







RESEARCH ARTICLE

CUSTOMARY DELICT OF
PENGLIPURAN BALI IN THE
PERSPECTIVE OF THE PRINCIPLE OF
LEGALITY: A DILEMMA AND
ARRANGEMENTS FOR THE FUTURE

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ABSTRACT

In the context of criminal law, recognition of customary law begins with a very fundamental principle, namely the principle of legality – a legal basis for declaring an act as a criminal act. This paper examines the implementation of customary law regarding the violation of

Penglipuran customary, in accordance with the customary delict from the perspective of the principle of legality and the future policy formulation of the principle of legality that accommodates the existence of customary law. To answer these problems, socio-legal research methods are used, data in the form of legal documents and results of in-depth interviews, various approaches (legal, theoretical, and historical approaches) and then analyzed through deductive-inductive methods. The results show that the Criminal Code adheres to the principle of formal legality, consequently, the written law is the only source to declare an act as an offense. Whereas in the Penglipuran community, it is known that customary delict is regulated not only in *awig-awig* but also unwritten ones such as *pararem penyahcah awig* and *perarem ngele*. The existence of indigenous peoples is not only found textually but also commonly, carrying out their lives based on customary law which contains applicable values, principles, and norms. Therefore, it is necessary to formulate the principle of legality that accommodates the existence of customary law as a source of criminalizing acts. This is intended to realize a criminal law that accommodates the rights of indigenous peoples to “*their own institutions, laws, and customs*”.

Keywords: Customary Criminal Law; Customary Delict; Penglipuran

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INTRODUCTION

CONSTITUTIONALLY, the existence of indigenous peoples is recognized, respected, and protected. Recognition, respect, and protection of indigenous people incorporate customary law (*adat*) in its community. A community's customary law is the entire value, principle, or norm that is used as a guide for the daily life of all members of the community, including the rules of legal relations amongst the community and God Almighty, the community and the environment and within the community itself. In carrying out the legal relationship mentioned above, customary law communities are bound by their respective customary laws. This is a characteristic of customary law whose application is special, generally only in the territory of customary law communities.

There are many areas of customary law communities in Indonesia. Penglipuran Village in Bali is one of the areas in which indigenous people and customary law still exist. According to the Traditional Head of Penglipuran Village, it is known that Penglipuran has a population of 1,015 with a total of 246 family heads.

The traditional village in Bali was previously known as the Pakraman village by the Bali Province Regional Legislation Number 3 of 2001 concerning Desa Pakraman as amended by Bali Provincial Legislation Number 3 of 2003 concerning Amendment to Bali Provincial Legislation Number 3 of 2001 concerning Desa Pakraman (Bali Legislation 3/2001). Although today, it is no longer in force and was replaced to Bali Province Regional Legislation Number 4 of 2019 concerning Desa Adat in Bali (Bali Legislation 4/2019). The term "Desa Pakraman" is also replaced to "Desa Adat". As stated on Article 1 Number 8 of the Bali Regional Regulation 4/2019, *desa adat* is a customary law community unit in Bali that has territory, position, original arrangement, traditional rights, own assets, traditions, social life rules for generations, inherited from a sacred place (*kahyangan tiga* or *kahyangan desa*), duties and the authority and right to regulate and manage their own household. Chapter XI of Bali Provincial Legislation 4/2019 became the basis for the formation of *Majelis Desa*

Adat (MDA) which is a forum for Pakraman villages. Normatively, the MDA consists of Provincial level MDA, Regency/City level MDA and District level MDA.

From an empirical perspective, there is no guarantee that there will be no violation of customary law. These violations in the context of customary law in Penglipuran Village are known as "*customary violations*". This is certainly different from the violation of the law known in the context of state law.

Based on national law, violations of the law are generally categorized into various types, namely violations of civil law, violations of criminal law, violations of administrative law, violations of international law, and so on. There is even another category for violations of public law and private law. This is what distinguishes it from customary law. Customary law does not recognize the categorization of law as found in national law. All types of violations are called customary violations. In the context of customary law communities, customary law contains various legal aspects, one of which includes customary violations. So, it is appropriate to reference customary law regarding customary violations.

In the context of criminal law, customary offenses with nuances of criminal dimensions are known as customary delict, a type of offense that is a violation of customary criminal law. In the Penglipuran customary law community, there are also customary violations that can be qualified as a customary delict. These acts include theft, murder, rape, and so on. The customary criminal law of the Penglipuran customary law community is a form of criminal law policy in tackling these customary delicts. In this case, it can be seen that to overcome crime, customary criminal law is one part of the national criminal law policy which can currently be found in the Criminal Code (KUHP) and laws and regulations outside the Criminal Code.

Currently, customary law communities are maintaining their customary law as a guide for declaring wrongdoing which is categorized as a customary delict. The customary law in Penglipuran village was developed based on the agreement of the Penglipuran

customary law community. Although the existence of the Penglipuran customary criminal law is recognized empirically, the acceptance of customary law as a basis to declare an act as a customary delict still is not recognized normatively by Article 1 paragraph (1) of the current Criminal Code which states, "*No act shall be punished unless by virtue of a prior statutory penal provision*". This means that only a statute (a formal written law) is accepted to regulate delicts.

Explicitly on Article 15 of Law Number 12 of 2011 on Legislation Making emphasizes that material contents regarding criminal provisions may only be regulated in the following type of legislation: law, provincial regulation, or regency/municipal regulation. This means that the only basis for imposing a criminal offense is a statute or a regional regulation. Such provisions certainly do not reflect the current state of customary law communities that are a part of Indonesia whose rights should be protected by the criminal law.

The Constitution of the Republic of Indonesia through Article 18B paragraph (2) has stipulated that The State shall recognize and respect entities of the adat law (customary law) societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws. Constitutional acceptance of indigenous peoples certainly includes their customary law. Customary law owned by a customary law community is part of the universally recognized human rights, in which customary law communities have rights in the form of "their own institutions, laws, and customs". Constitutionally, through an *expressive verbis* formulation, it requires customary law to be a part of the criminal law to regulate the customary delicts.

This paper examines the implications of adhering to the legality principle which emphasizes written legal rules as the basis for criminalizing contained in the Criminal Code with the enactment of customary criminal law in Indonesia, one of which is Balinese customary law, namely in the village of Penglipuran. In addition, this paper also examines the policy formulation of the legality principle in

the future so that it can better accommodate the existence of customary criminal law in tackling customary offenses.

The research method used to answer the problems in this paper is simultaneous between non-doctrinal and doctrinal research methods but was finalized by doctrinal research method. Doctrinal research methods are used to answer problems related to the normative aspects of the application of customary criminal law in the perspective of the principle of legality, while non-doctrinal methods are used to observe and examine the existence of customary delicts in the Penglipuran customary law community. In addition, this paper uses secondary data in the form of legal documents obtained through literature studies in the form of the 1945 Constitution of The Republic of Indonesia, the Criminal Code, various positive legal products related to customary law as well as primary data taken through observation and in-depth interviews with the traditional head of Penglipuran and Balinese customary law experts. To obtain these data, a socio-legal approach and a deductive-inductive data analysis technique were chosen.

THE DILEMMA OF THE IMPLEMENTATION OF THE BALINESE *PENGLIPURAN* CUSTOMARY CRIMINAL LAW IN THE PERSPECTIVE OF THE PRINCIPLE OF LEGALITY

THE CONSTITUTION is a state basis, Elliot Bulmer calls it the higher law.¹ S. E. Finer et.al as quoted by John Graham and Elder C. Marques states that:²

¹ International IDEA mentions *The vast majority of contemporary constitutions describe the basic principles of the state, the structures and processes of government and the fundamental rights of citizens in a higher law that cannot be unilaterally changed by an ordinary legislative act. This higher law is usually referred to as a constitution.* See Elliot Bulmer, *What is a Constitution? Principles and Concepts*, International IDEA, Sweden, (2017), p. 2.

² John Graham dan Elder C. Marques, *Understanding Constitutions: A Roadmap for Communities*, Institute on Governance Ottawa, Canada, (2000).

A typical definition of constitutions sees them as “codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and offices of government, and to define the relationships between these and the public.”

In Indonesia, the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution) is a written constitution that forms the basis for the implementation of the legal system in Indonesia. The 1945 Constitution constitutes the fundamental norm of any Legislation. This is normatively confirmed in Article 3 paragraph (1) of Law Number 12 of 2011 on Legislation Making (Law No. 12/2011). As a fundamental norm, the 1945 Constitution must be the basis for various laws and regulations, both in the field of civil, international, administrative, and criminal law.

Criminal regulations enforced in Indonesia must take into account the fundamental norms set out in the 1945 Constitution. One of the fundamental norms that need to be considered is about the recognition and respect for customary law communities as stipulated in Article 18B paragraph (2) of the 1945 Constitution “The State shall recognize and respect entities of the adat law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws.”

The existence of this article is very important in the context of Indonesia which believes in *Bhinneka Tunggal Ika*. Regarding the provisions of Article 18B paragraph (2) of the 1945 Constitution, the Constitutional Court through the Constitutional Court Decision Number 35/PUU-X/2012 states that³:

In the constitutional provisions, there is one important and fundamental point in the movement of legal relations. The important

³ See Constitutional Court Decision Number 35/PUU-X/2012 concerning the Review of Law Number 41 of 1999 concerning Forestry against the 1945 Constitution of the Republic of Indonesia.

and fundamental point is that these customary law communities are constitutionally recognized and respected as rights holders, which of course can also be burdened with obligations. Thus, customary law communities are legal subjects. As legal subjects in a society that has become a state, customary law communities must receive attention as other legal subjects when the law wants to regulate.

The consequence of recognizing customary law communities as confirmed in the constitution is the recognition, respect and protection of customary law. The Constitutional Court views customary law as living law⁴. Customary law becomes a reality that grows and lives amid society which of course must be regulated through criminal law. In other words, criminal law regulations must recognize and respect the existence of customary law.

In the context of criminal law, the recognition of customary law as a source of criminal law can be seen from the principles and norms of criminal law that are enforced. Currently, Indonesia is still using the Criminal Code (KUHP) which is based on *Wetboek van Strafrecht voor Nederlands Indie* (WvS) which is not built on the spirit of the Indonesian nation. This is reminiscent of Piepers' view as quoted by Sahetapy stating:

“Met die Code Penal (read-W.v.S.Ned.) ging het als een broek die eerst door vader wordt gedragen, dan overgaat op den oudsten en vervolgens met een lap er op, op den tweede zoon.” Translated by Sahetapy, *“Code Penal (KUHP) is like a pair of pants that was used by the father, then switched to the eldest child and then with a patch of cloth passed on to the second child.”* This statement is reasonable, because as said by Sahetapy, “KUHP is said to be from France and not only the Netherlands, because the Netherlands was essentially took over from France, namely *Code Penal c.q. W.v.S.Ned.* where France once colonized the Netherlands.⁵

⁴ *Id.*, p. 170.

⁵ J.E. Sahetapy, *Reformasi Hukum Harus Mengejawantahkan Pancasila*, dalam Komisi Yudisial Republik Indonesia, *Dialektika Pembaruan Sistem Hukum Nasional*, (2012), p. 120.

The Criminal Code (KUHP) has undergone developments or changes. Barda Nawawi Arief once stated the changes or developments, including:

1. Law Number 1 of 1946 (Article VIII): removes Article 94 Chapter IX Book I of the Criminal Code on the meaning of the term 'Kapal Belanda' (*Nederlandsche schepen*);
2. Law Number 20 of 1946 (Article I): adding a new principal criminal sanction in Article 10 sub a of the Criminal Code with an undisclosed criminal sanction;
3. Law Number 73 of 1958 (Article II): adding Article 52a (regarding the severity of the crime for committing a crime using the national flag);
4. Law Number 4 of 1976: changing and adding to the expansion of the territorial principle in Article 3 of the Criminal Code (expanded to aircraft) and the universal principle in Article 4 of the 4th Criminal Code (expanded to several aviation crimes); and adding Article 95a (regarding the meaning of 'pesawat udara Indonesia'), Article 95b (regarding the meaning of 'dalam penerbangan'), and Article 95c (regarding the meaning of 'dalam dinas');
5. Law Number 3 of 1997 (Article 67): revoking Article 45, 46, and 47 of the Criminal Code;
6. Law Number 27 of 1999: adding Article 107a to f of the Criminal Code regarding to crime against national security;
7. Law Number 20 of 2001 (Article 43B): revoking Article 209, 210, 387, 388, 415, 416, 417, 418, 419, 420, 423, 425, 435 of the Criminal Code;
8. Law Number 21 of 2007: Article 65 revoking Article 297 and 324 of the Criminal Code.⁶

With regards to changes or developments in the Criminal Code, Barda Nawawi Arief stated that there were no fundamental changes from the general principles of the criminal system in the Criminal Code. It is only natural that a statement from the Drafting

⁶ Barda Nawawi Arief, *Perkembangan Sistem Pemidanaan di Indonesia*, (Semarang: Penerbit Pustaka Magister, 2011). pp. 7-8.

Team for the Drafting of the First KUHP Book I of the New KUHP of 1964 was put forward as quoted by Barda Nawawi Arief⁷:

1. Although Law Number 1 of 1946 has tried to adapt to the atmosphere of independence, but in essence the principles and basics of criminal law and criminal law are still based on the science of criminal law and the practice of colonial criminal law;
2. In essence, the principles and basics of criminal law and colonial criminal law still persist with the blanket and face of Indonesia.

In the colonial legacy of the Criminal Code there are general principal rules that apply to all delicts, both those regulated in the Criminal Code and legislation outside the Criminal Code (Laws or Regional Regulations). One of these fundamental principles is the legality principle. Against this principle, Sudarto stated⁸ that In criminal law, there are known principles formulated in Latin: "*nullum delictum, nulla poena, sine praevia lege poenali*" which is sometimes referred to briefly but inaccurately as the principle of "*nulla poena, sine lege*", this principle is also called the principle of legality. This principle is important in criminal law. In the Criminal Code, this principle is contained in Article 1 paragraph (1) which reads: no act can be punished except on the strength of the criminal rules in the legislation that existed before the act was committed. If detailed, then Article 1 paragraph (1) contains two things:

1. A criminal act must be formulated/mentioned in the legislation;
2. This law must exist before the occurrence of a crime.

Regarding the above, Sudarto stated that one of the consequences is that acts that are not listed in the law as a crime cannot be punished. So, with this principle the unwritten law has no power to be applied.⁹ The juridical consequence of the formulation of

⁷ *Id.*, p. 8-9.

⁸ Sudarto, *Hukum Pidana I, Edisi Revisi*, (Semarang: Yayasan Sudarto, 2018), pp. 28-29.

⁹ Arief, *supra note 6*.

the legality principle in Article 1 paragraph (1) of the Criminal Code is the source for declaring an act as an offense is only a statutory regulation, which of course leads to written legal norms.

Stated on Law Number 12 of 2011, only statutory regulations are allowed to regulate criminal norms. Article 15 paragraph (1) of Law Number 12 of 2011 stipulates that material contents regarding criminal provisions may only be regulated in Law, Provincial Regulation, or Regency/Municipal Regulation.

Article 1 paragraph (1) of the Criminal Code in conjunction with Article 15 paragraph (1) of Law Number 12 of 2011 provides legitimacy for local laws and regulations to regulate criminal legal norms that generally rules which actions qualify as criminal acts, what sanctions can be imposed on these acts and how the criminal sanctions are implemented. Any act that is qualified as a crime can be subjected to criminal sanctions. Such regulatory provisions create implications for unwritten legal recognition as a source for declaring an act as a criminal act.

Substantially, Article 1 paragraph (1) of the Criminal Code in conjunction with Article 15 paragraph (1) of Law Number 12 of 2011 is not in line with Article 18B paragraph (2) of the 1945 Constitution which states "The State shall recognize and respect entities of the adat law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws." Article 18B paragraph (2) of the 1945 Constitution mandates that criminal law respects the existence of customary law communities, customary law and their customary delicts.

Every customary law community, including in Bali, has customary law that applies to all indigenous people. The traditional head of Penglipuran stated that as a traditional village, customary law or *awig-awig* was used as a guide to organize and regulate the activities of all indigenous peoples in Penglipuran. Every traditional village must have *awig-awig* as a guideline, if there is no *awig-awig* then there is no guideline. Customary law is used as a guide to declare

wrong to those who violates it.¹⁰ It is in this *awig-awig* that all the rules governing the behavior of the community in the customary law community are listed. Written *awig-awig* is a documented form of customary law. The *awig-awig* are set by members of the customary law community through meetings or meetings in the village called *sangkepan*.

The traditional head of Penglipuran also stated that the *Awig-Awig* of Penglipuran village has existed for a long time, but it was only recorded in writing in 1989. The *Awig-Awig* that applies in Penglipuran Village is certainly not contrary to Pancasila and the 1945 Constitution. This is confirmed in the *Awig-Awig* of Penglipuran village: *Desa adat Penglipuran ngemanggehan pemikukuh*:

1. Pancasila;
2. The 1945 Constitution, the originator of Article 18 of the Act No. 5/1974, Law No. 5/1979;
3. *Tri Hita Karana manut tatwaning Buana Agung*.

The provisions above cannot be separated from the belief of the Penglipuran customary law community itself. The indigenous people of Penglipuran believe that as indigenous people, they must carry out their obligations to customs and obligations to the state. Traditional villages recognize the existence of the state (obedient, docile, devoted to state rules) and secondly, indigenous peoples have their own rules to regulate their customary welfare. But both of these must be parallelized; there must be no contradiction.

Customary law is the basis for determining an act classified as a customary violation and what sanctions can be imposed if such a violation occurs. In a scientific context, substantially customary law contains customary delicts and sanctions. The Balinese customary law community in the Penglipuran area has determined an act known as a customary delict. In general, it can be said that, in principle, the customary delicts contain several elements. First, some actions are not allowed to cause imbalances in society. Second, there are

¹⁰ Result of Interview with the Traditional Head of Penglipuran Village, 26 November 2018.

efforts/reactions or sanctions from the community to restore this balance.

Customary offenses in the Penglipuran customary law community arise when there are actions that cause imbalances in society, and there are efforts to maintain existing customary law norms. Customary delicts in Balinese customary law communities can be qualified as follows:

1. Customary delicts pertaining to morality, these delicts consist as:

a. *Lokika Sanggraha*

Lokika Sanggraha, as formulated in Article 359 of the Adi Religion Book, as well as the development of community views and judicial practice in the Bali area, is a love relationship between a man and a woman who are both not yet bound by marriage, followed by consensual sexual relations based on a promise from the man to marry the woman. However, after the woman became pregnant, the man broke off his promise to marry the woman and ended their relationship without a valid reason.

b. *Drati krama*

Drati krama is a customary delict of a sexual relationship between a woman and a man while still being married to someone else. In short, it can be said that *drati krama* is the same as adultery in the Criminal Code.

c. *Gamia gamana*

Gamia Gamana is a customary delict of a prohibition on sexual relations between people who still have close family relations, either in a straight line or sideways. Similar provisions are also regulated in Article 8 of Law no. 1 of 1974 concerning Marriage.

d. *Mamitra ngalang*

Mamitra Ngalang is a form of customary offense in the form of a married man having a relationship with another woman who he gives spiritual and physical support like husband and wife, but this woman is not legally married to him. Their relationship is continuous and usually the woman is placed in

a separate house. This customary delict is very similar to *drati krama*, but the emphasis is on the man who is already married, while the woman is still not bound by marriage.

e. *Salah krama*

Salah krama is to have sex with creatures of the opposite sex. Those sexual relationship occurs between humans and animals like a man having sex with a female cow.

2. Customary delict concerning property

Customary delict regarding property regulated in the *awig-awig* of traditional villages can be categorized into two groups: stealing sacred objects and destroying sacred objects.

3. Customary delict concerning personal interest

This type of violation includes uttering dirty words *wakparusia*, such as cursing, slandering or *mapisuna*, cheating/lying or pecking/*mogbog*, and so on.

4. Violation of customs due to negligence or not carrying out obligations.

This customary violation, for example, is negligent or does not carry out obligations as a citizen or customary village manners, such as not carrying out the obligations of *ayah-ayahan*, not attending meetings or village community meetings, not fulfilling the obligation to pay *pepeson* or *paturunan* fees for the benefit of ceremonies or development, and so on. -other.

Qualifications as stated above are qualifications based on doctrine (*classified by doctrine*).¹¹

In customary law, customary sanctions transpire if someone violates the customary law of the Penglipuran customary law community. As a part of the Pakraman village, violations of customary law are known as customary violations. Sanctions given in the case of customary violations are often referred to as customary sanctions, customary reactions, or customary corrections.

¹¹ J.A.W. Lensing menamakan pembedaan kualifikasi delik menjadi *classified by statute* dan *classified by doctrine*. Perhatikan dalam Barda Nawawi Arief, *Kebijakan Formulasi Ketentuan Pidana dalam Peraturan Perundang-Undangan*, (Semarang: Pustaka Magister, 2012).

Customary sanctions imposed on “perpetrators” of violating customary law are aimed to restore balance or harmony between the actual (*sekala*) and the supernatural (*niskala*) in the traditional community of Penglipuran village. Restoring the magical balance becomes the orientation of punishment for the customary violations that occur. This is the philosophical basis for the punishment of the Penglipuran customary law community due to its customary law characteristics: religious, magical, communal, concrete, and cash. In general, in the Balinese customary law community, the source of the existence of customary sanctions can be found in various ways, including:

1. The decision of the village Prajuru or the customary village leader (written and unwritten)
2. *Village Perarem* (written and unwritten)
3. Pakraman Village’s *awig-awig* (written and unwritten)
4. *Catur dresta* (*sastra dresta, desa dresta, loka dresta dan kuna dresta*).
5. *Paswara* (king's judgment)
6. Agreements/decisions of customary institutions such as the Council for the Trustees of Traditional Institutions (MPLA) and the Implementing and Fostering Body of Customary Institutions (BPPLA). Agreement/Decision of the Indigenous Bendesa Forum.
7. Agreement/decision of the Pakraman Village Council.
8. Book of Manawa Dharmasastra (Hindu law).
9. Books of Religion (“Religion”, “Purwa Religion”, “Kutara Religion” and “Adi Religion”).

Customary sanctions can generally be categorized into three groups known as *tri danda* (three sanctions) consisting of *arta danda* (for example, a fine), *sangaskara danda* (for example, carrying out a cleansing ceremony or a ceremony of *pemarisudan*), and *jiwa danda* (for example, apologizing or *manegaksama*). The three types of sanctions are usually carried out simultaneously. It means that the perpetrator can be subject to *arta danda*, *sangaskara danda*, and *jiwa danda* for a violation of customs.

The customary law community of Penglipuran is very devoted to their customary law. This is due to legal awareness that arises from

customary law made by the customary law community themselves. So, the awareness factor was born because the source for making customary law is from within the community itself. Penglipuran customary criminal law is one of the many customary criminal laws that live in the customary law community in Indonesia. The Penglipuran customary criminal law regulates customary violations as stated above lives in people's daily lives. Meanwhile, from a normative point of view, its existence is not recognized by the formulation of the principle of legality based on Article 1 paragraph (1) of the Criminal Code.

REGULATION OF THE IMPLEMENTATION OF *PENGLIPURAN* CUSTOMARY CRIMINAL LAW IN THE FRAME OF FUTURE CRIMINAL LAW POLICY

THE DESIRE TO BE free from the shackles of colonialism's legal products implied giving the mandate to seek "National Law Development/Renewal". Apart from being implied as the ideals of the Proclamation, it is also stated in the Preamble of the 1945 Constitution which among other things is stated "... *By the Grace of God the Almighty and impelled by the noble desire to live a free national life, the people of Indonesia hereby declare their independence.....*". In this case, independence is intended so that Indonesian can embrace a "free national life," which also implies "a nation free from the shackles of colonial law." The spirit of national law reform (including the renewal of the national criminal law) can be understood if the editorial is contemplated in Article II of the Transitional Rules of the 1945 Constitution of the Republic of Indonesia, "All existing state bodies and regulations are still in effect immediately, as long as new ones have not been enacted according to this Constitution".

The noble ideals to be free from colonial law do not seem to have been "achieved", this can be seen from the current criminal law system that is still based on the Criminal Code (KUHP). Whereas

stated in the 1945 Constitution, it is essential to consider reforming the national criminal law. This becomes relevant, because with the Constitution, a country as a community has a clear goal and will guide it towards what it aspires to.¹² The 1945 Constitution has stated the goals of the Indonesian state, which must also be the final goal of efforts to develop national criminal law.

The issue of criminal law development can actually be seen from various aspects. First, it can be seen from "Criminal Law Policy in a Broad Meaning" that includes criminal law policy in the field of material criminal law, formal criminal law, and criminal law enforcement policies.¹³ Updates from such an angle provide direction so that penal reform is carried out in three fields, namely material, formal, and criminal law enforcement policies.

The renewal of the national criminal law is the government's effort to update the existing criminal law policy. The Criminal Code is a form of criminal law policy that is still in effect today—renewing the Criminal Code thereby updating the criminal law policy. One form of reform of the criminal law policies is drafting the Draft Criminal Code (RKUHP). In the upcoming RKUHP, customary law or the law that lives in the community will become one of the sources of law to declare an act as a crime.

The recognition that the law that lives in society as a source of law is carried out by formulating the principle of material legality. The material legality principle is an extension of the formal legality principle currently in force. This is contained in Article 2 paragraphs (1) and (2) of the RKUHP (Draft of the Criminal Code):

1. The provisions as referred to in Article 1 paragraph (1) do not reduce the enactment of the law that lives in society which determines that a person deserves to be punished even though the act is not regulated in the legislation.

¹² Satjipto Rahardjo, *Negara Hukum yang Membahagiakan Rakyatnya*, (Yogyakarta: Genta Publishing, 2009), hlm. 81.

¹³ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, (Jakarta: Kencana, 2011), hlm. 28.

2. The law that lives in society as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, Human rights, and general legal principles recognized by civilized society.

In the Academic Draft of the RKUHP it is stated that the reasons for the recognition of the unwritten law are, among others based on:¹⁴

1. Article 5 (3) sub b Emergency Law Number 1 of 1951
Which essentially regulates an act according to living law must be considered a criminal act, but has no basis in the Civil Code, it is then considered punishable by a law not exceeding three months in prison and/or a fine of five hundred rupiahs, which serves as a substitute law. Suppose the customary law imposed in the judge's opinion exceeds the confinement or fine referred to above, in that case, the defendant may be subject to a substitute sentence of up to 10 years in prison, with the understanding that the customary punishment is no longer compatible with the times as mentioned above.
2. Resolution in the field of criminal law, 1st National Law Seminar 1963.
The fourth point states that "what are seen as evil acts are acts which are formulated by their elements in this Criminal Code or in other legislation. This does not close the door for the prohibition of actions according to living customary law and does not hinder the formation of the aspired society, with customary sanctions that can still be in accordance with the nation's dignity. While the eighth point resolution states: "Elements of Religious Law and Customary Law are woven into the Criminal Code".
3. Law on Judicial Power (Law No. 14 of 1970 as amended by Law 35 of 1999 and Law No. 4 of 2004, and lastly by Law No. 48 of 2009).

¹⁴ Academic Draft of the RKUHP, P. 26-27.

- Article 14 (1): The court may not refuse to examine and adjudicate a case submitted on the pretext that the law is not/less clear, but is obliged to examine and adjudicate it.
- Article 23 (1): All court decisions in addition to containing the reasons and grounds for the decision, must also contain certain articles from the relevant regulations or unwritten legal sources.
- Article 27 (1): Judges as law and justice enforcers are obliged to explore, follow and understand living legal values.

4. 4th National Law Seminar 1979

In the sub B. II report regarding the “National Legal System”, it is stated, among other things:

- The national legal system must be in accordance with the needs and legal awareness of the Indonesian people
- “.....National Laws shall as far as possible be in written form. In addition, unwritten law remains part of national law.”

The formulation of the principle of material legality in the RKUHP basically has the following objectives:

1. Formulate a criminal law that is in line with the constitutional mandate

The written constitution in Indonesia is contained in the 1945 Constitution of the Republic of Indonesia. The 1945 Constitution is the fundamental law in statutory regulations. This means that the 1945 Constitution contains the basic norms for the Establishment of Legislation as the source of law for the Establishment of Legislations under the 1945 Constitution of the Republic of Indonesia.

The Constitution of the Republic of Indonesia requires that the establishment of criminal law in Indonesia must pay attention to:

- #### A. Criminal law as an instrument to attain national purposes
- Criminal law is no different from the law in general; it is built and developed to achieve a particular goal. In the context of law in Indonesia, law is made as a means to

achieve national goals as contained in the Fourth Paragraph of the Preamble to the Constitution of the Republic of Indonesia which reads as follow:

“..which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice..”

Criminal law must be oriented to achieve the national goals as mentioned above. When achieved, criminal law is said to be an instrument to achieve social defense as well as social welfare.

B. Criminal law as the basis for imposing criminal

Article 1 paragraph (3) of the 1945 Constitution states that Indonesia is a state of law. This implies that criminal penalties must be based on law, which in this case is criminal law. Criminal law as the basis for imposing a crime indeed cannot be interpreted as only written law as contained in Article 1 paragraph (1) of the current Criminal Code; of course, it must also include unwritten law or customary criminal law that applies in customary law communities.

C. Criminal law must recognize the law that lives in society as a source of law

Article 18B paragraph 2 of the 1945 Constitution as quoted above states that the State shall recognize and respect entities of the adat law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws. Customary law needs to be permitted the recognition by criminal law to impose a criminal sentence on someone.

D. Criminal law must ensure human rights

Chapter XA of Human Rights in the 1945 Constitution shows that Indonesia is a country that recognizes and upholds human rights. Human rights provisions in the 1945 Constitution guarantee that all fields of law must accommodate the protection of these rights. Criminal law, in terms of imposing a sentence on someone must also pay attention to human rights.

Furthermore, the mandate to create a criminal law that protects human rights has also received universal recognition. This is marked by the increasing number of instruments on human rights agreed upon by the global community, providing a basis for justification for each country to further realize the nuances of respect, fulfillment, and protection of human rights in the legal (criminal) system. Various criminal instruments related to human rights issues include:

- Standard Minimum Rules for the Treatment of Prisoners (OHCHR 1955);
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Medical Ethics, 1982);
- Convention Against Torture (UNCAT, 1984);
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principles of Detention, 1988);
- United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules, 1990);
- Declaration on the Protection of all Persons from Enforced Disappearance. General Assembly Resolution 47/133 (UNDPPED, 1992);
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules, 1985);

- Declaration of Basic Principles of justice for Victims of Crime and Abuse of Power (UNVCAP, 1985);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Adopted by General Assembly resolution 45/113 of 14 December 1990.

Human rights are rights ingrained in every person, without exception for indigenous peoples. The rights owned by indigenous peoples are also part of human rights. The United Nations has established a "Declaration on the Rights of Indigenous Peoples" or often abbreviated as UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples) or the United Nations Declaration on the Rights of Indigenous Peoples. UNDRIP is a comprehensive human rights document that regulates the rights of indigenous peoples. It contains the minimum standards that every member of the United Nations must meet to ensure the rights of indigenous peoples. Moving on to the provisions of UNDRIP, NZ Human Rights stated the rights of indigenous peoples, one of which is *Their own institutions, laws, and customs*.¹⁵ This emphasizes that criminal law provides space for customary criminal law.

2. Formulate a criminal law that accommodates the mandate of the prevailing laws and regulations in Indonesia

Legislation in Indonesia has provided a normative basis for formulating the principle of material legality in the RKUHP. These regulations include:

- a. Emergency Law of the Republic of Indonesia Number 1 of 1951 concerning Temporary Measures to Organize the Unity of Powers and Procedures for Civil Courts

Article 5 paragraph 3 sub b:

An act according to living law must be considered a criminal act, but has no basis in the Civil Code, it is then

¹⁵ NZ Human Rights, *The Rights of Indigenous Peoples: What you Need to Know*, NZ Human Rights, New Zealand.

considered punishable by a law not exceeding three months in prison and/or a fine of five hundred rupiahs, which serves as a substitute law. Suppose the customary law imposed in the judge's opinion exceeds the confinement or fine referred to above, in that case, the defendant may be subject to a substitute sentence of up to 10 years in prison, with the understanding that the customary punishment is no longer compatible with the times 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 punishable by the same punishment as the sentence of appeal which is most similar to that criminal act.

b. Law Number 48 of 2009 on Judicial Power

Several provisions of the article in the Law on Judicial Power mandate the existence of unwritten law as a source of law. Article 5 paragraph (1) Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society. Furthermore, Article 50 (1) also mentions that the court's decision must contain the reasons and basis for the decision and contain specific articles from the relevant legislation or unwritten legal sources that are used as the basis for adjudicating.

3. Respond to the need for legal development that is in line with the values that live in a society

One of the critical approaches in criminal law policy is the so-called value-oriented approach. A value-oriented approach is an approach inherent in every criminal law policymaking. Criminal law norms are basically the embodiment of the values adopted by a nation. Therefore, in formulating criminal law norms, the consideration of values that live in society cannot be separated.

The principle of material legality in the RKUHP is a form of policy formulation that considers the values of society. In other

words, the principle is part of the renewal of criminal law in accordance with the values that live in society. Regarding this, Barda Nawawi Arief stated:¹⁶

Criminal law reform is essentially an effort to review and reassess ("reorient and re-evaluate") the socio-political, socio-philosophical, and socio-cultural values that underlie and provide content for the normative and substantive content of the aspired criminal law. It is not a renewal ("reform") of criminal law, if the value orientation of the aspired criminal law (eg the New Criminal Code) is the same as the value of the old criminal law inherited from the colonialists (the Old Criminal Code or WvS).

Customary law communities are part of the Indonesian nation which in carrying out their daily life is based on customary law that is built on the values believed by the customary law community and does not conflict with Pancasila and the 1945 Constitution. Therefore, it must be accommodated in the principle of material legality, which will apply in the future.

CONCLUSION

PENGLIPURAN CUSTOMARY LAW community is part of the Indonesian nation, which has the right to "Their own institutions, laws and customs"- a part of human rights that need to be respected, protected, and fulfilled by law, including criminal law. It is also stated explicitly on Article 18B paragraph (2) of the 1945 Constitution that requires criminal law to initiate a room for the application of customary criminal law as an unwritten law to regulate customary offenses. However, due to the principle of legality as stated in Article

¹⁶ Barda Nawawi Arief, *Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, (Jakarta: Kencana, 2008), p. 30.

1 paragraph (1) of the Criminal Code, this initiation cannot be implemented. This contradiction makes the implementation of customary criminal law a dilemma. Moreover, the current policy reform regarding the principle of legality only accommodates written law as the basis for sentencing. In the future, it is necessary to formulate the principle of material legality that allows unwritten law or customary law as a source to determine an offense. This has been formulated in Articles 2 (1) and (2) of the RKUHP, which reads (1) the provisions as referred to in Article 1 paragraph (1) do not reduce the enactment of the law that lives in a society that determines that a person deserves to be punished even though the act is not regulated in the law. laws and regulations. (2) The law that lives in society as referred to in paragraph (1) applies in the place where the law lives, and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia. Human rights and general legal principles are recognized by civilized society.

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