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THE EXISTENCE OF LAUJE TRADITIONAL JURISDICTION IN THE CRIMINAL JUSTICE SYSTEM

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Abstract : The handling of cases related to the principle of newbies in idem is a study of the application of the principle of newbies in idem so that the same case is not repeated at the court level. Nebis In Idem is a legal principle that applies in both civil and criminal law. In criminal law, this principle implies that a person may not be prosecuted twice because of an act that has received a decision that has permanent legal force. The explanation is in accordance with Article 76 paragraph (1) of the Criminal Code.

Keywords : Implementation, Nebis In Idem, Judicial Decision

1. Introduction

The process of case settlement Seeing between the truth and justice of a case settlement before the court, not only looking at the final result of the decision that was handed down, but being assessed from the beginning of the case examination process. Whether from the initial stage the court handled the service in accordance with the provisions of the procedural law or not. In other words, whether the process of examining a case from the beginning until the decision is handed down, the examination is carried out in accordance with the provisions of the procedural law, which means that the court has implemented and enforced the ideology aspired by the rule of law and a democratic society.

The principle of Nebis in Idem is that a person cannot be prosecuted twice because of an act that has received a decision that has permanent legal force. In criminal law, the principle of ne bis in idem is often used as a basis for exceptions in trials by defendants. This happens because investigators and public prosecutors resubmit the accused in the same criminal act and have been decided by a judge who has obtained permanent legal force.

The validity of the basis of a law based on the principle of Nebis In Idem depends on that someone who has violated the law and has received a decision that has permanent law from the judge and the decision will not be changed again with a decision that contains the following :

a. Sentencing (*veroordering*). In this decision, it is clear that the defendant committed the crime directed at him;

b. Exemption from prosecution (*onstlag van rechtsvervolging*). In this case, the judge gave a decision that the incident aimed at the defendant was proven quite clearly, the incident was not a criminal event, in other words the defendant clearly did not violate the law and could not be sentenced because he could not be held responsible for the incident.
c. Free verdict (*vrijspraak*). This decision means that the defendant cannot be punished because he does not have enough evidence.[1]

After the judge's decision as described above, a person is not allowed to be prosecuted a second time for the same incident. The principle of newbies in idem is also included in the concept of the Draft Criminal Code in CHAPTER IV concerning (The Loss of Prosecution and Criminal Implementing Authority), Part One Article 147, which reads :"A person cannot be prosecuted a second time in the same case, if for that matter, there has been a judge's decision that has obtained permanent legal force".

The firmness on the principle of Nebis In Idem is also stated in Law no. 39 of 1999 concerning Human Rights (HAM) also regulates the right to life, the right to have a family and continue offspring, the right to develop oneself, the right to obtain justice, the right to personal freedom, the right to security, the right to welfare, the right to participate in government, Women's Rights, Children's Rights. In the statutory regulation No. 39 of 1999 concerning human rights, the principle of Nebis In Idem is contained in Article 18 Paragraph (5) which reads :"Every person cannot be sued a second time for the same case for an act that has obtained a court decision that has permanent legal force".

Based on the explanation of the principle of newbies in idem above, that no one can be prosecuted in the same event for a case that already has a court decision that has legal force and is final. This is not seen in the case of criminal acts of decency that occurred in the Balukang II Village, Sojol District, Donggala Regency, which has been processed through customary law in force in the area. However, the crime of decency was re-submitted to the Donggala District Court until the verdict No: 130 / PID. B / 2014 / PN Dgl. With this it can be said that the principle of newbies in idem is not seen in this case.

Indonesian positive law recognizes the existence of law, customary assemblies, in various regions in Indonesia still apply customary law as a special law to be implemented first if there are violations or immoral acts and other crimes than criminal or private (civil) law. Especially in Central Sulawesi, there are still some areas that still hold customary law with the existence of a customary assembly in that area. Such as the customary decision in Balakang II Village on immoral cases against minors, it has been resolved by custom, by going through the customary court process and providing mutual agreements and decisions in accordance with what happened in the field in the case. However, the case is then reprocessed in the national criminal justice process. This is contrary to the principle of newbies in idem that a person should not be tried

[1] R. Soesilo, *Kitab Undang-undang Hukum Pidana (KUHP),* di kutip dari Mohamad Arif Sahlepi, *Asas Nebis In Idem Dalam Hukum Pidana*, Tesis Universitas Sumatra Utara, Medan: 2009, hal. 29

and/or sentenced for a second or more time for the same crime or crime, so it is interesting for the author to analyze this gap.

2. Method

The type of research in this writing is the normative legal research. Normative legal research is research that examines document studies, using various secondary data such as laws and regulations, court decisions, legal theory, and can be in the form of opinions of scholars. The things studied in normative legal research include several things such as legal principles, legal systematics, the level of legal synchronization, legal comparisons and legal history.

3. Findings And Discussion

a. Customary Law in the Context of Indonesian Legislation

Customary law is an unwritten and unmodified rule, but it is still obeyed in society because it has a certain sanction if it is not obeyed. From this understanding of customary law, it can be said that most forms of customary law are unwritten. In fact, in a state of law, a principle applies, namely the principle of legality. The principle of legality states that there is no law other than what is written in the law. This is to ensure legal certainty. But on the one hand, if the judge cannot find his law in writing law, a judge must be able to find his law in the rules that live in a society.[2]

If we follow R. Soepomo's opinion on customary law which states that customary law is a synonym of law that is not written in the legislative regulations (unstatory law), the law that lives as a convention in state legal entities (parliament, provincial councils and so on) and so on, the convention is included in the category of customary law.[3] The discussion of customary law in the laws and regulations of the Republic of Indonesia is as follows:

1. 1945 Constitution

The existence of customary criminal law can be derived as a form of state protection against the existence and rights of indigenous peoples that have been guaranteed in the constitution, including:

• Article 18B paragraph (2) of the 1945 Constitution

[2] Dewi C Wulansari, Hukum Adat Indonesia Suatu Pengantar, PT Refika Aditama, Bandung, 2010, Hlm 3-4.
[3] Abdurrahman, Hukum Adat Menurut Perundang-undangan Republik Indonesia, Cendana Press, Jakarta, 1984, hlm 32-33

The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the unitary state of the Republic of Indonesia, which are regulated by law.[4]

The regulations included in the 1945 Constitution are the basis for the existence of the principles of recognition of indigenous peoples and the traditional rights inherent in them. Through this regulation, the existence of indigenous peoples and their rights are recognized and respected. Article 18B paragraph (2) contains the principle of recognizing the existence of indigenous peoples and their traditional rights. Attached to it. Through the article referred to, customary law community units have the right to live like people in cities and districts.

• Article 28I paragraph (3) of the 1945 Constitution

Cultural Identity and Rights of traditional communities are respected in line with the times and civilizations.[5]In the modern life, however, respect for cultural identity and the rights of traditional communities must continue to be carried out by taking into account the principles of justice, democracy, human rights, and equality for these traditional communities in accordance with the dynamics of their community.[6]

• Article 32 paragraph (1) of the 1945 Constitution

The State Promotes Indonesian national culture in the midst of world civilization by guaranteeing the freedom of the people to maintain and develop cultural values.[7] The government promotes Indonesian national culture. This is motivated by the need to place national culture and customs at a high degree on the basis of the understanding that national culture, which guarantees cultural elements, especially regional customs, is the identity of the nation and state that must be preserved, developed, and strengthened in the midst of global change. Rapid development and modernization that can threaten the identity of the Indonesian nation and state. At the same time realizing that Indonesian culture and customs are not a closed culture in the midst of a changing world.

Thus, it is hoped that in the future, the Indonesian nation and state will still have an identity that is in accordance with the basis of the state and the values and way of life of the Indonesian nation despite global changes.This provision is also based on the idea that the unity and nationality of Indonesia will be stronger if it is strengthened by a cultural approach other than a political and legal approach.

2. Legislation

[4] UUD 1945 Pasal 18B Ayat(2)
[5] Pasal 28I ayat(3) UUD 1945
[6] MHR.Tampubolon, Givu Tau Taa Wana Dalam Pembaharuan Hukum Pidana, LP2HKP, 2008, hlm 95
[7] Pasal 32 ayat(1)UUD 1945

The basis for the application of customary law to be reviewed juridically in various laws and regulations are as follows:

1. Article 5 paragraph (3) of Law Number 1 of 1951 concerning Civil Emergency :
   a) District Courts whose jurisdictions include jurisdictions Courts that were abolished based on the provisions in Article 1 paragraph (1) chapter e, f, g, h, I and j, and in Article 1 paragraph (2) chapter a and b, as an ordinary day-to-day court for all residents of the Republic of Indonesia to examine and decide in the courts of first instance all civil cases and/or all civil criminal cases that were previously examined and decided by the abolished courts.
   b) The civil material law and for the time being the civil, criminal material law which until now applies to the subjects of the Swapraja area and the people who were previously tried by the Customary Court, still applies to the subjects and the person, with the understanding: that an act which, according to living law must be considered a criminal act, but there is no comparison in the Civil Code, it is considered threatened with a sentence of not more than three months in prison and/or a fine of five hundred rupiahs, namely as a substitute punishment if the customary punishment imposed is not followed by the convicted party and the said replacement is deemed commensurate with the amount of the convicted person's guilt, that, in the judge's opinion, if the customary punishment imposed exceeds him/her with the confinement or fine referred to above, then the defendant's guilt may be subject to a substitute sentence as high as 10 years in prison, with the understanding that the sentence a date which according to the judge's understanding is no longer in harmony with the times, must always be replaced as mentioned above, and that an act which, according to living law must be considered a criminal act and which has an appeal in the Civil Code, is considered threatened with a punishment equal to the punishment its most similar appeal to the criminal act.
   c) If the convicted person does not fulfill the decision handed down by the Religious Judge in the Swapraja and Customary courts, a copy of the decision must be submitted by the interested party to the Head of the District Court whose jurisdiction covers the area of the Religious Judge's law in order to be implemented. The chairman, after it has become evident to him that the decision is irreversible, declares that the decision can be enforced, by placing the words: "In the name of justice" above, the decision and by explaining below that the decision is declared enforceable, which information must be removed and signed. After that, the decision can be carried out according to the applicable procedure for carrying out civil decisions of the District Court.[8]

a. Article 1 paragraph (2)

At a time, which will be gradually determined by the Minister of Justice, it is abolished:

[8] Uu no.1 tahun 1951 darurat sipil

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

What gets the attention above is regarding the position of customary criminal law, as we know that with the unification of the Criminal Code for all groups of residents, the place becomes pressed and with the legalistic system of the Criminal Code. It can be said that there is no place for customary criminal law anymore. However, here it is still given a leeway "for the time being" admitted. However, it must still be adjusted to what is formulated in the Criminal Code.[9]

2. Article 6 paragraph (1) of Law Number 39 of 1999 concerning Human Rights (HAM):

In the context of enforcing human rights, the differences and needs in customary law communities must be considered and protected by the law, the community, and the government.With the article above, it can be seen that the role of law number 39 of 1999 concerning human rights in customary law is clear and firm as long as it does not hinder the development of a just and prosperous society.

3. Article 1 paragraph (3) of the Bill of the National Criminal Code:

Verse 3
The provisions as referred to in paragraph (1) do not reduce the enactment of the law that lives in a society which determines that a person deserves to be punished even though the act is not regulated in the laws and regulations. It is a fact that in certain areas in Indonesia there are still unwritten legal provisions that live in the community and apply as law in that area. This is also found in the field of criminal law, namely, what is usually called customary crime. In order to provide a solid legal basis regarding the enactment of customary criminal law, it is strictly regulated in this Criminal Code. The provisions in this paragraph are an exception to the principle that criminal provisions are regulated in laws and regulations. The recognition of these customary crimes is to better fulfill the sense of justice that lives in certain communities.

Verse 4
The application of the law that lives in society as referred to in paragraph (3) as long as it is in accordance with the values of Pancasila and/or general legal principles recognized by the people of nations.

[9] Dewi C Wulansari, *Op. cit* , Hlm 110.

This verse contains guidelines or criteria or signs in determining the source of material law (law that lives in society) which can be used as a source of law (source of material legality). The guidelines in this paragraph are oriented towards national and international values.

4. Article 65 verse 1

The main crimes consist of:
a. Imprisonment;
b. Cover crime;
c. Supervision crime;
d. Fines; and
e. Social work crime.

5. Article 65 verse 1 letter e
Additional penalties consist of:
e. Fulfillment of local customary obligations and/or obligations under living law

6. Article 67 verse 3
Additional penalties in the form of fulfilling local customary obligations and/or obligations according to living law or revocation of rights obtained by corporations can be imposed even though they are not listed in the formulation of the crime. The imposition of additional penalties and the fulfillment of local customary obligations can be imposed together with the main punishment, as an independent crime or can be imposed together with other additional penalties.

7. Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power
Article 5 verse 1
Constitutional judges and judges are obliged to explore, follow, and understand the legal values and sense of justice that live in a society.
Article 10 verse 1
Courts are prohibited from refusing to examine, hear, and decide on a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it.
Article 50 verse 1
Court decisions must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant legislation or unwritten legal sources that are used as the basis for adjudicating.

Article 62
At the time this Law comes into effect, Law Number 4 of 2004 concerning Judicial Power (State Gazette of the Republic of Indonesia of 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358) was revoked and declared invalid.

The Law of the Republic of Indonesia Number 14 of 1970 concerning the Basic Provisions of Judicial Power is also not valid With the enactment of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, then Law Number 14 of 1970 and Law Number 4 of 2004 regarding judicial power is no longer valid in accordance with article 62 above, but

recognition of customary justice still has a place in the judicial power law by looking at article 5 paragraph (1) and article 50 paragraph (1).

Basically, the sentences, "legal values and a sense of justice that lives in society", "the law does not exist or are unclear", "unwritten sources of law that are used as the basis for adjudicating" reflect either expressly or impliedly that the enforcement of customary criminal law is also regulated in Law Number 48 of 2009.

3. Local regulation

Helping the resolution of legal issues that arise in the community in Central Sulawesi at this point the local government of Central Sulawesi informal/customary justice is still very significant.

Article 1 number 3
Customary Law Community is a group of people who have lived for generations in certain geographic areas of the State of Indonesia because of ties to ancestral origins, strong relations with land, territory, natural resources, have customary government institutions, and the customary law order in the territory.

Number 4
Customary institutions are organizing groups that grow and develop along with the history of a customary law community to regulate, manage, and resolve various life problems in accordance with customary law.

Number 5
Customary courts are institutions assigned or authorized to receive, examine and decide disputes based on customary law that lives in the community.

Number 6
Customary law is a set of norms and rules, both written and unwritten, which live and apply to regulate the life of the Customary Law community, and for violations of which customary sanctions are imposed.

Article 5 paragraph (1)

Disputes in the customary law community are resolved through customary courts.
Paragraph (2)
The customary court as referred to in paragraph (1) reconciles the disputing parties.
Paragraph (3)

Settlement of disputes through customary courts as referred to in paragraph (1) does not reduce the authority of the courts to resolve disputes between indigenous peoples in public jurisdictions. Conflicts that often occur in Central Sulawesi are often triggered only because of small problems. Due to the lack of good and serious handling from various parties.
At the same time, people's access, especially those living in rural areas, to solve problems through formal channels is often constrained by various problems, both distance and cost.Governor Regulation Number 42 of 2013 concerning Guidelines for the Central Sulawesi Customary Court is used so that it can contribute to strengthening peace in Central Sulawesi.

Based on the above description philosophically, the recognition and respect for customary law community units and their traditional rights have consequences for recognizing and respecting all existing structures and institutions (including the judiciary) owned by indigenous peoples. Article 18B paragraph (2) of the 1945 Constitution, Article 28I paragraph (3) of the 1945 Constitution, and the Bill on the National Criminal Code are the constitutional basis and the basis for implementing the original Indonesian law for the existence of customary courts, and are pillars of the unity of indigenous peoples.

b. The principle of Nebis in Idem in the Lauje Customary Case against the Donggala District Court's Decision.

The explanation of the Criminal Code states that every criminal case can only be tried, tried and decided once or in other words, a criminal case that has been decided by a judge cannot be examined and tried again for the second time. This provision expressly states in Article 76 paragraph (1) of the Criminal Code, CHAPTER VIII concerning the Disappearance of the Right to Demand Punishment and the Disappearance of Sentences. The article states that (1) Unless a judge's decision can still be changed again, then a person may not be prosecuted again because of an act that has been decided for him by a judge of the State of Indonesia, with a decision that cannot be changed again (in kracht van gewijsde). Paragraph (2) states: if the decision comes from another judge, then the prosecution may not be carried out against that person because of the act also in the case of:

a. Exemption or release from prosecution;
b. The sentence and the sentence have been executed, or have received a pardon or the sentence has been invalidated (because the prosecution has expired) ;

The above legal provisions in criminal law are called the principle of Nebi in Idem, which means that people should not be prosecuted once again because of the actions (events) that have been decided by the judge for him.[10] The application of the legal principle of Nebi in Idem is because, against a person related to a certain criminal act, a judge has taken a decision with a verdict that has permanent legal force and cannot be changed, whether it is a verdict that is bordering or

[10] R Soesilo, Kitab Undang-Undang Hukum Pidana serta Komentar-komentarnya lengkap Pasal demi Pasal, Politeia, Bogor, 1980, Hlm. 90

acquittal (vrijspraak), and the decision is free from all lawsuits (ontslaag van rechtsvervolging). The Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights, in article 18 (5) states that "Every person cannot be prosecuted a second time in the same case for an act that has obtained a court decision that has permanent legal force". This article regulates the right to obtain justice.

So it can be concluded that the principle of ne bis in idem is a principle that regulates that a person cannot be prosecuted once again for an activity or event that has been decided by a judge for him. This principle is a form of law enforcement for defendants in creating legal certainty. The importance of protecting defendants from legal certainty related to the principle of ne bis in idem received serious attention, namely the form of protection provided was expanded not only aimed at the defendant in the trial process, moreover the defendant was prosecuted for the second time in the same incident, so it is also necessary protection of defendants due to abuse of power in court.

1. Destination Ne Bis In Idem

Every decision that has been handed down by the judge against the defendant, whether it is a sentencing decision or other decisions, is a form of accountability given by law to defendants who have been legally proven and based on strong evidence that they have committed or not committed a crime. Every accused who has been proven to have committed a crime can only be held accountable for the events or criminal acts he has committed, and cannot be held accountable for crimes he has never committed, and also only has the right to serve the sentence imposed by the judge for the events and crimes he committed.

The Criminal Code as a positive law that applies in the country of Indonesia, states explicitly in Article 76, the defendant is only allowed to be examined in a trial, once against a criminal event that is committed and the Criminal Code explicitly prohibits the defendant from being examined and tried again a second time with the events and the same crime. The application of the principle of ne bis in idem in criminal cases is to have a specific purpose. The objectives include:

1. Do not let the government repeatedly talk about the same criminal incident, so that in a criminal event there are several decisions that are likely to reduce people's trust in their government;
2. Once a person as a defendant must be given peace of mind, one should not be allowed to continue feeling threatened by the danger of being prosecuted again in an event that has been decided once.[11]

Thus, it is clear that the purpose of applying the principle of ne bis in idem in criminal cases is to provide legal protection for the defendant so that he cannot be prosecuted and tried again in the same criminal case and event and which has previously been decided and also to prevent the

[11] *Ibid*

government from repeating it. Re-examine cases that have been examined previously which in the end led to several different decisions.

2. Nebis In Idem Terms

A criminal case that is prosecuted and retrial can only be declared as a ne bis in idem case if certain conditions have been met. According to M. Yahya Harahap in his book stating that the element of ne bis in idem can only be considered attached to a case, it must meet the conditions stipulated in Article 76 of the Criminal Code, namely :

1. The case has been decided and tried with a positive decision, namely the criminal act that was charged to the defendant has been examined the matter of the case in court, then on the results of the examination the judge has handed down a decision;
2. The decision handed down has obtained permanent legal force.

So in order for a case to be attached to the element of ne bis in idem, there must be these two (2) conditions.[12]In a criminal case, a court decision or a judge's decision that is positive towards a criminal event committed and charged can be in the form of:

a. Sentencing;
b. Acquittal verdict (vrisjpraak);
c. Decision Free from all claims (ontslaag van rechts vervolging).

Although one of the conditions for a criminal case decision to be declared ne bis in idem is that the decision has permanent legal force, but not all types of judge decisions that have permanent legal force and then against the defendant and the same criminal case cannot be prosecuted and tried again or declared as a criminal case that has been ne bis in idem. Therefore, if the decision handed down in a criminal case is not based on a positive decision on the criminal event that is charged to the defendant, but is outside the criminal event, namely in the form of a decision handed down from a formal perspective or a negative decision. The verdicts are:

1. Decision declaring the indictment null and void;
2. A decision stating that the indictment cannot be accepted;
3. A decision stating that the court is not authorized to judge.

c. Enforcement of Nebis In Idem in Lauje Customary Cases

The problems that exist in the Lauje traditional case which is located in the Balukang II Village, Sojol District, Donggala Regency. There is a case that has been tried and has had a decision handed down by the lauje customary council court, but is still being resolved through the Donggala District Court. The cause of this occurrence was caused by a third party (Uncle Victim) of the immoral victim who was not happy with the perpetrator. So that there is a report

[12] M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP, Penyidikan dan Penuntutan, Edisi Ke II*, Sinar Grafika, Jakarta, 2003, Hlm. 450.

to the authorities in this case is the police who are authorized in the area. The police then went to the village apparatus (Village Secretary) who knew the path of the incident.[13]Even though the village officials have given firmness to the police that the immoral case already has a customary council decision, the police are still continuing the investigation process. With this statement, it can be concluded that the legal understanding of the apparatus is still lacking.

Furthermore, when the case goes to the Donggala State Court. In the process of adjudicating cases, there is no affirmation of the principle of ne bies in idem, which means that once a case has been tried, it cannot be processed or tried again for the same case. In accordance with the conditions in Nebis In Idem, namely:

1. There is a decision that has permanent legal force;
2. The people who are ready for the decision to be handed down are the same;
3. The action (which is being sued for the second time) is the same as the one that was decided previously.

With this condition, it means that there must be no legal instrument / legal remedy (rechtsmiddel) that can be used to change the decision. Based on the explanation above, it can be concluded that the decision of the Donggala District Court No. 130/ PID. B/ 2014/ PN. With null, in other words, the decision cannot be applied to the perpetrator.

4. Conclusion

Whereas the recognition of customary law in the context of Indonesian legislation is contained in:

a. the 1945 Constitution in Article 18B paragraph (2), 28I paragraph (3), 32 paragraph (1);
b. Law Number 1 of 1951 concerning Civil Emergency in Article 5 paragraph 3;
c. Law Number 39 of 1999 concerning Human Rights in Article 6 paragraph (1);
d. Draft Criminal Code Article 1 paragraph (3), and (4).

That in accordance with the requirements of the Nebis In Idem Principle which:

a. There is a decision that has permanent legal force;
b. The people who are ready for the decision to be handed down are the same;
c. The action (which is being sued for the second time) is the same as the one that was decided

With this condition, it means that there must be no legal instrument / legal remedy (rechtsmiddel) that can be used to change the decision.

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• Law Number 1 of 1951 concerning Civil Emergency

• Law Number 39 of 1999 concerning Human Rights

• Criminal Code Bill