THE POSITION OF CUSTOMARY CRIMINAL LAW IN NATIONAL CRIMINAL LAW

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ABSTRACT

The position of customary criminal law in national criminal law can be seen in Article 5 paragraph 3 sub (b) of Law Drt No. 1/1951, Article 4 paragraph 1, Article 5 paragraph 1, Article 10 paragraph 1, and Article 50 paragraph 1 of Law No. 48/2009. Article 51 Law No.21/2001. As well as the application of the principle of formal legality and the principle of material legality. Then there is customary criminal law in the 2008 Draft Criminal Code, namely in Article 1 paragraphs 3 and 4, Article 11 paragraph 2, and Articles 67 and 12 of the 2008 Criminal CodeBill.

INTRODUCTION

The reality of national law has accommodated religious law and customary law so that legal pluralism in the country has become a characteristic of national legal development, likewise, reforming criminal law does not reduce the application of living law. Then in the Outlines of State Policy (GBHN) the decree of the People's Consultative Assembly of the Republic of Indonesia (MPR-RI) Number IV/MPR/1999, which has been amended by Law Number 25 of 2000 concerning the 2000 National Development Program (Propenas) -2004. That the direction of policy in the legal sector is determined, especially regarding the national legal system in chapter IV letter A number 2, namely to organize a comprehensive and integrated national legal system by recognizing and respecting religious and customary law as well as renewing colonial legacy legislation and discriminatory national laws including gender inequality and its incompatibility with demands for reform through legislative programs.

Thus, in order to organize the national legal system, religious law and customary law have a place as constituent materials and makers of legislative regulations. This means that customary (criminal) law needs to be studied in depth so that the material or materials that exist and are still alive in customary criminal law can be used as a basis for the formation of legislative regulations. Nyoman Union Putra Jaya (2005:6-7) revealed that the national legal development strategy is sourced and extracted from the legal values that live in society. It can also be seen in scientific meetings, such as in national legal seminars which have been held several times and the results are in the form of resolutions, conclusions and reports as follows:

1. Resolution of the first national legal seminar in 1963 in the field of criminal law
    a. What are considered evil acts are acts whose elements are formulated in the Criminal Code or in other legislation. This does not close the door to the prohibition of living customary legal acts and does not hinder the formation of the desired society with customary sanctions that can still be in accordance with the dignity of the nation.
    b. Resolution of point V number 4: Elements of religion and customary law are intertwined in the Criminal Code
2. Conclusion of the National Law Seminar III in 1974 Conclusion number 1: National legal development must pay attention to customary law which is the law that lives in society (the living law)
3. National Law Seminar Report IV 1979 In the report sub B II letters a, e and f regarding the national legal system, it is determined:
    a. The national legal system must be in accordance with the needs and legal awareness of the people
    b. In order to create legal order and certainty to facilitate national development, as far as possible, national laws must be kept in written form. Besides that, unwritten laws remain part of national law.
    c. To maintain unity and unity, national law is developed towards unification by taking into account the legal awareness of society, especially in areas that are closely related to spiritual life. So the description above raises the question of what is the legal basis for the application of customary criminal law? The relationship between customary criminal law and written criminal law. As well as customary criminal law in the Draft Criminal Code. This article will try to explain the position of customary criminal law in National criminal law.

As for the formulation of the problem in this research, what is the definition and terms of customary criminal law? What is the basis for the application of customary law? and What is the

relationship between customary criminal law and written criminal law.

METHOD

Research methods are used as a systematic way to search, discover, develop, analyze a problem, test objective and optimal truth and carry out correct methods. The right method is expected to be able to provide a sequential flow of thought in efforts to achieve the study. Research methods are needed as a type of scientific thinking used in research and assessment of this thesis, which has the ultimate goal of achieving objectivity in writing this thesis. Writing this thesis uses normative juridical research methods. Normative legal research is legal research that examines written law from various aspects, namely aspects of theory, history, philosophy, comparison, structure and composition, scope of material, and consistency. In other literature, it is stated that normative legal research consists of: research on legal principles, research on legal systematics, research on the level of legal synchronization, legal history, and comparative legal research. Normative legal research is carried out by examining written law which is binding in nature from all aspects related to the subject matter being researched.

RESULTS AND DISCUSSION

1. Terms and Understanding of Customary Criminal Law According to

In some customary law literature, the term customary criminal law comes from the Dutch term adat delicten recht which is interpreted as "customary law violations" (Hilman Hadikusuma, 1992:230). According to Hilman Hadikusuma (1989:7) these terms are not known in indigenous communities. Indigenous people, for example, only use the words “wrong” (Lampung), or “sumbang” (South Sumatra) to express actions that are contrary to customary law. For example, an action is said to be "small contribution" if it is a violation which results in harm to a person or several people (family, close friends), and it is said to be "major contribution" if the event or action is a crime which results in harm and disrupts the balance of society as a whole.

According to Van Vollenhoven (in Hilman Hadikusuma, 1989: 9-10) what is meant by a customary offense is an act that must not be carried out, even though in reality the event or act is only a small discord. The term customary delicten recht comes from Prof. Ter Haar, (in Soerjono Soekanto and Mustafa Abdullah, 1982:81) defines customary law as any disturbance of material or immaterial objects belonging to an individual or social group. In indigenous communities, these disturbances give rise to negative reactions that demand restoration of the disturbed cosmic balance. As is understood, customary criminal law is living law.

According to Bushar Muhammad (1995:61) defines that customary law violations are unilateral actions of a person or group of people who threaten or offend the balance in community life, materially or immaterially, to the whole community in the form of unity. Soerjono Soekanto (1988:83) explains that the negative sanctions referred to in customary violations are in the form of:

a. Compensation for immaterial losses in various forms such as forced marriage of girls whose virginity has been defamed;
b. Payment of customary money to people affected by victims in the form of sacred sacred objects as compensation for spiritual losses;
c. Cleaning community villages from all dirt or magic;
d. Covering shame, apology,
e. Various forms of corporal punishment up to death penalty,
f. Exile from society. Ter Haar in his book, the principles and structure of customary law, translated by K.Ng.Soebakti Poesponoto, thirteenth edition (2001:226), provides an explanation of the custom of delicten recht, namely in legal order in small legal communities, apparently it is considered a violation (delict).) is any one-sided disturbance (eenzijdig) of the material and immaterial balance of an individual person or of many people who form one unit (a group); Such actions cause a reaction

g. the nature of the size and size is determined by customary law
h. is a customary reaction (adatreactie), due to which the balance can and must be restored (mostly by paying for the violation in the form of goods or money).

Meanwhile, according to Soepomo (in Nyoman Union Putra Jaya, 2005:33) that in customary law all acts that are contrary to customary law regulations and illegal acts and customary law also recognize efforts to improve the law if the law is violated. Meanwhile, according to I Gede AB Wiranata (2005:207) himself, the law of customary violations is:

a. An action event from parties in society
b. This action causes balance disorders
c. This imbalance causes a reaction
d. The reaction that arises causes the balance to be restored to its original state. Types of Customary Offenses Soepomo (2003:127) Customary offenses that are the authority to adjudicate in customary courts are types of customary offenses that still exist in indigenous communities, including: (a) Customary moral offenses such as love affairs, consensual sex, broken marriage promises, adultery, incest' inter-religious marriage, cohabitation. (b) Customary property offenses such as theft of traditional objects, (c) Customary offenses violating personal interests such as uttering dirty words, insulting people, slandering people, deceiving others or telling lies that cause harm, making accusations without clear evidence, (d) Customary offenses of negligence or not carrying out customary obligations, such as not participating in traditional ceremonies, not attending traditional meetings, not paying dues for traditional purposes.

That the types of customary offenses other than the offenses listed in the description above, illustrates that the customary court can examine, adjudicate, and decide on other types of customary offenses by first notifying (reporting) the matter to the nearest law enforcement apparatus (Polri) to obtain security. This offense does not rule out the possibility of being processed according to the criminal justice system while attaching the decision of the customary court to be used as special consideration. One of the characteristics of a customary offense is "standenmaatschappij" namely customary offenses which are classified into levels according to the social structure or structure of the indigenous community concerned. . For example, in Bali, caste communities are influenced by Hinduism, for example, sexual intercourse between a Brahmin woman and a man from a lower caste is a serious offense, because it endangers society.

2. Legal Basis for the Application of Customary Criminal Law

There are several legal bases for the application of customary criminal law in Indonesia based on national legislation.

1. Emergency Law Number 1 of 1951 Emergency Law Number 1 of 1951 concerning Temporary Measures to Organize the Unity Composition, Powers and Procedures of Civil Courts. In Article 5 paragraph (3) sub (b) which reads: Civil material law and for the time being, civil criminal material law which until now applies to independent regional heads and people who were previously tried by customary courts, exists and remains in effect. for these subjects and persons with the understanding: that an act which according to living law must be considered a criminal act, but which has no equivalent in the Civil Criminal Code, is deemed to be punishable by a sentence of not more than three months in prison and/or a fine of Rp. 500.00 (five hundred rupiah), namely as a substitute punishment if the customary punishment imposed is not followed by the condemned party and the compensation in question is deemed commensurate by the judge with the magnitude of the condemned's fault; that if the customary punishment imposed in the judge's opinion exceeds the threat of imprisonment or a fine as referred to above, then for the defendant's mistake a substitute sentence of up to ten years in prison may be imposed with the understanding that the customary punishment which according to legal understanding is no longer in line with the times must always be replaced as stated above; and that an act which according to living law must be considered a criminal act and which has an appeal in the Civil

Penal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act. From the sound of the provisions above, it can be seen that in fact customary sanctions (customary punishment) are the main sanctions in the case of acts which according to living law are considered to be acts that can be punished, but there is no equivalent in the Criminal Code. There are the words "... as a substitute punishment if the customary punishment imposed is not followed by the condemned party. .." and so on, indicating that a maximum prison sentence of three months and/or a fine of Rp. 500.00 (five hundred rupiah), is a substitute punishment for customary sanctions which are not complied with by the convict. The formulation of Article 5 paragraph (3), also provides understanding that:

a. Regarding criminal acts, they are measured according to the laws that exist in society. If such a criminal act occurs, then customary criminal law is the sanction.
b. If the traditional convict does not follow the traditional court's decision, the local district court can decide the case based on three possibilities. 1) There is no appeal in the Criminal Code, 2) The judge considers that customary punishment goes beyond imprisonment and/or fines as mentioned in possibility 1, 3) There is an appeal in the Criminal Code.
c. That whether material legality applies or not is determined by the attitude or decision of the convict to follow or not follow the decision of the customary court. If the customary court decision is followed by the convict, then that is when material legalization functions. The functioning of material legalization here is a natural thing because the criminal act committed by the perpetrator is purely contrary to the laws that exist in society (unwritten law).

2. Law Number 48 of 2009 Law Number 48 of 2009 concerning Judicial Power in several articles also provides the basis for recognizing customary criminal law. Article 4 paragraph 1 states that: The court shall judge according to the law without discriminating between persons. Article 5 paragraph 1 states that: Judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society. Article 10 paragraph 1 states that: The court is prohibited from refusing to examine, try and decide a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it. Article 50 paragraph 1 states that: Court decisions must not only contain the reasons and basis for the decision, but also contain certain articles from the relevant statutory regulations or unwritten sources of law which are used as the basis for judging. That adjudicating according to law is one of the principles of creating a state based on law. Every judge's decision must have a substantive and procedural legal basis. The law in adjudicating according to law must be interpreted more broadly beyond the meaning of written and unwritten law. The law in certain cases or circumstances includes understandings that bind the parties, good morality and public order. That constitutional judges and justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society. For this reason, he must enter society to know, feel and be able to understand the feelings of law and justice that live in society. According to Bambang Sutiyoso (masyos.wordpress.com), a problem whose legal certainty is normatively clear does not necessarily fulfill society's sense of justice. On the other hand, something that is fair does not necessarily comply with statutory provisions. In this case, it is worth considering Bismar Siregar's opinion, that judges must have the courage to interpret the law so that the law functions as a living law, because judges do not merely enforce formal rules, but must also find justice that lives in the midst of society. In the same vein, Thomas Aquinas argued that the essence of law is justice, therefore an unjust law is not law. Likewise, if you look at the head of the decision, it is not for the sake of legal certainty, but in the form of a sentence that reads: "For the sake of justice based on belief in the Almighty God." In Islamic teachings, when someone decides on a punishment between humans, they are ordered to decide fairly. Al Qur'an Surah An-Nisa: 58 emphasizes: "...and (commands you) when you determine law between people, you must determine it fairly..." therefore, justice must be upheld and become the emphasis in enforcing the law without ignoring legal certainty. itself. That the Court is prohibited from

refusing to examine, adjudicate and decide a case that is submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it. Based on the provisions above, to resolve concrete problems/cases, it is hoped that the judge must take a solution, namely through legal discovery (Rachtsvinding). not the mouth of the law or the mouth of positive law in general. But the judge is the mouth of propriety, justice, public interests and public order. If the application of legal rules will conflict, the judge is obliged to choose propriety, justice, public interest and public order. That apart from having to contain the reasons and basis for the decision, it must also contain certain articles from the relevant statutory regulations or sources of unwritten law which are used as the basis for the trial. Therefore, judges need to know the sources of unwritten law in society. Generally, the source of unwritten law is customary law or other customs in society.

3. Law Number 21 of 2001 Law Number 21 of 2001 concerning Special Autonomy for the Papua Province, in Article 51 states that: 1) Customary courts are peace courts within customary law communities, which have the authority to examine and adjudicate customary civil disputes and criminal cases between members of the customary law community concerned; 2) Customary courts are structured according to the provisions of the customary law of the customary law community concerned; 3) The customary court examines and adjudicates customary civil disputes and criminal cases as intended in paragraph (1) based on the customary law of the customary law community concerned. 4) In the event that one of the parties to the dispute or the litigant objects to the decision that has been taken by the examining customary court as intended in paragraph (3), the objecting party has the right to ask the court of first instance within the competent judicial body to examine and re-adjudicate the dispute or case in question. 5) Customary courts do not have the authority to impose sentences of imprisonment or imprisonment; 6) The decision of the customary court regarding criminal offenses where the case is not requested for a re-examination as intended in paragraph (4), becomes the final decision and has permanent legal force. 7) To release criminal perpetrators from criminal charges according to the provisions of the applicable criminal law, a statement of approval to be carried out is required from the Head of the Court in their area obtained through the Head of the District Prosecutor's Office concerned with the place where the criminal incident occurred as intended in paragraph (3 8). In the event of a request the statement of approval to implement the decision of the customary court as intended in paragraph (7) is rejected by the District Court, then the decision of the customary court as intended in paragraph (6) becomes material for legal consideration by the District Court in deciding the case in question. The purpose of this Article can be explained as follows: as stated in the explanation of this Law, namely Paragraph (l) In this paragraph it is expressly acknowledged that in national law the existence of judicial institutions and customary courts in Papua Province, as institutions peace justice between members of customary law communities within existing customary law communities. Paragraph (2) The customary court is not a state judicial body, but rather a customary law community justice institution. Based on the existing facts, the structure is regulated according to the provisions of the customary law of the local customary law community and examines and adjudicates customary civil disputes and customary criminal cases based on the customary law of the customary law community concerned.

This includes, among other things, the composition of the court, who is tasked with examining and adjudicating the disputes and cases concerned, the procedures for examination, decision making and implementation. Customary courts do not have the authority to impose sentences of imprisonment or imprisonment. Customary courts do not have the authority to examine and adjudicate civil disputes and criminal cases where one of the parties to the dispute or the perpetrator of the crime is not a member of the customary law community. This includes authority within the state judiciary. With the recognition of customary justice in this law, there will be many civil disputes and criminal cases between members of the customary law community in Papua

Province which can be completely resolved by the citizens concerned themselves without involving courts within the state judiciary. Paragraph (6) The decision of the customary court is a final decision and has permanent legal force if the parties to the dispute or litigants accept it.

The decision in question can also free the perpetrator from criminal charges according to the provisions of the applicable criminal law. A statement of approval for the implementation of the decision from the Chairman of the District Court covering the territory is obtained through the Head of the District Prosecutor concerned. If a statement of approval for the implementation of the decision has been obtained, the prosecutor's office cannot carry out investigations and prosecutions. Paragraph (8) If the chairman of the district court refuses to provide a statement of approval for the implementation of the decision, the police and prosecutors can carry out an investigation and prosecution. In this case, the decision of the customary court in question will be taken into consideration in deciding the case that is being filed. In this paragraph, the possibility of re-examination is opened in the event that one of the parties to the dispute or case objects to the decision and submits the dispute or case to the court of first instance within the competent judicial body. Paragraphs (3), (4), (5) and (7/) of Article 51 are stated to be "sufficiently clear".

3. The Relationship between Customary Criminal Law and Written Criminal Law

Customary criminal law is a living law and is imbued with magical, religious family characteristics, where what is prioritized is not an individual sense of justice but a sense of family justice so that the way to resolve it is through a peaceful settlement that brings harmony, harmony and kinship. Customary criminal law does not intend to indicate what law and punishment should be imposed if a violation occurs, but its aim is to restore the law which is crippled as a result of an imbalance. According to Nyoman Union Putra Jaya (2005:54) that customary criminal law does not recognize a "prae-existente regels" system, meaning it does not recognize a system of legal violations that is determined in advance. Meanwhile, the Criminal Code system is based on the prae existence regels system (violation of laws determined in advance) as in the principle of legality contained in Article 1 of the Criminal Code. Customary criminal law also does not recognize static regulations. So, in customary criminal law, customary offenses are not static, this means that an offense does not always remain a customary offense. Each customary law regulation arises, develops and then disappears with the birth of a new customary law regulation, while the new regulation itself also develops and then also disappears with changes in the people's sense of justice that previously gave birth to that regulation. Likewise, customary offenses are born, develop and then disappear. This means that actions which were originally violations of the law, gradually change to no longer violate the law because the law that is violated is in accordance with changes in the people's sense of justice. And the people's sense of justice continues to move forward in connection with the development or growth of people's lives which is always influenced by physical and mental factors. Thus, in customary law, an act which previously did not constitute a customary offense may at one time be considered by a judge or by a customary head as an act which is against the order of society in such a way that it is deemed necessary to take customary measures (adatreaksi) to improve the law. .

Meanwhile, according to Fajrimei A. Gofar (2005:11-14) that the current national criminal law adheres to the principle of legality as clearly regulated in the current Criminal Code (Wetboek van Straftrecht) and in the Draft Criminal Code Law (hereinafter abbreviated as Draft Criminal Code) . Article 1 paragraph (1) of the Criminal Code states that no act can be punished except on the strength of criminal regulations in existing legislation, before the act is committed. Article 1 paragraph (1) of the Criminal Code, in detail, contains two important things, namely: (1) a criminal act must first be formulated in statutory regulations; (2) statutory regulations must exist before the criminal act occurs (not retroactively applied). The principle of legality requires that an act can be declared a criminal act if there is first a law stating that the act is a criminal act. This is known as the principle of formal legality (Ahmad Bahiej, 2006:4). Article 1 paragraph (1) of the Criminal

Code is the basis for criminal law enforcement in Indonesia, especially in relation to legal certainty. However, it is recognized that Wet Boek van Strafrecht (WvS) is a Dutch colonial legacy. So its implementation requires several adjustments in the Indonesian context.

As a Dutch legacy regulation, the principle of legality then becomes a problem in its implementation. The principle of legality is faced with the reality of heterogeneous Indonesian society. The Criminal Code and other criminal provisions outside of it still leave areas of action that are considered by society to be prohibited, while written laws do not regulate this prohibition. However, in the history of Indonesian criminal law, the existence of customary courts allows the application of customary crimes and laws that live in society (living law) even though these customary crimes are not regulated in the Criminal Code. Therefore, the principle of legality in practice in Indonesia is not applied purely as intended by Article 1 of the Criminal Code, this can be seen from the enactment of the Law. No. 48 of 2009 concerning Judicial Power. Article 4 paragraph 1 states that the court judges according to the law without discriminating between people. The word "law" here clearly has a broad meaning, not just the statutory regulations that regulate it, but also the laws that exist in society. Judging according to law is one of the principles of creating a state based on law. Every judge's decision must have a substantive and procedural legal basis. The law in adjudicating according to law must be interpreted more broadly beyond the meaning of written and unwritten law. The law in certain cases or circumstances includes understandings that bind the parties, good morality and public order. This is known as the principle of material legality (Ahmad Bahiej, 2006:4). Long before Indonesia became independent, the existence of customary courts was recognized during the Dutch occupation. This recognition of customary justice was stated in various regulations issued by the Dutch occupation government. In the early days of independence, customary courts still existed, while the Criminal Code (Wetboek van Strafrecht) was implemented to fill the legal vacuum. UUDS 1950 and Law Number 1 of 1951 are considered to have confirmed the existence of customary courts. However, since the enactment of Law Number 14 of 1970 concerning Basic Provisions of Judicial Power, customary courts have been abolished. As a practical consequence, the existence of customary courts has ended through Law Number 14 of 1970 concerning Basic Provisions of Judicial Power. However, its existence has been recognized again, specifically in the province of Papua with the enactment of Law no. 21 of 2001 concerning special autonomy for the province of Papua contained in Chapter XIV concerning judicial powers, Article 50 states that:

1. Judicial power in Papua Province is exercised by the Judicial Body in accordance with statutory regulations.
2. In addition to the judicial power as intended in paragraph (1), it is recognized that there is customary justice in certain customary law communities. In practice, customary justice uses customary law and existing laws in society as the basis for prosecuting and punishing someone.

In other words, someone who is deemed to have violated customary law (customary criminal law) can be brought to court and punished. Apart from that, the principle of material legality is also contained in the Draft Law on the Basic Principles and Basics of Criminal Law and Indonesian Criminal Law. The principle of legality is stated in Article 5 which states that the court can only qualify an act as a criminal act, if the author The law or unwritten law that exists among Indonesian society and which does not hinder the development of a just and prosperous society has determined this act as a criminal offense and threatens it with punishment. Furthermore, the special explanation of Article 5 determines that this article is a refinement of the nulla poena principle. Those who determine an act as a criminal act are the legislators and unwritten laws. For unwritten laws, the following conditions apply:

1. Living among Indonesian society.
2. Do not hinder the development of a just and prosperous society.

Likewise, the laws that exist in this society are included in the Draft Criminal Code in Article 1 paragraph (3). Automatically, what is meant in the Draft Criminal Code is the law that exists in society which

is related to criminal law, for example customary criminal law and Islamic criminal law. In Indonesia, it can be said that most of the unwritten laws are customary laws. In the context of the Draft Criminal Code, this includes customary offences. Regulations regarding the application of the principle of material legality in Indonesia are not something new, even though the Criminal Code (WvS) only recognizes the principle of formal legality. In Law Number 1/Drt./1951 and Law Number 14 of 1970 concerning the Principles of Judicial Power, the principle of material legality is something that must be upheld by judges when deciding a case. Even in Article 14 paragraph (2) of the 1950 Provisional Constitution, it is stated that "no person can be punished or sentenced except because of legal regulations that already exist and apply to him. The meaning of "The word "law" here is the same as article 4 paragraph 1 of Law No. 48 of 2009 concerning Judicial Power, namely that it has a broader meaning than just statutory regulations.

CONCLUSION

Based on the description of the discussion throughout the research, several conclusions can be drawn as follows:

1. That the legal basis for the application of customary criminal law is contained in Article 5 paragraph 3 sub (b) of Emergency Law Number 1 of 1951. Article 4 paragraph 1, Article 5 paragraph 1, Article 10 paragraph 1, and Article 50 paragraph 1 of Law Number 48 of 2009. Article 51 of Law Number 21 of 2001.
2. The basis for the application of customary law is due to community habits which cannot be separated from the habits that are attached to that person.
3. That the relationship between customary criminal law and written criminal law can be seen by the application of the principle of formal legality and the principle of material legality.

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