SPIRITUAL VALUES OF CUSTOMARY LAW
(Study of Court Judgment)

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Abstract

Recognition of living law in society or customary law / unwriten law, marking a pluralistic spiritual life that have law. Lawmakers (legislative or judge) must accommodate those values in their legal products. Moreover, judges as formers of practical law are obliged to explore and understand the values that live in society, which is the soul of the nation's personality (volkgeist), which is reflected through its Verdicts, so that the verdict can have transcendental values / spiritual values. The enactment of customary law as the basis of the Verdict of the judge or in other words the formation of the law by the judge through the Verdicts based on customary law, has existed before the Indonesian constitution is amended, namely in Article 5 paragraph (3) sub b Act No. 1/1951 About Measures - Temporary Measures for Conducting the Union of Suspended Power and Events of the Civil Courts.

Keyword: *Spritual Values, Customary Law, Court Judgment*

Background

Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "the State of Indonesia is a state of law", this means that the law is the supreme authority. The characteristics of a state law have also been expressed by Brian Z. Tamanaha that (1) the government is limited by law; (2) principled in legality, meaning that the law must be pre-established and applied to all people, so that the applicable law is writen law; (3) law is not a human, so that according to him that law is objective, not subjective like human.[1]The Indonesian state of law has different characteristics than those expressed by Brian Z. Tamanah, as Jimly Ashshidiqqie (1) supremacy of law indicates, that the supreme leader of the state is not really a human but a constitutionthat reflect the highest law. (2) Equality before the law, that discriminatory treatment in all spheres of life is not justified except for special and temporary actions called affirmative actions. (3) The legal principle (due process of law), that all acts of government should be based on legitimate and written legislation. The written rules of legislation must first exist or precede the acts committed. (4) Restrictions on power, power exercised by branches of power are not centralised in one organ, with a system of checks and balance, power. (5) Independent executive organs, that power is reduced by the establishment of 'independent bodies' such as the National Commission on Human Rights (KOMNASHAM), the General Election Commission (KPU), and even traditional institutions previously attached as an integral

1 Brian Z.Tamanaha, "The History and Elements of The Rule of Law", *Singapore Journal of Legal Studies,* 2012, halaman 236 dan 243

part of the executive function , also developed into independent such as Central Bank, army and police organizations. (6) Independent and impartial judiciary. (7) State administrative courts, as the main pillars of a law state which is also principled in an impartial free judiciary. (8) Protection of human rights; (9) It is democratic, that laws and regulations are not unilaterally stipulated, but need the participation of the people. (10) Serves to realize prosperity, that law as a tool / means for the intended purpose. (11) Transparency and social control in law enforcement. (12) Deity of the Almighty, that every Indonesian law product in addition must be made and established democratically and upheld without violating human rights, also requires any conformity with or free from the possibility of contradicting the religious norms believed by the subjects of Indonesian citizens[2].

Based on the characteristics of the state law as mentioned above it can be said that the law applicable in Indonesia falls into the category of modern law, as expressed by Marc Galanter that modern law is characterized (1) modern law is uniform meaning that the law is uniform across the country . (2) modern law is transactional, meaning that the rights and obligations are determined by the transaction / contract not determined by factors (such as age, class, tribe, religion and sex) not related to the rules. Thus rights and obligations are based on worldly functions and conditions (such as employers, employers, wives). (3) Modern legal norms are universal, that modern law applies to everybody. (4) The regulatory system is in written form and is hierarchical, whether hierarchical in formulation or hierarchy in its application. (5) Its implementation is bureaucratic, meaning that the enforcement of this law system must follow a prescribed procedure. (6) the law is rational, that the law is constituted as an instrument of achieving the purpose which has been chosen consciously. (7) The law is carried out professionally by a qualified person.[3] This shows that the principle of legality as the main principle, as shown by Marc Galanter in its characteristics.

However, these characteristics are not entirely in accordance with the conditions in Indonesia, as constitutionally there is an unwritten legal recognition (customary law / *jus non scriptum*), as a source of law. This Declaration in the 1945 Constitution of the Republic of Indonesia is formulated by acknowledging the existence of indigenous peoples' entities, which automatically recognize the law of a living society (adat law), as the formulation of Article 18 paragraph (2) that:

(2) The State recognizes and respects the unity of indigenous and tribal peoples along with their traditional rights as long as they are alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law.

Customary law is also recognized as a source of law, but not unfiltered, the filter is in the fundamental rules of the state,[4] namely the Preamble of the 1945 Constitution of the Republic of Indonesia. Therefore, the customary law is applicable, in other words the basic rules in the association of life in the community concerned is a customary law that does not preclude the achievement of state objectives and is against the Pancasila. Such a law according to the mashab of history is a law in accordance with the spirit of the personality / spirit of the nation (volksgeist), and according to this law will be dynamic according to the development of society, because it is formed bottom up, not top down.[5] Eugen Ehrlich, says that effective positive law is based on values that live in society, the concept known as the living law.[6]

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2 Jimly Asshiddiqie, "Prinsip Negara Hukum*"* , *Makalah,* in http://www.jimly.com/pemikiran/view/11, access Sunday , May 14th 2017

3 Marc Galanter, "The Modernization of law", in Myron Weiner, 1966, *Modernization*, in https://www.academia.edu/884243/The_modernization_of_law, access Thursday, April 12th 2018, pg 154 – 156.

4 Notonagoro, 1988, *Pancasila Dasar Falsafah Negara;Kumpulan tiga uraian pokok – pokok persoalan tentang Pancasila)*, Jakarta, Bina Aksara, pg 68. Notonagoro called the Preamble of the 1945 Constitution as a *staat fundamental norm*, the fundamental rule of the state.

5 Friedrich Karl von Savigny, in*Khazanah, Jurnal Ilmu Hukum,* Vol 2, No 1 year 2015, pg 198.

6 Theo Huijbers, 1989, *Filsafat Hukum dalam Lintasan Sejarah*, Yogyakarta : Kanisius, pg 152

This customary law is a law that is born, grows and develops in accordance with the current development of society, and if we examine from the fundamental rules of the state that the people of Indonesia is a society that recognizes the existence of God Almighty,[7] so that norms derived from the community values, which serves as a guide in common life, are values that are inseparable from divine values. These values by experts are referred to as spiritual values, those values that accentuate the spiritual nature, which transcends the limits of human understanding and experience. Customary law containing spiritual values is not only a guide to living together, but also as a basis for the settlement of violations that occur in the community, even some court Verdicts are also using the basis of customary law. Therefore, in this paper aims to examine court Verdicts on ethics offenses based on customary law as a living and spiritual law.

Discussion

Law is a rule that generally serves to control the behavior of community members, but on the other hand law also serves as a means to make changes to society. History has proven how feminists in their struggle used the law to change women's position and position in society.[8] This fact can be known in Indonesia that the government (in this case the Legislature) seeks to establish laws to provide protection to women and their rights, such as Act no. 21 of 2007 on the Criminal Act of Human Trafficking, Act No. 23 of 2004 on the Elimination of Domestic Violence, and others.

The formation of the law not merely be done by the legislative, but it also can be done by the judges (*judge made law*), this normatively can be seen from Act No. 48 of 2009 on Judicial Power Article 10 paragraph (1) that "the court is prohibited from refusing to examine,adjudicate, and decide upon a case filed under the pretext that the law is absent or less clear, but obligatory to examine and prosecute it."In accordance with the provision in the Act, there is an obligation for the judge in the context of fulfillment of the tasks outlined in Article 10 it is formulated in Article 5 verse (1) formulates that "Judges and judges of the constitution are obliged to explore, follow and understand the values of law and sense of justice living in society." These provisions indicate that judges can make legal discovery for a concrete event through the verdict. Meuwissen in Pontang Moerad, argued that judicial discovery of law by judge was a development of practical law. The practical law enforcement is an activity related to the realization of the law in the realities of daily life, this includes the activities of the formation of law, the discovery of the law, and legal aid. The formation of the law is the creation of a new law through its Verdicts or jurisprudence.[9]

Therefore, the view that the judge is the mouthpiece of the law in Indonesia is not in accordance with the provisions of the applicable law, the judge must also seek in the sense of finding the law if the law does not exist or not regulated. Below is described the differences in formation of the law by legislative and by judge as follows:

7 See Opening of the 1945 Constitution of the Republic of Indonesia, the third paragraph as follows "Atas berkat rahmat Allah Yang Maha Kuasa dan dengan didorong oleh keinginan luhur, supaya berkehidupan kebangsaan ……"

8 Rosemarie Putnam Thong, 2004, *Feminist Though: Pengantar Paling Komprehensif kepada Aliran Utama pemikiran Feminis*, Translator, Aquarini Priyatna Prabasmoro, Yogyakarta: Jalasutra, pg 55.

9 Potang Moerad, 2012, *Pembentukan Hukum melalui Putusan Pengadilan dalam Perkara Pidana,* Bandung : Alumni pg 79.

No	Element	Forming a law by	
		Legislative	Judge
1	Basic	Article 20 verse (1) UUD Negara RI Tahun 1945	Article 5 verse (1) and Article 10 verse (1) UU No. 48 Tahun 2009 about Judiciary Power
2	Purpose	Solving an abstract and mass event in the future.	Solving a real event at present time.
3	Form	Act or UU	Verdict
4	Prosess	In accordance with the formal provisions, regulated in Act no. 11 Year 2011 on the Establishment of Laws and Regulations	Through methods of interpreting or exploring the values that live in society. The excavation of living values is a command of the law.
5	Binding strength	Public binding means that the Act applies to the whole community	Binding to the party explicitly mention in verdict.
6	Must to follow	Must be followed and obeyed by all citizen including the judge in making the decicion	There is no obligation for other judges to follow, but can also be a reference for judges of other judges can even be a feedback in the formation of legislation in the future.

The formation of the law by judges through the excavation of living values in society, or in other words a judge's verdict based on or considering customary law (living law in society), has been done several times. The verdict is usually related to local customary violations. This is the case as shown in some judges' Verdicts, firstly, Verdict No. MA no. 93.K / Kr / 1976, dated 19 November 1977, the short description that:

Zainabun bint Muhammad, about 19 years old and unmarried, resides in Kampung Nusa, Mukim Khueh, Aceh Besar District. Conducting intercourse with Hashim bin Hamzah, age 26 and unmarried, residing in Kampung Nusa, Mukim Khueh, Aceh Besar District. It happened on Saturday, 1971, whose date and month were not remembered. The intercourse took place at a carabao cabin stable, at Clove Garden, Kampung Nusa, Khueh Sub-district, Longa Sub-district or one of the places that entered the jurisdiction of the Banda Aceh District Court. The act of intercourse was carried out 6 times or more than once so that Zainabun bint Muhammad was pregnant based on visum et repertum of Banda Aceh General Hospital dated 12 April 1971, No. 11/48/21 / Rsu / 71. The intercourse was committed by Zainabun bint Muhammad with Hashim bin Hamzah, because Hashim bin Hamzah promised to marry her.

Based on these acts, the Supreme Court ruled that both of them (Zainabun bint Muhammad and Hashim bin Hamzah) were guilty of indigenous crimes of adultery, based on Ps 5 (3) sub b of Act No. 1/1951, with the consideration of (1) the same act (adultery) has been examined by the Adat Court; (2) that sexual relations between men and women regardless of whether in a public place or not as required by Article 281 of the Criminal Code, such conduct constitutes a forbidden act; (3) irrespective of the requirement whether one of the parties has been married as stipulated in Article 284 KUHP.[10]

Verdict No. MA no. 93.K / Kr / 1976, dated 19 November 1977, this became the consideration of the Palu District Court in its Verdict No. 536 / Pid.B / 2009 / PN.PL, about the case of the intercourse without marriage bond. This MA ruling is based on customary law, so that in the Verdict of PN Palu is in addition to basing on KUHP also consider local custom law which can be known in the weighing section as follows:

10 Mahkamah Agung verdict, No. 93.K/Kr/1976 , date November 19th 1977, in http://hukumonline.com/pusatdata/detail/23855/node/760/putusan-ma-no-93k_kr_1976-zainabun-binti-muhammad,-et.al.?PHPSESSID=bb4t4t-mjdfh5rf77i7vq16uib7, access Thursday, March 28th 2018.

that according to customary law and in religious law referred to as adultery is intercourse committed by men and women without legitimate marriage. Because in the case of Defendant and witnes Lie Nova has done the press of ethiuhan while they are both unattached by legitimate marriage ropes, of course the actions of the Defendant is an act which according to customary law is strictly prohibited and denounced in society.

Second, the MAVerdict. 195 / K / Kr / 1978, dated October 8, 1979, a brief description of the verdict is:

I Wayan Saputra, 21 years old, lives in Banjar Delodtangluk, Village and Sukawati Subdistrict, Gianyar Regency, intercourse with Ni Ketut Sarni on the basis of love and leads Ni Ketut Sarmi pregnant, then without reason I Wayan Saputra not continue his love and do not want married Ni Ketut Sarmi became his wife.

The Supreme Court in its verdict rejected the appeal of the accused (custody), by reinforcing the Verdict of Gianyar District Court No. 23 / Pid / Sum / 1978 dated April 12, 1976, that the defendant I Wayan Saputra was guilty of committing a crime of *sanggeraha logika* (Balinese Customary Law). This ruling is based on Ps 5 (3) sub b Act No 1/1951 on Measures to Conduct Unitary Suspense of Power and Events of the Civil Courts.[11]

Third, MAVerdict No. 666 K / Pid / 1984 dated 23 February 1985, a brief description of the ruling that:

The defendant is a 30-year-old unmarried man who has an affair with a 24-year-old unmarried woman. The relationship continues to intercourse, because of the promise of the young man to marry the girl. As a result the girl was pregnant and the boy (her boyfriend) was not responsible even married to another girl.

The Supreme Court in its verdict that the defendant has committed indictment adultery adultery based on local custom law that is Palu custom law. This ruling is based on a Ps 5 (3) sub b Act No. 1/1951 on Measures - Temporary Measures to Conduct Unitary Suspensions of Power and Events of Civil Courts.[12]

The three Verdicts described above show that (1) acts committed by men and women, both of whom are single or unmarried; (2) they both commit the act of copulation on the basis of likes; (3) men, not willing to take responsibility for the consequences of the act of intercourse. This act is not regulated in KUHP, so the act is incomparable in the KUHP. This can be known from the formulation of Article 284 of the KUHP, which requires that one party be bound by marriage, so that if both are not married then the elements of the formulation of the article are not fulfilled. Even, article 285 of the KUHP can not be imposed on him because the element "with violence or the threat of violence implies ... .." is not fulfilled, because it is done not in accordance with her will, both agree. But at the end after the act resulted in loss, disturbing the victim, the victim's family and also the community.

Due to Article 285 of the KUHP can not be imposed on the perpetrator, the duty of the judge, is obliged to explore, follow, and understand the legal values and sense of justice that lives in the community.[13] Therefore, the judge should explore the prevailing customary law so

11 Mahkamah Agung verdict No 195/K/Kr/1978, dateOctober 8th 1979, inhttp://hukumonline.com/pusatdata/detail/23855/node/760/putusan-ma-no-93k_kr_1976-zainabun-binti-muhammad,-et.al.?PHPSESSID=bb4t4tmjdfh5rf77i7vq16uib7, access ThursdayMarch 28th 2018.

12 Sulistyowati Irianto (ed), 2006, *Perempuan dan Hukum :Menuju hukum yang Bersperspektif Kesataraan dan Keadilan Gender,* Jakarta : Yayasan Obor Indonesia, pg 586.

13 The task of such a judge has existed since 1964 with the passing of Law no. 14 of 1964 on the Basic Provisions of Judicial Power in Article 20 paragraph (1) states that Judges as an instrument of the Revolution shall explore, follow and understand the values of living law by integrating from within society in order to actually realize the function of law as a guidance. In 1970 there was a change in the Law on Judicial Power with Law no. 14 of 1970 on the Basic Provisions of Judicial Power, the provision is also formulated in Article 27 paragraph (1) Judges as law enforcement and justice shall explore, follow and understand the values of living law in society. In 2009 there was another change of the Law on the Power of the Judiciary, with Law No. 48 Year 2009 on Judicial Power, the provision was also formulated in Article 5 ayar (1), the formulation as mentioned

that his verdict meets the sense of justice, based on the subparagraph 5 (3) sub b of Law No. 1/1951 on Temporary Measures to Conduct the Unitary Suspense of Power and Events of the Civil Courts.

Fourth, in addition to the Verdicts in the field of moral decency, there is also a judge's Verdict to consider customary law in a criminal case that is the Verdict of the Kota Baru District Court, South Kalimantan, No. 28 / Pid.Sus / 2014 / PN.Ktb in the case of theft with a weighting, which is briefly descripted the case is as follows:[14]

Iwang Bin Alm Said (the defendant), conducted the theft of swiftlet nest, in November 2013 at around 1:00 pm, in Goa Temulung, Bangkalan Dayak Village, Kelumpang Hulu District, Kota Baru District, South Kalimantan Province, with his friend UUK (escaped). The wallet's nest belongs to Indigenous Peoples of Bangkalaan Dayak based on Supreme Court Verdict No. 1566 / K / KPD / 2011 / PN.Ktb. The defendant and his friend succeeded in taking the nest of six (6) wallet birds. Taking a bird's nest wallet using a tool called sarakap, which is a tool of bamboo ends tied with a iron hook. The act of defendant Iwang bin Alm Said harmed the Adat Institute. This defendant's conduct without the permission or approval of the Customary Institution. The act according to the panel of judges complied with elements of Article 363 paragraph (1) to the 4 KUHP, so that the defendant was sentenced to 5 months and 15 days imprisonment.

The judge's verdict over the imposed criminal sanctions is much lighter than the criminal threat formulated in Article 363 paragraph (1) of the 4 KUHP which is 7 (seven) years, and also the prosecutor's demands, 10 months. The judges' ruling considers the giving of pardon given by the Dayak Adat Institute, Bangkalaan Village which is expressed in the following testimony "that the only fair thing in my opinion is that the punishment is not high because they are our family." This statement implicitly indicates that indigenous peoples represented by the Bangkalaan Village Traditional Institution, wishes for a mild sentence if the defendant remains criminally charged, since the bird's nest has not been harvested and does not ask permission to the Adat Institute, according to the witness's testimony from the Customary Institution if the defendant or the defendants asks permission to Customary Institutions will then be customarily resolved. The giving of pardon by indigenous peoples contains spiritual values, seen from the teachings of religion (Islam), such as the Word of Allah in Al Quran An Nisa / 4: 149 and Surat Asy Shura / 42: 43, essentially that Allah SWT loving the one who gives the pardon.[15] According to writerthis can be said is a command of the Creator to mankind. In addition, based on the verdict of the judge, the defendant only bear the guilt of himself, the mistake of UUK that has not been found by the judge is not imposed on the defendant Iwang Bin Alm Said. This shows that the judge's decision is seen from the principle of culpability as a condition of criminal imposition also contains spiritual values.[16]

in this paper, only the judges are not limited to judges in the Supreme Court but also the Constitutional Court.

14 Mahkamah Agung RIverdict No. 28/Pid.Sus/2014/PN.Ktb, in https://putusan.mahkamahagung.go.id/putusan/5c84f-d33ec97a733e430601e43ed349f , accessThursday March 28th 2018

15 Al Quran Surah Anisa verse 149 /4:149

إِن تُبْدُواْ خَيْرًا أَوْ تُخْفُوهُ أَوْ تَعْفُواْ عَن سُوٓءٍ فَإِنَّ ٱللَّهَ كَانَ عَفُوًّا قَدِيرًا

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Meaning : If you declare something good or hide or forgive something wrong (other people), then Allah is the Most Merciful again the Almighty.

Surah Asy – Syura verse 43 / 42:43

وَلَمَن صَبَرَ وَغَفَرَ إِنَّ ذَٰلِكَ لَمِنْ عَزْمِ ٱلْأُمُورِ ﴿٤٣﴾

Artinya: But those who endure and forgive such (acts) are the things that are preferred.

16 Kuswardani, 'Pengakomodasian Aspek Spiritualitas dalam Hukum Pidana (Kajian terhadap Asas Lgalitas dan Asas Culpabilitas)" dalam Sulaiman (ed), 2016, *Pemikiran Hukum Spiritual – Pluralitik : Sisi Lain Hukum yang Terlupa-*

The customary law that grows and is born of society in general one of the inherent characteristics is religious-magical, that is, the rules of law born out of society can not be separated from supernatural forces. Such power is closely related to what is the belief of Indonesian society, which in Javanese society is called 'manunggaling kawula gusti', that human beings are united with the giver of life, whose personification is God (Allah). Therefore the customary law in it contains the teachings of God as the life-giving giver of the good things that should be the guides of human life. The teachings of virtue in everyday language are referred to as moral teachings, in order to realize akhlaqul karimah, or another term in the national development program included in the Nawacita is to improve the quality of life of Indonesian people, which is not only can be taken from the economic aspect but also from all aspects of life including the legal aspects. The legal aspect can accommodate local wisdom values to maintain social harmonization.

Therefore, the judge decicion, as mentioned above according to the opinion of the writer already reflects the judge's decision containing the value of justice which is based on the teachings of the life givers. In other words the value of justice derived from the divine value. Such a value can not be pursued only by applying the articles of the law, even though the law has regulated the matter of action, as in Decision No. 28 / Pid.Sus / 2014 / PN.Ktb, of theft with a denunciation, here the judge not merely applying Article 363 paragraph (1) to the 4 KUHP, but the judge also pay attention and consider the prevailing customary law. It thus is digging and understanding the roots of the soul of the nation, should be done by the judges in carrying out duties as solvers of the case. The root of this nation's soul by Savigny is called a volkgeist. Sidharta explains that volkgeist (spirit) is the soul of the people who is not the work of ratio but is a crystallization of values that are built through the development of history, so that this spirit is not built by an institution.[17] Therefore these values can not be found in legislation, but must be found in society.

The judges' rulings described above should be a reference to other judges in the future for the same cases, but note that the legal system in Indonesia is a civil law system, which means there is no necessity for other judges to follow, judges is free to follow or not. In the same case that the criminal act of morality as mentioned above has occurred also in Bengkulu with defendant MZ in Verdict No. 410 / Pid.B/2014 / PN Bgl jo No 12 / Pid / 2015 / PT.BGL. The case isbrief as follows:[18]

MZ (accused) and SNT (witness / victim) have known and have a special relationship, they had intercourse outside of marriage in a hotel room, previously MZ persuaded and seduced until SNT was willing to be stepped into hotel, after arriving at hotel MZ and SNT doing intercourse with his promises that will not leave SNT, which resulted in SNT being heavily deformed and taken to the hospital. But after they arrived in hospital MZ leave SNT, so the SNT family angry and reported MZ to the police. The Bengkulu District Court ruling imposed a five-year imprisonment penalty, because MZ's action fulfilled the element of Article 285 of the KUHP byexpanding the interpretation. "with the threat of violence forcing women to have sexual intercourse with him" is interpreted as cajolery and seduction to the victim (SNT) –with fake promises to have intercourse. This ruling by the Bengkulu High Court No. 12 / Pid / 2015 / PT.BGL also imposed the imprisonment to MZ for 4 years and 6 months.

The case of MZ is in fact similar to previous cases, as described in this paper, so that judges

kan, Proceding, Yogyakarta:Thafa Media, halaman 365 - 372, dalam online https://law.uii.ac.id/wp-content/uploads/2017/04/M.-Syamsudin-Prosiding-Nasional.pdf.

17 Sidharta, 2013, *Hukum Penalaran dan Penalaran Hukum : Buku I Akar Filosofis* Yogyakarta : Gentha Publishing, pg 209.

18 Distric Court verdict No. 410/Pid. B/2014/PN. Bgl date February 9th 2015, inhttps://putusan.mahkamahagung.go.id/putusan/5c84fd33ec97a733e430601e43ed349f , accessThursday March 28th 2018. Also see District Court verdict No 12/Pid/2015/PT. BGL inhttps://putusan.mahkamahagung.go.id/putusan/5c84fd33ec97a733e430601e43ed349f , access ThursdayMarch 28th 2018

can give verdict base on existing jurisprudence. However, because there is freedom of judges in following the jurisprudence, then in this case the judge using of his own opinion. Customary law which reflects the soul of the Indonesian personality and rooted in the life-giving giver with the moral teachings of goodness does not become the basis for the decision. The judge decision based on customary law is not without foundation, but there is a basic legal guarantee in Act No. 1/1951 on Temporary Measures to Conduct Unitary Suspense of Power and Events of Civil Courts, particularly in Article 5 paragraph (3) letter b which is as follows:

b. Civil material law and for the time being civil criminal law in which until now applies to the peoples of the Swapraja region and those who previously prosecuted by the Adat Tribunal, is still applicable to the subjects and the person, with the understanding:

that an act which according to law should be considered a criminal act, but is unequaled in the Criminal Code, it is deemed punishable by a sentence no later than three months in jail and / or a fine of five hundred rupiah, that is, as a substitute penalty if the customary penalty is not followed by the convicted party and the substitution is deemed to be equal by the judge with the punishment being punished,

that if the customary judgment imposed by the judge's perception is exceeds with the imprisonment or fine referred to above, then the defendant's punishment may be subject to a substitution of up to 10 years in prison, with the understanding that customary punishment which according to the judge's opinion is not aligned with the times always to be replaced as mentioned above, and

that an act which according to living law should be considered a criminal act and which is appealed in the Criminal Code of Criminal Law, shall be presumed to be threatened with the same penalty as its most similar appeal to that criminal act.[19]

Judge as the law formers through its decision, should understand carefully the duties and obligations of the judge as affirmed in Article 5 paragraph (1) Law No. 48 Year 2009 on Judicial Power. The judges' ruling that is based on customary law (*jus non scriptum*)also reflects the typical localized spiritual values because it contains also the protection of natural rights (victims and perpetrators) from the Essence of the Giver of Life.[20] Esmi Warassih, professor of sociology of law fromDiponegoro University, mentioning law as a spiritual - pluralitik, meaning that there is aspect of law that is closely related to the value of the concept of beliefs that involved with religious teachings. But on the other side, the law also that grow and develop can not be separated from cultural root of society.[21] Andria Luhur Prakosa, states that this law (in the sense of judgment of judges) is a prismatic law, that is the law which integrates various legal systems in which includes customary law containing spiritual values.[22]

The perspective of criminal law, the decision of a judge based on customary law as in the above decisions is not contrary to the grounds of the worth of a crime. Because in criminal law it is said that an act is referred to as a crime, in addition to the act that fulfills the formulation of the law, the act must also be unlawful. Based on the existing theory that there are two teachings of unlawful act, namely the teaching of act against the formal law / *formeel wederechtelijkheid* and teachings of act against the law of material / *meterieel wederechtelijkheid*. Theory of act is against the formal law, that the action can be punished if it has fulfilled the formulation

19 Badan pembinaan Hukum Nasional, UU No. 1 Tahun 1951, Lembaran Negara 1951/9, Tambahan Lembaran Negara, No 81, http://www.bphn.go.id/data/documents/51uut001.pdf, accessWednesdayMarch 28th 2018.

20 Kuswardani, " "Urgensi Nilai – nilai Spiritual dalam Pembaharuan Hukum Pidana :Kajian tentang Perlindungan Hukum Terhadap Perempuan", dalam Absori, et al, (ed), 2017, *Transendensi Hukum :Prospek dan Implementasinya,* prosiding, Yogyakarta:Genta Publishing, halaman 123 – 130, Terbitan online http://v1.eprints.ums.ac.id/archive/etd/57714/1/4.

21 Essmi Warassih dalam Sulalaiman (ed), 2016, *Pemikiran Hukum Spiritual Pluralistik :Sisi Lain Hukum yang Terlupakan,* Yogyakarta : Thafa media, pg x – xi.

22 Andria Luhur Prakosa, ""Reorientasi Politik Hukum Pertanahan Berdasarkan Konsep Hukum Prismatik", dalam Sulaiman (ed), 2016, *Pemikiran Hukum Spiritual Pluralistik : Sisi Lain Hukum Yang Terlupakan,* prosiding, Yogyakarta : Thafa Media, halaman 197 – 199, Terbitan online https://law.uii.ac.id/wp-content/uploads/2017/04/M.-Syamsudin-Prosiding-Nasional.pdf.

of the law, meaning that all elements of the offense have been fulfilled. While the doctrinal act of the material law has two meanings. First, the unlawful act of the material law is seen from the side of his actions, which is the act that violates or endangers the legal interests that the lawmaker wants to protect in the formulation of a specific offense. This unlawful act is attached to material formulations. Second, the notion of the unlawful act of the law is seen as having a meaning contrary to the unwritten law or law living in society, the values of justice in the social life of society. Based on its function the act of unlawful divided into its function, negative and positive. The unlawful act of the material law in its negative function is the act which fulfills the formulation of the law, but because something is outside the law or does not conflict with the sense of community justice then the action is not punished. The unlawful act of the material law in its positive function implies that although the act is not regulated in legislation, but if the act is not in accordance with the sense of justice or social life norms in society, then the action may be punished.[23] Thus the above-mentioned judges' decisions adhere to the doctrine of unlawful act of the material law in its positive function.

Closing

Customary law as a law that lives in society as the basic of rule also for judges in deciding cases (criminal). This law more reflects the spiritual values because it born from the soul of the nation who believe in the forces outside of human rationality, it is the power from the life giver, this as the root of the nation's culture is a recognition of something that exists that is the Creator , The One Almighty God.

The formation of the law through the judgment of a judge who is spiritual or in other words contain transcendental values is a highly anticipated by society, because such a decision will meet the public expectations of a sense of justice. In addition, such a verdict is actually the embodiment of the head of the verdict which reads "By Justice by the One Godhead."

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