

The Synergy of Customary Criminal Law and National Criminal Law: Orientation Towards Criminal Law Pluralism

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Abstract

The synergy between customary criminal law and national criminal law is an important orientation in criminal law reform. This can be seen from the substance of the New Criminal Code which emphasizes the importance of acknowledging the existence of customary criminal law so that aspects of legal pluralism are implemented. This study aims to analyze aspects of the notion of pluralism of criminal law in Indonesia as well as to describe the new orientation of Indonesian criminal law which emphasizes the synergy between customary criminal law and national criminal law. This research is a juridical-normative legal research using a conceptual and statutory approach. The results of the study confirm that the development of the idea of legal pluralism in Indonesia has implicitly been going on for a long time and has even been discussed in a limited way at the BPUPK-PPKI session. After the ratification of the New Criminal Code, the idea of criminal law pluralism has increasingly come to the fore by providing recognition of customary criminal law which emphasizes that after the passage of the New Criminal Code there has been a change in the orientation of legal pluralism which leads to aspects of public law, namely criminal law pluralism. orientation and synergy between national criminal law and customary criminal law based on legal pluralism also requires synergy and precise division of tasks between national law and customary law enforcement officials.

1. Introduction

The idea of criminal law pluralism was one of the ideas that strengthened from the formulation to the ratification of Law no. 1 of 2023 concerning the Criminal Code (New Criminal Code). Although the idea of legal pluralism is not a new idea in Indonesia, relating to criminal law pluralism is an interesting discussion because in general, with reference to the principle of legality, criminal

law is implemented in unification.(Lisma 2019) The unification aspect of criminal law emphasizes that criminal law, from its substance to the enforcement process, is carried out by a legal system coordinated by the state so that there is only one material and formal criminal law that is implemented in society.(Nurchaesar and Arafat 2021) Efforts to carry out unification of criminal law based on the application of criminal law singly in accordance with the characteristics of state law are intended to guarantee legal certainty as well as prevent the arbitrariness of law enforcement officers in the process of enforcing criminal law. The emergence of the idea of pluralism of criminal law in the New Criminal Code can be seen from the provisions of Article 2, especially Article 2 paragraph (1) of the New Criminal Code which provides space and facilitates the enactment of customary criminal law to be enforced jointly with the national criminal law which is substantially formulated in the New Criminal Code.(Kridasakti, Majid, and Yuningsih 2022) Efforts to facilitate customary criminal law in the New Criminal Code are actually new ideas contained in the New Criminal Code because the previous Criminal Code still strictly carries out the unification of criminal law.(Flora, Disantara, and Thuong 2023)

This indicates that the passing of the New Criminal Code in 2023 has changed the orientation of criminal law in the future from unification to one based on criminal law pluralism. The orientation of criminal law pluralism as contained in the substance of the New Criminal Code deserves to be studied because it has provided formulations and "new ways" of criminal law by applying not only national criminal law, but also facilitating the enforceability of customary criminal law.(Suhariyanto 2018) This study aims to analyze aspects of the idea of criminal law pluralism in Indonesia as well as describe a new orientation towards Indonesian criminal law that prioritizes synergy between customary criminal law and national criminal law. The study of legal pluralism in Indonesia is actually a study that is often carried out because culturally, Indonesia also recognizes non-state laws that already exist in society. In general, the study of legal pluralism in Indonesia is often carried out in the private sphere or other domains outside the criminal law.(Sahyana 2020) This is because criminal law oriented to the characteristics of public law is considered commonly carried out on the basis of national criminal law which refers to the principle of legality. From various studies on legal pluralism in Indonesia, there have been three previous studies that discuss legal pluralism, including: first, a study conducted by Disantara (2021) which discusses the existence of the application of legal pluralism as a solution to face the era of legal modernization. The novelty of this research from Disantara (2021) is that the complexity of life in the modern era has relevance to the application of legal pluralism to regulate complex human life.(Disantara 2021) Second, research conducted by Fitri (2022) which analyzes legal pluralism in the field of marriage law in Indonesia. The novelty of the research conducted by Fitri (2022) is the need for formulation and reassessment of pluralism in the field of

marriage law because of legal pluralism in the field of marriage, one of which makes it difficult in the aspect of law implementation and enforcement.(Arkisman 2022) Third, research conducted by Nurlaili, et al. (2023) which discusses legal pluralism in the field of inheritance law. The novelty of the research conducted by Nurlaili, et al. (2023) is that the understanding of inheritance law must be comprehensive, because with the application of legal pluralism in the field of inheritance law, the existence of customary inheritance law and faith-based inheritance law is very strong so it needs to be understood comprehensively.(Wirawan, Fadhillah, and Puspitaningrum, Silvia Diah 2023) From the three previous studies, there has been no specific study of criminal law pluralism which confirms that this research is an original research.

2. Research Method

This research focuses on aspects of the idea of criminal law pluralism in Indonesia as well as describes a new orientation towards Indonesian criminal law that prioritizes synergy between customary criminal law and national criminal law is a juridical-normative legal research. Juridical-normative legal research emphasizes the doctrinal aspects of a legal analysis that promotes coherence between principles, theories, concepts, and legal norms.(A'an Efendi 2015) The primary legal materials used are the 1945 NRI Constitution and the New Criminal Code, the secondary legal materials used are: journal articles, books, and other references that examine legal pluralism and criminal law reform, non-legal materials are language dictionaries. The approach used is a statutory and conceptual approach.

3. Results and Discussion

The Idea of Criminal Law Pluralism in Indonesia: What Does It Look Like?

The idea of legal pluralism is not a new idea in the context of legal science. Brian Z. Tamanaha highlighted how legal pluralism is related to the community's efforts to present trully justice. This context of fair justice can be fulfilled if there are norms or rules that are used as guidelines for community behavior are norms or rules that are in accordance with the legal ideals of the community. It is in this context that the idea of legal pluralism is actually a necessity. Werner Menski in further developments highlighted the existence of legal pluralism with three norms, each of which exists according to its own system which includes: norms or rules formed and made by the state, social norms or rules (laws that apply in society, including customary law), and religious norms or rules derived from teachings and beliefs in society.(Menski 2006) From Werner Menski's view above, the enforceability of more than one legal system is one of the main features of legal pluralism. The enactment of more than one legal system shows the way for society to explore and seek aspects of justice from certain norms or rules that are considered in line with the legal ideals of society.(Suryahartati et al. 2021)

Soetandyo Wignjosoebroto emphasized that the existence of legal pluralism occurs because of the relationship between each different norm or stands independently.(Wignjosoebroto 2014)

This aspect of relations is important so that legal pluralism does not seem to establish each rule or norm individually without a harmonious relationship between applicable norms. Soetandyo Wignjosoebroto even added that legal pluralism that only runs each norm or rule independently is a pseudo-legal pluralism. Soetandyo Wignjosoebroto's view is in line with the conception of legal pluralism as stated by John Griffiths who suggests that relations between rules or between norms are important in legal pluralism. This harmonious relationship between rules or between norms is what John Griffiths later used as the basis for classifying the conception of legal pluralism, namely between the strong and weak.(Prasetio 2021) Strong legal pluralism is characterized by harmonious relations between rules or between norms so that even though it runs according to the system and provisions independently, between rules or between norms each other supports its existence in realizing the orientation of justice for society.(Swenson 2018) In contrast to strong legal pluralism, weak legal pluralism is characterized by the absence of harmonious relations between rules or between norms so that they tend to run independently.(Diala 2021) In fact, in weak legal pluralism there are conflicts between rules or between norms that have implications for legal uncertainty in society, including often people who base their activities outside the context of state law to get intimidation and even criminalization.(Flambonita 2021) This is common in customary law communities that base their activities on customary law which due to the conflict between customary law norms and national legal norms, the superiority of national law makes customary law cannot be implemented which has implications for customary law communities which are often criminalized because they are considered disobedient to the provisions of state law.(B. Salinding 2019)

Referring to the views of John Griffiths above, at least efforts to realize legal pluralism, especially strong legal pluralism are based on two aspects, namely the internal aspect of a rule or norm and the external aspect, namely how other rules or norms have a harmonious relationship with other rules or norms.(Lewis 2023) In the internal aspect, legal awareness and internalization of a norm are important so that the enforceability of a norm or rule can be proven in real life in society. Efforts to internalize this norm are especially mandatory for customary law norms and religious law norms because substantively these norms are carried out voluntarily by the community.(Campbell 2021) This is certainly different from the legal norms of the country which has various devices and apparatuses that have actually internalized routinely and systematically. In the external aspect, efforts to establish harmonious relations with other rules or norms are important aspects where this can only be realized if there is an awareness that each norm does not stand alone. Judging from the existing substance, state legal norms must be a

means of integration for other norms and be able to facilitate the enactment of other norms other than state legal norms.(Dicky Eko Prasetyo Adam Ilyas Felix Ferdin Bakker 2021)

From the idea of legal pluralism above, in the Indonesian context legal pluralism is actually an important part of the national legal system. Historically, recognition of legal pluralism in Indonesia can be traced to debates in the BPUPK and PPKI sessions where both Moh. Yamin and Soepomo both argued that in addition to state law, laws that live in the community such as customary law and religious law must also be shaded in an independent Indonesian state later. Moh. Yamin even proposed the establishment of Balai Agung (which was later consensus named the Supreme Court until now) whose function is to review laws and constitutions if they conflict with the substance of customary law and religious law.(Kusuma 2004) Even if Moh's view. Yamin was not accepted, but the existence of such views in the BPUPK and PPKI sessions implicitly showed that at the establishment of an independent Indonesian state, the founding leaders had recognized that in empirical reality in society there had been legal pluralism. Constitutionally, the idea of legal pluralism in Indonesia is also supported by constitutional provisions, namely the 1945 NRI Constitution, especially in three aspects, namely: first, the aspect of the provisions of Article 1 paragraph (3) of the 1945 NRI Constitution which affirms that Indonesia is a legal state without certain frills. The assertion of Indonesia as a state of law actually smoothed the provisions of the 1945 Constitution before the amendment which in its explanation mentioned Indonesia as a state of law with the characteristics of a rechtsstaat based on the continental state of law.

The affirmation of Article 1 paragraph (3) of the 1945 NRI Constitution which affirms that Indonesia as a state of law without certain frills also confirms that the Indonesian state of law is a state of Pancasila law which has Indonesian characteristics and identity, one of which is legal pluralism.(Prasetyo et al. 2021) Therefore, the affirmation of Article 1 paragraph (3) of the 1945 NRI Constitution which affirms that Indonesia as a legal state without certain frills emphasizes the existence of legal pluralism as one of the national legal personalities. Second, the provision of Article 18B paragraph (2) of the 1945 NRI Constitution which affirms the recognition of indigenous peoples and their traditional rights in the form of customary law is an affirmation that in addition to national law, customary law also occupies an important position and is recognized for its enforceability by the state. This confirms that Article 18B paragraph (2) of the 1945 NRI Constitution recognizes the position of customary law in addition to positive law in Indonesia. Third, Article 29 paragraph (2) of the 1945 NRI Constitution also substantively provides space for the enactment of religious law in addition to state law. The right to religion as part of the constitutional rights of citizens is attached together with guarantees that the implementation of religious law in Indonesia is recognized and facilitated.(Aswandi and Roisah 2019)

Referring to the constitutional argument above, it can be concluded that explicitly the Indonesian constitution, namely the 1945 NRI Constitution recognizes legal pluralism as part of the characteristics of the Indonesian national legal system. In practice in Indonesia, legal pluralism is commonly practiced in the fields of customary law and religious law partially. This is as described by John Griffiths as weak legal pluralism. The practice of legal pluralism in Indonesia can be said to be still weak considering the position of customary law which has not received a legal umbrella in the form of an independent Customary Law Law. In addition, in the context of religious law, only private aspects of religious law can be applied independently by religious law, such as arrangements regarding inheritance, marriage, grants, and several other private aspects.(Hikmah 2022) Public aspects such as criminal law have not yet gained space for application based on the conception of legal pluralism. The idea of criminal law pluralism is strengthened when the New Criminal Code is passed in 2023, which in Article 2 paragraph (1) of the New Criminal Code is affirmed regarding the recognition of the existence of customary criminal law as part of the law that lives in the community. The regulation of customary criminal law in the New Criminal Code is a progressive arrangement, especially associated with the idea of legal pluralism. In fact, before the passing of the New Criminal Code, legal pluralism was always synonymous with the field of private law. After the passing of the New Criminal Code, the conception of legal pluralism was expanded and applied in aspects of public law in this case customary criminal law. The regulation regarding the recognition of customary criminal law in the New Criminal Code is at least a revolutionary legal policy because it makes progressive changes regarding the conception of legal pluralism which initially in Indonesia could only be applied in the field of private law.

The regulation on criminal law pluralism after the enactment of the New Criminal Code has aspects of updating the conception of legal pluralism, including: first, the recognition of customary criminal law through the New Criminal Code actually emphasizes the existence of legal pluralism in Indonesia which can not only be carried out in the field of private law, but can also be carried out in the field of public law, such as customary criminal law. Second, the recognition of customary criminal law through the New Criminal Code further strengthens the direction of national criminal law reform directed towards strong legal pluralism. This means that recognition of the existence of customary criminal law does not only stop at the recognition and implementation of customary criminal law, but also includes how to maintain and establish a harmonious relationship between national criminal law and customary criminal law. Third, strengthening legal pluralism after the enactment of the New Criminal Code by recognizing the existence of customary criminal law actually opens an orientation to establish synergy and harmony between criminal law enforcers, both national criminal law and customary criminal law. Synergy

between law enforcers is important so that criminal law enforcement practices, both national and customary, can bring aspects of justice to the community.

Based on the results of the analysis above, the development of the idea of legal pluralism in Indonesia has been implicit for a long time and has even been discussed in a limited way in the BPUPK-PPKI session. In further practice, legal pluralism is given space with its application to the private aspect. After the passing of the New Criminal Code, the idea of criminal law pluralism increasingly emerged by giving recognition to customary criminal law. Recognition of customary criminal law confirms that after the passing of the New Criminal Code there is a change in the orientation of legal pluralism which leads to aspects of public law, namely criminal law pluralism.

The Synergy of Customary Criminal Law and National Criminal Law: Orientation Towards Criminal Law Pluralism

One of the orientations of the formulation of the New Criminal Code is to facilitate the recognition of customary criminal law as part of the criminal justice system. Recognition of customary criminal law is important because the existence of customary criminal law is actually in line with the existence of customary law communities that existed before Indonesia became independent.(Priambodo 2018) The existence of this customary criminal law became "suspended animation" before the enactment of the New Criminal Code because although customary criminal law is believed to be valid by the community, customary criminal law is considered to lose its validity when there is a conflict of norms with the national criminal law. National criminal law is considered superior to customary criminal law. The superiority of national criminal law over customary criminal law in the context of legal pluralism gives rise to weak legal pluralism relations. There are three arguments that assert that there is an unequal relationship between national criminal law and customary criminal law so as to make the relationship of legal pluralism weak, which includes: first, the lack of juridical recognition of the enforceability of customary criminal law makes customary criminal law stand "between there and nothing".(Evelyna Hasibuan and Ringkuangan 2021) This is because even though customary criminal law is still applied in the community, it is often ignored when it comes into contact with national criminal law. This relationship places customary criminal law as a secondary criminal law under the shadow of national criminal law as primary criminal law.(Eka and Dodo 2021) Second, it has not been recognized that customary criminal matters are influenced by views on the concept of legal pluralism which is still conventional. In general, there are two views of legal pluralism, namely conventional and progressive.(Nugroho 2021) ‘

Conventional legal pluralism only asserts that legal pluralism can be applied to the substance of private law. This means that at the level of public law, legal pluralism becomes difficult to implement. In the progressive view, legal pluralism

actually emphasizes that almost all fields of law can be run based on the perspective of legal pluralism. This confirms that in addition to the field of private law, the field of public law can also be applied using the conception of legal pluralism. The formulation of a new criminal code that facilitates recognition of customary criminal law actually leads to a progressive understanding of legal pluralism. This means, in the perspective of legal pluralism, both the fields of private law and public law can be applied together. This can be seen from the application of customary criminal law in tandem with modern criminal law so that it will give rise to a strong practice of legal pluralism where customary criminal law and modern criminal law are implemented simultaneously.(Nurita 2022) Third, the weak position of customary criminal law before the enactment of the New Criminal Code can be seen from the weak regulations that discuss customary law communities even until 2023 there is no specific regulation regulating customary law communities. The absence of a law that specifically regulates customary law communities results in the unrecognition of the position of customary criminal law even though factually customary criminal law has been implemented in the community.

From the three arguments that show that the weak position of customary criminal law before the formulation of the New Criminal Code shows that the orientation of the New Criminal Code is to recognize customary criminal law as part of the law in force in society. The recognition of the existence of customary criminal law in the New Criminal Code also further emphasizes that the direction of criminal law reform in the future is the implementation of criminal law pluralism, especially to establish synergy and harmonious relations between customary criminal law and national criminal law. An orientation that emphasizes the synergy between customary criminal law and national criminal law actually leads to a progressive legal pluralism view that emphasizes the synergy between customary criminal law and national criminal law as a means to provide a sense of justice for the community.(Ledvinka 2020) The following is a table of criminal law orientation after the passing of the New Criminal Code.

Table 1. The Pluralism Orientation After the Passing of the New Criminal Code

No	Parameters	Before of the New Criminal Code	After the New Criminal Code
1.	Recognition related to the existence of customary criminal law	Not yet recognized	It has been recognized under the provisions of Article 2 of the New Criminal Code.
2.	The Nature of national criminal law	Centralized or unification of the Criminal Code	Legal pluralism, in addition to those contained in the New Criminal Code, also recognizes customary law norms that apply in the community.

3.	Characteristics of legal pluralism	None	It is progressive, meaning that the fields of public and private law can be jointly run based on the conception of legal pluralism.
4.	Principles of legality	Formal	Material.
5.	Penal theory	More emphasis on punishment in retaliation for criminal acts that emphasize sanctions	Emphasizing retributive theory which then emphasizes restorative justice aspects so that criminal sanctions are not the only orientation in punishment because the important aspect in punishment is recovery for victims.

(Source: Processed by Author)

From the table above, it can be seen that the orientation of national criminal law after the enactment of the New Criminal Code is to emphasize efforts to ensure synergy between national criminal law and customary criminal law so as to reinforce the practice of legal pluralism in the field of criminal law. The orientation and synergy between national criminal law and customary criminal law are carried out proportionally and side by side, which means that between national criminal law norms and customary law norms are carried out in accordance with their respective provisions.

In addition, the orientation and synergy between national criminal law and customary criminal law based on legal pluralism also requires synergy and precise division of tasks between national law enforcement officials and customary law enforcement officials. The role of law enforcement officials between national law and customary law is important to maintain legal pluralism can run optimally in conjunction with law enforcement practices by law enforcement officials.

4. Conclusion

The development of the idea of legal pluralism in Indonesia has been implicit for a long time and has even been discussed in a limited way in the BPUPK-PPKI session. In further practice, legal pluralism is given space with its application to the private aspect. After the passing of the New Criminal Code, the idea of criminal law pluralism has increasingly surfaced by giving recognition to customary criminal law. Recognition of customary criminal law confirms that after the passing of the New Criminal Code there is a change in the orientation of legal pluralism which leads to aspects of public law, namely criminal law pluralism. The orientation and synergy between national criminal law and customary criminal law are carried out proportionally and side by side, which

means that between national criminal law norms and customary law norms are carried out in accordance with their respective provisions. In addition, the orientation and synergy between national criminal law and customary criminal law based on legal pluralism also requires synergy and precise division of tasks between national law enforcement officials and customary law enforcement officials. The role of law enforcement officials between national law and customary law is important to maintain legal pluralism can run optimally in conjunction with law enforcement practices by law enforcement officials.

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