

Customary Law Existency in The Modernization of Criminal Law in Indonesia

Tolkah Tolkah*

Sekolah Tinggi Ilmu Hukum Gunung Jati, Tangerang, Banten, Indonesia

*email: dr.tolkah@gmail.com

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ABSTRACT

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Customary law is defined as assets owned by the Indonesian nation and developing in society. However, the existence of customary laws is often questioned to what extent these laws can be applied. In several criminal law cases in Indonesia, several regions still use the customary law system as an alternative to decisions because its role in law enforcement is quite dominant. This study aims to identify the existence of customary law as a modernization of criminal law in Indonesia. This study used a descriptive analytic method with a normative and empirical juridical approach. The data used are secondary data and primary data. The results show that the customary law can be used as a basis of law for developing new criminal laws that are acceptable to the society. Indonesian customary criminal law, which is divided into numerous customary law units, represents the Indonesian nation's original culture, which was once governed by Islamic law. Customary law is very relevant as a consideration for Indonesian criminal law reform, especially in the formulation of the Criminal Code (KUHP).

1. INTRODUCTION

Local wisdom is the identity of the Indonesian nation so that the wealth and potential of the Indonesian people. In social life, law and society are two things that cannot be separated. Where there is society, there is the law. Therefore we need the Rule of Law to regulate social life to achieve public order. These legal rules are either written or unwritten—applicable nationally and regionally, in public Law and private Law.¹

With various languages, cultures, and customs, various kinds of rules and norms live and grow and develop.² Each community in Indonesia's territory has its customary

¹ T Raharjo, "Mediasi Pidana Dalam Ketentuan Hukum Pidana Adat," *Jurnal Hukum Ius Quia Iustum* 17, no. 3 (2010): 492–519.

² A. J. Rahim, "Tinjauan Hukum Terhadap Penyelesaian Pidana Menurut Adat Tolaki Dalam Perkara Tindak Pidana Penganiayaan Di Desa Tirawuta Kecamatan Pondidaha Kabupaten Konawe," *Jurnal Hukum Responsif* 7, no. 2 (2011): 84–99.

law that differs from one another. Customary law also applies sanctions for anyone who commits a criminal act or violates rules and norms contrary to the public interest.

Ironically, the use of customary law in law enforcement in Indonesia is still minimal, but that does not mean it does not exist. Aceh District Court Decision Number 256 / Pid / B / 2014 / PN.Aceh., Provides a new nuance regarding the use of customary law in making decisions in criminal cases involving children as the perpetrators. The perpetrator of the crime, who was still a child, was sentenced to imprisonment for 3 (three) months even though his act of molesting and mistreating the victim as charged by the public prosecutor was not proven. The sentence was imposed based on considering that the defendant had violated Aceh's Customary Law as contained in the "Aceh Islamic Sharia Law and Aceh Adat Criminal Law. In this case, the use of customary criminal rules in criminal cases related to children is closely related to restorative justice.

Meanwhile, according to research Fathurrahman,³ the decision of the Pandeglang District Court based on Baduy customary law explains that in principle in the Baduy customary criminal law, a criminal must be cleaned physically and mentally. The cleaning is a form of responsibility for the perpetrator of a criminal act. External cleansing is in the form of the perpetrator's responsibility to the victim, manifested in the sanctions he has received. The sanctions are in the form of being rebuked/reprimanded, being admonished/advised, taking care of the law, compensation until being expelled from Inner Baduy residents to Outer Baduy residents. External cleansing is in the form of the perpetrator's responsibility to the victim, manifested in the sanctions he has received.

This paper does not intend to discuss this case. However, it opens discourse for legal observers, both from the executive and legislative bodies, to use local wisdom (customary law) in drafting the Draft Criminal Code in the future. The policy to use customary law is considered necessary considering that in several parts of the archipelago, it turns out that adherence to customary law is higher when compared to laws made by the government.⁴

The Indonesian Constitution before the amendment did not explicitly indicate the recognition and use of the term customary Law. After the amendment of the Constitution, customary law is recognizing as stated in the 1945 Constitution Article 18B paragraph (2): "The state recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and following community development and principles. The Unitary State of the Republic of Indonesia, which is regulating by law ".

In principle, the terminology of customary law comes from the word *adatrecht* used by Snouck Hurgronje and used as a juridical technical term by van Vollenhoven.

³ F. Fathurrahman, "Hukum Pidana Adat Baduy Dan Relevansinya Dengan Pembaharuan Hukum Pidana" (Universitas Diponegoro, 2019).

⁴ R Supusesa, "Eksistensi Hukum Delik Adat Dalam Perspektif Pembaharuan Hukum Pidana Di Maluku Tengah," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 24, no. 1 (2012): 41–54.

Then, the terminology of customary law known in the Dutch East Indies era regulated the provisions of Article 11 Algemene Bepalingen van Wetgeving voor Indonesia (AB) with the terminology *godsdientige wetten, volksinstellingen en gebruiken*, provisions of Article 75 paragraph 3 Reglement op het Beleid der Regeling van Nederlands Indie (RR) with terminology *Instellingen en gebruiken des volks*, then according to the provisions of Article 128 Wet op de Staatsinrichting van Nederlandsch Indie or *Indische Saatsregeling (IS)* used the terminology *godsdientige wetten en oude herkomsten* and based on the provisions of Stb. 1929 Number 221, Number 487 last used the terminology *adatrecht*.⁵ The development of customary law in Indonesia is academically highly influenced by the thinking of legal experts from the Netherlands.⁶

Customary law is a law that applies and develops in the community in an area. There are several definitions of customary law. According to Hardjito Notopuro, customary law is unwritten Law, customary Law with a characteristic that is a guideline for people's life in administering justice and community welfare and is familial. Soepomo said that customary law is synonymous with unwritten law in legislative regulations, laws that live as conventions in state bodies (parliament, provincial councils), laws that live as customary regulations that are maintained in social life, both in the city. as well as in villages.⁷ According to Cornelis van Vollenhoven Customary Law is a set of rules regarding behaviour for indigenous people, and the Foreign East, on the one hand, has sanctions (because it is legal). On the other hand, it is not codified (because it is customary).⁸

In the 1945 Constitution, which was re-enforced according to the Presidential Decree dated July 5, 1959) there is not a single article that states the basis (legislation) for the application of this customary law. According to Article 11 of the Transitional Rules of the Constitution, "All existing State agencies and regulations are still immediately effective as long as new ones have not been made according to this Basic Law". Before the re-enactment of this Constitution, the Provisional Basic Law of 1950 applies. Article 104 paragraph 1 explains that "all decisions must be based on statutory rules and customary law rules which are used as the basis for punishment" so that

⁵ N. S. P Jaya, "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Masalah-Masalah Hukum* 45, no. 2 (2016): 123–30.

⁶ L Mulyadi, "Eksistensi Hukum Pidana Adat Di Indonesia: Pengkajian Asas, Norma, Teori, Praktik Dan Prosedurnya," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013): 225–46.

⁷ G. F. Y Astuti, "Relevansi Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana Di Indonesia," *Pandecta Research Law Journal* 10, no. 2 (2015): 195–214.

⁸ A. R Upara, "Penerapan Sanksi Pidana Adat Terhadap Pelaku Tindak Pidana Zina Di Tinjau Dari Hukum Pidana Adat Dan Hukum Pidana Nasional Pada Masyarakat Adat Tobati Di Jayapura," *Journal of Law Science* 4, no. 2 (2014).

customary law can be used as the basis for imposing penalties. However, until now, there is no legal basis for the implementation.⁹

The statutory basis for the application of customary law, which originated in the colonial era and is still in effect today, is Article 131 paragraph 2 sub b IS. According to these provisions, their customary law applies to indigenous Indonesian legal groups and foreign eastern legal groups. However, if their social needs require it, the ordinance maker can determine for them:¹⁰

1. European Law,
2. Amended European Law,
3. Law for several groups together, and if the public interest requires it.

New law (*nieuw recht*), is a "syntese" between customary law and european law ("*fantasierecht*" Van Vollen Hoven or "*ambtenarenrecht*" Van Idsinga).¹¹

Several legal bases show the existence of customary law in the legal system in Indonesia:

1. The provisions of the 1945 Constitution. In article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia: "The state recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and following the development of society and the principles of the Unitary State of the Republic of Indonesia. , which is regulated in law. "
2. Law No. 1 of 1951 concerning Temporary Measures for Organizing the Unified Composition, Powers and Procedures of Civil Courts.
3. I Made Widnyana also explained that the provisions of the Customary Criminal Law in Article 5 paragraph (3) b of the Emergency Law No.1 of 1951 are as follows:
4. "Made Widnyana explained that the customary criminal law is still being maintained because the KUHP will be renewed according to the new government situation in a short time. Until now, customary criminal law must be recognized. So that for the time being the customary criminal law is not abolished. ".¹²
5. Law No. 5 of 1960 concerning basic regulations on agrarian principles (UUPA) Article 2 paragraph (4) regulates the delegation of authority to customary law communities to exercise control over land. The customary law community is the executing apparatus of the state's right to control over land in their territory.

⁹ D. A Situngkir, "Asas Legalitas Dalam Hukum Pidana Nasional Dan Hukum Pidana Internasional," *Soumatara Law Review* 1, no. 1 (2018): 22–42.

¹⁰ N Sambas, "Eksistensi Hukum Pidana Adat Dalam Pembentukan Hukum Pidana Nasional," *Siyar Hukum* 11, no. 3 (2009): 233–44.

¹¹ M. A Maskur, "Internalisasi Nilai-Nilai Masyarakat Adat Dalam Pembaharuan Hukum Pidana Nasional," *Masalah-Masalah Hukum* 47, no. 1 (2018): 22–31.

¹² D Apriani, "Urgensi Hukum Adat Dalam Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Ilmu Hukum* 5, no. 1 (2015): 65–74.

Law Number 14 Year 1970 regarding Basic Provisions of Judicial Power jo. Law Number 35 Year 1999 regarding Amendment to Law Number 14 Year 197 Concerning Basic Provisions of Judicial Power, which has been replaced by Law Number 4 Year 2004 and currently has been replaced by the latest law, namely Law Number 48 of 2009 concerning Judicial Powers, Article 50 paragraph (1) determines as follows:

"The court decision must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant laws and regulations or an unwritten source of law which is used as a basis for judging."

1. Law No.39 of 1999 concerning Human Rights, can be said to be the operation of TAP MPR XVII / 1998 which affirms that the rights of indigenous peoples are part of human rights.
2. Law no. 32/2004 concerning Regional Government is more focused on affirming the rights of indigenous peoples to manage their political system and governance following the provisions of local customary law.

The same provisions have also been regulated in Law of the Republic of Indonesia Number 14 of 1970 as amended by Law of the Republic of Indonesia Number 35 of 1999 concerning Principles of Judicial Power. In the law referred to provisions regarding the existence of customary law as mandated by the state constitution, are regulated in Article 23 paragraph 1, which states that all Court decisions must include reasons and grounds for the decision, apart from containing the basis of the reasons for the decision. Also, specific articles of the regulations concerned or sources of unwritten law are used as a basis for judging.¹³

Customary law is the original law in a particular society, which is usually unwritten, which was used as a guide for all aspects of life in the community concerned. This does not mean that customary law is forever unwritten law. There are written customary laws, namely *ciwacasana* (approximately 1000 during the reign of King Dharmawangsa in East Java) and *awig-awig* in Bali. However, compared to unwritten customary law, the number of unwritten customary laws is very small, so it has no effect and is often ignored.¹⁴

According to Utrecht, as quoted by Yudianto, this is different from customary civil law, since the introductory provisions of the written law came into effect, it has been declared that there is freedom for the community to implement it, but not with customary criminal law. According to article 75 paragraph (2) Regeringsreglement (RR) 1854, in

¹³ I. B. M. D Krisnawan, "Tindak Pidana Kesopanan Dibidang Kesusilaan (Perzinahan) Dalam KUHP Serta Padanannya Dengan Hukum Pidana Adat," *Jurnal Magister Hukum Udayana* 4, no. 2 (2015); A Hamzah, *Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 2017).

¹⁴ V. P Setyawan, "Prospek Pemberlakuan Hukum Adat Dalam Hukum Pidana Nasional," *Justitia et Pax* 35, no. 2 (2019): 221-37.

the old editorial, it was stated that the Governor-General had the power to make the Criminal Code applicable to Europeans, also to non-Europeans.¹⁵

The term customary criminal law is a translation of the Dutch term "*adat delecten recht*" or customary violation law. These terms are not well known among indigenous peoples.¹⁶ The opinion above is in line with the results of the research, which states that:

"Customary Criminal Law is the living law, followed and obeyed by the indigenous community continuously, from one generation to the next. Violating these rules of order is considered to cause shocks in society because it is considered to disturb the cosmic balance of society. Therefore, for the offender, the normal reaction is given, customary correction by the community through their customary officials".¹⁷

Based on this understanding, it can be seen that there are three main things about the meaning of customary criminal law, namely:

1. A series of rules and regulations made, followed and obeyed by the customary community concerned;
2. Violation of the discipline can cause shock because it is considered to disturb the cosmic balance. An act of violating the order can be called a custom offence;
3. The perpetrator who commits these violations can be subject to sanctions by the indigenous community.¹⁸

Furthermore, it emphasizes that what is meant by customary criminal law is as follows:¹⁹

"Customary Criminal Law is a living law and will continue to exist as long as there is a cultural human being. It cannot be abolished by legislation. If a law were issued that abolished it, it would be useless. The criminal law and legislation would lose its source of wealth because customary criminal law is more closely related to anthropology and sociology than statutory law".

The definition of customary criminal law according to Damanik is that every act in the customary system is respected and considered based on the relevant regulations that were in effect at the time the act was committed.. According to him, violations in customary law or customary law are any disturbance to the balance and any disturbance

¹⁵ O Yudianto, "Eksistensi Pidana Penjara Dalam Perspektif Hukum Islam Dan Hukum Adat," *Jurnal Ilmu Hukum* 8, no. 15 (2012).

¹⁶ E Danil, "Konstitusionalitas Penerapan Hukum Adat Dalam Penyelesaian Perkara Pidana," *Jurnal Konstitusi* 9, no. 3 (2016): 583–96.

¹⁷ A Sardi, "Sanksi Pidana Denda Adat Bagi Pelaku Pembunuhan Tidak Sengaja Di Kecamatan Simeulue Barat Studi Kasus Nomor 300/137/UJH/2017 Di Gampong Ujung Harapan Ditinjau Menurut Hukum Islam" (Uin Ar-Raniry, 2020).

¹⁸ A. R. M Siregar, "Penyelesaian Tindak Pidana Dengan Delik Pidana Adat Di Kabupaten Padang Lawas Utara," *Jurnal Hukum Responsif* 7, no. 7 (2019): 137–44.

¹⁹ A Abubakar, "Urgensi Penyelesaian Kasus Pidana Dengan Hukum Adat," *Jurnal Kajian Keislaman* 18, no. 1 (2014): 57–66.

to material and immaterial goods belonging to a person or group of people that causes customary reactions.²⁰

From Damanik statement, Juniarta argues that customary criminal law is a law that shows events and actions that must be resolved (punished) because those events and actions have disturbed the balance of society.²¹

Ter Haar assumes that what is considered a violation (*delict*) is every one-sided disturbance (*eenzijdig*) to the balance and every collision in terms of one on the material and immaterial things a person or a multitude of people who are a unity (*hordes*). Such action creates a reaction whose nature and size are determined by customary law (*adat reactie*), because of which reaction can be goods or money. To be able to call it a customary crime, it must cause shocks in the balance of the community. This shock occurs when legal regulations in society are violated and when the norms of morality, religion, and courtesy are violated.²²

Unlike the positive criminal law currently in effect in Indonesia, these events and actions are punishable because of a written law regulating them. As long as the incident and the act are not regulated in law, it cannot be offensive. That matter called the principle of legality as stipulated in article 1 paragraph (1) of the Criminal Code (KUHP), which reads: "An act cannot be convicted, except based on the strength of the existing criminal legislation."

Customary Criminal Law emphasizes "disturbed balance". As long as the balance of an indigenous community is disturbed, it will receive sanctions. Customary criminal law does not recognize the principle of legality and positive law because, in addition to its simple legal provisions, customary criminal law does not recognize codification. In other words, customary criminal law does not recognize written law even though some indigenous peoples in Indonesia are familiar with the codification of customary law. For example, the Book Kuntara Raja Niti (Lampung), Manawa Dharmasastra, Catur Religion, Awig-Awig (Bali), the Javanese Babad book (ancient Javanese). So, as long as these actions cause shocks in the balance in an established customary community, then that action can be said to violate the law.²³

²⁰ D Damanik, *Jalannya Hukum Adat Simalungun* (Medan: Pematang Sianta, 2019).

²¹ I. B. G. A. Juniarta and A. A. S Utari, "Pencurian Pratima Di Bali Dalam Perspektif Hukum Pidana Adat," *Journal Ilmu Hukum*, 2014, 1–5.

²² T Aswinda, "Sanksi Pidana Denda Adat Pinang Cerana Bagi Pelaku Pencurian Di Gampong Kampung Paya Kecamatan Kluet Utara Kabupaten Aceh Selatan Menurut Perspektif Hukum Islam" (UIN Ar-Raniry Banda Aceh, 2017).

²³ E Susylawati, "Eksistensi Hukum Adat Dalam Sistem Hukum Di Indonesia. Al-Ihkam," *Jurnal Hukum & Pranata Sosial* 4, no. 1 (2009): 124–40.

Customary criminal law or customary offences regulate actions that violate the sense of justice and decency that live in the community, disrupting the peace and balance of the community. In order to restore this peace and balance, a typical reaction occurs.²⁴

According to Ter Har, whom Surojo Wignjodipuro rewrote, customary offences were:

"Customary offence is every disturbance of balance, every disturbance of material or material goods belonging to someone's life or the unity of people that causes a customary reaction, with this customary reaction the balance must be restored.²⁵ Supriatin clarified the area of the customary offence that after the Criminal Code comes into effect, all offences contained in it become the authority of the landraad, or now it is called a district court. However, there is no formula for customary offences in the Criminal Code. Which is contained in the Criminal Code according to the Criminal Code is a custom offence. District courts have no power to order acts as a measure of adat, except as a particular condition of conditional sentences.²⁶

Expressly, regarding the scope of customary offences, it can be understood that the formulation of Article 5 paragraph (3) Sub B of Emergency Law Number 1 the Year 1951. Oemar Seno Adji explained that the article states whether the violation has a comparison with the Criminal Code.²⁷

An offence is born with the promulgation of a criminal threat in the staatsblad (state sheet). In the customary law system (unwritten law), the birth of an offence is similar to the birth of any unwritten legal rule. Every customary law rule arises, develops, and so disappears with the birth of new regulation, while the new regulation develops then disappears and so on.²⁸

Customary criminal law is limited to applying to certain indigenous communities, and there is no customary criminal law applicable to all Indonesian communities. The customary criminal law is still in effect as long as the customary community exists, but the power of effect depends on the circumstances, time and place.²⁹ Customary crimes can apply even if they are not written in the form of statutory regulations because of nature and legal sanctions and how they are resolved according to the times and

²⁴ S Ahmadi, "Hukum Pidana Adat Dalam Perspektif Pembaharuan Hukum Pidana" (University of Muhammadiyah Malang, 2018).

²⁵ Z. Suwandi, A., Zanibar and R Achmad, "Eksistensi Hukum Adat Terhadap Hukum Pidana," *Legalitas: Jurnal Hukum* 1, no. 3 (2017): 1–36.

²⁶ U. Supriatin and I Setiawan, "Persepsi Mengenai Hukum Pidana Adat," *Jurnal Ilmiah Galuh Justisi* 4, no. 2 (2017): 198–211.

²⁷ R Rahman, "Eksistensi Hukum Pidana Adat Melayu Jambi Dalam Sistem Peradilan Pidana Indonesia," *Jurnal Yuridis Unaja* 1, no. 1 (2015): 14.

²⁸ I. B. A. Y. Maheswara, M. G. Arthadana, and K. I. Apsaridewi, "Aspek Legalitas Hukum Pidana Dengan Hukum Adat," *Hukum Dan Kebudayaan* 1, no. 2 (2020): 44–59.

²⁹ M. P Gunarto, "Asas Keseimbangan Dalam Konsep Rancangan Undang-Undang Kitab Undang-Undang Hukum," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 24, no. 1 (2012): 83–97.

conditions of society or, in other words, customary law is dynamic law. Even though customary courts no longer exist, customary courts or village peace courts are still alive and are recognized by Emergency Law No.1 of 1951. Even though no law recognizes it, however, in everyday society, the peace court continues to operate according to the people's awareness and sense of justice.³⁰

For crimes such as murder, theft, and property offences, the people generally accept the Criminal Code. However, because the general criminal law's capacity is limited at the court table and will not serve every interest in the community's sense of justice, Customary efforts to restore the balance of disturbed communities are still needed. Therefore this research will develop a study of customary law in criminal law reform in Indonesia.

2. RESEARCH METHOD

This research was conducted in the Banten province. This research was conducted using descriptive-analytical methods with juridical normative and empirical juridical approaches. The normative juridical approach is meant to carry out an assessment of criminal law and the application of sanctions for customary offences in the framework of the development and reform of Indonesian criminal law. The empirical juridical approach is intended to research developing customary law communities related to indigenous peoples in Banten Province. To facilitate was data tracing, a law enforcement approach is used based on the factors that influence it.

The secondary data consists of primary, secondary and tertiary legal materials. This data is obtained through literature study, namely by studying books, laws and regulations and documents, opinions of legal experts, results of scientific activities and even public data related to writing.

Data collection techniques consist of literature study, observation, interview, and a list of questions (questionnaire). In this study, the data collection techniques used were in-depth interviews with sources and literature study. This study seeks to use primary data and secondary data simultaneously, which seem to complement each other. Primary data collection is done by in-depth interviews and questionnaires conducted by researchers.

The interview technique will be explored in full, not only about what the informants know, experience, but also their opinions and views. Informant was determined according to the interests and needs of the analysis. Secondary data collection is done by literature study and document study.

3. RESULTS AND DISCUSSION

Customary criminal law in several areas of the Unitary State of the Republic of Indonesia is still applied by general judicial bodies, including in Banten Province. As part

³⁰ Ahmadi, "Hukum Pidana Adat Dalam Perspektif Pembaharuan Hukum Pidana."

of the laws that live in society, customary criminal law is perceived as just law and therefore effective in restoring the balance (harmony) disturbed by a criminal act. Positive Law without customary law is like "curry without salt". Based on such a paradigm of thought, an Austrian legal expert named Eugen Erlich once said that positive law would only have effective behaviour if it is in harmony with living law.³¹

As it is known that the current Criminal Code originated from the Dutch colonialists. Automatically, the contents of the Criminal Code are not characterized, characterized and are not a source of law that was excavated or made based on the condition of society or the thoughts of the Indonesian nation itself.

Regarding positive law, which does not fully reflect the Indonesian nation, Tomalili also explained that it is as follows:

"Because at this time Positive Law in Indonesia is not entirely based on the 1945 Constitution and Pancasila, both laws promulgated or developed before the Proclamation of Independence or those promulgated after the Proclamation of Independence. So that it can be said that until now we do not have a National Legal System, but it is still in the process of formation and development".³²

Based on the MPRS Decree No. XX / MPRS / 1996 regarding the values of Pancasila, in essence, is a view of life, awareness and legal ideals, and noble moral ideals that include the psychological atmosphere and character of the Indonesian nation. Judging from its position, Pancasila is the highest source of law, making Pancasila a measure in assessing Law in Indonesia. The rule of law that is applied in society must reflect awareness and a sense of justice following the personality and philosophy of life of the Indonesian nation. In addition, Pancasila is also a reference for limiting Customary Criminal Law. So the Customary Criminal Law that collides with Pancasila is considered invalid.³³

In another point of view, it can also be said that a legal system does not consist of and is determined by legal principles alone but consists of and is determined by the general rules, institutions, institutions and facilities, instruments and resources as described by Tomalili are as follows: a) Basic Law; b) High State Institutions; c) Judicial Bodies; d) Government Agencies or Regulations; e) Jurisprudence; f) Legal processes or procedures; g) Legal personnel; h) Legal awareness of the community, government, Law and other law enforcement; i) customary Law; j) Education and national legal theory; k) Legal research; l) Hardware (buildings, tools); m) Software (programs).³⁴

³¹ Z. F. Aditya, "Romantisme Sistem Hukum Di Indonesia: Kajian Atas Kontribusi Hukum Adat Dan Hukum Islam Terhadap Pembangunan Hukum Di Indonesia," *Jurnal Rechts Vinding* 8, no. 1 (2019): 37–54.

³² Rahmanuddin Tomalili, *Hukum Pidana* (Jakarta: CV Budi Utama, 2015).

³³ A Dewi, "Kebijakan Formulatif Hukum Pidana Tentang Perkawinan Adat Merariq" (Universitas Muhammadiyah Mataram, 2020).

³⁴ Tomalili, *Hukum Pidana*.

The legal system consists of legal principles and determined by general rules, institutions, institutions, facilities instruments, It seems that the nature of the legal system will depend on availability. The rules institutions and institutions mentioned above, the effectiveness of these elements, and the interactions.³⁵

Based on the description above clear that there are always elements that provide space for legal life in society, especially Customary Criminal Law to have space in the National Law System so that law in society so that Customary Criminal Law have a contribution to the reform of Criminal Law in Indonesia.³⁶ Criminal Law Reform itself is simply a change or reform of Criminal Law, which began as Criminal Law from the Netherlands to Criminal Law which originated from a study of the values of Indonesian law. Regarding the reform of Criminal Law, the opinion is as "In principle, concretely the reform of Criminal Law must include Material Criminal Law, Formal Criminal Law and the implementation of Criminal Law.

The meaning and nature of criminal law reform are closely related to the background and urgency of the criminal law reform itself. The background and urgency for reforming criminal law can be viewed from the socio-political, socio-philosophical, socio-cultural aspects or various policy aspects (particularly social policy, criminal policy and law enforcement policies). It means that the meaning and nature of criminal law reform are closely related to these various aspects. The reform of criminal law, in essence, must be a manifestation of changes and reforms to various aspects of the policy behind it.³⁷

Criminal Law Reform in Indonesia is an urgent need because the current Criminal Code is a legacy product of the Colonial Law (*WvS/Wetboek van Strafrecht*), which is declared valid as positive law Indonesia based on Law No.1 / 1946 jo. Law No.73 / 1958. Therefore, the reform of the criminal law does not only cover political reasons (national pride to have its KUHP), sociological reasons (a social demand to have a KUHP based on a national value system) and practical reasons (the existence of original KUHP Indonesian). Apart from the three reasons mentioned above, some reasons are no less important, namely adaptive reasons, namely that the upcoming national KUHP should adapt to new developments.

As issues of a fundamental nature, other considerations relate to cultural heterogeneity and legal pluralism in Indonesian society, both customary and religious, which influence criminal law.³⁸

³⁵ Tomalili.

³⁶ A. R Rahawarin, "Kedudukan Hukum Pidana Adat Dalam Hukum Pidana Nasional," : : *Journal of Law Science* 1, no. 1 (2011).

³⁷ Rahawarin.

³⁸ M. M Setlight, "Penerapan Hukum Pidana Adat Dalam Putusan Pengadilan Di Wilayah Pengadilan Negeri Tahuna," *Lex Et Societatis* 3, no. 4 (2015).

Based on the sentence above it appears that the meaning and nature of criminal law reform is closely related to socio-political aspects, socio-philosophical aspects and socio-cultural aspects or from various aspects of policies, both social policies, criminal policies and law enforcement policies. Thus, the reform of criminal law manifests changes and renewal of various aspects and policies that provide the background for the need for reform of criminal law. Criminal law reform essentially contains meaning, an effort to re-orientate and reform criminal law according to the socio-political, socio-philosophical, and socio-cultural values of Indonesian society that underlie social policies and criminal policies and law enforcement policies in Indonesia. In short, it can be said that criminal law reform must be carried out with a policy-oriented approach and a value-oriented approach. Renewal is carried out with a policy approach. The renewal is part of a policy step, namely part of law politics / law enforcement, criminal law politics, criminal politics, and social politics. In every policy step, value considerations are also contained. From this fact, besides considering a value approach, the reform of criminal law must also consider an approach that is oriented towards a policy approach.³⁹

It was starting from efforts to make reforms in criminal law to arrive at the desired target. It is necessary to find various strategies that can support it. A strategy in the development of criminal law towards a new Indonesian criminal law era is that there is a need to study alternative concepts. These strategies include providing lessons on criminal law reform and criminal law politics, and comparative criminal law. A problem closely related to criminal law reform and comparative criminal law is the need to develop a special study on "laws that live in a society" in criminal law.⁴⁰ The importance of developing a study of the laws that live in society is something that should be done because criminal law essentially functions to protect and, at the same time to maintain the balance of various interests of the community, state, perpetrators of criminal acts and victims of criminal acts.⁴¹

Based on this fact, a sociological perspective as one of the reasons for reforming criminal law is essential. It means that the measure to criminalize an act depends on the values and collective views in society about what is good, right, proper or vice versa. So society's views on morality and religion are very influential in law formation, especially criminal law.⁴²

³⁹ N. S. P Jaya, "Relevansi Hukum Pidana Adat Dalam Pembaharuan Hukum" (Universitas Indonesia, 2002).

⁴⁰ Y. A. Fajrin and A. F Triwijaya, "Arah Pembaharuan Hukum Pidana Indonesia Di Tengah Pluralisme Hukum Indonesia.," *Jurnal Penelitian Hukum Dan Pendidikan* 18, no. 1 (2019): 734–40.

⁴¹ L Mulyadi, "Eksistensi Hukum Pidana Adat Di Indonesia: Pengkajian Asas, Norma, Teori, Praktik Dan Prosedurnya," *Jurnal Litigasi* 17, no. 2 (2016): 3284–3313.

⁴² D. S Abbas, *Dalam Hukum Syariah, Hukum Adat, Dan Hukum Nasional* (Jakarta: Pranada Media, 2017).

Criminal law as a harmful system of sanctions imposes sanctions on actions that society does not want. It is related to the view of life, morals and morals of religion and the nation's interests. It is not wrong if, to a certain extent, it can be said that the criminal law of a nation can be an indication of that nation's civilization.

In line with this,⁴³ it states that "Criminal law must pay attention to aspects related to the human condition, nature, and traditions that are deeply rooted in Indonesian culture".

From this description, it can be seen that in making reforms towards forming a national criminal law, the starting point is the values that exist in the country itself (laws that live in a society / customary criminal law). However, as a civilized nation that lives in the world's interactions, it must also see the development of international law. It is consistent with what Santayana expressed: "A man's feet must be planted in his country, but his eye should survey the world".⁴⁴

In this case, Customary Criminal Law is a wealth or element in the National Law of the Indonesian Nation. It doesn't mean that all aspects of Customary Criminal Law can be used to support Reforming Criminal Law in Indonesia. However, several studies or arrangements in the Customary Criminal Law have been applied inherently from generation to generation following the National Law System which can be included and stipulated in written Criminal Law as the National Criminal Law in Indonesia.⁴⁵

The basis for the need for reform of criminal law in Indonesia is that the regulation in criminal law reflects the political ideology of a nation where the law is developing, and the entire legal structure must rest on a sound and consistent political view. On this basis, it is not surprising that although various changes have been made to the Criminal Code, gaps/conflicts have been found in their application. On the one hand, there are actions which according to KHUP, are considered criminal acts. However, according to the community's opinion not as despicable acts. On the other hand, there are actions which are considered by the public as despicable. However, the KUHP does not regulate them as criminal acts.⁴⁶

Responding to this fact, Barda Nawawi Arief revealed that gaps/discrepancies and differences in values/interests could be a factor in the emergence of dissatisfaction with law enforcement practices. It can even be a factor that causes victims (victimogen factors) and the occurrence of offences / other crimes (criminogenic factors).⁴⁷ The occurrence of

⁴³ Abbas.

⁴⁴ P. S Saraswati, "Eksistensi Sanksi Adat Bali Dalam Sistem Hukum Pidana Nasional," *Jurnal Advokasi* 8, no. 2 (2018): 251–64.

⁴⁵ S Nilma, "Penerapan Sanksi Pidana Adat Dalam Putusan Hakim Terhadap Tindak Pidana Penghinaan Sebagai Suatu Delik Adat (Studi: Hukum Pidana Adat Minangkabau)" (Universitas Andalas, 2020).

⁴⁶ H. K. Laia and M Yasid, "Analisis Hukum Pidana Adat Nias Dalam Menyelesaikan Kasus Pencurian. *Jurnal Retentum*," *Jurnal Retentum* 1, no. 2 (2020): 92–100.

⁴⁷ Laia and Yasid.

this is an indication of how important it is to explore laws that live in society, especially customary criminal law / criminal law that is not written in the formation of national criminal law. In connection with this, Satjipto Rahardjo stated that "customary law is the fact that lives in society so that it is a determining factor in both the formation and application of Law in Indonesia."⁴⁸

Recognition of customary criminal Law has no equal or incomparable to the Criminal Code - it is getting stronger after developing in the form of jurisprudence. That can be seen from the existence of several Supreme Court decisions, including the Supreme Court Decision dated November 19 1977, which strengthened the decisions of the District Court, High Court and Supreme Court, Banda Aceh No. 93 / K / Kr / 1976 regarding the act of adultery which resulted in pregnancy. By referring to Article 5 paragraph (3) b of Law No.1 / 1951, the comparison with Article 284 of the Criminal Code according to the court is deemed inappropriate because adultery in Article 284 of the Criminal Code requires that the perpetrator has a status in marriage, even though the two perpetrators are not or not. Marry according to law. Thus, the act is contrary to customary Law and religious Law. Likewise, Supreme Court Decision No. 195 / K / Kr dated October 8 1979, had rejected the appeal for cassation by the cassation prosecutor who had been found guilty of committing the crime of LokikaSangraha. The refusal was addressed to the decision of the Nusa Tenggara High Court in Denpasar, which did not accept the defendant's appeal against the District Court's decision that had committed the crime of the Balinese customary law LokikaSangraha.⁴⁹ The refusal was addressed to the decision of the Nusa Tenggara High Court in Denpasar, which did not accept the defendant's appeal against the District Court's decision that had committed the crime of the Balinese customary law LokikaSangraha.⁵⁰ The refusal was addressed to the decision of the Nusa Tenggara High Court in Denpasar, which did not accept the defendant's appeal against the District Court's decision that had committed the crime of the Balinese customary law Lokika Sangraha.⁵¹

As a national identity, customary law must have characteristics and characteristics following the nation's philosophy and culture. Sudarto emphasized that "it is not wrong if to a certain extent it can be said that the criminal law of a nation can be an indication of that nation's civilization."⁵² The current national criminal law stipulates that it is prohibited to use the analogy in determining the existence of a crime. This provision

⁴⁸ S Sukirno, "Revitalisasi Dan Aktualisasi Hukum Adat Sebagai Sumber Hukum Pidana Positif," *Diponegoro Private Law Review* 2, no. 1 (2018).

⁴⁹ Sukirno.

⁵⁰ Sukirno.

⁵¹ Sukirno.

⁵² C Citranu, "Tindak Pidana Narkotika Berdasarkan Hukum Pidana Adat Dayak Ngaju," *Jurnal Ilmu Hukum* 6, no. 1 (2020): 1–14.

reinforces the legality principle, which is the main principle in the National Criminal Law which is positively applicable today.⁵³

In reality, the habits of the Indonesian people have their own rules, which include sanctions which are commonly known as customary law. Such customary law is certainly unwritten, in the sense that it does not become a written law officially legalized by the state, as is the case with laws. It indicates that the Indonesian people still adhere to the unwritten law, namely the customary law itself and the sanctions for violating the unwritten law. Thus, customary law and its customary sanctions are still intact and firmly maintained by the Indonesian people concerned in criminal law politics, especially the reform of national criminal Law, both material and formal criminal Law.⁵⁴

Making customary criminal law the content of some reforms to national criminal law also presents its challenges for the makers, both the legislature and the executive. The challenge lies in the many customary values in Indonesia, which are directly proportional to the number of tribes and customs that exist in this country. This diversity will give birth to different values of various ethnic groups in society in viewing and solving various problems that occur among them, including cases related to honour and morality. It is not only the parties involved in this issue. The case but also involves the wider community.

Behind these various problems, it is worth listening to J. Van Kan's opinion, which states that law is a mirror (*eenweergave*) of society. The formation of Indonesian Criminal Law should always reflect the values of Indonesian society or be based on living law.⁵⁵ That shows that criminal law should reflect the values that society must apply and accept and fulfil the sense of justice in the community where the law is enforced.

4. CONCLUSION

There are many reasons for reforming Indonesian criminal law, including the fact that the current Criminal Code is a legal product originating in the Netherlands, resulting in several legal contents in the Criminal Code no longer complying with established conditions, namely local wisdom that lives and grows in Indonesia. Based on these facts and circumstances, some legal scholars conclude that the content or content of material criminal law, which is still being debated, should be based on societal principles. The implication is that customary law can be used as a basis of law for developing new criminal laws that are acceptable to the society. Indonesian customary criminal law, which is divided into numerous customary law units, represents the Indonesian nation's original culture, which was once governed by Islamic law.

⁵³ Apriani, "Urgensi Hukum Adat Dalam Pembaharuan Hukum Pidana Di Indonesia."

⁵⁴ H Helnawaty, "Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Binamulia Hukum* 6, no. 2 (2017): 149–60.

⁵⁵ R. A Oviana, "Kedudukan Hukum Pidana Adat Bali Terkait Pelanggaran Delik Adat Gamia Gamana Menurut Hukum Pidana Nasional Dalam Perspektif Kepastian Hukum" (Fakultas Hukum Unpas, 2019).

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