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Renewal of Criminal Law in the Customary Law

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Abstract

This research aims to find out the position of customary law in the renewal of criminal law and also main difference between the Indonesia Criminal Code and Custom Criminal Law. The research method used in this research is qualitative normative juridical approach. In this research we are able to find the result, that is, if the Customary Law acts as the source of law in the Renewal of Criminal Law, then it can be seen from the angle of policy approach. First, as part of social policy. Second, as part of criminal policy. Third, as part o law enforcement policy. Then the main differences between the Indonesia Criminal Code and Custom Criminal Law lie in the subject of Law, deliberate or mistake, the crime doer, trial offence, nature of offence.
Keyword: KUHP, Customary Criminal Law

INTRODUCTION

Indonesia is a state of law (*rechtstaat*), where every aplicable conditions always hold on a law system nationaly acceptable. What is done by the state organizer or the people must relies on the law. In organizing the social life, there are two kinds of laws, they are private law and public law. The criminal law as part of public law field has its own codification that is the Indonesia Criminal Code.

The recent the Indonesia Criminal Code is the heritage of the Dutch colonial government in Indonesia first known as W.v.S. (*Wetboek van Straftrecht*) and valid according to principle of concordance. the Indonesia Criminal Code now has already been more than 60 years. Indonesia Criminal Code which had already aged and never been changed was seen that it was capable of obstructing the maintenance of national legal development that gradually continuous to be increased in order to law renewal and guide the legal order to ensure justice and legal certaintu and provide protection toward human praise and dignity for a long term. Therefore, the reformulation of the the Indonesia Criminal Code become one of the important elemen in realizing Indonesia criminal law renewal. Barda Nawawi Arief states that the effort in carrying out the (criminal) law renewal is basically an ongoing and continuous unstopable activity. Jerome Hall mentions the term "*a permanent on going enterprise*". Especially in the

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field of criminal law renewal, Jerome Hall states must be a permanent and continuous effort and any detail note/document about it should be kept and maintained (Nawawi Arief, 2005).

The formulation of the the Indonesia Criminal Code in the form of the Indonesia Criminal Code draft began in 1958 with the establishment of National Legal Development Institute (LPHN) which was later changed to National Legal Development Board (BPHN). The concept of the design is inseparable from the idea that the characteristics of Law in Indonesia is the adoption of the social order of society which is reflected in the behavior of life and social life in the heterogeneous domain of the Indonesian society.

In the legal system of Indonesia is also known three legal systems that become integral parts of each other, namely customary law, Islamic law, and western law. The existence of customary law as a living law can not be denied its role as a basic framework for the preparation of national law in the future.

One of the main concepts of legal recognition that develops or lives in society is the adoption of a system of sanctions in customary law (customary law) in the national legal system. The recognition and protection of the application of customary law sanctions is important in the life of cultural societies, because with customary sanctions, it can be constructed or created a balance and social harmonization, the interests of the human and individual groups, between the community and the society from the traditional mind of the Indonesian nation.

Etymologically the term of customary law consists of two words, namely law and custom. Law is a collection of rules consisting of norms and sanctions aimed at maintaining order in human relationships so that security and order are preserved. While custom is a reflection of the personality of a nation, is one of the embodiments of the nation soul concerned from century to century. In the context of contemporary Arab thought, custom or tradition is defined as a cultural heritage, ideological, religious, literary, and emotionally and ideologically charged arts (Gustian, 2011).

As the identity of the nation, the existence of customary law must have characteristics and characteristics in accordance with the philosophy and culture of the nation. National criminal law now determines that in determining the existence of a criminal offense it is prohibited to use analogies. These provisions reinforce the principle of legality which is the main principle in the national criminal law which positively applies now.

In reality, the customs of Indonesian people have their own rules which among them have sanctions commonly known as customary law. Such customary law is certainly not written, in the sense of not being a written law that was officially endorsed by the state as well as the law. This indicates that the Indonesian people still hold the unwritten law that is the customary law itself along with sanctions for violation of the unwritten law.

On the basis of the above explanation, the author will try to discuss the value of customary law in the renewal of criminal law in Indonesia. Based on the above description can be formulated the problems of where is the position of customary law in the renewal of criminal law? And how is the difference between Indonesia Criminal Code and Custom Criminal Law?.

RESEARCH METHOD

This research is a qualitative research with Juridical Normative approach. using normative case studies of legal behavioral products, for example reviewing the law. The subject of the study is the law that is conceptualized as the norm or rule that is in society

and becomes the reference of everyone's behavior. Thus normative legal research focuses on the inventory of positive law, legal principles and doctrines, the discovery of the law in the case of concreto, the systematic law, the level of synchronization, comparative law and legal history (Muhammad, 2004).

Primary legal materials, namely all legal materials / materials that have juridical binding status. Primary legal material consists of laws and regulations relating to research and secondary legal materials, ie in the form of materials or related material and explains the problems of primary legal materials consisting of books and literature related Mining Geothermal in particular. The legal material used in normative law research is literature of basic material which in research science is generally called secondary law material (Marzuki, 2005).

FINDING AND DISCUSSION

The Position of Customary Law in Indonesia

Indonesia is an archipelagic country that has diverse ethnic groups, and of course the culture and norms it embraces will vary. This diversity will give rise to different values of different ethnic groups in viewing and resolving the various issues that occur among them, not least in cases related to honor and morals, as this is not only the parties involved in but also involves a wider community community.

Article 18 B Paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia is expressly stated that "*the State recognizes and respects the provisions of indigenous and tribal peoples along with their traditional rights as long as they are alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia. governed by law*". Similarly Article 28 I Paragraph (3) states that, the cultural identity and rights of traditional communities are respected in harmony with the development of the times and civilizations. In the appendix to Act Number 17 Year 2007 concerning the Long- Term Development Plan for 2005-2025 letter G, it is also asserted that in the reform era, efforts to realize the national legal system continue to include several issues: First, the development of legal substance, both written and legal law unwritten mechanisms have a mechanism for establishing better national law in accordance with development needs and community aspirations.

Secondly, the involvement of all components of society that have high legal awareness to support the establishment of a national legal system that is aspired (Abdulah, 2015). Therefore Indonesia recognizes customary law. The term customary law is a Dutch translation recorded by Snouck Hurgronye when he conducted research in Aceh (1891- 1892) namely "*Adatrecht*", intended to distinguish between customs or establishments with customs that have legal sanctions. Since then the term adatrecht which was later translated as customary law became famous, especially since it was cooked by Van Vollenhoven to become a science of adat law. But it does not mean that customs and customary law (which by different experts understanding) has only existed since the year of Snouck The Hurgronye.

Customary law is the law of society, so its existence of course along with the beginning of life of the society tersebut.Hal is in line with the statement of Hilman Hadikusuma who said that customary law is a rule of human habit in community life. Since man was revealed by God to the earth, in the development of his life the law began from the human person who was given the God of reason, thought and behavior as the source of the customs and rules in their life.

Customary law is an unwritten law born from the local wisdom of indigenous people of Indonesia. Formed due to the interaction between citizens in a particular area so that the enactment of customary law is binding only for citizens and within certain areas.

According to M.M. Djojodiguno Customary Law is a work of a certain society that aims at a just order in behavior and deeds in society for the welfare of society itself. According to R. Soepomo, Customary Law is an unwritten law that includes a regulation of life that is not established by the authorities, but adheres to the community based on the belief that the rule has the force of law.

According to Van Vollenhoven Customary Law is a whole set of positive behavioral rules which on the one hand have sanctions whereas on the other hand it is not codified. While Surojo Wignyodipuro gives the definition of customary law in general has not or not written is a complex of norms that originate in the sense of justice of the people who always evolved include the rules of human behavior in everyday life, always adhered and respected because it has legal or sanctions (Wisnu, 2009).

When viewed from the above 4 definitions, it can be concluded that Customary Law is a rule that is not written and not codified, but still obeyed in society because it has a certain sanction if not obeyed. Then regarding its form, customary law is largely an unwritten and uncodified law. The existence of these unwritten laws can be rationalized when the political interests of the establishment of a national legal system or legal reform require non- written law to be part of its sacrality.

Customary law grew out of the ideals and minds of the people of Indonesia. Hence customary law can be traced chronologically since Indonesia consists of royal kingdom, spread throughout nusantara. The socio-cultural reality is constructed by one poet constructed by another, and reconstructed by the next poet. The period of Sriwijaya, Mato Muno, Majapahit period some inscriptions describe the development of applicable law (original law), which has regulated several fields, among others: 1. Rules of religious rule, economy and mining, contained in the King Sanjaya inscription in 732 in Kedu, Central Java; 2. Regulate religious and work, contained in the 760-year-old Raj Dewasimha inscription; 3. Land and Agricultural Law is found in the inscription of King Tulodong, in Kediri, 784 and an inscription in 919 which contains government posts, king rights over land, and compensation; 4. The law regulates civil justice, contained in an inscription Bulai Rakai Garung, 860. 5. The King's order to break customary rules, in the Darmawangsa inscription of 991; 6. During the Airlangga period, the establishment of the symbol of the royal seal of the head of the Garuda bird, the construction of the fief with its privileges, the determination of the income tax to be collected by the central government; 7. Majapahit period, visible in the governance and administration of the kingdom of Majapahit, the division of institutions and government agencies. After the fall of Majapahir, then the kingdom of Mataram is highly colored by the influence of Islam, then known qisas judiciary, which gives consideration for the Sultan to decide the case. In the interior, it is known that the judiciary, which is a settlement of disputes between individuals by village courts, is carried out peacefully.

At the same time, in Cirebon it is known: the Religious Courts decide cases that endanger the general public, the Digrama Judiciary who breaks adat violations, and other matters that do not belong to religious courts; and Cilaga Court is a court in the field of economy, trade, sale and purchase, accounts payable. Some of the examples mentioned above show that the original legal order that has been applicable in various regions, now known as Indonesia, shows that the law is based on indigenous people, either in the form of a ruling or legal decision in the local community.

Initially the original law of the community known as customary law was left as it is, but the presence of the VOC era can be noted as follows: 1. His attitude is not always fixed (dependent on the interests of the VOC), because it is not concerned with the original court; 2. The VOC does not want to be burdened by unnecessary administrative matters with respect to the original court; 3. Against the original institutions, the VOC depends on the need (opportuniteits politiek); 4. The VOC only interferes in criminal matters in order to uphold public order in society; 5. Against civil law submitted, and leave the customary law still in effect. In the Dandeles period, customary criminal law was changed to the European pattern, when:

a. Criminal acts committed result in disturbing the public interest;
b. Criminal acts when prosecuted under customary law can result in the freedom of offender (Manarisip, 2012).

Customary Law and Customary Criminal Law come from the culture of society. The nation's cultural values system consists of concepts that live in the minds of most citizens who are culturally relevant citizens who serve as guidelines for doing or not doing. According to Soepomo, in customary law all acts contrary to customary law and illegal practices and customary law also recognize endeavors to improve the law if the law is raped (Soepomo, 1982).

According to Hilman Hadikusuma, customary criminal law is a living law and will continue to live, as long as there is human and culture, it will not be removed by legislation. If a law was to be abolished, it would be useless, even criminal law would lose its source of wealth, because customary law was closer to its relationship to anthropology and sociology than the law of the law (Hadikusuma, 1984).

Whereas according to Teer Haar BZN that what is considered as a violation is any one-sided disturbance to the balance and every collision in terms of one on material goods and imateril material person-person or from the crowd which is a unity. Such an action gives rise to a reaction of substantial and minor nature set by customary law, for which reaction the balance can and must be recovered by way of payment of the offense (Haar, 1979).

From these thoughts there is a similarity that in a customary criminal act is an act that violates the feelings of justice and propriety that live in a society that causes disruption of the tranquility and balance of the community concerned. In order to restore the tranquility and balance it happens custom reactions. Customary reactions to restore circumstances disturbed by Indigenous infringement.

Viewed from the normative perspective, the theoretical, principles and practice of the basic dimensions of law and the existence of customary law enforcement in Indonesia are based on the provisions of Article 5 Paragraph (3) sub b Emergency Act Number 1 Year 1951 on Temporary Measures to Organize Unity Composition of Power and Events of Civil Courts (LN 1951 Number 9). The provisions of the law states that Civil material law and for a while the civil law criminal law which has prevailed for the municipalities of Swapraja and those previously tried by the Customary Courts, is still applicable to the subjects and the person with the understanding that an act which according to living law should be considered a criminal act, but unequaled in the Indonesia Criminal Code, it is deemed punishable by a sentence no later than three months in jail and / or a fine of five hundred rupiah, that is, as a substitute punishment if the customary penalty imposed is not followed by the convicted person and the intended replacement shall be deemed to be equal by the Judge with the grave error of the convictor that if the customary punishment imposed by the judge's mind exceeds him with the imprisonment or fine referred to above, then the defendant's fault may be subject to a 10 year prison sentence, with the understanding that customary punishment

g according to the judge's opinion is not aligned with the age always replaced as mentioned above, that an act which according to living law should be considered a criminal act which is appealed in the Indonesia Criminal Code, then it is deemed to be threatened with the same punishment as its appeal most similar to the criminal act.

In addition to the provisions of Article 5 paragraph (3) sub b Emergency Act Number 1 Year 1951, the legal basis of the enactment of customary law also refers to the provisions of Law Number 48 Year 2009 on Judicial Power. Explicitly or implicitly the provisions of Article 5 paragraph (1), Article 10 paragraph (1) and Article 50 paragraph (1) in the law lay the foundation of the existence of customary law. The provisions of Article 5 paragraph (1) of Act Number 48 Year 2009 states that: "*Constitutional Justices and Judges are required to explore, follow, and understand the legal values and sense of justice living in society*".

Then the provision of Article 10 paragraph (1) states that: "*The court is prohibited from refusing to examine, hear, and decide upon a case filed under the pretext that the law is absent and unclear, but obligatory to examine and prosecute*". Furthermore, in the provisions of Article 50 paragraph (1) mentioned: "*The judgment of the court shall contain not only the grounds and the basis of the decision also containing certain articles of the relevant legislation or the source of the unwritten law as the basis for judgment*". There are three basic conclusions from the provisions of Article 5 paragraph (3) sub b Emergency Act Number 1 Year 1952 on Temporary Measures to Organize Unity of Power and Civil Courts.

First, that an incomparable or equal criminal act in the Criminal Code which is not heavy or considered a traditional criminal offense is a mild criminal threat shall be a maximum imprisonment of three months and / or a fine of five hundred rupiah (equivalent to a minor crime) the minimum as set forth in the provisions of Article 12 of the Indonesia Criminal Code which is 1 day for imprisonment and a fine of at least 25 cents in accordance with the provisions of Article 30 of the Indonesia Criminal Code. However, for a customary criminal offense that weighs a maximum of 10 years of criminal sanction, in lieu of customary punishment that the defendant did not undergo.

Second, customary criminal offenses in the Indonesia Criminal Code, the criminal threat is similar to the criminal threat contained in the Indonesia Criminal Code, such as the traditional criminal act Drati Kerama in Bali or Mapangaddi (Bugis) Zina (Makassar) comparable to the criminal act of adultery as stipulated in Article 284 of the Indonesia Criminal Code. Thirdly, customary sanctions as provided in the above context may be the principal and or principal criminal punishment by judges in examining, adjudicating, and adjudicating acts which, according to living law, are considered to be unequaled crimes in the Criminal Code whereas criminal offenses the appeal in the Indonesia Criminal Code should be imposed with sanctions in accordance with the provisions of the Indonesia Criminal Code (PN Kepanjen, 2018).

In general, criminal law reform should be conducted with a policy approach, because it is essentially a part of a policy or policy move (that is, part of the politics of law / law enforcement, criminal law politics, criminal politics, and social politics). In each policy (policy) also contained the consideration of value. Therefore, criminal law reform should also be oriented towards a value approach.

If customary law is used as a source of law in the Criminal Law Update, it can be seen from the policy approach. First, as part of social policy, the renewal of the criminal law is essentially part of efforts to address social problems (including humanitarian issues) in order to achieve / support national goals (community welfare and so on). Secondly, as part of criminal policy, the renewal of criminal law is essentially part of community protection (especially crime prevention). Thirdly, as part of law enforcement policy, the renewal of criminal law is essentially part of the effort to renew legal

substance in order to make the law enforcement more effective (Nawawi Arief, 2014).

Viewed from the point of view of values, the renewal of the criminal law is essentially an attempt to review and reorient (reorientation and reevaluation) sociopolitical, socio-philosophical and sociocultural values that underlie and contribute to the normative and substantive content of the intended criminal law. It is not reform of the penal law, if the orientation of the value of the intended criminal law (eg the New Criminal Code) is tantamount to the value orientation of the old penal code of the colonial inheritance (*Wetboek van Strafrechts*) (Nawawi Arief, 2014).

The Basic Differences of the Criminal Code with Customary Criminal Law

Law with community life is closely related, the law plays a major role in realizing an orderly and secure life. In the event of distorted things, the role of the law can be seen more concretely. In the field of criminal law, there are two different laws that are used by the community, namely criminal law that originates from other unwritten rules and laws that are based on the Indonesia Criminal Code and written or customary regulations, namely Customary Criminal Law.

Customary criminal law regulates acts that violate the feelings of justice and propriety that live in the community, thus causing disruption of the tranquility and balance of society. To restore such tranquility and balance, customary reactions occur.

Initially there was a dualism in the Criminal Code that is with the issuance of Act No.1 Year 1946 which states that W.v.S. applies to the former regions of the Republic of Indonesia Yogya and W.v.S.v.I. applies to areas that were formerly controlled by the Dutch. However, since the issuance of Act No.73 Year 1958 marked the end of the dualism and stated that act No.1 Year 1946 of the Republic of Indonesia on the Penal Code Law applies to the entire territory of the Republic of Indonesia. Customary Criminal Law comes from the culture of society and the process of formation follows the development of local indigenous peoples. Therefore, the applicable law is well known to live in the local community.

The Indonesia Criminal Code and Customary Criminal Law have a characteristic difference because the background is different. The Indonesia Criminal Code is derived from the Dutch colonial heritage adopted from France while the Customary Criminal Code is rooted and sourced from the community itself. Western Law separates between punishment) are the only inclusion in terms of criminal law. Customary Law does not separate between lawless offenses that require a criminal retaliation claim with a law violation that can only be prosecuted with compensation in the field of civil law. Therefore, in customary law there is no difference in the prosecution of judges in the face of prosecution before the judge between prosecution in the civil field and criminal prosecution.

The difference of the western legal system with the customary law system in the separation or differentiation of civil law with this criminal law stems from the natural differences of thought from both societies. Western (individualistic- liberalistic, rationalistic) Eastern (traditional-cosmic, which includes everything as a unitary / totalitarian). Some of the main differences between the criminal law system in the Indonesia Criminal Code and the customary criminal system include, as explained by Azam (2011):

a. Legal Subject

The subject of Law in the Indonesia Criminal Code is only a man of age and does not apply to Indonesian legal partnership such as Village, relatives or family. While in customary law, such as in Minangkabau area, Gayo Land, Nias, Borneo,

Gorontalo, Ambon, Bali, Lombok is often happened if there is a crime in the village of origin of the villain or in the village where the murder or theft occurred against a stranger the criminal is required to bear the punishment imposed for the crimes committed by his citizens.

b. Deliberate or Error
   The Indonesia Criminal Code contains the principle that a person can only be punished if his actions are committed intentionally or with negligence. While in the Criminal Law Adat element of this error is not an absolute requirement or even no need for proof of kesengajan or error.
c. Perpetrator
   The perpetrators criminalized by the Indonesia Criminal Code distinguish between participating (*mededaderschap*), coaxing (*uitlokking*) and assistance (*medeplictigeheid*) as set forth in articles 55 and 56 of the Indonesia Criminal Code. In the Customary Criminal Law there is no recognition of the distinction because anyone who participates in violating customary law must fulfill the effort that the customary leaders have in restoring the tainted customary law.
d. Trial Offense
   The Indonesia Criminal Code recognizes the existence of a crime committed but not completed not because the will of the perpetrator or better known as a trial offense. Whereas Customary Law does not punish anyone for trying to commit a crime. For example in customary law, if there is someone wanting to kill another man with archery, but it turns out that the person is only injured then the perpetrator is not charged with trying to kill but punishment for injuring others.
e. The nature of the offense
   The Indonesia Criminal Code embraces a pre-existing system of law while the customary law does not embrace the system because the prescribed offense does not apply all the time. The birth of a customary offense followed by the disappearance of another indigenous delict. So it developed following the pattern of civilization of indigenous peoples.

CONCLUSION

Customary law that was born and developed in the community should be the basis of consideration and source in the formulation and drafting of the Indonesia Criminal Code because the Indonesia Criminal Code is a Dutch colonial heritage that lately felt less able to answer the problems that developed in the community. There are some fundamental differences or fundamental differences between the Customary Criminal Law and the Indonesia Criminal Code of the colonial heritage. The difference is considered sufficient as a basis to make the Customary Criminal Law is still used and exist until now, because in it there are values that live in the community.

Some of the main differences between the criminal law system in the Indonesia Criminal Code and the customary criminal system include Legal Subject, Perpetrators of Crime, Trial Offense, The nature of the offense. Incorporating pluralistic customary law into national criminal law in Indonesia is not easy. However, it should be the Authorized Government or in this case the legislature is working hard to incorporate customary law into national criminal law as a form of fulfillment of social justice in accordance with the ideals of the Indonesian nation. In addition it is expected to create a comfortable and orderly life as it is in accordance with the community's curiosity. Criminal law will be effective if it is in accordance with the nature and personality of the nation itself. Customary law is a reflection of the soul, personality and nature of the Indonesian nation that can not be released or ignored in the effort to renew the national criminal law.

BIBLIOGRAPHY

Abdulah, Rahmat. (2015). "Urgensi Hukum Adat dalam Pembaharuan Hukum Pidana Nasional". *Jurnal Fiat Justisia*, Volume 9 No. 2, April-Juni 2015.

Arief, Barda Nawawi. (2005). *Beberapa Aspek Kebijakan dan Pengembangan Hukum Pidana* (Edisi Revisi). Bandung: Citra Aditya Bakti.

Arief, Barda Nawawi. (2014). *Bunga Rampai Kebijakan Hukum Pidana (Perkembangan Penyusunan Konsep KUHP Baru)*, Edisi Kedua Cetakan ke-4. Jakarta: Prenadamedia Group.

Azam, Bayu Ruhul. (2011). 'Relevansi Hukum Pidana Adat dalam Hukum Nasional', *Online,* retrieved from http://bayuruhulazam.blogspot.co.id/2011/01/relevansi-hukum-pidana-adat-dalam.html

Gustian, Riki. (2011). *Penerapan Sanksi Pidana Adat dan Pidana KUHP Terhadap Pelaku Tindak Pidana Zina*. Padang: Universitas Andalas.Haar, Teer. (1979). *Azas-azas Hukum Adat*. Bandung: Alumni.

Hadikusuma, Hilman. (1984). *Hukum Pidana Adat*. Bandung: Alumni.

Manarisip, Marcono. (2012). "Eksistensi Pidana Adat Dalam Hukum Nasional". *Jurnal of Lex Crimen*, Vol.I/No.4/Okt-Des/2012.

PN Kepanjen. (2018). *Online,* retrieved from http://pnkepanjen.go.id/index.php?option=com_content&task=view&id=117&Itemid=36

Soepomo. (1982). *Bab-bab tentang Hukum Adat*. Jakarta: Pradnya Pramita.

Wisnu. (2009). 'Kedudukan Hukum Adat dalam Hukum Nasional', *Online*, retrieved from http://wisnu.blog.uns.ac.id/2009/07/28/kedudukan-hukum-adat-dalam-hukum-nasional/