

# Dynamics of customary reaction in the digital era: Challenges and opportunities

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## Abstract

The digital era is a phenomenon of technological development that provides ease in accessing all forms of information and communication. The influence given in people's lives is very significant, including in the legal field. One of the fundamental influences is the change in values that live in society, so that it will provide challenges in law enforcement, especially the provisions of customary reactions as part of customary law. This condition indirectly also provides opportunities for customary law to continue to exist in community life. This study will examine the challenges and opportunities of customary reactions in the digital era by first examining the existence of customary reactions in the positive criminal law system. This study uses a juridical-normative approach using secondary data collected from a systematic study of literature on primary, secondary, and tertiary legal materials. The data that has been collected is then analyzed using qualitative data analysis and presented descriptively-deductively. The results of this study conclude that customary reactions in the digital era will always have challenges and opportunities. The biggest challenge is the influence of changes in values that live in society, while the opportunities are the nature and characteristics inherent in customary law and especially its dynamic-adaptive nature. The existence of customary reactions will always exist even though society will always change, this is because customary law grows and lives with society, so it will not disappear as long as the society still exists.

## Keywords

Criminal law, Customary law, Customary reaction, Digital era

## Introduction

Customary reaction is the response given by the community when there is a deviation from customary law [1]. Community life cannot be separated from customary law, because customary law grows and develops with the community. The provisions contained in customary law are a reflection of the values that live in society and serve as guidelines for living everyday life. Deviating from customary law means destroying the values and guidelines adopted by the community, so giving customary reactions to the perpetrators of deviations becomes an obligation. The provision of customary

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reactions aims to restore cosmic balance, namely the real world (*sekala*) and the supernatural world (*niskala*) [2]. This goal is based on the magical-religious nature of customary law, which explains the belief in a sacred life [3].

The existence of customary law in the Indonesian criminal law system is still experiencing dynamics [4]. Juridical recognition has been given by the state through the constitution and other laws and regulations. Article 18B paragraph (2) of the 1945 Republic of Indonesia Constitution in general has recognised the existence of customary law in the Indonesian legal system. Customary law in the Indonesian criminal law system has been explicitly recognised through Article 5 paragraph (3) letter b of Law No. 1 of 1951. The article determines that every act based on the laws that live in the community must be declared a criminal act when there is no equivalent in the Criminal Code. Based on this provision, the existence of customary law has legal force, but in practice the application of customary law is not always in line with this recognition. One of them is the mechanism for resolving criminal cases that differs between the provisions of customary law and positive law, which can lead to overlapping authority [5] and *ne bis in idem*. Another problem arises when entering the digital era as it is today with the assumption that giving customary reactions is no longer relevant.

Today's society has entered the digital era with rapid and unlimited progress. The digital era can be defined as a time or era when information is easily and quickly obtained and disseminated through digital technology [6]. The influence of technological advances in the digital era has an impact on the shift in values adopted by the community and requires the community to adjust to rapid social change. This condition is a challenge for the existence of customary law to survive and adapt. Customary law will actually not die as long as the community is alive, even though the changes and dynamics of community life continue to develop. The dynamic and adaptive nature of customary law makes it still exist in the social dynamics of life. This nature explains that customary law can change according to place, time and circumstances (*village, kala, patra*) while still being guided by the philosophy adopted by the community [7].

Law Number 1 of 2023 about the Criminal Code (National Criminal Code) is one form of response to the influence of the digital era in the legal realm. There is something interesting when paying special attention to the types of punishment in the National Criminal Code. One of the punishments stipulated in the National Criminal Code is the fulfilment of customary obligations as an additional punishment and is regulated in the Article 66 paragraph (1) letter f. The fulfilment of customary obligations has the same meaning as customary reactions as part of customary law. Based on these provisions, it becomes the basis that customary reactions still have an existence in the digital era, but it is necessary to comprehensively study the challenges and opportunities of customary reactions in the digital era. This study is very important because the changes that occur in people's lives are very rapid and on the other hand, the provision of customary reactions is guided by the philosophy that has been adopted from generation to generation and always upholds the values that live in society. Thus, this study aims to

provide an understanding of the challenges and opportunities of regulating customary reactions in the digital era, so as to realise criminal law enforcement with harmonisation between customary law and positive law in the face of dynamics in the digital era.

## Method

Legal research is principally normative research [8], However, the techniques and perspectives used can be different and diverse. This research uses a juridical-normative approach used to examine the challenges and opportunities of customary reactions in the digital era. The data used to conduct the study in this research is secondary data and data collection is carried out through literature study of legal materials both primary, secondary, and tertiary systematically. The data that has been collected will be analysed using a qualitative data analysis method, namely the data that has been collected will be explained and described using logically arranged sentences [9]. This research will present the results of the analysis in a deductive way, so that conclusions will be drawn starting from something general, then described to provide answers to the problems contained in this study.

## Results and Discussion

### *Position of customary reaction in customary law*

The term customary law was first introduced scientifically by Christian Snouck Hurgronje in 1893 while conducting a study in Aceh and was outlined in his book entitled “*De Atjehers*” (the people of Aceh). Customary law was used by Snouck Hurgronje to distinguish between customs found in the life of the community as a general understanding of adat and customs that have legal sanctions [10]. The term customary law, which is defined as community custom, has long been known in Indonesia. The community has long used the term customary law, although its use is not so dominant, because the community more often only uses the term *adat*. Adat itself comes from the Arabic language and literally means ‘habit’, so that *adat* can be interpreted as the behaviour and actions of the community that always occur repeatedly and are still being carried out [11]. Thus, *adat* and customary law in practice are one and the same, but in the development of theory and science the two terms are distinguished in their understanding and use.

The development of an understanding of customary law in national legal development began with the Seminar on Customary Law and National Legal Development in 1976. The results of the seminar provided an understanding of customary law, namely “original Indonesian law that is not written in the form of legislation of the Republic of Indonesia which here and there contains religious elements”. This definition is actually in line with Soepomo’s opinion on customary law. Soepomo defines customary law as non-statutory law which is mostly customary law and a small part is Islamic law [12]. Based on some of the previous definitions, the term “customary law” will generally be

understood as provisions in the form of habits that grow and develop with the community and have a coercive nature through the sanctions contained therein.

Customary law has an important position in the lives of indigenous peoples. The provisions in it are guidelines for living life based on philosophy and living values with the aim of maintaining cosmic balance. Life for indigenous peoples is not only limited to life in the world as a form of real nature (*sekala*), but also includes life outside the world which is then referred to as the invisible world (*niskala*). This part is like the philosophy adopted by Balinese customary law, namely *Tri Hita Karana*. The philosophy explains the existence of 3 (three) relationships that must be maintained in life to achieve happiness, namely *parahyangan*, *pawongan* and *palemahan*. In simple terms, these three things can be understood as follows, *parahyangan* explains the life relationship between humans and *Hyang Widhi Wasa* (God Almighty); *pawongan* explains the life relationship between humans and other humans; and *palemahan* explains the life relationship between humans and the surrounding nature [13]. Based on this explanation, what is meant by cosmic balance is maintaining a harmonious relationship between the community and God, the community and fellow communities and the community and the universe. These three parts must be maintained to realise the goals to be achieved, so that the provisions in customary law become an obligation to be obeyed and obeyed by every member of the community.

Customary reaction has an important place in customary law. Customary reaction functions as a counterweight that will be used to restore the cosmic balance disturbed by a customary offence [14]. This function has consequences for the forms of customary reactions, which can be material or immaterial. This is because the balance to be restored is a cosmic balance, so the provision of material reactions or sanctions alone will not be sufficient to restore the balance of *sekala* and *niskala* (the balance of the real and supernatural worlds). Customary reactions in immaterial forms are usually carried out by performing certain rituals or traditional ceremonies in accordance with the beliefs and values that live in the community [15]. These provisions are the basic principles of customary reaction, but in reality each indigenous community has very diverse types and forms of customary reactions following their beliefs and values. Such diversity is unavoidable, but it should be noted that customary legal systems have the same principles to always emphasise in providing customary reactions, namely justice, balance and harmony in resolving conflicts [16].

### *The presence of customary reactions in the positive criminal law system*

The existence of customary reactions in the positive criminal law system will follow the existence of customary law itself. The existence of customary law in Indonesia's positive criminal law system has a long history, which can at least be divided into 3 (three) periodisation's, namely the period before colonialism, the period during colonialism and the period after colonialism. The three periodisation have fundamental differences so that there are distinctive characteristics in each period. This is because there are various factors that influence the changes and development of community life, especially the

prevailing values and regulations. Thus, it is necessary to understand the three periodisation to provide an explanation of the existence of customary law and its customary reactions in the Indonesian positive criminal law system.

The first period was during the pre-colonial period or can be said to be the royal period in Indonesian society. The existence of customary law at this time had a very important position in people's lives, so the application of customary law became the main choice to regulate community behaviour. Evidence of the existence of customary law during this period can be seen in the existence of books left over from the royal period which are still valid today. For example, here are some books from the royal period, 1) Kitab Civacasana in the year 1000 left by King Dharmawangsa of East Java, 2) Kitab Gajah Mada in 1331-1364 left by Gajah Mada Patih Majapahit, 3) Kitab Adigama in 1413 - 1430 left by Kanaka Patih Majapahit, 4) Kitab Hukum Kutaramanaya in 1350 found in Bali [17]. The substance of these books became the basis for enforcing customary law in the pre-colonial period and had characteristics according to influencing factors, especially the factor of religious belief or influence. This period can be said to be the application of pure customary law, namely being the main choice in resolving cases.

The second period was during colonialism and specifically when the colonisers attempted to impose their legal system on Indonesia. This period was very pronounced when the Dutch government began to study the customs of the indigenous people of Indonesia which served as guidelines for living society. In the beginning, the colonisers did not feel disturbed by the existence of customary law or native law that had prevailed in the lives of indigenous people, but over time the colonisers began to have difficulty in dealing with the dynamics that occurred in customary law. The initial view of the emergence of this disturbance was because customary law was considered to have no certainty, this was due to the dynamic and adaptive nature of customary law. The studies produced by researchers at this time were very diverse, but gave the conclusion that customary law could not be abolished from indigenous peoples, because customary law grew and lived with the community, besides that there was a great influence from the beliefs or religions adhered to [18]. This situation then became the basis for the development of reception theory to deal with the existence of customary law. Reception theory explains the relationship between customary law and religious provisions, in essence providing provisions that apply is customary law and religious provisions can apply when accepted by customary law [19]. The existence of customary law in the regulation of criminal law during this period can be said to still have a strong existence. The Dutch government has attempted to unify and codify criminal law, but the existence of customary law is very strong and cannot be abandoned. This condition also applied during the Japanese occupation.

The third period was during Indonesia's independence. This period can be said to be the beginning of national legal development, including in criminal law. Indonesia as a former colony that adheres to civil law systems, it is not surprising when the regulation of criminal law is carried out with the concept of unification and codification. Law Number



1 of 1946 on Criminal Code is the first codification of criminal law in Indonesia, which is then referred to as the Criminal Code. The substance of the Criminal Code is actually adopted from *Wetboek van Strafrecht* (WvS) which was in effect during the Dutch colonial period. The Criminal Code at this time became the main basis in regulating prohibited acts and has criminal sanctions, so it can be said that the existence of customary law along with customary reactions began to be abandoned. Over time, the community continues to develop and has an awareness that the substance of Criminal Code is not in accordance with the values that live in the community. This condition was then responded with the existence of Emergency Law Number 1 of 1951 and on Article 5 paragraph (3) b provides an explanation of the acts that are prohibited by living law (customary law) can be given criminal sanctions. The article is a turning point to give existence to customary law and customary reactions, but in a very limited scope, because there is a requirement that the actions that should be punished are actions that have no equivalent in Criminal Code.

The influence of colonial legacy and the development of the times require the reform of positive criminal law that can adjust to the values that live in society. Reform efforts have been made, recorded efforts began in 1963. Criminal reform is carried out with an effort to restore basic ideas to socio-philosophical, socio-political and socio-cultural values [20]. Awareness of the importance of the existence of values that are appropriate and live in society is a manifestation of the desire for effective and efficient criminal law regulation, so that it can achieve the goal of providing protection and public welfare. Based on these conditions, the part that must be considered is the existence of customary law and customary reactions that have begun to disappear in people's lives, especially the regulation in positive criminal law. This unrest has then been treated by the existence of National Criminal Code which provides several changes to the Indonesian positive criminal law system. The expansion of the principle of legality contained in National Criminal Code is the recognition of the principle of material legality. Based on the principle of material legality, the enforcement of criminal law is not only guided by the provisions contained in the law (written law), but the provisions contained in living law (unwritten law) have the space to be used as guidelines in enforcing criminal law [21]. The provisions on the principle of material legality are regulated in Article 2 of the National Criminal Code, Furthermore, the explanation of the article emphasises that what is meant by living law is customary law. Thus, the existence of customary law in National Criminal Code has an important position and one form of implementation is to make customary reactions as an additional form of punishment [1].

### *Challenges and opportunities for customary reaction in the digital era*

The digital era is often referred to as the mondial era or the global era. The digital era is a term that is often used to describe the current condition of society, namely the development of technology in social life. Another term used is the mondial era or global era, which has a comprehensive, universal or worldwide meaning [22]. This definition explains that the current condition of society is not limited by distance or time, because

with the digital era, information or communication in people's lives wherever they are can be quickly conveyed or known. This condition occurs in every part of the world, so the term mondial era or global era can be understood as the worldwide nature of the digital era. The influence of the digital era in people's lives is very significant, but the influence can be in the form of positive impacts and negative impacts. Both impacts will depend on the conditions and abilities of existing human resources in facing and utilising developments in the digital era.

The positive and negative impacts in this digital era can be challenges as well as opportunities in all aspects of people's lives, especially in the implementation of customary reactions. The challenges encountered in the implementation of customary reactions do not only come from negative impacts, but these challenges can also come from the positive impacts that exist. Simply put, when paying attention to the negative impacts that can occur in the digital era, it will emphasize the use of technological developments in the wrong or deviant way and not in accordance with the laws or values that live in society. For example, this condition is when utilizing technological developments for gambling, stealing, prostitution or other crimes, so that the majority of people will say that this is prohibited and deserves to be punished or given customary reactions. In contrast to these conditions, the positive impact of the digital era will actually provide greater challenges, this impact can be in the form of ease of information and communication so that it will facilitate access and efficiency in all matters including law enforcement [23]. The challenge in question is when society easily accesses all information from anywhere, it will influence the way of thinking and behaving which will eventually become a habit. This will be a challenge in implementing customary reactions because it can change the values that live in society, besides that it will also affect the local wisdom that exists in the society itself.

Customary reactions in principle cannot be separated from customary law provisions that are guided by the philosophy and beliefs of the community. The principles in customary law include several things and the most important is that it is carried out from generation to generation so that it is said to have a traditional nature [24]. The principles contained in the digital era are different from the traditional nature inherent in customary law, because the digital era prioritizes modernization in carrying out its social life. The understanding of modernization actually leads to a global life that is universal in nature, so that the values that are prioritized are universal values with the understanding that they can be understood by the entire community. This difference then has a major impact on the rejection of customary reactions, especially related to forms of customary reactions that have no certainty. In addition, this rejection is also based on a way of thinking that is considered no longer relevant, namely the goal of realizing a cosmic balance consisting of real natural life (*sekala*) and the supernatural world (*niskala*) which is implemented in the form of material and immaterial reactions [5].

The influence that occurs in the digital era has a great impact on changes in values that live in society. Community interaction in the digital era can transcend space and time, so that the exchange of culture, values, information, knowledge and so on will be very easy and fast. Society is required to face and adapt to these conditions, but the existence of customary law and customary reactions must still be considered. The basic reason is that customary law is the original law of society that grows and lives with the local community, while something that comes in this digital era will not always be in accordance with the personality of the community itself. One of the things that can then become a problem in maintaining customary law and its customary reactions is the view of human rights.

Human rights are a global issue that will always be discussed in human civilization, but human rights are not always freedom for every human being [25]. Especially in criminal law, the clash between law enforcement and human rights will always occur. For example, the imposition of punishment on criminals, a limited perspective in human rights will say that the imposition of punishment is a deviation from human freedom, but from another perspective, namely criminal law, it will say that every perpetrator of a crime must be punished. The current developments have indeed accommodated human rights views, so that in criminal law there is a principle of legality as a basic principle of criminal law enforcement which aims to realize certainty [21]. Theories contained in criminalization or giving punishment to perpetrators of crimes also continue to develop, it can be said that what was originally aimed at revenge has changed into an effort to foster and restore. The transformation that occurs in the field of criminal law in the digital era can actually be an opportunity for the existence of customary law and its customary reactions.

The very rapid changes in the digital era can actually provide opportunities for the existence of customary law along with customary reactions. Society will continue to change and create different civilizations, this will be a problem when its legal provisions cannot follow these changes. This condition is then experienced by positive law (written law), but unlike customary law (as unwritten law) this condition becomes an opportunity to provide its existence. Written law is very identical to its static or rigid nature and is slow when changes occur, while unwritten law (customary law) actually has a dynamic and adaptive nature, so it will be easier to follow the changes that occur. Customary law has other characteristics that can be used as a basis for fulfilling the opportunities for its existence in the digital era, the characteristics or features of customary law include:[26][27]

1. Customary law is religious-magical in nature, namely according to the beliefs or convictions held by the community and will be dominated by the influence of religious teachings, so that it is not only limited to life in the real world (*sekala*), but also includes life in the supernatural world (*niskala*).



2. Customary law is communal in nature, namely that human life will always be seen in the form of a group as a whole, so that the public or community interest is above individual interests.
3. Customary law is democratic in nature, namely always prioritizing the resolution of a case with a sense of togetherness, so that it more often uses a consensus system involving all parties in society.
4. Customary law is static-traditional in nature, namely always maintaining and preserving the fundamental values passed down by ancestors.
5. Customary law is dynamic-adaptive in nature, namely always following changes and developments in the times, in addition to always adapting to the dynamics of the state of society.

Based on these characteristics, customary law has religious-magical and static-traditional characteristics, but it is complemented by other characteristics. Customary law will always maintain the beliefs and philosophies it adheres to, while the application or implementation in community life will always follow the developments that occur. Especially in customary reactions, there are several examples that explain that the provision of customary reactions is always adjusted to the changes that occur in customary society, one of which is the form of customary reactions contained in Customary Law in Bali, namely:[14]

1. *Sangaskara Danda*, is a customary reaction or customary obligation by carrying out a series of rituals or religious ceremonies. This customary reaction can be in 2 (two) forms, namely: (1) *maprayascita*, is a ceremony to cleanse an area or location used as a place of events or actions that can disrupt the cosmic balance (considered to be dirty or *Lete Desa*); (2) *metirtha gemana*, is a customary reaction or customary obligation that is given specifically to priests (religious leaders) who have committed deviations and are called *sad atatji*, such as poisoning people, damaging people's honor and so on.
2. *Atma or Jiwa Danda*, is a customary reaction or customary obligation imposed on the body or psyche of the perpetrator, the forms of this customary reaction are *remebagbag*, *ketundung*, *keselong (selong)*, *kelarung (melarung)* atau *kapulang kepasih*, *kanosoyang*, *kesepekang* dan *mengaksama*.
3. *Artha Danda* is a customary reaction or customary obligation in the form of payment of a sum of money or objects. The form of *artha danda* can be in the form of *dedosan*, which is the payment of a sum of money imposed on someone who violates *awig-awig*.

Some forms of customary reactions are currently not all enforced and some have even been eliminated. This is due to the development of the times and provides the view that some forms of these reactions do not reflect humanity.

The adjustment and elimination of several forms of customary reactions in the digital era cannot be interpreted as the loss of opportunities for the existence of customary reactions in community life. This condition occurs because the paradigm of society has

changed towards the form of customary reactions, but the goal to be achieved has not changed, namely to realize cosmic balance. The opportunity for customary law with its dynamic-adaptive nature in facing this condition is to adjust the forms of customary reactions to the existing paradigm. Specifically, in the positive criminal law system of Indonesia through National Criminal Code, it actually provides space for the provision of customary reactions. Article 66 paragraph (1) letter f regulates the fulfilment of customary obligations as a form of additional punishment, so that this provision is proof that customary reactions are still needed in enforcing criminal law.

The most important part of the opportunity to provide customary reactions in the digital era lies in the case resolution system. Today's society is often introduced to the penal mediation system or *restorative justice*, which in essence seeks to resolve criminal cases outside the trial or can be said to be resolved with a *win-win solution* from all parties [28]. The system has actually been carried out in customary law since ancient times, such as the criminal procedure in the Balinese Traditional Village community based on the philosophy of *druwenang sareng-sareng*, namely trying to resolve cases through peace. This philosophy is also carried out with the aim of providing fairness for the parties, so that it prioritizes justice and benefits [29]. In addition, in general, there are at least 3 (three) principles that can be used as a benchmark for the procedure for resolving cases in living law or customary law, namely:[7]

1. *Asas rukun*, is the basis for returning things to normal, as well as realizing harmonization of village etiquette. This principle does not determine whether one party wins or loses.
2. *Asas patut*, which is the basis for resolving customary cases, must maintain the good name of each party, so that there is no discrimination in their status and honor as village customs.
3. *Asas keselarasan*, is the basis for realizing the realities and feelings that live in society, which have been embedded into traditions from generation to generation. The principle of harmony is carried out by paying attention to place, time and circumstances (*desa, kala, patra*), so that decisions can be accepted by parties in society.

## Conclusion

Customary reactions are an important part of maintaining customary law. Any act that contains a deviation from customary law and can disrupt the cosmic balance will automatically receive a customary reaction. The main purpose of giving customary reactions is to restore cosmic balance, namely the real world (*sekala*) and the supernatural world (*niskala*). The importance of customary reactions makes it an inseparable part of customary law, so that it will always have an existence in the life of society. The existence of customary reactions in the life of society will experience ups and downs due to changes and developments in the era. This also happens in the life of Indonesian society, especially when associated with the positive criminal law system, it

can be divided into 3 (three) periods, namely before colonization, the colonial period and after colonization or independence. Each period has a different existence, but the third period is the most complex part because it has to face the very rapid digital era.

The digital era brings changes and influences in all aspects of people's lives, including the legal aspect. These influences will have positive and negative impacts, depending on the ability of the community to accept and utilize them. The conditions of the digital era also have a significant influence on customary reactions as part of customary law, fundamentally the influence that is very pronounced is the ease of technology to access all information by penetrating space and time without any limitations. This will have an impact on changes in the values that live in society, so that it will provide challenges for customary reactions that have grown and lived with the community. On the other hand, in fact, these challenges also provide opportunities for customary reactions as customary law itself, because the nature and characteristics contained in customary law, especially the dynamic-adaptive nature will make customary law always able to adapt and be accepted by society even though there are changes in people's lives such as in the current digital era. Real evidence that customary reactions can still survive is the existence of additional criminal penalties in the form of fulfilling customary obligations in National Criminal Code which is currently still in the socialization stage for 3 (three) years after being ratified in 2023.

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