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Review Article

CUSTOMARY LAW IMPACT IN THE DEVELOPMENT OF INDONESIA'S CRIMINAL CODE

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Abstract
This research aims to understand the position of customary law as a source of national law from a dynamic process of Indonesia's law development, especially criminal law. The research's review focuses on literature methodology in correlation with the research. Customary law's formation is considered as a unity of society's behaviour for a long time and is taken as norms and guidance in manners. The term of *Ubi Societes, Ibi Ius* (where there is a society, there is the law) is true. Appointing custom law as one of the sources of law is a marking of Indonesia law renewal is very necessary since aspects of human lives are evolving. The result of research concludes that custom law is in stages of being forgotten in the system of national law. There is a strong perception of grounds that customary law deserves to be a part of the renewal of Indonesia's criminal law because customary law is considered as an order of normative rules and has a flexible nature which later on these rules could be created and accepted by all layers of society.

Keywords: customary law, criminal law, customary institution.

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INTRODUCTION

Customary law is known as a regulation system that literally has lived and developed (living law) amongst society in various parts of Indonesia but now is forgotten. When usually criminal law is considered as the goddess of justice or in Ancient Greek history is known as Goddess Themis, then in Indonesia, it is proper if this presumption is given to customary law as an unwritten law to be the justice goddess of Indonesia. Therefore, it is devastating if the national hierarchy system which customary law previously played a big role in solving every aspect of Indonesian society's issues at its peek gradually fades from existence. Considering the current condition, customary law's society is struggling to solve their problem when the customary law they look up to is now facing against positive law (Lastuti Abubakar, 2013).

The indication of customary law fading from its characteristic position as Indonesia's national source came from a presumption that the customary law is very traditional and irrelevant in reaching the current development of globalization and technology era (Riezka Eka Mayasari, 2017). The implication of Indonesia's politics law is now experienced in society's problem solving that denies the customary law's function as a part of the juridical pillar in society's life. As an example, the internal conflict between customary society that hopes to find a solution through customary institution and figures. However, this path usually priorities the national judiciary system and seems to highlight more in proving the guilty party, while the actual goal is to create peace between societies. Another example is ideas to have grounds of penalty expanded to the customary law (Riezka Eka Mayasari, 2017).

In essence, customary law has been present since the ancient era or pre-Hinduism in Indonesia. At that time, the ongoing custom is Malay-Polynesian custom. Gradually, Islamic and Christian culture gave an impact to the original custom (Eka Susylawati, 2009). And then, pre-independence era, which at that time Indonesia was also fighting to maintain independency in 1945-1950 so the dominant impact of customary law was much easier to implement in order to prioritize public interests (I Gede A.B. Wiranata, 20019). Seen from the terminology aspect, customary law cannot be separated from a strong bond of norms and ancient guidance book. For example in Lampung customary society, there is the Book of *Kuntara Raja Niti, Cepalo Ghuwabelas* and *Ketaro Adat Lampung*. These books hold precious advice in mannerism. For an instance, "Kutogh di muka di bulakan" in Bahasa Indonesia, "di dalam suatu negeri akan tercela apabila penduduknya tidak bisa menjaga kebersihan lingkungan serta halaman rumahnya masing-masing" which in English, "a neighbourhood would be in a catastrophe if the people cannot maintain the quality of their environment and each house" (Kuntara Raja Niti). In terms of presumptions from perspectives either about its position or considered as needs when to solve crime for society, it can be said that the urgency to have customary law in the new law formation orders is significant, recalling the customary law is a discipline of norm and also reflection of *Pancasila* which is flexible to fulfil government's necessity in creating grounds and source of New Indonesian Criminal Code.

Almost in every life stages, the human will come forth with law regulations. Numerous regulations are attached from norms and life aspects until ruling an issue become important. Mulyadi stated that in criminal code development that started in 1963 was aimed to create a criminal code master peace with Indonesian national personality and reflects the characteristic of Indonesia that respects religious and traditional values (Rizani Puspawidjaja, 2006). While according to Barda Nawawi Arief, the development of national law system hopes to support the national and international development by sourcing from law values and aspirations that live and evolves in the society (Reimon Supusesa, 2012). For decades until now, the evolution of law has gone through a lot of stages in certain aspects but never seems to adopt customary law issue in the government regulation's attestation on criminal law which brings an assumption of how is a law indicator considered capable if it does not see the source based on regulation's suitability with the society.

It is an undeniable reality that in certain parts of Indonesia lays unwritten regulation in the customary law (living law) which is considered as law in that region (Reimon Supusesa, 2012). There is a prohibition for judges to refuse a case that does not have a law base or no particular rule about it. To solve this, the judge must dig deep in the values respected by the society (customary law) Mardjono Reksodiputro stated that it is the correct action for a judge to be obligated in searching justice from making the customary law a source in criminal law of

Indonesia (Budi Suhariyanto, 2018). According to Van Vollenhoven, to be beneficial for the country and nation, Indonesia's national law must find its own path. Try to not follow laws or knowledge of law from the Netherlands (Sulastriono, Sartika Intaning Pradhani, 2018). Customary law is not codified in Indonesia, but its existence is acknowledged for the longest time until today in several parts of Indonesia. In this research, there are a few formulated problems which are: How does a customary law impact on the development of national criminal law? How is the customary law's existence in solving numerous social conflicts in society? This research aims to review and analyze the existence of customary law in Indonesia in terms of national law order formulation.

METHODOLOGY

This research uses a normative method, executed through literature and document studies, and steeping into secondary data source based on law literature in correlation with the research problems and purpose.

Impact of Customary law in the National Criminal Law Order

The acknowledgement of customary law by indigenous people has existed for a long time before colonialism, when in that situation, Indonesia is facing its hardest time to fight for independence. There was no firm rule at that time which made people choose to follow customary law that has been side by side with them in the aspects of civil or criminal law. If we see it from the context of national law order, the government has planned for a while to substitute the criminal code of Indonesia which is a legacy from the Netherlands colonialism with a new criminal code purely established in Indonesia. This statement first time noticed from pre-historical independence and efforts have been made since 1951 by (Moeljatno Herlambang, 2012). Until the current democracy of 2019, the Government of Indonesia is planning to validate the Blue Print of Criminal Code which will be validated by the House of Representative of the Republic of Indonesia. However, due to debate and rejection from the unity of student activists from several universities in Indonesia, the House of Representative of Indonesia agreed to postpone the blueprint of criminal code's validation. In the national law system, it is proved that customary law existence is involved in impacting the development of the criminal code's renewal. This can bee is seen in the blueprint of criminal code. If we review and analyze points of several new Articles that will support national values, amongst them is the customary law (Draft of Republic of Indonesia Law in 2019 concerning the Criminal Code Book):

Article 66 Section (1) Point (f)
Additional penalty mentioned in Article 64 point b consists of:

1. Revocation of certain rights;
2. Seizing certain goods and/or bills;
3. Announcing the judge's decision;
4. Payment of loss;
5. Revocation of the certain permit;
6. Fulfilment of local custom's obligation.

Article 92
(1) The additional penalty in forms of the fulfilment of local customary obligation can be executed even if it's not written in the formulation of penalty recalling Article 2 Section (2).
(2) Obligation formulation mentioned in Section (1) is considered comparable with category 2 of the fine penalty also a subject of a replacing penalty, if the local custom obligation is not fulfilled or not executed by the convicted person.
(3) Replacement penalty mentioned in Section (2) includes penalty of loss.

Article 97
The additional penalty means an obligatory fulfilment from local customs that can be executed even if it is unwritten in the formulation of the criminal act concerning the provision of Article 2 Section (2).

Article 116
Additional penalty mentioned in Article 114 point (b) consists of:

(1) Revocation of profit collected from a criminal act
(2) Fulfilment of customary obligation.

Article 120 point (d)
Fulfilment of customary obligation

Article 597 Section (2)
Penalty as in Section (1) is a form of customary obligation fulfilment mentioned in Article 66 Section (1) point (f).

In Book 1 Number 4 of Indonesia's Criminal Code BluePrint, the development of Indonesia's criminal law cannot be separated from the customary law existence in society. The law blueprint established states that an act of crime can be acknowledged based on the law that is present in a society which aims the highest degree of justice (Draft of the Republic of Indonesia Law on 2019 concerning the Criminal Code Book).

The birth of a large nation can be seen from the people's attitude in respecting and preserving their ancestors' legacy as historical evidence of fighting for their nation's sovereignty. Indonesia is a country that was born from a sense of unity and fraternity of freedom fighters gathered from various race and ethnicity. Therefore, it will be unethical if in developing and establishing a national law order, we have to put aside the ongoing customary law from the society. Indonesia has been known long enough as a country with a wide range of ethnicity, tradition, and custom. Von Savigny stated that a system of law is a part that comes from society. Consequently, in attempts to create a law order in a country must be ground by an aspiration to reach justice of society because laws originally come from constant practice hence became a law activity (customary law) (Yanis Maladi, 2010). Current civil law is as firm armour and almost impossible to substitute, then customary law could be ammunition in strengthening the vulnerable legislation. It is proved through the overlapping order of legislation and as if rushing in its establishment. The older positive laws are not able to adjust today's situation while customary law has a flexible nature in competing with an era (Hilman Syahril Haq, Hery Sumanto, 2016).

Regardless of the aims and goals of the government when establishing new law order on the criminal code, it is expected that there are no political interests involved that could lead to a legal defect of the created regulation. When discussing customary law as a source of law and its correlation to civil law, then law history experts will recall on the Emergency Constitution of Indonesia No, 1 Year 1951 Article 5 Section (3) sub (b) that gives space towards customary law to commit sanction when a performance is categorized as violated or not. If the prosecutor is legally considered to commit a prohibited crime then the sanction is jail from 3 months in light action of crime (tipiring) until 10 years of jail (Nyoman Serikat Putra Jaya, 2016). Until now, knowledge on customary law in education aspects especially law faculty is just limited in the civil affairs, so it is not surprising if academician and law experts rarely share their knowledge on customary law to young researchers and university students.

As proof that customary law is a part of a created centre of all regulations today could be seen in Article 18B Section (2) of Indonesia's Constitution 1945 that explains: "the nation (Indonesia) acknowledge and respects unities of customary law society and their traditional rights as they live and in accordance with the society's evolution and nation's principle of the Republic of Indonesia, regulated in the laws" (Marco Manarisip, 2012). From the explanation in the Article's reference, it can be said that customary law has an impact when proclaimed of Indonesia's independence formulated the constitution of Indonesia, which is the reason why indigenous society should have the same right in the national law order system, including their freedom to perform and preserve rules of customary law involving the right to vote on how to solve their problems through traditional institution. As a law that exists is considered still abstract and needs research and review

on how far the customary law is still realistic implemented until now either through literature study of historical archives or direct observation in the indigenous society (I Ketut Sudantra dan Ni Nyoman Sukerti, 2014).

Even though the customary law existence is known before Indonesia's independence, there is still no article in the Body of Indonesia's 1945 Constitution that clearly explains the position of customary law (Mahdi Syahbandir, 2010). Yet if we are to look into the 1945 Constitution, it can be seen that grounds of the highest law in Indonesia has a rule to prioritize written than unwritten law (customary law) in further explanation it states that in a society, if there is still a customary law, then it should be implemented in accordance with the legislation. This means that only unwritten law has a clear scope and traditional material acknowledged by the law. For example, the Aceh Province has an unwritten law amongst society but the law or local government well acknowledges it. Aceh for a long time has a special rule called *Qanun* or usually known as Islamic Law. It is because Aceh is famous as the Veranda of Mecca (Mahdi Syahbandir, 2010). It is expected that the blueprint of criminal code could view the indigenous society's interest alongside the value of Pancasila, human rights, and the national principle that is implemented by all society.

The Existence of Customary Law as Society's Conflict Solution

As a part that gives dynamic to society, the customary law is no separated from various social interactions both controlling considerably good or poor behaviour. Realistically, customary law is a ground for indigenous figures in implementing social sanctions to whoever commits a violation. Customary law is built through paradigm, harmony, nature, and characteristic (Jenni Kristiana Matuankotta, 2018).

In criminal law, the role of customary criminal justice is still abstract to experts and academician which is hard to accept. This nature is considered normal since until now the principle of legality is still effective to represent justice, this rose a stigma that the real form of customary law is separated with a thorn fence from the national criminal system (Elwi Danil, 2012). Even if the resolution through customary law is hardly heard in the modern era, it cannot be denied that in indigenous people, especially for them who held firmly and maintain the ancestor's choice to make custom as a way to control the social system as the right way, recalling that the judiciary path takes a lot of time and budget. Therefore, people prefer to use customary law for marriage to criminal act such as stealing and fighting that could solve through the mediation of disputing parties.

For example, cases of ethnic conflict that occurred in parts of Lampung, such as cases of clashes between groups that have occurred in South Lampung Regency. The incident allegedly arose as a result of people who wanted to bring in the conflict between the two parties. In order to create harmony and a sense of peace, an agreement was made that the misunderstanding was resolved in a customary manner by gathering representatives of traditional leaders from both parties accompanied by police officers (Detik News, 2012). In addition to handling social conflict issues that lead to criminal cases of customary law, sometimes it is also used by some Lampung traditional communities in marital problems or commonly known as *sebambangan* (elopement), many reasons arise why most Lampung traditional communities still carry out these traditions including *sebambangan* is a shortcut if the woman's family does not approve of their relationship or because the conditions requested by the woman's family are too burdensome. *Sebambangan* itself can be done if the woman has approved it if she wants to take the path to perform *Sebambangan*. *Sebambangan* is now more frequent by young couples who are considered by the law as minors (Dian Anggraini, 2016). Society's habit in solving their problems using family methods through customary institutions should be appreciated because they can accelerate the process of problem-solving and ease the national legal system and promote the principle of fraternity to create the third principle in Pancasila, namely the unity of Indonesia.

The diversity of ethnicity, ethnicity, and religion in Indonesia cause the society to adjust to all differences that cause social conflict. Technological developments in the digital age forces indigenous people adjust the era without eliminating the customs adopted. The solution of problems by using customary law makes the bond of fraternity between the people stronger. On the one hand, besides having the police as law enforcement officers to resolve the problem by the customary institution, this system also helps the law enforcement to gain trust from society and has the integrity as a protector of the nation. When someone chooses to be a part of social interaction, they are also required to accept the consequence, including the consequence of social conflicts. Therefore, the role of traditional leaders, law enforcement agencies, and representatives of traditional institutions are as medium for mediation is needed to minimize and mitigate issues ahead (Sri Warjiati, 2018). As long as customary law is still in harmony with the legislation and its freedom is not abused, it is natural that in every government hierarchy are obliged to preserve it and make a ground norm to stabilize the space for customary law to be in harmony existing national law.

The House of Representatives of Republic of Indonesia's participation in as an active role in seeing all conditions of indigenous peoples is needed so that later they can be considered for issuing a draft law sourced from indigenous peoples (Sri Warjiati, 2018). The customary law method in resolving a conflict always prioritizes a way of deliberation between the perpetrators and victims (restorative justice). Therefore, parties can achieve peace and no similar situation will occur in the future. With a settlement like this expected between the two parties, the agreement is a justice to be achieved or there are no terms of loosing and winning (Ali Abubakar, 2014). Indonesia is a country that highly respects spiritual values. The community believes that customary law is a set of rules that originate from religious, aesthetic and moral norms so everything regulated in the customary law has good meaning. No wonder in some region, some traditions attract tourists' interests. Even though customary law is not recognized in the principle of legality contained in the Criminal Code but it does not mean that its existence has faded in regards as society's grounds if mannerism (Elwi Danil, 2012).

Conflicts between ethnicity tend to happen in Indonesia but this problem is a common thing because Indonesia has many racial and ethnic differences, its resolution is difficult to handle, but it does not mean that it cannot be resolved. There is a lot of ways to solve a problem based on the principle of kinship. One of them is meditating without having to go through a legal process in court (mediation of the penalties). This step is carried out in order to maintain the continuity of harmony in establishing social life and to revive the role of traditional leaders in the midst of current times (Trisno Raharjo, 2010). Self mediation according to Ms Toulemonde is a case settlement process by means of deliberation (negotiation) involving both parties that are problematic namely between the victim as the injured party and the perpetrator as the person who made a mistake (Cahyono, 2019). Although the current national law has been applied for a long time, it the criminal code in Indonesia of the entire judicial system in Indonesia is not widely in harmony with the culture and waves of community life, especially for those who live in rural areas, most of which have characteristics of customary culture and religious norms. Therefore, what is listed in each article of the legal system of written law is sometimes unnecessary for the customary justice system and the contribution of national law in such areas will not be seen clearly (Trisno Raharjo, 2010).

CONCLUSION

Based on the research above, we can conclude on the worthiness and importance to have the customary law as a part of national law renewal hierarchy. The urgency on era development and the unlikely functions on the Netherlands' Criminal Code motivate the Indonesian Government to create and validate a new blueprint of criminal code as a pure Indonesia's national law product. The worthiness of customary law to be involved in the criminal law renewal is based on the

real proof that in most parts of society, especially those who hold firmly to norms and tradition in conflict resolution. Society's belief and effectiveness of a customary institution could solve issues peacefully without pressuring parties. This ground is expected as a consideration by the government in the renewal of national system order. Moreover, this is a form of preservation of indigenous people's local culture to maintain the historical value of the nation and the traditional rights it held.

Advice

It is expected that the government will have the customary law as a part of the national law system by prioritizing the society's interest and justice. Therefore, what is known as an identity of Indonesia will note be faded out by era development due to foreign cultures impact. Besides making customary law as a part of the criminal law of Indonesia, it is also to keep in mind that the government could use this customary law in an effort to improve the national economic sectors by inviting researches and foreign institution to visit rural is that majority have low income. By having tourist, that area could experience improvement of potentially untouched income.

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REFERENCES

1. Ali Abubakar (2014) Urgensi Penyelesaian Kasus Pidana Dengan Hukum Adat. *MADANIA* XVIII (1): 57-66.
2. Anisa Utami, Puji Astuti, Turtiantoro (2014) Resolusi Konflik Antar Etnis Kabupaten Lampung Selatan (Studi Kasus: Konflik Suku Bali Desa Balinuraga dan Suku Lampung Desa Agom Kabupaten Lampung Selatan). *Journal of Politic and Government Studies.* 3 (2): 126-132.
3. Budi Suhariyanto (2018) Problema Penyerapan Adat Oleh Pengadilan Dan Pengaruhnya Bagi Pembaharuan Hukum Pidana Nasional. *Mimbar Hukum* 30 (3): 421-435. https://doi.org/10.22146/jmh.33227
4. Cahyono (2019) *Model Mediasi Penal Dalam Penanggulangan Konflik Kekerasan (Carok) Masyarakat Madura Berdasarkan Local Wisdom.* Yogyakarta: Deepublish.
5. Dian Anggraini (2016) Budaya Lampung Dalam Cerpen "Sebambangan" Karya Budi P. Hatees. *Aksara* 28 (1): 49-62.
6. Eka Susylawati (2009) Eksistensi Hukum Adat Dalam Sistem Hukum di Indonesia. *al-Ihkâm* 4 (1): 125-140.
7. Elwi Danil (2012) Konstitusionalitas Penerapan Hukum Adat dalam Penyelesaian Perkara Pidana. *Jurnal Konstitusi* 9 (3): 536-596.
8. Herlambang (2012) Membangun Asas-Asas Peradilan Adat. *Kanun Jurnal Ilmu Hukum* 14 (1): 85-117.
a. http://dx.doi.org/10.29255/aksara.v29i1.100.49-62
9. I Gede A.B W (2009) *Hukum Adat Di Persimpangan.* Bandar Lampung: Universitas Lampung.
10. I Ketut Sudantra, Ni Nyoman Sukerti (2014) Pengaturan Peradilan Adat Dalam Awig-Awig Desa Pakraman: Studi Pendahuluan Tentang Eksistensi Peradilan Adat Dalam Kesatuan Masyarakat Hukum Adat Desa Pakraman. *Jurnal Magister Udayana* 6 (2): 310-326. https://doi.org/10.24843/JMHU.2014.v03.i02.p06
11. Jenni Kristiana Matuankotta (2018) Peran Aktif Masyarakat Hukum Adat Dalam Pembangunan Ekonomi. *SASI* 24 (2): 101-113.
12. Lastuti Abubakar (2013) Revitalisasi Hukum Adat Sebagai Sumber Hukum Dalam Membangun Sistem Hukum Indonesia. *Jurnal Dinamika Hukum* 13 (2): 319-331. http://dx.doi.org/10.20884/1.jdh.2013.13.2.213
13. Mahdi Syahbandir (2010) Kedudukan Hukum Adat Dalam Sistem Hukum. *KANUN* 12(1): 1-13.
14. Marco Manarisip (2012) Eksistensi Pidana Adat Dalam Hukum Nasional. *Lex Crimen*, 1 (4): 24-40.
15. News, Detik. 2012. *Redakan Konflik, Raja Bali & Ketua Adat Lampung Buat Maklumat Bersama*. Available at https://news.detik.com/berita/2081098/redakan-konflik-raja-bali--ketua-adat-lampung-buat-maklumat-bersama (accessed 21 Oktober 2019).
16. Nyoman Serikat Putra Jaya (2016) Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional. *Masalah-Masalah Hukum* 45 (2): 123-130. 10.14710/mmh.45.2.2016.123-130
17. Reimon Supusesa (2012) Eksistensi Hukum Delik Adat dalam Perspektif Pembaharuan Hukum Pidana di Maluku Tengah. *Mimbar Hukum* 24 (1): 41-54. https://doi.org/10.22146/jmh.16148
18. Riezka Eka Mayasari (2017) Tantangan Hukum Adat Dalam Era Globalisasi Sebagai *Living Law* Dalam Sistem Hukum Nasional. *Jurnal Equitable* 2 (1): 94-114.
19. Rizani P (2006) *Hukum Adat Dalam Tebaran Pemikiran.* Bandar Lampung: Universitas Lampung.
20. Sri Warjiati (2018) Eksistensi Hukum Adat Dalam Penyelesaian Konflik Pada Daerah Otonom. *AHKAM* 6 (2): 389-410. 10.21274/ahkam.2018.6.2.389-410
21. Sulastriono, Sartika Intaning Pradhani (2018) "Pemikiran Hukum Adat Djojodigoeno Dan Relevansinya Kini."*Mimbar Hukum*, Vol. 30 (3): 448-462. https://doi.org/10.22146/jmh.36956
22. Syahril Haq, Hilman, Hery Sumanto (2016) Mengukuhkan Eksistensi Hukum Adat Dalam Sistem Hukum Indonesia (Studi terhadap Pengembangan Kelembagaan Mediasi Komunitas). *Yustisia Merdeka* 2 (2): 15-26.
23. Trisno Raharjo (2010) Mediasi Pidana dalam Ketentuan Hukum Pidana Adat. *Jurnal Hukum* 17 (3): 492-519. https://doi.org/10.20885/iustum.vol17.iss3.art8
24. Yanis Maladi (2010) Eksistensi Hukum Adat Dalam Konstitusi Negara Pascaamandemen. *Mimbar Hukum* 22 (3): 450-464. https://doi.org/10.22146/jmh.16235
25. Mir Javid Iqbal, Mohammad Ishaq Geer , Parvez Ahmad Dar. "Medicines Management in Hospitals: A Supply Chain Perspective." Systematic Reviews in Pharmacy 8.1 (2017), 80-85. Print. doi:10.5530/srp.2017.1.14