Research Article

Reformulation of Customary Criminal Law in the National Criminal Code Based on the Formation of Legislation

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ABSTRACT

Customary criminal law, as a living law in society, holds a recognized position as an unwritten source of law. However, Article 2, Paragraph (3) of Law No. 1 of 2023 concerning the Criminal Code (KUHP) stipulates that customary law must be established through government regulations. This requirement poses a challenge and introduces new complexities in the reform of the National Criminal Code.This study aims to reconceptualize customary criminal law within the National Criminal Code based on the framework of statutory formation. The research adopts a doctrinal approach with a normative juridical method, utilizing legal sources such as legislation, jurisprudence, court decisions, and academic literature through a literature review. The analysis is conducted qualitatively.The findings reveal that customary criminal law already holds an equivalent position to statutory law and jurisprudence as an unwritten source of law. Therefore, formalizing customary law in the form of regional regulations is misguided. The application and procedural aspects of customary law should remain under the authority of indigenous communities. Meanwhile, the imposition of additional sanctions by judges should be regulated in the revised Criminal Procedure Code while respecting customary community norms.In conclusion, customary criminal law holds an equal position as an unwritten legal source and should remain recognized without requiring formalization through regional regulations. The state's role should be limited to providing protection and acknowledgment rather than enforcing formalization.

Keywords: Customary Law; Criminal; Reform.

ABSTRAK

Hukum pidana adat sebagai hukum yang hidup di masyarakat telah memiliki kedudukan sebagai sumber hukum yang tidak tertulis dan diakui eksistensinya. Namun pasal 2 ayat (3) UU No. 1 Tahun 2023 tentang KUHP menjelaskan hukum adat harus ditetapkan dalam peraturan pemerintah, sehingga hal ini menjadi masalah dan membuat kompleksitas baru di dalam pembaharuan KUHP Nasional. Tujuan penelitian ini merekonsepsi hukum pidana adat dalam KUHP Nasional berdasarkan pembentukan peraturan perundang-undangan. Penelitian ini bersifat doktrinal dengan pendekatan yuridis normatif Data yang digunakan bersumber dari undang-undang, yurisprudensi, putusan pengadilan, dan literatur akademik melalui studi literatur. Analisis dilakukan secara kualitatif. Hasil penelitian menjelaskan Hukum pidana adat sudah memiliki kedudukan yang sama dengan Undang-Undang dan yurisprudensi sebagai sumber hukum tidak tertulis. Sehingga memformalismekan hukum adat dalam bentuk peraturan daerah merupakan suatu hal yang keliru, konsepsi dalam penerapan hukum adat dan tata caranya tetap menjadi kewenangan masyarakat adat, sedangkan perihal penerapan sanksi tambahan yang dapat dijatuhkan oleh hakim diatur dalam pembaharuan kitab undang-undang hukum acara pidana dengan tetap memperhatikan rambu-rambu dalam masyarakat adat. Simpulannya hukum pidana adat memiliki kedudukan yang setara sebagai sumber hukum tidak

tertulis dan sebaiknya tetap diakui tanpa harus diformalkan dalam peraturan daerah, sehingga negara hanya berperan dalam memberikan perlindungan dan pengakuan.

Kata kunci: Hukum Adat; Pidana; Pembaharuan.

A. INTRODUCTION

Customary law is an unwritten legal system that exists, evolves, and is upheld by indigenous communities in a particular region. This law will continue to endure as long as the community adheres to the customary rules passed down by their ancestors (Silambi et al., 2022). This phenomenon occurs because customary law emerges from and is deeply rooted in the norms of the local community. Ultimately, customary law serves as a guideline for social behavior and dispute resolution, placing greater emphasis on restoration and reconciliation rather than merely imposing punishment (Helnawaty, 2017).

Customary law is generally not the sole system governing people's daily lives in society. However, it should be recognized and acknowledged that customary law plays a role in shaping the behavior of many people worldwide (Utama et al., 2024). This is similar to what happens in Ethiopia, where the customary legal system serves as one of the instruments for resolving legal issues in both criminal and civil matters (Kassa & Srur, 2016). Furthermore, countries such as South Africa recognize their customary law within the South African legal system (Matthee, 2021).

When discussing customary criminal law in Indonesia, there should no longer be a dichotomy with national criminal law, which is positivistic-legalistic in nature. This is because Article 5, paragraph (1) of Law No. 48 of 2009 on Judicial Power explicitly states that judges and constitutional judges are obliged to explore, adhere to, and understand the legal values and sense of justice that develop within society.

The existence of customary criminal law in Indonesia has been reflected in the Supreme Court Jurisprudence Decision No. 1644 K/Pid/1988 dated May 15, 1991, in which the Supreme Court essentially respects the decision of the customary leader, based on customary deliberation, to impose customary sanctions on those who violate customary norms. Based on this jurisprudence, a perpetrator of a criminal act cannot be tried under two legal systems, namely customary law and the Indonesian Penal Code (KUHP), even if the offense is regulated under the KUHP (Rozah, 2024).

In his inaugural speech as a professor, Barda Nawawi Arief explained that one of the urgent aspects that needs to be studied as an alternative for the reform of the Indonesian Penal Code is an examination of the legal system that exists within society. The prevailing and developing legal values originate from customs and religious principles; therefore, it is essential to explore the legal principles and norms embedded

within the living law. These principles should be analyzed through the lens of Pancasila, so that their commonalities can be integrated and recognized as the foundation of positive criminal law in the application of customary law (Pujiyono, 2023).

An alternative reform in the Indonesian Penal Code (KUHP) was explained by Eko Suponyono in his inaugural speech as a professor, in which he stated that one of the missions of the KUHP is adaptation and harmonization, including the recognition of customary criminal law as a characteristic of Indonesian law. It is a fact that various regions in Indonesia still adhere to and implement customary criminal law, which determines offenses that warrant criminal punishment. This practice is carried out to fulfill the community's sense of justice (Pujiyono, 2023).

The reform of Indonesia's criminal law has been implemented with the enactment of Law No. 1 of 2023 on the Penal Code. In this reform, Article 2, paragraph (1) acknowledges the existence of customary law as an integral part of the national legal system. This demonstrates formal recognition of customary law and the necessity of harmonizing positive law with local legal practices (Ardiansyah, Kurnia, & Rahayu, 2024).

This reform aligns with the 1945 Constitution of the Republic of Indonesia, specifically Article 18B, paragraph (2), which states: *"The state recognizes and respects the customary law communities along with their traditional rights as long as they remain in existence and are in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, as regulated by law."*

However, the National Penal Code (KUHP) does not yet provide a clear explanation or regulation regarding the mechanism for implementing customary sanctions or customary criminal penalties that may be imposed by judges. This lack of regulation has the potential to create ambiguity and legal uncertainty concerning the application of customary criminal law. Moreover, Article 2, paragraph (3) of the National Penal Code mandates that the implementation of customary sanctions or customary criminal law be regulated through Government Regulations.

Yoserwan's research concludes that the accommodation of customary criminal law within the KUHP has placed it in a subordinate position to state law. Its implementation will fall under the national criminal justice system, thereby marginalizing customary courts and limiting the scope of offenses that can be subject to customary sanctions (Yoserwan, 2024). The recognition of customary law within the context of criminal law is based on the principle of legality, a fundamental principle that serves as the basis for determining whether an act constitutes a criminal offense (Adhari et al., 2021). Due to this principle, the legal status of customary law—both in theoretical studies and statutory regulations—is

not equivalent, leading to potential gaps and paradoxes (Du, 2013). This aligns with research findings that highlight the dichotomy between customary law and national criminal law, often resulting in complex legal dynamics (Handayani & Prabowo, 2024).

The reconceptualization of Article 2, paragraph (3) is considered crucial for the future (*ius constituendum*) when the National Penal Code (KUHP) comes into effect, as there is concern that it may lead to the codification of customary offenses in government regulations and their derivatives, which would contradict the inherent flexibility of customary law. Therefore, based on this legal issue, this study aims to elaborate on the concept of customary criminal law within the KUHP from the perspective of legislative drafting.

The researcher's review of studies on customary criminal law identified several relevant works, including *The Relevance of Customary Criminal Law in Criminal Law Reform in Indonesia* (Astuti, 2015), *A Study on Customary Criminal Law (Sanctions) in National Criminal Law Reform* (Jaya, 2016), *The Formulation of Government Regulations on the Implementation of Customary Criminal Sanctions as an Effort to Harmonize the Application of Customary Law to Achieve Legal Certainty* (Ardiansyah, Kurnia, & Rahayu, 2024), *An Analysis of Customary Criminal Law in National Criminal Law* (Handayani & Prabowo, 2024), and *The Implications of Applying Customary Criminal Law under Article 2 of the KUHP on the Principle of Legality in Indonesia's Criminal Law System* (Yogaswara, Surwita, & Yustia, 2024).

The distinction between this study and previous research lies in its legislative approach, highlighting the need for a reconceptualization of Article 2, paragraph (3) of the KUHP to prevent its interpretation as the codification of customary criminal law. This approach ensures that local wisdom remains preserved and harmonized with the national legal system.

Therefore, this research is essential, as it presents a novel contribution by examining the conceptual differences between *living law* within society and *positive law*.

B. RESEARCH METHOD

This study is a doctrinal legal research employing a normative juridical approach, aiming to identify relevant legal provisions based on legal theory. Through this approach, it is expected to formulate a suitable framework for accommodating customary criminal law in Indonesia.

The data used in this research is secondary data, derived from *Law No. 1 of 2023 on the Penal Code*, Supreme Court jurisprudence, court rulings, and academic literature, obtained through a literature study. The data analysis is conducted qualitatively by elaborating on legal provisions (statutory laws), legal theories, and expert doctrines, which are then juxtaposed with

legal issues to establish a pattern for addressing the identified legal problems.

C. RESULTS AND DISCUSSION

1. Customary Law in the Reform of the National Penal Code

The development of law in the field of criminal law is not limited to legal structures but also includes legal substance, which is a product of a culturally embedded legal system. Therefore, in structuring the national legal system, including its criminal law, laws derived from religious law and customary law should be given a place in the formulation of legislation. In this context, customary criminal law needs to be thoroughly examined.

This study has been acknowledged through the *Judicial Authority Law*, from *Law No. 14 of 1970* to *Law No. 48 of 2009*, which states that court decisions must include reasoning or considerations based on both written law (statutory law) and unwritten law.

Judges are mandated to explore and understand the legal values that exist within society when formulating their legal considerations. Based on this legal foundation, judges, as law enforcers, along with other judicial institutions, must elaborate on and comprehend the local wisdom that has developed, evolved, and been upheld by society through generations as a consciously practiced legal system, despite not being codified.

With regard to the recognition of *living law* or customary law, *Article 1, paragraph (2) of the People's Consultative Assembly Decree No. III/MPR/2000 on Legal Sources and the Hierarchy of Laws and Regulations* states that legal sources consist of both written and unwritten legal sources.

These legal foundations reflect that unwritten law, or customary law, is a significant legal source that should be explored and understood in resolving legal issues, as it embodies the social, cultural, and structural values of Indonesian society. Therefore, the author refers to it as *Indonesian law*.

Moreover, the National Penal Code (KUHP) embodies the values of democracy, decolonization, and harmonization by accommodating customary law or *living law* within its framework (Butt, 2023).

The issue of customary criminal law is a strategic matter that requires thorough discussion. This is particularly important because, since Indonesia's independence, the KUHP has remained a product of Dutch colonialism, disregarding and marginalizing *Indonesian law*, which reflects the identity of the Indonesian people. The principle of formal legality established in the *Wetboek van Strafrecht (WVS)* does not provide space for the application of customary criminal law, often resulting in a sense of injustice within society.

Sunaryati Hartono illustrates this by comparing customary law to the land and national

law to the building that stands upon it. A strong and resilient national legal system cannot be separated from its foundation—customary law—just as modern buildings cannot exist without the land they are built upon.

The author presents the depiction in the following image (Source: Author)

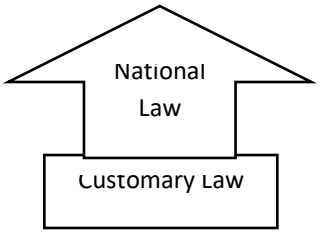

Figure 1. Traditional and National Legal Structures

The illustration depicts that customary law, including customary criminal law, serves as one of the foundations supporting national law and should be considered a reference in developing national law. This is because living law reflects the philosophy, beliefs, culture, and identity of Indonesian society, all of which are embodied in Pancasila.

The strategy for constructing a robust national legal system with customary law as its foundation has been evident in various scholarly meetings. The author presents the reports from these meetings as follows:

a. Resolution of the First National Law Seminar (1963) in the Field of Criminal Law

The resolution from this seminar in the field of criminal law produced two key points: (1) Resolution Point IV states that customary legal practices that are still alive and do not hinder the development of an ideal society should not be prohibited, provided that customary sanctions remain in line with national dignity; (2) Resolution Point V, Section 4, emphasizes that religious elements and customary law should be integrated into the Indonesian Criminal Code (KUHP).

b. Conclusion of the Third National Law Seminar (1974)

The conclusion from this seminar highlights that the development of national law must take into account customary law, as it represents the living law within society.

c. Report from the Fourth National Law Seminar (1979)

The report, specifically Section B II (letters a, e, and f) on the national legal system, concludes that to ensure order and legal certainty in facilitating national development, national law should, as much as possible, be codified in written form. However, unwritten law should still be recognized as an integral part of the national legal system.

d. Report from the Sixth National Law Seminar (1994)

This report emphasizes that written law remains essential as a source of national law. However, written and unwritten laws should complement each other. This is based on the fact that the formation of unwritten law is more flexible than written law, allowing it to bridge the gap between legal validity and effectiveness.

The findings from these scholarly meetings indicate that customary law, including customary

criminal law, is regarded as a reference source for the development of the national legal system.

In line with these findings, customary criminal law has long been practiced and remains relevant in society. This is reflected in the decision of the Supreme Court of the Republic of Indonesia No. 948/K/Pid/1996 dated November 15, 1996. The ruling clarifies that if an offense under customary criminal law has been resolved in accordance with the living law within the community, and the offender has been adjudicated by the local customary court—receiving customary fines that have been fulfilled—then the offense cannot be prosecuted again under the Criminal Code (KUHP). This principle aims to prevent double jeopardy in criminal sentencing.

Another Supreme Court decision, No. 1644/K/Pid/1988 dated May 15, 1991, also acknowledges the existence and validity of customary criminal law through local customary courts. Consequently, district courts or high courts are considered to be disregarding customary court rulings if they adjudicate cases that have already been resolved through customary sanctions, particularly when the sanctions have been duly carried out by the offender.

Therefore, based on these two Supreme Court decisions, it can be concluded that the existence of customary criminal law is recognized. If an offender has been subjected to customary sanctions and has fulfilled them, law enforcement authorities must declare the case inadmissible to prevent double punishment.

In Law No. 1 of 2023 on the Criminal Code, customary law has been given a place and legal foundation, specifically in Book One, Chapter I, Article 2, Paragraph (1), which states: *"The provisions as referred to in Article 1, Paragraph (1) do not preclude the application of living law within society, which determines that a person may be subject to punishment even if the act is not regulated in this law."*

Article 2, Paragraph (2) provides a clearer provision regarding the applicability of Customary Criminal Law, which reads as follows: *"The living law within society, as referred to in Paragraph (1), applies in the place where the law itself exists, insofar as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution, human rights, and the general legal principles recognized by the community of nations."*

Based on these two articles, Eko Soponyono, as cited by Astuti (Astuti, 2015), explains that the sources of law that can serve as a foundation are not only based on the principle of formal legality but can also derive from material legality, which originates from the living law within society. Thus, customary criminal law can contribute to the reform of Indonesia's criminal law.

The recognition of customary law in the new Criminal Code (KUHP) reflects respect for the diversity of Indonesian society and culture.

Consequently, this recognition is expected to enhance responsiveness to justice needs based on local values and, more importantly, to embrace criminal law as a means to strengthen legal compliance (Yogaswara, Surwita, & Yustia, 2024).

2. Limitations on the Application of Customary Criminal Law

Previous studies have explained that customary law, particularly customary criminal law, holds a recognized position and existence in Indonesia's legal enforcement. This is reflected in Supreme Court rulings, which prohibit prosecuting criminal offenders under the Criminal Code (KUHP) if they have already been subjected to and have served customary sanctions.

From a comparative and academic legal perspective, the recognition of customary law is not an unfamiliar concept. In his book, Nyoman Serikat Putra Jaya (Jaya, 2005) explains the following:

a. *Living law* serves as a source of law in both the *common law* system and customary legal systems.
b. The doctrine of *material unlawfulness* asserts that the law is not solely based on written statutes but also on the living law within society.
c. Lesing's view suggests that "*case law/unwritten law/ongeschreven recht*" is not formally recognized as a source of law, yet in practice, it plays a significant role as a legal source.

International legal documents also provide a place for the application of living law within society. For example, Article 15, Paragraph (2) of the International Covenant on Civil and Political Rights (ICCPR) allows for the prosecution of an offender based on general legal principles recognized by society (Jaya, 2016).

Thus, both nationally and internationally, as well as in comparison with the *common law* system, customary law—particularly customary criminal law—is acknowledged and regarded as a legal source.

This discussion must also address the limitations on the application of customary law, as not all customary legal provisions can be enforced. There are criteria and boundaries that law enforcement authorities must consider. Moreover, the new National Criminal Code (KUHP) does not provide clear limitations or guidelines regarding which aspects of customary criminal law or customary sanctions may be applied.

Article 96 of the National Criminal Code (KUHP) provides law enforcement authorities with the discretion to impose customary sanctions as an additional penalty. Furthermore, Article 97 clarifies that such customary sanctions may be applied even if they are not explicitly stipulated in the formulation of a criminal offense, provided that they remain in accordance with the provisions of Article 2, Paragraph (2). (KUHP 2023 – Law No. 1 of 2023 on the Criminal Code).

If the convicted person fails to fulfill or carry out the customary obligation penalty, the obligation shall be replaced with compensation equivalent to a Category II fine. If the convicted person is unable to pay the compensation, it shall be substituted with a supervisory sentence or community service (KUHP 2023 – The Criminal Code (Law No. 1 of 2023)).

Sudarto stated that the most important part of a Criminal Code (KUHP) is its penal system. The existing penal system can serve as a measure of the level of civilization of the nation in question (Jaya, 2016).

Regarding customary sanctions or customary criminal penalties that may be applied, Article 2, Paragraph (2) only provides general guidelines, requiring that they comply with Pancasila, the 1945 Constitution, human rights, and the general legal principles recognized by the international community.

Therefore, the customary criminal law that can be enforced needs to be identified, and it certainly does not emerge suddenly but through a lengthy process. Citing the opinion of Fitzgerald, as written by Umi Rozah in her book (Rozah, 2024), the requirements for a custom to be accepted as law by society include:

a. Feasibility, which is measured by the general acceptance of its justice and usefulness, requiring clear rationality for it to be accepted by society.
b. Recognition of truth regarding a living law in society, which is followed openly.
c. Stability, because it is formed over a long period, has strong historical value, and is deeply rooted in society's way of life across generations.

If these requirements are met, they can evolve into legal norms that carry consequences when violated, provided the following conditions are fulfilled:

a. Material requirement, where the practice has been in place for a long time.
b. Intellectual requirement, where the legal norm creates a general belief that it must be obeyed as a legal obligation.
c. Customary sanctions, as an implication if the norm is violated or disregarded.

Nyoman Serikat Putra Jaya provides another perspective, explaining that customary criminal law, as a foundation for national criminal law, must be based on the following principles (Jaya, 2005):

a. The customary criminal law must still be actively practiced within Indonesian society.
b. The customary criminal law must not hinder the achievement of a just and prosperous society.
c. It must align with the noble values of Pancasila.

Building on the views of Umi Rozah and Nyoman Serikat Putra Jaya, and based on Articles 96 and 97 of the National Criminal Code (KUHP), the author cites Muladi's opinion regarding customary sanctions as both an additional and a primary punishment. Its success depends on several factors: (1) It must be appropriate and serve the same functional

purpose; (2) It must be accepted as a form of punishment by society; (3) Its usefulness must be carefully considered; (4) It must be recognized as a necessity within the framework of the criminal justice system; (5) Adequate infrastructure must be in place to support its implementation.

Ultimately, the imposition of customary sanctions on criminal offenders must be based on rational reasoning and well-founded considerations (Arief, 2022).

The existence of these provisions and requirements is expected to clarify the application of customary law in the context of customary criminal sanctions. In this regard, customary law should not be interpreted as universally recognized; instead, it must be identified to ensure its alignment with Pancasila's philosophy, does not hinder the achievement of a just and prosperous society, is acknowledged for its usefulness, and is supported by adequate infrastructure for implementation.

With these provisions in place, customary law holds an equal position alongside legislation and jurisprudence as a source of law.

3. The Concept of Customary Criminal Law in the Formation of Legislation

Societal life is governed by both written and unwritten regulations. One form of unwritten regulation is customary norms**,** which are practiced across generations and are not formally established by an institution like statutory law.

The formation of legislation, as part of the effort to create new laws, must consider its hierarchical structure. As explained by Nawiasky, the hierarchy consists of the following levels:

1. Staatsfundamentalnorm (Fundamental Norm of the State)
2. Staatsgrundgesetz (Basic Law of the State)
3. Formell Gesetz (Formal Law)
4. Verordnung and Autonome Satzung (Implementing Regulations and Autonomous Regulations) (Berry, 2018).

The implication of this hierarchical structure is that lower-level regulations must not contradict higher-level regulations. Therefore, it is essential to refer to Law No. 12 of 2011 on the Formation of Legislation, which establishes the following legal hierarchy:

a. The 1945 Constitution of the Republic of Indonesia
b. Decrees of the People's Consultative Assembly
c. Laws (UU) and Government Regulations in Lieu of Laws (Perppu)
d. Government Regulations (PP)
e. Presidential Regulations (Perpres)
f. Provincial Regulations
g. Regency/City Regulations

Based on the general explanation of Article 2, Paragraph (3) of Law No. 1 of 2023 on the Criminal Code (KUHP), it is stated that government regulations serve as guidelines for regional authorities in determining "living law" within society through regional regulations.

The explanation of Article 2, Paragraph (2) further clarifies that it serves as a guideline for establishing customary criminal law recognized by

legislation. Consequently, this creates a dichotomy between customary law acknowledged by legislation and that which is not recognized.

From the author's analysis, if customary criminal law is incorporated into the formalization of regional regulations, despite its origins in long-standing traditions and societal beliefs rather than formal institutions, it must still comply with higher legal provisions. As a result, the principle of Lex Superior Derogat Legi Inferiori applies, meaning that a lower regulation must not contradict a higher regulation. This aligns with the hierarchical theory of legislative formation, where lower-level regulations must adhere to higher legal norms.

According to the author, this concept is not relevant because customary law is not a political product that emerges suddenly. There are several legal issues if customary offenses are regulated under regional regulations (Perda), including (Rozah, 2024):

a. The issue of recriminalization and reformulation of customary offenses within regional regulations.
b. The formulation of criminal sanctions in regional regulations.
c. The sentencing system for customary offenses differs from that in regional regulations.
d. The shift from a material unlawful act to a formal unlawful act if regulated by regional regulations.

It is important to understand that the functions of regional regulations (Perda) are:

a. A policy instrument to implement regional autonomy or assistive duties.
b. Must not conflict with higher regulations.
c. Accommodate regional specificity or diversity.
d. A development tool to enhance regional welfare.

Considering the functions of regional regulations (Perda), there is a fundamental difference between regional regulations and customary offenses (delik adat). Therefore, it is inappropriate to regulate customary criminal law specifically within regional regulations. Such an approach could be seen as a recolonization of customary law rather than a recognition and protection of its existence and diversity as part of Indonesia's legal identity and local wisdom.

Von Savigny argued that law is a manifestation of the spirit of a nation, encapsulated in his maxim: "Das Recht wird nicht gemacht, es ist und wird mit dem Volke," meaning "Law is not made, but rather exists and develops alongside the spirit of the nation."

Customary criminal law has long coexisted with national criminal law as an unwritten legal source. The state's duty is to recognize and protect customary criminal law as it grows and develops within society, rather than reducing it into the framework of regional regulations.

4. Analysis of Article 2 of Law No. 1 of 2023 on the Criminal Code

Rahardjo explains that the authenticity of customary law does not stem from state

recognition but rather emerges autonomously from society. Djodigoeno further asserts that customary law will continue to live within society through its beliefs and practices, carried out honestly and fairly, making legal codification unnecessary due to its dynamic, plastic, and unwritten nature (Sulastriyono & Pradhani, 2018).

The National Criminal Code (KUHP) has accommodated customary criminal law under Article 2, Article 12, and Article 16. However, despite this inclusion, there are conditions and limitations regarding the applicability of customary criminal law or customary sanctions.

A contradictory provision arises concerning the requirements and conditions under which customary criminal law may be applied, as these matters will be regulated through Government Regulations. This is seen as a formalization that restricts the flexibility of customary law. As a living, dynamic, and evolving legal system, customary law should not require formal government regulations.

From the author's perspective, customary law requires only recognition and protection for its existence. A major concern is that formalization or codification of recognized customary laws may ultimately hinder their natural evolution.

Hoven argues that customary law emerges independently, without intervention from the authorities or the state. Its dynamic nature allows it to adapt to changes organically while also carrying its own consequences for non-compliance (Beckmann-Beckman & Beckmann-Beckman, 2011).

The explanatory provision of Article 2, paragraph (3), which states that the application of customary criminal law should be regulated through regional regulations (Perda), could instead hinder the enforcement of customary law. The legislative process at both the national and regional levels is complex and time-consuming. There is concern that the flexibility of customary law will be lost if it is incorporated into regional regulations, making it subordinate to higher legal provisions, thus creating a contradiction.

The restriction of customary criminal law through regional regulations will gradually erode its values and authenticity, reducing it to a mere formal document rather than a living legal tradition within society (Hamida, 2022).

The formalization of customary criminal law will face several challenges. There is still no clear separation between provisions that are of a criminal or civil nature, and not all customary norms are written down; many remain within the beliefs of society. This creates difficulty in formulating customary criminal offenses.

Formalization is like a double-edged sword: it provides clarity but has philosophical implications that undermine the sacred values of customary law itself. Moreover, the requirement to regulate customary criminal law through regional regulations would affect its dynamic nature in adapting to changes. It is important to remember

that customary law is not a political product like regional regulations.

Customary law is heterogeneous. Currently, indigenous communities have established governmental structures that align with the state while still preserving their traditions. For example, the Minangkabau customary law adheres to the principle of *"Adat Salingka Nagari,"* which means that customary law exists and applies within the jurisdiction of a *nagari* (village). This indicates that different *nagari* may have distinct customary laws, even within the same region, and these variations are distributed across the lowest levels of governance.

Minangkabau customary law provides an example of legal pluralism, formed through the integration and harmonization of customary norms and religious principles, giving rise to the expression *"Adat basandi syara', syara' basandi Kitabullah,"* which means "Customary law is based on Islamic law, and Islamic law is based on the Quran."

Another issue, aside from the formalization of customary law into regional regulations, concerns the application of customary sanctions under Article 66 of the National Criminal Code (KUHP), which classifies customary sanctions as additional penalties. Paragraph (1), letter (f) states that one form of additional punishment is the fulfillment of local customary obligations.

This provision carries significant consequences in its implementation, as it effectively places customary sanctions in a subordinate position to principal punishments under the Criminal Code (Amelya & Elfiani, 2022). Moreover, additional sanctions are optional and depend on the discretion of the judge. If the customary sanction cannot be carried out, it may be replaced by a fine categorized as Level II. If the fine remains unfulfilled, it is further substituted with supervisory punishment or community service, as stipulated in Article 96 of the National Criminal Code.

State-imposed penalties may be perceived as disregarding local customary institutions, which have a deeper understanding of the philosophical, sociological, and historical values behind such sanctions compared to court judges. The Supreme Court decisions No. 948/K/Pid/1996 and No. 1644/K/Pid/1988 provide guidance that judges must not impose additional punishment on an offender who has already been sanctioned by a customary institution or court and has served the customary sentence. This principle respects customary rulings and prevents double punishment.

Another issue in regulating customary offenses is the matter of jurisdiction. Customary law, as a legal institution, also upholds justice in resolving disputes within its community. Customary law functions as a court established and operated by Indigenous Peoples, involving their direct participation in the judicial process (Wiratraman, 2022).

The issue arising from the integration of customary sanctions as additional penalties in the National Criminal Code (KUHP) is the question of jurisdiction over customary offenses. The key concern is whether such cases fall under the jurisdiction of the district courts or customary courts. Consequently, this policy is considered contradictory to the objective of protecting and advancing customary law, as it risks reducing and undermining the existence of customary courts.

It is important to recognize that customary courts have distinctive legal and cultural characteristics, as well as moral and religious values, which enable them to resolve disputes through consensus-based deliberation. Their resolution mechanisms align with customary law processes, which are based on sociological considerations, particularly the community's cultural foundations (Rochaeti & Sutanti, 2018).

If the state intends to recognize and strengthen customary criminal law, it must also acknowledge and legalize the existence of customary courts. The presence of a formal legal framework would enable indigenous communities to uphold and maintain their legal traditions in daily life.

This discussion highlights the need to realign the concept of recognizing customary criminal law in the National Criminal Code. Customary law should not be treated as subordinate to higher regulations simply because it is incorporated into regional regulations, nor should it be viewed merely as a supplementary component of criminal sentencing through additional penalties. Instead, customary law should retain its status as an unwritten legal source, equal to statutory law or jurisprudence.

Ideally, the National Criminal Code should provide clear guidelines or recognition rules for the proper application of customary law. In the author's view, the implementation and procedures for applying customary law should be entrusted to indigenous communities. Any additional sanctions that a judge may impose should be regulated within the Criminal Procedure Code, in accordance with established Supreme Court rulings, to prevent double punishment for offenders and avoid conflicts between national and customary law. The Supreme Court has already recognized the existence of customary legal institutions and respects their decisions when they impose customary sanctions on offenders.

Therefore, the government does not need to regulate customary law through regional regulations but should instead focus on providing recognition and protection. Articles 2(1) and 2(2) of the National Criminal Code already acknowledge the existence of customary law. The key issue is to ensure its implementation does not rely on regional regulations but follows a more appropriate legal framework.

D. CONCLUSION

Customary criminal law already holds the same status as statutory law and jurisprudence as

an unwritten source of law. This is based on Law No. 48 of 2009 on Judicial Authority, the Supreme Court of the Republic of Indonesia's Decision No. 948/K/Pid/1996 dated November 15, 1996, and another Supreme Court ruling, Decision No. 1644/K/Pid/1988 dated May 15, 1991. The limits of the applicability of customary criminal law have been outlined in the National Criminal Code (KUHP) with guidelines aligned with the philosophy of Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by the international community.

The provision stating that customary law to be applied in the National Criminal Code must be regulated through regional regulations, as referred to in Article 2(3), would restrict the flexibility and sacredness of customary law. The state should focus solely on recognizing and protecting customary criminal law rather than formalizing it within regional regulations. Under the theory of lawmaking, such formalization would place customary law in a subordinate position to higher laws, following the principle of *Lex Superior Derogat Legi Inferiori* (a higher law overrides a lower law).

The validity, application, and procedural aspects of customary criminal law in the new Criminal Code should be entrusted back to customary courts and indigenous communities. Additional sanctions that judges may impose can be accommodated in the revised Criminal Procedure Code, ensuring that legal guidelines are followed while considering the social and cultural conditions of indigenous communities. This approach would allow judicial decisions to preserve their philosophical, sociological, and historical values.

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