



Reconstruction of Customary Criminal Law Based on Balinese Hindu Local Wisdom

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ABSTRACT

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Law is a set of rules that bind and compel society. The implementation process must be enforced by imposing sanctions so that the objectives of the law can be achieved. The purpose of the law is to provide universal benefits, namely how to create peace and tranquility in the community that can be felt concretely by all levels of society. Indonesia already has original law as a regulator of life that is born from the soul of the community which is called customary law. Customary law cannot be separated from the formation and development of national law, including criminal law. The criminal law of the Dutch colonial heritage which is not in accordance with the values of the life of the Indonesian people needs to be renewed by constructing the values of customary law so that it can apply effectively and ideally, which is known as customary criminal law because in customary law there are regulations on customary criminal law. In the legal system, especially those related to legal substance or legal products, both written and unwritten, as well as decisions from judicial institutions, can be extracted from legal sources in the form of local wisdom, especially those in Bali. One of them comes from the lontar which is then explored the values, principles and legal concepts. Regarding Law, Politics and Institutions, it is also contained in Balinese Hindu lontars which are spread in almost all corners of the region in Bali. This is important in the development and renewal of customary law and criminal law in synergy as a legal reconstruction based on Balinese Hindu local wisdom.

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1. INTRODUCTION

Law and society are two things that cannot be separated. Cicero mentions an adage *ubi societas ibi ius* which means where there is society, there is law. Cicero's adage is supported by Van Apeldoorn which says "the law is all over the world, where is human society" (Mustafa 2001). Indonesian society has laws that are born from the soul of the community (*volkgeist*), which is known as customary law (Fathurokhman and Ferry 2009). Customary law is original Indonesian law whose form is not written in the form of legislation of the Republic of Indonesia which here and there contains elements of religion (Surpha 2004). There is a close relationship between law and public life, The law plays a major role in creating an orderly and safe life. If things go wrong, the role of the law can be seen more concretely. In the field of criminal law, there are two different laws used by the

community, namely the law that is based on the Criminal Code as well as other written laws and regulations and the criminal law that is based on unwritten or customary regulations, namely the Customary Criminal Law (Santoso 1990). Customary criminal law regulates actions that violate the feelings of justice and propriety that live in the community, causing disturbances to the peace and balance of society. To restore this peace and balance, then there is a customary reaction (Santoso 1990).

Hilman Hadikusuma defines that customary criminal law is a law that shows events and actions that must be resolved (punished) because these events and actions have disturbed the balance of society (Effendi 2018). So different from Western criminal law which emphasizes what events can be punishable by punishment and what kind of punishment, because the incident was contrary to the laws and

regulations. Customary criminal law focuses on the existence of "consequences" so that a person and his relatives must be responsible for the consequences. Van Vollenhoven stated that what is meant by customary offenses are actions that cannot be done, although in reality the event or action is only a small contribution. So it can be said that customary offenses are all actions or events that are contrary to propriety, harmony, order, security, sense of justice, and legal awareness of the community concerned, whether it is the result of someone's actions or the actions of the customary rulers themselves.

The position of customary criminal law is slowly shifting its position because it is not codified in legislation and/or the Criminal Code, while until now in some areas of Indonesia, people still rely on their respective customary law habits. The existence of customary law is contained in Article 18 B paragraph (2) of the 1945 Constitution which states that "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia. regulated by law, meaning implies that the existence of these traditional rights, including customary law, is recognized. Article 5 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power states that "Judges and constitutional judges are obliged to explore, follow and understand the legal values and sense of justice that live in society", this states that the recognition of the existence of customary law is seen from the phrase legal values and a sense of justice that live in society. Thus in Article 50 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power states that "Court decisions must include the reasons and basis for the decision, also contains certain articles of the relevant laws and regulations or unwritten legal sources that are used as the basis for adjudicating, meaning that the phrase unwritten sources of law indicate the recognition of customary law values which are generally referred to as unwritten law.

Criminal acts are referred to by various names such as offenses, criminal incident, crime and so on, whereas in the customary law literature, customary crimes are often called customary offenses, customary violations or customary crimes. In Balinese customary law, the term customary offense, customary violation or customary crime among Balinese people is

commonly used salah, sisip, dosa (Wiranata 2005). The imposition of criminal sanctions based on the Criminal Code by judges through court institutions is felt to have not improved the inner atmosphere of the Hindu community in Bali which has resulted in disruption of the balance of the external world and the unseen world (sekala lan niskala). Therefore, all actions that cause disturbance of public order as a disturbance to the cosmic balance are classified as customary offenses, and the perpetrators may be subject to customary sanctions as a form of customary reaction (Diantha, Griadhi, and Windia 2009). In the legal system in Indonesia, especially in Bali related to legal substance or legal products, both written and unwritten as well as decisions from the judiciary, can be extracted from legal sources in the form of local Balinese Hindu wisdom, one of which comes from lontar which is then excavated values, principles and concepts of law. Therefore, it is necessary to study the reconstruction of customary criminal law based on Balinese Hindu local wisdom, Based on this description, the author is interested in conducting an assessment .

2. METHOD

The criminal law of the Dutch colonial heritage which is not in accordance with the values of the life of the Indonesian people needs to be renewed by constructing the values of customary law so that it can apply effectively and ideally, which is known as customary criminal law because in customary law there are regulations on customary criminal law. In the legal system, especially those related to legal substance or legal products, both written and unwritten, as well as decisions from judicial institutions, can be extracted from legal sources in the form of local wisdom, especially those in Bali. One of them comes from the lontar which is then explored the values, principles and legal concepts. Regarding Law, Politics and Institutions, it is also contained in Balinese Hindu lontars which are spread in almost all corners of the region in Bali. This is important in the development and renewal of customary law and criminal law in synergy as a legal reconstruction based on Balinese Hindu local wisdom.

3. RESULTS AND DISCUSSION

Reconstruction of Customary Criminal Law Based on Balinese Hindu Local Wisdom as Legal Reform in Indonesia

Justice will be realized if the political activities that give birth to legal products are indeed in favor of the values of justice itself. Despite that in the process of working legal institutions must work independently to be able to provide legal certainty and protection, the basis of the formation of the law itself carried out by political institutions must also contain the principles of building a just rule of law (Salman 2004).

Law is a set of rules that bind and compel society. The implementation process must be enforced by imposing sanctions so that the objectives of the law can be achieved. The purpose of the law is to provide universal benefits, namely how to create peace and tranquility in the community that can be felt concretely by all levels of society. In society there is a desire to be achieved, then the law is used as a tool to change the behavior of the community so that it is carried towards the desired goal (Effendi et al., 2010).

State teachings based on law (*de rechts staat* dan the rule of law) implies that the law is supreme and obligations for every state or government administrator to comply with the law (subject to the law) (Manan 2003). There is no power above the law (above to the law). Based on the statement above, there should be no arbitrary power or abuse of power both in countries in the form of kingdoms and republics. In a meaningful way, Obedience to the law implies the limitation of power as well as the teachings of separation and division of power. Therefore, a state based on law contains elements of separation or division of power (Rani 2008). In order to achieve justice in society, it is necessary to have a reconstruction in the field of Balinese customary criminal law which is taken from Balinese local wisdom. The Adigama Lontar Manuscript is one of the texts that contains a narrative of the behavior of the people at that time and what consequences will be obtained when committing a social deviation. Lontar Adigama is one of the Javanese texts that discusses law, rules of social life, family ethics, including marriage and legal actions and their sanctions.

Even though it has now entered the Kaliyuga era, the influence of the use of the Manawa Dharmasastra as a source of Hindu law remains valid. Meanwhile, the Dharmasastra, which was written by Bhagawan Parasara, specifically for the Kaliyuga era, is hardly heard by us. Therefore, in various laws, both in the context of

legal reform, the Book of Manawa Dharmasastra remains the standard to be considered. In Indonesia, The Book of Manawa Dharmasastra has been widely practiced and transformed into regulations during the reign of the Hindu kingdoms in Indonesia, both in the form of written and unwritten regulations.

Constitutional law, Criminal law, and the Civil Law applied at that time was the law which mostly came from the Manawa Dharmasastra book. This can be seen from the contents of the book Adigama, Kutaramanawa, Purwadigama, Dewagama, and other books. These books present various legal principles as contained in the Manawa Dharmasastra. The Kutaramanawa (Constitution of Majapahit) for example, It can be said that it is a derivative book from the Manawa Dharmasastra, its contents mostly contain interpretations of the Dharmasastra book, but has been adapted to the conditions and situations that developed at that time.

As in the Siwagama Lontar, one of them alludes to ethics, where in this case the function of ethics in the legal profession as an effort to enforce the law with justice includes aspects of human life in a broad sense, especially in the interactive relationship of humans with fellow humans in their social environment, among others in relation to work and/or professional relationships. Like the plaintiff and the judge, advocate with his client, prosecutor with defendant and a notary with his notarial services, all of these professions are regulated in their respective laws.

The reconstruction of customary criminal law based on Balinese Hindu local wisdom as legal reform in Indonesia is also found in Lontar Kutaramanawa. Kutaramanawa or Kutaramanawa Dharmasastra is a book of laws used during the Majapahit kingdom. Kutaramanawa was compiled at the height of Majapahit's glory and became the main reference for the formation of customary law in Indonesia. In 1951 Raad Kerta or the Hindu Religious Courts Institution in Bali was abolished and this is a serious setback because in the daily life of Hindus in Bali rely on Hindu religious laws, however, in the event of a dispute/case, the Government of the Republic of Indonesia provides a civil/criminal judicial institution that refers to European (Dutch) legal sources and jurisprudence. This statute book, which is primarily a criminal law code (*jenayah*), but besides that there are also civil law laws, which includes chapters on buying and selling,

distribution of inheritance, marriage and divorce. Kutara Manawa as it is in the ancient Javanese language stirred erratically, and in the effort to rearrange it, the structure or division is obtained as follows:

1. Chapter I : General provisions regarding fines;
2. Chapter II : Eight kinds of murder called *astadusta*;
3. Chapter III : The treatment of servants is called *kawula*;
4. Chapter IV : The eight kinds of theft are called *astacorah*;
5. Chapter V : coercion or *sahasa*;
6. Chapter VI : Buy and sell or *adol-atuku*;
7. Chapter VII : pawn or *sanda*;
8. Chapter VIII : accounts payable or *ahutang-apihutang*;
9. Chapter IX : Deposit
10. Chapter X : dowry or *tukon*
11. Chapter XI : marriage or *kawarangan*;
12. Chapter XII : pervert *paradara*;
13. Chapter XIII : inheritance *drewe kaliliran*;
14. Chapter XIV : insults or *wakparusya*;
15. Chapter XV : hurt or *dandaparusya*;
16. Chapter XVI : negligence or *kagelehan*;
17. Chapter XVII : fight or *atukaran*;
18. Chapter XVIII : land or *bhumi*;
19. Chapter XIX : slander or *duwilatek*

Quotation of the Contents of the Kutaramanawa Book : Who are the so-called eight thieves :

1. Those who carry out the theft;
2. Those who incite to steal;
3. Those who give food to a thief;
4. Those who give shelter to a thief;
5. Those who are friends with a thief;
6. Those who guide a thief until he gets a chance to steal;
7. Those who help a thief;
8. Those who hide a thief.

These are the so-called eight thieves, and hopefully they are punished by the king: but their father, their mother, their children and the rest of their brethren may not be punished by the king, if they are not guilty: only the eight persons mentioned above may be punished.

The punishments given to the eight thieves were different. How to give the punishment can be seen in sections 22 and 23, the sections are as follows: :

Part 22. Those who steal and those who incite to steal, if there is evidence, can be sentenced to death by the king; the thief's wife, son with all his rights brought into the king's residence to be sold by the king or given to someone else; their wives and children who incite theft may remain at their place of residence and be subject to a fine of 10,000; if they also incite to steal, then they must also die by the king. 21

Part 23. Those who give shelter to a thief as well as those who feed a thief, if there is evidence, will be fined 20,000 by the king; his wife and children are not punished; those who hide a thief or guard a thief, and say that he is not a thief, or those who get rid of a thief; while there is evidence stating that the person is a thief, he is subject to a fine of 40,000 by the king; those who help the thief, knowing that the person is a thief, or keeping silent, while they have been friends with that person for a long time, are fined 10,000 by the king; if they also incite to steal, then they are also sentenced to death by the king.

What is very interesting is the regulation regarding the eradication of witchcraft or sorcery, which we are now very strange to hear, because nowadays such things are considered as superstition and not to include it in a verse of law. This is described in section 173. It reads as follows:

If a person writes another person's name on the clothes or cloth of a deceased person, or on a cloth in the form of a doll, or a doll made of flour and bury the doll in a grave, or put it in a tree, on the ground that has been imbued with incantations, or at a crossroads, then such a person is considered an evil magician; if the crime of such a person is proven, then the king must kill him with all his descendants and parents; none of them may be allowed to live by the king, if the king wants to achieve world welfare; all his rights that are in his territory may be taken.

Life of decency at that time was highly respected. This relates to their belief that society is part of God. So if decency is violated, disaster will befall the whole society. Therefore, see how tough the measures to eradicate acts that violate decency are. In such cases the death penalty is often given quickly. This can be seen in section 250:

If someone gives a gift to a married woman or a woman who is prohibited by caste, or receives it from a woman because she is motivated by love, it doesn't matter what the gift consists of, whether powder, flower ear

ornaments, rings, knives, a piece of clothing or decoration, in short anything given by a man or woman as a gift, or if anyone is found joking or laughing secretly with women, then it is considered strisanggrahana zina and he is sentenced to death.

The government at that time was also like the current government apart from trying to eradicate the very large interest collected by moneylenders. The interest that could be collected at that time was only half a percent every month, and that was the highest interest. Society at that time consisted of several castes as found in India. Also the penalties given to the castes are different. We can equate this with literature found in India. The differences can be seen from section 220:

If a ksatriya insults a brahmin he is subject to a fine of 2000; if a Vaisya abuses a Brahmin, he is subject to a fine of 5000; if a sudra abuses a brahmin, he is sentenced to death; king 23, must kill this slave. If a brahmin abuses a ksatriya, he is subject to a fine of 1000; if he abuses Vaisya people, he will be fined 500; if a sudra, 250 is charged. Unfortunately, that we can not know the size of the money used at that time. The maximum fine is 160,000.

The laws formed by traditional villages in Bali come from the customs and situations that exist in the traditional village itself which directs the formation of such laws. Therefore, it can also be said that the existence of law is not only due to the formation (formed), but there are also laws that are found and grow because they flow following the development of the society in which the law applies. This law that grows and develops in society is meant as customary law that is enforced by indigenous villagers in living their lives, which is side by side with state law which they are also obliged to obey in their position as citizens.

Sanctions in a broad sense can be classified into three types, namely:

1. As a remedy, which is usually found in the field of civil law,
2. As a fulfillment of circumstances, which are usually also found in civil law,
3. As punishment in a broad sense, including criminal and action. It can be observed that the imposition of (negative) sanctions is one of the efforts of the social control system owned by a certain society to create order in society.

Thus, customary sanctions are customary corrections as a result of violations to correct

laws that have been violated. So, customary sanctions are a coercive tool used by legal officers, in this case the Customary Prajuru through Paruman Desa to achieve legal balance again so that it can function repressively.

Balinese customary law and Hinduism in Bali in reality live side by side and complement each other. It can be assumed that compliance with customary law in Bali is not solely due to the content and nature of the law, but more than that, because of the existence of sacred/holy elements in the sense of being in accordance with the view of life based on Hindu religious teachings. According to customary law, actions that are contrary to customary law regulations are illegal acts and customary law recognizes efforts to improve the law (*rechstherstel*) if the law is violated. Acts that are contrary to customary law regulations are commonly called customary law offenses. These acts when classified include:

- a. Customary crime against property
- b. Customary crime against the public interest
- c. Customary crime against one's honor
- d. Customary crime against decency.

The pattern of imposing/implementing customary sanctions here is intended as a process of imposing sanctions carried out by customary law communities where customary law applies. As a form of legal alliance, traditional villages in Bali have 3 (three) elements as main characteristics:

- a. Elements of Parahyangan/Sacred Places,
- b. Elements of Palemahan/Region,
- c. Pawongan/Human Element.

Community life can not be separated from the procedures for solving a problem that arises in the indigenous community itself, which can not be separated from what is called *catur dresta*. *Catur Dresta* are four guidelines as a guide in efforts to resolve a dispute or problems which include:

- a. *Sastra Dresta* (the guidelines for the rules of life are found in the holy library)
- b. *Loka Dresta* (the provisions resulting from the agreement of the customary law community taken from the village management meeting)
- c. *Purwa Dresta* (provisions that are based on historical considerations that are deemed appropriate)
- d. *Desa Dresta* (provisions made by taking into account the environmental factors of the traditional village).

4. CONCLUSION

Based on the explanation above, a conclusion is obtained regarding the reconstruction of customary criminal law based on Balinese Hindu local wisdom, that the law that has long been far from the value of community justice needs to be renewed by referring to the soul of the community where the law should have been born and developed on the awareness of the community. As a means of legal reform in Indonesia, It is also necessary to refer to the legal history of local wisdom, such as in Balinese Hindu lontars where there are many articles related to regulations in the field of law that regulate human behavior for a long time and strictly to comply with these rules and also have consequences with balance of real and unreal nature (sekala lan niskala).

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