



The Position of Customary Criminal Law in Positive Law in Indonesia

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Abstract. This research explores the status of customary criminal law in the context of positive law in Indonesia. Customary criminal law, as an integral part of the cultural heritage of Indonesian society, has values and norms that have developed from generation to generation. However, in an era of increasingly structured positive law, fundamental questions arise regarding the extent to which customary criminal law is accommodated and recognized by the formal legal system. This research uses a normative legal approach to analyze statutory regulations, court decisions, and related legal literature. Research findings identify that although customary criminal law is not explicitly regulated in the national positive law system, there are certain efforts to recognize and respect its existence. In this context, this research explores the concept of integrating customary criminal law into a positive legal system as a medium of preserving legal plurality and realizing local justice. Apart from that, this analysis also discusses the challenges and potential conflicts between customary criminal law and modern positive law principles, as well as efforts that can be made to achieve harmony between the two. In conclusion, this research contributes to a better understanding of the status of customary criminal law in the context of positive law in Indonesia, by highlighting important aspects to be considered in developing inclusive and just legal policies. This research is in the form of a research article.

Keywords: Customary law, criminal law, positive law

Abstrak. Penelitian ini mengeksplorasi status hukum pidana adat dalam konteks hukum positif di Indonesia. Hukum pidana adat, sebagai bagian integral dari warisan budaya masyarakat Indonesia, memiliki nilai dan norma yang berkembang secara turun-temurun. Namun, di era hukum positif yang semakin terstruktur, muncul pertanyaan mendasar mengenai sejauh mana hukum pidana adat diakomodasi dan diakui oleh sistem hukum formal. Penelitian ini menggunakan pendekatan hukum normatif untuk menganalisis peraturan perundang-undangan, putusan pengadilan, dan literatur hukum terkait. Temuan penelitian mengidentifikasi bahwa meskipun hukum pidana adat tidak diatur secara eksplisit dalam sistem hukum positif nasional, namun terdapat upaya-upaya tertentu untuk mengakui dan menghormati keberadaannya. Dalam konteks ini, penelitian ini mengeksplorasi konsep pengintegrasian hukum pidana adat ke dalam sistem hukum positif sebagai media untuk menjaga pluralitas hukum dan mewujudkan keadilan lokal. Selain itu, analisis ini juga membahas tantangan dan potensi konflik antara hukum pidana adat dan prinsip-prinsip hukum positif modern, serta upaya-upaya yang dapat dilakukan untuk mencapai keselarasan di antara keduanya. Sebagai kesimpulan, penelitian ini memberikan kontribusi terhadap pemahaman yang lebih baik mengenai status hukum pidana adat dalam konteks hukum positif di Indonesia, dengan menyoroti aspek-aspek penting yang perlu dipertimbangkan dalam mengembangkan kebijakan hukum yang inklusif dan berkeadilan. Penelitian ini berbentuk artikel penelitian.

Kata kunci: Hukum adat, hukum pidana, hukum positif

Introduction

The 1 section (1) of the 1945 Constitution of the Republic of Indonesia declares Indonesia to be a nation of laws, which stipulates that Indonesia is a country of law. So, Indonesian civilization cannot be divided from the law by the adage which states *ibi ius ibi societas*, namely where there is society, there is law, so Indonesia applies a legal system to regulate and run society's life in Indonesia. The legal system in Indonesia experiences pluralism, namely the customary law system, the Islamic lawful system, and the Western or National legal system. (Anwar, 2014)

Customary law is given recognition in Indonesia in the statute by Article 18B section (2) of the 1945 Constitution of the Republic of Indonesia declares that the state provides recognition and respect for the preservation of ancestral privileges and the cohesion of the community governed by customary law, as well as the advancement of humanity as well as the legally stipulated ideals of the Unitary State of the Indonesia Nation. Criminal law in Indonesia also adheres to 3 (three) legal systems, namely customary criminal law, Islamic criminal law, and national criminal code.

The national criminal law, which previously still used Dutch law, then changed to the Criminal Code has been formed which regulates every criminal act and its offenses as well as criminal sanctions that exist in social life in Indonesia. (Sinaga, 2019) Apart from that, Indonesian society still adheres to customary criminal law, where criminal law is a customary legal rule that regulates events or wrongful actions that result in disturbances in the balance of people's lives. The reason why customary law is still applied is that Indonesia has a view, namely *Bhinneka Tunggal Ika*, where Indonesia respects the cultural diversity that exists in society. (Wignjodipuro, 2013) However, until now there are still frequent questions regarding the status of Indonesian traditional law because whenever there is a criminal act, the national criminal law is often only applied.

There is still no codification of criminal law in Indonesia concerning customary criminal law, so this raises legal problems regarding the legal certainty of the standing of Indonesian customary criminal code. Even though Indonesia created Draft Criminal Code Laws in 2008 and 2010 which have substance related to customary criminal law, this is only an academic text and has not been ratified even though customary law is one of the fundamentals of Indonesian society. (Widnyana, 2016)

So, the legal issue that will be raised in this journal is the customary Indonesian criminal justice system and its position in the criminal justice system or positive law in Indonesia.

Methodology

The research scheme operated is normative legal research which is accomplished by conducting research on library materials which is library legal research. (Soekanto, 2013) The methodology used in this paper includes a conceptual approach and an analytical approach. Existing legal materials include statutory regulations, books, journals, and legal dictionaries.

Results and Discussion

Customary Criminal Law System in Indonesia

Customary law is the law that applies and develops within the municipal in an area. Before criminal law was implemented in Indonesia, customary law had already been executed in Indonesia. Customary law has existed in Indonesia for a very long period due to the cultural diversity of each custom, so its application is still enforced in Indonesia. (Kusumadara, 2013) As a source of criminal law that is given national recognition and codified in the form of the Criminal Code, however, for regional communities who still adhere to Indonesian customs and still have a strong regional character, the source of criminal law used is customary criminal law. (Abdussalam, 2016)

The presence of the municipality's customary penal code reflects the way that the community lives, and every area has own conventional criminal statutes according to the customs that develop and are applied in the area where the community is located. Hilman Hadikusuma expressed his opinion regarding customary criminal law, namely that it is a law that specifies events and actions that must be resolved because these events and actions have disturbed the balance of society. (Hadikusuma, 2019) Then agreeing to Van Vollenhoven, traditional criminal law is an action that is not permitted even though, in reality, the event or deed is only a small dissident act. (Vollenhoven, 2018) Customary criminal law or customary offenses are acts that violate the sense of justice and propriety that exists in society, thus causing disturbances to the peace and balance of society. To restore the sense of peace and balance, customary reactions occur. (Santoso, 2017)

In summary, customary criminal law is an activity that violates societal norms of justice and propriety, thereby disrupting the sense of harmony and proportion in society. (Irfan, 2018) So customary criminal law is needed to provide restoration of a sense of security and balance where there is a customary reaction as a manifestation of the return of magical peace that has been disturbed with the aim of eliminating or neutralizing a situation resulting from a violation of custom. (Abdurrahman, 2015)

The legal basis that can be used to enforce traditional law in Indonesia is :
(Soemadiningrat, 2021)

1. 1945 Constitution

The state acknowledges and appreciates customary law a commonality units and their traditional liberties as long as they are still in existence, as well as by the advancement of society and the legally regulated tenets of the Unitary State of the Republic of Indonesia, according to Article 18 B paragraph (2) of the Constitution from 1945. In this article, it is written that the indigenous populace is recognized and respected for their units and traditional rights because that is why there is a need for customary law and customary criminal law.

2. Emergency Law Number 1 Of 1952, Discussing Interim Steps To Bring The Unity Structure Of Civil Justice Procedures And Authorities Into Effect

In Article 5 paragraph (3) of the Emergency Law Number 1 of 1952, it is stated that a customary crime that has no equal or equal in the Criminal Code which is not serious in nature or is considered a light customary crime carries the threat of imprisonment with a maximum penalty of three months and /or a fine of five hundred rupiahs (equivalent to a light crime), the minimum is as specified in the clauses of Article 12 of the Criminal Code, namely one day for confinement and a minimum penalty of 25 cents by the stipulations of the Criminal Code's Article 30. For customary crimes that are comparable in the Criminal Code, the criminal threat is the same as the criminal threats that exist in the Criminal Code, such as the traditional crime of *Drati Kerama* in Bali or *Mapangaddi* (Bugis), Adultery (Makassar) which is comparable to the crime of adultery as stipulated in Article 284 of the Criminal Code. Customary sanctions as stipulated in the context above can be used by judges as major and/or primary criminal punishments when evaluating, determining, and making decisions on actions that, in accordance with living law, are deemed criminal offenses that are not subject to appeal under the Criminal Code, whereas criminal offenses that are not subject to appeal under the Criminal Code must impose sanctions by the provisions of the Criminal Code.

3. Law Number 5 of 1960 concerning Agrarian Principles

Article 2 paragraph (4) of the UUPA governs the transfer of power to communities governed by customary law in order to carry out the right to manage land and uphold traditional customs communities are the apparatus that implements the right to control

the state to handle the land in their area. Then, Agrarian Law, as defined in Article 5 of the UUPA, is Customary Law as long as (with restrictions) it does not interfere with national laws and pertains to the ground, water, air, and space, state, socialist, and statutory interests.

4. Law Number 14 of 1970 about Basic Provisions of Judicial Power

In Article 28 paragraph (1) of the Judicial Power Law, it is stated that judges as institutions that enforce law and justice must carry out investigations to observe and comprehend the societally accepted legal norms.

5. Law Number 39 of 1999 concerning Human Rights

According to Article 6 of the Human Rights Law, the governing bodies, society, and legal system must take into account and safeguard the needs and distinctions among communities governed by traditional customs in order to preserve human rights. The cultural identity of customary law communities, including rights to customary land, is protected, in line with developments over time. Then in the explanation of Article 6 paragraph (1) of the Human Rights Law, it is stated that "customary rights" which are still valid and upheld communities governed by customary law must be honored and safeguarded in the context of preserving and upholding human rights in the community concerned by paying attention to the law and legislation.

6. Law Number 32 of 2004 relating to Regional Government

In Article 203 paragraph (3) of the Regional Government Law, it is stated that the election of Village Heads within traditions community groups and, if they are still extant and acknowledged, their traditional liberties that apply the provisions of local customary law stipulated in regional regulations guided by Government Regulations.

So, it might be said that traditional criminal legislation is still guaranteed to exist in Indonesian legislation.

The Position of Customary Criminal Law in National Law in Indonesia

Customary criminal law is a law that is alive and continues to exist as long as there are communities and traditions, so customary law will not be abolished from statutory regulations. However, the problem is that customary criminal law is not codified, but people often believe and assume that the only applicable law is written law. (Pide, 2014)

The still validity of customary Indonesian penal code can be constructed on the rules in Emergency Law Number 1 of 1951's Article 5 Paragraph 3 Addressing Temporary Authorities to Implement a Unity Structure of Civil Court Powers and Procedures by confirming civil material law and the temporary use of law. The regulations concerning civil criminal matters that previously pertained to independent regional officials and individuals who were formerly subject to the Customary Court still stand. Essentially, this means that any actions deemed criminal under current law will still be treated as such for these groups and individuals. However, there is no equivalent in the Civil Criminal Code, it is deemed to be indictable by a sentence of not more than three months in prison and/or a fine of five hundred rupiahs, namely as a substitute punishment if the customary sentence imposed is not followed by the convicted party and the intended replacement is considered commensurate by the judge with the basis of the convict's guilt. (Thontowi, 2015) That, if the customary sentence imposed in the judge's opinion exceeds that of imprisonment or what is intended above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary sentence according to the judge's understanding is no longer in line with current times, replaced as stated above, and, that an act which according to living law must be considered a criminal act and which has a counterpart in the Civil Code, is deemed to be threatened with a punishment that is most similar to that of the criminal act.

By the rules of the Emergency Law Number 1 of 1951's Article 5 Paragraph (3) Sub b provides the legal foundation for the implementation of traditional criminal statutes. also provides a reference for the rules of Law Number 48 of 2009 expressing that judges as well as justices of the constitution are indulged to carry out investigations, follow and provide understanding the value of law and the feeling of fairness that lives in citizens. There is also a prohibition on refusing to carry out an examination and terminating a case because there is no law or lack of clarity in the law.

So, in Emergency Law Number 1 of 1952, it can be inferred that there is a position of customary law that can be used in imposing a crime, i.e: (Arief, 2013)

1. This provision pertains to customary criminal acts that differ from conventional criminal acts. Punishments for such acts involve customary sanctions and are categorized into light crimes, carrying a maximum penalty of 3 (three) months or a fine of 500 million rupiah; or serious crimes, with a maximum penalty of 10 years, serving as a substitute for the customary sentence that was not enforced by the offender.

2. Provisions relating to customary criminal acts that can be compared with conventional criminal acts carry the same criminal threat as the criminal threat in the Criminal Code.
3. Customary injunctions can be finished as prime and/or main criminal penalties by judges in carrying out examinations, trials, and termination of actions by customary law and are deemed to be criminal acts that cannot be compared with conventional criminal acts, but criminal acts that can be compared with Conventional criminal acts must be subject to sanctions by the provisions of the Criminal Code.

So, it can be concluded that the substance of traditional criminal law is based on the values contained in a society that is characterized by the principles of kinship, religious magic, and communalism and based on justice together, whereas in traditional unlawful law if there is a problem, customary law will prioritize its existence, restoration of a situation that has changed due to a violation committed by the perpetrator. (Sukirno, 2018)

The characteristics of customary criminal law values are a reflection of the characteristics of society in Indonesia which has the nature of kinship and cooperation by conducting deliberation mechanisms in solving problems. It is a reflection that Indonesian people still adhere to their customs and that the customary law will always exist as long as Indonesian citizens still adhere to customs as a guide for their behavior.

Thus, it may be said that customary criminal law's viewpoint is as a source of national law that lives in society and regulates issues related to community life to achieve order and peace. In this case, law enforcement officials must also pay attention to the standpoint of traditional criminal law if those experiencing criminal problems are customary law communities.

Conclusion

The customary criminal law system was in effect even before the criminal law was implemented and still exists in Indonesia. Customary criminal law has differences between one region and another, where the rules in customary criminal law are adapted to each respective custom and by the habits of each region. Customary criminal law has been contained in written regulations in Emergency Law Number 1 of 1951, but formally customary criminal law has not been provided with regulations in a standard and written regulation where the procedural law is provided with regulations in positive law. Indonesian policymakers must consider the incorporation of customary criminal law into the legislative framework, as this form of law still holds a significant position in the country's legal system. It is essential to ensure that customary criminal law is aligned with written law, to achieve consistency and coherence in the legal system.

References

- Abdurrahman. (2015). Hukum Adat Indonesia dalam Lingkungan Lokal, Nasional, dan Global. *Jurnal Multikultural Hukum*.
- Abdussalam, H. R. (2016). Prospek Hukum Pidana Indonesia. *Jurnal Restu Agung*, 2.
- Anwar, C. (2014). *Hukum Adat Indonesia Menuju Hukum Adat Minangkabau*. Jakarta: Rineka Cipta.
- Arief, B. N. (2013). *Bunga Rampai Kebijakan Hukum Pidana*. Jakarta: Kencana.
- Hadikusuma, H. (2019). *Hukum Pidana Adat*. Bandung: Alumni.
- Irfan, M. (2018). Kepastian Hukum Hak Atas Tanah dan Eksistensi Lembaga Rechtsverwerking Dalam Perspektif Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah. *Jurnal Hukum Kenotariatan dan ke PPATan*, 1(2).
- Kusumadara, A. (2013). Perkembangan Hak Negara Atas Tanah : Hak Menguasai Atau Hak Memiliki. *Jurnal Median Hukum*, 20(2).
- Pide, S. M. (2014). Hukum Adat: Dahulu, Kini, dan Akan Datang. *Jurnal Konstitusi Hukum*, 3(1).
- Santoso, T. (2017). Pluralisme Hukum Pidana Indonesia. *Jurnal Iustitia*, 9.
- Sinaga, A. S. (2019). Strategi Penyelesaian Pendaftaran Tanah Hak Komunal Masyarakat Hukum Adat Pandumaan Sipituhuta. *Jurnal Tunas Agraria*, 2(1).
- Soekanto, S. d. (2013). *Penelitian Hukum Normatif*. Jakarta: Rajawali Press.

Soemadiningrat, O. S. (2021). Rekonseptualisasi Hukum Adat Kontemporer. *Jurnal Interpretasi Hukum*, 2(3).

Sukirno. (2018). Revitalisasi dan Aktualisasi Hukum Adat Sebagai Sumber Hukum Pidana Positif. *Diponegoro Private Law Review*, 2(1).

Thontowi, J. (2015). Pengaturan Masyarakat Hukum Adat dan Implementasi Perlindungan Hak-Hak Tradisionalnya. *Jurnal Penelitian Ilmu Hukum*.

Vollenhoven, V. (2018). Adatwetboekje voor heel Indie . *Jurnal Ersesco*, 228.

Widnyana, I. M. (2016). Kapita Selektta Hukum Pidana Adat. *Jurnal Hukum Eresco*, 1.

Wignjodipuro, S. (2013). *Pengantar Asas-Asas Hukum Adat*. Jakarta: Gunung Agung Anggota IKAPI.