

# Juridical Review of Customary Criminal Law in the Perspective of Indonesian Positive Law

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## Juridical Review of Customary Criminal Law in the Perspective of Indonesian Positive Law

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### Abstract

Basically, the sentence "legal values and a sense of justice that live in society, the law does not exist or is unclear, sources of unwritten law are used as the basis for adjudicating". reflects both expressly and impliedly that the enforceability of customary criminal law is also regulated in Law Number 48 of 2009 concerning Judicial Power. Apart from the policymaking the enactment of criminal law is regulated and discussed in various customary criminal law seminar forums to also be directed in the framework of reforming national criminal law, for example: in the Resolution of Point IV of the National Law Seminar 1 of 1963 in the Field of Criminal Law it is stated that: "what are seen as evil acts are acts whose elements are formulated in the Criminal Code and in other laws. Thus, this does not close the prohibition on the actions of living customary law and does not hinder the formation of the desired society with customary sanctions that can still be in accordance with the dignity of the nation.

**Keywords:** criminal law; customary law; judicial power.

### 1. INTRODUCTION

Customary criminal law or criminal customary law, is a rule of law owned by an indigenous people or certain ethnic groups that is used to regulate criminal acts and their sanctions. Customary criminal law can be detailed in terms of criminal acts, but the imposition of sanctions is sometimes relatively flexible and can be adapted to local customs

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and traditions. In the perspective of Indonesian positive law, customary criminal law is considered as a sub-system of law owned by indigenous peoples and whose existence can be recognized. Article 18B paragraph (2) of the 1945 Constitution states that "The state recognizes and respects the legal units of indigenous peoples under national law 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, which are regulated in the Law -Invite."

In addition, the existence of customary criminal law at the level The jurisprudence of the Supreme Court of the Republic of Indonesia is also recognized through the interpretation of the unlawful nature of material law, both in its positive and negative functions. On Jurisprudence The Supreme Court of the Republic of Indonesia which applies unlawful nature material with a negative function, contained in the Decision of the Supreme Court of the Republic of Indonesia Number 42/K/Kr/1996 dated January 8, 1996 on behalf of the defendant Machroes Effendi, in which the Supreme Court justified the elimination of unlawful nature due to 3 (three) factors, namely:

- 1) The state is not harmed;
- 2) The public interest is served, and
- 3) Defendant No profit, and an action in general can lose its unlawful nature, which is not only based on a provision in the law, but also based on basic- the principles of justice or unwritten principles of law (Lilik Mulyadi, 2012).

In its implementation, customary criminal law is recognized as an integral part of the general criminal law in force in Indonesia. In this case, if there is a criminal act committed by people from indigenous peoples, customary criminal law can be applied in accordance with local customs while taking into account the provisions stipulated by general criminal law. However, recognition of customary criminal law in the perspective of Indonesian positive law is not absolute. Customary criminal law implemented by indigenous peoples must first be studied from the perspective of human rights, gender equality and tolerance. If there is a criminal act that is contrary to these values, the recognition of customary criminal law can be canceled and general criminal law is applied.

In practice, the Indonesian government also recognizes the existence of customary institutions such as the Customary Courts and Customary Institutions as an effort to





accommodate the existence of customary criminal law. These customary institutions function to resolve legal disputes within indigenous peoples according to customs, but the recognition of these decisions still depends on the interpretation of judges in public courts. Overall, customary criminal law still plays an important role in legal regulation in Indonesia's indigenous peoples, but its implementation must always be guided by the values of human rights and gender equality. Therefore, the recognition of customary criminal law in the perspective of Indonesian positive law must be maintained carefully, to avoid misuse and violation of human rights.

In the practice of the Lokika Sanggraha Customary Delict in Bali, it is a specific customary delict and only exists in Bali, and is also imposed on those who are subject to Balinese customary law, so if only one party is subject to the Balinese customary law, so here the existence of the Lokika Sanggraha customary offense does not appear in it. Reviewed from a technical juridical perspective as in the Denpasar District Court Decision Number 104/PN.D<sup>5</sup>/Pid/1980, Denpasar District Court Decision Number 2/Pid. B/1985/P<sup>5</sup>. Dps, Denpasar District Court Decision Number 66/Pid. B/1985/PN. Dps, and Denpasar District Court Decision Number 25/Pid. B/1986/PN. Dps, the term "Sanggraha Logic" is used (lilie, 1987).<sup>15</sup>

As for the purpose of this research is to find out: 1) Can customary criminal law be applied and recognized as part of the Indonesian legal system, 2) How is the protection of human rights in the application of customary criminal law, and 3) What is the harmonization process between customary criminal law and Indonesian positive law.<sup>13</sup>

## 2. RESEARCH METHODS

The research used in this journal is normative juridical research (Huda, 2022). The normative juridical research was carried out using 3 (three) approaches, namely: the statutory approach (*statute approach*), concept approach (*concept approach*), and case studies. The legal theories used as analytical tools for the three problem formulations are the Theory of Positivism and Theory of Realism.

## Results and Discussion





The existence of Customary Criminal Law in the perspective of Indonesian positive law, can be used as part of the legal system in Indonesia. It should be noted that Indonesia has five types of legal systems that apply simultaneously, namely:

1. National Law
2. Islamic law
3. Customary law
4. European or Continental Law
5. Anglo-Saxon Law or Common Law

Each type of law has different characteristics, depending on the type of crime or violation being faced, such as Customary Law. Customary law is a legal system that applies to indigenous peoples or certain ethnic groups in Indonesia. Although customary law is not specifically regulated in the 1945 Constitution of the Republic of Indonesia, Article 18B paragraph (2) of the 1945 Constitution states that the State recognizes and respects the only Customary Law recognized by society as part of the national legal entity. Therefore, in accordance with the 1945 Constitution, customary criminal law can be recognized and applied as part of the Indonesian legal system. However, the recognition and application of customary criminal law must always be within the corridors of national law and not contradictory to the values and principles of the Indonesian constitution.

In practice, the recognition and application of customary criminal law often encounters obstacles and controversy. This relates to the very local and limited nature of customary law, as well as issues of consistency and suitability with more modern and modern national laws. Therefore, in applying customary criminal law, it must be done carefully and with due regard to the consequences that may arise for society and the national legal system. According to customary criminal law, individuals, families or relatives who suffer losses as a result of someone's mistakes, can act independently (the right to judge for themselves) in settling and determining compensation and other penalties for perpetrators who have made mistakes. (Meidy, 2022). One of the legal rules governing social life is criminal law. In the field of criminal law, there are two different laws used by society, namely criminal law in the form of written regulations originating from the Criminal Code (KUHP) and other regulations. Then criminal law that is not written or in the form of custom is lawPcustomary law. LawPcustomary law is a living law (*the living law*) set action (anjani, 2023).







In a juridical review of customary criminal law in the perspective of Indonesian positive law, there are several theories that can be used as references, such as the cultural-historical, structural-functional, positivism, and realism theories. The theories are as follows (Syamsul, 2014)

1. Cultural-Historical Theory

Viewing that customary criminal law is an integral part of society's culture, which must be maintained and recognized by the modern legal system;

2. Structural-Functional Theories

Considering that the customary criminal law system plays a role as a means to maintain security and order in society, as well as to take action against perpetrators of crimes and guide the community to behave in accordance with predetermined norms;

3. Theory Positivism

Considering that customary criminal law can only be recognized if it has been regulated in the applicable laws and regulations, and may not conflict with positive law; And

4. Theory Realism

In view of the importance of implementing customary criminal law in increasing the effectiveness of law enforcement, especially in areas that are difficult to reach by security forces and judicial institutions.

Protection of human rights in the application of customary criminal law is very important to ensure that human rights are respected and protected in every legal process. The following are several ways to guarantee the protection of human rights in the application of customary criminal law:

1. The enforcement of customary criminal law must be carried out by respecting the principles of human rights, including the right to equality before the law, the right to a fair trial, the right to freedom from inhumane treatment and the right to privacy;
2. The decision of the customary criminal law court must be based on strong and fair evidence. In addition, the party deemed guilty must be given the opportunity to defend himself and appeal;
3. Protection of human rights must also be given to victims and witnesses who are involved in the legal process. Victims and witnesses must be protected from threats, oppression or revenge that may be carried out by parties who feel aggrieved;





4. The existence of education or counseling for the community about human rights and customary criminal law so that the community understands their rights and especially the right to appeal or the right to protection from the law;
5. The government must ensure that the customary criminal law that is applied does not conflict with internationally recognized human rights;
6. Reports of incidents that occur under customary criminal law in line with human rights must be reported so that there is transparency in the reporting and legal process;
7. The government must ensure that institutions dealing with customary criminal law are equipped with adequate resources and capabilities to carry out their duties.

Protection of human rights in the application of customary criminal law is important to maintain justice and avoid discrimination or human rights violations. In practicing customary criminal law, the parties involved must pay attention to and make a commitment to guarantee that human rights will not be neglected in the process and implementation.

The harmonization process between customary criminal law and Indonesian positive law can be carried out through the following steps:

1. Understand the basic principles of customary criminal law and Indonesian positive law. Legal actors and legal experts must understand the basic principles of customary criminal law and Indonesian positive law in order to find similarities and differences between the two laws;
2. Identify differences and similarities between customary criminal law and Indonesian positive law. Legal experts and legal actors must identify the differences and similarities between customary criminal law and Indonesian positive law to find a harmonious midpoint between the two;
3. Considering the principles of human rights in harmonization. Legal experts and legal actors must consider the principles of human rights in harmonizing customary criminal law with Indonesian positive law, to ensure that human rights will continue to be respected and protected;





4. Define harmonization areas. Legal experts and legal actors must determine the areas of harmonization, namely which areas of law will be in harmony between customary criminal law and Indonesian positive law;
5. Increase dialogue between legal experts and legal actors. Legal experts and law actors must increase dialogue to find a mutually beneficial middle point in the harmonization of customary criminal law with Indonesian positive law;
6. Make proper regulations. Legal experts and legal actors must formulate appropriate regulations and ensure that these regulations reflect the proper harmonization between customary criminal law and Indonesian positive law;
7. Ensuring that the harmonization process is based on Indonesian positive law. Legal actors and legal experts must ensure that the harmonization process is carried out in accordance with Indonesian positive law and does not conflict with the basic principles of law in force in Indonesia.

The process of harmonization between customary criminal law and Indonesian positive law is not easy, but it is very important. The steps above can assist legal experts and legal practitioners in finding commonalities between the two laws and developing appropriate regulations to ensure fairness for all parties. Criminal law according to Van Hattum is a whole of the principles and regulations followed by the state or another legal community, in which they, as custodians of public law order, have prohibited enactment actions that are unlawful and which have linked violations of its regulations with a special suffering in the form of punishment (Taufik, 2023).

In the perspective of Indonesian positive law, customary criminal law has the same position as positive law, as long as it does not conflict with applicable legal norms. Therefore, the recognition and application of customary criminal law must be carried out carefully and selectively, taking into account the values of justice and legal certainty. In practice, the application of customary criminal law in Indonesia still sometimes creates controversy. Several cases in society are often resolved through customary law, which is not always in accordance with positive law and objective rules of justice. Therefore, it requires further studies to strengthen the position and application of customary criminal law in the national legal system.

#### **Conclusion**







The existence of Customary Criminal Law in the perspective of Indonesian positive law, can be used as part of the legal system in Indonesia. Furthermore, Protection of human rights in the application of customary criminal law is very important to ensure that human rights are respected and protected in every legal process.

In the perspective of Indonesian positive law, customary criminal law has the same position as positive law, as long as it does not conflict with applicable legal norms. Therefore, the recognition and application of customary criminal law must be carried out carefully and selectively, taking into account the values of justice and legal certainty.

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