for Legal Pluralism." *SSRN Scholarly Paper*, 2010, pp. 1-9, <https://doi.org/10.2139/ssrn.1660606>.

<sup>6</sup> Sudarto. *Hukum Pidana Jilid 1 A-B*. Semarang, Fakultas Hukum Universitas Diponegoro, 1989, p. 2.

(negative sources of law). In addition, they can also be values that live in the community contribute as a source of positive law, which is a basis for determining whether or not an action should be considered unlawful.<sup>7</sup>

Concerning customary law, Cornelis van Vollenhoven groups at least 19 customary law environments (*rechtsringen*) in Indonesia. Each of these customary law environments is further divided into sections referred to as *Kukuban Hukum* (*rechtsgouw*). One of the *rechtsringen* in Indonesia is Gorontalo, which consists of two *rechtsgouw*, namely Bolaang Mongondow and Boalemo.<sup>8</sup> Based on the description above, this article will focus on examining the existence of Gorontalo customary law, especially concerning the opportunity for Gorontalo customary law to apply based on the provisions stipulated in Article 2 paragraph (1) of the National Criminal Code.

Regarding the existence of Gorontalo customary law and its relationship with criminal law regulations, there is one study that has studied it, namely a study entitled "Local Wisdom of the Huyula of Gorontalo Society as an Anti-Corruption Education Media" compiled by Supandi Rahman and published in the *Tadbir Journal*, Vol. 10, No. 2, Year 2022.<sup>9</sup> However, the focus of the research is policy in education, the focus and scope of the *Tadbir journal*. So that between, this study and this study have differences. These differences and the research objectives described in the previous paragraph will strengthen this study's conclusions as a novelty. What strengthens this claim is that this study focuses on the existence of Gorontalo customary law and its relationship with the National Criminal Code, which has 'just' been promulgated by the government.

This article is prepared using normative legal research methods with a statutory and conceptual approach. Normative legal research is legal research that examines positive legal norms as the object of study. Legal norms refers both as outlined in the

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<sup>7</sup> Tongat. *Dasar-Dasar Hukum Pidana Indonesia Dalam Perspektif Pembaharuan*. Malang, UMM Press, 2008, p. 179.

<sup>8</sup> Siregar, Fatahuddin Aziz. "Ciri Hukum Adat dan Karakteristiknya." *Jurnal AL-MAQASID: Jurnal Ilmu Kesyariahan Dan Keperdataan*, Vol. 4, No. 2, 2018, pp. 1-14, <https://doi.org/10.24952/almaqasid.v4i2.1473>.

<sup>9</sup> Rahman, Supandi. "Kearifan Lokal Huyula Masyarakat Gorontalo sebagai Media Pendidikan Anti Korupsi." *Tadbir: Jurnal Manajemen Pendidikan Islam*, Vol. 10, No. 2, 2022, pp. 148-159. <https://journal.iaingorontalo.ac.id/index.php/tjmpi/article/view/2792>.

form of regulations and in the form of literature.<sup>10</sup> In normative legal research, the law is no longer seen as a utopia. Still, it has been institutionalized and written through existing norms, principles and legal institutions. Normative legal research is called dogmatic legal research that examines, maintains and develops positive legal buildings with logical buildings.<sup>11</sup> The legislative approach in legal research examines all laws and regulations related to the legal issue being discussed (researched).<sup>12</sup> At the same time, the conceptual approach is an approach that departs from the views and doctrines that develop in legal science.<sup>13</sup>

The legal materials used in this study are primary, secondary and tertiary legal materials. Primary legal materials include legislation, official records or minutes in making legislation and judges' decisions. Secondary legal materials are all publications about the law that are not official documents. Publications on law include textbooks, legal dictionaries, legal journals, and commentaries on court decisions.<sup>14</sup> Tertiary legal materials are materials that provide information about primary legal materials and secondary legal materials, such as bibliographies and cumulative indexes.<sup>15</sup> The legal material is then analyzed qualitatively using grammatical, systematic, and historical interpretations. Grammatical or grammatical interpretation is to give meaning to a term or word following every day or legal language. Systematic interpretation is used if a term or word is included more than once in one article or one law, then the meaning must be the same. While historical interpretation is carried out by examining the history of law or the making of a law, it will find the meaning of a term being studied.<sup>16</sup>

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<sup>10</sup> Indriati, Ervina Dwi, et al. "Philosophy of Law and the Development of Law as a Normative Legal Science." *International Journal of Educational Research & Social Sciences*, Vol. 3, No. 1, 2022, pp. 314-321, <https://doi.org/10.51601/ijersc.v3i1.293>.

<sup>11</sup> Muhaimin. *Metode Penelitian Hukum*. Mataram, Mataram University Press, 2020, p. 46; See also in Wiradipradja, E. Saefullah. *Penuntun Praktis Metode Penelitian dan Penulisan Karya Ilmiah Hukum*. Bandung, Keni Media, 2015, p. 5.

<sup>12</sup> Efendi, Jonaedi and Johnny Ibrahim. *Metode Penelitian Hukum: Normatif dan Empiris*. Jakarta, Prenada Media, 2018, p. 132.

<sup>13</sup> Muhaimin, *Op.Cit.*, p. 57.

<sup>14</sup> Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta, Kencana, 2014, p. 181.

<sup>15</sup> Suratman and Philips Dillah. *Metode Penelitian Hukum*. Bandung, Penerbit Alfabeta, 2013, p. 67.

<sup>16</sup> Muhaimin, *Op.Cit.*, pp. 68–69.

## II. DISCUSSION

### 1. The Living Law in Indonesian Laws and Regulations

The existence of the living law in Indonesia cannot be separated from the discourse between the school of natural law and the school of legal positivism in laws and regulations in Indonesia. Because in the development of legal science, these two schools are always used as references to find out the nature of law, including its binding power. With its theory, the school of natural law views law as an instrument to achieve justice. Meanwhile, the school of legal positivism, with its theory, views law only as a sovereign commandment so that legal certainty will be created.<sup>17</sup>

The school of natural law can be said to be the oldest school of law. In looking at the law, this school is divided into two, namely irrational and rational. The irrational school views law as coming from God with famous figures such as St. Augustine and Thomas Aquinas. The rational school views law as derived from the ratio (reason) of a man with famous figures such as Grotius, Immanuel Kant, and others. However, the starting point of this school is that "the law is used as an instrument to achieve justice".<sup>18</sup>

The school of natural law holds that hukum was born to fulfil not only the physical aspect of man but also the existential aspect. Therefore, the law is not a value-free object but full of value – good or bad, right or wrong, just or unjust – on which meaningful law is based in human life. The law is not only a sovereign commandment but must be moral, and the highest moral is "justice". Regarding this justice, Thomas Aquinas stated that justice can be divided into three, namely distributive justice (*iustitia distributiva*), commutative justice (*iustitia commutativa*) and legal justice (*iustitia legalis*). Distributive justice refers to the principle that the same is given equally, to the unequal is given the same. Commutative justice refers to asymmetric justice, which is an adjustment that must be made if an act does not follow the law. Legal justice refers to obedience to the law.<sup>19</sup>

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<sup>17</sup> Hadi, Syofyan. "Kekuatan Mengikat Hukum dalam Perspektif Mazhab Hukum Alam dan Mazhab Positivisme Hukum." *Legality: Jurnal Ilmiah Hukum*, Vol. 25, No. 1, 2017, pp. 86-97, <https://ejournal.umm.ac.id/index.php/legality/article/view/5992>.

<sup>18</sup> *Ibid*, pp. 88–92.

<sup>19</sup> *Ibid*.

Suppose the school of natural law views law as an instrument of justice that cannot be separated from morals and ethics. In that case, the school of legal positivism views law as a means to create legal certainty, so that law must be separated from good or bad values and fair or unfair values. For the school of legal positivism, laws are seen only as sovereign commandments. One of the main figures of the school of legal positivism, Jeremy Bentham, strongly rejected the opinion of the school of natural law. According to him, the law is not a reflection of morals and ethics, so it is only imposed based on human ethical consciousness, but the law is the order of a sovereign ruler. Rules that a sovereign ruler does not make are not laws but are only limited to custom. Other natural law schools, such as John Austin and Hans Kelsen, reinforced this.<sup>20</sup>

The discourse between the school of natural law and the school of legal positivism cannot be separated from the differences regarding the purpose and function of law, which are manifested in Ethical Theory and Utility Theory. Ethical Theory, pioneered by Aristotle, argues that the purpose of the law is to realize justice (*rechtsvaardigheid* or justice), both distributive justice and commutative justice. The Theory of Utility, pioneered by Jeremy Bentham, emphasizes that the purpose of the law is to realize what is beneficial (*doelmatig*) for people, which is to realize as much happiness as possible for as many people as possible.<sup>21</sup>

Both theories above basically contain the same weakness, which is too one-sided. Ethical theories that place great importance on justice tend to ignore legal certainty (*rechtszekerheids*). The tendency to ignore legal certainty needs to be digested, considering that it can have destructive consequences because it will interfere with the tire reliability aspect. Justice can be well realized in the tire capacity. In contrast, Utility Theory ignores justice by attaching great importance to legal certainty. The tendency to ignore justice will also have destructive consequences considering that law is synonymous with power. Due to these two theories' weaknesses, many opinions today attempt to combine Ethical and Utility Theories. In the case of Indonesia, Prof. Mochtar Kusumaatmadja, in the book "The Function and Development of Law in National

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<sup>20</sup> *Ibid*, pp. 93–95.

<sup>21</sup> Yusuf, Asep Warlan. "Artikel Kehormatan: Hukum dan Keadilan." *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)*, Vol. 2, No. 1, 2015, pp. 1-13, <https://doi.org/10.22304/pjih.v2n1.a1>.

Development", mentions this combination effort as the Theory of Protection.<sup>22</sup>

In the teachings of the Theory of Protection, implementation in the national legal order must be responsive to developments and aspirational to community expectations. Or in other words, the law aims to create humane social conditions to allow social processes to take place reasonably. Every human being has ample opportunity to develop all his humanity's potential (outward and inward). The efforts to realize this protection will include *first*, order and order that give rise to predictability; *second*, peace of peace; *third*, justice which includes distributive justice, commutative justice, vindicative justice,<sup>23</sup> and protective justice;<sup>24</sup> *fourth*, welfare and social justice; and *fifth*, the formation of noble morals based on Godhead.<sup>25</sup>

The discourse of the school of natural law and legal positivism ultimately led to the birth of the living law and positive law. The term living law itself was first proposed by Eugen Ehrlich as opposed to the word state law (law made by the state). For Eugen Ehrlich, the development of law is centred on society itself, not on the formation of law by the state, judges' decisions, or the development of legal science. Eugen Ehrlich wanted to convey that society is the main source of law. The law cannot be separated from its society. On this basis, Eugen Ehrlich stated that the living law is the law that dominates life itself, even though it has not been incorporated into the legal proposition.<sup>26</sup>

The law of the country in John Austin's theory is referred to as positive law. For him, the law is a positive law formed by the person who holds power over the people. John Austin also based his opinion on "command" as essential to law. Further, the law

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<sup>22</sup> *Ibid.*

<sup>23</sup> Justice vindicative is to give rewards or punishments in accordance with the mistakes committed. See: *ibid.*, p. 7.

<sup>24</sup> Protective justice is given protection to see a person so that Dak A also will get Treatment arbitrarily. See: *ibid.*

<sup>25</sup> The purpose of the law of protection is to protect people passively (negatively) by preventing arbitrary actions and actively (positive) by creating humane social conditions that allow the social process to take place reasonably, so that justly each human being has a broad and equal opportunity to develop all his human potential as a whole. Sidharta, B. Arief. *Refleksi Tentang Struktur Ilmu Hukum: Sebuah Penelitian Tentang Fundasi Kefilsafatan dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia*. Bandung, Mandar Maju, 1999, p. 190.

<sup>26</sup> Hadi, Syofyan. "Hukum Positif dan the Living Law (Eksistensi dan Keberlakuannya dalam Masyarakat)." *DiH: Jurnal Ilmu Hukum*, Vol. 13, No. 26, 2017, pp. 259-266, <http://dx.doi.org/10.30996/dih.v0i0.1588>.

is part of the commandment. The (positive) law is called law because of the "command". Without a "command", it is not a law. It is said that law is due to the order of the sovereign. It cannot be called law if it is not a sovereign order.<sup>27</sup>

In Indonesia, law (positive law) is used as the main source of law. Even the laws and regulations in Indonesia are arranged in stages and levels. Almost all levels of government are given the authority to make laws and regulations. Not a single aspect of state administration and public behavior escapes positive legal arrangements. Therefore, many experts declare Indonesia as a state of law.<sup>28</sup>

Even though Indonesia, which in its history could not be separated from the Dutch legal system, which had a civil law tradition that was very positivistic, if you look at some laws and regulations in Indonesia, the living law has a place, even more days it shows its existence as one of the sources of law in Indonesia. If it is traced, the existence of the living law is contained in the constitution to the laws and regulations under it, as follows:

(1) Constitution of the Republic of Indonesia Year 1945 (UUD 1945), (2) Law Number 19 of 1948 concerning the Composition and Power of Judicial and Prosecutorial Bodies, (3) Emergency Law Number 11 of 1955 concerning Amendments to Emergency Law Number 1 of 1951 concerning Temporary Measures to Organize the Unity of Power Structure and Procedure of Civil Courts, (4) Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, (5) Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, (6) Law Number 11 of 1974 concerning Irrigation, (7) Law Number 39 of 1999 concerning Human Rights, (8) Law Number 41 of 1999 concerning Forestry, (9) Law Number 22 of 2001 concerning Oil and Gas, (10) Law Number 20 of 2003 concerning the National Education System, (11) Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court (Constitutional Court Law), (12) Law Number 21 of 2014 concerning Geothermal, (13) Law Number 39 of 2014 concerning Plantations, (14) Law Number 45 of 2009 concerning Amendments to Law Number 31 of 2004 concerning Fisheries, (15) Law Number 26 of 2007

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<sup>27</sup> Hadi, Syofyan. "Hukum Positif dan The Living Law (Eksistensi dan Keberlakuannya Dalam Masyarakat)." *Op.Cit.*

<sup>28</sup> *Ibid.*

concerning Spatial Planning, (16) Law Number 48 of 2009 concerning Judicial Power, and (17) Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code)

The existence of the living law is contained in various articles in the above laws and regulations, for example, in Article 18B paragraph (2) affirming that the state recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and following the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law. The latest in the National Criminal Code, Article 2 Paragraph (1) of the National Criminal Code, confirms that the provisions stipulated in Article 1 Paragraph (1) of the National Criminal Code do not reduce the enactment of laws living in a society that determines that a person should be punished even though the act is not regulated in the National Criminal Code. In the next paragraph, it is further elaborated that the law that lives in the community applies in the place where the law lives and as long as it is not regulated in the National Criminal Code and follows the values contained in Pancasila, the 1945 Constitution, human rights, and general law principles recognized by the community of nations.

The existence of the living law in the above laws and regulations is inevitable when considering that Indonesia makes Pancasila the source of all sources of law. In Article 1 of MPR Decree No. III / MPR / 2000 concerning the Source of Law and Order of Laws and Regulations, it is affirmed that: (1) Legal sources are sources that are used as material for the preparation of laws and regulations, (2) Legal sources consist of written legal sources and unwritten laws, (3) The source of national basic law is Pancasila as written in the Preamble to the 1945 Constitution, namely the One and Only God, just and civilized humanity, Indonesian and People's Unity led by wisdom in consultation/representation, and by realizing social justice for all Indonesian people and the body of the 1945 Constitution.

This provision was again strengthened by Article 2 of Law No. 10 of 2004 concerning the Establishment of Laws and Regulations (Law No. 10 of 2004), which affirms that Pancasila is the source of all sources of state law. After Law No. 10 of 2004 was repealed by Law Number 12 of 2011 concerning the Establishment of Laws and Regulations until undergoing a second amendment through Law Number 13 of

2022, the provisions of Article 2 in Law No. 10 of 2004 are still maintained.

The presence of the above provisions emphasizes the existence of Pancasila as the supreme norm in the Indonesian legal system so that Pancasila as a view of life, consciousness and legal ideals, as well as the moral ideals of the nation, are juridically legitimized.<sup>29</sup> Given that Pancasila is a fundamental value of the Indonesian nation and is very valuable extracted from Islam, modernity and culture,<sup>30</sup> the presence of the living law is a logical consequence of Pancasila as the source of all sources of law.

## **2. The Existence of Gorontalo Customary Law After the Promulgation of the National Criminal Code**

Cornelis van Vollenhoven defined customary law as a rule applicable to indigenous peoples and foreign easterners, which on the one hand, has sanctions (hence the word "Law") and, on the other hand, is not codified (hence the word "Custom").<sup>31</sup> Ter Haar defines Customary Law as a whole regulation that is incarnated in the decisions of legal functionaries (in the broad sense) who have authority (*macht*; authority) and influence and which in its execution prevails and (spontaneously) and is obeyed wholeheartedly.<sup>32</sup> According to Soepomo, customary law is a small part of Islamic law. Furthermore, according to him, the customary community protects the law based on the judge's decisions that contain legal principles in the environment where he decides cases in traditional culture. Customary law is a living law because it explains the real legal feeling of the people. Following his hunch, customary law is continuously in a state of growth and development like life itself.<sup>33</sup>

Based on the above understandings, at first glance, the customary law has a

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<sup>29</sup> Bo'a, Fais Yonas. "Pancasila Sebagai Sumber Hukum Dalam Sistem Hukum Nasional." *Jurnal Konstitusi*, Vol. 15, No. 1, 2018, pp. 21-49, <https://doi.org/10.31078/jk1512>.

<sup>30</sup> Badan Pembinaan Ideologi Pancasila Republik Indonesia. "Pancasila Digali dari Keislaman, Modernitas dan Budaya." *BPIP.go.id*, <https://bPIP.go.id/>, accessed on 25 April 2023.

<sup>31</sup> Van Vollenhoven, C. *Het Adatrecht van Nederlandsch - Indie: oostelijk deel van de archipel*. Edited by Hoogleeraar. Leiden: E.J. Brill, 1931; See also in Syamsuddin, Rahman. *Pengantar Hukum Indonesia*. Jakarta, Prenada Media, 2019, p. 233; Compare with Wignjodipoero, Soerojo. *Pengantar dan Asas-Asas Hukum Adat*. Jakarta, Haji Masagung, 1992, p. 15.

<sup>32</sup> Syamsuddin, Rahman. *Op.Cit.*, p. 233.

<sup>33</sup> Hadikusuma, Hilman. *Pokok-Pokok Pengertian Hukum Adat*. Bandung, Alumnii, 1980, p. 33.

specificity that characterizes it and distinguishes it from other laws, namely:<sup>34</sup> (a) *Magic/Religious Religio*. The Indonesian nation is religious, and it animates the customary law it created. In legal acts such as land clearing, marriage is evident in its religious nature. (b) *Togetherness*. Unlike Western law centred on individuals, customary law is centred on the community. Common interests take precedence, while individual interests are covered by common interests (publicly charged). This can be seen, for example, in Rumah Gadang and heritage land in Minangkabau, Dati Land in Ambon, Karang Village land and Ayahan Village in Bali. However, prioritizing the common interest does not mean individual interests are ignored. (c) *Traditional*. The word "traditional" comes from the noun "tradition", which according to Myror Wemwr means: "the beliefs and practices handed down from the past, as we reinterpret our past, the tradition change". Customary law is essentially a tradition as well, namely the practice of the life of community members in social life that is considered right by the norms created by themselves and given coercive power with sanctions for those who violate them. The norms practised come from the legacy of the past, which is always updated by reinterpretation to suit the demands of the times and circumstances and societal changes. So, the traditional customary law is not static. (d) *Concrete*. The nature of legal relations in customary law is concrete, meaning real, and can be felt by the five senses. (e) *Light and Cash*. Light means not vague and can be seen, known, witnessed and heard by others. For example, in "*ijab kabul*", the giving of managers and *peningset* before buying and selling and marriage. Cash means that every legal action occurs simultaneously between submission and receipt. (f) *Dynamic and Plastic*. Dynamic means it can change according to the times and societal changes, while plastic can adapt to circumstances. (g) *Not codified*. Customary law is mostly unwritten, although some are written, such as awig-awig in Bali. Because of its unwritten form, it is easy to change to adapt to the development of society if they wish, (h) *Deliberation and Consensus*. Customary law attaches importance to deliberation and consensus in conducting legal deeds and relationships within the family, kinship and community, even in dispute resolution. Customary law, according to Koesnoe, is the law of the

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<sup>34</sup> Arliman, Laurensius. "Hukum Adat di Indonesia Dalam Pandangan Para Ahli dan Konsep Pemberlakuannya di Indonesia." *Jurnal Selat*, Vol. 5, No. 2, 2018, pp. 177–190, <https://doi.org/10.31629/selat.v5i2.320>; See also in Simbolon, Laurensius Arliman. *Ilmu Perundang-Undangan Yang Baik Untuk Negara Indonesia*. Deepublish, 2019, p. 42.

people who make it their people and regulates their lives that are constantly changing and developing through decisions or solutions issued by the community as a meeting and meeting through deliberation. Old things that are not worn are changed or left inconspicuously. The characteristics of togetherness, traditional, dynamic, plastic, non-codified, deliberation and consensus are interrelated and mutually supportive of each other.

Customary Law is an unwritten law. It grows and develops and disappears in line with the growth and development of society. At this time, efforts were being made to elevate the customary law into law, and thus it has endeavored to obtain a written form. An example can be seen in the Basic Agrarian Law of 1960. However, Customary Law, which has become written law, is different from the previous Customary law because it has become a statutory law.<sup>35</sup> The same situation occurs in the National Criminal Code.

Related to the above situation, Barda Nawawi Arief once reminded us that the law of a nation is "Nation Centric".<sup>36</sup> The reason is that the reform of a nation's law – including the reform of criminal law – is essentially an attempt to review and reassess the sociopolitical, socio-philosophical and sociocultural values that underlie and give content to the normative and substantive content of the criminal law to which it aspires. For this reason, the reform of a nation's laws thus cannot be separated from the culture of the nation concerned.<sup>37</sup>

Barda Nawawi Arief's views align with those of Asep Warlan Yusuf. According to him, in the framework of legal development, development, reform or whatever it is called, there are at least some important things or themes that must be fought for in the

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<sup>35</sup> Muzamil, Mawardi, and Anis Mashdurohatun. *Perbandingan Sistem Hukum (Hukum Barat, Adat dan Islam)*. Semarang, Madina Semarang, 2014, pp. 64–65.

<sup>36</sup> Tongat, et al. "Hukum yang Hidup Dalam Masyarakat Dalam Pembaharuan Hukum Pidana Nasional." *Op.Cit.*, p. 160.

<sup>37</sup> Sukerti, Ni Nyoman and I. Gst Ayu Agung Ariani. "Budaya Hukum Masyarakat Adat Bali Terhadap Eksistensi Perkawinan Beda Wangsa." *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, Vol. 7, No. 4, 2018, pp. 516-528, <https://doi.org/10.24843/JMHU.2018.v07.i04.p07>; See also in Muhammad Natsir, Muhammad, and Andi Rachmad. "Penetapan Asas Kearifan Lokal Sebagai Kebijakan Pidana Dalam Pengelolaan Lingkungan Hidup di Aceh." *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, Vol. 7, No. 4, 2018, pp. 468-489. <https://doi.org/10.24843/JMHU.2018.v07.i04.p05>.

process. These things include the following:<sup>38</sup>

(1) Fighting for law in the State of Pancasila, with characteristics including:  
(a) The first precept of Pancasila states, "The One and Only Godhead". This implies that laws and regulations and regulations may override, let alone contradict, valid religious norms. Religious norms are divine kalam that is true and right and guarantees true justice without any doubt. Religious law guides life on earth as a provision for the afterlife. The legislation as a positive law is man-made, whose degree of truth and justice is relative (b) The law must be able and reliable to realize the outward-inner welfare of the people by always referring to the values of human dignity and the One and Only Godhead.

(2) Fight for a legal system that is to be built in a pyramidal hierarchical manner composed of the ideals of Pancasila law, national legal principles, and positive legal rules consisting of jurisprudence, institutions, and customary law rules as long as they are still alive in reality and have not been appointed into legal provisions or Islamic legal rules as long as they have been accepted in customary law or have become provisions of law and customary law. The legal order also contains the following characteristics: (a) national-minded and archipelago-minded; (b) able to accommodate legal awareness of ethnic-regional groups and religious beliefs; (c) to the extent possible in written and unified form; (d) is rational which includes rationality of rules and rationality of values; (e) procedural rules that ensure transparency that enables rational review of government decision-making; and (f) responsive to the development of people's aspirations and expectations;

(3) Fight for the rule of law to be built for the welfare and happiness of the Indonesian nation through strategies including preventing the death of values, norms of people's law (folk law/customary law/adat law), including religion and legal traditions and community wisdom in the region through domination of the enforcement and enforcement of state law (state law).

What was conveyed by Asep Warlan Yusuf above is to be realized through the National Criminal Code. In the Explanation of Article 2 paragraph (1) of the National Criminal Code, it is affirmed as follows:

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<sup>38</sup> Yusuf. *Op.Cit.*, pp. 10–12.

"What is meant by "the law that lives in society" is customary law that determines that a person who commits a certain act deserves to be punished. The laws that live in the society in this article relate to the laws that are still valid and developing in people's lives in Indonesia. To strengthen the enforceability of laws living in the community, Regional Regulations regulate these customary criminal acts."

Based on the explanation of the article above, the living law, which is customary law, will be appointed into legislation and finally obtain a written form in the form of Regional Regulations. The selection of regional regulations as a form of living law is the right election because of the enforceability of regional regulations covering certain areas. This is also in line with the Explanation of Article 2, paragraph (2) of the National Criminal Code, which reads:

"In this provision, what is meant by "apply in the place where the law lives" applies to Everyone who commits customary criminal acts in the area. This paragraph contains guidelines for establishing customary criminal laws whose validity is recognized by this Law."

The inclusion of the living law in regional regulations is a manifestation of preventing the death of values, norms of folk law (folk law/customary law/adat law), including religion and legal traditions and community wisdom in the region through the dominance of the enforcement and enforcement of state law (state law). Moreover, when the living law is contained in the Regional Regulations, the Indonesian legal order will be in order, as stated in the second point outlined by Asep Warlan Yusuf above.

The explanation of Article 2, paragraphs (1) and (2) of the National Criminal Code can be said to be the initial signposts to regulate customary law as the living law. Of course, before the enactment of the Government Regulation referred to in the Explanation of Article 2 paragraph (3) of the National Criminal Code as a guideline for regions in determining laws that live in the community in the Regional Regulation. Based on the Explanation of Article 2, paragraphs (1) and (2) of the National Criminal Code, customary law, which will later be regulated in regional regulations, can be traced at least based on the understanding of customary law and the characteristics of customary law that have been described earlier.

Gorontalo, as one of the customary law areas proposed by Cornelis van Vollenhoven, certainly has the opportunity for Gorontalo customary law to exist

through regional regulations with the presence of Article 2 paragraphs (1) and (2) of the National Criminal Code. However, customary law substance largely determines this opportunity following the provisions in Article 2, paragraphs (1) and (2) of the National Criminal Code, namely, there is customary law that prohibits certain acts from being carried out, and these acts can be criminally charged. These provisions are still very fanciful to be used as a reference. Therefore, at least some laws and regulations are needed that can be used as a reference to clarify the provisions of Article 2, paragraphs (1) and (2) of the National Criminal Code as initial signposts to determine whether living law can be used as a basis for the state to carry out penalties. These regulations will affirm the existence of customary law communities, which is a requirement for the presence of customary law in a region in Indonesia. The laws and regulations include:

(1) The 1945 Constitution, through Article 18B paragraph (2), affirms that the State recognizes and respects the unity of the legal community and its traditional rights as long as it is alive and following the development of society and the principles of the Unitary State of the Republic of Indonesia, which are stipulated in the law. Furthermore, Article 28I paragraph (3) reads, "Cultural identity and rights of traditional communities are respected following the development of times and civilization". Based on these two Articles, the State recognizes and respects the existence of indigenous peoples but with four juridical requirements, namely: (a) to the extent they exist; (b) following the development of times and civilizations; and (d) provided for by law. Given that these four conditions are stipulated in the 1945 Constitution, the four can be called constitutional conditions.<sup>39</sup> (2) Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UU PA), through Article 3 which states, "Because of the provisions in Articles 1 and 2 the exercise of Customary Rights and similar rights of customary law communities, so long as they exist, shall be such that they are following national and State interests, which are based on national unity and must not contradict the Law and other higher regulations. In this sense, it is seen that customary rights belong to customary law communities. The UUPA also adopts a similar understanding by saying that customary law communities with customary rights are

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<sup>39</sup> Simarmata, R. *Indonesian Law and Legality in the Delta: A Socio-Legal Inquiry into Laws, Local Bureaucrats and Natural Resources Management in the Mahakam Delta, East Kalimantan*. Dissertations, Leiden University Press (LUP), Netherlands, 2012, p. 51.

prohibited from obstructing the granting of business use rights (HGU) or refusing forest clearing to add food and population transfer (General Explanation II number 3). By using this concept, UUPA also recognizes customary law communities as subjects with customary rights (objects). Customary rights as objects could not exist without customary law communities as subjects.<sup>40</sup>

(1) Law Number 41 of 1999 concerning Forestry (Forestry Law), through Article 67 paragraph (1), confirms that the existence of customary law communities, in reality, meets the elements of (a) the community is still in the form of a community, (b) there is an institution in the form of customary control tools, (c) there is a clear customary jurisdiction; (d) there are legal institutions and instruments, especially customary courts that are still adhered to, (e) collect forest products in the surrounding forest area to meet their daily needs. (2) Constitutional Court Decision Number 35/PUU-X/2012 ruled that the definition of customary law communities as written in Article 51 of the Constitutional Court Law, namely "The unity of customary law communities as long as they are alive and following the development of society and the principles of the Unitary State of the Republic of Indonesia as stipulated in law".

Of the various definitions and conditions for identifying the existence of customary law communities contained in some of the laws and regulations above, the most detailed provision describing the requirements for the existence of customary law communities is Article 67, paragraph (1) of the Forestry Law, especially in provisions that require the existence of legal institutions and instruments, especially customary courts that are still obeyed. This provision is very important when combined with Article 2, paragraphs (1) and (2) of the National Criminal Code. Because in the last article, acts, prohibitions and sanctions are the main points that will certainly be known and can be processed through legal institutions and instruments, especially customary courts. If we look at Gorontalo customary law, these institutions and legal instruments exist through several laws and regulations at the regional level, including:

(1) Regional Regulation of Gorontalo Province Number 2 of 2016 concerning the Implementation of Customary Institutions (Regional Regulation of Gorontalo Province concerning the Implementation of Customary Institutions), (2) Gorontalo

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<sup>40</sup> *Ibid*, p. 57.

Mayor Regulation Number 10 of 2020 concerning the Implementation of the Dulohupa Customary Institution of Gorontalo City (Gorontalo Mayor Regulation concerning the Implementation of the Dulohupa Customary Institution of Gorontalo City), and (3) Regional Regulation of Bone Bolango Regency Number 8 of 2020 concerning the Implementation of Customary Institutions (Regional Regulation of Bone Bolango Regency concerning the Implementation of Customary Institutions).

Article 5 of the Regional Regulation of Gorontalo Province concerning the Implementation of Customary Institutions affirms that Customary Institutions have the duty to foster and preserve culture and customs as well as relations between customary institutions and Village and Regional Governments. Furthermore, Article 7 paragraph (1) stipulates the authority of customary institutions, one of which is to carry out customary deliberations in resolving differences concerning customs, culture and community customs as long as the settlement does not conflict with applicable laws and regulations. This authority can certainly become a customary institution referred to in the Regional Regulation of Gorontalo Province concerning implementing Customary Institutions as a legal instrument, especially as a customary court in Gorontalo customary law. As for the legal system, of course, referring to Gorontalo customs are very much influenced by Islamic culture from the Arab community. Therefore, every custom of the Gorontalo people must have a very strong Islamic religious connection and colour.<sup>41</sup> This is seen through one of Gorontalo's philosophies: "*Adati hula-hula'a to sara'a, sara'a hula-hula'a to kuru'ani*", meaning custom joined with sharia, and sharia joined with the Qur'an/Kitabullah.<sup>42</sup> This philosophy is also emphasized in Article 9 of the Gorontalo Mayor Regulation concerning the Implementation of the Dulohupa Customary Institution of Gorontalo City, which reads:

“The Dulohupa Customary Institution, in carrying out its duties as referred to in Article 8, carries out the following functions: Preserve, develop and utilize the customs, culture and customs of the people in Gorontalo City who have the philosophy of *Adati hula-hula'a to sara'a, sara'a hula-hula'a to kuru'ani* (custom jointed shari'a, and sharia jointed with the Qur'an) in supporting the implementation of local government.”

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<sup>41</sup> Rahman, Muhrizal H. *Tradisi Walima (Suatu Studi Etnografi di Desa Bongo Kecamatan Batudaa Pantai Kabupaten Gorontalo)*. Undergraduate Thesis Gorontalo State University, Indonesia, 2014, p. 15.

<sup>42</sup> Wikipedia, “Adat istiadat Gorontalo.” *Wikipedia.org*, [https://id.wikipedia.org/w/index.php?title=Adat\\_istiadat\\_Gorontalo&oldid=22434784](https://id.wikipedia.org/w/index.php?title=Adat_istiadat_Gorontalo&oldid=22434784), accessed on 22 December 2022.

Gorontalo customary law is not solely present through some of the regulations above. As a concrete characteristic of customary law, the management of customary institutions is carried out periodically. For example, on April 12, 2021, Gorontalo Regent Nelson Pomalingo confirmed the management of the *Uduluwo Tou Limo Lopohalaa* Customary Institution of Gorontalo Regency for the 2021-2024 period at Yiladia Lo Hall of the Gorontalo Regent Official House.<sup>43</sup> Most recently, the Gorontalo Provincial Customary Institution for the 2023-2028 period was formed on March 15, 2023, through the Gorontalo Customary Conference (*Dulohupa Lo Ulipu*).<sup>44</sup>

With the presence of several regulations at the Gorontalo regional level that regulates customary institutions and the existence of concrete Gorontalo customary law, the regulation of concrete norms related to actions prohibited under living law in regional regulations as required by the Explanation to Article 2 paragraph (1) of the National Criminal Code will have a very big opportunity. Of course, this will contribute to the diversity of laws that live in the National Criminal Code as a form of the legal system that is built in a pyramidal hierarchical manner composed of the ideals of Pancasila law, national legal principles, and positive legal rules consisting of jurisprudence, institutions, and customary law rules.

### **III. CONCLUSION**

Gorontalo customary regulations exist through the presence of several regional regulations, including (1) Gorontalo Provincial Regulation Number 2 of 2016 concerning the Implementation of Customary Institutions, (2) Gorontalo Mayor Regulation Number 10 of 2020 concerning the Implementation of the *Dulohupa* Customary Institution of Gorontalo City, and (3) Regional Regulation of Bone Bolango Regency Number 8 of 2020 concerning the Implementation of Customary Institutions. Furthermore, through regulations at the regional level, Gorontalo customary law is also

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<sup>43</sup> Administrator. "Nelson Kukuhkan Lembaga Adat Periode 2021-2024." *GorontaloKab.go.id*, 12 April 2021, <https://gorontaloKab.go.id/nelson-kukuhkan-lembaga-adat-periode-2021-2024/>, accessed on 22 December 2022.

<sup>44</sup> Hadji, Echin. "Lembaga Adat Provinsi Gorontalo Terbentuk, Ade Khali Ketua." *GorontaloProv.go.id*, 14 March 2023, <https://gorontaloProv.go.id/lembaga-adat-provinsi-gorontalo-terbentuk-ade-khali-ketua/>, accessed on 20 April 2023.

present through concrete events such as the management of customary institutions carried out periodically. With the presence of several regulations at the Gorontalo regional level that regulates customary institutions and the existence of concrete Gorontalo customary law, the regulation of concrete norms related to actions prohibited under living law in regional regulations as required by the Explanation to Article 2 paragraph (1) of the National Criminal Code will have a very big opportunity.

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