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Existence of Customary Law in Indonesian Criminal Law*

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Abstract
Currently, the scope and regulation of the criminal law system which only recognizes written law is deemed unable to accommodate the various legal needs of indigenous peoples who are still alive today. This is due to the principle of legality of criminal acts which is oriented towards individual-liberalism, not the plurality of society. Therefore, recognizing acts that violate customary law within the framework of the national legal system is considered appropriate in meeting the legal plurality needs of indigenous communities. The rigidity and arrogance of the current legalistic view of criminal law is no longer able to respond to plurality and a sense of justice, especially for customary law communities, because the reality of indigenous people's lives shows that there are countless customary law provisions outside of the law, which continue to live and are obeyed in every vein. community group members. The research method used in this study is a normative legal research method with a socio legal research approach. The socio-legal approach is intended as an approach in legal research that is focused on studying legal phenomena from the perspective of social sciences. The research results state that the position of traditional justice institutions is actually in a state of existence and absence, on the one hand it is not recognized by the Indonesian positive legal system but there are practices of these traditional justice institutions. However, cases decided based on customary law can still be found in a very limited number of cases.
Keywords: Legal Reform; Customary law; Criminal Code

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Eksistensi Hukum Adat dalam Hukum Pidana Indonesia

Abstrak
Saat ini, jangkauan serta pengaturan sistem hukum pidana yang hanya mengakui hukum tertulis dianggap belum mampu mengakomodir berbagai kebutuhan hukum masyarakat adat yang sampai saat ini masih hidup. Hal ini disebabkan prinsip legalitas tindak pidana yang berorientasi pada liberalisme-individu, bukan pluralitas masyarakat. Oleh karena itu, pengakuan perbuatan yang melanggar hukum adat dalam kerangka sistem hukum nasional dinilai tepat di dalam memenuhi kebutuhan pluralitas hukum masyarakat adat. Kekakuan dan keangkuhan pandangan legalistik hukum pidana saat ini sudah tidak mampu menjawab pluralitas dan rasa keadilan khususnya masyarakat hukum adat, sebab realita kehidupan masyarakat adat menunjukan bahwa terdapat berbagai ketentuan hukum adat diluar undang-undang yang tak terhitung jumlahnya, terus hidup dan ditaati dalam setiap nadi anggota kelompok masyarakat. Metode penelitian yang digunakan pada penelitian ini adalah metode penelitian hukum normatif dengan pendekatan penelitian *socio legal*. Pendekatan *socio legal* dimaksudkan suatu pendekatan dalam penelitian hukum yang difokuskan untuk mengkaji gejala hukum dengan perspektif ilmu-ilmu sosial. Hasil penelitian menyatakan bahwa posisi lembaga peradilan adat sebenarnya berada dalam keadaan ada dan tiada, disatu sisi tidak diakui oleh sistem hukum positif Indonesia namun terdapat praktek lembaga peradilan adat tersebut. Namun demikian, perkara-perkara yang diputus berdasarkan hukum adat sampai saat ini masih dapat dijumpai dalam sejumlah perkara yang sangat terbatas.
Kata Kunci: Reformasi Hukum; Hukum Adat; KUHP

Существование обычного права в индонезийском уголовном праве

Абстрактный
В настоящее время сфера действия и регулирование системы уголовного права, которая признает только писаное право, считается неспособной удовлетворить различные юридические потребности коренных народов, которые все еще живы сегодня. Это связано с принципом законности преступных деяний, который ориентирован на индивидуально-либерализм, а не на плюрализм общества. Таким образом, признание действий, нарушающих обычное право, в рамках национальной правовой системы считается целесообразным для удовлетворения потребностей коренных общин в правовом плюрализме. Жесткость и высокомерие нынешнего легалистского взгляда на уголовное право больше не могут отвечать плюрализму и чувству справедливости, особенно для общин обычного права, поскольку реальность жизни коренных народов показывает, что существует бесчисленное множество положений обычного права за пределами закон, который продолжает жить и соблюдается во всех отношениях. члены общественной группы. Метод исследования, использованный в данном исследовании, представляет собой нормативно-правовой метод исследования с социально-правовым исследовательским подходом. Социально-правовой подход задуман как подход в правовых исследованиях, ориентированный на изучение правовых явлений с позиций социальных наук. Результаты исследования констатируют, что положение традиционных институтов правосудия фактически находится в состоянии существования и отсутствия, с одной стороны, оно не признается индонезийской позитивной правовой системой, но существуют практики этих традиционных институтов правосудия. Однако дела, решенные на основе обычного права, по-прежнему встречаются в очень ограниченном числе дел.
Ключевые слова: правовая реформа; Обычное право; Уголовный кодекс

A. INTRODUCTION

The existence of plurality in society demands different services and protection by the state in each social group (Syam, 2011: 260). Plurality is interpreted as the reality of differences in understanding, values, different habits in an area (Rozi, 2017: 106), so that there will be various different and fundamental views of life (Kurniawan, 2012: 30), including legal aspects (Harry, 2003: 61). Customary norms commonly referred to customary law (adatrecht) (Manarisip, 2012: 65) originate from the articulation of a community's understanding of the importance of maintaining the group's religious-magical values. (Kristiyanto, 2017: 163), (Nurhanifah, 2019: 4)

This view does not only revolve around the calculation of profit and loss (Endri, 2020: 22) but for the sake of maintaining harmony based on an understanding of the relationship between humans and the existence of the universe itself (Handayani, 2010: 2). Violation of customary law can be said to be an act that harms all members of the social group (Mulyadi, 2013: 227), so that national legal institutions are needed that are able to maintain relationships between group members in harmony, not only for individual interests.

Today, the reach and regulation of the criminal law system that only recognizes written law is considered unable to accommodate the various legal needs of indigenous peoples who are still alive today (Amrani, 2019: 86). This is due to the principle of legality of criminal offenses that is oriented towards individual liberalism (Faisal, 2014: 86), not community plurality (Utama, 2020: 16). Therefore, the recognition of acts that violate customary law within the framework of the national legal system is considered appropriate in meeting the needs of the legal plurality of indigenous peoples (Mutuankotta, 2018: 111), (Sabardi, 2013: 178) as stipulated in the draft Criminal Code Bill (RUU KUHP). The direction of the regulation will certainly encourage local governments to map customary laws that still apply and live in their communities.

However, the criminal law paradigm gives role to the principle of legality (nullum delictum nulla poena sine praevia lege poenali) as a determinant of criminalization of criminal acts (Chen, 2015: 334). The basic idea pioneered by Beccaria, Voltaire, Rosseau, and Diderot (Cadoppi, 2015: 8) in the 17th century requires that the law must explicitly accommodate criminal acts in the legislation (Gradinaru, 2018: 1). This is affirmed in Article 11 of the Universal Declaration of Human Rights which states:

> "No one shall be held guilty of any penal offence on account of any or omission which did not constitute a penal offence, under national or

> international law, at the time when it was committed, Nor shall a heavier penalty be imposed that the one that was applicable at the time the penal offence was committed" (Article: 11).

Such a narrative is a positivist (Rozah, 2014: 3) paradigm which according to Hans Kelsen, requires law as an order of norms (Cohen, 1978: 3) whose validity is based on the establishment by authorized state organs (Cufar, 2020: 161). Therefore, the law should not provide space for morals and customs to become offenses within the framework of national criminal law (Wendel, 2005: 427). This is a response to the idea of natural law which cannot bring certainty due to the legal order based on human subjectivity and metaphysical natural rules.

The ambiguity of legal indicators that live in society based on moral values is suspected of causing over-criminalization (Utama, 2020: 22). The morality of an act is based on a person's conscience in judging between right and wrong (sense of right and wrong) (Wild., dkk, 2013: 1089) of the act committed indicates the weakness of conscience in conducting an objective assessment of criminal acts (McConnel, 2008: 804). This has the consequence that the enforcement of moral values is different from the enforcement of positive law. The reality of customs accommodated through moral values and unwritten laws (Sinaga., Sabila, 2019: 4) has a broad interpretation and difficulty in concretely defining criminal acts that can be tried (Luthan, 2012: 513). This construction has an impact on the practice of imposing excessive criminal sanctions due to the elastic concept of offense.

Within the scope of the civil law legal system, punishment should be based on the written aspects of legislation (lex scripta) (Gunakaya, 2010: 8), non-retroactive (lex praevia), clarity of offense formulation (lex certa), and cannot be analogized (lex stricta) (Iksan, 2017: 8). This aspect, according to Roelof H. Haveman, is the combination as a true meaning to the principle of legality (Zakaria, 2006: 136), (Haveman, 2002: 50). In this context, the application of criminal offense based on the law that lives in the community in Article 2 paragraph (1) of the Draft Law on Criminal Code (RUU KUHP) is feared to cause problems of legal certainty.

B. METHODS

The legal research method used in this research is normative legal research method with socio legal approach. The socio legal approach is intended to be an approach in legal research that is focused on examining legal symptoms

with a social science perspective. Thus legal science has an interdisciplinary nature, which is used to help explain various aspects related to the presence of law in society. Various aspects of the law that we want to know cannot be explained properly without utilizing scientific disciplines, such as politics, anthropology, sociology etc. Considering the problems and research objectives of this study, namely reforming the implementation of criminal law in Indonesia, it can be emphasized that this study is based on analytical descriptive research. This analytical descriptive research is intended as a study that describes the function of law in the context of changes in the implementation of criminal law in Indonesia. This research uses secondary data consisting of primary, secondary, and tertiary legal materials. Primary legal materials used in this research are the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 1946 on the Criminal Code, Law Number 8 of 1981 on the Criminal Procedure Code, and Ministerial Regulation of the Ministry of Home Affairs Number 52 of 2014 on Guidelines for Recognition and Protection of Indigenous Peoples. Secondary legal materials used in this research are legal journals, as well as papers related to laws that live in society and criminal law. Tertiary legal materials, used to complement and provide further explanation of primary and secondary legal materials such as legal dictionaries, English/Indonesian dictionaries and encyclopedias. The data in this study was collected through the library research method and analyzed using descriptive analysis method.

C. RESULTS AND DISCUSSION

1. The Position of Customary Law in the Criminal Law System

The legal positivism paradigm requires a strict separation of law and morals in the law enforcement system. H.L.A Hart in his work The Concept of Law states that law is not a part or reproduction of the provisions of morality. Hart's view is based on the idea that if the law is considered as a moral order (Hart, 1958: 598), then the law is not a part or reproduction of the provisions of morality, then society will not be able to change it (Sitabuna, Adhari, 2020: 110). On the other hand, if the law contradicts the subjective morality of individuals, (Bello, 2014: 384) then the law will be ignored (Firmanto, 2017: 105). On this basis, legal positivism does not want subjective norms obtained through legislation.

The positivism school has an influence on the application of criminal law through the doctrine of the principle of legality accommodated in Article 1 paragraph (1) of the Criminal Code which states that "No act can be punished other than based on the provisions of the legislation that preceded it." This

narrative indicates that criminal law norms cannot apply retroactively. Furthermore, there is no criminal act and therefore no punishment if there is no written legal norm or law (lex scripta). This indicates that criminal law norms must be written, as well as the punishment threatened against the prohibited act must be explicitly written in the law.

Criminal punishment cannot be imposed if there is no written rule (Rahayu, 2014: 3) or law with clear formulation (lex certa) (Kantjal, 2016: 8). That is, it is a prohibition to apply unwritten law in criminal law and in imposing punishment and a prohibition to impose punishment if the formulation of norms in written law is vague (not concrete) (Rohmana, 2017: 107), and there is no criminal act and therefore no punishment if there is no strict written law (lex stricta) (Abdullah, 2013: 3). This means that the provisions contained in the criminal law must be interpreted restrictively (Herdinanto, 2016: 226). The logical consequence of this is the birth of an understanding that has been accepted in legal circles that in criminal law it is forbidden to use analogies (Tongat, 2015: 526). Referring to these four elements, it can be concluded that legal certainty is the spirit of the principle of legality. The terminology of the law that is accommodated refers to the criminal policy of the legislator. This is based on Kelsen's idea that if there was an objectively knowable justice, there would be no positive law (Ashiddiqie., Safa'at, 2006: 21).

At the same time there would be no state. However, it must be recognized that there are natural laws that are absolutely good (Hajar M, 2013: 566), but they are transcendental. Therefore, it cannot be understood. So justice in the perspective of natural law cannot be clearly defined, because it is something abstract and unreachable (Anshari, 2010: 139). As a result, justice in natural law is an ideal that is almost impossible for human knowledge to achieve (Hermoyo, 2010: 29). Since societies are divided into many ethnicities, political beliefs, religions, professions, and so on, which often differ from one another, so many ideas about justice become incomprehensible.

Such a construction has a long history starting from Roman law which was accommodated in Corpus Juris Civilis and influenced the development of the Continental European legal system (civil law) (Qamar, 2010: 3). This construction was then adopted and refined by the French Code Napoleon as a struggle to protect human rights from the arbitrariness of the authorities. The doctrine then prevailed in the Netherlands and was born in Indonesia through colonization.

The reason is that the conception of the principle of legality of the civil law tradition derived from individualism-liberalism makes the application less

representative of justice in the Indonesian society. Because Indonesia's social reality is plural, based on various differences, both horizontally covering social units based on ethnicity, language, customs and religion, as well as vertical differences, namely concerning differences in the political, social, economic and cultural fields.

Based on this axis of thought, criminal law must be present for communal harmonization and rehabilitation efforts (Amrani, 2019: 9). This makes the development of legal pluralism shift the positivistic paradigm that assumes that state law is the only law (Azhari, 2012: 490). Because in reality, there are many 'other forces' that do not come from the state (Muabezi, 2017: 430). Legal pluralism is present to provide an understanding that in addition to state law there are other legal systems that first exist in society (Safitri: 50). In addition, the fact that there is a social order that is not part of the legal order of the state is a necessity. Among them, customary law, (Djik, 1971: 4) religious law (Yudha, 2017: 159), customs (Siregar, 2018: 2), cross-national treaties and so on (Sukimana, 2019: 108). These forces have the ability to regulate the actions of the people bound by them.

This inspired the reformulation of criminal law that not only places the written law as an offense but also recognizes violations of laws that live in society as criminal acts. This is accommodated in Article 2 paragraph (1) of the Draft Law on Criminal Code which states that:

> "The provisions referred to Article 1 paragraph (1) shall not prejudice the applicability of the law living in the community which determines that a person should be punished even though the act is not regulated in this Law." (RKUHAP: 2 (1)).

Some criminal law experts consider that this arrangement is an expansion of the principle of legality (Widayati, 2011: 314), (Chritianto, 2009: 351). The law, which was initially only interpreted as positive law in a formalistic legal perspective (Luthful h., Intaning: 107) as a product of the state (Wijayanti, 2013: 182), accommodates the provisions of unwritten laws that apply and are still alive in certain areas. The expansion of the principle of legality into material cannot be separated from Welner Menski's triangular concept of law, which states that no legal system can stand alone without influence from other aspects. Menski asserts that law consists of three types that are intertwined, namely laws created by the state, laws created by society, and laws that arise through values and ethics. (Djoko S, 2018: 29)

The principle of material legality is based on positive law and customs that are originally an interpersonal relationship as the basis of value between

humans (Tabiu,. Hiariej, 2015: 30). It is derived from interaction patterns, value systems, thinking patterns, attitudes, and norms that continuously give rise to indicators of decency as the basis of individual ways or usage (Ismansyah, 2010: 13), (Shalihah, 2017: 7). G.A. Theodorson and A.G Theodorson define usage as a uniform or customary way of behaving within social groups (Soekanto, 1983: 67). Violation of the norm causes reproach from individuals because of different subjective standards. The continuous application of usage creates habits (folkways) and develops into a system of behavior (mores). The behavior of citizens and the eternal value system transforms mores into customs. (Soekanto, 1981: 34)

Customs have strong ties (Yulia, 2016: 23) and influence because they are imbued with the value of cosmic balance (Imanuel, 2013: 123). The belief in the creation of a balance between humans and nature when practicing customs (Putra, 2014: 45) and any action that disturbs this balance is considered a communal loss because it destroys the order of cosmic balance. On this basis, violations of customary law do not only harm the individual but also harm the community communally (Kalekongan, 2017: 30), because of the disruption of cosmic balance (Hidayat, 2012: 14). In order to restore harmony or cosmic balance, (Mujib, 2013: 479) punishment for the perpetrator is carried out. This is realized by the obligation (as a punishment) for the perpetrator to carry out traditional ceremonies and other customary criminal sanctions.

The implementation of the customary law framework in state judicial institutions is reflected in Supreme Court Decision No. 3898 K/Pdt/1989, which states that a person who has consensual sexual intercourse outside of marriage that results in pregnancy, and the man who impregnates does not want to take responsibility, is subject to customary sanctions in the form of belis (dowry fees) from the male party to the woman. (Putusan Mahkamah Agung Nomor: 3898 K/Pdt/1989)

Barda Nawawi Arief argues that punishment in the form of local customary obligations or legal obligations that exist in the community accommodated through the principle of material legality is a form of protection for victims (Mulyadi, 2013: 236), (Arief, 1994: 25). Basically, the imposition of such punishment is an effort to pay compensation to the community for harming indigenous peoples communally.

2. Conception of Law Existing in Society According to Indonesian Law

Juridically, there is a mandate to carry out reforms in the implementation of a just criminal law system by the government (Yudistira D, 2013: 4), this can

be seen based on various applicable laws and regulations (Sufriandi, 2010: 46) including:

> Article 24 of the 1945 Constitution:
> "Judicial power is an independent power to administer justice in order to uphold law and justice". (Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia) and Article 50 paragraph 1 of Law No. 48/2009 on Judicial Power: "Court decisions must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant laws and regulations or unwritten sources of law that are used as the basis for judging". (Article 50 paragraph (1) of Law No. 48/2009 on Judicial Power)

Criminal law reform that regulates various groups of society has become a real need, especially in Indonesia (Setiadi, 2000: 206), (Ariyanti, 2019: 187). Various social realities of Indonesian society cause differences in conception among countless customary law communities (Sukirno, 2013: 487). Such differences result in differentiation of values (Safitri, Uliyah, 2015: 35) that they consider good and not good (sense of right and wrong) for social life (Luthan, 2012: 509). Thus, there are differences in the meaning of justice in each custom that develops in society. (Istiqamah, 2018: 216)

In fact, the concept of justice in customary criminal law has been applied several times in resolving cases, such as in Decision 427/PID/2008/PT.MKS. Samuel as the defendant was convincingly proven guilty of having sexual intercourse outside of a legal marriage, even though the incident was not regulated by the Criminal Code. However, there are very few cases of criminal law violations. One of the reasons for this is that the settlement is only based on the judge's reasoning consciousness so that it gets less attention to be practiced consequently (Danil, 2012: 588). Therefore, future legal reform (ius constituendum) needs to emphasize the material and formal laws of customary criminal law in a strategic position as seen in the formulation of Article 2 paragraph (1) of the current Criminal Code. (Draft KUHP: 47)

The settlement of customary cases in Indonesia is actually currently handled by a customary institution of community culture (Syarifuddin, 2019: 4), such as in the Minangkabau village life order, all problems in a village must be resolved by bajanjang naiak and batanggo turun (Azra., et.al: 2008: 11), meaning that all problems must be resolved starting from the bottom, namely starting from the mamak then to the head of the family. If the problem is not resolved at the head of the community, it will be forwarded to the tribal leader (Sumarty, 2007: 17). If the problem is not resolved, it will then reach the Kerapatan Adat Nagari (KAN) as the institution responsible for maintaining and resolving

various customary law issues of the nagari community (Alma, 2002: 39). Likewise, all the results of the Kerapatan Adat Nagari (KAN) are conveyed to the children through levels or batangga turun. The tribe head conveys the head of the family and so on to the mamak head of the inheritance and so on to the kemenakan and their children. (Michael, 2016: 25)

Although there are still customary institutions that handle customary cases (Kamaruddin, dkk, 2013: 48), most of the customary institutions have now been removed from their authority to handle customary cases, this is based on the enactment of Law No. 1 of 1981 concerning the Criminal Procedure Code (KUHAP). The existence of such authority, which led to the handling of customary cases outside state organs, was officially revoked (Yanti, 2016: 4). Similarly, various provisions on judicial power (Adonara, 2015: 221) no longer recognize bodies outside state organs (Harahap, 1996: 81). Therefore, the existence of customary judicial bodies is currently considered non-existent in the perspective of positive law.

The institutionalization of customary justice as a solution to problems is faced with a number of significant challenges, due to the fact that the role of customary justice has not been well recognized (Sudantra, et.al., 2017: 87), while on the other hand the role of customary justice is also found to be limited, such as the limited involvement of women (Shonhaji, 2017: 19). In certain cases, it may be perceived as unfair if customary courts do not adopt principles of gender (Rahayu, 2012: 17) justice and human rights (Sodik, 2012: 170). This is a challenge and not an easy task to change the situation of communities that have for generations maintained a customary law system that is often found to be contrary to human rights principles (non-discrimination, equality, human dignity, universalism) (Khairunnisa, 2018: 75). The plurality of society and the lack of institutionalization of customary criminal law enforcement show the need for a criminal justice system that accommodates various criminal laws in society. (Fendri, 2010: 9)

Looking back at the relationship between customary law communities and the role of customary criminal law in the order of life, I Made Madyana said that customary criminal law is a living law, (Genta, 2019: 46) followed and obeyed by indigenous peoples continuously, from one generation to the next (Kurniawan, 2016: 18). Violation of the rules of discipline is considered to cause turmoil in the community because it is considered to disturb the cosmic balance of society (Budiyanto, 2016: 89). Therefore, violators are given customary reactions, customary corrections or customary sanctions by the community in consultation with customary leaders or administrators. The definition presented

shows similarities with the definition of customary law in general where this order of rules has lived in the community and is passed down from generation to generation.

The urgency of applying customary criminal law has been clearly illustrated by looking at the role of customary law that inevitably must be obeyed by the community (Nurjaya, 2011: 240), because it is considered the only effort to resolve conflicts between fellow community members and nature, (Junef, 2015: 100) so that through a criminal perspective, the application of customary criminal law sanctions against violators is an obligation that brings justice to the community, this is in line with the opinion of Barda Nawawi Arief that the realization of customary criminal law is an effort to treat natural victims (Alfarisi, 2018: 22). In this case indigenous peoples, which is marked by the return of balance and harmonization of the life order of indigenous peoples. (Maladi, 2010: 457)

However, by realizing the weakness of customary institutions that are unable to adjust to the context of the times, Sinclair offers the concept of a "collaborative approach" or hybrid justice system between customary justice and the formal legal system in its implementation must pay attention to aspects: (a) That discriminatory treatment is no longer applied; (b) That the punishment imposed must look at the development of punishment that refers to respect for human rights; (c) It must also be considered whether this mechanism can apply to perpetrators of serious crimes such as rape or murder; (d) There is a guarantee of legal certainty guaranteed by law for every decision made through this informal channel. (Zulfa, 2010: 182-203)

The model for the formalization of customary justice in the national judicial system has been put forward in Lilik's article entitled "Customary Law and Decisions in State Judicial Practice", which is actually a very concrete offer. However, the idea of three models, namely: 1). An independent customary court; 2). A customary court within the general judicial chamber; and 3). A customary court within the general judicial chamber without a customary high court (National Dialogue, 2013). In addition to normative urgency, there is also a sociological impetus, especially coming from the Alliance of Indigenous Peoples of the Archipelago (AMAN), where AMAN has been participating in encouraging the ratification of the Criminal Code, especially related to the settlement of customary law cases with a human rights perspective through the national judiciary. (Delik Adat, 2021)

Seeing the development and dynamics of customary criminal law in customary law societies in Indonesia, the role of state judicial institutions is

increasingly needed, and even becomes the only alternative to answer the complex process of state life (Idem, 2017: 36), because one of the main backgrounds for the formation of a state institution is the existence of real conditions and needs, both due to social, economic, political and cultural factors in the midst of the dynamics of the waves of influence of internationalism v. increasingly complex nationalism resulting in variations in the structure and function of organizations and state institutions are growing. (Basarah, 2014: 2)

The logical consequence of the role of the state judiciary in enforcing customary criminal law is the provision of tasks, responsibilities and a relatively heavier burden on judges to be able to understand and explore legal values that live in society (Wicaksana: 88). In this context, judges must truly understand the feelings of the community, the condition of the community, especially the pluralistic Indonesian community with a variety of different customs, traditions and cultures that are still maintained as living law. (Suhariyanto, 2018: 425)

Soedarto stated that the judge's eyes, mind and feelings must be sharp to be able to capture what is happening in society, so that the decisions made do not sound discordant. Judges with their entire personality must be responsible for the truth of their decisions both formally and materially (Fahmianto, 2021). The separation of customary criminal law enforcement from state courts based on legal developments in various countries is no longer relevant, therefore, there needs to be a manifestation of criminal law in the legal and judicial system of the state. (Harper, 2017: 11)

Then after finding the right institution to carry out the function of implementing customary criminal law, it is necessary to discuss the qualifications of customary criminal law that will be used as the basis for punishment, seeing the Explanation of Article 2 paragraph (1) of the Criminal Code which states:

> "The law that lives in the community that determines that a person should be punished" is customary criminal law. The law that lives in the community in this article relates to the law that still applies and develops in the life of the people in Indonesia. In certain regions in Indonesia there are still unwritten legal provisions that live in the community and apply as law in the area, which determine that a person should be punished. To provide a legal basis for the enactment of criminal law (customary offenses), it is necessary to emphasize and compile by the government derived from the respective Regional Regulations where customary law applies. This compilation contains laws that live in the community that are qualified as customary criminal offenses. This situation will not override and still guarantee the implementation of the principle of legality and the prohibition of analogy adopted in this Law".

The explanation indicates that the need for recording through a compilation of customary criminal law and recognition of indigenous peoples whose determination authority is delegated to the local government, this step is a manifestation of recognition and respect for the laws that live in the community so that they can be juridically identified (Abdurrahman, 2015: 65). Therefore, in order for customary criminal law to be applied consequently in social life, a responsive and comprehensive recording process of customary offenses is needed and an evaluation is held every certain period of time.

D. CONCLUSION

Criminal law is conceptualized as a law that must prioritize the principle of legality, meaning that in order to sanction a person's actions, it is necessary to have the existence of a formulation of the prohibition of the act (lex certa) as stipulated in a previous law (lex scripta), and at the same time the prohibition may not be applied to other cases even though the events are similar (lex stricta). This cult of regulation comes from the view of legal positivism of various European countries which considers that laws outside the written law of the state are not laws. The background of this thinking is certainly very long, starting from the legal tradition of the Roman Empire to the codification by Napoleon. The presence of such views in Indonesia certainly originated from Dutch colonialism through the principle of co-foundation which ultimately has a common legal system that comes from the civil law legal tradition, the goal is for the law itself, the law is fair because the law is enforced. However, the rigidity and arrogance of the legalistic view of criminal law at this time is actually unable to answer plurality and a sense of justice, especially for indigenous peoples, because the reality of the lives of indigenous peoples shows that there are various provisions of customary law outside of countless laws, which continue to live and be obeyed in every pulse of community members, therefore it is necessary to improve and develop the criminal law system in Indonesia, one of which is to apply the principle of material legality which will provide access to justice for the plurality of Indonesian indigenous peoples.

One of the most important elements in the customary criminal law system of indigenous peoples is the application/enforcement of customary criminal law itself. The position of customary justice institutions is actually in a state of existence and absence, on the one hand it is not recognized by the Indonesian positive legal system but there is a practice of customary justice institutions. However, cases decided based on customary law can still be found in a very limited number of cases. The main reason is that although customary

criminal law needs to be applied, not all customary offenses can be applied, because, if there are customary offenses and sanctions that are fundamentally contrary to gender equality, human rights and human dignity, the case must be reconsidered whether it can be implemented or not, seeing that one of the conditions for the validity of laws that live in society in the Indonesian frame is as long as it is in accordance with the times and the principle of a unitary state. This is essentially in line with the background of the birth of state institutions, one of the reasons for which is the social, economic, legal and political needs of the community, especially in the midst of the struggle for internationalism v. nationalism.

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