FORMULATION OF CUSTOMARY CRIMINAL LAW FROM THE PERSPECTIVE OF JUDGES IN LEGAL FINDINGS

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ABSTRACT

Objective: This study aims to identify and analyze how customary judges' application of criminal sanctions results from disclosing the law through decisions on customary criminal cases.

Method: This study employs empirical legal research methods by analyzing criminal cases and utilizing both primary and secondary data to produce qualitative descriptive data.

Result: The customary criminal sanctions applied due to the analysis of legal findings by the judge's decision are considered quite effective and capable of being directed forward because customary criminal sanctions provide a deterrent effect consisting of social and criminal sanctions as sanctions for customary crimes.

Conclusion: The regulation of customary criminal law still needs updating and legal discovery because there are still no statutory rules that concretely regulate customary criminal law. In addition, the formation of rules or legal discoveries through decisions as mentioned above needs to be adapted to developments in national criminal law.

Keywords: law, customary crime, customary sanctions, judge.

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FORMULAÇÃO DO DIREITO PENAL COSTUMÁRIO SOB A PERSPECTIVA DOS JUÍZES EM CONCLUSÕES JURÍDICAS

RESUMO

Objetivo: Este estudo visa identificar e analisar como a aplicação de sanções penais por juízes consuetudinários resulta da divulgação da lei por meio de decisões sobre casos criminais costumetos.

Método: Este estudo emprega métodos de pesquisa jurídica empírica, analisando casos criminais e utilizando dados primários e secundários para produzir dados descritivos qualitativos.

Resultado: As sanções penais consuetudinárias aplicadas a partir da análise das conclusões legais pela decisão do juiz são consideradas bastante eficazes e passíveis de serem encaminhadas adiante, pois as sanções penais consuetudinárias proporcionam um efeito dissuasor que consiste em sanções sociais e criminais como sanções para os crimes consuetudinários.

Conclusão: A regulamentação do direito penal consuetudinário ainda carece de atualização e descoberta jurídica, pois ainda não existem normas estatutárias que regulem concretamente o direito penal consuetudinário. Além disso, a formação de regras ou descobertas legais por meio de decisões conforme mencionado acima precisa ser adaptada aos desenvolvimentos do direito penal nacional.

Palavras-chave: direito, crime costumheiro, sanções costumetias, juiz.

1 INTRODUCTION

Indonesia is a country that has a wealth of culture. Cultural diversity in Indonesia is so embedded in every aspect of people's lives which then influences the formation of laws that regulate people's behavior in the sense that society cannot be completely separated from culture. One of the cultural products is rules created by the people themselves or what can be called customary law.

Customary law is the oldest law in Indonesia. Customary law is a law that has a broad scope in the form of written or unwritten rules. According to C. Van Vollen-hoven customary law is the whole of behavior that regulates human behavior in the life of society which is customary and at the same time has or provides sanctions for anyone who violates it and there are efforts to force (Nugroho, 2016). Through this definition, the criteria for customary law itself emerge, namely the existence of rules of conduct that regulate human life, is behavior that has sanctions, has efforts to force and provide sanctions for anyone who violates it.

In its application, customary law has a broad scope as mentioned above. Customary law is divided into customary criminal law, customary civil law, customary
constitutional law, and others. One of the areas of customary law that has undergone renewal is customary criminal law. According to I Made Widnyana, customary criminal law is a living law, followed and obeyed by indigenous peoples continuously, from one generation to the next. Violation of these rules of conduct is seen as causing upheaval in society because they are considered to disturb the cosmic balance of society, therefore, the offender is given a customary reaction, customary correction, or customary sanctions by the community through their customary administrators (Widnyana, 1993).

Criminal law in the context of customary criminal law as explained by Ter Haar according to the conception of customary law, if there is an act of violating the provisions of customary norms, then customary sanctions are essentially customary reactions, the content is not in the form of torture or suffering but the main thing is to restore kosmisch, which is interrupted as a result of the breach. Just as Soepomo gave a brief understanding of customary criminal law, according to him all actions that conflict with customary law regulations are illegal acts and customary law also recognizes efforts to revise the law ("rechtsherstei"). (Dewa & Rasta, 2019)

Customary criminal law has been embedded in customary regional communities along with customary sanctions contained therein, but currently judges in finding laws still use statutory rules that are regulated explicitly. Therefore, legal renewal is still needed in determining criminal sanctions, especially customary criminal sanctions. In this study, the authors aim to help find formulations or formulate law through customary criminal law decisions and identify how customary criminal sanctions can continue to be oriented forward in the existence of criminal law in Indonesia.

The problems that will be discussed later in this study are about how the judge's legal findings consider customary criminal law in their decisions and regarding how the future orientation of customary criminal sanctions is to convict perpetrators of criminal acts. The purpose of this research is definitely to find, analyze, and examine the decisions of judges who apply customary criminal law and to find and analyze the legal findings of judges considering customary criminal law in their decisions.

The urgency of research priority consists of three parts. The first is theoretically, which is to contribute theoretical thoughts related to "Ius Costituendum", namely a legal construction concept in formulating criminal sanctions that can fulfill the purpose of punishment in resolving customary criminal cases in criminal law science in general and in particular in national criminal law. The second is practically, namely providing a
contribution of thought in solving legal problems, especially with regard to fulfilling the objectives of punishment in solving customary criminal cases for law enforcers and the government in the national criminal law in the future. Finally, as a contribution to conceptual thinking for the government in the context of efforts to renew or establish a national criminal law.

2 THEORETICAL FRAMEWORK

2.1 JUDGE’S DECISION

A decision can be said to be a good decision if at least it meets two requirements, namely theoretical needs and practical needs. Theoretical needs can be fulfilled when judging from the contents, a decision can be accounted for from a legal or juridical verantwoord point of view and when the judge's decision can give rise to a new legal form (Afandi & Dan, 19 C.E.). As for it can be said that the practical needs can be met is when the judge's decision can resolve a legal issue or legal dispute and the decision can be accepted by the parties concerned, especially by the public because the decision is considered fair, correct, and can be accounted for based on law. The judge's decision in court should ideally not create new problems in society, meaning that the quality of the judge's decision affects the authority and credibility of the court as an institution (Utara & Utara, 2023). However, it needs to be emphasized, decisions that are only taken based on the consideration of judges and juridically, decisions like this do not have standard references so that it can be said that decisions do not necessarily fulfill the existing aspects of certainty, justice and benefit which cannot ignore legal ideas from Indonesia (Mappong & Lili, 2023).

2.2 CUSTOMARY CRIMINAL LAW

Hilman Hadikusuma argues that customary criminal law is a law that shows events and actions that must be resolved (punished) because these events and actions have disrupted the balance of society (Hadikusumah, 1989). Such an act creates a reaction whose nature and magnitude are determined by customary law (adat reactive), due to which the balance can and must be restored. So that it can be said as an ordinary crime, then the act must be able to shake the balance in society. The shock does not only come when the legal regulations of an organization are violated, but also when the norms of decency, religion, and manners in society are violated.
Soepomo explained in more detail that between acts that can be punished and actions that only have consequences in civil areas, there is no difference in structures (Soepomo, 1967). That is, between "criminal law" and "civil law" where the difference in structure is distinguished by its territory in positive law, in customary criminal law there is no distinction between that structure. Whether it is included in the criminal or civil area, as long as it "disturbs the balance" of society, it is categorized as a delict or a criminal act. Customary criminal law or custohilmanmary offenses regulate actions that violate the sense of justice and propriety that lives in society, thus disrupting the peace and balance of society. To restore peace and balance, there was a customary reaction.

2.3 CUSTOMARY SANCTIONS

Talking about sanctions, the problem generally leads to criminal law, even though it is known that customary law does not recognize the difference between civil violations and criminal (private or public) violations. Criminal law is part of the overall law or applicable law that regulates prohibited acts accompanied by sanctions in the form of a crime. It can be said that criminal law is a legal (criminal) sanction. To understand the sanctions in customary offenses, one cannot study them using Western legal concepts. Customary law does not have a closed violation system. Customary law does not recognize a system of law violations that has been determined beforehand as is the case with Article 1 paragraph 1 KHUP, although it is known that customary law does not recognize the difference between civil violations and criminal (private or public) violations. The manifestations of customary sanctions vary, depending on the values and feelings of justice of the people concerned. Apart from being a stabilizer, resistance to customary sanctions is also a preventive and repressive action so that it can become a social control for the community, especially in customary areas (NUR ROCHAETI dkk, 2023).

3 RESEARCH METHODOLOGY

The type of research used in this journal is empirical legal research (MA., 2009). Empirical legal research is a legal research method that seeks to see the law in a real sense or can be said to see, and examine how the law works in society, which then uses a qualitative approach (Prof. Dr. Lexy J. Moeloeng, 2006). A qualitative approach is usually used to produce descriptive data in the form of written or spoken words from the
person or behavior being observed and further strengthened by primary and secondary data sources (Soekanto, 1986).

4 DISCUSSION

4.1 LEGAL FINDINGS BY JUDGES IN CONSIDERING CUSTOMARY CRIMINAL LAWS IN THEIR DECISIONS

4.1.1 Discovery of Law by Judges

In deciding a case, a judge must also look for the law if there is a legal vacuum, because a judge may not decide a case without being based on a law. or it is not clear to serve as a legal basis in deciding cases, the law is searched for, found, supplemented, and explained using legal discovery.

The process of legal discovery is the formation of law by judges or other legal officers who have the task of implementing the law on concrete legal events. Legal discovery is carried out because there are times when laws are incomplete or have unclear interpretations. Thus the judge must seek the law and must find the law. This is known as legal discovery or rechtsvinding. The theory of legal discovery then answers questions regarding legal interpretation or interpretation of the law (Hidayat, 2013).

The legal basis that can be used in finding a law by a judge is Law Number 48 of 2009, Regarding Judicial Power, article 10 which reads "The court may not refuse to examine, try, and decide on a case filed because the law does not exist or is unclear.", but it is obligatory to examine and judge him." In this article, there is the meaning of the adage or principle of Ius Coria Novit, namely that judges are considered to know the law. Departing from this adage, the judge in deciding a case must know what law must be used and which rules must be applied in making a decision. Thus, the judge has the authority to determine which objective law must be applied by the subject matter of the case which concerns the legal relationship of the litigants in concretions.

Judges can create legal norms through the mechanism of finding the law as implied in Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Powers, but in adjudicating a case one must first use written law if written law is insufficient or inappropriate If there is a problem in a case, then the judge will seek and find the law himself. Second, article 77 of the Criminal Procedure Code is a limitation, so that legal discovery is limited to objects that have been regulated in that article, but the pretrial decisions that have existed to date have shown that judges use different legal discovery
methods, so there must be rules regarding the limitations of judges in making legal discoveries. Legal findings by these judges can be through court decisions from previous cases which later affect the decisions made by judges in deciding a case.

4.1.2 Customary Criminal Law and Decisions on Customary Criminal Cases

Customary criminal law is a law that is limited and applies to certain indigenous peoples, there is no customary criminal law that can apply to all Indonesian people. Customary criminal law is still valid as long as the indigenous peoples exist, but the force of its application depends on circumstances, time, and place. Customary punishment can apply even though it is not written in the form of statutory regulations because the nature and legal sanctions and the method of the settlement are to the times and conditions of society in other words customary law is a dynamic law. Even though the customary court no longer exists, the customary court or village peace court is still alive and recognized by Emergency Law Number 1 of 1951.

Even though no law recognizes it, in everyday society, the peace trial continues to operate by the people's awareness and the people's sense of justice. It is true that for crimes such as murder, theft, and property offenses, people generally accept the Criminal Code, but because the general criminal law's capacity is limited at the court, and will not be able to serve every interest in the sense of justice in society, efforts are still needed - customary efforts to be able to restore the balance of disturbed society.

Furthermore, the identification of the legal basis implicit in statutory regulations can be used as the basis for the application of customary criminal law. Several legal bases can be used as a basis for the enactment of Customary Law in Indonesia at this time, including:

a. The provisions of the 1945 Constitution in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, which regulated in law". This article clearly states that indigenous peoples are recognized and respected for their units and their traditional rights because that is why it is necessary to have customary law and customary criminal law.
b. UU Drt. No. 1 of 1951 concerning temporary measures to organize the unified structure, powers, and procedures of civil courts. Article 1 paragraph 2 of the Law Drt. 1 of 1951 gradually determined by the minister of justice, removed:
• All autonomous courts except the Islamic courts in the former East Sumatra, West Kalimantan, and formerly East Indonesian states.
• All customary courts except Islamic courts. Article 1 paragraph 3 of the Law Drt. No. 1 of 1951 the village magistrate was retained.

c. UU no. 5 of 1960 concerning the UUPA Article 2 paragraph (4) UUPA regulates the delegation of authority back to the customary law community to exercise their right to control over land so that the customary law community is the implementing apparatus of the state's right to control over land in its territory.
• Article 3 of the UUPA that the implementation of customary rights of the Customary Law community, insofar as in reality it must be such that it is by national and state interests, based on national unity, and may not conflict with laws or higher regulations.
• Article 5 of the BAL states that the Agrarian Law that applies to land, water, air, and space is Customary Law as long as (with limitations) it does not conflict with national, state, socialist, and law interests.
• Article 22 UUPA the occurrence of property rights based on customary law provisions will be regulated by PP

d. UU no. 4 of 2004 which replaced Law no. 14 of 1970 concerning Main Provisions of Judicial Power.
• Article 25 paragraph (1) which contains all court decisions besides having to contain the grounds for the decision, must also contain certain articles of the regulations concerned or unwritten sources of law which are used as the basis for adjudicating.
• Article 28 paragraph (1) which contains judges as enforcers of law and justice are required to explore, follow and understand the legal values that live in society.

e. Law No. 39 of 1999 concerning Human Rights, may be referred to as the operationalization of TAP MPR XVII/1998 which emphasizes that the rights of indigenous peoples are part of human rights. Article 6 of Law No.39/1999, states:
"In the context of upholding human rights, the differences and needs of indigenous and tribal peoples must be considered and protected by law, society, and the government."

"The cultural identity of indigenous and tribal peoples, including their rights to customary land is protected, in line with the times."

The elucidation of Article 6 paragraph (1) of this Law states that "customary rights" which are still valid and upheld within the customary law community must be respected and protected in the context of protecting and upholding human rights in the community concerned by taking into account laws and regulations. While the explanation for paragraph (2) states that in the context of upholding human rights, the national cultural identity of indigenous peoples, customary rights that are still firmly held by local customary law communities are still respected and protected as long as they do not conflict with the principle of state law with the core of justice and people's welfare.

As mentioned above, the rules regarding customary criminal law are only regulated explicitly in law, because not all customary rules in an area can be adopted by applicable national law. The new Criminal Code has regulated customary law crimes. The customary criminal law will be outlined in the form of regional regulations later by the origin of the customary law, for example in Bali, Minangkabau, South Sulawesi, Papua, and other regions. However, this can be realized when the Criminal Code is enacted later. Currently, judges in finding customary criminal law still use the guidelines for statutory rules that are regulated explicitly as mentioned above, and use customary law that is applied in that area. Therefore the need for a legal discovery, one of which is through court decisions regarding customary crimes.

One example of legal discovery by judges can be seen through decisions in the Denpasar District Court which are based on or are still related to Balinese customary crimes. The following are two examples of decisions related to Balinese customary crimes:

• Decision Number 997/Pid.Sus/2019/PN Dps

Decision Number 997/Pid.Sus/2019/PN Dps is a case related to the Loka Sanggraha crime, which started when the Defendant was dating the Victim. During their courtship, the victim and the defendant had intercourse several times with the promise that the defendant would marry the victim if she became pregnant. Until finally the victim became pregnant, and based on DNA results it was known that the Defendant was the
biological father of the child born to the victim. The Defendant's actions were later found guilty by the Panel of Judges of violating Article 5 paragraph (3) letter b of the Emergency Law Number 1 of 1951 in conjunction with Article 359 of the Adhigama Book concerning Lokika Sanggraha. Regarding this case, the Panel of Judges issued a decision declaring that the Defendant had been legally and convincingly proven guilty of committing the Lokika Sanggraha crime and sentenced the Defendant to imprisonment with imprisonment for 1 (one) month and 15 (fifteen) days;

• Decision Number 967/Pid.B/2013/PN Dps

Decision Number 967/Pid.B/2013/PN Dps is a case related to theft under aggravating circumstances as charged with Article 363 paragraph (1) 4th and 5th of the Criminal Code. In this case the Defendants, namely Defendant 1, Defendant 2, Defendant 3, and Defendant 4 were charged with a single indictment of Article 363 paragraph (1) 4th and 5th of the Criminal Code for committing theft of sacred or prima items owned by Pemempon Pura Sada at Br Pemebetan, Mengwi, Badung. In their considerations, the Panel of Judges considered aggravating matters, one of which was "the actions of the Defendants harmed the disgraceful act of insulting the holy places of Hindus which were very sacred" and "as a result of the actions of the Defendants, the Pempon Pura Sada Kapal carried out a ceremony to restore the sanctity of the temple and to replace Pretima which was taken by the Defendants which cost a lot of money”. For his actions, the Panel of Judges passed a Decision stating that the Defendants had been legally and convincingly proven guilty of committing the crime of theft under aggravating circumstances and sentenced the Defendants to prison for 3 years each;

From the two decisions, it is known that Balinese customary crimes are still alive and being tried at the Denpasar District Court. The two decisions serve as examples in illustrating differences in the application of customary crimes under Law Number 1 of 1951. In Decision Number 997/Pid.Sus/2019/PN Dps, the customary crimes being tried are customary crimes that do not yet have equivalent rules and punishment, so that the Panel of Judges based directly on Article 359 of the Adhigama Book as the single indictment of the Public Prosecutor. Whereas in Decision Number 967/Pid.B/2013/PN Dps, the customary crime that was tried already has an equivalent in the Criminal Code, namely Article 363 paragraph (1) 4th and 5th relating to theft under aggravating circumstances.
The discovery of the law by the judge in Decision Number 997/Pid.Sus/2019/PN Dps above was carried out because there are no regulations regarding criminal acts of customary violations that are regulated in law so judges need to make legal discoveries that are by adat in the area. Lokika Sanggraha’s crime as stated in the decision is a crime that is also a violation of customary law in Bali, so that in solving it it must use legal and customary rules which then led to a legal discovery by the judge which resulted in customary criminal sanctions. Whereas in decision Number 967/Pid.B/2013/PN Dps regarding burdensome theft, there is already a law that regulates it in our Criminal Code, so judges only need to stick to the rules contained in the Criminal Code.

4.2 FUTURE ORIENTATION REGARDING CUSTOMARY CRIMINAL SANCTIONS IN CONVICTING PERPETRATORS OF CRIMINAL ACTS

Article 5 paragraph (3) letter b of Law Drt 1/1951 explains that customary crimes have no equal in the Criminal Code, customary crimes have no comparison in the Criminal Code and customary sanctions. Customary sanctions can be used as the main punishment or the main crime by judges in examining and adjudicating acts which according to living law are considered criminal acts that have no equal in the Criminal Code.

The purpose of the Witness (criminal) according to the customary concept is to restore cosmic balance, balance between the world of birth and the world of the unseen, to bring about a sense of peace among fellow citizens. Besides that, the punishment must be fair, meaning that the punishment must be felt fairly by both the judge and the victim or by the community so that the imbalance disappears (Proponoto, 1981).

In current practice, the imposition of customary criminal sanctions will provide a sufficient deterrent effect for perpetrators of criminal acts because they have to carry out their punishment within their customary area which not only has to face criminal sanctions but also social sanctions in their community. The existence of customary sanctions serves as a stabilizer to restore the balance between the world of birth and the world of the unseen. The form of customary sanctions varies depending on the values and feelings of justice of the people concerned. In addition to being a stabilizer, the existence of customary sanctions is also a preventive and repressive measure so that it can become a social control for the community, especially in areas where customary rules are still thick.
Nonetheless, customary criminal sanctions must be adapted to the development of existing criminal law in Indonesia, so that they do not conflict with our national law. Various customary cases, as in the decisions mentioned above, need to be understood together, both by the community, and customary leaders as decision makers, regarding the existence of customary sanctions, especially in the application of these customary sanctions, so that arrogance does not arise in imposing customary sanctions and contradicting national (criminal) law moreover leads to human rights violations.

5 CONCLUSION

The discovery of process law is the formation of law by judges or other legal officers who have the task of carrying out the law on concrete legal events. Legal discovery is carried out because there are times when laws are incomplete or have unclear interpretations. Thus the judge must seek the law and must find the law. The discovery of the law by the judge in decision Number 997/Pid.Sus/2019/PN Dps above was carried out because there were indeed no rules regarding criminal acts of customary violations that were regulated in law or the Criminal Code so judges needed to make legal discoveries by adat in the area.

In current practice, the imposition of customary criminal sanctions will provide a sufficient deterrent effect for perpetrators of criminal acts because they have to carry out punishments within their customary area which not only have to face criminal sanctions but also have to face social sanctions within their community. Customary sanctions function as a stabilizer to restore the balance between the world of birth and the world of the unseen. In addition to being a stabilizer, the existence of customary sanctions is also a preventive and repressive measure so that it can become a social control for the community, especially in customary areas.

SUGGESTION

The regulation of customary criminal law still needs updating and legal discovery because there are still no statutory regulations that concretely regulate customary criminal law. In addition, the formation of rules or legal discoveries through decisions as mentioned above needs to be adjusted to the development of national criminal law. Various customary cases also need to be resolved with the community, and traditional leaders as decision
makers, regarding the existence of customary sanctions, especially in the application of these customary sanctions, so that arrogance does not arise in imposing customary sanctions and contrary to national (criminal) law, let alone leading to human rights violations.
REFERENCES


Dewa, O., & Rasta, M. 2019. TINDAK PIDANA ADAT DI BALI DAN SANKSIADATNYA. Jurnal Yustisia, 13(2).

Dr. Ulber Silalahi MA. 20009. Metode Penelitian Sosial. Bandung: PT. Refika Aditama. hlm. 10


Indonesia. Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia. Jakarta: Sekretariat Negara

Indonesia. Undang-Undang Nomor 5 tahun 1960 Tentang Undang-Undang Pokok Agraria Jakarta: Sekertariat Negara


Maria, dkk. 2023. IMPACTS OF LIVING ON JUDGES’ DECISIONS IN CIVIL DISPUTES IN NORTH SUMATERA. RUSSIAN LAW JOURNAL Volume XI (2023) Issue 4. Hal 537


Nguyen Ving Hung, dkk. 2023. The Freedom to Sue In Vietnam Civil Procedure. RGSA


Zainuddin, Lili. 2023. RIGHT TO SELF SUBMISSION TO WESTERN INHERITANCE LAW FOR THE HEIRS OF ISLAMIC RELIGION WHOM THE PROPERTY LEAVER HAS DIFFERENT RELIGION. Jurnal of Law and Sustainable Development

Development ISSN: 2764-4170. DOI:https://doi.org/10.55908/sdgs.v11i2.423. Hal 6