

THE PROTECTION OF CUSTOMARY LAW COMMUNITIES AT THE NATIONAL AND INTERNATIONAL LEVEL (POST THE ISSUE OF LAW NO: 1 OF 2023 CONCERNING THE CRIMINAL LAW BOOK)

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ABSTRACT

The 2023 reform of Indonesia's Criminal Code aims to improve the protection of society from crime, including immoral acts and modern crimes. A number of new articles, including those governing adultery and LGBT, are expected to provide substantial justice and adapt the law to the dynamics of society. The research method used is qualitative with a literature study. Although the new Criminal Code recognizes the rights of indigenous peoples, challenges in implementation still exist. Unequal access to justice, financial constraints, and inadequate legal representation are some of the obstacles that need to be overcome. It is important to ensure the Criminal Code's compatibility with existing international legal instruments related to community rights, such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169. Robust reporting and monitoring mechanisms are needed to ensure the sustainability of the implementation of the Penal Code and involve the active participation of indigenous peoples. Potential international litigation Indonesia must ensure the protection of customary law in the Criminal Code does not violate international standards. The successful implementation of the Criminal Code depends on cooperation between the government, indigenous peoples, and law enforcement agencies.

Keywords: Justice, Criminal Code, UNDRIP

A. INTRODUCTION

The Criminal Code was passed in 2023 to reform criminal law in Indonesia. The existence of these regulations is expected to be a solution for better protection of society so that they avoid crime. Indonesia is a rule of law country and various legal products were created to protect and maintain the community, such as the Criminal Code. This permission is fully supported by the Indonesian people. Many additional articles prevent them from becoming victims of criminal crimes. These articles were deliberately created to follow the dynamics of society in the information technology era. Among the articles in the Criminal Code, the one that is best known to the public is that adultery carries a sentence of one year in prison. Meanwhile, perpetrators of cohabiting, aka living together without a legal marriage bond, will be sentenced to 6 months in prison. This punishment is deemed appropriate because the suspect committed immoral acts, by taking the victim's virginity by force or committing other immoral acts. Meanwhile, perpetrators of cohabitation are also punished because they also violate moral norms, religious law, and state law. The birth of the new Criminal Code, he added, is also an effort to adapt to current conditions, such as several criminal acts regulated in the old Criminal Code. The Criminal Code will realize substantial justice because it regulates almost all areas of society. For example, customary law (living law), anti-hoax articles, anti-adultery and LGBT articles. Then there are articles prohibiting violations of the head of state and his deputies, articles on privacy settings, etc. With these articles, criminal

law in Indonesia will be enforced and protect the public from various types of crimes because it has various articles. With the existence of the National Criminal Code, the Indonesian people will be safer because these new regulations have accommodated the various legal needs of modern society. Alexander Joshua Galen, a contributor to the *Equatorial Voice*.

National People's Day is celebrated every August 9. This day has been commemorated since the United Nations General Assembly adopted the United Nations (UN) Declaration on the Rights of Indigenous Peoples (The United Nations Declaration on the Rights of Indigenous Peoples) on September 13 2007 Indigenous peoples welcomed with joy the adoption of the Declaration which had been fought for decades by various indigenous peoples' organizations throughout the world. However, the implementation of international norms in the Declaration is still far from being burnt. Indigenous peoples and individuals have freedom and equality with other communities and individuals and have the right to be free from all kinds of discrimination, the right to self-identification, and freedom of civil and political rights as well as economic, social, and cultural rights. Indigenous peoples also have rights to land, territories, and resources that they traditionally own, control, or use and rights to lands, territories that they traditionally own. They also have the right to participate in decision-making that can have an impact on their rights. Article 18B paragraph (2) of the 1945 Constitution states that the state recognizes and respects customary law community units and their traditional rights as long as they are still alive and following the development of society and the principles of the Republic of Indonesia as regulated in the Law. According to Yance Arizona (2010), article 18B paragraph (2) of the 1945 Constitution as one of the constitutional foundations of indigenous peoples states declarative recognition that the state recognizes and respects the existence and rights of indigenous peoples. However, this recognition provides limitations or requirements so that a community can be recognized as a customary law community, namely: (a) as long as it is still alive; (b) following societal developments; (c) Principles of the Unitary State of the Republic of Indonesia; and (d) regulated by law. 1Mimin Dwi Hartono (geotimes, 8 August 2016).

Article 67 paragraph (2) of Law number 41 of 1999 concerning forestry recognizes the existence of indigenous communities as long as it has been confirmed in the form of regional regulations. However, in many cases, indigenous communities experience difficulties in obtaining recognition in the form of regional regulations, due to several problems.¹yoserwan yoserwan Faculty of Law, Andalas University, Padang, Indonesia.

The crime of castration is not new because several countries have implemented this crime for perpetrators of sexual crimes. For example, the state of California has implemented the crime of castration since 1996. Other states that have implemented this penalty are Georgia, Iowa, Montana, Oregon, Texas, and Wisconsin. Chemical hazelnut penalties in some states can be implemented depending on the court's decision. Apart from the United States, there are still several countries that have implemented chemical castration, namely Poland, Moldova, Israel, Argentina, Estonia, Australia, South Korea, and Russia. Meanwhile in Indonesia, the criminal castration policy was issued by President Joko Widodo through Perpu no. 1 of 2016. Victims who are children who should receive protection receive treatment that can have a lasting psychological trauma impact until they are adults for the rest of their lives and make the child lose their future due to trauma. It is not uncommon for victims to become adults even after they are adults. can become a perpetrator of Pedophilia because of traumatic feelings and the nature of revenge that is difficult to eliminate. Therefore, the perpetrator has a punishment that can provide a sense of appropriate justice for the victim regarding what was done by the perpetrator of the crime of Pedophilia (Nafsiah," Here are 9 countries that apply sanctions for sex offenders").

The general explanation is that the RKUHP also states that the preparation of the National Criminal Code (KUHP) to replace the Criminal Code left by the Dutch colonial government with all its amendments is one of the efforts in the context of developing national law. These efforts are carried out in a directed and integrated manner so that they can support national development in various fields, following development demands as well as the level of legal awareness and dynamics developing in society.

However, so far there has been no formulation regarding the purpose of punishment in positive law in Indonesia. As a result of the absence of a criminal formulation, there are many inconsistent and overlapping formulations and types of criminal sanctions. The RKUHP that has been drafted seems to experience the same problem, where there is a tendency to mix up the concepts of punishment and the determination of sanctions. The issue of determining sanctions in the Indonesian RKUHP has undergone several changes in its history, with more than eight RKUHP concepts recorded, some of which have similarities but also have differences.

According to the author, this shows that the concept of punishment and determining sanctions in the RKUHP always changes from time to time, there are quite fundamental changes from the initial concept to the final concept, showing that the issue of providing sanctions in the RKUHP is always adjusted to developments in the living conditions of the nation and state. Barda Narwawi Arief stated that the relationship between determining criminal sanctions and the purpose of punishment is an important point in determining criminal political planning strategies. Determining the purpose of punishment can be the basis for determining the methods, means, or actions that will be used (Arief, 2011: 21).

The main problems in criminal law relate to three things, namely: the problem of criminal acts, the problem of criminal error/responsibility, and the problem of crime and punishment. About the three main problems of criminal law above, the science of criminal law that is being developed today discusses dogmatic problems of criminal law more than criminal sanctions. There needs to be a lot of discussion of criminal sanctions that strengthen legal norms so that discussion of the entire contents of criminal law is felt to be still not harmonious (Moelyatno, 2009: 59).

Andi Hamzah believes that crime and punishment are not only related to criminal law but are the core problems of criminal law. However, according to Bambang Pornomo, the issue of crime and punishment is considered to be a form that is not widely known, so the science of criminal law and dealing with crime in general and imprisonment, in particular, receive little attention. So far, there have been many questions in the science of criminal law and criminal responsibility, which lie outside the criminal field and the criminal system (Hamzah, 1993: 9)

At the sociological level and in criminal law enforcement practice, the term "punishment" is also often used in criminal terms. The term that will be discussed is a translation of the Dutch term, namely "straf". The Criminal Code, which is an abbreviation of the Criminal Law Code, is also a translation of the Dutch term *WvS* (*wetboek van strafrecht*). If *straf* is translated into Indonesian as "punishment", then the translation of *WvS* into Indonesian should not be the Criminal Code, but rather the KUHH (penal code) (Widodo, 2009: 53).

Method

The research method used in this research is a qualitative method with a literature study approach using international journals. This research begins with selecting a relevant topic and following the research objectives. Literature searches were carried out through basic data from international journals, online libraries, and other reference sources using appropriate

keywords. The literature found was then filtered based on inclusion and exclusion criteria to ensure its relevance to the research topic. Next, the literature is analyzed in depth, by identifying themes, concepts, findings, and research approaches used by previous researchers. Findings from the literature are organized and structured to form a cohesive framework of understanding. This analysis process helps in identifying similarities, differences, and patterns that emerge from the literature that has been researched.

B. DISCUSSION

The Effectiveness of the Criminal Code in Protecting the Rights and Customary Orders of Traditional Legal Communities

The effectiveness of the Criminal Code (KUHP) in protecting the rights and customary order of customary law communities in Indonesia is a complex and contextual aspect. Even though the Criminal Code as the basis of national criminal law has undergone several revisions, the question of the extent to which it is sustainable, recognized, and protected for the rights and customary order of indigenous law communities is still a matter of debate (Feka et al., 2023).

The Criminal Code recognizes the diversity of culture and customs in Indonesia, in line with the spirit of *Bhinneka Tunggal Ika* in the constitution. Articles in the Criminal Code provide space to consider customary norms in the judicial process, especially when referring to customary punishments. However, the sustainability of this recognition depends on the extent to which implementation is carried out at the level of judicial practice.

Although the Criminal Code provides a framework, the handling of cases involving indigenous peoples does not always reflect fair treatment. There are challenges in applying criminal law to perpetrators of criminal acts in indigenous communities, where cultural principles, local wisdom, and community customs can conflict with criminal law norms. Therefore, it is important to ensure that law enforcement takes into account local cultural context and customs. Protection of individual rights in the context of customary law communities is also a complex issue. The Criminal Code needs to continue to be developed to be more responsive to the dynamics of customary law communities, including the protection of their rights to land, natural resources, and institutional systems (Senjaya, 2023).

To increase the effectiveness of the Criminal Code, there needs to be coordination between the government, customary law communities, and the authorities, as well as an active role from law enforcement agencies. Increasing legal awareness at the community level is also key to achieving more effective protection of customary rights and orders. In this way, the sustainability and effectiveness of the Criminal Code in protecting the rights and customary order of customary law communities can be achieved through sustainable implementation, improved regulations, and increased legal awareness at all levels of society.

Barriers to Access to Justice for the Legal Community

After the issuance of Law No. 1 of 2023 concerning the Criminal Code (KUHP), barriers to access to justice for indigenous peoples at the national and international levels remain relevant and need to be considered in detail. At the national level, although there is recognition of customary law communities in legal regulations, the implementation and enforcement of the law often do not follow the spirit of protecting the rights of customary law communities. Slow bureaucracy, lack of resources, and minimal understanding and awareness of the legal rights of indigenous peoples can hamper the protection process. Therefore, efforts need to be made to increase consistent and effective implementation of the law at the local level (Himan et al., 2023).

Financial constraints remain a significant obstacle. Legal processes, especially regarding land or natural resource settlements, often require high costs. Customary law communities, which generally have economic limitations, can find it difficult to finance their legal processes. Therefore, concrete measures, such as providing financial assistance or program subsidies, need to be considered to ensure that costs do not become a barrier to access to justice.

The aspect of legal representation is still an issue. Many indigenous and tribal peoples do not have access to legal aid or lawyers who can help them understand and deal with the legal process. Inequality in access to legal representation can harm indigenous peoples in court, so steps are needed to increase access to legal aid. At the international level, obstacles involving the recognition of the rights of indigenous peoples can also be encountered. Inequality in representation in international forums, conflicts between national and international law, and the lack of mechanisms for enforcing the rights of indigenous peoples at the global level are serious challenges. Therefore, more intensive diplomatic and advocacy efforts are needed to ensure that the rights of indigenous peoples are consistently recognized and respected at the international level (Harun et al., 2023).

Criminal Code in Accordance with International Legal Instruments Concerning the Rights of Indigenous Peoples

The Criminal Code (KUHP) is the highest statutory regulation in Indonesia which regulates criminal law. The Criminal Code has an important role in protecting the rights and customary order of indigenous people. Along with this, international legal instruments that regulate the rights of indigenous peoples, such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), become relevant.

Article 2 of the Criminal Code tries to accommodate "living law" in indigenous communities by recognizing customary law as a valid source of law in Indonesia. However, several aspects need to be considered to strengthen the compatibility of the Criminal Code with UNDRIP. First, the concept of "living law" needs to be explained in more detail to prevent differences in interpretation. Second, Article 2 of the Criminal Code needs to be expanded in scope to cover all aspects of indigenous peoples' rights so that it is in line with UNDRIP provisions (Zulfa, 2023).

Several things need to be considered to strengthen the compatibility of the Criminal Code with UNDRIP. There needs to be a detailed explanation of the concept of "living law" to avoid differences in interpretation. Article 2 of the Criminal Code needs to be expanded in scope to cover all aspects of indigenous people's rights, including rights to land, natural resources, cultural identity, and self-government. In addition, a clear mechanism is needed to ensure that the customary law applied does not conflict with UNDRIP.

Another relevant international legal instrument is ILO Convention No. 169 concerning Indigenous Peoples and Ethnic Nations. Criminal Code, after the enactment of Law No. 1 of 2023, is better than the old Criminal Code to ILO Convention no. 169. However, several aspects still need to be strengthened, such as stronger protection from discrimination and violence, as well as guaranteeing the participation of indigenous people in decision-making that affects their lives. There needs to be improvements and improvements in the Criminal Code to ensure conformity with international legal instruments related to the rights of indigenous peoples. This aims to provide effective protection for the rights and customary order of indigenous peoples by international standards (Channa et al., 2023).

Mechanism for Reporting and Monitoring the Implementation of the Criminal Code towards Indigenous Law Communities

The mechanism for reporting and monitoring the implementation of the Criminal Code towards indigenous peoples is an important foundation for ensuring the continuity and success of the implementation of criminal law in Indonesia relating to the rights of indigenous peoples. In the context of reporting, customary law communities have a central role in reflecting Criminal Code violations in their territory. They can submit reports to law enforcement officials, traditional institutions, or NGOs capable of supporting and advocating for their rights. In addition, traditional institutions can function as effective mediators in resolving criminal cases involving customary law communities, thereby facilitating constructive dialogue between related parties. NGOs also have a role in helping indigenous communities by providing advocacy and legal assistance.

Regarding monitoring mechanisms, the Ministry of Law and Human Rights has the crucial responsibility to monitor the implementation of the Criminal Code as a whole throughout Indonesia. Komnas HAM, as an independent institution with the authority to monitor the implementation of human rights, including the rights of indigenous peoples, also has an important role in ensuring the protection of these rights. On the other hand, independent NGOs can play an important role by carrying out objective monitoring of the implementation of the Criminal Code, providing critical views, and voicing the interests of customary law communities.

After the enactment of Law no. 1/2023 concerning the Criminal Code, strengthening reporting and monitoring mechanisms is imperative. Wider outreach about this mechanism needs to be carried out so that customary law communities, traditional institutions, and NGOs can understand it well. Increasing the capacity of law enforcement officials to handle criminal cases involving customary law communities must also be a priority, including a deep understanding of customary legal values and norms. Adequate budget support is a crucial basis for maintaining the sustainability of these reporting and monitoring activities so that these mechanisms can function effectively and make a positive contribution to the protection of the rights and customary order of indigenous and tribal law communities in Indonesia (Simo, 2023).

Compatibility of the Criminal Code with International Legal Instruments Regarding the Rights of Indigenous Peoples

The compatibility of the Criminal Code (KUHP) with international legal instruments related to the rights of indigenous peoples is a crucial aspect in ensuring the protection of these rights in Indonesia. The Criminal Code, as the highest statutory regulation in the context of criminal law, has a central role in protecting the rights and customary order of customary law communities.

One of relevant international legal instruments is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognizes the basic rights of Indigenous peoples, including the rights to land, natural resources, cultural identity, and self-government. The Criminal Code, through Article 2, tries to accommodate "living law" in indigenous communities, recognizing customary law as a valid source of law in Indonesia. However, the application of Article 2 of the Criminal Code needs to be strengthened so that it is in line with UNDRIP principles (Wiesner, 2023).

To strengthen the compatibility of the Criminal Code with UNDRIP, several things need to be considered. First, a more detailed explanation of the concept of "living law" is essential to

avoid differences in interpretation between law enforcement officials and customary law communities. Second, expanding the scope of Article 2 of the Criminal Code is necessary to cover all aspects of indigenous people's rights, including rights to land, natural resources, cultural identity, and self-government, to ensure comprehensive protection of their rights. In addition, clear mechanisms need to be implemented to ensure that the customary laws applied do not conflict with UNDRIP, preventing discrimination and violations of the rights of indigenous peoples (Scheidel et al., 2023).

Apart from UNDRIP, other relevant international legal instruments are ILO Convention no. 169 concerning Indigenous Peoples and Ethnic Nations. Criminal Code, after the enactment of Law no. 1/2023, has demonstrated increased conformity with ILO Convention No. 169. However, several aspects still need to be strengthened, such as providing stronger guarantees for indigenous peoples to participate in decision-making that affects their lives and protecting them more effectively from discrimination and violence.

Potential international lawsuit against Indonesia regarding the inequality of customary law protection in the Criminal Code

Indonesia is a party to international legal instruments that recognize the rights of indigenous peoples such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169 concerning Indigenous Peoples and Ethnic Nations, has the responsibility to protect the rights and customary order of indigenous peoples. Even though the Criminal Code acts as the highest legislative regulation in Indonesia in terms of criminal law, its implementation is still not fully in line with international standards regarding the rights of indigenous peoples. In this context, there is the potential for an international lawsuit against Indonesia (Ryniak, 2023).

Potential international lawsuits could involve several forums, such as the United Nations Human Rights Commission (UN Human Rights Commission) and the International Court of Justice. Indigenous peoples can file a lawsuit with the UN National Human Rights Commission if they feel their rights have been violated, with the UN National Human Rights Commission having the authority to conduct investigations and provide recommendations to countries that violate human rights. Other countries can also file a lawsuit with the International Court of Justice if their citizens feel their rights have been violated (Lasheras et al., 2023).

The possibility of an international lawsuit against Indonesia regarding the inequality of customary law protection in the Criminal Code will increase if the inequality is systematic and has a broad impact on indigenous peoples. Apart from that, if indigenous peoples have tried to resolve problems through domestic channels but have been unsuccessful, and if there is support from other countries with an interest in protecting the rights of indigenous peoples.

To prevent potential international lawsuits, Indonesia needs to take concrete steps. One of them is to harmonize the Criminal Code with international legal instruments related to the rights of indigenous peoples. Increasing law enforcement officials' understanding of the rights of indigenous peoples is also an important step, while the active participation of indigenous peoples in the process of drafting and implementing the Criminal Code can strengthen the protection of their rights. In this way, Indonesia can minimize the risk of international lawsuits and ensure the protection of the rights of indigenous peoples with international standards.

C. CLOSING

Conclusion

The effectiveness of the Criminal Code in protecting the rights and customary order of indigenous peoples in Indonesia is still complex. Even though the Criminal Code has been revised, implementation still raises debate. Recognition of cultural and customary diversity in the Criminal Code, in line with the spirit of *Bhinneka Tunggal Ika*, needs to be improved in judicial practice. The main challenge lies in the gap between cultural principles and criminal law norms. Law enforcement is needed that takes into account local cultural and customary contexts. Protection of individual rights in the context of customary law communities also needs to continue to be developed.

Barriers to access to justice remain relevant at national and international levels. Slow bureaucracy and financial constraints are the main obstacles. Unequal legal representation and inequality at the international level are also serious issues. The Criminal Code needs to continue to be developed and adapted to international standards, especially UNDRIP and ILO Convention No. 169. A detailed explanation and expansion of the scope of Article 2 of the Criminal Code is necessary to ensure compliance. Reporting and monitoring mechanisms need to be strengthened through increased awareness, capacity, and budget support.

The potential for an international lawsuit against Indonesia regarding the inequality of customary law protection in the Criminal Code could occur, especially if the inequality is systematic and detrimental to indigenous peoples. Concrete steps, such as aligning the Criminal Code with international legal instruments and increasing the understanding of law enforcement officials, need to be taken to prevent the risk of international lawsuits. In this way, Indonesia can ensure the protection of the rights of indigenous peoples by international standards.

Suggestion

To improve the implementation of the Criminal Code (KUHP) and protect the rights of indigenous peoples in Indonesia, it is necessary to carry out wider outreach regarding the latest Criminal Code. The government, traditional institutions, and NGOs can play an active role in conveying information to the community. Apart from that, law enforcement officers need to increase their understanding and capacity regarding customary law through more focused training and education. It is also important to formulate a clear mechanism for handling conflicts between customary law and national criminal law, by involving customary institutions as mediators. The reporting and monitoring system for the implementation of the Criminal Code towards customary law communities needs to be strengthened by involving the National Human Rights Commission and NGOs. Cooperation with the international community in dealing with issues of indigenous peoples' rights and ensuring the adjustment of the Criminal Code to international standards also needs to be improved. With these steps, it is hoped that harmony will be created between the Criminal Code and the rights of indigenous peoples by human rights principles and local wisdom.

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