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THE ROLE OF CUSTOMARY CRIMINAL LAW IN THE FRAMEWORK OF NATIONAL CRIMINAL LAW AFTER THE RATIFICATION OF LAW NO. 1 OF 2023 CONCERNING THE Criminal Code.

Hepy Krisman Laia
Panca Budi Development University
E-mail:hepykrismanlaia@dosen.pancabudi.ac.id

Abstract

Customary criminal law as the original law of the Indonesian nation is essentially an inseparable part of the Indonesian legal system. The reform of Indonesian criminal law to replace colonial criminal law has accommodated customary criminal law as the basis for legalization or recognition of the existence of customary criminal law in the New Criminal Code (KUHP). However, on the other hand, the regulation of customary criminal law has implications for the existence of customary criminal law itself because of the formalization, requirements and restrictions on its application. This article examines the implications of regulating customary criminal law in the New Criminal Code that will be implemented. The study was carried out using normative legal research methods based on statutory regulations. From the study conducted, it was concluded that although the aim of regulating customary criminal law in the New Criminal Code is to provide a legal basis and protect the application of customary criminal law, these regulations create restrictions that can weaken the existence of customary law itself. What is basically needed is a legal basis that respects and protects customary criminal law to live and develop with its own legal norms, but of course still within the framework of the philosophy of the nation and state.

Keywords: Customary Criminal Law; Customary Law Community; Customary Court.

INTRODUCTION

The development or reform of criminal law is an effort by the Indonesian people to replace criminal law, especially the Criminal Code (KUHP) which originated from the Dutch colonial era. Criminal law reform is not only aimed at building legal institutions, but must also cover the entire substance, institutions and legal culture which are the result of a legal system in the form of criminal law regulations and cultural ones, namely attitudes and values. that influence the implementation of the legal system. Satjipto Rahardjo. (1980). Therefore, criminal law reform must be based on the cultural values and legal ideals that live in society itself.

For the Indonesian state, national legal development is realized in a legal reform effort based on philosophical, political, sociological and practical reasons. The political reason is that colonial law is clearly not in line with the philosophy of the Indonesian nation, namely Pancasilan. Political reasons are based on the idea that an independent country must have its own national laws in line with its national goals as expressed and implied in the 1945 Constitution of the Republic of Indonesia (UUD 1945). For sociological reasons, social life requires laws that reflect the cultural values of the nation concerned (latency). Meanwhile, practical reasons stem, among other things, from the fact that Indonesia usually inherits a colonial legal system, which in many cases is not in harmony with the needs of the people. In addition, the current Criminal Code is almost a century old since it was established and came into force in Indonesia in 1918. Therefore, every country always wants to develop its own legal system that suits the conditions, needs and background of the country itself. Start. (1985).

Efforts to reform criminal law have actually started since Indonesia's independence with the birth of nationalist awareness which also requires criminal law to be in line with Pancasila and the 1945 Constitution. New laws or legal codification, and through ad hoc efforts, namely by forming special criminal laws outside the Criminal Code. The government has made efforts to compile a new codification of criminal law by forming a committee for drafting the Criminal Code which has changed from time to time to produce various draft

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formulations of the draft Criminal Code which have then been enacted into law, namely Law no. 1 of 2023 concerning the Criminal Code, hereinafter referred to as the New Criminal Code.

Efforts to carry out legal reform through efforts to establish a new legal rule cannot be separated from the requirements for the formation of a statutory regulation, namely that it must pay attention to philosophical, normative, sociological or practical aspects. Philosophical requirements require that the formation of legal rules must be in accordance with the philosophy adhered to by the Indonesian people. Sociological requirements or considerations require that a legal rule must be in accordance with the conditions and situation faced by that society, in the sense of being in accordance with the values or laws that exist in society. Meanwhile, for normative considerations, criminal law reform must be in accordance with the principles and principles contained in criminal law. Apart from that, one thing that cannot be denied is the fact that long before the colonialists, the Indonesian people already had their own legal system, namely customary law, which existed throughout Indonesia. In this regard, Sudarto said that as the identity of a nation, customary law is a characteristic and characteristic that is in accordance with the nation's philosophy and culture. Sudarto. (1981). Therefore, in legal reform, customary law in criminal matters cannot simply be put aside, but must be a source that is accommodated in the formation of legal norms.

The existence of customary criminal law in the Unitary State of the Republic of Indonesia can no longer be denied. In Article 18B paragraph (2) it is explicitly stated that the existence and recognition of the unity of customary law communities and their traditional rights. However, according to Satjipto Rahardjo, the existence of customary law does not actually involve thinking about or considering whether it is recognized by state power or not, but must emerge and be present from the womb of the community itself autonomously so that it can be called authentic. Hart calls this position of customary law "primary rules of obligation", while state law is called "secondary rules of obligation". Satjiotp Rahardjo (2005). This view actually shows the urgency of customary law and the values contained in it in people's lives, including in relation to customary criminal law. Although normatively there are limitations in the implementation of customary law, which are called subject centric or asymmetric and monologic paradigms, as long as they are in line with the principle of a unitary state, optimization can eliminate these limitations. F. Budi Hardiman. (2006)

The manifestation of this recognition of customary law is then stated in Article 5 paragraph (1) and 50 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power. This provision requires judges to explore, follow and understand the legal values and sense of justice that exist in society. In subsequent developments, the New Criminal Code, namely in Article 2, states that the recognition of the principle of legality, in the sense of written criminal law, does not reduce the validity of existing laws in society which determine that a person deserves to be punished even though the act is not regulated in statutory regulations. Meanwhile, the law that exists in society applies as long as it is in accordance with the values contained in Pancasila, human rights and general legal principles recognized by the community of nations. Thus, it means that sociologically and normatively the existence of customary criminal law has actually been strengthened by the ratification of the Criminal Code. Considering that the existence of customary law is an inseparable part of the Indonesian people, it is a positive law that lives within the customary law community and plays a social controlling role. HR Otje Salman. (2007)

The accommodation of customary law in the New Criminal Code on the one hand formally confirms the existence of customary criminal law as an integral part of national criminal law. However, on the other hand, the formalization of customary law will raise various questions and implications regarding its implementation. First, the aspect of customary criminal regulation is only vaguely regulated in the New Criminal Code. In Article 2 paragraph (2) the New Criminal Code uses legal terms that live in society as a deviation from the principle of legality. The explanation of Article 2 states that what is meant by law that exists in society is customary law. However, this article contains rules that limit the application of customary law itself, namely where the law lives, and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, human rights and general legal principles recognized by society. civilized. The explanation of Article 2 of the New Criminal Code also determines that the implementation of customary criminal law needs to be implemented in Regional Regulations. Second, from the aspect of criminal sanctions, Article 66 of the New Criminal Code places customary criminal sanctions only as additional penalties. This of course places customary criminal sanctions not as the main and independent sanctions, but only as an addition or complement to the main criminal sanctions.

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Another issue that makes customary criminal regulations in the Criminal Code increasingly unclear is the existence of customary courts. A material law always requires the existence of an institution. Customary criminal law as a law basically has an organized and independent institution, namely the judiciary which will enforce customary law norms. The colonial government also recognized the existence of customary courts, but after Indonesia became independent, Law Drt.1 of 1952 abolished the existence of customary courts. As a result, the existence of traditional justice seems to exist but does not exist. However, in fact, traditional justice institutions are still alive, and sometimes they are really needed and are effective in resolving various conflicts that exist in traditional law communities. In fact, in its development, customary law played a large role in resolving cases through restorative justice. Nur Rochaeti, Rahmi Dwi Sutanti. (2018). Considering several things stated above, there needs to be a study regarding the existence of customary law after the ratification of the New Criminal Code.

METHOD

Law as a social reality is not a single concept, but rather a plural concept. This gave birth to approaches to understanding law, namely normative legal research (doctrinal) and sociological/empirical research (non-doctrinal). The choice of method depends on the object of study. Considering that this research examines customary criminal law rules in law, the research uses normative legal research methods. Therefore, this research uses a statutory approach (statue approach) in this case, especially the New Criminal Code, and examines the synchronization of statutory regulations.

RESULTS AND DISCUSSION

Goals of National Criminal Law Reform

Reform and development of criminal law cannot be carried out in an ad-hoc (partial) manner but must be fundamental, comprehensive and systemic in the form of recodification which covers 3 (three) main problems of criminal law, namely the formulation of acts that are against the law (criminal act), criminal liability. (criminal responsibility) both from the perpetrator in the form of a natural person (natural person) and a corporation (corporate criminal responsibility) and the crimes and actions that can be applied. Muladi and Diah Sulistyani. (2013).

Efforts to reform law in Indonesia have basically started since the proclamation of independence on 17 August 1945 and the enactment of the 1945 Constitution of the Republic of Indonesia (UUD 1945). This effort cannot be separated from the foundation and national objectives formulated in the Preamble to the 1945 Constitution, especially the fourth paragraph.

From the formulation above, it can be seen that there is a national development goal, namely the goal of "social defense" and "social welfare". In addition to the explanation of the 1945 Constitution, it requires the need to harmonize the development of universal law for the sake of legal order between nations in the era of multi-dimensional globalization. Barda Nawawi Arief. (2009).

National goals are general policy lines that are the basis and also the goal of achieving legal politics in Indonesia. These goals are also the basis and goal of every legal reform effort, including reform of Indonesian criminal law. The Third Criminology Seminar of 1976 in its conclusion stated: "Criminal law should be maintained as a means of "social defense" in the sense of protecting society against crime by improving or restoring ("rehabilitation") the perpetrator without reducing the balance of the interests of the individual (maker) and public."

In reforming criminal law, this effort was carried out through the preparation of a draft Criminal Code or codification of criminal law to replace the colonial Criminal Code. The preparation of a very basic codification of criminal law must begin with compiling the principles of generally applicable criminal law as outlined in book I concerning general provisions. Book I will replace Book I contained in Wetboek van Strafrecht voor Nederlandsch-indie's. 1915 No. 732.

In the next stage, the National Criminal Law Reform Symposium in 1980, emphasized that in accordance with the politics of criminal law, the aim of punishment must be directed at protecting society from crime as well as balance and harmony in life in society by taking into account the interests of society/state, victims and perpetrators.

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Thus, there are two goals to be achieved by criminal and criminal law, namely "protection of society" and "welfare of society". These two goals are a corner stone of criminal law and criminal law reform. Apart from that, there is also the aim of participating in creating world order in connection with development

The first concrete step in post-independence criminal law reform was to provide a basis for the implementation of the colonial Criminal Code before the formation of the new national Criminal Code. This was done by enacting Law no. 1 of 1946. Article 5 of Law no. 1 of 1946 concerning Criminal Law Regulations. However, on the other hand, Law No. 1 of 1946 also confirms that criminal law regulations, which in whole or in part cannot now be implemented, or conflict with the position of the Republic of Indonesia as an independent country, or no longer have any meaning, must be deemed in whole or in part to be temporarily invalid. ".

Starting from the aim of "social defense", the aim of reforming criminal law includes: protecting society from anti-social acts that are detrimental and endanger society, so the aim of punishment is to prevent and overcome crime.

a. protection of society from a person's dangerous nature, then the aim of punishment is to correct the perpetrator of the crime or try to change and influence his behavior so that he returns to obeying the law and becoming a good and useful citizen of society.
b. protection of society from abuse of sanctions or reactions from law enforcers or members of the public in general, then the aim of punishment is to prevent arbitrary treatment or actions outside the law.
c. protecting society from disturbances in the balance or harmony of various interests and values as a result of crime, then criminal law enforcement must be able to resolve conflicts caused by criminal acts, be able to restore balance and bring a sense of peace in society. Community protection in this case also includes special protection.

Customary Criminal Law in National Criminal Law

Considering the existence of the Indonesian State which was born and formed from various diverse regions, Indonesian criminal law is also inseparable from the rules, norms and laws that have been adopted by each society or region concerned. This is in line with the motto of the Indonesian nation, namely Bhinneka Tunggal Ika (Even though we are diverse, we are still united). The values and norms that live in society can be categorized into various terminologies such as habits, customs or customary law. Basically, these rules or norms are rules that were born and developed in the life of the society concerned and also apply in that society. This diversity should also be reflected in the reform of national law, including criminal law, so that policies in developing national law also pay attention to aspects of legal diversity (legal pluralism). Ignoring aspects of legal pluralism will have an impact on the development of law itself. Geoffrey Swenson. (2018).

The concept or term adat or customary law has actually been born in the lives of Indonesian people for a long time before the arrival of Dutch colonial rule. One written evidence of terms or customary law terminology is contained in the Makunta Alam Book, during the reign of Sultan Iskandar Muda in Aceh in the 12th century. In the preamble to the book it is stated that a judge must pay attention to Sharia law and customary law. Dewi Wulansari. (2009). In fact, this term is also used by various customary law communities in Indonesia. In Minangkabau, for example, even though it is not stated in written form, the term adat is something that cannot be separated from daily life, for example from proverbial expressions such as: customs are filled with institutions that are poured (customs are carried out) and customary obligations are everyday things, especially in various activities, community members must follow and fulfill existing customs.

After the arrival of the Dutch, Snouch Hurgronye then carried out a study of people's lives and outlined it in his book De Atjehers. However, he uses different terms, but in substance it is the law that lives in Acehnese society. In his book he uses several terms such as, godidstige weten (religious law). Thus, the concept and terminology of customary or customary law has existed for a long time, but in academic studies it was born after a study conducted by Cornelius van Vollenhoven. In his book Het Adat Recht van Nederlandsch Indie, he states that customary or customary law is law that does not originate from laws made by the Dutch East Indies government or other instruments of power that are joint and established by the former Dutch authorities themselves. behavior that applies to natives which on the one hand has sanctions (so it is said to be law) and on the other hand it is not codified (so it is said to be custom).

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After the study conducted by van Vollenhoven on customary law, customary law then became a scientific academic study which began to attract the attention of many parties. One of the studies was carried out by Ter Haar Bzn which focused more on the customary law community itself. Ter Haar stated that customary law is customary rules that acquire legal character through decisions or determinations of legal officers such as traditional heads, judges and others, both within and outside of disputes. Thus, it is slightly different from van Vollen Hoven, who sees more of the nature of customary law as legal rules that do not originate from government power, but are born from the community, whereas Ter Haar views customary law as rules that arise from the decisions of officials or officers who have authority from the community. . For this reason, Ter Haar's view is called teaching or decision theory (legal functionary).

Formally, the Dutch East Indies government then recognized the existence of customary law in various regulations, but by using various different terms such as, de gebruiken, gewoonten, en godsisnteige instellingen der inlanders (customs, customs and religious institutions of the Bumi Putra people). However, the Dutch actually do not recognize customary law as formal law, but only local rules, because the Dutch government views law as written rules (lege). This can be seen from the concordance policy which was then also implemented for the residents of Bumi Putra. Yanis Malad, (2011).

Meanwhile, studies on customary law were also carried out by Indonesian scholars such as Supomo and Hazairin. According to Supomo, customary law is unwritten law (unstatutory law) in legislative regulations which includes:

a. laws that live as conventions in state bodies (parliament);
b. law arising from the decisions of judges (judge made law);
c. laws that live as habits that are maintained in social interactions both in the city and in the village (customary law).

Thus, the Supomo concept looks more at the nature of the law, namely written or unwritten rules. Apart from that, Supomo views the concept of law in a broad sense. Meanwhile, customary law that exists in society is defined as customary law.

Meanwhile, Hazairin stated that customary law is a direct connection and correspondence between law and morality. Customs are deposits of morality in society and receive recognition from society. Even though they are different, the rules of law and the rules of morality are very closely related, therefore they also have law and coercion.

From the various views expressed above, it can be stated that customary law is basically the rules or norms that exist in society which are born and apply in a legal society and are obeyed by its members. Customary law is not made by a formal institution but rather arises in the social life of the community itself. Some of the customary laws are written, especially verbal and exist in the minds of the people.

Considering that the existence of the Indonesian state cannot be separated from the existence of customary law communities, the existence of customary law is also an inseparable part of the life of the nation and state. The state's acceptance and recognition of customary law was initially contained in the 1945 Constitution before it was amended, not explicitly using the term customary law. This confirmation is first stated in the Transitional Regulations which state that all existing laws and regulations are still valid as long as new ones have not been created according to this Constitution. Then in its body, namely in Article 18 which essentially recognizes the existence of special or special forms of regional government which in certain cases are given the authority or autonomy to carry out government and special rules such as customary law rules. Even though the term customary law is not used, some scholars consider that this article actually contains the meaning of customary law, because in the explanation of the 1945 Constitution it is stated that in addition to the written Constitution, the existence of unwritten law is also acknowledged. Imam Sudiat. (1978).

Even though the 1945 Constitution does not use the term customary law, in its implementation the People's Consultative Assembly Decree (TAP MPRS) No. II of 1960 in attachment I states that Customary Law is the basis of the National Legal System. Then in Law no. 5 of 1960 concerning the Basic Agrarian Law states that national land law is based on customary law. Furthermore, in TAP MPR no. IV of 1999 and TAP MPR no. IX of 2001, also firmly accepted customary law as national law.

The use of customary law in the constitution is contained in the 1945 Constitution which has been amended. Article 18B paragraph (2) states that the State recognizes and respects customary law community units and

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their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are enshrined in law.

Concretely, the implementation of the recognition of customary law must of course be stated in organic law to implement the 1945 Constitution. In subsequent developments, the Law on Regional Government provides authority or autonomy for regional governments to carry out development implementation in accordance with social life and respective culture as long as it does not conflict with national law. In this way, national legal instruments have provided a strong legal foundation for regions to make rules and adopt policies related to customary law.

The existence of legal rules, including customary criminal law, is certainly meaningless without the existence of an institution that functions to enforce customary law. Customary criminal law, like other criminal laws, also has law enforcement institutions, especially judicial institutions, namely customary courts. The Dutch colonial government recognized the existence of customary law and customary justice institutions. After Indonesia's independence, Law no. 1 Drt. of 1951 concerning Temporary Measures to Implement a Unitary Structure of Power and Procedures for Civil Courts then abolished the existence of Customary Courts. This law states that it will eliminate village judicial institutions outside Java and Madura, whose existence is carried out in accordance with customary law. With this law, criminal law basically lost its formal existence.

Despite this, in reality, customary justice is still alive in the community. It was then that the Supreme Court gave recognition to the existing customary court decisions. In several of its decisions the Supreme Court acknowledged and supported customary criminal justice decisions. However, this is of course not enough because there are no rules or norms that formally guarantee recognition of customary criminal justice decisions.

Customary Criminal Law Regulations in the New Criminal Code.

Customary Criminal Law as part of the law existing in society exists in two forms, both written and unwritten, both part of formal law and non-formal law. As part of written law, customary criminal law is set out in a text in the form of statutory regulations, while what is not written, customary criminal law lives in the minds of indigenous people and is realized in the form of customary decisions by traditional leaders. Customary criminal law, which exists in formal form, is transformed into a state or government decision which is stated in a legal product by the state or government. Meanwhile, customary criminal law which was born in an informal form is a law that lives in the minds of customary law communities but has received recognition from the state or government.

In the course of history, the presence of customary criminal law has undergone various forms and changes. In the pre-colonial era there was no separation between customary law and state or government law because it was part of state or government law in the kingdoms in the archipelago. During the Dutch colonial era, customary criminal law was not part of state or government law but received recognition from the state or government. This is marked by the existence of various colonial laws that recognize the existence of customary law, namely in Article 131 of the Indische Staatregeling (IS).

After Indonesia's independence, there seemed to be a separation between state law and customary law. In various cases, customary law is a form of law existing in the state, while on the other hand, customary law is part of national law through recognition by the state. The concept of a unitary state requires the existence of sovereignty in the state or government and requires the existence of a rule of law (unification). However, on the other hand, with the motto "Bhinneka Tunggal Ika", the state recognizes the condition of diversity in the life of the nation and state, including its legal aspects. This results in Indonesia being unable to abandon its view of legal pluralism. Suci Flambonita, Vera Novianti, Artha Febriansyah. (2021). Therefore, there is a desire to maintain the existence of customary law. This right is proven by the recognition of customary law either in the constitution or in other organic legislation. Motto

The existence of customary criminal law in national criminal law reflects ambiguity. This was marked by the presence of Law No. 1 of 1946 which established a national criminal law, namely the Dutch Colonial Heritage Criminal Code. Thus, whether substantively or formally, there is only national criminal law. Emergency Law No. 1 of 1951 which abolished Customary Courts, itself gradually degraded the existence of customary criminal law. All customary criminal functions have been assumed by formal authorities. However, in its very minimalist function, customary criminal law is allowed to exist as it is.

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In the process of drafting the New Criminal Code, there were also efforts not to eliminate the existence of customary criminal law in the national legal order. This was then marked by the inclusion of regulations regarding criminal law in Article 2 which reads:

(1) The provisions as intended in Article 1 paragraph (1) do not reduce the laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this Law.
(2) The laws that live in society as intended in paragraph (1) apply in the place where the law lives and as long as they are not regulated in this Law and are in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights human beings, and general legal principles recognized by civilized society.

The existence of Article 2 of the New Criminal Code indicates several things. First, this provision recognizes the existence of Customary Criminal Law, especially customary offenses. Even though Article 2 paragraph (1) uses the concept of "law that lives in society" whose meaning also includes national law, the explanation of Article 2 paragraph (1) states that what is meant by law that lives in society which determines whether someone deserves to be punished is law. customary crime. Furthermore, this explanation states that this provision aims to provide a legal basis for the application of customary criminal law. The use of the concept of living law in society, which refers to the concept of "the living law" which is often linked to the concept put forward by Eugen Ehrlich which is basically not exactly the same. Franz and Keebet von Benda-Beckmann. (2009). However, the use of legal concepts that live in society in the Criminal Code is seen as a breakthrough. Ahmad Rifan and Ilham Yuli Isdiyanto. (2021). However, this is actually something that is necessary for the development of Indonesian law.

Second, the regulations in Article 2 of the Criminal Code, on the other hand, have the meaning of restrictions and can even be the basis for eliminating customary criminal law itself, because it regulates conditions which are basically restrictions on the application of customary criminal law. These requirements or restrictions are:

1. Applies only where the law lives
2. As long as it is not regulated in this Law;
3. In accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society.

Apart from the three conditions above, there are still things that can limit the application of customary criminal law, namely the existence of a compilation by the government and that compilation of regional regulations in which the customary criminal law applies.

Looking at the provisions of Article 2, there is a contradiction between recognition and limitation. In essence, customary law as a norm lives and applies in society without or with recognition. As stated by van Vollen Hoven, law exists on its own, without being related to the existence or coercive power of the state. Customary law is a custom that has legal consequences. He is dynamic, and has his own ideas about change. Van Vollen Hoven further stated that customary law is largely unwritten and dynamic in nature. Customary law is a living law because it is a reflection of the true legal feelings of the community. Therefore, customary law is a continuous process of birth and development like life itself. Therefore, customary law can disappear in line with the legal feelings of society and adapt to developments. In Minankabau customary law, for example, this is found in the expression: "sakali aia gadang, sakali tapian barubah.". Therefore, the regulation of customary law in Article 2 of the New Criminal Code contains two dimensions that can be contradictory. On the one hand, this regulation aims to provide protection and on the other hand, it has implications for limiting and even stunting.

The existence of conditions or guidelines as long as they are not regulated in this Law will automatically dwarf customary law itself, because most of the deviant behavior in customary offenses is also regulated in the Criminal Code. Limitations on the application of customary law should be based first on offenses related to state interests or general public interests. Second, there are offenses that indigenous peoples themselves cannot resolve and require state or government intervention.

Restrictions in the form of the need to compile regional regulations that regulate them and drafting them through regional regulations will practically end the application of customary law itself. Efforts to compile customary law are certainly not an easy thing. This requires an academic and political process that takes time.

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The second issue related to the regulation of customary law in the Criminal Code is regarding customary sanctions. Article 66 of the New Criminal Code regulates additional penalties. Paragraph (1) letter f states that one form of additional punishment is fulfilling local customary obligations. This arrangement has various consequences. First, placing customary criminal penalties as additional criminal penalties results in customary criminal sanctions being subordinate, or complementary, because additional criminal penalties can only be imposed along with the main criminal punishment. In cases where there are customary offenses that can be resolved simply by imposing customary sanctions. Therefore, how is it possible to impose a penalty in the form of a customary penalty without a principal penalty? The consequence that also arises is that placing it as an additional punishment will result in the enforcement of customary offenses and customary sanctions not being a necessity (imperative) but rather as a facultative one, depending on the judge. This provision also implies that the imposition of customary criminal sanctions is through state judicial institutions, not by the community or through customary courts, so that they are no longer autonomous.

Another problem that arises from the regulation of customary offenses in the New Criminal Code is related to its institutions. Even though institutions and legal institutional authority are part of formal law, the regulations in material law will greatly determine the implications. Faisal Muhammad Rustamaji. (2021). The inclusion of criminal law regulations in the New Criminal Code indicates that there has been formalism towards the law or in other words the law has been transformed into formal law and written law. This will have implications for the elimination of traditional justice institutions. The abolition of customary courts will eliminate the enforcement of customary law by indigenous communities and will become formal and written law. The question that arises is whether customary law in the understanding of the New Criminal Code can still be said to be customary law or law that lives in society. Therefore, there must still be regulations that allow for customary justice to enforce substantive customary criminal law norms, so that its existence and continuity will be maintained.

CONCLUSION

Customary criminal law as part of customary law is a legal rule that is inseparable from the Indonesian nation and state, even existing before the formation of the Indonesian state. Customary criminal law as the original law of the Indonesian nation lives and develops in the lives of its traditional communities. Therefore, the state is obliged to protect and promote customary law and its indigenous communities, parts of which are inseparable from the Indonesian nation as a whole. The existence of customary criminal law essentially does not require any authority, because it coexists with the customary community. However, the State, through the constitution and statutory regulations, is obliged to protect and promote customary criminal law, but still within the limits of the philosophy of the nation and state.

The regulation of customary criminal law in the New Criminal Code on the one hand aims to protect the existence of customary criminal law, but on the other hand it has implications for endangering the existence or causing the decline of customary criminal law itself due to the requirements and restrictions on its application. What is actually needed are regulations that protect customary criminal law to live according to its own rules.

BIBLIOGRAPHY

Ahmad Rifan and Ilham Yuli Isdiyanto. (2021). "Diametricalization of Living Law and Legal Certainty in Article 2 RKUHP", Ahmad Dahlan Legal Perspective, Vol.1 No.1.

Alumni.

Barda Nawawi Arief. (2009). Aims and Guidelines for Sentencing, Semarang: Diponegoro University Publishing Agency.

Dewi Wulansari. (2009). Indonesian Customary Law Before Colonization, Refika Aditama: Jakarta.

Edy Ikhsan. (2015). "Land Tenure of the Malay People in North Sumatra: From Normative Trap to the Historical Denial", in Hasanudin Law Review, (2) 3.

F. Budi Hardiman. (2006). The Structural Position of the Ethnic Group, and the relationship between Ethnic Groups in the Nation and State Life in Indonesia, in Indonesia Ignas Tri (ed) National Commission on Human Rights, Jakarta: Komnas HAM.

Faisal Muhammad Rustamaji. (2021). "Renewal of the Pillars of Criminal Law in the Criminal Code Bill", Udayana Master of Law Journal (Udayana Master Law Journal), Vol.10, No. 2.

CC Attribution-ShareAlike 4.0 License.

Franz and Keebet von Benda-Beckmann. (2009). "The Social Life of Living Law in Indonesia", in Marc Hertogh, Living Law Reconsidering Eugen Ehrlich, Oxford and Portland Oregon, Hart Publishing.
Geoffrey Swenson. (2018). "Legal Pluralism in Theory and Practice", International Studies
HR Otje Salman. (2007). Public Legal Awareness of Inheritance Law, Bandung: PT Alumni.
Hakim, AR, & Tanjung, IU (2024). The Principle of the Reverse Burden of Proof of Corruption Crimes in the Legal System in Indonesia. Law Synergy Conference Proceedings, 1(1), 07–11. Retrieved fromhttps://conference.sinergilp.com/index.php/lsc/article/view/5
Imam Sudiat. (1978). Principles of Customary Law Introductory Provisions, Yogyakarta: Liberty. Muladi and Diah Sulistyani. (2013). Corporate Criminal Liability, Bandung: PT
Lilik Mulyadi (2013). "The Existence of Customary Criminal Law in Indonesia, Study, Principles, Norms, Theory, Practice and Procedures:, Journal of Law and Justice, (2)2.
Nur Rochaeti, Rahmi Dwi Sutanti. (2018) "Contribution of Customary Justice and Restorative Justice in Criminal Law Reform in Indonesia." Legal Issues, Vol. 47, no. 3.
Review, Vol. 0, No. 1.
Salim HS, 2013, Application of Legal Theory in Thesis and Dissertation Research, Raja Grafindo Persada, Jakarta
Yoserwan. (2023). The Existence of Customary Criminal Law in National Criminal Law After the Ratification of the New Criminal Code. UNES Law Review, 5(4).https://doi.org/10.31933/unesrev.v5i4

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