Epistemological Errors of Criminal Law Politics in the Criminal Code: The Loss of Authority of the Chief of Adat

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Abstract. Criminal law politics, as implied in the New Criminal Code, has established a process of criminalizing customary law as a living law within the community. This criminalization process, in order to be subsumed under Article 1 paragraph (1) of the New Criminal Code, utilizes legal instruments in the form of Government Regulations and Regional Regulations. This article aims to explain and uncover the ideological aspects - as a result of epistemological fallacies, which have an impact on the degradation of the essence and existence of Indigenous Leaders in maintaining harmony in the lives of Indigenous communities. Based on this, the problem that will be examined through this research is "how is the normative potential of regulating customary law as a criminal offense in the New Criminal Code?" This research uses Legal Research with empirical approach and Critical Discourse Analysis (CDA) approach. The result of this research is the state's attempt to reduce the charisma of Indigenous Leaders through a normativization process based on the principle of legality. Thus, when there is a legal problem within the scope of the Indigenous Community, the existence of Indigenous Leaders will be removed. Therefore, members of the Indigenous Community will refer to Regional Regulations that have regulated types of Customary Criminal Acts.

Keywords: Criminal Law Politics, Epistemological Fallacy, Indigenous.

1. Introduction

The year 2023 holds immense significance in the history of Indonesia. This is because it marks the momentous occasion when the new Criminal Code came into effect, as stipulated in Law Number 1 of 2023. This new code replaces the previous Wetboek van Strafrecht, which had been in force since 1946 under Law Number 1 of 1946 on Criminal Law Regulations, along with Law Number 73 of 1958 that extended its application to the entire territory of the Republic of Indonesia and introduced amendments to the Criminal Code. It's important to note that the previous code had its origins in the Wetboek van Strafrecht voor Nederlansche-Indie.Consequently, from a normative standpoint, the concordance principle, which was previously used to validate the Old Criminal Code, has now been rendered obsolete.

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The enactment of the New Criminal Code is of course based on three reasons, namely First, political reasons which means that a country must have its own national legal products, this refers to the existence of legal products left by the colonialists; second, sociological reasons which mean that law must reflect the cultural values of a nation; and third, practical reasons which mean that there are various developments both scientifically and in practice that must also be followed by laws and regulations so that they can be applied in accordance with the times.[1]

Another reason for reforming the criminal law is based on the following reasons:[2]

a. The Criminal Code is perceived as out of sync with the evolving landscape of Indonesia's national criminal legislation;

b. The expansion of criminal law beyond the confines of the Criminal Code, including specialized and administrative criminal laws, has altered the framework of the criminal legal system originally established within the Criminal Code. This has led to the emergence of multiple coexisting criminal legal systems within the national framework; and

c. In various instances, there has been an overlap of criminal legal provisions between those found in the Criminal Code and those present in laws external to the Criminal Code.

Based on these reasons, a conclusion can be drawn, namely that there is a strong desire from the state to break away from the stigma of colonialism which is based on differences in paradigms in thinking, where the Old Criminal Code was always attached with the jargoon that the Old Criminal Code was individualistic, liberal and positivistic—without wanting to mentions the inability to interpret contextually. Thus, they wish to have a National Criminal Code based on the values of nationalism.

However, such a basic idea was basically put forward by R. Soepomo in connection with the difficulty of enforcing national values as national law. R. Soepomo[3], emphasized that the values of indigenous Indonesian society had collapsed since the colonial period, thus creating a colonial society. Thus, with the collapse of the colonial period, colonial society has left. That is, independence has left problems to create new values.

On the other hand, there was a strong effort to change the legal culture that was rooted in Indonesian society at that time. This is something that is difficult to achieve. Changes in the legal culture are not only in state institutions, but also changes in the public's perspective on the movement of these institutions. In this connection, the influence of developments on respect for human rights at the international level also influences the life of the nation.[4]

Theoretical and conceptual studies from customary law experts such as Ter Haar, Van Vollenhoven, R. Soepomo and Hilman Hadikusuma or Islamic law experts such as Hazairin, Muhammad Natsir, KH. Wahid Hasyim, Ali Yafie and others, in

reality were unable to be absorbed into the context of national legal development. As we know, these two sources of law are one of the elements forming the development of national law, which since 1945 until now is believed to have collaborated with western law, which actually dominates the development of national law.[4]

In fact, Bernard Arief Sidhartha[5] has indicated that there is a hegemonic paradigm of thinking that inhabits the thinking of Indonesian jurists, namely a way of thinking that departs from the views of the Dutch or Western people in general. It was this that later became the main obstacle for Indonesian jurists, in the early days of independence, in translating the original values of the Indonesian nation into the formulation of legal language to be enforced nationally.

In research, in order to guarantee the originality of the research, the researcher presents dialectics and legal discourse that focuses on studies of the inclusion of Customary Law in the Draft Criminal Code (RKUHP) which is believed to be a form of renewal of the National Criminal Law. Where, research conducted by Yoserwan with the title "Existence of Customary Criminal Law in National Criminal Law After Ratification of the New Criminal Code" which was published through Unes Law Review Volume 5, Issue 4, Year 2023. In this research, according to Yoserwan[6], who emphasized that customary criminal law as part of customary law is a rule of law that is inseparable from the nation and state of Indonesia, and even existed before the formation of the Indonesian state. Customary criminal law as the original law of the Indonesian nation lives and develops in the lives of its indigenous peoples. Therefore the state is obliged to protect and promote customary law and its indigenous peoples as an integral part of the Indonesian nation as a whole. In essence, the existence of customary criminal law does not require any authority, because it lives together with its customary community. Nevertheless, the state through the constitution and laws and regulations is obliged to protect and promote customary criminal law, but still within the limits of the philosophy of the nation and the state. The regulation of customary criminal law in the New Criminal Code on the one hand aims to protect the existence of customary criminal law, but on the other hand has implications for endangering the existence or for the decline of customary criminal law itself because of the requirements and restrictions on its application. Actually what is needed is a rule that protects the customary criminal law to live according to its own rules.

In the research mentioned above, there are similarities with this research related to the existence of Customary Law in the discourse on National Law. The aforementioned researcher acknowledges that there will be a potential setback from the Customary Law itself in the form of a reduction in the applicability of the emergence of several restrictions. Meanwhile, in this study, the starting point of this research is to look at another reduction potential, namely the existence of traditional chiefs.

There is also research conducted by Nyoman Putra Jaya Association with the title "Customary Criminal Law (Sanctions) in the Reform of National Criminal Law" which was published in the Journal of Legal Issues, Volume 45, Number 2, Year 2016. In this research, according to Nyoman Serikat Putra Jaya[7], who emphasized

that in the renewal of Indonesian criminal law, especially the Draft Criminal Code, customary criminal law is used as a source to determine whether an act can be punished or not, both as a positive and negative source. Customary sanctions in the form of fulfilling customary obligations, aside from being additional punishments, can also be prioritized punishments, solely for violations of customary law.

Regarding the research above, there are similarities in the object of study, namely customary law and efforts to reform the National Criminal Law. However, the first thing that should be criticized is related to objectivity-subjectivity issues, that Nyoman Putra Jaya's Union is one of the drafters of the RKUHP itself.[8] So, of course, all forms of argumentation and legal logic constitute hegemony for the mainstreaming of customary law in the RKUHP.

After 60 years, since the launch of the Criminal Law reform movement by drafting the Draft Bill on the Criminal Code as a mandate from the National Law Seminar I in 1963, the passing of the New Criminal Code was, in essence, also a form of epistemological error towards the concept of Living Law in Society which was then reduced become customary law. Which then, instead of wanting to ground national values, actually turned around to make assumptions as a claim of truth and normative claims through instruments of power relations by stipulating them to enter into the scope of the Legality Principle.

Article 2, paragraph (1) of the New Criminal Code affirms that "The rules mentioned in Article 1, paragraph (1), do not diminish the authority of customary laws prevailing in society, which dictate that an individual may be subject to punishment even if the action is not specifically addressed in this legal document." Article 2, paragraph (1) clarification in the Criminal Code specifies that "The term 'laws that prevail in society' refers to customary laws that determine the deserving punishment for certain actions. In this context, 'laws that prevail in society' pertain to unwritten laws that continue to evolve within the lives of people in Indonesia. To reinforce the legitimacy of these societal laws, Regional Regulations are enacted to govern these customary offenses."

Based on these stipulations, it becomes evident that customary offenses will be governed through Regional Regulations (PERDA). Nevertheless, referring to Article 2, paragraph (3) of the Criminal Code, which asserts that "Provisions pertaining to the procedures and criteria for establishing these societal laws are addressed through Government Regulations."

These principles are further outlined in Article 597 of the Criminal Code, which states the following:

a. Any individual who engages in an action that, according to the prevailing societal norms, is defined as a prohibited act, may face criminal consequences; and

b. The penalties, as mentioned in paragraph (1), take the form of fulfilling customary obligations, as described in Article 66, paragraph (1), letter f.

We are concerned about the existence and essence of the Traditional Head/Chairman who has a function as a catalyst in the social relations of indigenous peoples, will turn to a legalistic view of Government Regulations and Regional Regulations that have been prepared and stipulated to contain customary law.

2. Problems

Based on the description above, the limitation of the problem in this study is "What is the normative potential for customary law arrangements as offenses in the New Criminal Code against Traditional Heads/Chairmen as catalysts in indigenous peoples?"

3. Method

The research approach model used to complement the legal research method is a statutory approach, a conceptual approach, and a case approach. Therefore, this research does not only focus on the meaning of positive law, but also discusses how the essence and existence of a customary leader acts normatively and the "potential" impact that will arise in social relations among indigenous peoples. So, by borrowing the opinion of Johnny Ibrahim, where a normative juridical research method can use several other approaches.[9] So, the researcher also uses the Critical Discourse Analysis (CDA) approach and the Relationship Trichotomy Approach.

4. Discussion

The essential concept of connecting national development to every facet of life while considering its legal aspects is imperative. Development entails elevating society from one state to a more favorable one. The pivotal role of humans in development endeavors determines how the process of transformation is intentionally put into action. These fundamental ideas of transformation and implementation are fundamentally rooted in normative principles that steer and govern their manifestation.[10].

The formation of a national legal politics and national legal system should be an important study. Thus, the framework for national development moves in the corridor of the legal system and legal politics which is understood by all levels of society. Starting from an assumption, the law is not only for the community, but the law is also binding on all state agencies (institutions). Even if referring to Cicero's opinion that law emerges from society, what needs to be understood is that law enforcement officers are also part of society itself.[11] Thus, it is impossible to separate material criminal law from formal criminal law in the discussion of legal reform, especially in criminal law. Thus, both the Criminal Code and the Criminal Procedure Code, constitute a unified criminal law system that are interrelated. Therefore, the determination of the criminal law system is also very dependent on the

view of the political review of criminal law which is owned by the legislative power in Indonesia.

The representation of a particular legal and political perspective, which subsequently shapes a specific legal framework, is fundamentally established by an authoritative institution vested with the power to create statutory rules. These laws and regulations are designed to govern conduct. In essence, all regulations reflect a communal determination that society or those in positions of authority desire certain behavior to align with specific objectives.[12]

Due to the widespread impact of legal relationships, which often transcend international borders and are commonly referred to as globalization, it can be argued that legal philosophy plays a significant role in shaping a country's legal politics and legal system. As elucidated by CFG. Sunaryati Hartono, various legal philosophies have influenced the evolution of domestic law, both historically and in contemporary times.[13]

Based on the foregoing, a legislative act is inseparable from the formation and determination of its legal politics. This legislative action, of course, is also an effort to prevent arbitrariness[4], [14]from the State against its citizens originating from the Legality Principle.

Therefore, the concept of legality meticulously delineates the boundaries of punishable actions. Nonetheless, within the realm of Legal Science, there exists the prospect of construing the expressions of forbidden deeds. In the field of criminal law, various techniques for interpretation are recognized, including logical interpretation, systematic interpretation, grammatical interpretation, historical interpretation, reverse interpretation, teleological or sociological interpretation, constraining interpretation, expansive interpretation, and analogous interpretation.[15]

Groenhuijsen outlines four interpretations encompassed within Article 1, paragraph 1 of the Criminal Code. The initial two pertain to lawmakers, while the remaining pair offer guidance to judges. To begin with, legislators are restricted from retroactively applying a penal provision. Secondly, the articulation of offenses must incorporate all forbidden actions as explicitly as feasible. Thirdly, judges are barred from asserting that the accused has committed a criminal act based on unwritten or customary laws. Lastly, applying analogies to regulations within criminal law is expressly prohibited.[14] The four things revealed by Groenhuijsen basically also state as a function of the Legality Principle.

The existence of this Legality Principle sometimes or occasionally conflicts with the sense of justice in society, where there are actions that hurt the sense of justice both individually and as a group of groups in society.

On the basis of this thought, with reference to Article 5, paragraph (3), sub-section (b) of Law no. 1/Drt/1951, as well as Article 18B, paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), states that "The state acknowledges and respects traditional community units' customary laws and their traditional rights as long as they remain relevant to societal progress and in alignment

with the principles of the Unitary State of the Republic of Indonesia, as regulated by the law." Consequently, Article 2 of Law Number 1 of 2023 regarding the Criminal Code (New Criminal Code) has been enacted, which confirms the following:

a. The provisions mentioned in Article 1, paragraph (l), do not diminish the validity of societal norms dictating the punishment of an individual, even when the specific action is not addressed within this legislation;

b. These societal norms, as described in paragraph (1), are applicable universally, wherever such norms exist, provided they are not covered by this Law and align with the principles of Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and the overarching legal principles recognized globally; and

c. Guidelines for the formulation of these societal norms are established through Government Regulations, outlining the procedures and criteria for their recognition.

Next, Article 2, paragraph (1) of the New Criminal Code is reiterated in Article 12, paragraph (2) of the same code, reinforcing the requirement that an act must have a criminal nature or run contrary to societal laws and regulations to be deemed a criminal offense. This same principle is echoed in Article 597, paragraph (1) of the New Criminal Code, which states that anyone committing an act prohibited by the laws governing society is subject to punishment.

What's particularly noteworthy is the attempt to narrow down the concept of "the law that lives in society," as outlined in the explanation of Article 2, paragraph (1) of the New Criminal Code, to essentially become synonymous with Customary Law. This implies that "the law that lives in society" is primarily composed of Customary Law. However, Tongat, et al.[16] , argue that this concept encompasses not only customary law but also societal customs and even religious laws in certain regions.

Considering the components of the Legality Principle, namely Lex Scripta, Lex Certa, and Lex Stricta, the drafters of the New Criminal Code have made an argumentative effort by establishing regulatory norms. This is underscored in Article 2, paragraph (3) of the New Criminal Code, which stipulates that the procedures and criteria for determining the laws governing society will be outlined in Government Regulations.

Hence, it becomes the responsibility of the Central Government to promptly issue Government Regulations that define both the procedures and criteria for identifying the laws that govern society. It's important to note, however, that these Government Regulations serve as guidelines for the creation of Regional Regulations that will encompass legal norms related to "the law that lives in the community" or Customary Law, as explained in Article 2, paragraph (1) in conjunction with paragraph (3) of the New Criminal Code.

In our view, the composition and model for the formulation of Customary Law into the New Criminal Code contains epistemological errors. Where, epistemological

error is a concept that can be found in the field of Communication Studies. The study of the phenomenon of epistemological errors is a form of discourse (event) that indicates a lack of understanding of a concept, which causes unethical behavior[17] [18][19]. Meanwhile, in the field of Law, Abintoro Prakoso[20], emphasized that the inability to explain a concept and a lack of understanding of the concept will lead to wrong legal reasoning and conclusions. Thus, the concept of "Epistemological Error" is a starting point for entering into the study of Philosophy of Logic regarding Fallacy.

Before entering into this discussion, the researcher wants to present data obtained from Community Service (PkM) activities carried out by the Research and Community Service Unit (UPPM) of the Faculty of Law, Pancasila University, located in Anyer on June 23, 2023. Where, in a During the consultation session, there was a report from a district administrator named Cinangka District who formed a program called the Child Protection Program (PPA) from acts of domestic violence (KDRT) and others. This program was basically formed to handle cases of domestic violence and others by prioritizing consultation and protection by strengthening the customary law side of the area. However, in practice there were many people who bypassed the program and immediately made complaints to the local police. Thus, programs created by traditional institutions with the aim of providing assistance and protection through family deliberations by prioritizing regional customary law cannot run well.

This shows that even though the recognition of adat crimes as stated in Article 2 paragraph (1) of the New Criminal Code has not yet been enforced, there has been a situation where the position of customary head has been replaced by law enforcement officials. Of course, a hypothesis will emerge when Article 2 paragraph (1) of the New Criminal Code will come into effect. Therefore, this will actually further fade the existence of the role of customary heads in resolving community conflicts which has an impact on the loss of dynamic cultural diversity and is replaced by a culture that is uniform and formal and rigid. This is because the recognition of customary law will result in the disappearance of the character of traditional institutions/traditional leaders and tarnish the self-esteem of the customary head. In fact, the existence of this traditional leader is the key to the existence of customary law itself.

It is alleged that the application of the provisions of this article will shift the position of customary heads who have long played a central role in maintaining cultural identity, traditions and representing their indigenous peoples to the outside world. In this modern era, the existence of traditional institutions has begun to be displaced and forgotten by advances in technology and science, so that the enactment of this article will certainly shift and eliminate the entity of indigenous peoples, which from the beginning has been one of Indonesia's identities before the world. Meanwhile, the existence of the customary head itself is a strong foundation in mediating Indonesian society that is diverse, inclusive and sustainable amidst the challenges of the times so that it is an important element for the preservation of customary law in this modern era, as mandated through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

On the flip side, as a type of epistemological mistake within the political framework of criminal law, there exists a regional regulation aimed at governing traditional offenses. This situation is poised to give rise to a social issue concerning the role of the customary law enforcement apparatus itself. Various viewpoints on this matter have emerged, with one articulated by Eddy Hiariej, the Deputy Minister of Law and Human Rights of the Republic of Indonesia, who explained that, "If you incorporate the laws existing within society into Regional Regulations (PERDA), then the duty and responsibility of Civil Service Police Unit (CSPU) will no longer fall under the purview of the Police. In other words,

"In this context, Satpol-PP is set to serve as the enforcer of Regional Regulations (PERDA). However, it's worth noting that according to Article 255, paragraph (2), letter a of Law Number 23 of 2014 concerning Regional Government, the primary role of the Civil Service Police Unit (CSPU) is to implement non-judicial measures against individuals, officials, or legal entities found in violation of local regulations and/or regional regulations. Consequently, the incorporation of customary law into regional regulations may potentially disrupt the established authority of Satpol-PP, which should exclusively handle its responsibilities and obligations outside the legal court system." The argument put forward by the Government, in the Trichotomy of Relations approach, is a form of knowledge construction spoken in order to neutralize "doubts" about the weaknesses of the working pattern of the components of the Criminal Justice System which operate in a mere legalistic-positivistic manner. However, what this statement did not think of was how to correlate the work pattern of the Satpol-PP with the Judge's verdict through the process of proof in court hearings?

Article 12, section (1) of the New Criminal Code underscores that if a behavior is categorized as a crime and is breached, it will result in legal penalties. Additionally, Article 12, section (2) of the New Criminal Code stresses that actions that go against established laws in society are also encompassed within the scope of Article 12, section (1) of the New Criminal Code. This implies that actions that contravene customary practices, as defined by government and regional regulations, are considered criminal offenses and are subject to punitive measures.

5. Conclusion

Based on the data and facts that occur in the community, which show the reluctance of some people to utilize customary law in solving criminal problems and choose to directly use the Criminal Law route through the Indonesian National Police, it shows a cultural change in social life. Thus, when the legislator pulls every action that violates customary criminal law into national law - which is then translated into regional regulations, it is an affirmation that the State has deliberately tried to "kill" the authority of the customary chiefs.

Actions that contravene Customary Law have undergone normativisation, transforming reprehensible acts (mala in se) into prohibited acts (mala in prohibita).

This creates a legal relationship between the community and the state for the punishment of individuals deemed criminal offenders. Due to an epistemological error in determining the criminal law politics in the New Criminal Code by the legislators, the customary chief's role in resolving issues within the customary community has been reduced. Another epistemological error of the legislators is the inclusion of acts that violate traditional customs into a Regional Regulation, leading to law enforcement being carried out by the Pamong Praja Police Unit. However, this unit is not a component in the Criminal Justice System, and lacks the capability to conduct investigations.

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