

# Innovation in Resolving Customary Sanctions in Criminal Cases in Bali

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The purpose of this study is to find out and analyse the importance of the application of custom sanctions and the consequences of fair punishment of perpetrators by district courts in the resolution of customary criminal cases in Bali. The method used is an empirical legal science method by directly digging field data and documents analysed descriptively qualitatively. The results of the research show that district court judges in Bali have never linked custom sanctions in their decisions expected by the community to perpetrators of customary criminal acts because they have not been regulated in the Criminal Code. Therefore, in the future it is expected that district court judges must have the courage to associate customary sanctions as additional penalties expected by indigenous peoples in addition to criminal sanctions in the Criminal Code in resolving customary criminal cases in Bali and to those authorised to make Laws (KUHP) and drafters of the Criminal Code new ones in the future must follow up on this matter.

**Key words:** *Customary criminal cases in Bali, Customary sanctions, Urgency of application.*

## Introduction

The application of customary sanctions is one of the customer reactions or customary efforts against violations of customary rules (Raharjo, 2010). Customary sanctions are intended to restore the disturbed balance due to customary violations. Like sanctions in general, custom sanctions are always accompanied by an event or act that must be accounted for by the offender and his family (Maskur, 2018). The existence of customary sanctions or customary criminal law in the reality of customary law communities in certain regions in Indonesia, such as (Mulyadi, 2016): Aceh (Amalia, Mukhlis, & Yusrizal, 2018), Gayo-Alas and Batak, Minangkabau, Mentawai, South Sumatra and Enggano, Malay Region, Bangka and Baliton, Kalimantan, Gorontalo, South Sulawesi, Ambon, Java, Madura, Bali, Lombok, Timor, etc. are

forms of social control mechanisms (Ali, 2010) that grow and develop in the traditions of the community concerned (Jaya, 2005).

According to Tolib Setiady, customary law *delik* (customrecht delicten), customary criminal law or customary law violations are customary law rules governing events or acts of error that result in disruption of community balance. This needs to be resolved (punished) so that community balance is not disturbed. Customary criminal law is one area of customary law, as an integrated system with customary law. Therefore, customary criminal law cannot be released from the cosmic mind that lives in Indonesian society which is very different from the mind that controls the western legal system (Continental Europe). Although in national law politics leads to the unification of law, the reality is that customary law as a living law in Indonesian society still applies in customary law community units (Abubakar, 2013). Customary criminal law in some customary law communities in Indonesia is still enforceable (Rasooli & Abedini, 2017).

Soerjono Soekanto once stated, that customary law is a complex of customs that are not recorded, not codified and is coercive, but has legal consequences. From this understanding, it can be stated that the main characteristics inherent in customary law in several customary law environments in Indonesia, for example:

- 1) Substitute immaterial losses in various forms, such as being forced to marry a defiled girl;
- 2) Paying customary money to those affected, in the form of magic objects as a substitute for spiritual loss;
- 3) Cover shame, apologies;
- 4) Various corporal sentences to the death penalty;
- 5) Exile from the community and put the person outside the legal system.

In this context, Emile Durkheim once said that social reactions in the form of punishment or sanctions are very necessary to take care so that the traditions of traditional beliefs will not be shaken, so that community stability can be realised. In 1973, the Faculty of Law and Public Knowledge of Udayana University formed a research team that conducted research related to customary sanctions in the Bali area with the title "The Influence of Religion on Criminal Law in Bali". Where one of the conclusions states, that: indigenous people are not satisfied with the District Court's decision to examine customary criminal acts and only apply sanctions by Article 10 of the Criminal Code. This has been followed up with subsequent research, such as Nyoman Serikat Putera Jaya (2005 research), I Gusti Ketut Ariawan (1999 research), I Dewa Made Suartha (research in 2011) etc. However, the results have never changed from the research conducted by the Udayana University Faculty of Law.

Given the island of Bali is one of the areas where the people still uphold customary law to date, including the form of sanctions. The implementation of traditional sanctions is always

accompanied by a ritual/upakara/pamarisuddan ritual or a ritual/upakara/prayascitta ceremony, which is a ritual/upakara/ceremonial cleansing of the village from the unclean feeling of the supernatural. These traditional sanctions in the form of rituals/ceremonies/ceremonies are not intended as torture or suffering or revenge, but a legal action to restore the cosmic balance (Musawar & Harfin Zuhdi, 2019).

The application and implementation of customary sanctions in Bali demonstrate that there is a very close relationship between customary law and Hinduism in Bali, which can not only be seen from the provisions of customary law. This is commonly called awig-awig, but also in terms of the application of more customary sanctions associated with religious rituals. Therefore, the application of customary sanctions in Bali includes two important things, namely scale sanctions (material sanctions) and noetic sanctions (immaterial sanctions). This sanction certainly cannot be released with the pattern of structuring the lives of indigenous peoples in Bali which is based on the concept of tri hita karana, wherein the life of the people there is always a balance between humans and God, between humans and other humans, and between humans and their environment. So customary sanctions have an important role in the lives of indigenous peoples in Bali because it is not only customary violations which are subject to customary sanctions, even against ordinary offenses often the community is burdened with customary sanctions even though the perpetrators have been convicted by the general court. This opinion has also been proven by the results of the same study conducted by I Dewa Made Suartha in 2010-2011, that the number of customary criminal cases was 29 cases (Suartha, 2015a), consisting of: theft of sacred objects 11 cases, persecution in the temple/place of worship 3 cases, vandalism temples/shrines 1 case, lokika sanggraha/ husband and wife relationship without legal marriage 7 cases, gamia gemana/caring for women without marriage 4 cases, and wrong manners/intercourse with animals 2 cases; all of which have been sanctioned with customary custom initiatives and the local custom/pakraman village. Moreover, they have been sentenced to between 2-3 months for minor crimes and 3-7 years for crimes that are aggravated by general justice in Bali. Based on that, it can be said that custom sanctions are very important in the resolution of customary criminal cases in Bali. It seems that the uniqueness of the people in Bali that every event that occurs will be seen as a positive and negative impact that is thankful to God Almighty. Therefore, it is not surprising to find people living in Bali every day offering certain offerings/rituals to God Almighty whether or not there are cases in their environment.

Cultivating the urgency of implementing customary sanctions in the resolution of cases of customary criminal acts in Bali as mentioned above, is a fundamental reason behind the need for this research. The focus of the topic raised in this study is: "The Urgency of the Implementation of Customary Sanctions in the Resolution of Customary Crimes in Bali".

The problems that arise in this study are:

- (1) Why is the application of custom sanctions so important in the resolution of customary criminal cases in Bali?
- (2) What is the prosecution process that fulfils the community's sense of justice towards the perpetrators in solving traditional criminal cases in Bali?

## **Method**

The research method used in this research is empirical legal research or non-doctrinal legal research also known as sociological legal research (Choudhury, 2017), socio-legal research (Sonata, 2014) which in this research focuses on the operation of law in society (Sunggono, 2003), with an approach statute (statute approach), case approach (case approach), and conceptual approach (conceptual approach) (Petroski, 2013). The data in this study are primary data obtained from sources directly on site. As a source of information or key informants from this research is those who are directly involved in the process of general/formal justice and informal justice/customary institutions in the customary community in resolving customary cases in Bali. To obtain data in this study using primary and secondary data. How to obtain primary data is by in-depth interview techniques (dept interview) with the judges of district courts and customary heads/administrators/traditional village/customary officers and customary community leaders, while secondary data is obtained through document studies at formal/informal institutions which are related. Qualitative data collected in the data collection process will be presented in an in-depth, focused description. In this case, qualitative data verification will be carried out relating to this research topic.

## **Results and Discussion**

### ***The Importance of Imposing Customary Sanctions in the Resolution of Customary Criminal Cases in Bali***

#### ***Existence of Customary Sanctions in Bali***

Sanctions are derived from the Latin word "sanctum" meaning "affirmation" (bevestiging or bekrachtiging) which can be positive in the form of a gift/gift, and can be negative in the form of punishment, so sanctions are an incentive to do or not do. Legal groups usually interpret the term sanctions as negative sanctions or penalties (Surya, 2017). In this connection, Sudarto defines sanctions in the form of criminal sanctions which are threatened by violators of the norm, so that criminal law is declared as a "negative sanctions system." (Surya, 2017) From this, it seems that criminal law is distinguished from other fields of law. Therefore, sanctions in the broadest sense can be classified into three types, namely (Marjuki,

2019):

- a. As a remedy, which is usually found in the field of civil law;
- b. As a fulfillment of the situation, which is usually also found in civil law; and
- c. As a punishment in the broadest sense, including criminal and action

Types of custom reactions (custom correction/custom sanctions) to customary violations in several customary law environments in Indonesia, for example:

- 1) Substitute immaterial losses in various forms, such as being forced to marry a defiled girl;
- 2) Paying customary money to those affected, in the form of magic objects as a substitute for spiritual loss;
- 3) Cover shame, apologies;
- 4) Various corporal sentences to the death penalty;
- 5) Alienation from the community and putting people outside the legal system.

Based on the explanation above, I Made Widnyana stated that customary sanctions or customary reactions or customary efforts or customary corrections are a form of action or effort to restore the balance of the world including magical (sacred) balance as a result of disturbances that constitute customary violation (offense / criminal act), then the term customary sanction is synonymous with the term customary efforts or customary reaction or customary correction. The term customary sanctions used as one of the variables in the title of this paper is to follow the terms affirmed in the 1963 National Law Seminar Resolution, especially in letter F item IV which states: ... does not close the door to prohibitions against acts in living customary law and does not inhibit the formation of the community that was aspired to with "custom sanctions" which are still in accordance with the dignity of the nation, especially in the formation of national criminal law (Devi Salain, Isles, & Wairocana, 2017).

The use of the term custom sanctions is also based on the popularity of their use in today's society. In connection with criminal law as a negative sanction system, as stated by Sudarto, that sanctions are generally imposed by the legal community as a crime or act to stimulate its citizens to behave by the expected legal norms together, so that community peace can be achieved. Sanctions in customary law are not always in the form of material sanctions, but can also take the form of immoral sanctions. Immaterial sanctions in Bali, their application in the form of "customary obligations" to carry out certain traditional rituals, which are believed by indigenous peoples to restore the balance of scale / real nature and Niskala / supernatural. Therefore, it can be said that up to now customary sanctions in Bali as an amplifier to maintain a balanced and harmonious relationship between humans, nature, and God Almighty.

Thus, the ideal pattern of relationships regarding the relationship between humans, nature, and God according to the minds of the Balinese. All of this is intended to create a balance between the human-nature-God relationship, so that a common goal can be achieved, namely the welfare born (the real world/scale) and the inner world (the unreal world/noetic). Therefore it is not wrong if the island of Bali is often dubbed as the island of the gods because every time in Bali there will be found a community offering (worship / yadnya) to the Almighty / God Almighty. The Balinese view that every event / event will certainly lead to positive and negative things all of which are the will of God to be grateful for a yadnya in the form of "traditional obligations" in the form of ceremonies/offerings as a reaction to the custom/customary efforts/sanctions customs to maintain and maintain the balance between man-nature-God. In safeguarding and maintaining the ideal pattern of relationship between man and nature, God is guided by the values of propriety in the form of customary arrangements/rules/ regulations set by the customary community. If an event/event that results in disruption of the balance of indigenous peoples as a violation of custom is what then causes a reaction of the custom/customary efforts/imposing customary sanctions on the perpetrators/their families (Rideng, 2019).

For example, in the last few years (2009-2015), in Bali, there has been an increase in customary criminal cases in the form of theft of sacred objects in Pura (a place of worship for Hindus). In this case, even though the culprit has been subjected to criminal sanctions that have been aggravated by the District Courts in Bali, the community remains dissatisfied because the judge has not linked traditional sanctions which can restore the disturbed balance expected by the custom community. The importance of customary sanctions can also be proven that the community does not care about court decisions that have imposed serious crimes on perpetrators (customary criminal acts), but customary sanctions continue to be implemented with initiatives and both material and immaterial costs borne by the community itself. Because the customary reaction/customary sanctions have implications for the physical and psychological conditions of the indigenous peoples concerned.

Based on the explanation above, customary sanctions have an important role in the lives of indigenous peoples in Bali, because it is not only customary violations that the community is subject to customary sanctions, even against customary sanctions often imposed by customary sanctions even though the perpetrators have been convicted by the general court.

The traditional sanctions mentioned above, are not much different from the traditional sanctions that were once used in Bali by using certain terms, namely:

- 1) Prayascitta / pamarisuddan (traditional village cleansing ceremony / pakraman);
- 2) Dedosan (fines);
- 3) Akaksama / lumaku / ngidih Olas / ngihih pelih (apologise);

- 4) Metirta gemana / metirta yatra (custom sanctions for priests / sulinggih);
- 5) Meselong (banished from the kingdom until leaving Bali);
- 6) Merarung / mapulang lover (drowned in the sea);
- 7) Meblagbag (tied and then guided around a customary/expert village);
- 8) Katundung (evicted from custom / pakraman villages);
- 9) Kerampag (his property is confiscated);
- 10) Kasepekang (excommunicated, ie not invited to speak and not get the services of traditional villages / pakraman);
- 11) Kanorayang/kaelad (suspended temporarily as manners/members of the Banjar/traditional village) and others.

In the development of customary sanctions/customary reactions/customary efforts, then called: pamidanda, which is classified/grouped into tri danda/tri pamidanda which includes:

- 1) Artha danda is a legal action in the form of a fine;
- 2) Danda soul is a legal action in the form of physical and spiritual suffering for perpetrators of traditional violations (physical and psychological punishment); and
- 3) Sangaskara danda is a legal action in the form of a religious ritual to restore the magical balance (supernatural).

From the explanation above, it can be understood that sanctions are always followed by law and vice versa; because sanctions are an amplifier/guarantor/coercion for compliance with the law.

### ***Implementation of Customary Criminal Law in Bali***

Customary criminal law is a collection of methods/regulations in customary law regarding traditional violations. The term customary criminal law used in the customary law library generally varies greatly and is highly dependent on the context of the author, such as customary law, criminal customary law, customary criminal law, customary law violation and so on.

Regarding custom violations, B. Ter Haar stated as follows (Roestamy & Martin, 2019):

in small legal communities it seems that what is considered a violation (delict) is any disruption of one aspect (eenzijdig) to the balance and every collision of the one in terms of material goods of material life and immaterial of an individual; or of many people who are a single unit (a group). This action causes a reaction which is determined by the nature and size of customary law as a custom reaction (custom reactie), because of the reaction where the balance can and must be restored (mostly through payment of violations in the form of goods or money).

According to R. Soepomo (Prasetyo, 2019), in the customary legal system, all actions that are contrary to customary law are illegal and customary law recognises efforts to improve the law. In line with the description of Ter Haar and Soepomo above, Bushar Muhamad, as quoted by I Made Widnyana, provides a definition of customary offense as a one-sided act of an individual or association, threatening or offending or disturbing the balance and life of a material nature or immaterial, to individuals or society in the form of unity. Such actions or actions will result in an custom reaction. The statement above is in line with Hilman Hadikusuma's statement, that customary law is not the result of the rational, intellectual and liberal mindset, such as Western ways of thinking, but the result of communal, magical, and religious or communal cosmic thoughts. This mindset is reflected in the Customary Criminal Law, if someone commits an offense, so that people's lives become unbalanced, then not only that person must be subjected to legal consequences, but also his relatives share responsibility. Therefore what must be maintained is the balance of people's lives. If the balance is disturbed, then the community legal officers must try to restore the balance (Mokoginta, 2019).

Van Vollenhoven also affirmed this, that Bali is an area of Indonesia that has its traditional legal style that is different from other regions. The specificity of customary law in Bali as a customary law circle is as a result of the influence of Hinduism, where Hindu elements are closely intertwined with the life of traditional law. Customary Law and Hinduism in Bali, in reality, live side by side and complement each other. From this fact, it can be assumed that adherence to customary law in Bali, is not solely due to the content and nature of the law, but more than that, because of the existence of sacred / sacred elements in the sense of being in accordance with the view of life based on the teachings of Hinduism.

Starting from the definition of a customary offense above emphasises the existence of unilateral actions of individuals or groups that cause disruption of balance and life in society, both material and immaterial. Somewhat different from the understanding of the scholars above, Hilman Hadikusuma sees the "incident" can also cause customary offense, besides the actions of individuals or groups. In his book entitled "Customary Criminal Law", states that the definition of the customary offense is all acts or events that are contrary to propriety, harmony, order, security, a sense of justice and legal awareness of the community concerned. One thing that is very important to note from the formulations/definitions of the violation of custom above, is that there is an element of disturbing balance in people's lives as an element of the offense. For this reason the imposition of customary sanctions is a necessity in the resolution of customary criminal cases in Bali, because the cosmic and religious views of indigenous people will feel uneasy/peaceful (Santhi) and always feel guilty before customary efforts/application of customary sanctions in each event/ events as a result of violations of custom. The purpose of implementing customary sanctions is to restore the balance of nature that is shaken/disturbed due to customary violations. In principle, the application of

customary sanctions is as a legal action and is not intended to suffer/retaliate for acts of customary violation, but rather is intended as a means to restore balance/harmonisation in the lives of indigenous peoples, both in real-world life (scale) and the unreal world / supernatural (Niskala) in accordance with the philosophy of "tri hita karana", namely: human relations with humans, human relations with nature, and human relationships with God.

Regarding this matter, Nyoman Serikat Putra Jaya, in his book entitled: "The Relevance of Customary Criminal Law in the Renewal of National Criminal Law", stated expressly that; Customary sanctions have the function to restore the balance between the natural world and the unseen world. And in Bali, customary sanctions have an important role to restore the balance ".

### **Prospects of Criminalisation That Fulfil the Sense of Justice of the Community in the Resolution of Customary Criminal Cases in Bali**

#### ***The Pattern of Applying Customary Sanctions in Customary Criminal Law in Bali***

The application of customary sanctions is one of the customary reactions or customary efforts against violations of customary rules. Customary sanctions are intended to restore the disturbed balance due to customary violations. Like sanctions in general, custom sanctions are always accompanied by an event or act that must be accounted for by the offender and his family. Therefore, in addition to customary law known material sanctions are also sanctions immaterial. In Bali immaterial sanctions in the form of certain traditional rituals to neutralise or restore the balance or harmony of the scale/real nature and the realm of noetic/supernatural as a result of the violation of these customs.

In reality, the judges of the District Court in Bali did not understand the existence of the customary law community in Bali, so the decision did not fulfil the sense of justice for the indigenous people. Likewise, the national legal system also does not comprehensively accommodate problems that are fundamental and in particular, relating to the patterns of regulation of indigenous peoples and justice. So it is not surprising that the resolution of customary criminal cases has almost always been deadlocked when using a formalistic approach, such as the Criminal Code (KUHP). The uniqueness of a community in addition to being assessed from the culture in the context of customs is also heavily influenced by "local wisdom" which specifically has a plus/excess value in solving all the problems that are around it.

This was emphasised again by Barda Nawawi Arief in his book: "Rampe Interest in Criminal Law Policy", that indigenous peoples in Bali have a strong cultural system supported by religious values. Customary criminal law that exists and lives in the reality of society, is

much influenced by elements of Hinduism. This fact has also been said by Hazairin, that customary law and Hinduism in Bali are an inseparable unity as a result of the influence of Hinduism so strongly into customs. The consequence of interrelations between customary law and religion is customary law which is not only reinforced by outward sanctions but also inner.

According to I Ketut Mudana, Former Bendesa custom /Prajuru custom / Head of custom from Custom Village / Pakraman Samprangan Gianyar, said:

the role of traditional sanctions is very important to restore the balance of the world born with the inner world as a result of traditional violations and educate the perpetrators / their families/others so as not to repeat/imitate the actions of the perpetrators.

He further said,

that if customary sanctions had been implemented by the perpetrators / their families/communities, then the community would automatically accept the existence of the perpetrators / their families in the community concerned.

In line with some of the opinions above, Ida Pedanda / Priest / Saint Griya Cebang Gianyar (also a former judge and Chief of the High Court), said that customary sanctions for indigenous peoples in the archipelago are very important to restore the balance of people who are disturbed by violations custom carried out by perpetrators of customary criminal acts. Because customary sanctions not only contain reality values (scale), but also contain world values that are not real (magical/Niskala) to melt/eliminate the feeling of being uncomfortable/dirty/lethargic/sinful (in Bali there are regions/places/ certain objects are purified, such as temples/places of worship of Hindus) as a result of violation of custom (custom offense).

The settlement of the customary criminal case above can have legal and social implications, namely: "juridical implication" the defendant is only charged with ordinary theft, in the case of stolen objects that are of infinite value and difficult to measure temporally / empirically, because they contain magical/sacred values. This causes injustice for victims and indigenous people / Hindus in Bali. While "social implications" will emerge, grow, and develop, because the case of theft of holy objects is oriented to aspects of religion, customs, social, economic, tourism and others. Therefore, the defendants of customary criminal acts are dealt with in addition to a criminal penal policy / criminal law as well as a non-criminal policy.

In the literature study on the documents related to this research, it turns out that not only in

Bali customary sanctions play an important role in resolving customary criminal cases but in other regions throughout Indonesia. Even the imposition of customary sanctions has received recognition from the Supreme Court in the criminal justice process relating to local customs/customs of indigenous peoples (customary law). This can be known in the decision of the Supreme Court Number: 1644 /K/Pid/1988 dated May 15, 1991 jo the decision of the Supreme Court Number: 984 K/Pid/1996 dated January 30, 1996, which states: "a person who commits an act, which according to law who live (traditional law) in the area is an act that violates customary law, namely '*custom delict*'". The customary leader or traditional leaders give a customary reaction (custom sanctions) to the perpetrator. The customary sanction has been carried out by the convicted person, so he cannot be filed again ("for the second time") as a defendant in the trial of the State Judiciary ("District Court") with the same indictment, violated customary law and was sentenced to prison according to the provisions of the Criminal Code jo (Article 5 paragraph (3) b of Act No. 1 of 1951 Emergency). In such circumstances, the transfer of case files and Prosecutor's Claims in the District Court must be declared 'unacceptable' (Niet Ontvankelijk Verklaard). Thus, the Supreme Court of the Republic of Indonesia until now still respects the decision or the determination of customary leaders or traditional leaders who have imposed customary sanctions on traditional law violators.

### ***Criminal Prospects in the Criminal Code 2014/2015***

Regulatory policy in criminal law is a reflection of the political ideology of a nation, where the law develops and is a very important thing, that the entire legal structure rests on a sound and consistent political outlook. It can be calculated, that the Criminal Code of individual Western European countries is different from the Criminal Code in Eastern European countries with a socialist political outlook. The Republic of Indonesia has a political view based on Pancasila, while the view of criminal law is closely related to the general view of the law, about the state and society, and about crime. Dogmatically, it can be said that criminal law has three main issues, namely:

- a. Prohibited acts;
- b. People who carry out prohibited acts, and
- c. The criminal is threatened with violating the prohibition.

Packer also raised three main problems in criminal law, stated (Packer, 1968):

*The rationale of the criminal law rest on their concepts: offense, guilt, and punishment. Before turning to the concept and function of each, it may be useful to consider the relationships among them. These three concepts symbolise the three basic problems of substance (as opposed to procedure) in the criminal law : (1) what conduct should be*

*designated as criminal; (2) what determination must be made before a person can be found to have committed a criminal offense, and (3) what should be done with persons who are found to have committed criminal offense.*

Packer argues that the rationality of criminal law is based on 3 (three) concepts, namely Offense, Guilt, and Punishment. These three problems are the main problems in criminal law, namely: 1) what behaviour can be qualified as a crime?; 2) what criteria must be met to be able to say that someone is evil?; and 3) what should be done to someone who is known to have committed a crime?

The three main problems raised above (Sudarto and Packer), to reform criminal law are problems that are not easy to solve because the three are interrelated and each has its problems. The first main problem, involving crime, violation of the law (offense) or acts that are prohibited in criminal law. Included in this issue is the problem of criminalisation and decriminalisation with all its requirements. The second main problem, namely guilt, and the third problem, are criminal and criminal sanctions which are threatened or will be imposed on each violator. This problem is very dilemmatic, given that criminal acts always result in individual losses and social losses, while the problem of punishment, besides individual deterrence, turns out that there are still other things that determine the success of criminal proceedings, such as reform of the offender and retribution and other social aspects that are not may be forgotten, namely concerning general prevention, protection of society, justice, and reparation.

In the National Criminal Law Renewal Symposium organised by the National Law Board of the Indonesian Ministry of Justice and the Faculty of Law of the University of Diponegoro on 28-30 August 1980 in Semarang, specifically regarding the problem of criminalisation and decriminalisation, reported as follows:

- a. Changes in values, attitudes, and patterns of community behaviour also cause changes in criminological views on several specific acts in the life and livelihood of the community.
- b. The problem of criminalisation and decriminalisation of an act must be following the criminal politics made by the Indonesian nation, that is, to what extent the act contradicts or is not in line with the fundamental values prevailing in society and is deemed appropriate or inappropriate by the community to maintain public order.
- c. To determine an act as a criminal offense, general criteria need to be considered as follows:
  - 1) Whether the act was disliked or hated by the community because it was detrimental, caused victims or could bring victims;
  - 2) Is the cost of criminalising balanced with the results to be achieved? This means that the costs of making laws, overseeing and enforcing the law, the burden is borne by the

victims and the perpetrators themselves must be balanced with the legal order situation to be achieved;

- 3) Will it increase the burden on law enforcement officers so that there is an imbalance in the ability and duty burden, or obviously cannot be carried out by the capabilities of law enforcement officers?;
- 4) Does the act hinder or hinder the ideals of the Indonesian people, namely the realisation of a just and prosperous society, so that it is a danger to the safety of the community?; and
- 5) Aside from the above criteria, another criterion is still needed to declare an act that is appropriate or despicable or improper.

Bemmelen, as quoted by Roeslan Saleh (Ariyanto, Mulyadi, & Setyadi, 2018), believes that generally in addition to morals, behaviour can be convicted if it is harmful or harmful or at least potentially damaging or detrimental (for example in an experiment) (Amdani, 2014). Following Bemmelen's opinion, Roeslan Saleh stated:

It might be emphasised that in determining criminal, both the destructive (detrimental) and immorality of something acts to play its role. In an event the nature of the damage and the possibility of damage or loss that plays a major role while in other events, the same immoral nature. This results in that no one religion has an absolute meaning.

In determining whether an offense is appropriate or not, the main legal basis in the Criminal Code is the written law (Marbun, 2014). So starting from the principle of legality in a formal sense, as affirmed in Article 1 paragraph (1) of the Criminal Code that applies so far (the Dutch Wvs enacted in Law No. 1946 in conjunction with Law No.73 of 1958). Unlike the case with the principle of legality contained in Article 1 paragraph (3) of the Draft Law of the 2014/2015 Criminal Code which extends its formulation materially, emphasising that the provisions of Article 1 paragraph (1) do not reduce the meaning of living law that exists in the reality of society.

Thus, the Draft Law of the Criminal Code (RUU KUHP) of 2014/2015, in addition to the law (written law) as a formal benchmark criterion, also provides an opportunity for unwritten legal sources, as a basis for determining the criteria to be deserved for an act. However, it should be noted that this only applies to acts that are not regulated in the Criminal Code or to offenses that have no counterpart in the Criminal Code. Departing from the understanding of the basis for the conviction of an act, then this concept also determines that a criminal act, in essence, is an act that is against the law, both formally and materially (Jaya, 2016). The establishment can be seen from the several provisions of the 2014/2015 Penal Code draft bill as follows:

#### Article 11

- (1) A criminal offense is an act of doing or not doing something by statutory regulations declared as an act that is prohibited and threatened with the crime.
- (2) To be declared a criminal act, in addition to the said act being prohibited and threatened with criminal acts by laws and regulations, it must also be against the law or contrary to the legal awareness of the community.

#### Article 12

In considering the law to be applied, the judge as far as possible imposes justice above legal certainty.

In the provisions of Article 11 paragraph (2) of the Criminal Code Bill above, it is clearly stated that every criminal act is always considered contrary to the law (Suartha, 2015). So it can be said that the nature of breaking the law is an absolute element of a crime. Although the element of unlawfulness is not explicitly mentioned in the formulation of the offense, the offense must always be considered against the law. The formal measurement must still be tested materially on the offender, whether there is a justification or not, and whether the act is contrary to public legal awareness (Abdullah, 2015).

With the inclusion of the provisions in Article 1 paragraph (3) of the Criminal Code Bill above, it means that the Criminal Code Bill has adhered to the teachings of material unlawful nature, both in positive and negative functions. The teachings against formal law determine that an act is against the law if it is against written law or the law. While the teachings against the material nature of law, determine that an act against the law is not only contrary to written law or law but also contrary to the principles of law that live in society.

Thus, customary criminal law can be a source of positive law and negative source of law, namely:

- a) A positive source of law, in the sense of customary criminal law (custom sanctions), can be the legal basis for the examination of cases in the District Court;
- b) Negative legal sources, in the sense that the provisions of customary criminal law (custom sanctions) can be a justification, reasons to alleviate or aggravate the crime.

Starting from the description above, the judges in the future need not hesitate in examining, adjudicating, and deciding customary criminal cases by imposing custom sanctions as additional crimes or all customary sanctions as principal crimes. This is also following Article 5 paragraph (1) of Law Number 48 the Year 2009 concerning Judicial Power, which states:



"Judges and constitutional judges must explore, follow, and understand the legal values and a sense of justice that lives in society".

## **Conclusion**

The importance of applying customary sanctions in resolving customary criminal cases in Bali is a necessity, because customary sanctions in the form of customary obligations in the form of certain rituals are seen by the community as customary efforts that can restore the balance/harmony of the disturbed/disturbed indigenous people, as a result, there is a violation of custom.

The prospect of criminal prosecution in the resolution of customary criminal cases in Bali is that judges/courts need not hesitate to impose customary sanctions as criminal sanctions or at the same time customary sanctions as principal crimes because they are following Article 5 paragraph (1) of Law no. 48 of 2009, Law No.1 Drt of 1951, Theory of unlawful nature, Extensive interpretation methods, and Article 1 paragraph (3), 11, 12, 2014/2015 Criminal Code Bill.

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