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URGENCY OF REGULATING LIVING LAW AS CULTURAL IDENTITY OF INDONESIAN SOCIETY IN DRAFT BILL OF INDONESIAN NATIONAL CRIMINAL CODE

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ABSTRACT

The Indonesian criminal code today basically is a legacy of the Dutch colonial. As a sovereign and independent country, the Indonesian nation aspires to have its own criminal law. Until now, the Draft Bill of Indonesian Criminal Code (RKUHP) has not yet been enacted. One of the pros and cons around the drafting process of RKUHP is the inclusion of the laws that living in the society (living law) in to RKUHP as a basis to impose criminal sanctions. The living laws can be seen as customary or adat laws. In this research will be discussed as to whether the existence of adat law as "living law" in Indonesia has accordance with the demands of peoples sense of justice. Also will be discussed how the criminal justice system in Indonesia regulates the status "living law" in order to achieve legal certainty in the enforcement of criminal law itself. The conclusion from this research is the existence of adat law as "living law" in some areas in Indonesia is accordance with the fulfillment of the society's sense of justice. In other areas, the regulation of adat law which categorized as unjust law, it is necessary to be reviewed as it is considered incompatible with the society's sense of justice. To achieve legal certainty requires clear guidelines for the deviation of the principle of legality, and the arrangements of procedural law. Indonesia is plural society, therefore inclusion the living law in the Indonesian criminal justice system is something that must be accommodated.

Keywords: RKUHP, living law, legal certainty.

INTRODUCTION

Law is a product of culture of humanbeing. Legal development is influenced by cultural development and the development of civilization. Indonesian society as a whole cultural community is also undergoing changes that affect the legal system. A part of the legal system will be discussed in this description is Criminal justice system. The criminal law is a law lives very close to the everyday life because it regulates the actions of violations committed by the peoples, whereas these measures will affect the harmony and stability of the community.

According to van Hattum, (in Lamintang, 1996, p.2), criminal law is a whole of principles and rules followed by the state or other public law society, where they are a custodian of public law and order therefore has been prohibit the act that are unlawful and have connected violations of rules with an affliction that is specific form of punishment. From that definition, it seems that in the criminal law, sanctions or penalties should always be connected to the existence of rules. This is known as the principle of legality.

The principle of legality is based on the spirit of respect for human rights and guarantees of the rule of law. Criminal punishment is the imposition of negative sanctions in the form of restriction on the rights of the convicted person; therefore it is need to be limited what actions are categorized as criminal acts. The restriction is carried out by establishing it in legislation. The foundation for the imposition of a criminal sentence is a written law. The imposition of sanctions in the absence of a written law resulted in legal uncertainty.

Issues regarding the principle of legality is now surfaced, along with finalizing the draft of the Criminal Law Code (hereinafter referred to RKUHP), which until now has not been completed. As the current KUHP applies, the RKUHP also embraces the principle of legality, the formulation is:

Article 1 (1): No one can be imprisoned or subjected to the action, unless the deed is done has been established as a crime in the legislation in force at the time they were committed.

The problem is that the RKUHP also stipulated the rules in Section 2:

Article 2:

(1) The provisions referred to in Article 1 (1) **do not diminish the enactment of the living law** which determines that someone should be convicted even if such actions are not regulated in the legislation.

(2) Applicability of living law as referred to section (1) **as long as consistent with the values of Pancasila, human rights, and the general principles of law** recognized by the community of nations.

The substance of the two articles if construed grammatically, seem contradictory. In one side, Article 1 RKUHP adheres to the principle of legality, which states that an act can be imprisoned merely on the basis of a written legal validity. It aims to ensure legal certainty and the protection of human rights. However, the applicability of Article 2 RKUHP as if provide a gap that the validity of the written law can be broken, if there are actions against living law provisions. General Explanation of RKUHP states:

"In the new Book of the Criminal Justice Act is also recognized the criminal acts **based on the living law or formerly known as customary criminal offense** to better satisfy the sense of justice that live in the society. It is a fact that in some areas of the country, there are legal provisions that are unwritten, live and recognized as applicable law in the regions, which determines if any violation of the law is should be convicted. In this case the judge may impose sanctions in the form of "Fulfillment of Local Customary Obligations" to be carried out by the perpetrators of criminal acts. This implies, that the standards, values and norms that live in the local society are still protected to better satisfy the justice that live in a particular society ".

The above explanation identifies the definition of "living law" as "adat law". This raises a lot of debate among legal experts, as the opinion of Widati Wulandari (2013, p.286) states:

"The society in general in everyday life, taking into account that everyone is considered to know the law, should prevent the violation of criminal provisions that are made through formal legislation (state law) and also should give attention to the enactment of customarry offenses.The customarry offenses different from criminal offense under national law, does not apply in Indonesia's territorial sovereignty, but limited to the territory of the adat society concerned. Judges are required to search for and find a living law and considered it in the decision that will be imposed. It is conceivable that the living law is not necessarily identical to the concept of adat law society. The living law (and sense of justice) in the society is not identical with the adat law applicable to and in a limited scope (in certain adat law socities). Adat law is sometimes considered as improperly to reflect the values of law and sense of justice that live (growing) in Indonesian society. "

Contradictive meaning between these two becomes one of the factors hamper the enactment process of RKUHP into positive law. In fact, if we look from the historical aspect, the current Penal Code is Wetboek van Strafrecht voor Nederlandsch Indie (W.v.S), which came into force on 1 January 1918 of the Criminal Code or W.v.S.v.N.I. This is the copie (derivative) of the Wetboek van Strafrecht of Netherland, which finished in 1881 and entered into force in 1886.

That means, the Indonesian Criminal Code today is the product of regulation in the colonial period, in which the contents do not reflect the nation's basic philosophy of Pancasila, and also contents of WvS does not fully comply with the constitution of RI. Therefore it is a matter of urgent for Indonesia as an independent and sovereign state to immediately enact and enforce national criminal law that has been drafted in RKUHP, where the regulation of the criminal law is concerned with the condition of society without putting aside the cultural identity of the nation.

From the above description, the Government of the Republic of Indonesia, in this case the legislators must first have a limitation of certain meaning about what is meant by the "living law", so in terms of RKUHP will be enacted and enforced, the article will not become a trigger of polemic in law enforcement process.

PROBLEM IDENTIFICATION

Based on the background descripted, the problem can be formulated as follows:

1. What is the urgency of setting up "living law" in the Draft KUHP in order to meet the demands of society for the fulfillment of a sense of justice?
2. How does the Indonesian criminal law system regulate the status of "living law" in order to achieve legal certainty in criminal law enforcement?

THE RESEARCH METHOD

This paper is base on normative juridical method and socio-legal research. Soemitro (1982, p.10) states that the normative juridical method refers to the research method by analyzing the data and relating it to the applicable legal rules.

According to Johnny Ibrahim, (2006, p. 128), this study is descriptive analytical research to solve problems, which exist in the present (actual problems), by collecting data, and interpreting. To collect such kind of data, litterature studies were conducted. Because this reseach is also concerned with society, field studies has also done to collect data directly from several purposive samples.

THEORETICAL REVIEW

1. Various Views on Legal Objectives, Legal Certainty and Justice

Law exist is in the community in order to realize various objectives. Each school or schools of law, formulates different legal purposes. Each school gives its respective emphasis on the main purpose of the existence of law. One of the objectives of the existence of law is to create certainty and protection.

Definition of legal certainty by van Apeldoorn (in Sudarsono, 1991, p.193) has two aspects. First of all is the matter of the law can be determined in concrete terms, the parties that seeking for justice want to know what is the law in the particular, before he started with the case. Second, legal certainty means legal security, meaning protection for the parties to the arbitrary powers of the judge.

Justice seekers may be infringed upon their rights when the rule of law itself is uncertain. The arrangement of "living law" elements in RKUHP must be formulated properly so as not to generate potential legal uncertainty. Widati Wulandari (2013, p.288) cites the opinion of David Nelken defines the "living law" as follows:

> *"the living law is the law which dominates law itself eventhough it has not been posited in legal proposition. The source of knowledge of this law is, first the modern legal documents, secondly, direct observation of life, of commerce, of custom and usage, and of all associations, not only those that the law has recognized but also of those it has overlooked and passed by, indeed even of those that the law has recognized but also of those it has overlooked and passed by, indeed even of those that it has disapproved"*

Sudarsono (1991) quotes Apeldoorn; the uncertainty of customary law is greater, because there is no formulation. The history of law also teaches that there is always a need for more assertive certainty that is the so-called codification of the law. The Code or codified law characterizes the school of legism. JP Glastra van Loon classifies two extreme views of the occurrence or growth and development of the law, namely Legism and Freirechtlehre View.

In the view of legism, law is formed only by *wetgeving*, where judges are firmly bound by law and justice as Institutions that mechanically apply the provisions of law on concrete events. While the customary will only gain legal force if it is recognized by law. A second view is Freirechtlehre's view that law is constituted only by the judiciary (*rechtspraak*). In view of the occurrence of law, which develops, today there has developed a doctrine which can further explain the occurrence of law which is a compromise of both views as follows: That law is formed in several ways, firstly because the legislator (*wetgever*) makes general rules, so the judge must apply the law. But the application of laws can not take place mechanically, but rather requires interpretation (interpretation). Therefore, the application of law requires creativity. The middle ground for legism and *Freie Rechtsbewegung* is *Rechtsvinding's* understanding. According to this understanding, judges are bound by law but not as strictly as legisme as they are. Judges have freedom, but freedom is not as free as the views of the school of *Freie Rechtsbewegung*. According to the *Rechtsvinding* school, judges have limited freedom in performing their duties. According to the school of *Interessenjurisprudent*, that legislation is not complete because it is not the only source of law. Judges and other law enforcement have a wide range of freedoms to find the law. To achieve the fairest law, the judge may deviate from the legislation. The most equitable law is the law that guarantees the interests of society and assesses those interests. The judge has *Freies Ermessen*. This school teaches that only regulations that are in accordance with legal awareness and senses of justice are to be exercised by law enforcement, while the measures is the standard of the Judge's own belief whose position is absolutely free (Sudaryanto, 2015, p.69-70).

Sudarsono (1991, p.254) states that according to the doctrine of the decree (*beslissingenler*), the judge is encouraged to carefully consider the rules of customary law to be used in decisions. The judge is bound by the rules that have been manifested in society since the past, he is also bound to the question of which rule of law should be formulated as an appropriate legal provision in future society. In addition, the judge is also free, that he can critically assess his work, by focus to his own legal awareness.

Indonesia as a country with a pruralistic society requires an understanding of the legal meaning from a pruralistic standpoint. Mochtar Kusumaatmadja's theory known as Theory of Development Law, states (Yesmil Anwar, Adang, 2008, p.3): Laws are the overall principles and norms governing human life in society and also includes institutions, and the processes that manifest the validity of the norms in reality. Thus Mochtar Kusumaatmadja states that the law can not be viewed merely as legislations.

The sociological legal justice model as stated by B. Arief Sidharta as the axiological aspect of the law itself that leads to the achievement of the values of justice and expediency simultaneously, which is then followed by legal certainty, the two first-mentioned values become the out comes in the search process (contex of discovery), while the final value is the interest in the context of its application (contex of justification). (Sholehudin, 2011, p.49)

2. **The principle of legality as the Main Principles in Criminal Law Enforcement**

According to Satjipto Rahardjo, (2000, p.47), the principle of law is the broadest foundation for the emergence of a rule of law. This legal principle is worth mentioning as the reason for the emergence of the rule of law or the legis ratio of the rule of law. The principle of law contains ethical values and demands. In the application of criminal law, the principle of law is applied to achieve ethical demands of society that is the establishment of legal certainty and justice.

Criminal law enforcement is bound to the principle of legality. The doctrine of this legality principle is often referred to as *nullum delictum, nulla poena sine praevia lege poenali*, meaning: no offense, no criminal, without preceded by criminal provisions in legislation. Although using Latin, according to Jan Remmelink, the origins of the above adage are not derived from Ancient Roman law. But it was developed by a German jurist named Von Feuerbach, who developed in the nineteenth century and therefore should be regarded as a classical teaching (Fajrimei A Gojar, 2005, p.6). In the tradition of the Civil Law system, there are four aspects that strictly applied the legality principles:

a. Legislation (law):
   Punishment should be based on legislation that is based on written law. Without legislation regulating the prohibited acts, then such actions can not be said as a crime.
b. Retroactivity:
   The provisions of legislation formulating criminal offenses can not be applied retroactively. The imposition of retroactivity is an arbitrariness, which means human rights violations. A person can not be prosecuted on the basis of a retroactive law.
c. *Lex Certa*:
   Lawmakers must clearly define without vague (*nullum crimen sine lege stricta*), so there is no ambiguity regarding the formulation of a prohibited act and sanctioned action.
d. Prohibition of Analogy:
   In brief, the interpretation of the analogy is that if against an act which at the time did not constitute a criminal offense, applied a criminal provision which applicable to another criminal act which has the same nature or the same character as the act, so that both acts are considered analogue With others. Conducting an analogy in applying criminal law will create legal uncertainty. According to van Hattum, application of law by analogy is forbidden in the criminal law, if due to the application of such a formula can expand the offense. (Lamintang, 1996 p.75)

Examples of the application of the principle of legality, for example: until now, no criminal code prohibits the practice of living together outside of marriage. Those who commit such acts can not be convicted even if their actions violated ethics in society.

3. **The Existence of Adat Law in Indonesia**

Customary law is a very unique type of law, which has long been growing in Indonesian society, whose development is in accordance with the needs of existing indigenous communities. Van Vollenhoven states that customary law has existed in Indonesia since hundreds of years ago, long before the arrival of the Dutch. Where indigenous peoples of Indonesia have already embraced and live their own legal order known adat law (Soemadiningrat, 2011, p.7).

The term common law has long been known in Indonesia, as in Aceh on the Sultan Iskandar Muda government. The term of customary law is found in the book of the law at that time, which in its preamble contained that a judge must pay attention to one of the customary law in the examination of his case. That term is recorded by Christian Snouck, when he was doing research in Aceh in 1891-1892 for the benefit of the Dutch government, which translate into Dutch

term "*Indigenous-Recht*". Research results outlined in the book De Atjehers (Acehnese) in 1894. (D.Wulansari, 2010, p.2) The term Adat-Recht better known since it was used by Cornelius Van Vollenhoven in the three-volume of his book entitled Het Adat-Recht van Nederlandsch (Dutch Indies Customary Law). Adat law is a term used to refer to the applicable law for indigenous people of Indonesia.

Hilman Hadikusumah, confirmed that the normative Indonesian Custom Law generally shows the following features:

1. Traditional
2. Religious
3. Communal
4. Concrete And Visual
5. Open And Simple
6. Can Be Changed And Adjusted
7. Not Codified
8. Deliberation and Consensus

Adat law also regulates the imposition of consequences on adat violations (customs offenses), where such acts allegedly disturb the balance of the society. Tolib Setiady (2009, p.345) states that adat law offense (adatrecht delicten) or customary criminal law or customary law violation are the rules of adat law governing the events or acts of error that result in disruption of the balance of society, so it needs to be resolved or punished in order that the balance of society is not disturbed. The definition of the offense according to Suartha (2015, p.201) is a unilateral act of a person or group of people, threatening to offend or disturb the balance and community life, is material or immaterial, against a person or against society in the form of unity of action thus lead a customary reaction.

4. Law Renewal and Renewal of Criminal Justice Policy in Order to Accommodate the Cultural Identity of the Indonesia Nation

Legal reform is promoted by positivistic school that sees the law as a closed system. Afterwards raise the legal realism school which views that the law is not only a closed normative system. Law reformers are oriented on living law.

Legal changes inevitably accompanied by changes in policy / policies. According to March Ancel, the Penal Policy or criminal law policy is both a science and an art that ultimately has a practical purpose to enable the positive legal regulations to be better formulated and to provide guidance not only to legislators but also to courts that apply the law and also to the organizers or executor of court decisions. (Y.Anwar, Adang, 2008, p. 58).

There are several things to consider, and the characteristics / characters that must be understood in the renewal of Indonesian criminal law, in result national criminal law will have the characteristics of Indonesia. First, Indonesian society is a pluralistic society that has a diversity of customs and cultures of which has its own customary legal system, which must be protected, respected and acknowledged. Second, that the people of Indonesia have diversity and beliefs/belief systems (the religious system). Religious values are very influential in society, even in adat law and governance of social interaction. Third, as an independent state and modern country, Indonesia also has a desire to build its own legal system which is characterized by Indonesia. And fourth, that Indonesia can not be separated from the influence of the International development, relationships between nations. The issues of human rights, democratization and political-economic world / global pressure in shaping and developing a national law. (M.Najih, 2014, P.23).

The draft of National Criminal Code seeks to accommodate the existence of living law or the law that live in society, within the codification of the written law. In this case there is an effort to integrate the written law with unwritten law. According to Muladi, the Draft of Criminal Code has a dynamic Indonesian principle (equilibrium) which contains elements:

a) The equilibrium principle based on Pancasila (religious morality, humanity, nationality, democracy / populist, social justice / non-discriminatory)
b) B) Real National conditions, socio-cultural conditions, social political, social, historical,
c) C) Adjustment to the development of scientific doctrine,
d) Adjustment to the basic idea of international agreements.

In this matter it appears that Pancasila became the basic philosophy of criminal law enactment which until now is still *ius constituendum*. The applicable criminal law is expected to reflect the noble values contained in Pancasila, one of which is religious moral values

ANALYSIS AND DELIBERATION

1. Living Law and Society's Sense of Justice

Nowaday, the existence of living law in some places is increasingly displaced by the development of a modern legal paradigm that requires a straightforward, objective, rational legal nature and is established by the competent authority. Nevertheless in Indonesia, many regions still place living law in an important position. For example, based on research by the author, the people in the province of Bali still hold strong customs, as well as people in Sulawesi (Bugis tribe, Toraja tribe).

Based on the results of interviews conducted in Penglipuran Village community on February 3, 2017, it was found that customary law as living law still exists, understood and obeyed by society. Because based on the public confidence, the values of justice can be extracted and manifested from the living law. As for example in Bali, in the Penglipuran Village area of Bangli regency, the community believes the importance of obeying customary law because customary law regulates matters pertaining to the concept of *Tri Hita Karana*. Customary law regulates community life in the field of security (human relations); Cleanliness (human relationships with the environment), and religion (human relationship with the Creator), and by obeying the customary law, the equilibrium / harmony in life can be achieved.

In Penglipuran Viillage imposed severe restrictions on polygamy action. If there are members of the community who violate the provisions, polygamist perpetrators will be exiled in Karang Memadu. As a sanction, the concerned should not step on the shrine while still having more than one wife. The reason why indigenous peoples of Penglipuran banned polygamy action are to unconditionally respect women (first wife) who had accompanied the man from the beginning. The action of polygamy is believed to be an action that can lead to conflict and disrupt the harmony of human relationships.

Besides Bali, there are Bugis tribe communities where customary law is still valid and enforced. One of them is silariang customs offense. Silariang offense is the act of doing Elope (married without the consent of the families). This offense is considered humiliating and demeaning to women's families.

In general Bugis-Makassar tribe society still holds the costums, although in practice along with the times, adherence to the values of the spiritual from the Bugis Makassar customs are no longer fully in accordance with the advice of indigenous ancestors (crushed by the times / modernity). For instance, in the Bugis Makassar there is a value known as Siri na Pacce term, that is the advice that requires people to care between the members of the tribe, unity feeling in misery and unity feeling in virtue.

Djojodigoeno stated that customary law has formal and material elements. The formal element of customary law is its unwritten characteristic. This formal element is manifested in the decision of adat authorities in the conflict resolution process. The material element of customary law is a set of norms expressing a sense of justice in the social relations between people.

According to Koesno, in a book written by Ratno Lukito (2008, p.41), from the formal aspect, customary law is part of the adat embodied in the whole institution, the rules and decisions about social relations accepted by the people concerned as something that organizes their lives . In the material dimension, adat law is a direct expression of a people's sense justice in their social relations.

From the description of those concepts, the authors identify the concept that needs to be underlined that the living law elements as introduced by Eugen Erlich and Savigny, is an element that raises awareness of law in the midst of society. The concept, according to the author, is equivalent to the concept of customary law in a material sense. In order to analyze the existence of law governing inter-society relations within pluralistic of Indonesia, we need to understand beforehand that living law is not merely a repetitive habit or behavior pattern, nor is there an unwritten rule that is believed to hereditary have governed the community in the particular regions, but a common sense of justice shared by the community in a particular customary sphere.

Basically justice is subjective. What is perceived as fair by a person or group of people, not necessarily perceived as fair by another person or another group. Therefore, the scope of application of customary law should be limited. Customary law is applied exclusively only to the indigenous peoples concerned, which have traditionally embraced and upholds certain values that reflect or represent their sense of justice.

Loebby Loqman states that need to be considered the presence of just living law and unjust living law. That is not all laws that live in society always good and fair. It may be good and fair for certain minority communities, but in macro terms it is an injustice. (M.Najih, 2014, p.20).

For example, under the Bugis customary law, the imposition of customary a'massa sanctions is made when one or both of the married couples (silariang) violate the applicable customary rules. For example, if they (those who make elopement/silariang) have the courage to set foot to the house or village where they come from with no good faith to do or with the intention of returning to legalize their ties / relationships by customary law or known locally as amminro baji ' (pulang baik). Then the a'massa punishment will be applied to them. In addition, some other thing that allows to apply the customary a'massa sanction is when one or both of the couples who marry / run away, intentionally or unintentionally found or met directly by one of their families, the punishment a'massa Will be applied to them. The physical sanction of traditional sanctions a'massa for example is light maltreatment, aggravated assault and even murder if the offense is very severe. The customary sanction of a'massa in its application is carried out in a group (a'massa), with the rule that those who may execute a'massa punishment are persons who have family / blood relationships with those who have eloped (silariang). The customary sanction of a'massa is applied because the families of those who have eloped (silariang) consider that his actions are shameful (appakasiri ').

The author argues, the imposition of sanctions in the form of corporal punishment, let alone to the form of taking life (murder) of the perpetrator is a form of unjust law. It is also necessary to examine what factors cause a pair of men and women to conduct silariang. One of the factors that led to this is the high demands of the female family on the amount of the dowry or what is known as the Panai' money, and the men who do not afford it may choose a dishonorable way of doing silariang. In addition, relationships that are not approved by the family are also often the trigger factor for the silariang offense.

Another example of this case is gambling by the buffalo race in Tana Toraja. Based on the research conducted by Suprianto Panca Kendek Allo (2013) at Tana Toraja Resort Police, the result that the long-running gambling racing activity made most Torajans thinks that gambling is part of the buffalo race that also became a tradition that can not be separated. The Toraja people's way of thinking eventually forms an understanding that gambling is legal because it is a tradition, and that tradition must be preserved. Understanding to preserve gambling ultimately makes gambling in the tradition ma'pasilaga tedong (buffalo race) in Toraja is very difficult to stop.This is due to cultural constraints, and lack of cooperation between the parties. Gambling in the tradition of buffalo race has been going on for so long that it is considered a cultural heritage by the community, therefore the gambler very vulnerable to conflicts. One of the obstacles that complicate the Tana Toraja resort police in the application of criminal sanctions against the perpetrators of ma'pasilaga tedong is because the culture of the society. In accordance with Toraja customs ma'pasilaga tedong is part of the tradition of rambu solo ceremonies especially at the level of dirapai ', as of the police have a dilemma in cracking the buffalo fight case, because they have to enforce the law but on the other hand must respect the ceremony of rambu solo that must be preserved.

The case in Tana Toraja indicates the existence in reality customary law can be contrary to the development of society and does not accommodate the sense of justice. It should be that gambling activities that negatively impact people's lives can not be justified on the basis of custom (adat). Based on the results of field studies in Central Sulawesi, the authors have found that the mechanism of adat law enforcement is based on Governor Regulation No. 42 of 2013 concerning the the Central Sulawesi Adat Justice. Adat Justice is defined as an institution assigned or authorized to receive, examine and decide disputes based on adat law that lives in society.

At Central Sulawesi province, there are some districts that adat law societies still practice customary tribunals such as Donggala, Sigi, Luwuk, Banggai, Tojo Una-una, Poso and some other districs. According to the records of the Central Sulawesi Adat Forum and SAJI Project-Bappenas / UNDP, in the last six years (2010-2016) there are at least 120 cases handled by customary courts in some MHA communities in Central Sulawesi. Types of cases ranging from mild cases such as border disputes, fights between villages, domestic violence, theft and even severe criminal cases such as rape and murder. (Andreas Lagimpu, Yusak Jore Pamei, 2013). The implementation of adat law can work in harmony and complement to the national law. Based on research in Central Sulawesi particularly in Toro or Ngata Toro adat villages, through interviews with village leaders and the Chief of adat, confirm that certain adat law is still enforceable, including crime in adat and every interaction and conflict resolution among them. The village leader of Ngata Toro, Mulyanto Dharmawan, explained how adat law implemented because it suits their identity, and most importantly fulfills the demands of justice they seek.

In addition to the Pergub. 42 of 2013, recognition of the applicability of adat law in the regions of Central Sulawesi is also reinforced by the synergy or institutional cooperation between the Police and the Customary Court in handling cases, especially cases of minor criminal acts (Tipiring). The Government and the Police give authority and hand over the charge of Tipiring to the Customary Court. The inter-agency cooperation was marked by the signing of MOU and Agreement between Central Sulawesi Governor, Central Sulawesi Police and Chairman of Central Sulawesi Customary Justice Forum at Governor's office on May 20, 2016.

The customary justice system that lives and is still practiced in some adat societies in Central Sulawesi is restorative justice because in addition to fulfill the sense of justice, it can restore the relationship of the parties to the conflict or the conflicted interest. According to the Chairman of the Central Sulawesi Customary Justice Forum as well as customary judges in Ngata Toro, Andreas Lagimpu, customary court is still the main choice of adat peoples in Central Sulawesi because it is easier to access, the process is quick and the procedure is not convoluted and cheap and affordable or efficient in terms of financing. Another important aspect, indigenous and tribal peoples through their customary judicial institutions is able to create social order and harmony of life in society as well.

2. Living Law and Legal Certainty

Eugene Ehrlich stated "law consists of the rules of conduct followed in everyday life-the customary practices and usages which give rise to and maintain the inner ordering of associations (the family, village community, corporations, business associations, professions, clubs, a schoolor factory, etc). This is the 'living law'. "(Brian Z Tamanaha (2001, p.31)

From the quotations above, it can be seen that " the living law " is a living and actual law in a society. 'The living law' is not something static, but it constantly changing over the time. 'The living law' is a law that lives in society, it could be written or it could be unwritten. Similarly " the living law " could be an adat law (unwritten), it may also be a customary (unwritten) law of Western origin, as well as Islamic law in certain areas of law.

For example, the enforcement of Islamic Sharia in Aceh. Based on observations made by Muhammad Ansor, Yaser Amri and Ismail Fahmi Arrauf, it is stated that:

> "It is interesting to be observed that although there is no written instruction to non-Muslim women in wearing veil, but in fact they are veiled when appearing in public spaces. Environmental conditions in which women generally wear veil in Langsa greatly influence their decisions to adapt and likewise, wear it. In addition to that, the frequent raids on Islamic dress conducted by DSI (Department of Islamic Law) also affect their decision. Using Pierre Bourdieu's perspective of habitus, the fact that Muslim and Christian women in Langsa share the same space in their daily activity also affects their decision to wear veil. Above all, the minorities usually choose to adapt to trends and values adopted by majority groups as part of the efforts to be accepted by the majority."

The regulation of living law in RKUHP is considered potential to reduce the degree of legal certainty. This is because living law is dominated by unwritten law. By enacting living law as the basis of punishment, there is a deviation from the principle of legality.

In the author opinion, the act that violates living law actually has the same elements with those set forth in Article 1365 of the Civil Code. In Article 1365 of the Civil Code states that "Every illegitimate act, which causes damage to third parties, obliges the party at fault to pay the damage caused." Article 1365 of the Civil Code was originally formulated as narrowly as "an act against the law/Tort" or in Dutch termed *onwetmatigdaad*. However, with the various cases that has not been regulated in the legislation that requires completion, the Hoge Raad decided to expand the meaning of *onwetmatigdaad* becoming *onrechmatigdaad*. Acts that are subject to sanction are not merely acts against the law, but also unlawful acts in a broad sense, namely public order, decency and propriety. This means that to impose sanctions also considering extra-legal elements, and the meaning of "law" in the context of unlawful acts, here also includes the unwritten law. Thus, the violation of the living law contains elements of violation against public order, decency and propriety.

To apply those concept in the field of criminal law, the method of interpretation of the law applies. To apply the concept in the field of criminal law, a methods of legal interpretation is required. Legal Interpretation has a variety of methods including:

a) "Grammatical interpretation: the interpretation is based on literal interpretation of legislation with guidance on the meaning of words that connected each other in a sentence used in the legislation.

b) Historical interpretation, the interpretation based on history, both the history of the formation of legislations, as well as the history of the law (including the investigation of the intention of the legislators at the time of forming the law), to investigate the origins of a regulation associated to a legal system that has been enforced or to certain foreign legal systems.
c) Systematic interpretation is the interpretation that considers the composition of words that relate to the literal of the other articles, either in the legislation itself or any other laws.
d) Teleological (sociological) interpretation, the interpretation of which concerns about the purpose of the law. That is, even if a law is no longer appropriate to the need, but if the law is still in force, it will still apply to a case or to current events. However, the notion is adapted to the situation at the time the regulation is applied.
e) Authentic interpretation is interpretation based on an explanation of the words, terms and meanings of the legal regulations in the relevant legislation. "(Sudaryanto, 2015, p.82)

From The five types of interpretation of the law, all can be used by criminal law. In the perspective of criminal law that is based on positivism school, prohibited for an interpretation that can give a broader meaning than the meaning of what is contained in the legislation. It is intended to prevent criminalization.

In order to accommodate the living law, the judge must be able to appropriately apply the method of teleological interpretation. Of the five kinds of interpretive methods mentioned above, the method of interpretation that concerns the development of society is the method of teleological / sociological interpretation. This is in line with the argument expressed by the Interessenjurisprudent school, that the legislation is incomplete because it is not the only source of law. Judges and other law enforcement officers are widely freed to find the law. According to the Interessenjurisprudent school, in order to achieve the fairest law, the judge may deviate from legislation.

The author wants to emphasize that in this case, a judge is required to have a prospective thinking. A judge should consider whether the application of an unwritten legal provision will have a good effect on future legal developments, or not. Therefore, it is necessary to avoid the application of laws aimed solely to meet the demands of certain communities that are not in accordance with the society's developments. To ensure legal certainty, the principle of legality can be set aside with the following conditions:

1. Conducted to meet the demands of justice
2. Conducted by considering the appropriateness of the application of the unwritten legal principle to the demands of society's progress and development.
3. Judges should remain cautious in deciding for whom the unwritten rule of law can be applied in order to avoid over-criminalization.
4. Does not result in human rights violations.

Based on interviews, the authors obtained an understanding that customary law is basically applies in a limited way. Customary law in one area applies to the community members of the indigenous peoples. Similarly, if a community member commits an offense outside the customary jurisdiction, when he returns to the adat village; customary sanctions may still be applied to him. Likewise, the mechanism of adat law enforcement has been determined by the community concerned, involving community elders and other parties that have been determined. Thereby, adat law enforcement will not lead to an illegal trial.

The existence material criminal law requires the support of formal criminal law. Material criminal law is a set of rules governing the subject of law as the target of regulation, governing actions permitted or prohibited, sanctions for violation of the rules, and conditions to impose sanctions. The enforcement of material criminal law requires a set of rules concerning law enforcement procedures. It is accommodated in criminal procedural law or formal criminal law.

When RKUHP which accommodates the unwritten law is enforced, it will cause difficulties in the process of criminal procedure. Elements of violation of law are not clearly defined. This will affect the process of preparing the indictment. For example, if an action is considered "degrading" of the members of the indigenous community. How can a Public Prosecutor define the element of "degrading"? In what ways the existing legal system can provide the limitations of legal interpretation that can be implemented by a law enforcer.

It should be given an affirmation in the RKUHP regarding the limits of legal interpretation that can be done to find the meaning of an element of the act of violations of living law. Some important things to be emphasized in order to formulate the living law arrangement so as not to conflict with the purpose of creating legal certainty:

1. The mechanism of interpretation of elements of offense were not formulated in writing

2. The criminal justice process and the authorities who have the authority to trial
According to the Jurisprudence of the Supreme Court of the Republic of Indonesia number 1644 K / Pid / 1988, May 15, 1991, the Supreme Court of Indonesia as the highest Court of Justice respects the decision of the Adat Chief which gives "customary sanctions" against offenders of customary law norms. The General Courts can not be justified in prosecuting for the second time the offender of customary law by giving a prison sentence (ex. 5 paragraph (3) sub b. Drt Act No.1 Year 1951 jo Articles of the KUH Pidana)
3. The concept of the cability of the perpetrator to responsible for his criminal acts.

CONCLUSIONS AND RECOMENDATIONS

Conclusion

1. Customary law is a law that emerges and grows together with the society or can be regarded as a law born out of the society. Customary law is a law in accordance with the cultural patterns of Indonesian society.

   The living law element, introduced by Eugen Erlich and Savigny, is the element that raises the legal awareness in the society. Nevertheless, the existence of customary law as a "living law" in Indonesia needs to be ajusted to the concrete conditions of society development so as to meet the demands of a society sense of justice. In addition, mechanisms of adat law enforcement also need to give attention to society development. Customary law can not be regarded as a law applicable to all Indonesians. The concept of just living law and unjust living law needs to be understood by the community and law enforcers, in order to adapt the application of customary law within the context of modern legal society. The perspective and appreciation of the society regarding the sense of justice are influenced by many things, including the religious believes. Indonesia as a pluralistic country, in upholding the living law, must remain guided by the appreciation of the values of Pancasila which became the nation's view of life within the framework of the Unitary Republic of Indonesia. The accommodation of living law concept in Indonesian criminal law system is urgent considering the peculiarities of the socio-cultural aspects of Indonesian society. Accommodation living law arrangement also haruis done in order to expand public access to justice. Legislators and law enforcement agencies are expected to pay attention to the cost and benefit principle in enforcing criminal sanctions for living law violations.
2. In order to achieve legal certainty in criminal law enforcement, the accommodating of "living law" arrangements in the Indonesian criminal law system needs to concern to:
   a. The basis of excluding the principle of legality:
      The principle of legality is not absolutely excluded, but can be excluded by considering the following requirement:
      i. Conducted with the aim of meeting the demands of justice
      ii. Conducted by considering the appropriateness of the application of unwritten legal rules to the demands of society's progress and development.
      iii. The judge must remain cautious in determining for whom the unwritten rule of law can be applied in order to avoid over-criminalization.
      iv. To waive the principle of legality should not conflict with the principles of human rights protection.
   b. Territorial Principal still applied
      Whereas living law within a certain community (adat) can apply to the community (adat) from other area, even to foreigners residing in Indonesia. The limitation is if the acts committed by the person occur in the territory of indigenous peoples and proven to be harmful to the local community. (In this case lex locus delicti should be considered).
   c. The process of criminal procedure that has been in force, need to be adapt to to the specific character of criminal law violations.

RECOMMENDATION

The recomendation proposed as a result of this research:

1. Adressed to the Legislator
   The provision of Article 2 of RKUHP concerning the possibility of the use of living law as the basis for criminal prosecution, shall remain listed in the RKUHP by adding to the explanation section about the limitation of the provisions enactment. In addition, an implementation regulation (procedural rule) must be made which specifically regulates the enforcement mechanism and application of article 2 RKUHP in factual cases. Another important point is the necessary

guidelines on how to interpret the meaning of the elements of costumary offences (the difficulty that arises is that the elements of costumary offences are formulated in an unwritten manner).

2. Adressed to Judges
In deciding case based on Article 2 RKUHP (if the RKUHP is finally passed into the National Criminal Code), the judge is expected to give more emphasis on the fulfillment of the society sense of justice. Customary rules are not necessarily appropriate to the development of society. Therefore, the sentence is expected to provide a balanced protection against the interests of the perpetrators, victims and society in general, resulting in the development of Indonesian criminal law enriched with various kinds of jurisprudence on living law enforcement.

3. Adressed to Society
Society (especially community leaders) currently incorporated to certain indigenous communities are expected to initiate the compilation of customary criminal codes, which contain prohibited actions, imposed sanctions, and mechanisms of sanctions imposition. The compilation is expected to assist the judge to decide the case on living law enforcement.

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