

## Legal Standing of the Institution of Dispute-Resolution and Customary-Sanction Imposition of Desa Pakraman in Bali in the Restoration of National Criminal Law

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### ABSTRACT

*In the societal life of village Pakraman in Bali, the people live in a group of societal organization with cultural system closely relating to religious values. The existing and accepted customary law has been mixed with religious values. The forthcoming renewal or restoration of criminal law, substantively customary sanction can be carried out by way of penal policy, meanwhile for institution of dispute-resolution and customary sanction-imposition can be carried out by way of non-penal policy. So that the forthcoming criminal law can reflect social values and cultural aspect, including the dispute-resolution institution and the imposition of customary sanction, so that the restoration of the forthcoming criminal law can reflect a national identity, and can be accepted by all different and multicultural people, all of those are related to a policy which will be created by regulator, that is legislative body.*

**Keywords:** Dispute-resolution, customary-sanction, desa pakraman

### INTRODUCTION

Desa Pakraman is one form of social community of customary law in Bali. Existence of legal community units known by “customary community” scattered throughout Indonesian region including social custom with its traditional rights, which is integral part of Indonesia. Customary communities are typical identities reflecting their existence between nations in the world and as national treasure which have to be upheld and developed. The state has obligation to protect and uphold the existence of legal community units with their various cultures as national treasure.

So it is clear that the existence of those units with their traditional rights, social custom, culture, governmental system and so forth which scatter throughout Indonesian region has a firm ground, it has been stated in the Constitution of 1945. This means those units with their autonomous rights are entitled to control their life, in the department of government, economy, social, and culture, including the resolution of problems which arise in their regions through customary figures from those units. The autonomy of legal community comes from social process and history ensuing within customary-law community. The autonomy is not the one is granted by Indonesian Government after its independence, those units had it long before Indonesia was proclaimed on August 17, 1945, so that it is a genuine autonomy.

Throughout Indonesian region, those units of customary-law communities have various names, such as: nagari in Minangkabau, desa in Java and Bali including Nusa Tenggara Barat, Kampung di Kalimantan, marga di Sumatera Selatan dan jambi ang so forth.

“Similarly there are different names of the unit leader or head of customary-law society, such as: Bendesa (Bali), Kepala Desa (Nusa Tenggara Barat), Kepala Desa/Lurah (Java), etc.” As a unit of customary law community, desa or others have own leaders, properties or treasures, material or immaterial, and and other supporting institutions for helping to lead the customary

communities in solving dispute cases, such as “lembaga Musyawarah Kombong” (Dayak Taman community in Kalimantan Barat), “Runggut Adat” (Batak Karo community), “Padju Adat” (in Kalimantan), “Karamat Gubuk” (suku sasak in Lombok), “Majelis Desa Pakraman” (in Bali).

Desa as a unit of customary-law community is autonomous and entitled to make its own rules based on agreement between those who rule the organization, implement the agreed-upon rules and settle disputes which arise between the people, and impose a customary sanction against a member of community who commits a customary violation for restoring order. Leaders or heads of those units act to uphold and ensure the customary law works well. The units are not the governing bodies (*gezagsgemeenschap*), people’s life in those units are like-family to each-other, side by side mutually, closely and collectively (*levensgemeenschap*). Collective interest is upheld here, but, proportionally, they don’t disregard personal interest as well.

In Indonesian traditional thinking, those units are not individual bodies with their own interest-neighborhood, apart from people interest who are members of the units; instead the groups or units are all the members as collectivization where everyone feels he is a part of the others.

The head or leader of those units (collectives) directs mutual-relations in those collectives, upholds the law within the collectives, and ensures that the law works well, so those collectives have order, peace and harmony in their collective life. Whenever a disorder arises and threatens their harmonious collective life, it is necessary to restore order immediately.

The head or leader activities cover all of life aspect. With other words that there are no areas of human-relations in life in the collectives escape from his intervention to keep order, peace and balance for upholding the law. The power that the leaders have is wide, covers every aspect of people life including dispute resolution and sanction imposition against those who violate the law.

The cases of customary violation in Bali arose because of opinion differences, and personal, family or group problems. Those problems are attributable to regional development. Title change, resignation from banjar, customary dispute, and land, cemetery disputes and dispute of declaring name Pura. The existing data from Polda Bali, for a period of 2001-2010 concerning cases of customary violation reported to the police, among other things: Development of Banjar Poh Gading Ubung Kaji Denpasar, regional development of pakraman Buleleng, change in title in desa Cemagi Buleleng, resignation 10 KK from Banjar Batas Keje Badung, and development of Banjar Mulung from desa Sumita Gianyar. Other cases of customary law are those between tempekan kangin dan tempekan kawan of desa Pakudul Gianyar, refusal of aliran Sampurna yana in Banjar Pengembangan Gianyar. Other cases arose in Kabupaten Tabanan, disputes of declaring name Pura Puseh and Pura Dalem in desa Nyitdah.

In Kabupaten Klungkung, there is a case of throwing out (*kasepekang*) a member of Banjar Pancingan Kusamba. Other disputes are cemetery case in Desa Besang Kanging versus Banjar Bucu Klungkung. In Kabupaten Bangli, 29 KK (head of family), people of Tempelan Danganan were thrown out from Desa Pakraman. In Banjar Adat Gaga Taman Bali Bangli, 7 local people were sent to exile and the last case in Bangli that is administrative matter between a group (19 KK) contra banjar adat Gria Kelempung.

Dispute resolution and sanctions in Bali imposed by Desa Pakraman or other customary institution against a person or a group of people or their families because they proved to be

the actors who have committed a violation against customary norms and religious norms of Hindu. These sanctions are imposed for restoring balance of real world (sekala) and spiritual world (niskala) in the community.

There are various acts regarded as delik/customary violations. Those acts are categorized into:

1. Delik against properties;
2. Delik against personal interest;
3. Delik against carelessness;
4. Delik against norms;
5. The birth of twins' male and female (kembar buncing).

From the fore mentioned explanation of delik limits, a concept of customary delik used in this essay is: an act which violates justice and conformity which work well in the community causes disorder and imbalance. Customary responses are necessary, therefore, for restoring order and balance.

The limit of dispute in this research is dispute between individual members (karma) of desa pakraman who commit a violation of customary law defined in the awig-awig of desa pakraman in Bali.

Restoration of criminal law is an urgent need; because KUHP prevailing so far is a product of colonial legacy (WvS/Wetboek van Strafrecht) declared operative as positive law in Indonesia based on UU No. 1/1946 jo. UU No. 73/1958. Therefore, the renewal of Criminal law covers political reason (national pride for having its own KUHP), sociological reason (it is urgent to have KUHP based on system of national values) and practical reason (KUHP with Indonesian language), also adaptive reason, that is KUHP should adapt to new developments, especially national development which has been agreed upon by civilized society. Another reason, as fundamental matters are those relating to cultural heterogeneity and legal pluralism in Indonesian society, in viewpoints of customary law and religion which influence criminal law.

Based on the aforementioned explanation, this study pinpoints the existence of dispute-resolution institution and imposition of customary sanction of desa pakraman in Bali in the perspective of reconstruction or restoration of criminal law as issues of research. This study is important and interesting for research because: (1) so far the research on these issues are rare, especially at the level of dissertation, (2) it is interesting because there are many institutions of dispute resolution and imposition of customary sanction can be drawn up at national level, (3) designed ways of the institution in resolving dispute and imposing a customary sanction become the underlying reason for the research, and also as an effort for digging cultural values to bring them into surface in order to make a policy relating to dispute resolution and sanction imposition at national level, (4) the people of desa pakraman as a unit of customary-law collectivity so far is capable of upholding social custom and culture in Bali. Even though sometimes from the outside can be seen that dispute resolution and sanction-imposition are contradictory with human rights, but in reality the imposed procedures have gone through phases which are in accordance with prevailing rules in community of Desa pakraman.

### **Legal Standing of Institution of Dispute Resolution and Customary Sanction-Imposition of Desa Pakraman in the Restoration of National Criminal Law**

In daily life in the community of desa pakraman in Bali, the people live in a collectivity with a cultural system closely related to religious values. The prevailing law and religious values

combine. The strong relationship between customary law and religion has been exposed by Van Vollenhoven, who stated that “customary law and Hindu is an integral part. Hindu has a strong effect on social custom.” This relationship results in following matters, conformity to customary law is related to custom and religion as well because customary law cannot be enforced only by external sanction but also internal sanction. One of concrete examples about relationship between law and religion is ways of settling dispute and imposing a customary sanction. These ways of settling and imposing are implemented by way of musyawarah/mufakat (assembly) in a meeting called sangkepan/paruman desa pakraman which involves the institution of dispute resolution and customary-sanction imposition from level of banjar pakraman to the level of Majelis Utama Desa Pakraman, they try to make a decision of peace. Whenever peace arises, this means customary dispute has been settled in a institution at the level of desa pakraman. The institution of dispute-resolution and customary-sanction imposition is based on customary rules of law. In settling a dispute and imposing a customary sanction, it is important to know which customary rules of law is violated and can be used as a ground or reason for resolving it. Therefore, in coping with disputes, it must be understood the legal substance which is violated and how to deal with it, process of the resolution.

In the customary law, legal substance and legal procedures are not clearly separated, but they can be differentiated theoretically. The community life is based on customary law which underlies collectivity and people don't want customary dispute to arise.

Awig-awig desa pakraman is a set of rules defining social life in desa pakraman or banjar pakraman. Awig-awig is made by the people of desa pakraman or banjar pakraman based on musyawarah/mufakat (the assembly). Awig-awig is also known by name tunggul that is pasikian pasubayan (collective or mutual agreement). The substance of awig-awig covers tata parahyangan, tata pawongan, and tata palehmahan. It is based on Tri Hita Karana. The procedure is not clarified in detail, it is defined by who is in charge of settling the dispute and imposing a customary sanction, and how his perspective in resolving the dispute and imposing a customary sanction is based on the prevailing awig-awig in desa pakraman. But, this institution of dispute resolution and customary sanction imposition is making use of customary law, i.e. it digs social values prevailing in the community and then implements them fairly and wisely. There are no those who win and lose in the dispute resolution and sanction-imposition, a disrupted balance will have to be restored, and the dissenting parties can live a harmonious life.

There are various institutions of dispute-resolution and sanction-imposition in each village pakraman in Bali, these are attributable to guides called awig-awig which is utilized by each desa pakraman is different as well, these guides are adapted to situation and condition of each desa pakraman.

The institution of dispute-resolution and sanction-imposition in desa pakraman in Bali is still based on local values or by communal solidarity which underlines harmony, where as the institution of dispute-resolution outside the court, or what is called “Alternative Dispute Resolution” (ADR), which is continuation of common practices socially admitted by the people and their customary law.

In modern society the concept of ADR is essentially a perspective takeover from traditional one which emphasizes informal dispute-resolutions for reaching peace. It shows that the imposition coped with through dispute resolution is a way of intervention from the institution of dispute resolution existing in the community of desa pakraman to neutralize a disrupted balance as a result from violations. But not all disputes which arise in desa pakraman can be

resolved by local institutions, if a dispute continues, there might be an intervention comes from law upholder apparatus, regional government or other institutions related to the dispute. Therefore, the intervention is necessary for neutralizing a disrupted balance, because it enables people to live a peaceful life.

In cultural differences, a guide such as awig-awig and situation-condition between desa pakraman, it still can be found similarities on each institution of dispute resolution and sanction-imposition, that is implementation of musyawarah/mufakat mechanism, and the resolution by way of legal principles of state.

According to Hoeffnagels in coping with crimes can be done by three ways:

- I. Criminal law application or frequently called by penal policy.
- II. Prevention without punishment or called by non-penal policy
- III. Influencing view of society on crime and punishment

It can be said that crime control can be carried out by two policies: penal or non-penal. In making use of penal policy (upholding of criminal law), it is needed a knowledge about limitation on upholding of criminal law in managing or controlling the crimes. But criminal law application is not the only way the law works, but its success will be waited for, since the meaning “State is based on law” is placed under this law. The other way is non-penal policy, because problems of crime control cannot be copied with penal policy alone. It can be carried out by social policy. Basically, social policy is a rational policy in reaching social prosperity, which can be identical with development planning; it covers a wide range of areas and has to be dealt with a ripe planning.

From the aforementioned explanation, it can be said that the meaning of criminal law restoration, reviewed from policy approach, is a part of social policy, a part of criminal policy, and a part of law-enforcement policy. Reviewed from value approach, restoration of criminal law is basically reorientation and reevaluation of socio-politic, socio-philosophic, and socio-cultural values which underlies and provides normative and substantive content of the desired criminal law.

If this is analyzed with the theory of penal policy, according to Marc Ancel in the writing of Barda Nawawi Arif states that penal policy is a science and art which eventually has practical goals to enable the rule of positive law to be formulated better and to provides guides not only for lawmaker but also for the court which applies the law and for decision maker.”

Barda Nawawi writes that “the policy of criminal law is not simply technical swork of law making which can be carried out in juridical, normative and systematic, dogmatic point of view. It needs sociological, historical and comparative approaches. It also needs a comprehensive approach consisting of other social sciences and an integral approach with national development and social policies.”

According to Barda Nawawi Arif, “a policy to make good rules of criminal law cannot be separated from the aim of crime control by way of penal code. The work for controlling crimes by making use of criminal law is basically part of the work for upholding the law (especially criminal law enforcement). Therefore, it is frequently said that criminal law policy is also part of law enforcement policy.”

The work for controlling crimes by way of criminal law making is basically integral part of work for protecting the people. So “if a crime-control policy is made by utilizing penal facility (criminal law), then penal policy at the level of formulation/legislative policy must

consider and aim for the objectives of social policy, those are social welfare and social defense.”

From this perspective, in the forthcoming restoration of criminal law, substantially customary sanction can be imposed by way of penal policy, where as for the institution of dispute resolution and customary-sanction imposition can be applied through non-penal policy. So that the forthcoming criminal law can reflect social values and cultural aspects, including the institution of dispute resolution and customary sanction imposition, so that the restoration of the forthcoming criminal law can reflect a national identity, and can be accepted by all different and multicultural people, all of those are related to a policy which will be created by regulator, that is legislative body.

## **CONCLUSION**

The forthcoming restoration of criminal law, substantially customary sanction can be imposed by way of penal policy, where as for the institution of dispute resolution and customary-sanction imposition can be applied through non-penal policy. So that the forthcoming criminal law can reflect social values and cultural aspects, including the institution of dispute resolution and customary sanction imposition, so that the restoration of the forthcoming criminal law can reflect a national identity, and can be accepted by all different and multicultural people, all of those are related to a policy which will be created by regulator, that is legislative body.

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