Formulation of Customary Criminal Law in Future Criminal Code and Legal Enforcement in Indonesia

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ABSTRACT

The pros and cons were debated in limiting national legal substance with full recognition of Customary Criminal Law in the bill of Criminal Code and its future enforcement. On the other hand, there are arguments against the inclusion of Customary Criminal Law in the Criminal Code and the resulting disparities in legal enforcement caused by some Judges’ ignorance of judging customary criminal cases settled with the imposition of customary sanctions, which resulted in an unjust situation. This article aims to serve as a legal academic framework for establishing, identifying, and analyzing the formulation of Customary Criminal Law into the Indonesian Criminal Code, as well as to contribute to the discussion of judges’ roles in sentencing customary criminal cases, which they should determine and judge based on customary law. This article demonstrated the use of normative legal research in conjunction with statutory law, legal conceptual, and philosophical approaches to law. This article discovered that: first, several issues concerning the formulation of Customary Criminal Law into several national Bills of Criminal Code were debatable; second, it also cannot be enacted due to conflicting contexts with Criminal Law principles, unwillingness, and an ambiguous law-making process. Furthermore, the prospect of including the Customary Criminal Law in the Bill of Criminal Code is based on various justifications and legal needs that reflect the diverse local genius that still exists and adheres to Pancasila law principles. Additionally, it relates to a proposed new paradigm that Judges and other legal enforcers should adopt when enforcing Customary Criminal Law in any customary criminal case.

Keywords: Customary Criminal Law; Local Genius; Pancasila; Formulation; Bill of Criminal Code; Legal Enforcement;

INTRODUCTION

As a customary reaction, customary sanction aims to balance and harmonize the tangible and intangible things in response to one or more customary crimes while also requiring
perpetrators to comply with customary sanction.¹ This existence is still alive and going well in several customary communities throughout Indonesia. These laws and sanctions reflected society control that grows and develops in any customary community in Indonesia.²

Customary law enforcement accommodates customary wrongdoing and these consequences.³ In this context, customary sanctions that impose to balancing and harmonizing communal life, both material and immaterial, including spiritual loss replacement, apologies, body punishment, death punishment, or isolation from community. The customary reaction has the objective of maintaining the customary belief in realizing social stability.

As a subset of customary law, Customary Criminal Law cannot be separated from the cosmic/intangible paradigm that pervades Indonesian society, in contrast to the western paradigm reflected in the legal system of the European Continental.⁴ While national legal political directions shift, the customary law as the consequences from customary autonomy existence continues to exist, as well as its community efforts to adjudicate customary sanctions over customary crimes.⁵ The rapid globalization, most recently any disruptive condition that caused by 4.0 industrial revolution, and 5.0 society, impacted every countries development, including legal development. There is competition both from cultural transformation and cultural gaps that may result in insecurity and instability.⁶ It is necessary to rethink national legal development in terms of national identities, including the Criminal Code reform which is reflected rich local genius that still existed and it also strengthened with application of Pancasila values.

The law reform process was conducted by several arguments, inter alia: first, based on the political context, independent states are responsible for determining and enacting national laws that reflect their national identity, national pride, and indigenous values,⁷ second, based on the sociological context, the existence of law is defined as a reflection of national cultural values. and third, based on the political context, independent states are responsible for determining and enacting national laws that reflect their national identity, national pride, and indigenous values.⁸ Theses argumentation are not separated with the reality that Indonesia as

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¹ Demian, M. (2014). On the Repugnance of Customary Law, Comparative Studies in Society and History, 56(2), 508–536, DOI: https://doi.org/10.1017/CSS.2014.175.14000127.
² Henley, D. & Davidson, J.S. (2008). In the Name of Adat: Regional Perspectives on Reform, Tradition, and Democracy in Indonesia, Modern Asian Studies, 42(4), 815–852, DOI: https://doi.org/10.1017/S0026749X07003083.
³ Jaya, N.S.P. (2005). Relevansi Hukum Pidana Adat dalam Pembaharuan Hukum Pidana Nasional, Citra Aditya Bhakti, Bandung.
⁴ Larcom, S. (2013). Accounting for Legal Pluralism: The Impact of Pre-colonial Institutions on Crime, Law and Development Review, 6(1), 25–59, DOI: https://doi.org/10.1515/3dr.2013.0031.
⁵ Otto, J.M. (2009). Rule of Law, Adat Law and Sharia: 1901, 2001, and Monitoring the Next Phase, Hague Journal on the Rule of Law, 1(1), 15–20, DOI: https://doi.org/10.1017/S1876404509000153.
⁶ Gauri, V. (2010). Customary Law and Economic Outcomes in Indonesia, Hague Journal on the Rule of Law, 2(1), 75–94, DOI: https://doi.org/10.1017/S187640451000049.
⁷ Yusa, I.G., Hermanto, B., & Aryan, N.M. (2020). No-Spouse Employment and the Problem of the Constitutional Court of Indonesia, Journal of Advanced Research in Law and Economics, 11(1), 214-226, DOI: https://doi.org/10.14505/jarle.v11.1(47).26.
⁸ Koemiawaty, S. (2019). The Role of Penal Mediation to Resolve Criminal Acts that Cause Harms to Others in Indonesian Military Court, Journal of Legal, Ethical and Regulatory Issues, 22(2), 1-7.
former Dutch colonies still inherit the Dutch laws with colonizers languages that cannot be understood by younger generation in Indonesia after gained independence, so that the spirit of using the unity language and other national identities into their national legal arrangement, that in line with national legal unification that reflected national identity.

The incorporation of Customary Criminal Law into Bill of Criminal Code cannot be divorced from the debate over the legality principle, as the criminal justice system that recognizing the existence of Customary Criminal Law in a formal juridical context. The Customary Criminal Law was incorporated into the formal criminal process in accordance with Article 5 Paragraph (3) letter b of the Emergency Law 1/Drt/1951 regarding the Civil Judicial System, and the Law 48/2009 regarding Judicial Power, as well as the Article 18B Paragraph (2), and Article 28I Paragraph (3) of the 1945 Indonesia Constitution, which recognize traditional communities within formal juridical systems. This effort, however, is unable to result in the enactment of a new Indonesian Criminal Code that recognizes and incorporates Customary Criminal Law into customary crime resolution.

This issue arose in connection with the enforcement of Customary Criminal Laws as a result of Judges’ unwillingness and incapacity to adopt and apply customary law standards when judging crimes involving the traditional community’s laws. It also believed that the customary cases are comparable to other criminal offenses defined in the Criminal Code or this judgment decision does not adequate to provide justice value based on customary values, while in some cases it also contradicts customary spirit and paradigm within communal, religious, magic, and cosmic context. Additionally, the paradigm shift through legislation and judicial use of formal statutory laws to decide criminal cases judgment that does not recognize the customary sanctions existence. Meanwhile, judges impose the harshest punishment possible in all cases without imposing customary sanctions, which contrary with customary community’s need to maintain the value of justice based on customary law. In this context, customary sanction serves solely to restore the traditional community’s balance after being shattered/disturbed by customary crimes. Therefore, this article aims to provide input for researchers and legal science bearers so that they become the basis for dissemination in order to complete the legal solution framework.

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9 Yuliatin, Y., Husni, L., Hirsanuddin, H., & Kahanudin, K. (2021). Character Education Based on Local Wisdom in Pancasila Perspective, *Journal of Legal, Ethical and Regulatory Issues*, 24(1s). Retrieved from: https://www.abacademies.org/articles/character-education-based-on-local-wisdom-in-pancasila-perspective-10253.html

10 Carnegie, M. (2010), Living with difference in rural Indonesia: What can be learned for national and regional political agendas? *Journal of Southeast Asian Studies*, 41(3), 449–481, DOI: https://doi.org/10.1017/S0022463410000263

11 Maroni, M., Sitepu, S., & Ariani, N.D. (2019). Humanistic Law Enforcement as the Application of the Value of Justice, Expediency and Legal Certainty Based on Pancasila. *Journal of Legal, Ethical and Regulatory Issues*, 22(4). Retrieved from: https://www.proquest.com/openview/1b0c783b99380631e39d1620a980673b?pq-origsite=gscholar&cbl=38868
METHOD

This article was conducted with purify legal conceptual analysis based on normative legal method, focusing on law as prescriptive disciplines,\(^\text{12}\) and placing law within norms system.\(^\text{13}\) This article contributed to the conduct, analysis, and identification of several issues related to the formulation of Customary Criminal Law into several Bills of Criminal Code that have not been enacted in several decades, and to the proposal of a prospective national Bill of Criminal Code that includes Customary Criminal Law as an integral part that reflects pluralism, futuristic, holistic, and comprehensive Indonesian criminal law.

ANALYSIS AND DISCUSSION

A. Legal Development Theory and Indonesian Law Reform Concept

Mochtar Kusumaatmadja as quoted from I Dewa Made Suartha introduced this theory by proposing that law plays important role as the development instrument with propose articulation from all stakeholders’ interests in dealing national development goals. The law bolsters the traditional role of law as an instrument for ensuring certainty and order. His argument became justification and inspired from Eugen Ehrlich’s sociological jurisprudence paradigm, which Kusumaatmadja reintroduced into state legal development. Law should not be viewed solely just as the normative symptom; it is also should be understood as the social symptom that cannot be divorced from the values that still existed in the common paradigm. A good law reflects the society’s living values, is internalized, and develops into living law.\(^\text{14}\)

Mochtar Kusumaatmadja places law as fundamental instrument for accelerating social development based on two fundamental concepts. First, law and order approach in the context to create effective national reform agenda were important needed, and second, the law as norms system with main objectives as the instrument to shift human activities and efforts into written rules instruments, statutory laws, and judicial decision that corresponding and reflecting living law.\(^\text{15}\)

His argumentation also brought and inspired by the historical legal school founded by von Savigny, who defined law as a declaration of the nation’s soul *(das Recht wird nicht gemacht, es ist ein wird mii dem volke)*, implying that shifting law should not understood just

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\(^{12}\) Wibisana, A.G. (2019). Menulis di Jurnal Hukum: Gaga san, Struktur, dan Gaya. *Jurnal Hukum & Pembangunan*, 49(2), 471-496, DOI: [http://dx.doi.org/10.21143/jhp.vol49.no2.2014](http://dx.doi.org/10.21143/jhp.vol49.no2.2014), pp. 481-482.

\(^{13}\) Sudiarawan, K.A., Tanaya, P.E., & Hermanto, B. (2020). Discover the Legal Concept in the Sociological Study, *Substantive Justice International Journal of Law*, 3(1), 94-108, DOI: [http://dx.doi.org/10.33096/sjijl.v3i1.69](http://dx.doi.org/10.33096/sjijl.v3i1.69), pp. 97-99.

\(^{14}\) Suartha, I.D.M., Martha, I.D.A.G.M., & Hermanto, B., (2021), Innovation based on balinese local genius shifting alternative legal concept: towards indonesia development acceleration, *Journal of Legal, Ethical, and Regulatory Issues*, 24(7), 1-9. Retrieved from: [https://www.abacademies.org/journals/month-june-year-2021-vol24-issue-6-journal-2ljeripast-issue.html](https://www.abacademies.org/journals/month-june-year-2021-vol24-issue-6-journal-2ljeripast-issue.html)

\(^{15}\) Bedner, A., & van Huis, S., (2008), The return of the native in Indonesian law Indigenous communities in Indonesian legislation, *Bijdragen tot de Taal-, Land- en Volkenkunde*, 164(2/3), 165-193. [http://www.jstor.org/stable/27868480](http://www.jstor.org/stable/27868480)
about arranging, but about integrating and developing with the nation’s soul.\textsuperscript{16} Savigny’s argument was consistent with Ehrlich’s assertion that positive law is only effective when it corresponds to essential Living Law: when legal codes are founded on underlying social norms. The law should be viewed as an integral part to create social order. The positive law could be entered into force effectively if its substance reflects living law in society; it is also related to the fact that law cannot be divorced from communal forces and widely recognition apart from government power. The regulations that govern public affairs could be determined as actual living laws, with a much broader scope than the standards developed and implemented by government institutions.\textsuperscript{17} The law is effectively working as the fundamental social instruments if it reflects living values in society, and the living law is a law that evolves over time and consistently exceeds static and immovable state laws. In realizing the legal development, a state laws position that is appropriate and harmonious with any social values that exist in society (local genius and five principles of Pancasila) can be achieved.

Indonesian law reform is implemented by reimagining customary laws to reflect real evolution and renewal of Indonesia laws in the context of legal reorientation and legal reform simultaneously based on politics, philosophies, social, and cultural values. The Indonesian law must reflect all stakeholders’ diverse social, cultural, and legal needs, while the national legal-political landscape shifts toward legal unification by accommodating local genius and emphasizing Pancasila’s five principles.\textsuperscript{18} The national law reform initiative seeks to preserve, reform, and create new national laws following the national legal development paradigm and recognizing the nation’s reality as a multicultural state. In this context, national legal politics views law as a tool for achieving national goals and ideals, with the ultimate goal of developing a national legal system that reflects national ideals, and the development of national legal substance has three primary objectives, including reforming national statutory law, rescinding colonized inherited statutory law, and creating new statutory law based on national ideals.

Indonesian law reform cannot be separated from legal development agenda, which aims to reform all colonialisst Code or laws in accordance with the priority scale of national legislation/regulation agenda, Pancasila principles values, recognized legal principles, and existed local genius.\textsuperscript{19} Pancasila concepts were established as fundamental and primary source of the national legal system that operationalized and should be reflected in legislative and judicial processes without violating customary law, social-cultural considerations, or technical legal development principles. Pancasila concepts served as a critical foundation and guiding

\textsuperscript{16} Chua, L.J. (2014), Charting Socio-Legal Scholarship on Southeast Asia: Key Themes and Future Directions, Asian Journal of Comparative Law, 9(1), 5–27, DOI: \url{http://dx.doi.org/10.1515/asjcl-2014-0067}
\textsuperscript{17} Vel, J., Zakaria, Y., & Bedner, A. (2017), Law-Making as a Strategy for Change: Indonesia’s New Village Law, Asian Journal of Law and Society, 4(2), 447–471, DOI: \url{http://dx.doi.org/10.1017/als.2017.21}
\textsuperscript{18} Yusa, I.G., Hermanto, B., & Ardani, N.K. (2021). Law Reform as the Part of National Resilience: Discovering Hindu and Pancasila Values in Indonesia’s Legal Development Plan, Proceedings of the International Conference of Democracy and National Resilience, 1-10, \url{https://www.atlantis-press.com/proceedings/icdpr-21/125966783}
\textsuperscript{19} Wardana, A. (2014), Alliances and Contestations in the Legal Production of Space: The Case of Bali, Asian Journal of Comparative Law, 9(1), 145–171. DOI: \url{http://dx.doi.org/10.1515/asjcl-2014-0030}
principle for the drafting and applying national laws in judicial decisions, resulting in the pyramidal structure of all national legal system elements that reflected Pancasila and local genius values.\textsuperscript{20} Pancasila is also critical in translating international consensus into national legal development, including national law reform that reflects national identity, shared values, and local/customary law.\textsuperscript{21}

Local genius cannot be separated from the diversified and pluralism context, location, or locality of the wisdom or genius in this context, such that local genius understood as much broader than existing traditional genius, it should be determined that local genius includes new genius or contemporary genius.\textsuperscript{22} Thus, local genius encompasses both old genius (inherited based on generations), and current genius (inherited from environmental and social experiences).\textsuperscript{23} The local genius cannot be divorced from nation’s noble values.\textsuperscript{24} In principle, local genius results from using a society’s intelligence as a means of intelligence.\textsuperscript{25} Thus, existing local genius will be bolstered through inventories, documentation, and research. These three factors contribute to the socialization, strengthening, and internalization of local knowledge in all aspects of national development, including legal development. It can be concluded that the four primary steps toward achieving national statutory law direction are legal planning, legislative process, and legal research and development, as well as the resolution of prior legal substance issues, the fulfillment of national interests (including legal needs), as well as the comprehensive and prospective norms based on Pancasila values and UUD NRI 1945, as stipulated in Indonesia’s RPJPN/Long Term National Development Plan 2005-2025 and four RPJMN/Mid-Term National Development Plan (2005-2009, 2010-2014, 2015-2019, and 2020-2024).\textsuperscript{26}

\textbf{Table 1. Priority Scale and Development Strategy in RPJPN 2005-2025}

| No. | Mid-Term Development Period as stipulates in RPJPN 2005-2025 | National Legal Development Priority Scale and Development Strategy stipulates in all RPJMN |
|-----|-------------------------------------------------------------|------------------------------------------------------------------------------------------|
| 1   | RPJMN 2005-2009                                            | Internalization of justice and law enforcement to create a stable foundation of national legal supremacy and human rights enforcement based on Pancasila and UUD NRI 1945, and build an ideal national legal system. |

\textsuperscript{20} Sidharta, B. A. (1996). Refleksi tentang Fundasi dan Sifat Keilmuan Ilmu Hukum Nasional Indonesia, [Doctoral dissertation, Padjadjaran University, Bandung] http://repository.unpar.ac.id.

\textsuperscript{21} Kameo, J. & Prasetyo, T. (2021). Pancasila as the First and Foremost Source of Laws: A Dignified Justice Philosophy, \textit{Journal of Legal, Ethical and Regulatory Issues}, 24(1), 1-8. https://www.abacademies.org/articles/pancasila-as-the-first-and-foremost-source-of-laws-a-dignified-justice-philosophy-10381.html

\textsuperscript{22} Holden, L. (2020). Cultural Expertise and Law: An Historical Overview, \textit{Law and History Review}, 38(1), 29-46, DOI: http://dx.doi.org/10.1017/S0738248019000049X

\textsuperscript{23} O.C.A. Johnson, (2017). Equality Law Pluralism, \textit{Columbia Law Review}, 117(7), 1973-2004.

\textsuperscript{24} Straus, S. (2011). Water Conflicts among Different User Groups in South Bali, Indonesia, \textit{Human Ecology}, 39(1), 69-79, DOI: http://dx.doi.org/10.1007/s10745-011-9381-3

\textsuperscript{25} Warnan, K., Isra, S., & Tegnan, H. (2018). Enhancing legal pluralism: The Role of Adat and Islamic Laws Within the Indonesian Legal System, \textit{Journal of Legal, Ethical and Regulatory Issues}, 21(3), 1-9.

\textsuperscript{26} Priambodo, B. (2018). Pentahapan Sasaran Jangka Panjang, Menengah, dan Pendek, \textit{Jurnal Majelis: Media Aspirasi Konstitusi}, 3(8), 1-8.
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|   | RPJMN 2010-2014                                                                 | Increasing legal consciousness and legal enforcement based on legal supremacy consolidation and furtherance of human rights enforcement, as well as strengthen the national legal system. |
|---|---------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 3 | RPJMN 2015-2019                                                                | Internalization of democratic values, tolerance, non-discriminatory, and empowerment decentralization and regional autonomy, with shift legal consciousness and legal enforcement within the maturity of the national legal system, to support national development. |
| 4 | RPJMN 2020-2024                                                                | Institutionalization of national legal and political within democracy consolidation, legal supremacy, and human rights enforcement of Indonesian legal system based on Pancasila and UUD NRI 1945, supported with good governance, bureaucratic reform, and national identity. |

Source: National Development Planning Agency of the Republic of Indonesia, 2007.

RPJPN and four terms of RPJMN have placed Indonesia’s legal system developed within constitutionalism framework, dignified human rights, and implementing Pancasila and UUD NRI 1945. In addition, they also consolidate legal supremacy and human rights enforcement, as well as the institutionalization of legal consciousness and legal enforcement. First, The Elucidation Part II.1 Sub-part G. Law and Apparatus in the UU RPJPN 2005-2025 stipulates that national legal substance with the primary objective of pursuing national legal reform through the development of legal substance, both written and unwritten, within the framework of establishing a solid and continuous national legal system based on social needs. The legal drafting or law-making process is defined by a set of procedures and standards for drafting a bill that reflects the law-making process’s order. This agenda, however, has harmed efforts to establish a national legal system based on law supremacy and a human rights order founded on justice and truth.

Second, The Elucidation Part IV concerning Direction, Steps, and Priorities in Long-Term Development Year 2005-2025 UU RPJPN 2005-2025 stipulates that there is a need for national legal reform based on law values and justice that reflects the truth, justice, accommodativeness, and aspiration of the national legal system. It also emphasizes the Part IV.1 concerning Long-Term Development Direction on 2005-2025 in the national legal reform agenda, with the primary objection that legal development must include enforcing and protecting legal values, eradicating corruption, promoting good governance, and legal substance reform that respect the plurality of legal orders, globalization’s influence on increasing legal certainty and legal protection, law and human rights enforcement, legal consciousness, and legal services with justice, truth, order, and prosperity purposes.

Third, Part IV.1.3. number (6)-(7) in the RPJPN 2005-2025 also stipulates that national legal development has aims to realize maturity of the national legal system within Pancasila and UUD NRI 1945. It stipulates legal development with legal substance reform agenda that similar with arrangement of Chapter IV concerning Directions, Steps, and Priorities on the Long-Term
Development Year 2005-2025 in the Elucidation of the **UU RPJPN 2005-2025**. The national legal substance development is pursuing statutory law reform to eliminate colonialized statutory laws that conflict with social values and the interests of the Indonesian society, to achieve a continuous, stable, and consistent national development under Pancasila and UUD NRI 1945, by implementing legal planning, law-making process, and legal research and development, as well as eliminating past legal substances problem, fulfilling national interest (including legal needs), comprehensive, and prospective norms based on Pancasila values and UUD NRI 1945, as stipulates in Indonesia’s RPJPN/Long Term National Development Plan 2005-2025 and four RPJMN/Mid-Term National Development Plan (2005-2009, 2010-2014, 2015-2019, and 2020-2024).

Law cannot be entirely understood by focusing exclusively on ideal rules regarded as legal reflections; instead, the functions of law must be affirmed through an examination of society’s social, structural, and cultural dimensions.\(^{27}\) Law reform was situated within the broader policy context to operationalize law in accordance with values, perspectives, ideology, socio-philosophical, political, and cultural dimensions.\(^{28}\)

Apart from that, the fundamental issue in Indonesian society is cultural and legal pluralism,\(^{29}\) which are inherent in the realms of customary and religious law, which are unaffected by Indonesian law.\(^{30}\) This is inextricably linked to specific legal products, as colonial-era legacies embedded in the civil law system reflected individualism, liberalism, and individual rights.

As an Indonesian cultural heritage, the customary law has long represented the customary community's living values; it has grown and developed as a result of social interaction between the **customary** society that once existed in Indonesia create strong fundamental to peace, and law order consistent with shared values, culture, and socio-structural factors.\(^{31}\) While this agenda was reintroduced from several decades later, it failed to enact a normatively, pragmatically, and socially controlled arrangement for customary law's existence in national laws. It should reflect traditions, ideological, and rational dimensions to accommodate living law.

### B. The Problem to Formulate Customary Criminal Law Recognition into the Indonesian Criminal Code and Current Legal Enforcement

Indeed, criminal law should to reflecting political ideology, and it also should be following rapid development within a legal framework consistent with a noble national politics.

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\(^{27}\) Suartha, I. D. M., Puspitosari, H., & Hermanto, B. (2020). Reconstruction Communal Rights Registration in Encouraging Indonesia Environmental Protection. Reconstruction, 29(3s), 1277-1293. https://doi.org/10.1017/S0021911809999074X

\(^{28}\) Duncan, C. R. (2009). Reconciliation and revitalization: The resurgence of tradition in postconflict Tobelo, North Maluku, Eastern Indonesia. *Journal of Asian Studies*, 68(4), 1077-1104. https://doi.org/10.1017/S002191186900007X

\(^{29}\) Hadiprayitno, I, I (2010). Defensive Enforcement: Human Rights in Indonesia, *Human Rights Review*, 11(3), 373–399, DOI http://dx.doi.org/10.1007/s12142-009-0143-1

\(^{30}\) Fagertun, A. (2017). Waves of Dispossession: The Conversion of Land and Labor in Bali’s Recent History, *Social Analysis*, 61(3), 108–125, DOI: http://dx.doi.org/10.3167/sa.2017.610307

\(^{31}\) Creese, H. (2009). Judicial processes and legal authority in pre-colonial Bali, *Bijdragen tot de Taal-, Land-en Volkenkunde*, 165(4), 515-550. DOI: https://doi.org/10.1163/22134379-90003631
The Indonesian Criminal Code inherited from the Netherlands with the form Criminal Code 1918 that reflects individualism and liberalism, much like any Western Europe Criminal Code from the nineteenth and early twentieth centuries. However, as the common understanding, the criminal law cannot be divorced from general understanding correlations between law, state, society, and crimes. It also shifts necessitates a reimagining of criminal law reform that reflected living values and policy-oriented approach.32

The Customary Criminal Law, as an Indonesian cultural heritage, has long represented the living values of the traditional community; it has grown and developed as a social interaction between the traditional communities that once existed in Indonesia, intending to establish a solid fundamental for peace, order and balance based on social values, cultural aspects, and communal structure factors.33 While the criminal law reform has been reintroduced over the years, it has yet to result in the enactment of a formulation of Customary Criminal Law’s into Bill of Criminal Code that reflected traditional, ideological, and rational aspects. There are five problems that investigated and arise over strengthening the efforts to formulate and apply Customary Criminal Law:

First, the legislature and government have failed to draft regulatory instruments in the form of statutory law was reflected the direction and concept of legal development and interpret the local genius that still existed, and considering Pancasila values, including the long-awaited Criminal Code reform.34 This issue is also connected to the chasm between paradigms and substantial efforts to draft and enact a new Indonesian Criminal Code consistent with the country’s legal development trajectory.

Second, there is a rivalry between state laws and customary law sometimes led crash and gap between them. In theoretical framework, the competition between state law and customary law to dominate the legal system shifts results in state law domination, in other context, marginalization of local law was raises while it is more effective and functional than state law. In line with Samford, this issue is caused by an unbalanced legal social foundation that appears to be harmonious, orderly, clear, and specific on the surface, but in reality, creates disorder and an unsystematic pattern. Unsuitable laws for society’s living values are less likely to be elected by the people, even when executive sanctions back up the state law; however, because state law was viewed as less beneficial to society, state law is frequently ignored.35

32 Arief, B.N. (2013). Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana, 4th Edition, Badan Penerbit Fakultas Hukum Universitas Diponegoro, Semarang.
33 Creese, H. (2009), Old Javanese legal traditions in pre-colonial Bali, Bijdragen tot de Taal-, Land- en Volkenkunde, 165(2-3), 241-290. DOI: https://doi.org/10.1163/22134379-90003636
34 Kristiansen, S., & Trijono, L. (2005). Authority and Law Enforcement: Local Government Reforms and Security Systems in Indonesia. Contemporary Southeast Asia, 27(2), 236–254. http://www.jstor.org/stable/25798735
35 Susilowati, C.M.I. (2019). Establishing Humanistic Tendencies through Restorative Justice in the Law Enforcement Context, Journal of Legal, Ethical and Regulatory Issues, 22(2), 1-6. Retrieved: https://www.abacademies.org/articles/establishing-humanistic-tendencies-through-restorative-justice-in-the-law-enforcement-context-8169.html
Third, the discussion and arrangement efforts to propose Bill of Criminal Code have not been discussed and in some cases, it also shifts broader participation from all scientists, with special agenda to synchronize and create a strong foundation of new Criminal Code. According to the 4th National Law Seminary in 1979, the national legal system should be follows any needs and legal awareness, as far as possible it should be arranged within written form, as well as fostering legal unification agenda and delivered public legal awareness.36

Fourth, the legality principle is predicated on the existence of crimes and their punishments, which shall be interpreted within a neoclassical paradigm based on the dader-daadstrafrecht concept. It is still inapplicable to contemporary interpretations of the Indonesian Criminal Code. It remains incapable of incorporating forward-thinking, restorative justice, and natural crime into law making process and law enforcement into integrative model.

Fifth, the main problem is related to difficulty in reaching common ground and differences between customary criminal law and the principle of legality. It is in line with harmonious and general morality philosophy, on the one hand, there is strict definition of crime; the punishment that should impose based on the formulation of crime in the Criminal Code; follows free will, normative context, and definite stipulations.37

Expanding these five issues can confirm the fundamentals that become the characteristics evaluation of Customary Criminal Law, while it is leave problems to re-criminalization of Customary Criminal Law into criminal law implementation through revolutionary shift in the Criminal law formulation, which has the logical consequence of conferring a strategic position on and to judges or another law enforcers.

C. The Customary Criminal Law Reinvention and Formulation in Indonesia’s Criminal Code Reform

Law is not sufficiently placed as norms or rules that are considered as the reflection of the law. There is necessary to affirm law functions with examining society’s social, structural, and cultural aspects. The criminal law reform is situated within the broader policy context to operationalize or functionize criminal law based on social, philosophy, politic, and other context. The formulation of Customary Criminal Law’s application in the Bill of Criminal Code should be reoriented to accommodates Customary Criminal Law.

Given the fundamental nature of the challenge of encouraging Indonesian Bill of Criminal Code, there is an urgent need to organize a comprehensive revision of the current Criminal Code, as emphasized by Law Number 1 of 1946 and Law Number 73 of 1958, which are deemed incompatible with Indonesian needs. Apart from that, the main issue is Indonesian

36 Roff, W.R. (2010). Customary Law, Islamic Law, and Colonial Authority: Three Contrasting Case Studies and Their Aftermath, *Islamic Studies*, 49(4), 455–462.
37 Anant, D.R. (2021). Retributivism: Punishment and Justification, *International Journal of Criminal Justice Sciences*, 16(1), 17-33, DOI: http://dx.doi.org/10.5281/zenodo.4756184
society’s cultural heterogeneity and legal pluralism, which are inherent in customary and religious law and are thus unaffected by Indonesian criminal law. This is inextricably linked to the fact that the current Indonesian Criminal Code is a legacy of the Dutch era’s, which reflected individualism, liberalism, and the paradigm of individual rights.

Indonesia’s Bill of Criminal Code within control system to counteract any crime, both major and minor, is organized around wrongdoing that is classified as crime, criminal liability, criminal sanctions. This reform aims to combat and eradicate any crimes through the use of criminal law or a penal instrument, prevention without punishment or a non-penal instrument directed at criminal factors, and influencing society’s view of crime and punishment through the use of mass media or a non-penal instrument directed at criminal factors to implement social welfare and social defense. The following is a comparison of several Indonesian Criminal Code drafts that began organizing the Customary Criminal Law’s existence to create an ideal Indonesia Criminal Code, as compared to the Indonesian Bill of Criminal Code.

Table 2. Customary Criminal Law Arrangement Comparisons between Indonesia’s Bill of Criminal Code

| Comparison Element | Bill of Criminal Code 2009 | Bill of Criminal Code 2014 | Bill of Criminal Code 2019 |
|--------------------|---------------------------|---------------------------|---------------------------|
| Customary Criminal Law and the Legality Principle | The formal legality principle cannot to reducing the living law enactment that defining any person that could be sentenced while this crime does not regulate in statutory laws. (Article 1 Paragraph (3) RKUHP 2009, Article 1 Paragraph (3) RKUHP 2014) | The formal legality principle cannot to reducing the living law enactment that determines any person could be sentenced while this crime does not regulated in statutory laws. It is should not be contrary with all of Pancasila values, the 1945 Indonesian Constitution, dignity, humankind, human rights, and another legal principles. (Article 2 Paragraph (1) and (2) RKUHP 2019) | The Customary Criminal Law could be determining as the crimes. (Article 12 Paragraph (2) RKUHP 2019). |

The The customary The conviction aims to The fulfillment of local

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38 Hermanto, B. (2021). Discover Future Prospect of Indonesia Criminal Law Reform: Questioning Adat Criminal Law existence, Material and Formal Legislation, and Constitutional Court Decision Frameworks, Paper was presented at International Seminar Udayana University and University of Melbourne, 17 June, 1-20.

39 Suartha, I.D.M., Martha, I.D.A.G.M., & Pranajaya, M.D. (2020). Innovation in Resolving Customary Sanctions in Criminal Cases in Bali, International Journal of Innovation, Creativity and Change, 12(3), 16-33.
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Sanctions that determine as complementary sanctions caused by customary recovery needs (Article 67 Paragraph (1) letter e RKUHP 2009). This sanction is reflected customary obligations and other obligations that recognized by living law should be punished while there is no formal arrangement. (Article 67 Paragraph (3) RKUHP 2009).

Sanctions solve the conflict, social harmony, social balance, and social peace (Article 50 Paragraph (1) letter c RKUHP 2014), with fulfillment of customary obligation as complementary sanctions that could be punished. (Article 62 Paragraph (1)- (3) RKUHP 2014).

Customary obligations was recognized as supplementary punishment. (Article 66 Paragraph (1) letter f RKUHP 2019). Several criminal acts have been subject to customary sanctions (Article 116 letter b, Article 120 Paragraph (1) letter d, Article 419, and Article 445 RKUHP 2019). Interestingly, this formulation accommodating criminal acts that in line with living law to fulfill customary obligations. (Article 597 Paragraph (1)-(2) RKUHP 2019).

The Implementation of Customary Criminal Law

The judge was constructed has authority to determine the local customary obligations fulfillment. It could be considered as major offense crime under the Article 1 Paragraph (3) RKUHP, it can be considered comparable with a category I of fine, and it also can be subject to a substitute penalty for a fine if convict person unfulfill any customary obligation (Article 100 Paragraph (1)-(3) RKUHP 2009).

The court decisions could impose customary obligations that should be carried out either as the major crime that comply with the provisions of Article 1 Paragraph (3) RKUHP, or equivalent to a category I of fine accompanied by substitute sanctions for a fine if the customary obligation is not fulfilled or carried out by the convicted person (Pasal 93 ayat (1)-(4) RKUHP 2014).

It is to fulfill customary obligations that imposed when local custom requires it, the crimes have serious upheaval, violate common appropriation, and social moral. (Elucidation Article 93 RKUHP 2014).

The complementary sanctions to fulfill the customary obligations for crimes that comply with Article 2 Paragraph (2) RKUHP. It also could be comparable to the Category II of fine that adding complementary sanctions could be sentenced to fulfill local customary obligations. (Article 96 Paragraph (1)-(2), and Article 97 RKUHP 2019).

Source: Data from the Secretariat General of People’s Representative Council and the Ministry of Law and Human Rights of the Republic of Indonesia, 2020-2021.

This is the same example as the previous one, except the numbers of each item are assigned in listed material. The bulleted lists are avoided since they vary significantly between
manuscripts and affects the journal’s overall appearance. National law reform agenda is being implemented by reimagining Customary Criminal Laws that in line with evolution and Criminal Code reform. Indonesia’s draft criminal law must reflect all stakeholder parties’ diverse social, cultural, and legal needs, while the Indonesia legal political shift toward legal unification requires accommodating local genius and emphasizing Pancasila’s five principles. The national criminal code reform seeks to maintain, reform, and create new national with acknowledging the diversified and pluralism in Indonesia.

The formulation of Customary Criminal Law is inextricably linked to law reform agenda, to reform all colonial statutory law products in accordance with the legislation program, Pancasila, recognized civilized legal principles, and local genius. Pancasila were established as a primary source of the Indonesian legal system both in the legislative and judicial processes that should not be violating customary law, social-cultural aspects, or technical principles of law reform agenda. Pancasila concepts played a significant role as the cornerstone and guiding principle for national legal drafting and application in the form of judicial decisions, with the result that all elements of the national legal system were structured in a hierarchical pyramidal structure. Pancasila plays a critical role in converting international common recognition into legal reform agenda, including the arrangement of the Bill of Criminal Code that incorporate core national elements that consistent with the country’s character, shared values, and customary law existence.

In this context, local genius encompasses both traditional genius (derived from previous generations) and contemporary genius (derived from environmental and social experiences). Local genius cannot be divorced from the nation’s noble values in this context. Local genius is, in principle, the result of a society’s intelligence being used as a means of intelligence. Thus, existing local genius shall be bolstered through inventorying, documenting, and conducting research. These three factors promote the socialization, strengthening, and internalization of local genius in national development, including legal development.

The recognition of the Customary Criminal Law and the inclusion of customary sanctions in the future draft of the Bill of Criminal Code does not separate from the critical and noble role. The informal judicial authority established by the head of the traditional community to sentence the convict to customary sanctions with purpose to create effective stabilize instrument and simultaneously resulting harmony and balance relationship between the tangible and intangible customary crimes.\(^4\) This sanctions imposed on the convict have evolved into an attempt to correct the convict’s attitude, rather than to punish the convict, as is customary under

\(^4\) Machmudin, D.D. (2018). Modernization and Acceleration of Case Standard Handling and Reviewing on Indonesia Supreme Court, *Journal of Legal, Ethical and Regulatory Issues*, 21(3), 1-7.
European Continental/Western Criminal Law. The customary sanctions that sentenced are intended to impose and that have been agreed upon by the traditional community.

The Customary Criminal Law enforcement that applied in the formal juridical context conducted by the Judges to sentence criminal customary cases by imposing additional sanctions, in the form to fulfill customary obligation and recover harmony and balance conditions. It is strengthened with appropriation and ethical principles, customary decision that imposed in line with social needs to access common justice. The Judges also use Pancasila became an imperative values and core philosophical aspects to adopt customary decisions into any customary crimes that are sentenced by the Judges. They also have an essential role in the law-making process especially determining criminal sanction norms.

According to the freierechtslehre paradigm, as the legal creator and inventor, judges are prohibited from declining any cases because no legal instrument that effectively could be used to sentence them, as stipulated in the Article 22 Algemene Bepalingen and the Article 10 Law Number 48 of 2009. The judges have an obligation to search for, adhere to, comprehend, and arrange criminal sentences based on prevailing law values in society. This requires judges to comprehend, feel, and adapt to society's law and justice values, including the traditional community. Article 5 of Law Number 48 of 2009 establishes the authority of judges to sentence customary sanctions, and Emergency Law Number 1/Drt/1951 establishes the likelihood of judicial bodies to sentence customary sanctions. In subsequent stages, the existence of Customary Criminal Law as a positive legal source used by District Court Judges devolved into a negative legal source used as a justification for imposing criminal sanctions. Judges' fundamental step in imposing customary sanctions and establishing a solid framework for traditional community trust in formal institutions law enforcement bodies was to include customary sanctions as additional or complementary sanctions in several Bill of Criminal Code.

D. Conclusion

Conclusions are drawn based on the legal issues that arise in this paper, there are several issues regarding the articulation and arrangement of the Customary Criminal Law into several national Criminal Code drafts that have yet to be enacted. The Customary Criminal Law is structured to accomplish imposing criminal purposes consistent with the customary community's justice values, with criminal sanctions serving as the primary sanctions and

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41 Buchanan, R.M. (2011). “Passing through the Mirror”: Dead Man, Legal Pluralism and the De-territorialization of the West. *Law, Culture and the Humanities*, 7(2), 289–309, DOI: [http://dx.doi.org/10.1177/1743872109360122](http://dx.doi.org/10.1177/1743872109360122)

42 Maroni, M., & Ariani, N.D. (2018). Humanistic Criminal Law Enforcement to Achieve Spiritual Justice, *Journal of Legal, Ethical and Regulatory Issues*, 21(2), 1-5.

43 Tuori, K. (2013). The Disputed Roots of Legal Pluralism. *Law, Culture and the Humanities*, 9(2), 330-351, DOI: [http://dx.doi.org/10.1177/1743872111410216](http://dx.doi.org/10.1177/1743872111410216)

44 Budianta, I.N.P. (2019). The Existence of Pancasila as A Basic Rule toward the Dispute Settlement of Complaint Offence through Penal Mediation Outside the Court of Indonesia. *Journal of Legal, Ethical and Regulatory Issues*, 22(2), 1-5. Retrieved: [https://www.abacademies.org/articles/the-existence-of-pancasila-as-a-basic-rule-toward-the-dispute-settlement-of-complaint-offence-through-penal-mediation-outside-the-8166.html](https://www.abacademies.org/articles/the-existence-of-pancasila-as-a-basic-rule-toward-the-dispute-settlement-of-complaint-offence-through-penal-mediation-outside-the-8166.html)
customary sanctions in the form of customary obligations serving as additional/complementary sanctions. And the prospect of designing an Indonesian Criminal Code that incorporates Customary Criminal Law into the bill of Criminal Code has purpose to pursue a comprehensive and futuristic Indonesian Criminal Code that incorporates customary community willingness adopting Customary Criminal Law in addition to conventional Criminal Law. It also aims to shift new paradigm to the Judges and another law enforcers to implement Customary Criminal Law into future criminal law enforcement as inseparable part of legal reform agenda, based on culture, religious, politic, social, and existence the needs to balance of tangible and intangible values, and the stakeholder’s ability to select Customary Criminal Law that still exists and in line with international standards and national pathway in reforming criminal laws.

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