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Hybrid Justice System: Efforts Of Legal Internalization Living In The Criminal Justice System

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Abstract
There is a dualism of justice, namely traditional and modern justice. Various authors note that there are legal problems that live in a society which are considered sidelined. On the one hand, there is also an assumption that the legal system that has been built has suppressed the existing system. Even though it is acknowledged that the justice system no longer recognizes customary courts institutionally, this becomes an issue of how the process of internalizing the law that lives in society into the Indonesian criminal justice system. This study uses a normative juridical research method, namely a legal research method that only examines literature or secondary materials (Soerjono & Sri, 1994; Roni, 1994; Achmad, 2009). The research results show that the hybrid Justice System is a model of law internalization that lives in society. In Indonesia, it is a reality that exists without design. The dualism of the justice system, primarily criminal justice, where on the one hand, the formal legal system works based on the principle of legality, while on the other hand, there is customary law as a living law in society.

Keywords: Hybrid Justice System, Legal Internalization, Criminal Justice System

INTRODUCTION

The dualism of justice between customary courts as traditional courts based on laws that live in society and the Indonesian legal system that operates has been felt and has become a discussion that has just stopped. In the draft National Criminal Code which is considered a substitute for the colonial heritage code that is used today, for example, the term material legality appears, which was built as an instrument of recognition of living law in society or customary law which complements formal legality which refers to laws and regulations only (*nullum crimen sine lege*). Bedner calls it the Leiden school, which contrasts unwritten customary law with state law, a legislative product outlined in statutory regulations (Bedner: 2019: 419).

Various authors note that there are legal problems that live in society, which are considered to be sidelined on the one hand. There is also an assumption that the legal system that has been built has suppressed the existence of the existing system. The struggle between an existence that is in doubt, the applicability of values that are considered old-fashioned and valid in a limited scope, sources of law originating from an unwritten culture of speech and which are considered only to be consumed by the needs of parents are the root of the legislature's confusion about including it in the formal legal system that applies. Soepomo:1947) (Henley and Davidson:2007: 12-13) (Dinnan: 2003). The notion of legality that is adhered to by many law enforcers has made the existence of living law in society and customary justice institutions no longer part of the legal system (in the law, the main points of the judicial power of customary institutions are never explicitly stated)

This condition is considered inappropriate. Lilik Mulyadi, the existence of living values in society is still reflected in various judges' decisions as part of the recognition of living law and efforts to uphold justice for the community (Mulyadi:2010) (Suharyanto:2010). Even though it is acknowledged that the justice system no longer recognizes customary courts institutionally, this becomes an issue of how the process of internalizing the law that lives in society into the Indonesian criminal justice system.

METHODS

This study uses a normative juridical research method, namely a legal research method that examines literature or secondary materials only (Soerjono & Sri, 1994; Roni, 1994; Achmad, 2009). Normative Juridical Research concerning issues concerning Hybrid Justice System.

RESULTS AND DISCUSSION

Hybrid Justice System

The problem of the dualism of the legal system in ex-colonial society after the Second World War, where the legal system inherited from the colonial government became the formal legal system that applies on the one hand. On the other hand, the community still recognizes that the traditional legal system is a problem in various countries. Dinnan mentions that a collaborative approach is needed, which combines customary justice as a law enforcement institution that lives in society with the formal justice system that applies in a country (Dinnan:2003:2-4).

The Collaborative Approach that forms the basis of the Hybrid Justice System is known for dealing with serious crimes. Hybrid Court describes collaboration between national and international courts in cases of gross human rights violations (UNHCR:2006). This was stated as part of the Post-Conflict recovery strategy, in which a country's country's condition is generally in critical condition. In this case, the formal legal system cannot be implemented, including law enforcers who cannot work. In this context, the presence of international institutions is essential to restore conditions. Major cases such as Bougenville in Papua New Guinea, The Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon, or the Kosovo Specialist Chambers are special courts modified to involve the public actively addressing the conditions required in the recovery framework. In reality, the community's involvement is also the involvement of the law that lives in society. In cases of riots that occurred in Indonesia, Braithwaite stated that traditional institutions played an essential role in efforts to reconcile society in Indonesia (Braithwaite: 2010). Call it the local conflicts in Aceh, Ambon, Kalimantan and Central Sulawesi. The role of traditional institutions is essential to guarantee the goal of the settlement process, which aims to achieve peace. Efforts to involve victims and the community in achieving true peace. In the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters in 2000, this is stated as "an "evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities."

"Social Harmony", as stated in the Basic Principles on the Use of Restorative Justice Programs, philosophically, there is a difference between the objectives of customary justice and the existing legal system. Traditional values in traditional society, such as balance, harmonization and peace, are peculiarities that are not adhered to in the formal legal system. The goal of public order and public safety often forgets the value of balance. This, in practice, actually creates dissatisfaction with the functioning of the criminal justice system, which often triggers conflict (Braithwaite: 2010).

From any perspective, this hybrid justice is built to fill the space where the interests of the victims and the neglected community are considered. This neglect is inseparable from the history of post-colonialism in several former colonial countries, where the structure of the legal system still refers to the laws left by the former colonialists. It is a historical record in which decades of colonialism caused European law to dominate the legal system in many countries in the world. This has triggered several countries to adapt by adopting local values in the new legal system. This is not an easy matter. On one side, the system built and established during the colonial period has changed the formal legal structure and culture. Generally, law enforcement officials

are " familiar with the existing system." So returning to a mindset that is in line with traditional values and values is not easy homework.

On the other hand, the existence of customary courts is also an acknowledgement of the existence of indigenous peoples. Declaration on The Rights of Indigenous People (United Nations Declaration on the Rights of Indigenous Peoples) was passed on September 7, 2007. Article 5 states that indigenous peoples have the right to maintain and strengthen political, legal, economic, and social institutions and their culture while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. While Article 34 of this declaration defines that indigenous peoples have the right to promote, develop and maintain their distinct institutional and customary, spiritual and traditional structures, procedures, and practices, and in cases where there are any, their judicial or customary systems, following these standards, international human rights. This was born as a response to the many efforts to elevate local values , which in certain circumstances are recognized as a legal system that is still alive and functions in conditions where the formal legal system cannot work.
The fact shows that this mechanism is still valid in many countries in remote areas (Dinnan: 2003). This happens for several reasons (Zulfa: 2010), including:

1. Access to justice, related to its existence in remote areas and limited understanding of the workings of formal law, has resulted in the community's limited access to the existing formal legal system. Hasu acknowledged that in Indonesia, there are still many isolated tribes whose existence still exists today. For example, the Mentawai tribe on Mentawai Island, West Sumatra or the Anak Dalam tribe who live in the Bukit Dua Belas Sarolangun area, Jambi Province. Traditional communities living in isolated areas still have a solid legal tradition based on their traditional law in solving legal problems. This reality is where tradition or "custom" still applies in many places. This is also a reality where social change sometimes collides with regional boundaries, and this is also a reality where there are areas where the formal legal system is still "sterile".
2. Different philosophies and values of justice lead to different forms of societal solutions. Giving traditional clothes to the community on Timor Island, NTT Province, as a form of peace, traditional ceremonies such as Peusijuek in Aceh or Bakar Batu in Papua, are not a form of problem-solving in the view of modern society. Because of this, the type of problem-solving offered by the formal legal system sometimes gets different views. It is considered inadequate and does not fulfill the sense of justice of the people who still adhere to their legal traditions. So that it is not uncommon in various cases even though a criminal has been sentenced by a court but still asked for criminal responsibility by traditional institutions or vice versa.
3. Inadequate infrastructure and resources owned by the formal legal system lead to a lack of adaptability in absorbing the needs of the local community's sense of justice.

However, it must be acknowledged that in many practices in various countries, the existence of living law, which is recognized as traditional law, has various weaknesses (dinnan: 2003) (Zulfa: 2010). Zulfa stated that the position of customary justice in the formal legal system is often questioned (Zulfa: 2010), not only related to the pattern of relations when both are implemented, but also includes several doubts related to the existence of this traditional justice institution, including:

a) The view believes that older people hold the most customary justice. Because of this, their thinking often does not look at the development of existing conditions in society, especially the younger generation.
b) Discriminatory views born of patriarchal culture are suspected to be very strong. This affects their decisions, such that they discriminate against women and children.
c) Allegations that even in customary courts, a culture of nepotism and corruption is prone to occur. The position of family background and lineage, which causes the existence of different social strata, which causes different treatment in the community structure, influences the operation of the customary court institution.
d) The coercive power of customary court decisions is often questioned as well.
e) That customary justice institutions will only be effective and binding in a homogeneous traditional society and within a limited locus.

Regardless of the advantages and disadvantages possessed by traditional institutions, the need for their existence is still felt. Koesnoe stated that this was not a new customary justice model but a model for internalizing traditional values in the national legal system, not just a hook

(Koenoe:1970:21-22). Therefore we need Legal Politics (Criminal) which wisely formulates a system collaboration model that can integrate the two running systems.

Legal Politics of Recognition of Indigenous Courts

Legal politics in the sense of an effort to "law enforcement and justice" can be interpreted as a" statement of the authorities' will regarding the applicable law. Regarding the direction in which the law is to be developed (Asep: 2018: 10). The politics of criminal law is not just determining what categories of actions are declared as a crime by the state but how the state organizes community law order by looking at two things, namely individual interests and the collective interests of society (Mardjono: 2018).

The existence of traditional institutions in the criminal justice system in Indonesia is basically in an intermediate position. As previously stated, Koesnoe refuses to confront law and customary courts with the National Law system (Koesnoe: 2007). Customary law should be an integral part of the national legal system. Unfortunately, Abdurahman then criticized the National Legal Development Agency (BPHN), one of its seminars that put the law as Indigenous Indonesian Law (Abdurahman: 1980: 63).

The position of customary law as Indigenous Indonesian Law is no different from how the colonial government viewed it in the past. (Zulfa: 2010). During the colonial period, the Dutch East Indies Government positioned customary law as local law that applied to native people. Several regulations were issued as a form of recognition of its existence. Some examples include:

a. Staatsblad no.83/1881 for Aceh Besar;
b. Staatsblad no.220/year 1886 for Full (West Kalimantan);
c. Staatsblad no.90/1889 for Gorontalo area etc

However, this provision can also be interpreted as the interference of the colonial government in the operation of this system. Provisions issued by the Dutch East Indies government include:

1. Official Gazette No.80 tahun 1932 tentang Regulation of Indigenous Jurisdiction in Directly Administered Area (pengadilan adat).
2. Self-government Rule 1938 regarding the Swa praia trial as well
3. Staatsblad no.102 of 1935 inserted Article 3a into the Reglement Ordonantie, which regulates the authority of judges from local law communities to examine and adjudicate cases under their authority.

The legal politics of the Dutch colonial government became interesting to observe. The position of recognizing customary courts but not fully including them as part of the formal legal system certainly has reasons. One of the fundamental reasons is the absence of direct government interest in actions considered violations of criminal acts in customary offenses (Bedner: 2018).

Efforts to Integrate Living Law into the Formal Legal System

Efforts to integrate the values that live in society as part of the formal legal system begin with the provisions contained in Emergency Law No. 1 of 1951. The provisions in this emergency law were made during the Soekarno era, after the Round Table conference, which became a milestone in the history of Indonesia's recognition as a country in the eyes of the International (Santoso: 2020: 219). The nature of the provisions of this Law was made as a temporary measure for the government in the transition period of independence as the title of Emergency Law Number 1 of 1951 concerning Temporary Measures for the Organization of the Unitary Structure of Power and the Procedures of the Civil Courts. The purpose of this Law is to serve as the initial foundation for the birth of a unified Indonesian national legal system realized to have a very pluralistic nature.

It is realized that this pluralistic nature was born from the birth of this nation, which initially consisted of many archipelago kingdoms that eventually submitted themselves to a single unitary state sovereignty. Until now, Indonesia's demographic position has placed it as the fourth most populous country in the world. According to the 2020 population census, Indonesia's population is 270.2 million. As many as 56% of the population live on the island of Java, the most populous island in the world. There are around 300 ethnic groups and 737 languages that still live in Indonesia. Van Vollen Hoven noted that there are 19 customary law areas (rechtsfragen) which he refers to as Aceh; Gayo Alas, Batak, and Nias; Minangkabau; South Sumatra; Malay; Bangka Belitung; Borneo; Minahasa; Gorontalo; Toraja Land; South Sulawesi; Ternate Islands;

Moluccas; West Irian; Timor Islands; Bali and Lombok; Central Java, East Java, Madura; Solo, Yogyakarta; and West Java, Jakarta (Bedner:2020).

Moreover, even though the Indonesian government only recognizes six official religions: Islam, Catholic Christianity, Protestant Christianity, Hinduism, Buddhism, and Confucianism, the diversity of languages and religions indicates how pluralism exists in Indonesian society. The position of ethnic, linguistic, and religious diversity in a large area, on the one hand, is a wealth of diversity. However, on the other hand, it is a challenge in the unification of the legal system, especially criminal Law, which the founders of this nation realized.

However, the structure of the colonial legal system, which had been rooted for 350 years during the colonial period, gave birth to a dualism of the justice system that runs together in society on different tracks. Colonial politics, which makes 3 population groups (Article 163 and Article 131 Indian Constitution (I.S.) (Stb 1925-415) (Hartono:2015:12-13), was an effort to facilitate the implementation of a legal system that was considered beneficial by the government at that time. On the one hand, autonomous justice that applies to indigenous or ethnic groups of indigenous Indonesians is considered an acknowledgment of the existence of traditional institutions or local community justice by the government. In the Criminal Code for the Netherlands Indies, translated as the Criminal Code, which is used to date, the population classification policy, considered ideal in the colonial era but in the current era of the legal system, has been questioned.

One can be found in Article 76 of the Criminal Code regarding ne bis in idem, for example. In the original formulation, the provisions of Article 76 paragraph (1) of the Criminal Code stated:
"behouden te gevallen waarin rechterlijke uitspreken voor herzeining vatbaar zijn, kan niemand andermaal worden vervolgd wegens een feit waarover te zijnen aanzien bij gewijsde van den Nederlandech-Indischen rechter, of van den rechter in Nederland of in de kolonien en bezittingen van Nederland bukten Nederlandsch-Indie, onherroeplijk is beslist. Onder Nederlandsch-Indischen rechter worden hier mede verstaan de inheemsche rechters in streken waar het recht van zelfbestuur aan de Inlandsche vorsten en volken is gelaten, zoomed waar de Inlandsche bevolking in het genot harer eigen rechtspleging is gelaten".

The essence of the provisions in Article 76 of the Criminal Code states that a person cannot be prosecuted twice for the same act that a court decision has decided with permanent legal force. The original text states that the court referred to here also includes courts including native judges based on the state administration of kings in the Dutch East Indies colonial countries or judges of Swapraja courts. In current court practice, this is no longer the basis for *Ne bis in Idem,* resulting in a double punishment.

The provisions in Article 76 of the Criminal Code became a problem after the issuance of Emergency Law No. 1 of 1951, which abolished the existence of customary justice institutions in Indonesian territory. Particularly in the provisions of Article 1 paragraph (2) of Emergency Law No. 1 of 1951, which states that at a time that will be gradually determined by the Minister of Justice to be abolished:

a) All Swapraja Courts (Zelfbestuursrechtspraak) in the former State of East Sumatra, formerly the Residency of West Kalimantan and formerly the State of East Indonesia, except for the Religious Courts, if according to living law, the judiciary is a separate part of the Swapraja judiciary;
b) All customary courts (*Inheemse rechtspraak in rechtstreeksbestuurd gebied)*, except for the Religious court if the court according to living law is a separate part of the Adat court.

The law that lives in society is manifested through customary justice, whose existence is attached to the community where the law lives. The abolition carried out legally and formally did not necessarily make this institution non-existent. This institution continues to live and work according to its role in society. The problem is its recognition of decisions made formally.
The formulation to acknowledge the existence of a living law is not made rigidly. Concerning material law, this provision states in Article 5, paragraph (2) letter b as follows:

The civil material law and, for the time being, the civil, unlawful material law, which until now applies to the subjects of the Swapraja area and those whom the Customary Court previously tried, still applies to the subject matter and that person, with the understanding:

(a) That an act which according to the living law should be considered a criminal act, but there is no comparison in the Civil Criminal Code, it is considered punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiahs, namely as a substitute punishment if customary punishment the sentence imposed was not followed by the condemned party and the said compensation was considered commensurate by the judge with the magnitude of the guilt of the convicted person,
(b) That, if, according to the judge's opinion, the customary sentence was exceeded by the imprisonment or fine referred to above, then for the defendant's mistake, a substitute sentence of up to 10 years in prison could be imposed, with the understanding that the customary punishment according to the judge's understanding was no longer in harmony with the times must always be replaced as mentioned above, and that an act which according to the living law must be considered a criminal act and which has an appeal in the Civil Criminal Code, is deemed to be subject to the same punishment as the sentence for the appeal that is most similar to said criminal act.

The different position between formal law and material law in terms of recognition in the formal legal structure causes:

a. The Dualism of the justice system between the formal justice system that applies within the scope of the state and customary justice as part of institutionalized institutions in society;
b. Judicial institutional policies that do not accommodate the need to enforce customary material law;
c. different legal politics between the central and regional governments related to the recognition of customary and institutional institutions
d. The uncertainty of judges in making decisions based on the law that lives in society.

Regarding judicial institutional policies that do not accommodate the need to enforce customary material law, Lev noted it as a policy in the administrative field of justice (Lev: 1990: 438-473). Lev noted that the conception and structure of political power that prevails in society significantly determine the formation of a legal product. So one should not only view the law as a set of rules and principles contained in written provisions but also includes institutions (institutions) and process (process) as well as culture (culture) laws that are required to create laws in reality (Friedman: 1969).

This policy can be seen in the provisions later issued in policies regarding the internal judicial power environment. The Law on Main Provisions of Judicial Power (Article 10 of Law Number 14 of 1970), which the Judicial Power Law later amended (Law Number 35 of 1999 and amended again by Law Number 4 of 2004, Law Number 48 of 2009) does not the existence of the Customary Court is known again at the level of legislative policy. Legislative norms that do not recognize the existence of customary law have an impact on the responsibility for applying living law to judges. Lev stated that the administrative system of assigning judges where the mutation system is running causes judges to be unable to delve into the laws that live in the community where they work and include them in the consideration section (Lev: 1990).

Recognizing the existence of customary courts becomes interesting when referring to a number of special laws and regional regulations that recognize the existence of this institution. Several regional regulations referred to include:

1. Regional Regulation of Central Kalimantan Province Number 9 of 2001 concerning Handling Population Impacts of Ethnic Conflict

Article 4 Part Three of this provision regulates the Authority and Role of the Damang Traditional Head, namely:

1.) Maintaining regional customs that live, grow, and develop as socio-cultural, socio-economic, and social norms/rules.
2.) Settlement by peaceful means, inter-ethnic and inter-tribal disputes as long as they do not conflict with laws and regulations.
3.) We implement Customary Decisions when there is a violation of Customary Law.

2. Gowa Regency Regional Regulation Number 44 of 2001 Concerning Empowerment, Preservation, and Development of Customs and Customary Institutions

In Article 5, paragraph (2), this provision regulates assignments. Customary institutions include channeling community opinions to the government and resolving disputes concerning customary law and community habits.

Meanwhile, Article 6 regulates the authority of traditional institutions, namely.

a. Representing indigenous peoples, namely in matters relating to the interests of indigenous peoples
b. Manage customary rights and/or customary assets to improve the community's progress and standard of living in a better direction.
c. Resolving disputes concerning customs and habits of the community as long as the settlement does not conflict with the applicable laws and regulations.

3. Fifty Cities District Regulation Number: 01 of 2001 concerning Nagari Government

Article 60, this provision regulates the duties and obligations of the Wali Nagari.

a) To reconcile the dispute referred to in paragraph (I) letter e, the Nagari Wali can be assisted by the Nagari Traditional Institution.
b) All disputes reconciled by the Wali Nagari are binding on the parties to the dispute.

While Article 103 formulates a Nagari Adat institution that functions to resolve sako and pusako disputes according to the provisions as long as the adat applies in the Nagari, in the form of a peace decision. If it is unsuccessful, the parties concerned can forward their case to the District Court through Wali Nagari.

4. Regional Regulation of North Barito Regency Number 21 of 2000 Concerning the Preservation and Development of Customs at the Village and Kelurahan Level

Article 2 of this provision formulates the aims and objectives of preserving and developing traditional institutions to enhance the role and function of traditional institutions in the Village and Kelurahan areas.

5. North Lampung Regency Regional Regulation Number 13 of 2000 Concerning Preservation, Development, and Empowerment of Customs and Traditional Institutions

In Article 8 of this provision, the duties of the Customary Board are to accommodate and channel the opinions of the community to the Government as well as to resolve various disputes related to customary law. Therefore the Lembaga adat has the right and obligation to deal with various disputes related to day-to-day matters as long as the settlement does not conflict with the applicable laws and regulations.

6. North Lampung Regency Regional Regulation Number 13 of 2000 Concerning Preservation, Development, and Empowerment of Customs and Traditional Institutions

In Article 1, it is stated that the Data Agency is a social organization either intentionally formed or which naturally has grown and developed in the history concerned or a particular customary law community unit with the said traditional territory and has the right and authority to manage and resolve various problems. Life is related to the customs and customary laws that apply. While Article 8 states that the task of traditional institutions is to accommodate and channel community opinions to the Government and resolve disputes concerning customary law.

7. North Lampung Regency Regional Regulation Number 13 of 2000 Concerning Preservation, Development, and Empowerment of Customs and Traditional Institutions

In Article 1, it is stated that a customary institution is a social organization either intentionally formed or which naturally has grown and developed in the history concerned or a particular customary law community unit with the said traditional territory and has the right and authority to organize and resolve various problems. Life is related to the customs and customary laws that apply.

8. Muara Enim Regency Regional Regulation Number 10 of 2000 concerning Empowerment and Preservation and Development of Customs and Customary Institutions

In Article 12, this provision states that the Duties and functions of Village/Kelurahan Traditional Institutions Resolve disputes concerning the customs of the Village/Kelurahan community concerned;

9. Kanan Regency Regional Regulation Number 35 of 2000 concerning Empowerment, Preservation, and Development of Customs and Customary Institutions.

In Article 1, it is stated that a Customary Institution is a social organization, either intentionally formed or naturally having grown and developed in the history of the community concerned or in a specific Customary Law community and said Customary Territory, and has the right and authority to regulate, administer and resolve various life problems related to and referring to the relevant Customs and Customary Laws.
Meanwhile, Article 9 states that the Customary Institution has the right and authority to resolve various disputes concerning routine matters as long as the settlement does not conflict with the applicable laws and regulations.
10. West Lampung Regency Regional Regulation Number: 14 of 2000 concerning Empowerment, Preservation, and Development of Customs and Customary InstitutionsThe provisions in Article 1 become interesting to observe where the definition of a Customary Institution is a social organization, whether intentionally formed or natural that has grown and developed in the history of the community concerned, or in a specific Customary Law community and the Customary Territory, and has the right and authority to regulate, manage and resolve various life problems related to and referring to the relevant Customs and Customary Laws.
11. Central Lampung Regency Regional Regulation Number 11 of 2000 concerning Empowerment, Preservation, and Development of Customs and Customary Institutions.
The provisions in Article 9 paragraph (1) letter c state that the Customary Institution has the right and authority to resolve various disputes concerning Customary cases as long as the settlement does not conflict with the applicable Laws and Regulations.
12. Regional Regulation of Jeneponto Regency Number: 09 of 2000 concerning Empowerment, Preservation, and Development of Customs and Customary Institutions.
In the formulation of Article 10 letter c, it is stated that the Authority and Obligations of Customary Institutions are to resolve any disputes over customs.
13. Bangkalan Regency Regional Regulation Number: 19 of 2000 concerning Empowerment, Preservation, and Development of Customs and Customary Institutions
This Regional Regulation is interesting to observe, considering that Bangkalan is located on Madura Island, which is relatively close to the island of Java, where issues regarding traditional institutions are no longer coming to the fore. The administrative system in the Java region, which is close to the central power, causes the formal legal system to work. In Article 1, the formulation of traditional institutions is understood to be the same as other regions, namely a social organization formed by a particular customary law community that has specific areas and other assets and has the right and authority to regulate and manage and resolve matters related to customs; Likewise, the provisions in Article 10 letter b which state that customary institutions have the authority to resolve disputes between indigenous peoples and between indigenous peoples and the Government.

The regional regulations mentioned above are only a small description of the many similar regional regulations issued by local governments to provide space for traditional institutions and customary courts. Regardless of the institutional structure that makes it different from the provisions in the statutory regulations, the spirit to accommodate and provide recognition of the law that lives in society and its institutions is reflected in the various policies above.

This particular provision regarding traditional institutions is contained in 2 (two) laws, namely Law Number 11 of 2006 concerning the Governance of Aceh and Law No.21/2001 concerning Special Autonomy for Papua. Article 128, paragraph (2) of Law Number 11 of 2006 states, "The Syar'iyah Court is a court for every Muslim who resides in Aceh." The sharia court has the authority to examine and adjudicate cases adjudicate and decide on finger cases (criminals), such as the spread of heretical sects, failing to pray three Fridays in a row without a syar'i excuse, providing facilities/opportunities to Muslims without a syar'i excuse 'i not fasting (in the field of worship), eating and drinking in public places during the day during the fasting month, and not wearing Islamic clothing, and the Syar'iyah Court is also entrusted with adjudicating criminal cases in the management of zakat.

While Law No.21/2001 Concerning Special Autonomy for PAPUA in Article 50 of this Law states that in addition to judicial power in the Province of Papua exercised by the Judiciary following statutory regulations, it is also recognized that there is customary justice in specific customary law communities. While Article 51, paragraph (1) of this Law states that customary justice is a

peace trial within the customary law community, which has the authority to examine and adjudicate customary civil disputes and criminal cases among the members of the orthodox law community concerned. Article 51, paragraph (3) states that the customary court examines and adjudicates customary civil disputes and criminal cases, as referred to in paragraph (1), based on the customary law of the relevant customary law community.

Even though there are policy gaps in the administrative realm of judicial institutions, this does not result in the disappearance or abolition of customary law as a living law in society. Lilik stated that traditional values were still included in many judges' considerations (Mulyadi: 2013). The National Criminal Code drafting team captured this to formulate it in the provisions of Article 2 of the draft provisions. This issue provokes debate about the legality principle, especially concerning the written law. Legal penal provision translated as legislation is a product of the legislature, so the term Material Legality appears.

The principle of material legality is present in many discussions about the formulation of the principle of legality in the formulation of Article 2 of the Draft Criminal Code, which provides recognition of customary law as a living law in a society where violations can qualify as a crime (Explanation of Article 2 of the RKUHP). The formulation of the provisions of Article 2 paragraph (1) is as follows "The provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law that lives in a society which determines that a person should be punished even though the act is not regulated in this law". The explanation of this provision bridges the gap between the regional regulations described above and the provisions in the Basic Law on judicial power. In the explanation, it is stated that to provide a legal basis for applying criminal law (customary offenses), it is necessary to confirm and compile the government originating from the respective Regional Regulations for implementing customary law. This compilation contains laws that live in a society that qualify as customary crimes.

This provision illustrates a hybrid Justice System that departs from the reality of judicial practice in Indonesia. In many of their decisions, judges who have the task of finding the law have internalized customary law through consideration of their decisions. This is done as an effort to harmonize certainty in the formal legal system and the value of justice that society needs. Some decisions that serve as examples, for example

(a) The decision of the Supreme Court of the Republic of Indonesia Number 1644 K/Pid/1988, dated May 15, 1991, where in the consideration section, stated that if someone violated customary law, then the Head and Traditional Leaders gave a normal reaction (customary sanctions) then the person concerned could not be submitted again (for the second time).
(b) Palangkaraya District Court Decision No. 278/Pid.B/2003/PN.P1.R dated February 16, 2004, where one of the rulings stated "...because the victim's family and the defendant's family had entered into customary peace, which peace the defendant had fulfilled all demands according to law Dayak adat, so that the values that live in that society, deserve attention and respect, because of which besides paying attention to the juridical and philosophical aspects the Panel of Judges also pays attention to the sociological aspects..".
(c) Decision Number 984 K/Pid/1996 dated January 30, 1996, the Supreme Court of the Republic of Indonesia, among other things, held that: "The act of adultery between a husband and wife with another party which has so far been known as the qualification of adultery delict ex Article 284 of the Criminal Code, from this case it turns out that when the perpetrator (dader) has been subject to customary sanctions or received normal reactions from customary village stakeholders, where customary law is still respected and thrives within the indigenous peoples concerned, the prosecutor's prosecution of the perpetrators (dader) ex Article 284 of the Criminal Code legally, must be declared not acceptable.
(d) Decision Number 33 Years/Pid.B/2006/PN. BKL, where the judge rejected a case previously subject to customary sanctions by the institution Rajo Penghulu. In his consideration, the judge stated that this decision referred to the arguments in consideration of the Supreme Court as contained in Number 984 K/Pid/1996, dated January 30, 1996.

The arguments in these various Decisions are translations of the Provisions of the Emergency Law No. 1 of 1951, where even though the autonomous judiciary is abolished, day-to-day decisions are still respected to avoid double punishment and keep the basics to not do the same

thing twice. Based on the Supreme Court Decision, until now, customary law and traditional institutions that function as institutions for settling cases of customary offenses are still recognized and respected. Decisions or determinations of customs officials who have imposed normal reactions or customary sanctions on violators of customary law are still binding and have legal force. Thus the Supreme Court or even the District Court is not justified in trying a second time against the perpetrators of customary law violations by imposing a sentence even though previously they had been tried according to customary law by a customary institution. Therefore, the ne bis in idem principle, as stipulated in Article 76 of the Criminal Code, apply to this case. So if a criminal case has been subject to customary sanctions, then referring to the Supreme Court Decision, the judge should declare the public prosecutor's charges unacceptable (*Niet Ontvankelijk Verklaard*).

CONCLUSION

Hybrid Justice System as a model of law internalization that lives in society. In Indonesia, it is a reality that exists without design. The dualism of the justice system, primarily criminal justice, where on the one hand, the formal legal system works based on the principle of legality, while on the other hand, there is customary law as a living law in society. The two sides are contradictory and have different philosophical foundations and goals. Combining two different things is a challenging job. Legal politics still needs to provide a direction to end this dualism. Efforts to internalize traditional values in the formal legal system do not yet have a clear direction because practice still refers to Emergency Law No. 1 of 1951, which in its formation was only directed at temporary policies. Laws that aim to create a unified legal system create dualism. Institutional abolition on the one hand through Article 1 but still retaining material law on the other hand, as in Article 5 paragraph (3) letter b. The position of the Customary Courts is not recognized in the formal legal system except in two Special Laws, namely Law Number 11 of 2006 concerning the Government of Aceh and Law No.21/2001 concerning Special Autonomy for Papua. The law as in the Law on Judicial Powers has been amended four times (UU Number 14 of 1970), which the Judicial Powers Law later amended (UU Number 35 of 1999 and amended again by Law Number 4 of 2004, Law Number 48 of 2009) received a reaction with the presence of several regional regulations which in the structure of the legislation are provisions under the law which provide recognition for customary law institutions. In judicial practice, judges also see the need to continue referring to the laws that live in society to achieve justice. Various considerations for decisions at the level of the district court and the Supreme Court provide arguments that try to bridge the norm, which is the translation of the Provisions of the Emergency Law No. 1 of 1951 where even though the autonomous judiciary is abolished, day-to-day decisions are still respected to avoid double punishment. They remain to uphold the principle of ne bis in idem. An effort to collaborate on system dualism in decisions that are expected to provide legal certainty. A reality where the Hybrid Justice System is then outlined in Article 2 of the Draft National Criminal Code. The provisions are expected to accommodate and end the dualism of the existing legal system in Indonesian judicial practice. (EAZ)

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