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The Application Of Law On The Criminal Law Of Incest Offices Reviewing From Bali Candidate Criminal Law

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Abstract

Law has two forms, namely written and unwritten, one of the laws that has an unwritten form is customary law. As written law, the existence of customary law also plays a role in realizing an orderly and safe life, because in life there will always be actions that are not in accordance with applicable norms. Acts that are not in accordance with these norms are sometimes found to be in two legal domains or intersect with two legal domains. For example, between the realm of criminal law and the realm of customary law. Customary law has a strong influence in several areas in Indonesia, one of which is in the province of Bali, where most of the customary offenses are regulated in the rules (awig awig) of the village concerned. The attachment of religion, especially Hinduism to customary law in Bali, can be found in the way the Balinese people resolve a violation of their customs. One of the customary offenses regulated in the awig awig of the Balinese village is related to morality (the traditional offense of Gamia Gamana). This study uses empirical legal research methods that use primary data sources and secondary data sources that are descriptive with qualitative data analysis. The results of the analysis will be presented in a descriptive way, which describes the problems studied systematically and critically. Gamia Gamana is a violation of adat in the form of a prohibition on sexual relations between people who still have close family relationships (such as children and stepmothers, fathers and daughters, and so on). To restore the balance that has been disturbed as a result of unusual acts,

Keywords: *Incest Offense; customer crime; Gamma Gamana.*

A. Introduction

Every social relationship must not conflict with the provisions and legal regulations that exist and apply in the community. This provision has been regulated in the provisions contained in the 1945 Constitution of the Republic of Indonesia, Article 1 Paragraph 3 confirms that the Indonesian state is a state based on law, namely a country where all the authorities and actions of citizens as well as state

equipment are regulated by law and based on law and justice¹, because the law is the whole of the rules, principles, institutions and processes that regulate social life to maintain order and enforceability of the rules as a reality in society. Law as a rule is a collection of rules and prohibitions that regulate the order of a society and must be obeyed by the community. According to Moeljatno, a collection of regulations and prohibitions in the realm of criminal law formulates what actions should not be carried out, accompanied by the threat of sanctions in the form of a certain crime, for those who violate, when and in what case, can be subject to a crime and in what way the criminal imposition is carried out.

Law has two forms, namely written and unwritten, one of the laws that has an unwritten form is customary law. Customary law is the law of the Indonesian people that is not codified, related to all positive behavior that has sanctions, is coercive and has legal consequences, where for legal order there is always great respect for the sacred will of the ancestors in the indigenous peoples.² Customary law as unwritten law applies in a limited scope, that is, it only applies to the indigenous peoples where the law lives, because each indigenous people have different customary laws. As written law, the existence of customary law also plays a role in realizing an orderly and safe life, because in life there will always be actions that are not in accordance with applicable norms.

Acts that are not in accordance with these norms are sometimes found to be in two legal domains or intersect with two legal domains. Between the realm of criminal law and the realm of customary law. Customary law has a strong influence in several areas in Indonesia, one of which is in the province of Bali, where most of the customary offenses are regulated in the rules (*awig awig*) of the village concerned. The attachment of religion, especially Hinduism to customary law in Bali, can be found in the way the Balinese people resolve a violation of their customs. Likewise, the procedure for imposing customary sanctions, which are generally in the form of carrying out obligations based on religious teachings and philosophical values, neutralize the life of indigenous peoples from a situation called *leleh* (dirty).³ One of the customary offenses regulated in the *awig awig* of the Balinese village is related to morality, one of which is the customary offense of *Gamia Gamana*.

Gamia Gamana is a customary offense in the form of a prohibition on marriage and/or sexual relations between a man and a woman who still have kinship ties, either according to straight or sidelines.⁴ In this case, the author is interested in taking an example from the case of violation of the *Gamia Gamana* customary offense on May 6, 2017 between a grandfather and his underage grandson. Based on the *awig-awig* in

¹ Abdul Aziz hakim, *Negara Hukum dan Demokrasi*, Pustaka Pelajar, Yogyakarta, 2011, Hlm. 8.

² Titik Triwulan Tutik, *Pengantar Ilmu Hukum*, Prestasi Pustakaraya, Jakarta, 2006, Hlm.100.

³ I Gusti Ketut Ariawan, *Eksistensi Delik Hukum Adat Bali Dalam Rangka Pembentukan Hukum Pidana Nasional*, Tesis, Program Pascasarjana Program Studi Ilmu Hukum, Jakarta, 1992, hlm.10. dalam Ida Bagus Sudarma Putra, 2015, *Hakikat Sanksi Adat Sangskara Dandaterhadap Pelanggaran Adat Gamia Gamana*, *Jurnal Magister Hukum Udayana*, Vol. 4. No. 2, Hlm. 319.

⁴ I Made Widnyana, *Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana*, PT. Fikahati Anmeska, Jakarta, 2013, Hlm. 216.

that case, the sanction imposed on the violation of the traditional gamia gamana by the Undisa Kelod Pakraman Village is prayascita which is one of the sanctions from sangaskara danda. The author is interested in studying the violation of Gamia Gamana customary offenses by analyzing the application of sanctions in customary offenses in customary law communities in Bali and forms of legal settlement for violations of Gamia Gamana customary law according to Balinese customary law and looking at the perspective of national criminal law related to the theory of legal certainty. .

Theoretical framework

Indonesia is a state of law, so all must be equal in the eyes of the law according to the principle of "Equality Before The Law".⁵ And every law's goal is to bring about justice. Likewise with customary criminal law. There are various theories to provide a legal basis for the state in the application of customary law in the customary criminal justice system. The theories are as follows:

a. Legal Theory

Legal theory is a theory in the field of law that aims to provide a convincing argument that the content described is scientific, or at least provides an overview, i.e. the things described meet theoretical standards. According to Aristotle, he distinguished the theory of justice in distributive and commutative states. Distributive justice is justice given to each person according to their services (distributed according to their respective rights). Meanwhile, what is meant by commutative justice is justice that gives everyone the same amount without considering individual services;

b. Legal Certainty Theory

In this case, Utrecht provides an understanding of legal certainty with the first meaning, The existence of general rules makes individuals know what actions can and cannot be taken. The second legal certainty is the legal guarantee given to individuals because they are violated by these general rules, namely individuals can understand actions that may be taken by the state against individuals or against other people;⁶

Customary Courts and Customary Crimes resolve problems in communities who violate customary law and require them to impose sanctions on those who violate customary law. Customary court law is customary law that regulates the procedure for resolving cases and/or the law that regulates cases in accordance with customary law. The process of implementing how to resolve and determine the decision of a case is called a "customary court".

The Balinese people have their own customary rules regarding customary arrangements in the customary law justice system in the Indonesian province of Bali. This customary law is called Awig-Awig which has been developed and maintained and obeyed by the community in social life. public. Found in practice, especially in dispute resolution.

⁵ Majelis Permusyawaratan Rakyat Republik Indonesia, Panduan Pemasarakatan Undang-Undang Dasar Republik Indonesia Tahun 1945 (Sesuai dengan Urutan Bab, Pasal dan Ayat), Sekretaris Jendral MPR RI, Jakarta, 2010, Hlm. 46.

⁶ Moh. Kusnardi dan Harmaily Ibrahim, Hukum Tata Negara Indonesia, Sinar Bakti, Jakarta, 1998, Hlm. 153.

B. Literature review

The awig-awig of the Tulikup Kelod Traditional Village has regulated the types of *cuntaka* (unholy conditions) and *sengker cuntaka* (the limit of a person being called in an impure state) according to their circumstances, one of which is regulating *Gamia gemana* (sexual relations between people who still have sexual relations). blood), which is contained in the Awig-Awig Traditional Village of Tulikup Kelod Palette 3 Indik Pitra Yadnya Pawos 43 paragraph (1) letter "ta" which reads: "Cuntaka antuk gamia gamana" which means: "unholy condition due to sexual intercourse between people who still related by blood. Furthermore, the provisions regarding eliminating *cuntaka* (unholy conditions) due to *Gamia Gemana* (sexual relations between people who are still related by blood) are regulated in Pawos 43 paragraph (2) letter "ta" which reads: "Cuntaka Gamnia Gamana,⁷

C. Method

The type of research used in writing this thesis is the type of empirical juridical law research. This type of empirical juridical law research is used to reveal the legal behavior of society that can be observed in real life, especially in solving the legal problems it faces. The use of this type of empirical legal research is related to the case of violation of the traditional *gamia gamana* between a grandfather and his grandson in Undisan Kelod Pakraman Village, Tembuku, Bangli.

D. Results and Discussion

Application of Sanctions in Customary Offenses in the Balinese Customary Law Society (Awig-Awig)

The term customary criminal law is a translation of the Dutch term "adat delicten recht" or "customary violation law". These terms are unknown among indigenous peoples. Indigenous peoples, for example, use the words "salah" (Lampung), or "sumbang" (South Sumatra), to express actions that are contrary to customary law. For example, an act is said to be "small discord" if it is a violation that results in harm to a person or several people (family, relatives), and is said to be "major discordant" if the event or act is a crime that results in harm and disturbs the balance of society as a whole. In Balinese society, these terms are not commonly used terms among the people. The terms commonly used are terms such as: false, insert, sin and so on. In awig-awig, a technical term is known to refer to it, namely the term "talk" which implies a legal issue that must be resolved, whether legal issues in the form of violations of customary law (awig-awig) or legal issues in the form of disputes.⁸

⁷ Ni Made Ayu Trimayukti, I Nyoman Gede Sugiarta, I Ketut Sukadana, Penerapan Sanksi Adat Bagi Pelaku Persetubuhan Terhadap Anak Kandung Di Desa Tulikup Gianyar, Jurnal Interpretasi Hukum | ISSN: XXXX | E-ISSN: XXXX Vol. 1, No. 1-Agustus 2020 Hal. 204-209| Available online at <https://www.ejournal.warmadewa.ac.id/index.php/juinhum>.

⁸ Windia Wayan P dan Sudantra Ketut, 2006, Pengantar Hukum Adat Bali, Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana, Hlm. 136-137

If from ancient times there were many types of customary crimes/traditional violations that existed in Bali. However, of the many types of customary crimes, many have been abandoned because they are no longer in accordance with the development of society and the times.

There are 4 types of customary violations in Bali, but the author will focus on customary offenses related to morality, including the following:

- a. Lokika sanggraha is a love relationship between a man and a woman who are both not married, followed by consensual sexual relations because of a promise from the man to marry a woman, but after the woman becomes pregnant the man denies the promise to marry the woman. woman and cut off her love relationship without a valid reason;
- b. Drati krama is a sexual relationship between a woman and a man while they are still in a marriage bond with another person (similar to adultery in the Criminal Code);
- c. Gamia gamana is a sexual relationship between people who still have close family relations either in a straight line or sideways;
- d. Mamitra ngalang is a married man who has a relationship with another woman who he gives him spiritual and physical support like husband and wife, but this woman has not been legally married. Their relationship is continuous (ongoing) and usually the woman is placed in a separate house. This customary offense is very similar to Drati Krama, but the emphasis is on the man who is already married, while the woman is not bound by marriage. So maybe still a girl or already a widow. The woman is not (yet) legally married. The special element here that distinguishes it from Drati Krama, is the nature of the continuous relationship and usually the woman is placed in one house and given physical and spiritual support. It can be said that the woman is the mistress of the man;
- e. The customary offense of wrong manners is having sex with a creature of a different kind. For example, sexual relations between humans and animals;⁹
- f. Kumpul kebo is a man and a woman living together in the same house and having sexual relations, like husband and wife, but they are not yet married. The term kumpul kebo, has not only become a monopoly of the Balinese people, but has become a term that is well known throughout the country, which is an act as described above. The difference may be that in Bali, besides being an immoral act, it is also seen as disturbing the cosmic balance, so that it is seen by indigenous peoples as an act that should be prohibited and the perpetrators may be subject to customary sanctions;¹⁰
- g. caught or caught or caught red-handed. If there is an incident or act of sexual intercourse between a man and a woman outside a legal marriage and is caught by the community while they are having that relationship, then the incident is called being caught or being caught or caught red-handed or caught red-handed because the incident is considered to disturb the balance. whether the balance is

⁹ Windia Wayan P dan Sudantra Ketut, 2006, Pengantar Hukum Adat Bali, Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana, Hlm. 147.

¹⁰ I Made Widnyana, 1993, Kapita Selektta Hukum Pidana Adat, (yang selanjutnya disebut Widnyana I Made II, penerbit PT. Eresco Bandung, Hlm. 17

material or immaterial, there is a customary reaction, namely in the form of imposing punishment by the community on the perpetrators. There are various types of punishments imposed depending on the sound of the customary provisions of each community where the incident occurred.¹¹

Sanctions among traditional or indigenous peoples are known as "customary sanctions", "customary corrections" or "customary reactions". In Bali, customary sanctions are generally called *danda*, or *pamidanda*. The purpose of this customary sanction is to restore the balance that has been disturbed due to customary violations. So customary sanctions or fines in Bali are sanctions imposed by the *Pakraman* village or other customary institutions to a person or group of people and or their families, because they are deemed proven to have violated customary norms and Hindu religious norms, intended to restore the balance of scale (real nature). and *niskala* (unseen realms) in society.¹²

As explained earlier, the purpose of this customary sanction is to restore the balance that has been disturbed due to customary violations. Because violations of *adat* (customary offenses) can cause disturbances in the balance in real and unreal life, in Balinese customary law there are known groups of customary sanctions concerning the improvement of real and unreal natural life (*sekala niskala*). There are three groups of customary sanctions which in Balinese society are called *pamidanda*. The three groups of sanctions are known as *tri danda*, which consist of:

- a. *Artha danda*, namely legal action in the form of imposing a fine (in the form of money or goods);
- b. *Jiwa danda*, legal action in the form of imposing physical and spiritual suffering for perpetrators of violations (physical and psychological punishment);
- c. *Sangaskara danda*, in the form of legal action to restore magical balance (punishment in the form of performing religious ceremonies).

The purpose of sanctions (criminal) according to the customary conception is to restore cosmic balance, the balance between the external world and the unseen world, to bring a sense of peace between fellow citizens or between members of the community or between members of the community and the community. In addition, the punishment must be fair, in the sense that the punishment is perceived as fair both by the convict and by the victim and by the community so that the disturbance, imbalance or conflict will disappear.¹³

Gamia gamana is a violation of *adat* in the form of a prohibition on sexual relations between people who still have close family relations (such as a child and stepmother, father and daughter). *Gamia gamana* is a customary offense in the form of a prohibition on marriage/sexual relations between a man and a woman who still have close kinship ties in straight lineage or side line.¹⁴

¹¹ Sutha I Gusti Ketut, 1987, *Bunga Rampai Beberapa Aspekta Hukum Adat*, Penerbit Liberty, Yogyakarta, Hlm. 76.

¹² Windia Wayan P dan Sudantra Ketut, *op.cit*, Hlm. 143.

¹³ Widnyana I Made, I, *op.cit*, Hlm. 142.

¹⁴ Tjokorda Raka Dherana dan Made Widnyana, 1986, *Agama Hindu dan Hukum Pidana Nasional*, Bagian Penerbit Fakultas Hukum & Pengetahuan Masyarakat UNUD, Denpasar, Hlm. 32

Based on the awig-awig of Pakraman Undisan Kelod Village, the violation of the gamia gamana custom is regulated in Pawos 46 paragraph (1) letter g which reads: "Sene kasinannggeh kacuntka sekadi ring sor: g. cuntaka antuk gamia gamana" The free translation in Indonesian is: the cause of an impure condition (cuntaka), one of which is due to the occurrence of blood relations between close relatives (Gamia gamana). In addition to the person concerned, the consequences of gamia gamana were also felt by all the manners of the Pakraman village. This is in accordance with the provisions of Pawos 46 paragraph (4) letter f which says: "Gamia gamana, sane kacuntaka sang sane implements the gamia gamana and the traditional village of nyane. Regarding customary sanctions related to violations of gamia gamana, it can be found in Pawos 46 paragraph (2) letter f which reads: "Cuntaka Gamia gamana, cuntakania ngantos sesampunekapalasang utawi mesapihang tour sampun kewentenang pelayascita sports tour kewentenang pelayascita traditional village/kayangan" which means cuntaka resulting from gamia gamana will disappear when the person concerned has been separated and performs a cleansing ceremony for the person concerned and a cleansing ceremony for the sanctity of the Pakraman village . Based on the awig-awig explanation described above, the sanction imposed on violations of the traditional gamia gamana by the Undisa Kelod Pakraman Village is prayascita which is one of the sanctions from sangaskara danda.

Legal Settlement for Violations of the Gamia Gamana Customary Offenses According to Balinese Customary Law and National Criminal Law

Basically every offense or criminal act contains a violation of moral values, it can even be said that the law itself is a minimum of moral values (das recht ist das ethische minimum).¹⁵In the case of the violation of the Gamia gamana tradition that occurred on May 6, 2017 between a grandfather and his underage grandson, the Pakraman village gave customary sanctions in accordance with the provisions contained in the awig-awig of Undisan Kelod Pakraman Village, in order to restore the balance that had been disturbed as a result of This unusual act was explained by I Wayan Budiarta (59 years old) as the Indigenous Villager of Undisan Kelod Village In an interview on September 24, 2017. The customary court process related to the violation of the Gamia Gamana custom in Undisan Kelod Pakraman Village is as follows:

- a. Customary Management Meeting, this management meeting is held to discuss the right day to carry out the village parum, which will later be held to determine customary sanctions for violations of the gamia gamana custom that have occurred. This meeting was attended by all members of the traditional village prajuru;
- b. Customary Courts, in the application of customary sanctions related to violations of the Gamia Gamana custom in Undisan Kelod Pakraman Village, customary justice is carried out through the village community which is attended by all traditional officers and village manners. firm on the principles of harmony, barrel, and proper;

¹⁵ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, edisi kedua cetakan ke4, Kencana, Jakarta, 2014, Hlm. 251.

- c. Imposition of Sanctions, based on the provisions contained in the awig-awig of Undisan Kelod Pakraman Village, namely Pawos 46 paragraph (2) letter f, then for violations of the gamia gamana adat, Pakraman village imposes sanctions in the form of prayascita raga and prayascita desa, and the perpetrators of the village of Pakraman give sanctions in the form of abolishing the right to a holy place and not being allowed to use village facilities, but if the perpetrator dies, it is still given using a setra (grave);
- d. Implementation of Customary Sanctions, the traditional sanction of sangaskara danda imposed by the Undisan Kelod Pakraman Village for violations of the gamia gamana custom is carried out by holding the pangrsigana coral ceremony and the village pangrsigana ceremony. The ceremony of Pangresigana Karang is accompanied by the ceremony of metelah-te which means to restore the status of the victim to a bajang (single), and for the perpetrators, the prayascita raga ceremony is carried out without the presence of the perpetrators because the perpetrators are still in the national legal process, but the perpetrators must be given tirta (water). sacred) of the panggresigana ceremony;
- e. Policies Against Perpetrators and Victims, in the customary court regarding the violation of gamia gamana in Undisan Kelod Pakraman Village, the village prajuru provides several policies towards the perpetrators and victims, namely in the case that the customary sanctions imposed are the lowest level pangrsigana (Nistaning Utama), with the aim that restoration of balance can be carried out immediately and so as not to burden the residents. For the victims of Pakraman village, they provide a policy in the form of returning the victim's status to being single, and for the status of children born to the victims of Pakraman village, they ask that the child be extorted/adopted by the family. Paruman results from this customary court directly become a guideline for village manners in behaving and acting in daily life to avoid violations. In addition to being resolved by customary law, this case of gamia gamana is also resolved by national law, where the actions of the perpetrator/defendant are subject to criminal sanctions under Article 81 Paragraph (3) of the Republic of Indonesia Law. No. 35 of 2014 concerning amendments to the Law of the Republic of Indonesia. No. 23 of 2002 concerning Child Protection.

One of the acts that are considered as customary offenses is the customary offense against decency, which in this case is the customary offense of Gamia Gamana, as mentioned above. Generally, the implementation of customary sanctions in Bali is accompanied by a cleansing ceremony called pamarisudhan/Maprayascitta. The Pamarisudhan / Maprayascitta ceremony has the function of neutralizing/cleaning the community and the area where the customary violation occurred. Gamia Gamana is not only against the rules of Hinduism and the provisions of customary law, but also against the values that apply in the life of the Balinese indigenous people. According to the belief of the Balinese indigenous people, Gamia Gamana's actions can cause shock and disaster for the wider community.¹⁶

¹⁶ I Made Widnyana, *Delik Adat Dalam Pembangunan, Orasi Penguhan Guru Besar*, Fakultas Hukum Universitas Udayana, Denpasar, 1992, Hlm.11. dalam Ida Bagus Sudarma Putra, 2015, *Hakikat Sanksi Adat Sangaskara Dandaterhadap Pelanggaran Adat Gamia Gamana*, Jurnal Magister Hukum Udayana, Vol. 4. No. 2, Hlm. 320.

Gamia Gamana or Incest in the national criminal law is not only related to the provisions of the Criminal Code Article 284, Article 287, Article 294 paragraph (1) and Article 295 paragraph (1) item (1) of the Criminal Code, but is also related to Law no. 23 of 2004 concerning the Elimination of Domestic Violence, then Law no. 23 of 2002 concerning Child Protection Article 59, Article 69, and Article 82 as long as the actions of Gamia Gamana or Incest have fulfilled the elements contained in these laws and regulations, because the customary offense of Gamia Gamana or Incest is legally regulated by national law only through prohibitions. - prohibition of actions that cannot be done by parents or guardians of children under their supervision only, not specifically regulated and detailed in both general regulations and special regulations. According to Utrecht, legal certainty contains two meanings, namely first, the existence of general rules that make individuals know what actions may or may not be done, and second, in the form of legal security for individuals from government arbitrariness because with the existence of general rules individuals can know what the State may charge or do to individuals.¹⁷

E. Conclusion

Gamia Gamana is a customary offense in the form of a prohibition on marriage/sexual relations between a man and a woman who still have close kinship ties in straight lineage or side line. There are three groups of customary sanctions which in Balinese society are called Pamidanda. The three groups of sanctions are known as Tri Danda, which consists of Artha Danda, Jiwa Danda and Sangaskara Danda. Based on the awig-awig of Pakraman Undisan Kelod Village, the violation of the gamia gamana custom is regulated in Pawos 46 paragraph (1) letter g, Pawos 46 paragraph (4) letter f. The customary sanctions related to the violation of gamia gamana can be found in Pawos 46 paragraph (2) letter f.

A crime of decency is an act that violates the provisions of the legislation. Both in positive law and in customary law, acts of decency are not justified. For example, Gamia Gamana in Bali is the case of the violation of the Gamia Gamana custom that occurred on May 6, 2017 between a grandfather and his underage grandson, the Pakraman village party gave customary sanctions in accordance with the provisions contained in the awig-awig of Undisan Kelod Pakraman Village, in order to restore the balance that has been disturbed as a result of these unusual actions.

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¹⁷ Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum*, Citra Aditya Bakti, Bandung, 1999, Hlm.23.

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