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Criminal Law Reform in Indonesia: Implementation of Law's General Principles into Living Law

Deni Setya Bagus Yuherawan[1], Subaidah Ratna Juita[2],
Rina Yulianti[3], Joice Soraya[4]
& Kurnia Dewi Anggraeny[5]

Abstract

The living criminal code must comply with and not clash with the broad principles of law accepted by civilised countries, according to Article 2 paragraph (2) of the Draught Criminal Code. As mentioned above, the broad concepts of law recognised by civilised nations are utilised to evaluate the current criminal law system. This essay explains, qualifies, and emphasises the importance of applying universal legal concepts to the general principles of law recognised by civilised nations and incorporating them into criminal law to improve it. Locally implemented customary law makes up live criminal law. A civilised nation recognises general legal concepts in international law, which international bodies apply globally. The two concepts seem disconnected, rendering them unsuitable as touchstones and separate concepts. Basic legal concepts in civilised countries' general principles of law and living criminal law are the link between the two. Extending and qualifying legal notions is the biggest challenge in implementing the law.

Keywords: Criminal Law, Criminal Law Reform, Living Law, Legal Principles, Civilized Countries, General Principles.

Introduction

One of the most important concepts in the Draft Criminal Code is the notion of law as something that exists in a certain society (Utama, 2020). The provisions referred to in Article 1 paragraph (1) do not affect the validity of the living law in a society that determines that a person deserves to be punished even if this Law does not regulate the act, and in paragraph (2), The law that lives in

[1]The author is associated with the Faculty of Law, Universitas Trunojoyo Madura, Jalan Raya Telang PO. BOX. 2, Madura, East Java 69162, Indonesia. denisetya.utm@gmail.com
[2]The author is associated with the Faculty of Law, Universitas Semarang, Jalan Soekarno-Hatta, Semarang City, Central Java 50198, Indonesia. ratna.juita@usm.ac.id
[3]The author is associated with the Faculty of Law, Universitas Trunojoyo Madura, Jalan Raya Telang PO. BOX. 2, Madura, East Java 69162, Indonesia. rina.yulianti@trunojoyo.ac.id
[4]The author is associated with the Faculty of Law, Universitas Wisnu Wardhana Malang, Jalan Terusan Danau Sentani No.99, Malang City, East Java 65139, Indonesia. joicewijayas99@gmail.ac.id
[5]The author is associated with the Faculty of Law, Universitas Ahmad Dahlan Yogyakarta, Jalan Ahmad Yani, Special Region of Yogyakarta 55166, Indonesia. kurniadewi@law.uad.ac.id

society as referred to in paragraph (1) applies only where the law lives and for as long as the act is not regulated by this Law and is by the values referred to in Article 1 paragraph (1); and Human rights and broad legal concepts were officially acknowledged by civilised society in 1945 (Remaja, 2020).

As defined by the Expert Team for the Revision of the Draft Criminal Code, living law in society is referred to as the living law in this context. While the phrase general legal principles recognised by civilised society is not only found in Article 2 paragraph (2) of the Draft Criminal Code, but it is also found in the Statute of the International Court of Justice (ICJ), which was adopted on April 18, 1946, and is referred to as General Legal Principles Recognised by Civilised Society (Hairi, 2016). According to Article 38 paragraph (1) letter c of the Statute of the International Court of Justice, the Court, whose purpose is to adjudicate disputes brought to it in conformity with international law, shall apply: the broad principles of law acknowledged by civilised countries (Dirks & Aseltine, 2008). According to the legislation, the Court applies general law principles acknowledged by civilised society to international law by applying international law principles (Schlesinger, 1957).

The explanation of Article 2 of the Draft Criminal Code states that the term "customary criminal law" refers to the law that exists in society and determines whether or not a person deserves to be sentenced. The law that exists in society in this article refers to the law that is still in effect and developing in the lives of the people in Indonesia. For example, in certain parts of Indonesia, there are still unwritten legal requirements in society that are considered law in that region, which decide whether or not a person deserves punishment. The government must confirm and collect a legal foundation for the application of criminal law (customary crimes) drawn from the Regional Regulations of each location where customary law is practised to establish a legal basis for the application of criminal law (customary offences). In this collection, you can find the laws that apply to those who reside in the community and are classified as Customary Crimes. This circumstance will not preclude the application of the concept of legality and the prohibition of parallels, which are both enshrined in this Law, and will continue to ensure their application. In this section, what is meant by "applicable in the location where the law is in effect" is that the law applies to anybody who commits a customary offence in the region where the law is in effect. According to this paragraph, principles for assessing the validity of customary criminal law, which this Law recognises, may be found.

The legal concept expressed in Article 2 paragraph (2) of the Draft Criminal Code is that what is referred to as "living law" is customary criminal law, which is still in effect and evolving in the lives of Indonesians. Living law must be

enforced as living (criminal) law in the same way as customary criminal law is enforced. The present state of criminal law is divided into two categories: the current or current circumstances and the development or development state of the law (prospective). To create a legal foundation for the implementation of criminal law (customary crimes), it is required for the government needs to confirm and consolidate information generated from the Regional Regulations of each location where customary law is in effect. The mission of the Draft Criminal Code to the government is to incorporate the spirit of affirmation and compilation of customary criminal law and customary crimes (criminal actions) into their separate regional laws, which they must do in the spirit of the Draft Criminal Code.

If the Draft Criminal Code is issued, compiling the code will begin immediately due to living criminal legislation. The most important aspect of the compilation process is the development and qualification of particular legal standards as live criminal law and the classification of certain activities as customary crimes. In addition, it is necessary to examine the legal concepts that form the foundation of contemporary criminal law.

According to article 2 paragraph (2) of the Draft Criminal Code, the living criminal code must conform with (and not in conflict with) the broad principles of law recognised by civilised countries, and it must not conflict with those general principles. The broad principles of law acknowledged by civilised countries are therefore positioned as a touchstone against the realities of contemporary criminal law. When it comes to determining whether current criminal law conflicts with generally recognised legal principles, the touchstone concept is appropriate because it determines whether general principles of law recognised by civilised nations conflict with generally recognised principles of law recognised by civilised nations (Damgaard, 2008). Regardless of whether the test findings are true, a relationship between the notion of broad principles of law acknowledged by civilised countries and current criminal legislation is an essential prerequisite for a testing procedure. It is not easy to test without first establishing a relationship between the two notions.

Understanding that the content of living criminal law is customary law, which is still relevant and evolving in people's lives, is a critical component of understanding living criminal law. Furthermore, the level of the region of application is restricted to the location (area) where the legislation is in effect. In the real world, criminal law is local, and it differs from place to place (Gully, 1985). In contrast, the content of a general concept of law acknowledged by a civilised country is a legal principle in international law (Bassiouni, 1990). This legal principle is applicable at the international level, as it should be. There are

variances in the extent and degree of application of the various regulations (Abbott et al., 2000). The basic principle of law is acknowledged by civilised countries in international law and applies globally if live criminal law incorporates customary law and its level at the local level (Tamanaha, 2008).

At first look, the two conceptions seem to stand on their own, without any link to one another, making it impossible to regard each as a legal notion that can be used as a touchstone and a legal concept that can be evaluated. The presence of basic legal principles in the general principles of law acknowledged by civilised countries and living criminal law is the common ground and thread connecting the two notions (Simma & Alston, 1992). The most significant task in carrying out the law is developing and qualification the aforementioned legal concepts.

Because the living criminal law is still in the process of being compiled, the legal issues discussed in this article are:

1. The ambiguous legal principles in living criminal law;
2. The need for the elaboration and qualification of the principles in the general principles of law recognised by civilised nations, which will serve as critical norms (the touchstone) and constructive norms for living criminal law; and
3. The need to elaborate and qualify the general principles of law recognised by civilised nations will serve as critical norms.

This study examines the substance of the general principles of law recognised by civilised nations and living criminal law and the significance of the implementation of legal principles in the general principles of law recognised by civilised nations and living criminal law. The study is based on the problems discussed above.

Literature Review

International migration is a complex phenomenon influenced by various factors and causes. Conflicts, instability, economic imbalances, globalization, new means of communication, and the increasing impact of climate change lead to increasing levels of mobility. However, recent developments indicate that new challenges are being added to existing ones, resulting in unpredictable situations that evolve rapidly, involve a complex interplay of driving forces, or are based on deliberate and hostile actions by other states. This new migration environment is shaped by a number of factors: the continued impact of long-term trends and drivers, the impact of growing geopolitical competition, the direct and indirect impact of war and conflict (ICMPD, 2023a).

Migration is a response to shocks and global imbalances, such as huge gaps in income and well-being across countries. About 40% of the world's

population (3.5 billion people) live in places that are highly affected by climate change. Economic opportunities in affected regions decrease, thereby increasing migration pressure (World Bank, 2023).

Understanding the dynamics of the migration crisis is important for predicting its impact on Eastern Europe. Different Eastern European countries have responded differently to the crisis: some of them adopt more restrictive immigration policies and others advocate a more compassionate approach.

Studies in this area establish that political leaders and parties in Eastern Europe have taken advantage of the migration crisis to advance their political agendas. They presented the crisis as a threat to national identity and security, often using rhetoric that resonated with their electoral base. This shift in policy discourse has influenced policy decisions as governments have introduced measures to address the challenges posed by the migration crisis (Hutter & Kriesi, 2022; Hadj Abdou et al., 2022).

The Universal Declaration of Human Rights (UDHR) adopted by the United Nations established a universally recognized list of fundamental rights and freedoms that should be protected уйгфддн for all people, regardless of their nationality, ethnic origin or migration status. The UDHR defined the right to freedom of movement (Article 13), the right to seek asylum from persecution (Article 14) and the right to citizenship (Article 15) (United Nations, 1948). These provisions are particularly relevant in the context of the migration crisis, as a significant number of migrants and refugees are fleeing conflicts, violence, and human rights violations in their countries of origin.

In the current conditions, it is of particular concern that some Eastern European countries have implemented strict immigration policies and securitized discourse, which may worsen the protection of human rights for migrants and refugees. In turn, the above implies resistance to human rights violations. The European migration policy is increasingly diverging from the EU's commitments to uphold human rights. Signs of discrimination, limitations on freedoms, and failure to uphold certain social rights are observed (Bast et al., 2022). The migrant crisis is fostering an exclusive policy within the European Union, leading to increased human rights violations (Christofi & Georgiadou, 2023), which escalate into criminal actions by migrants attempting to defend their rights by any means necessary (Muñoz, 2022).

Some Eastern European countries, such as Hungary, responded to the migration crisis by introducing new restrictive rules to prevent the influx of migrants (Kallius, 2017; Goździak, 2023). These actions indicate that narratives about the threat to national identity and security from the influx of migrants have intensified in the political discourse of these countries. Individual countries are

accused of unwillingness to adhere to the European values of solidarity and humanism in the treatment of migrants in some other eastern EU members. Gellwitzki and Houde write about the strengthening of populist, anti-migrant and Eurosceptic narratives in the political discourse of some Eastern European countries in the context of the migration crisis (Gellwitzki & Houde, 2023). One of the problems is the institutional changes in the EU, which caused a certain differentiation in the process of adopting new legislative acts (Schimmelfennig & Winzen, 2023).

Researchers conducted extensive studies on the migration crisis and its impact on political discourse in Eastern Europe. A number of studies are often based on different theoretical approaches. Many studies have applied framing theory to examine how political actors in Eastern Europe formulated the migration crisis (Czymara & Klingeren, 2022). It examines how different frames such as security (Tkaczyk, 2017; Lloyd & Sirkeci, 2022), cultural identity and humanitarianism, mass media (Czymara & Klingeren, 2022) influence public opinion and political decisions.

In general, the research provides a ground for understanding the role of political discourse in Eastern European countries during the migration crisis, showing the complex relationship between rhetoric and policy decisions and providing a basis for further analysis in this study.

Research Methods

The legal research presented in this article is mostly theoretical. A conceptual framework was carried out in this investigation (Jabareen, 2009). The legal materials required are the legal concepts included in relevant legal principles, theories, doctrines, opinions, and legal documents. Compilation of legal principles about the content of the broad principles of law acknowledged by civilised countries begins with developing and defining legal concepts before applying those principles. Then, as a checkpoint, this qualified legal theory is applied to current criminal legislation to establish its applicability.

Results and Discussion

Aristotle wrote: "In every civilisation, there is always a law that acts to govern their conduct," implying that there is always the rule of law in place to regulate their behaviour (Burnay, 2018). According to Martin Kryger (1986), the law as tradition is a stage of cultural development that is always followed by legal developments, or vice versa; law evolves and grows in tandem with the development and expansion of the culture of its people. This event demonstrates that the rule of law and the people are inextricably linked. Society is the primary

source of legal authority. That the law is a component of a society's cultural evolution is shown by this remark.

A civilised community always creates its own set of rules. Every community develops its own set of forms and varieties of laws. Every civilisation always imagines the law by the culture of the community in which it exists. Every culture always develops legal traditions distinct from those of other societies, for example, the civil law and common law traditions in the United Kingdom. Because the two legal traditions evolve and expand in various societies' cultural lives, the two legal traditions have distinct features. According to this concept, every civilisation has a living law that has evolved and developed throughout history. When a living law is developed out of the social life of a society and is physically exercised continually, the community obeys it out of a sense of moral obligation (*Opinio Juris Sive Necessitatis*) rather than because of the sovereign's compulsion (Carty, 2017). This is known as the rule of law. Customs and traditions, religion, and other sources may all be used to create living laws. If someone claims no norms of conduct in traditional society can be referred to as law, they express an incorrect perspective.

Eugen Ehrlich (1922) used the phrase "living law" to describe the polar opposite of state law (law created by the state/positive law), which he believed was a misnomer. According to Eugen Ehrlich, legal evolution is concentrated on the development of society itself rather than on the production of legislation by the state, the judgments of judges, or the development of legal science in general. Eugen Ehrlich wishes to communicate that society is the primary source of law. Law and society are inextricably intertwined. Eugen Ehrlich argued that the living law is the rule of law that governs life itself, even though it has not been incorporated in a legal argument. In light of the above, it may be concluded that the living law is a collection of provisions whose emergence coincides with the emergence of society. Law and society are inextricably intertwined. The community creates the rule of law, and it serves the interests of that community in all of its manifestations. As a result, according to Eugen Ehrlich, state law is not something that exists in a vacuum, apart from social circumstances. State law must consider the living law that has developed and matured in the lives of individuals. Eugen Ehrlich expressed himself in this way: "The principles of law were not dead creations that existed independently of social realities," according to him. Contrary to this, they are integral to society's functioning and functional order of social communications, which serves to defend some interests that have been favoured by society while discriminating against others that have been rejected or condemned by society. Ultimately, society creates a general order of societal interactions, which is eventually formalised into legal forms by social

organisations and people acting in their position as legislators (in the broader meaning, as specified above) (Golia & Teubner, 2021).

According to sociological and anthropological considerations, Indonesian society is diverse, with various cultures, faiths, and traditions (Geertz, 1957). Indonesian society is thus governed by various rules, such as customary law and Islamic law, which are all practiced (Butt, 2010). As a result, the Indonesian people already had the living law prior to the country's independence. There has existed legal pluralism, in which each legal community has its own set of laws, each with its own set of traits and style (Simanjuntak, 2022). Dutch colonisation in Indonesia had a significant impact on the Indonesian legal system, to a greater or lesser extent (Lev, 1985). As is generally known, the Netherlands is a civil law nation with a long history of legal reform. The essential aspect of civil law is that the law serves as the primary source of law for the people. According to Joseph Dainow (1966), the codified legislation is the primary source of law in civil law jurisdictions.

The notion of living law may be explained in the following way: According to FSC Northrop (1956), the course on the contrast between civil law and common law was given by FSC Northrop, and its subject matter dealt with the distinction between positive legal rules and the living law that exists in every human society. Magee defines positive law as the legislation made by the government and implemented by the administrative machinery, which is Northrop's conception. Except in cases when arbitrary rule by an individual was enacted, positive legislation was intentionally examined, debated with or among those in positions of authority, and made public in some form of language that would be referred to in the future and could be changed relatively quickly. Instead, living law was a law that existed not because of legislation but rather because of how people were brought up, and it was this law that more than anything else, gave a community its distinct character and sense of place.

The two experts explain the distinction between positive and living laws throughout every human society. Law that has been imposed by the government and enforced by the administrative machinery is known as positive law. Living laws are distinguished by the fact that they are not enforced by the government but rather by how they are formed, and it is this that gives the community its distinct character above all else.

Garret Barden and Tim Murphy (2010) developed their ideas within the framework of the basic jurisprudence that we laid forth in Law and Justice in Community (LJC). We modified Northrops' version by referring to how any human community conducts itself by the customs, practices, well-known and accepted procedures, and mutual expectations that establish the journal

relationships and entitlements specific to that community; and our account specified that the living law represents a moral tradition comprised of the set of communally accepted norms that express how, in certain types of situations, members of the community are tasked with acting. Living law is also known as communal moral law or customary law since it refers to the generally accepted standards of a society, some of which may be written down but seldom, if ever, all of which may be expressed verbally. For want of a better term, children are brought up in communities where they learn the community morality in the same manner that they acquire the common language, to use Northrop's phrase (Coffey et al., 2012).

Apart from the law, which is considered the primary source of law in Indonesia, the living law is also considered one of its legal sources. This may be found in the following clauses of the statute: First and foremost, Article 18B paragraph (2) of the Indonesian Constitution acknowledges indigenous peoples' rights. These clauses recognise and appreciate the presence of the living law in the life of the country and the state in a more indirect manner than other laws. In this case, traditional villages and villages with rights derived from their different living laws are recognised, as are traditional villages and villages with rights. According to Article 5 of the Law on Judicial Power, a judge must investigate the sense of law that develops and expands in a community. As a result, unlike in the civil law tradition, judges are not restricted to acting as the spokesman of the law while determining matters in Court. Judges are granted the flexibility to investigate the living law to bring about justice for everybody. Judges employ existing laws in society to conduct legal discovery even when there is a legal void to be filled.

It is decided in the LoGA that the foundation of national land law is derived from customary law. The acknowledgment of customary rights serves as an indication of this. It is decided in the Marriage Law that marriage is lawful if it is performed in line with the religious and philosophical principles of the parties involved. In inheritance law, legal plurality is permitted, with Islamic, customary, and Western inheritance rules all existing side by side.

It is clear from the instances above that the living law is still respected in the Indonesian legal system. As a matter of fact, in Indonesia, the living law serves as a source of material law for the development of positive law. Many parts of Islamic law have been deemed positive by the government. The implementation of the living law in Indonesia, on the other hand, must be tailored to the country's legal system. For example, criminal law closely adheres to formal legality. If a crime is committed, the law does not specifically criminalise that; it cannot be punished, even though the conduct violates the current law.

It is reflected in the provisions of Customary Law and the laws of criminal law, which are included in the Customary Criminal Law, that social institutions exist in Indonesia to control and maintain the order of the community (Restuti, 2018). Its presence as a social reality is characterised by the fact that it is a living rule that indigenous peoples observe and obey consistently from one generation to the next. Because it is believed to have upset the cosmic balance, it is considered possible for a violation of the rules of conduct (customary criminal law) to cause shock in the community. As a result, customary reactions, corrections, and sanctions are applied to the perpetrator of the offence.

It is not distinguishable between breaches of a criminal character that must be investigated by a criminal court and violations of a civil nature that a civil judge must investigate by traditional criminal law. Furthermore, it makes no distinction between whether the infraction is a violation of traditions, religion, or decency or decency All of them will be reviewed and tried by customary judges as a complete case, with deliberations and judgments that are comprehensive, taking into account all of the variables that impact the outcome (Berman, 2003).

When it comes to maintaining the equilibrium in both society and within customary law groups, the balance must be restored as quickly as possible. Regardless of whether the event or conduct is lawful or illegal, the event or act may be penalised if it disrupts the social order. For example, as stated by Soepomo in Hilman Hadikusumah, there is no structural distinction between criminal activities that may be prosecuted and illegal acts that merely have effects in the civil realm.

As stated by Soepomo (1959), Customary Offenses are defined as any act or incident that greatly disturbs the inner strength of the community, any act or incident that pollutes the inner atmosphere or opposes the sanctity of society any act or incident that causes a rift within the community. Between the realm of birth and the world of the unseen, as well as infractions that wreak havoc on the fundamental fabric of society. It is possible to gain a guide as a measure in assessing the attitude of a criminal act, that is, an attitude of action that aligns the inner order of society with the order of the unseen world, even if it is a little abstract.

According to Ter Haar (1960), an offence is any disruption of the equilibrium, any disturbance in the material and immaterial possessions of a person's or a group's existence that results in the emergence of a usual response, with the result that the balance will and must be restored Reinstated. In its most basic definition, an offence is an act that breaches the sense of fairness and obedience that exists in society, producing a disturbance of the peace and balance

of the community in question, and in order to restore this equilibrium, customary responses are triggered in the community.

According to Hilman Hadikusuma (1979), the essence of customary crimes is as follows, and the legal laws governing customary infractions, in general, are as follows: The term "traditional religious magic" refers to the belief that activities that should not be done and that disrupt the equilibrium of society are inherited in nature and are related to religion. Several incidents or actions of defiance of conventions are illogical, not intellectual or liberal, but rather cosmic in origin, putting human existence in connection with nature that is inextricably linked to the danger of God the Creator, according to the traditional mentality.

A customary offence is comprehensive and unifying in nature. It does not discriminate between criminal and civil offences nor distinguishes crimes as legal offences and violations as legal offences, as is the case with criminal and civil offences. On the other hand, it makes no distinction between a deliberate act (*opzet*) and a negligent one (*negligence*) (*culpa*). The solutions to all of them are comprehensive and united in that there is no difference between the offender (*dader*), those who participated in the act (*mededader*), those who assisted in the act (*medeplichtiger*), or those who provoked the act (*medeplichtiger*) (*uitloker*). They are all joined if one with the other is a sequence of events upsetting the equilibrium. They are also unified in their settlement before the Court (consultation of customary law officers).

There is no *Prae-Existente* Customary Law. According to Soepomo (1959), the offence does not adhere to the prae-existente regels system, in contrast to western criminal law, which is stated in Article 1 of the Criminal Code and adheres to the Montesquieu adage which reads *Nullum delictum, nulla poena sine praevia lege poenali* (There is no crime without; there is no offence except by the force of the criminal code in the existing law before the act). The consequence of this is that the crime of customary criminal law does not comply with the premise stated before.

In order to avoid generalising, if there is a customary offence, the most important thing to pay attention to is the development of a response or correction, as well as the disturbance of the social equilibrium, as well as who is responsible for the offence and what his or her motivations are. The offenders of customary law violations and the circumstances and activities do not generalise.

The principles of customary law for crimes are open and adaptable to new components that alter, whether they come from outside or are brought about by changes and advances in the community context. While customary law does not necessarily reject these modifications, it does not do so as long as they do not contradict the legal and religious beliefs of the community in question.

Customary crimes may occur when local customary norms are broken or when a party feels offended, resulting in the emergence of responses and corrections and the disruption of the community's equilibrium. Consider the crime of fruit theft in Aceh. If the fruit is stolen by picking it from a tree that has not been properly maintained, the thief will be penalised and forced to pay the fee. If a customary offence happens, but the local community no longer perceives that the equilibrium has been upset, and there is no response or correction directed at the culprit, the conduct is no longer a customary offence or a customary offence with no legal repercussions. Then there are the customary crimes, which vary from one location to the next.

Complaints are number seven. If there is a customary crime that causes the family's equilibrium to be upset, a complaint, a notice, and a request to have the matter fixed must be made to the customary head in order to resolve the claim or lawsuit brought by the aggrieved party to the Court of law.

Reaction and Correction: The goal of the event or offence's reaction and correction is to restore the equilibrium of the disrupted society. Customary officers often carry out events or crimes that disrupt the balance of indigenous peoples, but those that disrupt personal or customary families are typically carried out by the head of the family or the head of the relative who is the target of the event or offence. In the same way, accountability for faults might be placed on the individual who committed them, their family, or the traditional leader.

By criminal law (customary offences), if an event or crime happens, what is the effect of the conduct, and who should be held responsible are the questions that must be addressed. According to traditional law, not only may the individual criminals be held liable, but also the perpetrator's family or relations and the customary head of the community. Consequently, the liability for mistakes in customary criminal law rests with the family, close relatives, and the leader of the tribe or clan. Location of Enforcement: The location where the customary crime law is enforced is not nationwide in scope but rather is restricted to select indigenous peoples or rural regions in certain cases.

Soepomo's philosophy holds that in the traditional cosmic nature of Indonesian thought, it is essential that there be a premium placed on achieving a balance between the exterior world and the unseen world, between the whole human group and individuals, and between communities within each other. Consequently, any conduct that upsets the balance is a breach of the law, and the legal officer is responsible for taking whatever steps are required to restore the legal equilibrium.

Conclusions

The discussion of the problem formulation leads to the conclusion that the substance of general principles of law recognised by civilised nations is consistent with living criminal law and that the values embodied in general principles of law recognised by civilised nations can be easily applied to living criminal law norms in a significant way. Article 2 of the Draft Criminal Code stipulates that the living criminal law must be by (and not in conflict with) the general principles of law recognised by civilised nations and that the living criminal law must not be inconsistent with these general principles of law. A different approach is to use universally accepted legal principles as a yardstick against current criminal legislation, as is done in civilised countries. An analytical method is used to establish whether or if the broad principles of law acknowledged by civilised countries are used as critical standards against current criminal legislation.

A consistent (linked) relationship exists between the legal principles included in the broad principles of law acknowledged by civilised countries and the rules of criminal law currently in effect. Except for the variation in the sphere of application, there is no ontological distinction between the two groupings of principles. The legal concepts of the two legal systems are by one another (not contradictory). As a result, when the concepts in the broad principles of law acknowledged by civilised countries are implemented into living criminal law, the importance of its application does not pose issues.

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