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Legal Certainty in the Determinant Application of Customary Law in Indonesian National Criminal Law

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ABSTRACT

Customary criminal law is an integral part of Indonesia's legal heritage that has long been studied, from the thoughts of Snouck Hurgronje to Van Vollenhoven. Its recognition in Article 18B paragraph (2) of the 1945 Constitution and its incorporation into the new Criminal Code (KUHP) mark significant steps toward developing a legal system that aligns more closely with Indonesia's social conditions while reducing dependence on colonial laws. However, this recognition also brings consequences, particularly concerning the formalization, requirements, and limitations imposed on customary law. This raises the question of whether customary criminal law will introduce a new dimension to the national legal system or create dualism in its application. This article will examine legal certainty following the implementation of customary criminal law in the Criminal Code and its impact on law enforcement processes in Indonesia.

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1. Introduction

With the revision of the first and second books in the old Criminal Code (KUHP), the Criminal Code introduced various new provisions. Some of these include the recognition of corporations as legal subjects, the application of conflict resolution based on restorative justice, and the recognition of the laws that apply in society. In Van Vollenhoven's view, customary law is a set of rules of conduct that bind Indigenous peoples and Oriental peoples, which on the one hand have legal sanctions but on the other hand are not codified, so they are called customs. Although there are several documented customary laws, no customary law, including customary criminal law, is as recorded as Western law.

A person can be found guilty of breaking the "laws that live in society" (customary law), according to Article 2 paragraph (1) of the new National Criminal Code, which now recognizes customary criminal law. Despite this, the new Criminal Code does not classify this act as a main criminal (Wirdi, 2024). This clause appears to go against the criminal law principle of nullum delictum nulla poena sine praevia lege poenali, which states that an act cannot be punished criminally unless it was covered by laws and regulations prior to the conduct being performed.

However, the new Criminal Code also sets limits on the application of customary criminal law, as stipulated in Article 2 paragraph (2). This provision states that customary law can only apply in the territory where the law lives, as long as it does not conflict with the Criminal Code, and is in line with the values of Pancasila, the 1945 Constitution, human rights, and internationally recognized general law principles. In addition, the sanctions imposed in customary criminal law are also limited to additional crimes, namely the fulfillment of customary obligations (Law, 2023).

Therefore, the acceptance of the law that governs society does not in fact conflict with the previously established legality premise. However, it should be noted that in the principle of legality there are four main prohibitions, two of which need to be understood in depth so that the regulation of customary criminal law does not cause legal dualism or legal uncertainty.

In the author's view, there are two aspects of the four prohibitions that are the main problems. First, in determining a criminal act, it is not allowed to use analogies, either in the form of comparisons or equations. The prohibition on the use of analogies aims to ensure that judges do not interpret criminal rules creatively outside of the provisions that have been set out in written regulations (Faidatul, 2024).

Second, criminal law must be clearly formulated *(lex certa).* A good criminal offense formulation must be able to explicitly describe the prohibited or ordered act (Action, 2023). In the National Criminal Code, the provisions regarding customary criminal law are only described as additional crimes and are listed in Article 2 paragraph (2) of the Criminal Code, without providing clarity on the basis of a person's criminal conviction in customary criminal law. The restrictions mentioned earlier are still general, raising questions about the basis used by judges in deciding customary criminal cases.

In addition, there is a problem regarding who is authorized to be an expert in determining whether an act is really included in the category of customary criminal acts. Judges and prosecutors do not have the authority and in-depth understanding of customary criminal law, which is very diverse in various regions. The absence of codification of customary criminal law is also an obstacle for judges in deciding a case, so that it can cause legal uncertainty

Therefore, if this problem is not resolved immediately, it can cause legal dualism. For example, in Decision Number 92/Pid.Sus/2021/PN Snj, a child is required to marry the defendant Embang bin Sudding due to the act of "sexual intercourse with a minor." However, based on local customary law, the defendant is required to marry the victim as a form of settlement. This is explained in the decision.

We can also see that in October 2022, Lukas Enembe, the former governor of Papua. Through his lawyer, he wants the bribery and gratuity case of Lukas Enembe to be investigated according to customary law that applies in Papua. Although in the end the KPK still adheres to the positive law enforcement process in accordance with the applicable law, it also raises pros and cons about the existence of customary criminal law and its implementation on the motherland.

Thus, not all provisions in customary law can be aligned with national law. Unfortunately, the regulation of customary criminal law in the National Criminal Code is still minimally explained. This kind of legal uncertainty is certainly not in line with positive legal principles and legal ideals (rechtsidee).

2. Methods

This research uses normative legal research methods and literature studies. In normative research, the analysis is focused on the process of applying the law based on the applicable positive law and its implications in the judge's decision. In addition, the author also refers to Gustav Radbruch's views in understanding the true concept of legal certainty. Furthermore, this

research is also based on Carl von Savigny's thinking in assessing the law based on the culture of the community and the soul of a nation.

3. Results and Discussion

3.1 Basis For Customary Criminal Law Considerations in the New National Criminal Code

The Existence of Customary Criminals in Indonesia

Customary law in Indonesia has been firmly rooted in people's lives since ancient times. It grows and develops naturally to maintain social balance, regulate social interaction, and resolve disputes with a community-based approach. According to Ter Haar, customary law is a set of rules that are enforced through decisions that have authority and are binding in the process of its formation. This opinion is known as decision theory (beslissingenleer) (Sigit, 2023), which emphasizes that customary law is not just an unwritten norm or custom, but a legal system that is enforced through decisions made by stakeholders in society.

Therefore, customary law does not originate from formal legislation, but is formed and maintained through various collective decisions made by customary law communities. This decision does not only come from judges in the formal justice system, but also from traditional leaders such as traditional heads, village deliberations, land guardians, community leaders, and other village officials. These decisions not only resolve disputes officially, but also take into account the social values and norms upheld by indigenous peoples (Helnawaty, 2017).

The existence of customary criminal law in Indonesia cannot be separated from customary law as a whole, given its essential function that is oriented towards maintaining social stability in the community. Over the course of history, customary criminal law has developed dynamically and is rooted in various local cultures while maintaining fundamental principles that prioritize social balance and harmony.

History records that customary law existed long before the formation of the Dutch East Indies government. In the 12th century, during the reign of Sultan Iskandar Muda in Aceh, the Kitab Makunta Alam was applied, which stipulated that a judge in carrying out his duties must consider three main aspects, namely sharia law, customary law, and community traditions (Syaiful, 2020). Meanwhile, during the Majapahit Kingdom, although the belief system changed due to the entry of Islam into the island of Java, the rules of criminal law were still systematically regulated in Kutaramanawadharmasastra (KMD) (Iwan, 2022).

This book regulates serious crimes such as murder, including for the main perpetrators, instigators, and aid providers. Article 3 of the KMD lists eight categories *(astadusta*), with severe sanctions, even the death penalty. Customary criminal law is firm, preventive, and maintains social balance. In indigenous communities such as Batak Toba, norms *(Tongka)* prohibit sacred violations such as interracial marriage, adultery, and theft, with severe social sanctions or customary crimes.

In the academic realm, various scholars have studied customary law and customary criminal law in Indonesia. Snouck Hurgronje, in his research on Acehnese society documented in the book *De Atjehers*, prefers to use the term *godsdienstige wetten* (religious law) rather than adat recht (customary law), because he sees that the legal system that applies in Aceh is closely related to Islamic teachings (Selika, 2023).

Meanwhile, Cornelis van Vollenhoven in his work *Het Adat Recht van Nederlandsch-Indië* stated that customary law is a rule that does not originate from colonial legislation, but has strong binding force and sanctions even though it is not written in the codification of the law. Therefore, customary law is referred to as custom, which has a dynamic and flexible character in regulating social life (Ibi Satibi, 2023).

According to Geoffrey Swenson, legal formulation must consider the principle of legal pluralism or legal pluralism (Geoffrey, 2018). Like the law in Indonesia, with its diversity, it has various customary law systems that are distinctive in each region, such as Aceh, Batak, Java, and Papua, each of which has its own legal characteristics that are still upheld by the local community.

Overall, customary law is essentially a legal system that grows and develops in the lives of Indonesian people. The provisions and norms that apply in customary law are the result of social processes that are inherited from generation to generation. Indonesia's demographic diversity is reflected in the variation in customary laws in various regions, each of which has distinctive customary values. Thus, customary law, including customary criminal law, remains relevant in the national legal system and continues to be an integral part of legal practice in Indonesia.

The Foundation for National Criminal Law Reform in Indonesia

Criminal law reform is a step taken by the Indonesian people to replace the existing criminal law, especially the Criminal Code (KUHP) which originated during the Dutch colonial period. Criminal law reform is not only limited to the establishment of new legal institutions, but must also include all aspects of the law, including the substance, instrument, and culture of the law. This includes the regulations in criminal law as well as attitudes and values that affect the implementation of the legal system. Therefore, criminal law reform must be based on cultural values and legal ideals that develop in society.

Lawrence M. Friedman stated that the effectiveness of law enforcement depends on a legal system that consists of three components, namely legal structure, legal substance, and legal culture (Farida, 2022). Friedman also explained that the function of legal culture is to distribute and maintain the allocation of values that people feel. The allocation of these values, which are thought to reflect the truth, is often referred to as justice. The success of the legal system in upholding justice depends on its ability to bring the principles of justice into society. The community itself is an important factor in the functioning of an effective legal system.

The reform and development of criminal law cannot be carried out sporadically or limited to specific aspects, but must be carried out in a fundamental, comprehensive, and structured manner in a holistic approach. This process includes three main aspects in criminal law, namely the formulation of actions that are classified as criminal *acts,* criminal *responsibility,* both for individuals *(natural persons)* and legal entities *(corporate criminal responsibility),* as well as the types of criminal sanctions and legal actions that can be applied.

In principle, the Government of Indonesia has been trying to reform the law since the proclamation of independence on August 17, 1945, which was marked by the enactment of the 1945 Constitution of the Republic of Indonesia (1945 Constitution). This initiative is in line with the national goals contained in the Preamble to the 1945 Constitution, especially in the fourth paragraph of the Preamble to the 1945 Constitution which states that the state has national goals that include "protecting the entire Indonesian nation" *(social defence)* and "promoting the general *welfare".* In addition, legal reform also aims to adapt the national legal system to universal legal developments, especially in the era of complex and multidimensional globalization.

In the context of criminal law reform, the drafting of a new codification of criminal law must begin by formulating universal basic principles of criminal law, which are then laid down in the national Criminal Code (KUHP) as a replacement for the criminal law principles previously adopted from the *Wetboek van Strafrecht voor Nederlandsch-Indië (Staatsblad 1915 No. 732).*

Thus, the goal of "protecting the entire Indonesian nation" and "advancing the general welfare" led to the formation of the concept of a welfare state *(Welvaartsstaat),* which became the basis for criminal law reform. *The Wetboek van Strafrecht voor Nederlandsch-Indië* is not a legal product rooted in the legal culture of the archipelago society and is no longer in accordance with the current conditions of criminal law. Therefore, legal certainty and justice cannot be realized without a strong basis in the codification of criminal law. In this context, the concept of a protector state and a welfare state *(Welvaartsstaat)* is a crucial factor in current legal reform (Elviandri, et., al 2019).

Through Law No. 1 of 1946, the government created the national Criminal Code as a first step toward codifying criminal law. According to Article 5 of the law, "Criminal law regulations, which are wholly or partially unenforceable, or contrary to the position of the Republic of Indonesia as an independent state, or no longer relevant, shall be considered in whole or in part temporarily invalid."

As is well known, the codification of the Criminal Code aims to realize the state as a protector of the people and as a welfare state (Welvaartsstaat), so as to lead to several main goals in the reform of the criminal law, namely:

a) The state is responsible for protecting society from potentially harmful individuals or groups. In this case, the purpose of punishment is not only to provide punishment, but also to rehabilitate criminals, so that they can improve their behavior and return to becoming law-abiding members of society.
b) The state is tasked with protecting the public from the possibility of abuse of authority by law enforcement officials and vigilante actions by the community. The main purpose of this principle is to prevent arbitrary actions that are contrary to the principles of justice and the rule of law.
c) The state plays a role in creating order and social harmony in society. The value imbalance that develops in society can cause social tension, so the penal system is expected to be able to restore the balance of values upheld by society.

The view of the state playing a role in creating social order and harmony is an important view to create harmony between national law and laws that are already alive in society. So that Law No. 1 of 2023, namely the new Criminal Code (KUHP), is the state's way of ensuring that the law that lives in society continues to exist until now.

The Existence of Customary Criminal Law in Indonesian National Law

Customary law has become an integral part of the national legal system along with its developmental dynamics, although it is not explicitly included in the 1945 Constitution. However, its existence gained legitimacy through various legal instruments, one of which was the Decree of the Provisional People's Consultative Assembly (TAP MPRS) Number II of 1960, which expressly affirmed that customary law is one of the fundamental elements in the formation of the national legal system. In addition, Law Number 5 of 1960 concerning the Basic Regulation of Agrarian Principles (UUPA) also explicitly states that the national land law system guarantees customary rights. Further recognition of customary law as an integral part of the national legal system was also strengthened through the MPR TAP Number IV of 1999 and the MPR TAP Number IX of 2001.

After the amendment of the 1945 Constitution, customary law gained a stronger basis for legitimacy with the inclusion of Article 18B paragraph (2). This provision affirms that the state recognizes and respects the existence of customary law communities and the traditional rights attached to them, provided that their existence is still relevant and in harmony with the development of society and does not contradict the basic principles of the Unitary State of the Republic of Indonesia as stipulated in laws and regulations.

It should be understood that in every legal system, including customary criminal law, a formal or procedural criminal legal apparatus is needed that can accommodate the substance of the criminal law so that it can be applied effectively. In this context, an institution that has the authority to enforce customary law is needed. During the colonial period, the Dutch East Indies Government actually recognized the existence of customary law and the existence of customary justice institutions. However, after Indonesia became independent, through the implementation of Emergency Law Number 1 of 1951, customary justice institutions were abolished (Amrita, 2022), so that customary law lost its formal legitimacy in the national justice system. However, in the new Criminal Code, customary law becomes part of formal criminal law. Violators of customary law can be sanctioned by the court in the form of customary obligations as an additional penalty, ensuring that customary law remains valid in modern courts.

So, for the author, the existence of additional crimes in the form of fulfilling customary obligations requires a very ethical approach and based on high cultural sensitivity. This is because the Criminal Code does not explicitly detail the form of customary obligations that can be applied in judicial practice. Substantially, the fulfillment of customary obligations in the criminal context can be interpreted as a legal mechanism that aims to restore the balance that is disturbed due to the occurrence of customary law violations. This process involves not only perpetrators and victims, but also indigenous peoples collectively as stakeholders in the customary law system.

The concrete form of fulfilling customary obligations can vary, depending on the customary law norms that apply in each region. These customary sanctions can be in the form of the implementation of ritual ceremonies, payment of compensation to the aggrieved party, social work carried out in the community, or other forms in accordance with the values of local wisdom embraced by the local indigenous people (Adi, et., al, 2023). In the context of laws and regulations, the fulfillment of customary obligations is categorized as an additional crime that is considered comparable to the category II fine as stipulated in Article 96 of Law Number 1 of 2023 (Law, 2023).

This provision states that if the defendant does not fulfill the customary obligations set, then he is obliged to pay compensation equivalent to the penalty of a category II fine. The fine classification scheme in the Criminal Code is divided into eight categories, namely: category I at most IDR 1 million, category II IDR 10 million, category III IDR 50 million, category IV IDR 200 million, category V IDR 500 million, category VI IDR 2 billion, category VII IDR 5 billion, and category VIII IDR 50 billion. In imposing a fine, the Criminal Code requires judges to consider the financial ability of the defendant by taking into account the factors of income and expenditure in real terms, without overriding the principle of restorative justice which should be the spirit in the application of customary sanctions.

For the author, the mechanism for paying fines in the criminal justice system cannot be equated with the fulfillment of customary obligations. In many cases, the payment of fines actually has the potential to reduce the essence of restoring justice for indigenous peoples. For example, in the case of customary law violations committed by legal entities (PTs), they often prefer to pay fines rather than fulfill customary obligations required by the local community.

As a concrete illustration, the indigenous people of the Kajang Tribe in Bulukumba Regency, South Sulawesi, are one of the communities that consistently uphold traditions and customary laws in maintaining and preserving the forest ecosystem in their area. For the people of Kajang, forests are not only an ecological area, but also a sacred place that is believed to be the initial location of life. They apply the Kamase-masea philosophy of life, which is a simple and unpretentious lifestyle that emphasizes balance and harmony between humans and nature. In practice, they manage natural resources wisely while maintaining the sustainability of the ecosystem (Elfira, et., al, 2023).

It is unfortunate that the ecological and social losses experienced by indigenous peoples due to the actions of companies or individuals are only compensated with an administrative fine of Rp10 million, even though the impact caused is much greater than this value. Even though there is a principal penalty imposed on the perpetrator, the fulfillment of customary obligations remains a more effective instrument in restoring community trust and maintaining harmony between the indigenous community and the surrounding environment. This is in line with the principle of protection of the rights of indigenous peoples as guaranteed in Article 18B paragraph (2) of the 1945 Constitution.

Therefore, judges who handle cases related to customary law must adhere to the basic principles of their professional code of ethics and have a high moral responsibility. The decisions taken are not only oriented towards the aspect of punishing the perpetrators, but also consider their impact on society at large. This principle is in line with the classic legal adage *Lex semper dabit remedium*, which means that law always provides solutions to problems faced by society. Thus, the law should not be an instrument that hinders justice, but rather an effective means of upholding substantive justice. Therefore, the fulfillment of customary obligations must be placed as a concrete solution that provides direct benefits to indigenous peoples, as well as ensuring that the national legal system is still able to accommodate the values of local wisdom without losing its universal essence in upholding justice

3.2 Basis For the Justification of Judges in Customary Crimes in the New National Criminal Code

Judge Principles and Solutions in Deciding Customary Criminal Cases in the Perspective of Carl Von Savigny

Judges have legal legitimacy in recognizing the enactment of customary crimes as stipulated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power. This provision explicitly requires judges and constitutional judges to explore, follow, and understand the legal values that grow and develop in society as a manifestation of the principle of substantive justice (Budi, 2018). In judicial practice, the Supreme Court has recognized the existence of customary crimes through various precedential decisions, such as the Supreme Court Decision No. 195/K/Kr/1978 which handles Balinese customary offenses (Lokika Sanggraha) and Supreme Court Decision No. 59K/Kr/1969 which adjudicates Karo customary offenses (Ndjurmak).

In addition, in Decision No. 1644 K/Pid/1988 dated May 15, 1991, the Supreme Court affirmed that customary sanctions that have been imposed and implemented by customary leaders have legal force equivalent to the decision of the general court. Therefore, sanctions that have been carried out in the realm of customary law cannot be reprocessed in the general justice system *(ne bis in idem).* However, this provision can potentially cause contradictions with Article 2 paragraph (1) of the new National Criminal Code, which emphasizes the importance of integrating customary law into the national criminal law system to avoid fragmentation of the legal system that has the potential to disrupt legal certainty.

In the perspective of the principle *ne bis in idem*, a case is considered to have been resolved if it has been decided with a decision that has permanent legal force and has been substantially examined in court (Fabilara, 2024). Therefore, the application of customary sanctions by customary leaders should no longer be a stand-alone mechanism in the criminal justice system if the new National Criminal Code is really used as a reflection of the volkgeist, as stated by Carl von Savigny. Savigny argues that law is not just a set of regulations formed by the state, but is also a reflection of the soul, legal awareness, and cultural values inherent in a nation (M. Zulfa, 2020).

The existence of customary courts that run autonomously and separately from the national criminal justice system has the potential to cause dualism of authority in the law enforcement process. This can create uncertainty in the mechanism for imposing sanctions, which in turn raises questions about the effectiveness and more authoritative judicial authority in dealing with customary crimes. Therefore, a more comprehensive and harmonious approach is needed in integrating customary law into the national legal system without eliminating its fundamental characteristics and values.

As a concrete solution, customary leaders can be used as evidence in the trial to provide relevant information for the judge in assessing whether an act committed by the defendant has met the elements of customary criminal acts legally and convincingly. In accordance with Article 1 number 28 of the Criminal Code, expert testimony is information provided by a person who has special expertise about what is needed to bring light to a criminal case for the purpose of examination.

This approach is in line with the mandate of Article 5 paragraph (1) of Law Number 48 of 2009, which implicitly provides space for judges to be more flexible in exploring, understanding, and adjusting legal norms to the evolving realities in society.

The concept is also strengthened by the academic findings presented in the dissertation of Dwi Putri Melati, S.H., M.H., C.Me., entitled *"Refunctionalization of Lampung Customary Criminal Law in the Criminal Law Enforcement System Based on Local Wisdom".* highlighting the effectiveness of Lampung's customary criminal law in maintaining social harmony and providing a deterrent effect, especially for the Pepadun and Saibatin communities. Lampung's customary criminal law already has a normative basis in various manuscripts such as Cepalo, Kuntara Rajo Asa, and Kitab Kuntara Raja Nit, so it is important to revitalize it in order to remain empowered in the national justice system. The enactment of the new Criminal Code requires judges to consider the sources of customary law, including customary books, statements of customary leaders, and opinions of customary elders who have authority in their communities

In addition, Article 2 paragraph (2) of the new National Criminal Code serves as a normative limitation to ensure that the application of customary crimes does not conflict with the fundamental principles in Pancasila, the constitution, and the guarantee of protection of the rights of the community at large. With a more integrated and comprehensive approach, customary law cannot only continue to exist in the national legal system, but can also function as an effective instrument in upholding justice based on the values of local wisdom

3.3 Creating Legal Certainty in Customary Crimes

Formulation of Customary Criminal Certainty Based on Legal Positivism

In the perspective of legal certainty according to Gustav Radbruch, law is always associated with how legal positivism operates. Legal positivism emphasizes that codified criminal law functions as an instrument to avoid the arbitrariness of rulers or kings in imposing sentences on someone (Andini, 2023). This thought is in line with the ideas of Auguste Comte who in his work *Cours de Philosophie Positive* outlined the theory *of the Law of Three* Stages, which consists of theological stages, metaphysical stages, and positive stages.

In this theory, Comte explained that the development of society goes through three main phases. First, the theological stage, in which laws and social rules are based on religious beliefs and the intervention of supernatural forces. Second, the metaphysical stage, in which law begins to be explained through abstract concepts oriented to philosophy, but is still not entirely based on empirical reality. Third, the positive stage, which is the most rational stage, in which law and science are based only on facts that can be empirically and objectively proven, without being influenced by subjective metaphysical conceptions.

Based on this theory, the question arises how customary law, which is basically not always codified in written form, can be in accordance with the principles of legal positivism. In general, customary law is more dynamic, develops based on the habits that live in the community, and is often inherited orally. However, in order for customary law to gain legitimacy in the national legal system based on positivism, formalization efforts are needed in the form of regulations recognized by the state.

Regulation of customary law in regional regulations (also known as regional regulations) is one method that can be used (Miasiratni, 2024). For example, Regional Regulations, such as the Sorong Regency Regulation No. 10 of 2017, participate in establishing the standards and procedures for applying customary criminal law in line with the new National Criminal Code's Article 2 paragraph (2). Law No. 1 of 2023's Article 2 Paragraph 3 highlights that government regulations govern the laws that govern society. Given the diversity of customary criminal law in Indonesia, the Regional Regulation is a strategic instrument to accommodate and ensure legal certainty at the local level, while maintaining harmonization with national law, Pancasila, and human rights principles.

Additionally, it is stressed in Law Number 1 of 2023's Article 2 Paragraph 3 that "Provisions regarding the procedures and criteria for determining laws that live in society are regulated by Government Regulations." This provision subtly suggests that although the state acknowledges the existence of customary criminal law, its application must adhere to rules set forth in official government regulations.

Referring to the diversity of customary criminal law in various regions in Indonesia, a regulation is needed that is able to accommodate this diversity within the scope of their respective regions. Therefore, the use of Regional Regulations as a legal instrument that regulates customary criminal law at the local level is a strategic solution. Legal certainty in the resolution of customary criminal cases can be more assured with the presence of a regional regulation that specifically lays out the rules of customary criminal law. This is also consistent with the idea of harmonizing national and customary law, according to which customary law can still be accepted and used as long as it doesn't clash with Indonesia's constitution, fundamental Pancasila values, or human rights principles.

4. Conclusion

The new National Criminal Code acknowledges the significance of customary criminal law in the country's legal system. In accordance with the legal pluralism principle, which acknowledges the diversity of Indonesia's legal system, its presence indicates the government's attempts to accommodate the law that exists in society. Nevertheless, despite recognition, there are still a number of obstacles to customary criminal law's incorporation into the national legal system, particularly with regard to the concepts of legality, legal certainty, and the possibility of legal dualism.

The incompatibility of customary criminal law with the legality principle, which stipulates that all criminal acts must be explicitly stated in written law before they can be approved, is one of the primary obstacles to its application. Although Article 2 paragraph (1) of the Criminal Code recognizes the existence of a living law in society, this provision still raises debate because it does not provide clarity on how customary law can be applied without contradicting the principle of lex certa and the prohibition of the use of analogies in criminal law. In addition, there are problems in the authority of judges and prosecutors in determining an action as a violation of customary law, considering the diversity of customary norms that apply in various regions. Therefore, the role of customary leaders as expert witnesses in the trial is needed, in order to explain certain customary sanctions, and the interpretation of certain customary criminal books to assist judges in implementing decisions.

The discussion also highlighted that in some cases, customary law can conflict with the national legal system, such as in the case of Decision Number 92/Pid.Sus/2021/PN Snj and the request for settlement of customary law in the case of Lukas Enembe. This shows that without clear regulations, customary criminal law can cause conflicts of norms and legal uncertainty in the judicial system. Therefore, more detailed regulations are needed, such as in the form of Government Regulations (PP) or Regional Regulations (Perda), to ensure that the application of customary criminal law remains within the framework of national law and does not conflict with Pancasila, the 1945 Constitution, and human rights.

Thus, in order for customary criminal law to be applied effectively in the national legal system, harmonization and clarity of regulations are needed that can accommodate local values without sacrificing legal certainty and justice. The integration of customary law in the Criminal Code must still pay attention to the principles of applicable national law so as not to cause conflicts of norms and legal dualism in practice

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