



# Incest in the Intersection Between Criminal Law and Bugis Custom

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## ABSTRACT

*This article will explain the case of incest, which is the most severe and despicable Malaweng Kedo (decency) offense of all customary offenses in Bugis Land. People can be sentenced to death by drowning in the sea (ri labu) or falling off a cliff for this act. While the articles imposed in the Criminal Code only refer to Article 294, Articles 8 through Article 48 of Law Number 23 of 2004 On the Elimination of Domestic Violence (PKDRT), and Articles 81 and 82 of Law Number 35 of 2014 On the Amendments to Law Number 23 of 2002 On the Child Protection. Then, under the provisions of Articles 490, 497, and 498 of the RKUHP, the incest offense is transformed into a new offense. This article employs qualitative research based on normative juridical methods to examine theoretical legal materials concerning the principles, conceptions, doctrines, and legal norms related to incest cases. The purpose of this research is to investigate and determine the intersection of criminal law and Bugis custom in the effectiveness of using the law to catch incest perpetrators. According to the findings of this study, several District Courts can hear and decide customary offenses whose jurisdiction is customary courts, and there is jurisprudence that recognizes the existence of customary offenses. This demonstrates that Bugis Criminal and Customary Law can complement each other, as evidenced by the recognition of customary community settlement practices through court decisions, the formation of positive law referring to "living law" in society, and the discovery of judge law based on legal values that exist in society*

**Keywords:** Incest, Criminal law, Bugis Custom

## I. INTRODUCTION

As a country that practices the principles of the rule of law, Indonesia clearly regulates the prohibition of incest. Incest is one of the sexual crimes that must be taken seriously in this criminal law reform. Incest, as one of the most common sexual crimes in Indonesia today, is committed by rape or sexual abuse of family members by other family members. The disclosure of several cases of incest in various areas, both in the media and in real life, has opened our eyes to the fact that many children are now victims of sexual crimes committed by family members, known as incest.

Although incest cases are always in the news, they are thought to be an iceberg phenomenon, with many more cases likely going unreported. Due to a lack of data collection on the handling of incest cases that occurred in the community by various parties, there is no official data that can be used as a benchmark to track the occurrence of this crime in the future.

Most incest victims in Indonesia were young women aged 10-17 years (75%) and most incest perpetrators are their biological fathers or stepfathers (77%) who are on average more than 50 years old (31%). According to data from the Women and Children Information System (Simphoni PPA), there were 2,319 cases of violence against adult women with 2,347 victims and 3,314 cases of violence against children with 3,683 victims from January 1 to June 9, 2021. Whereas the number of sexual assaults is always the most prevalent in these statistics.

Several studies have shown that the perpetrator of incest is not only the victim's biological father or stepfather, but also the victim's grandfather, uncle, or relative who is the victim's closest relative. This uncivilized act is usually repeated over many years in the crime of incest, and it only stops when the victim overcomes their fear of speaking up, or when the crime is discovered by others. This is what most often causes information about the crime to be

buried and become a hidden disgrace, especially when the victim faces threats from the perpetrator or her own mother does not dare to report the crime for fear of jeopardizing the family's dignity.

There are numerous major obstacles in the process of enforcing the law. One of the difficulties that arises is the product of legislation. Meanwhile, under customary law, all actions that are contrary to customary law regulations are illegal, and customary law recognizes efforts to restore the law (*rechsherstel*) if the law is violated. The crime of incest is the most serious customary offense; the most severe punishment is the death penalty, while the least severe is exile from the community for the perpetrator of incest. Incest in incest is still a taboo in the Bugis-Makassar community, as is done in the Bugis tradition. With limited information, prevention will be difficult, resulting in the recurrence of such cases, as well as inadequate protection for victims of incest.

Based on the foregoing, this paper tries to respond to the following problem formulations: First, what is the pattern of incest practice and its impact on victims; second, how incest is regulated under the law; Finally, what is the connection between incest in the Criminal Code and Bugis Customs?

## II. DISCUSSION

### 2.1 Patterns of Incest Practices and Its Impact on Victims

Incest is derived from the Latin words *incestus*, which means impure, and *incestare*, which means to desecrate or pollute. Carter quoting Holmes and Holmes, provide a basic definition of incest as "sexual relations between persons who are too closely related by blood to marry." Incest is commonly defined as sexual intercourse or other sexual activity between closely related individuals whose marriage is prohibited by law and culture. In Indonesian society, this act is commonly referred to as discordant relations or discordant marriages, referring to those who marry despite the fact that there is a marriage prohibition based on close blood ties between them.

Incest, according to Sawitri Supardi Sadarjoen, is a sexual relationship carried out by a partner with strong family ties, such as a father and his daughter, a mother and her son, or biological families. A broader definition of incest includes illicit sexual relations, carried out by people who have been given the right and trust to care for or look after someone, which is carried out on their foster children. For example, a teacher to his students or a priest/ulama with his students or students, and so on. So that it looks like there is an element of abusing the responsibilities of people who have been trusted.

**Incest Scope Table:**

Aspect	Defenition	Relation
Sociological	sexual relations between family members who are still related by blood	Blood relation
Customary law	sexual relations between family members who are still related by blood	Blood relation
Marriage Law Law No. 1 of 1974	prohibition of marriage forever, namely marriages carried out because of blood ties, marital ties, marital relations, and for adultery.	Side by side blood relations, marriage, marriage, and breastfeeding
Civil Law (BW)	Marriage is prohibited between them, which one is related to the other family in a straight line up and down, either because of legal birth, or illegitimate, or because of marriage, and in a sideways line, between legal brothers and sisters. or invalid	Blood relationship, marriage, straight line up, side line
Criminal law Criminal Code, other laws	Obscene acts with his child, stepson, adopted child, child under his supervision who is not yet an adult, or with a person who is not yet an adult, whose care, education or supervision is handed over to him or his bachelor or subordinate who is not yet an adult	Blood relations, marriage and supervision, superior-subordinate relationships. Public Relations
	Adultery	Fellow adults

The general pattern of comprehending incest is performed in two patterns:

- The first pattern is incestuous behavior that occurs without the use of violence, coercion, or seduction. Even if this occurs, it constitutes incest in the broad sense where the perpetrator is a fellow adult. This pattern is known as voluntary incest (sexual intercourse that occurs without coercion), or consensual sexual intercourse.
- The practice of sexual violence against children, families, and others is the second pattern. This does not fall under incest in the strictest sense, but because there is a blood or family relationship behind the sexual violence, it is sometimes referred to as an incest practice with sexual violence, both physical and non-physical violence or by means of deception and misdirection. Soetji Andari explained that the factors that lead to incestuous sexual violence do not occur in isolation, but rather as a result of the accumulation of various problems such as poverty, a lack of knowledge, particularly religious knowledge, the preservation of aristocratic lines and family assets, and isolation from the community.

Incest has a significant impact on the victim, including physical trauma, psychological trauma, unwanted pregnancy, and chaos in family relationships. As a result of the victim's incest, psychological disturbances or trauma may occur, causing the victim to be unable to trust others, to be afraid and worried about having sex, to feel depressed, to want to commit suicide, and to engage in other self-destructive behaviors, and to have low feelings of self-worth. low, guilty, angry, aloof, and unwilling to associate with other people Another effect that victims frequently experience is being blamed and receiving a negative stigma in society.

In fact, many victims of incest are women/girls, and the sexual relationship is frequently accompanied by threats, coercion, and violence. The consequences of this violence can cause women to feel inferior and worthless, to despise men (perpetrators), to experience sexual disorientation, anxiety/not feeling safe at home, and to experience long-term trauma. Not to mention physical injuries like bruising or bleeding.

### 1. Incest in the Legal Approach

Basically, regarding the legal rules governing incest, there are no clear rules that are really binding on the existence of a case of incest.

With regard to provisions relating to the provisions of articles imposed on perpetrators of the crime of incest, they only tend to use alternative articles in order to prevent a legal vacuum. This means that there are no inconsistent provisions that can be imposed on perpetrators of incest. This is what the government and law enforcers should pay special attention to.

#### a. Incest in the Criminal Code

The term incest is not found in the Criminal Code and only regulates the practice of incest and is qualified into two categories, namely:

- As an immoral act because of a sexual relationship (adultery) between the perpetrator and the victim. Due to the consent of both parties and fellow adult perpetrators;
- As an immoral act because of a sexual relationship that is forcibly carried out by the perpetrator with the victim who has a relationship (blood-marriage) where the victim is not yet an adult.

In the Indonesian Criminal Code, the article that mentions obscene acts between people who have family relations is only Article 294 paragraph (1) of the Criminal Code. The type of relationship that is threatened with punishment in Article 294 paragraph (1) is the relationship between a person and his child, his stepson, and his adopted child.

The full text of Article 294 paragraph (1) of the Criminal Code, which is located in Book II Chapter XIV: Crimes against Morals, according to the BPHN translation, is "Whoever commits an obscene act with his child, stepson, adopted child, child under his supervision who is not yet an adult, or with a minor whose care, education or care is handed over to him or his bachelor or subordinate who is not yet an adult, shall be punished by a maximum imprisonment of 7 years.

The criminal act in Article 294 has a special character, namely that there is a certain relationship between the legal subject (perpetrator) and the object (victim). In this verse the relationship can be divided into two categories:

- 1) Family relations (including blood relations or marriage) where the perpetrator has a legal obligation to protect, support, nurture, educate.
- 2) Relationships outside the kinship but in it grows a legal obligation to maintain it, or to support it.

Obscene acts or violating decency as referred to in this article are derived from the word *ontucht plegen*, actions relating to sexual matters or entering the meaning of a sexual relationship. This means that the scope of actions that are categorized as obscene/violating morals in this incest crime are acts that are included in the definition of obscene acts and others related to sexual desire. So, it is limited only to obscenity but if it is related to a wider context, several other articles of the Criminal Code can also be applied to acts of incest but in a limited way.

### 2.2 Incest in Law Number 23 of 2004 concerning the Elimination of Domestic Violence

Article 1 number (1) explains that "domestic violence is any act against a person, especially a woman, which results in physical, sexual, psychological misery or suffering, and/or neglect of the household including threats to commit acts, coercion, or deprivation. independence against the law in the domestic sphere".

Based on the law, the parties included in the "Scope of household in this law include:

- a) Husband, wife, and children;
- b) People who have family relationships with people as referred to in letter a because of blood relations, marriage, breastfeeding, care, and guardianship, who live in the household; and/or
- c) People who work to help the household and stay in the household.

Furthermore, it is determined in Article 46 of this Law in terms of the criminal provisions for perpetrators of acts of sexual violence, which can be formulated:

- a. Each person
- b. Committing acts of sexual violence
- c. What is meant in article 8 letter (a)

- d. Sentenced to a maximum imprisonment of 12 years
- e. Or a maximum fine of Rp.36,000,000.00.

Article 8 states that: "The acts of sexual violence as referred to in Article 5 letter c include a. coercion of sexual intercourse carried out against people who live in the household environment." What is meant by sexual violence in this provision is any act in the form of forced sexual intercourse, forced sexual intercourse in an unnatural and/or unwelcome way.

The household environment includes: (1) husband, wife, children and (2) people who have family relations as referred to in letter a due to blood relations, marriage, breastfeeding, care, and guardianship who live in the house and or people who help the household and stay in the household.

If the act prohibited in Article 46 causes the victim to receive an injury that does not give any hope of healing at all, experiences mental or mental disturbances for at least 4 (four) continuous weeks or for 1 (one) year not in a row, the person will sentence to death. Also, If the death of the fetus in the womb, or causing the reproductive organs to malfunction, shall be punished with a minimum imprisonment of 5 (five years) and a maximum imprisonment of 20 (twenty years) or a minimum fine of Rp. 25,000,000 (twenty-five million rupiah). and a maximum fine of Rp. 500,000,000 (five hundred million rupiah).

### **2.3 Incest in Law Number 35 of 2014 On the Amendments to Law Number 23 of 2002 On the Child Protection**

If a child is the victim of a crime, Indonesia already has a law that specifically regulates all forms of child protection. When it comes to responding to incest crime, this law is the most potent tool in the criminal law arsenal. This law states in one of its criminal articles that:

"Everyone who violates the provisions as referred to in Article 76D shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah)."

The criminal provisions as referred to in paragraph (1) also apply to any person who intentionally commits a trick, a series of lies, or persuades a child to have intercourse with him or with another person." In the event that the criminal act as referred to in paragraph (1) is committed by a parent, guardian, child caretaker, educator, or educational staff, the penalty shall be increased by 1/3 (one third) of the criminal threat as referred to in paragraph (1)."

Furthermore, in Article 82, it is also regulated that: "Anyone who violates the provisions as referred to in Article 76E, shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah)." If a parent, guardian, child caretaker, educator, or education staff commits the criminal act referred to in paragraph (1), the penalty is increased by 1/3 (one third) of the criminal threat referred to in paragraph (1). In the provisions of Article 1 paragraph (1) it is determined about the age limit of a child, namely "A child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb". As explained above regarding the protection of children from all forms of violence.

It is not appropriate to apply Article 81 paragraph (1) of Law Number 23 of 2002 concerning Child Protection to perpetrators of the crime of incest (parents). This is because the formulation of the perpetrator in this criminal provision is still general in nature; it is not distinguished from the perpetrator whether the perpetrator and the victim are related by blood or not. Furthermore, there is no additional punishment or threat for parents who commit incest. Especially given that the impact of the crime of incest will be much greater and more complex than the impact of criminal acts committed by perpetrators who are not related by blood, in this case a father.

### **2.4 Incest in the RUU KUHP**

The reality of criminal law in society is not as easy as stated above, many complex and emerging problems, including the problem of criminal acts that are increasingly developing and varied, along with the development of society towards the modern era. The regulation regarding incest in the Draft Criminal Code is regulated in the section on the Moral Offenses Chapter, namely:

Article 490:

- 1) Sexual intercourse committed against a person who has blood relations with him in a straight line or sideways up to the third degree, shall be punished with imprisonment for a minimum of 3 years and a maximum of 12 years."
- 2) "If it is done with a woman who is not yet 18 years old and not yet married, she will be punished with imprisonment for a maximum of 15 years and a minimum of 3 years."

Article 497:

- 1) "Committing obscene acts with their biological children shall be punished with imprisonment for a minimum of 3 years and a maximum of 12 years".
- 2) "Everyone who commits obscene acts or has sexual intercourse with his stepson, adopted child, or child under his supervision entrusted to him to be cared for, educated or guarded, or with his domestic helper or

with his subordinates, shall be punished with imprisonment of at least 2 (two) years and a maximum of 10 (ten) years.”

3) "Shared with imprisonment for a minimum of 3 (three) years and a maximum of 12 (twelve) years" :

- a. an official who commits an obscene act with his subordinates or with a person entrusted or handed over to him for protection; or
- b. doctor, teacher, employee, administrator, or officer at a correctional institution, state institution where job training, educational house, orphanage and/or orphanage, mental hospital, or social institution commits obscene acts with people who are admitted to institutions, homes, or the orphanage.

Then in Article 498 paragraph (1): "Anyone who connects or facilitates another person to commit obscene acts or sexual intercourse as referred to in Article 497 paragraph (1) and paragraph (2), shall be sentenced to a minimum imprisonment of 2 (two) years and maximum of 10 (ten) years.”

With this arrangement, it can be argued that the crime of incest in the Criminal Code has undergone changes. The change is the addition of "method of intercourse" as a new offense related to the crime of incest, which has not been included in Article 294 of the Criminal Code. The addition of the element of "intercourse" in incest crimes will provide a significant change in anticipating incest crimes which are usually only imposed by means of obscenity.

Article 490 regarding incest also shows that the Draft Criminal Code expressly prohibits acts of incest whether committed because of blood relations as well as in a special relationship, whether carried out by fulfilling elements of coercion, without will, without the consent of either party. in incest that occurs through the consent of both parties (by consent).

## 2. Incest in Bugis Custom

The role of customary law as living law is conceptualized as a legal system that is formed and derived from the empirical experience of the community in the past, which is considered fair or appropriate and has gained legitimacy from customary authorities so that it is binding or must be obeyed (normative). The process of compliance with customary law initially emerged because of the assumption that every human being from birth has been covered with legal norms that regulate personal behavior for every legal act he does in a harmonious interaction. According to customary law, all actions that are contrary to customary law regulations are illegal acts, and customary law recognizes efforts to restore the law (*rechsherstel*) if the law is violated. In Van Vollenhoven's book Volume II page 750 and so on, which was later quoted by R. Soepomo, there are certain types of offenses, one of which is the most serious offense, namely a violation of the balance between the external world and the unseen world, namely: public secrets or conspiracy with enemy groups, acts of setting fires, acts of personally insulting the Customary Chief (tribal chief or king), acts of witchcraft or sorcery, acts of incest which means 4 (four) kinds of:

- a) A sexual relationship between two people, which according to customary law is not allowed to carry out marriage, because of a violation of exogamy;
- b) Violation of blood relations that are too close according to customary punishment;
- c) A sexual relationship between two people of different castes, for example a Brahmin girl and a Sudra (Balinese) youth;
- d) The discordant relationship between parents and their children, although it is rare but sometimes occurs in society.

In customary law, there are several offenses that can be categorized as criminal acts of decency. Which is included in the type of offense that is the most severe because it is a violation of the balance between the external world and the unseen world, namely the act of incest. Incest offenses include the most severe customary offenses, the heaviest punishment is the death penalty while the lightest punishment is the incest perpetrator being exiled by the community. As is done in the Bugis Custom.

Bugis people, especially those who live outside the city, in their daily lives are still much bound to the system of norms and customary rules, which are sacred and sacred, all of which are called *Pangadareng* (*Pangadakkang/Makassar*). *Pangadareng* consists of 5 (five) elements, namely: 1). Ade (Ade/Makassar); 2) Talk; 3) Slim; 4) Wari; 5) Sarah. These five elements are woven together as an organic unit in the realm of thought, feeling and social identity called *siri*.

In the concept of *siri* contained human rights, especially members of relatives (Bugis, *rapu*, *appang*) women to maintain *siri* and the degree of family and relatives. It is said that in the stratified Bugis Makassar society, the position and function of women is very important in maintaining the *siri* and the blood of their family and relatives. *Adat* for Bugis people does not mean just habits (*gewooten*), but is a key concept in understanding Makassar Bugis people. *Adat* is the person of their culture. And more than that, *adat* is a way of life for the Bugis Makassar community. As a way of life and personal, traditional culture for Bugis Makassar people is considered the same as the requirements of human life.



The people of South Sulawesi are familiar with the term *Sanre-i ade-E, ri sara-E*, which means that customary law provisions rely on or are sourced from Islamic law. Applications of *Sanre-i ade-E, ri sara-E* that can be shown include among others in family law and partly in the civil field.

In the relationship between men and women, it is arranged in such a way in a concept called *malaweng* (violations), in order to create a living atmosphere of *sipakalebbi* (mutual respect), *sipakaraja* (mutual respect) including:

- a. *Malaweng pakkita* (violation of sight);
- b. *Malaweng speech* (transgression of words);
- c. *Malaweng pangkaukang* (violation of actions or behavior).

Because in customary law, violation of the relationship between men and women is considered a serious offense and brings bad luck. In the *siri'* cultural value system, women play a very important role in maintaining the continuity of the *siri'* honor of their relatives. Therefore, the position, status, and dignity of women are often at stake for efforts to uphold their self-respect and *siri'* honor.

In Bugis-Makassarese culture, the position and function of women can be compared as a ladder, where the degree of family can go up and down. In this stratified form of society, women are the rungs of the ladder. Surrounding them, and their families, can rise or fall in nobility through the stairs. If a woman herself is allowed to go down or marry anyone, then a woman is no longer a rung of the ladder, everything is uncertain because the road to go up or down has become slippery. Intercourse between women and men will be reprehensible if they have crossed the boundaries of normal association called "*malaweng*".

The actions of *malaweng pakkita* and *malaweng kedo*, although they are still seen as despicable acts, have never been sentenced to criminal acts again, especially if they occur in cities, even in the current era of openness, it is very difficult to find these actions punished. However, "*malaweng luse offense*" is still seen as a very despicable act, which is equated with animal behavior (*gau olokolok*). *Malaweng's* actions will result in *siri'* violations and cause serious difficulties for parents and relatives (especially from the women's side).

Incest is a *malaweng* offense, which is the most severe and despicable offense of all customary offenses in Tana Bugis. This act is called an animal act, *pangkaukeng olok 'kolok'*. The act of *malaweng luse* is subject to the death penalty, by being drowned in the sea (*ri labu*) or thrown into a cliff. State taboos (*sapa' ri tana*), also called food crop taboos (*sapa wisesa*) or incest in the intersection of criminal law can be explained as follows:

- a. *Sapa ri tana, sapa wisesa*, as a violation of the rules of state criminal law outside the territory of the autonomous judiciary. It turned out that because of the pressure and demands of the community on incest offenses that occurred in Makassar City, it affected the criminal justice system to explain customary offenses in Makassar. Whereas Makassar is not the area where the autonomous and customary courts apply. This can be seen in one case where the Makassar District Court treats customary criminal law in areas that are not the territory of the customary courts, and the autonomous judiciary. This case also shows that the influence of customary offenses, especially "*sapa ritana*" or incest, penetrates the area of competence of a court. It is here that Makassar and other areas around it, are the territory of the kingdom of Gowa which was handed over by Sultan Hasanuddin to Admiraall Speelman in accordance with the Bungaya Agreement in 1667. Therefore, in the Makassar District Court, customary criminal law does not apply, even though the community is still aware customary law.
- b. *Sapa ri tana, sapa wisesa*, as a violation of Article 5 paragraph 3 sub (b) of Law no. 1 Emergency 1951. After 1951, moral offenses which had no equivalent in the Criminal Code were resolved according to Article 5 paragraph 3 sub (b) of Law no. 1 Emergency 1951, while customary offenses that have equivalents, are resolved based on the provisions of the Criminal Code. Various cases that were resolved based on Article 5 paragraph 3 sub (b) of Law No.1 Emergency 1951 can be seen in the following cases:
  - (1) Sexual intercourse between a woman-in-law and her daughter-in-law is qualified as an offense of "*sumbang starch*" (*bloedschande, incest*).
  - (2) Sexual intercourse between a man and his mother's sister is qualified as "*malaweng'i sapa' tana*".
  - (3) Sexual intercourse between a father and his daughter is qualified as *sapa' ri tana*.

From the above case, it is concluded that sexual intercourse between an adult woman and an adult man is a crime according to customary law. Then the unwritten law regarding *sapa' ri tana*, has changed its form to be made by judges, through the application of Article 5 paragraph 3 sub (b) of Law No.1 Emergency 1951.

- c. The offense of having sexual intercourse with a child who is not yet an adult and is under his supervision is a "*kagau-gau*" act, but against a child who is not yet an adult it is not seen as a mistake, and therefore is not subject to criminal sanctions. In contrast to the greeting *ri tana* carried out by adults, the two perpetrators are threatened

with the death penalty by sanctioned customary law called "becci". In Pandecten van Het Adatrecht, Part X, 1936 it is stated that if a person has intercourse with his child, he will be sentenced to be thrown into the sea (Adatrechtbundel XXXI: 171). The death penalty is no longer enforced by the court. This has something to do with Article 5 paragraph 3 sub (b) of Law No.1 Emergency 1951, which is threatened with three months imprisonment and or a fine of three hundred rupiahs, as a substitute punishment. If the customary offense which is qualified as heavy and light is threatened with a maximum sentence of ten years in prison.

- d. In the case of sexual intercourse between two siblings, each of the perpetrators was sentenced to six years and six months in prison. In the case of incest between a father and his daughter, the father was sentenced to ten years in prison, while the daughter was sentenced to three years in prison. Although the sanctions imposed on these three cases are relatively high. However, there is still a gap between the sanctions recognized by the community through their customary law, and the sanctions carried out by state law. The discrepancy between "becci customary sanctions" and state criminal law is even more pronounced in "kagau-gau acts" committed against minors. In the codified criminal law system, it is stated: "having sex with a minor who is under his supervision is qualified as obscene. This act violates Article 294 of the Criminal Code, and is punishable by imprisonment for 7 years.

In the Bugis society's "decency awareness", as has been described in several cases above, it is very despicable. However, in the practice of implementing Article 294 paragraph (1) of the Criminal Code, the act of a stepfather who sexually assaulted his stepdaughter ten times continuously, causing the child to give birth to a child, was sentenced to only three years.

However, in some circles of customary law scholars, there are those who argue that customary law only has legal value if it is born through jurisprudence. Because of this stipulation, customary rules are subject to legal sanctions to be defended through the courts, such as the opinion of Ter Haar with the "Beslissingeleer" theory or as Soepomo's opinion, which holds that the law arising from judge's decisions (judge made law) is customary law.

The position of decisions from the customary dispute resolution process is also recognized as a source of law for judges. Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society. This provision is intended so that the decisions of judges and constitutional judges are in accordance with the law and the community's sense of justice. The position of customary law in judges' decisions can be found in various judges' decisions, and some of them even show a contradiction. Meanwhile, there is a judge's decision that includes customary law provisions as a complement to the criminal law provisions contained in the Criminal Code, in the sense that for certain cases involving customary offenses, provisions are sought as their equivalent in the Criminal Code. This shows that Bugis Criminal and Customary Law can complement each other, as evidenced by the recognition of customary community settlement practices through court decisions, the formation of positive law refers to "living law" in society and legal findings by judges are required to explore values that live and develop in society, as a consequence, the court is prohibited from refusing to examine, try, and decide on a case that is submitted on the pretext that the law does not exist or is unclear, but it is obligatory to examine and try it. Therefore, the role of customary law is important in carrying out the duties of judges and also has an influence in the development of national law, so that judges can link their decisions to local customary law.

The presence of recognized customary institutions, although informally, also plays an important role in the compliance of indigenous peoples. The form of customary institutions which are structurally composed of traditional leaders or leaders, can play a role in resolving conflicts experienced by the community.

### III. CONCLUSION

The discovery of several cases of incest in various areas has opened our eyes to the fact that in this day and age, there are not a few cases of incest or incest found. They only use alternative articles to prevent a legal vacuum when it comes to provisions relating to the provisions of articles imposed on perpetrators of the crime of incest. The articles used are also not found in the Criminal Code, whereas the articles that are frequently imposed in the Criminal Code only refer to Article 294, but if it is associated with a broader context, several other articles of the Criminal Code can also be applied to acts of incest, albeit in a limited way. Article 46 of Law Number 23 of 2004 on the Elimination of Domestic Violence (PKDRT), Article 81 and Article 82 of Law Number 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection. Then in the RKUHP the incest offense is transformed into a new offense regulated in Article 490 and Article 497, and Article 498.

The intersection of criminal law and Bugis customary law, where incest is one of the most serious and despicable offenses in *Malaweng Kedo* (decency) of all Bugis customary offenses. The position of customary law in judges' decisions can be found in a variety of judges' decisions, and it can even be contradictory. Meanwhile, there is

a judge's decision that includes provisions of customary law as a supplement to the criminal law provisions contained in the Criminal Code.

## REFERENCES

- Amanda, Amanda, and Hetty Krisnani. "Analisis Kasus Anak Perempuan Korban Pemerkosaan Inses." *Focus : Jurnal Pekerjaan Sosial* 2, no. 1 (2019): 120. <https://doi.org/10.24198/focus.v2i1.23129>.
- Andari, Soetji. "Dampak Sosial Dan Psikologi Korban Inses." *Publiciana* 11, no. 1 (2017): 184.
- Artika, I Wayan. *Incest*. Jakarta: Iterprebook, 2008.
- Carter, J. W. "Incest." *The Encyclopedia of Women and Crime*, 2019, 1–5. <https://doi.org/10.1002/9781118929803.ewac0290>.
- Drs. Mattulada. *Bugis-Makassar, Manusia Dan Kebudayaanannya. Berita Antropolog*. Jakarta: Fak. Sastra UI, n.d.
- Eddyono, Supriyadi Widodo. "Merekonstruksi Ulang Kejahatan Inses Di Indonesia." *Legislasi Indonesia* 7 (2010): 302.
- . *Tindak Pidana Inses Dalam Rancangan RKUHP*. Edited by Anggara. Jakarta Selatan: Institute for Criminal Justice Reform, 2016.
- . "Tindak Pidana Inses Dalam RUU KUHP | Aliansi Nasional Reformasi KUHP," 2008.
- H. Ahmad Ubbe, S.H., M.H., APU. "Laporan Akhir Penelitian Hukum Tentang Perkembangan Hukum Adat Di Propinsi Sulawesi Selatan." Jakarta, 2005.
- Hijriani and Herman. "The Value of Siri ' Na Pacce as an Alternative to Settle Persecution." *Padjajaran Jurnal Ilmu Hukum (Journal of Law)* 3, no. 3 (2018): 564.
- Mindlin, Jessica. "Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform." *Washington Law Review* 65, no. 189 (1990).
- Murdiyanto, and Tri Gutomo. "Penyebab, Dampak, Dan Pencegahan Inses." *Jurnal Media Informasi Penelitian Kesejahteraan Sosial* 43, no. 1 (2019): 55.
- PAUDPEDIA. "Sebanyak 3.683 Anak Menjadi Korban Kekerasan Selama Januari Hingga Juni 2021," n.d.
- Penerjemah, Tim BPHN. *Kitab Undang-Undang Hukum Pidana (KUHP)*. Jakarta: Sinar Harapan, 1983.
- Putra, Ilham Pratama. "KemenPPPA Terima 3.122 Laporan Kekerasan Terhadap Anak Sepanjang 2021 - Medcom.Id," n.d.
- R. Soepomo. *Bab-Bab Tentang Hukum Adat*. Cetakan ke. Jakarta: PT. Pradnya Paramita, 2007.
- Rahmad Dwi Putra Santosa. "Analisis Yuridis Tindak Pidana Inses/Incest Menurut Peraturan Perundang-Undangan Nasional." *Ilmiah Ilmu Hukum* 26, no. 7 (2020): 895.
- Retnaningrum, Dwi Hapsari. "Incest Sebagai Bentuk Manifestasi Kekerasan Terhadap Perempuan." *Jurnal Dinamika Hukum* 9, no. 1 (2009): 20.
- Sawrikar, P. "Mencegah Penyalahgunaan Seksual Anak (CSA) Di Komunitas Etnis Minoritas: Sebuah Tinjauan Literatur Dan Saran Untuk Latihan Di Australia. Anak-Anak Dan Remaja Jasa." 2017, n.d. <https://doi.org/10.1016, 85, 174-186>.
- Soerjono Soekanto. *Masa Depan Hukum Adat Di Indonesia, Makalah Pada Seminar Penelaahan Pembaharuan Hukum Nasional*. Jakarta: BPHN, 1982.
- Soerjono Soekanto and Soleman Taneko. *Hukum Adat Indonesia*. Jakarta: Rajawali Pers, 1986.
- Suyanto, Bagong, Medhy Aginta Hidayat, Rahma Sugihartati, Septi Ariadi, and Rendy Pahrin Wadipalapa. "Incestuous Abuse of Indonesian Girls: An Exploratory Study of Media Coverage." *Children and Youth Services Review* 96 (2019): 364–71. <https://doi.org/10.1016/j.childyouth.2018.11.034>.
- Wotulo, Fredy A. "Kedudukan Delik Inses (Incest) Dalam Sistem Hukum Pidana Indonesia." *Lex Crimen* 6 Nomor 4 (2017): 38.
- Yudaningsih, Lilik Purwastuti. "Pengaturan Tindak Pidana Inses Dalam Perspektif Kebijakan Hukum Pidana." *Inovatif VII*, no. II (2014): 96.