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CUSTOMARY LAW IN THE NEW INDONESIAN CRIMINAL CODE: RECOGNITION OR REDUCTION?

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Abstract
The new Indonesian Criminal Code, as stipulated in Article 2 of Law No. 1/2023, formally acknowledges customary criminal law as the basis for determining criminal liability. Its implementation is further specified in government regulations, as guidelines for regions in formulating laws that reflect community-based principles. However, this arrangement potentially engenders legal issues, including jurisdictional conflicts and the erosion of local wisdom. This study seeks to analyse whether the provisions represent a recognition or reduction of customary criminal law. The analysis is grounded in the legal pluralism theory, which emphasises the interaction between various legal systems in society, and the theory of law and society, which views law as a social phenomenon shaped by local values and culture. As doctrinal research, this study utilises primary and secondary legal materials, employing a qualitative analysis approach informed by legal hermeneutics. The findings suggest that Article 2 of Law No. 1/2023, concerning the Criminal Code, acknowledges the validity of customary criminal law in Indonesia. From theoretical, legal, and practical perspectives, this provision plays a crucial role in Indonesian judicial practice. However, such recognition should not be construed as subordination within a hierarchical regulatory framework that could undermine the autonomy of customary criminal law. Instead, it should serve as a framework for legal coexistence, where mutual respect is fostered as an adaptation to the challenges of global complexity, thus preserving Indonesia's pluralistic legal identity.

Keywords: *Customary criminal law; new Criminal Code; legal pluralism.*

Abstrak
Kitab Undang-Undang Hukum Pidana (KUHP) Indonesia yang baru, sebagaimana tercantum dalam Pasal 2 Undang-Undang No. 1 Tahun 2023, secara resmi mengakui hukum pidana adat sebagai dasar dalam menentukan pertanggungjawaban pidana. Penerapan lebih lanjut diatur dalam peraturan pemerintah, sebagai pedoman bagi daerah dalam merumuskan peraturan yang mencerminkan prinsip-prinsip berbasis komunitas. Namun, pengaturan ini berpotensi menimbulkan masalah hukum, termasuk konflik yurisdiksi dan erosi kearifan lokal. Penelitian ini bertujuan untuk menganalisis apakah ketentuan tersebut merupakan pengakuan atau justru pengurangan terhadap hukum pidana adat. Analisis ini didasarkan pada teori pluralisme hukum, yang menekankan interaksi antara berbagai sistem hukum dalam masyarakat, serta teori hukum dan masyarakat, yang memandang hukum sebagai fenomena sosial yang dibentuk oleh nilai-nilai dan budaya lokal. Sebagai penelitian doktrinal, studi ini menggunakan bahan hukum primer dan sekunder, dengan pendekatan analisis kualitatif dan hermeneutika hukum.

Penelitian ini menunjukkan bahwa Pasal 2 Undang-Undang No. 1 Tahun 2023 tentang KUHP mengakui sahnya hukum pidana adat di Indonesia. Dari perspektif teoretis, hukum, dan praktis, ketentuan ini memiliki peran penting dalam praktik peradilan pidana Indonesia. Namun, pengakuan tersebut seharusnya tidak dipahami sebagai subordinasi dalam kerangka regulasi hierarkis yang dapat mereduksi otonomi hukum pidana adat. Sebaliknya, pengakuan tersebut harus dipandang sebagai kerangka bagi ko-eksistensi hukum yang saling menghormati sebagai adaptasi terhadap tantangan kompleksitas global, sekaligus melestarikan identitas pluralisme hukum di Indonesia.

Kata Kunci: *hukum pidana adat; KUHP baru; pluralisme hukum.*

Introduction

Customary law is a dynamic and evolving body of law within a society, upheld and practised across generations by the community, and regarded as sacred.[1] Customary law originates from local customs, serving as guidelines for behaviour, social norms, and a mechanism for resolving issues with a focus on restorative justice, rather than solely on punishment.[2] The existence of customary law in Indonesia exemplifies legal pluralism, aligning with Werner Menski's view that "law cannot be understood as a uniform and static entity, but rather as a plural, dynamic phenomenon, greatly influenced by the social context, culture, and diverse values in society."[3]

Although not the sole normative system, customary law remains a fundamental pillar of legal awareness and social regulation in many regions.[4] Customary law illustrates the contextual and evolving nature of the legal system, reflecting its inherent presence within diverse societal conditions and its development in response to social dynamics.[5]

Within Indonesian criminal law, customary law is a source that judges must consider when adjudicating cases, in the context of legal pluralism. This obligation is grounded in Article 5 (1) of Law No. 48 of 2009 concerning judicial power, which clearly mandates that judges and constitutional judges explore, adhere to, and understand the evolving legal values and sense of justice in society.

The Indonesian legal system recognises and incorporates customary law as a foundation for criminal proceedings. The Supreme Court, as Indonesia's

1 Erni Dwita Silambi et al., "Ideal Concept of Traditional Justice in Solving Criminal Cases," *Academic Journal of Interdisciplinary Studies* 11, no. 1 (January 3, 2022): 293, https://doi.org/10.36941/ajis-2022-0026.

2 Helnawaty Helnawaty, "Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Binamulia Hukum* 6, no. 2 (27 Desember 2017): 149–60, https://doi.org/10.37893/jbh.v6i2.79.

3 Werner Menski, "Flying Kites in a Global Sky: New Models of Jurisprudence," *Socio-Legal Review* 7, no. 1 (January 2011): 1, https://doi.org/10.55496/JZEO6754.

4 Tody SJ Utama et al., "New Ways of Teaching Adat (Customary) Law at Indonesian Law Schools," *The Indonesian Journal of Socio-Legal Studies* 4, no. 1 (2024), https://doi.org/10.54828/ijsls.2024v4n1.2.

5 Menski, "Flying Kites in a Global Sky," January 2011.

highest judicial authority, in its decision No. 1644 K/Pid/1988 (May 15, 1991), affirms its respect for the decisions of customary chiefs based on customary deliberations, which impose sanctions on those who violate customary norms. This decision clarifies why the institution's rulings or customary deliberation are recognised. If the perpetrator has already undergone the sanction, the district court may not impose a further sentence to prevent double punishment.[6]

In his professorial inauguration address, Barda Nawawi emphasised the need to examine the living legal system as a viable alternative for reforming the Indonesian Criminal Code. He argued that the legal system, which emerges and evolves within society, is deeply rooted in customary traditions and religious norms. Thus, it is fitting to explore the principles and standards of criminal law as reflected in living law, analysing them through the lens of Pancasila values. By identifying the convergence between these customary principles and national ideology, these norms may be elevated to become the guiding principles of positive criminal law in the enforcement of customary law.[7]

In his professional inauguration address, Eko Soponyono highlighted that a key mission of Indonesian Criminal Code reform is to harmonise customary and national criminal law system. He explained that one of the missions of the Criminal Code involves adapting and harmonising the recognition of customary criminal law as a defining feature of Indonesian law. This recognition is particularly pertinent, as many regions in Indonesia continue to apply customary law to determine whether an action constitutes a criminal violation, reflecting the community's sense of justice.[8]

This opinion highlights the importance of examining and studying the principles and norms of criminal law prevalent in society in light of Pancasila values and integrating them into national criminal law. Thus, criminal law aligns more closely with the character and needs of society, becoming a distinctive feature of Indonesian law. It is crucial to recognise that the principle of formal legality, enshrined in the Indonesian Criminal Code as a legacy of Dutch colonialism, often with the pluralism of Indonesian law, which is rooted in unwritten norms.[9] Thus, the renewal of the Criminal Code must incorporate local and customary values to adapt to social realities and foster a sense of justice. Such integration is vital to prevent conflicts between customary law and positive criminal law in Indonesia.[10]

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6 Umi Rozah, *Fisafat pemidanaan dalam sistem pemidanaan KUHP 2023 (Aplikasi dalam Kebijakan Hukum Pidana)* (Semarang: Yoga Pratama, 2024).

7 Pujiyono, *Guru Besar Undip Bicara Pembaharuan Hukum Pidana*, 1 ed. (Depok: Rajawali Pers, 2023).

8 Pujiyono.

9 Ade Adhari et al., "Customary Delict of Penglipuran Bali in the Perspective of the Principle of Legality: A Dilemma and Arrangements for the Future," *Journal of Indonesian Legal Studies* 6, no. 2 (30 November 2021): 411–36, https://doi.org/10.15294/jils.v6i2.50555.

10 Yu, Du, "Customary Law in the Practice of Criminal Law: A Real and Powerful Role," *Peking University Law Journal* 1, no. 1 (2013): 37–68, https://doi.org/10.5235/205174813807351618.

Comparative studies in pluralist societies, such as Ethiopia, demonstrate that customary law plays a significant role in daily life, including the resolution of both civil and criminal disputes.[11] Jordan, which follows a mixed legal system, recognises Bedouin tribal customs in criminal and family matters, with customary mediation processes running parallel to formal legal procedures.[12] The South African 1996 Constitution also acknowledges the validity of customary law, requiring its application by the courts where relevant, provided it does not conflict with the Constitution, particularly with the principle of human rights. Customary courts have jurisdiction over disputes within indigenous communities.[13] The study suggests that countries worldwide continue to recognise and protect their customary law, often explicitly stated in their constitution, and these laws serve as an instrument for resolving legal issues.

The reform of criminal law in Indonesia has entered a new phase with the enactment of Law No. 1 of 2023 concerning the Criminal Code (hereinafter abbreviated as Law No. 1/2023), which, in Article 2 (1), recognises customary law as an integral part of the national legal system for determining criminal liability.[14] Article 2(1) embodies the ideology of the Indonesian nation as outlined in Article 18B(2) of 1945 Constitution which states: "The state recognises and respects customary law community units, along with their traditional rights, as long as they remain extant and consistent with societal development and the principles of the Unitary State of the Republic of Indonesia, as regulated by law."

A problem arises with Article 2(3) of Law No. 1/2023, which, in its explanation of the Government Regulation, provides guidelines for determining the law governing society in regional regulations. The provision raises a theoretical challenge: the formalisation of customary criminal law through Regional Regulations, when viewed through a positivist legal framework, risks undermining the diversity and dynamic nature of living legal practices within society. Yoserwan's research results indicate that customary criminal law, as defined in Law No. 1/2023, has the potential to be subordinate to higher regulations, potentially narrowing the scope of criminal acts subject to customary sanctions.[15]

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11 Wondwossen Demissie Kassa and Muradu Abdo Srur, *Legal status of customary criminal justice systems and human rights in Ethiopia*, 1st Edition (Routledge: Taylor and Francis, 2016).

12 Judiciaries Worldwide: A Resource on Comparative Judicial Practice, access in https://judiciariesworldwide.fjc.gov/customary-law , at June 9 2025

13 Jacques Matthee, "Indigenous beliefs and customs, the South African criminal law, and human rights: identifying the issues," *The Journal of Legal Pluralism and Unofficial Law* 53, no. 3 (2021): 522-544., https://doi.org/10.1080/07329113.2021.2005353.

14 Deri Ardiansyah, Rayhan Dwi Kurnia, dan Rika Rahayu, "Formulasi RPP Pelaksanaan Pidana Adat sebagai Upaya Harmonisasi Penerapan Hukum Adat guna Mewujudkan Kepastian Hukum," *WICARANA* 3, no. 1 (29 Maret 2024): 11–22, https://doi.org/10.57123/wicarana.v3i1.64.

15 Yoserwan, "Implications of Adat Criminal Law incorporation into the New Indonesian Criminal Code: Strengthening or weakening?" 10, no. 1 (2024), https://doi.org/10.1080/23311886.2023.2289599.

Another study highlights that subordinating customary criminal law to higher-level regulations may result in several problems, including the transformation of material unlawfulness into formal unlawfulness through codification in regional regulations, as well as inconsistencies between the punishment system for customary crimes and the criminal sanctions outlined in regional regulations.[16] In light of these theoretical challenges, the study by Astuti et al. supports the view that a dichotomy exists between customary law and Indonesian criminal law, which is grounded in the principle of formal legality, thus creating complex dynamics.[17] Thus, within the context of legal pluralism, it is essential to integrate an understanding of society, culture, and value systems.

In light of these theoretical issues, it is crucial to determine whether Article 2 of Law No. 1/2023 represents a genuine recognition or, conversely, a weakening of customary criminal law in Indonesia. This research is significant in light of Muladi's assertion that customary criminal law embodies the "Indonesian Way" – a distinctive feature of national legal norms rooted in a structure recognised and upheld by indigenous peoples across generations.[18] Thus, this study aims to critically examine the extent to which Article 2 of Law No. 1/2023 serves as a recognition or weakening of customary criminal law in Indonesia.

This study applies Werner Menski's theory of legal pluralism, focusing on the plurality of individual and group legal behaviours in society, influenced by social context, culture, and local values.[19] Additionally, Brian Z. Tamanaha's theory of law and society posits that law is inherently part of society, not an external entity, and is embedded within societal structures.

A review of existing literature on customary criminal law includes studies such as the Relevance of Customary Criminal Law in Indonesia's Criminal Law Reform,[20] The role of Customary Criminal Law Sanctions in National Legal Reform,[21] The Formulation of the draft government regulation (RPP) for the implementing customary criminal law to ensure legal certainty,[22] and the

16 Rozah, *Fisafat pemidanaan dalam sistem pemidanaan KUHP 2023 (Aplikasi dalam Kebijakan Hukum Pidana)*.

17 Tri Astuti Handayani dan Andrianto Prabowo, "Analisis Hukum Pidana Adat Dalam Hukum Pidana Nasional," *Jurnal Hukum Ius Publicum* 5, no. 1 (22 April 2024): 89–105, https://doi.org/10.55551/jip.v5i1.95.

18 Handayani and Prabowo.

19 Dicky Eko Prasetio et al., "The Legal Pluralism Strategy of Sendi Traditional Court in the Era of Modernization Law," *Rechtsidee* 8 (March 9, 2021), https://doi.org/10.21070/jihr.2021.8.702.

20 Galuh Faradhilah Yuni Astuti, "Relevansi Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana di Indonesia," *Pandecta: Research Law Journal* 10, no. 2 (31 Desember 2015): 195, https://doi.org/10.15294/pandecta.v10i2.4953.

21 Nyoman Serikat Putra Jaya, "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Masalah-Masalah Hukum* 45, no. 2 (19 April 2016): 123, https://doi.org/10.14710/mmh.45.2.2016.123-130

22 Ardiansyah, Dwi Kurnia, dan Rahayu, "Formulasi RPP Pelaksanaan Pidana Adat sebagai Upaya Harmonisasi Penerapan Hukum Adat guna Mewujudkan Kepastian Hukum."

implications of customary criminal law implementation on the principle of legality within Indonesia's criminal system. [2324] While previous studies have focused on the broader integration of customary law into national reform, this study explicitly examines whether Article 2 of Law No. 1/2023 constitutes recognition or a diminution of the role of customary criminal law in Indonesia.

Methods

This study employs a doctrinal research approach, focusing on the interpretation of legislation and the constitutional position of customary law within the Indonesian criminal justice framework. The doctrinal approach is deemed appropriate for clarifying the legal status and normative implications of Article 2 of Law No. 1/2023. This approach is expected to provide a detailed analysis of Article 2 of Law No. 1/2023 concerning the Criminal Code, which may either recognise or diminish the role of customary crimes in Indonesia.

The data for this study are drawn from primary sources, including the Criminal Code and Supreme Court jurisprudence, and analysed through legal hermeneutics, with particular emphasis on constitutional coherence, interpretive consistency, and alignment with the principles of legal pluralism. Additionally, secondary legal materials, such as books, journals, scholarly articles, and relevant legal literature, were utilised in the study. This process was conducted through library research, which involved the systematic reading, recording, and citation of sources to acquire a comprehensive understanding of the legal norms under investigation.

Results and Discussion

Existence and Recognition of Customary Criminal Law in Indonesia

The development of criminal law extends beyond its institutional framework to encompass the legal substance, an essential component of the broader cultural legal system. Consequently, the development of a coherent national legal framework, including criminal law, must integrate legal norms derived from religious and customary traditions into legislative drafting.

The interaction between customary criminal law, rooted in natural law, and state law resembles Werner Menski's triangular model. Menski's concept seeks to achieve justice through a dynamic interplay among natural law (including religious, ethical, and moral principles*), societal law*, and *state law*. Accordingly, it is essential to recognise that societal values emerge from these three domains and should be regarded as legitimate sources of law.[25] This perspective, consistent with Brian Z. Tamanaha's contributions to Law and Society scholarship, rejects

23 Handayani and Prabowo, "Analisis Hukum Pidana Adat Dalam Hukum Pidana Nasional."

24 Yanuardi Yogaswara, Tata Surwita, dan Dewi Asri Yustia..

25 Werner Menski, "Flying Kites in a Global Sky: New Models of Jurisprudence," *Socio-Legal Review* 7, no. 1 (January 2011): 1, https://doi.org/10.55496/JZEO6754.

the notion that law consists solely of isolated, written provisions divorced from societal context. Instead, law is an integral element of society, inherently interwoven with and shaped by its social milieu.[26]

Theories of legal pluralism and law and society assert that customary criminal law, although unwritten, emerges organically from the values, beliefs, and needs of local communities to regulate social interactions. Hence, each community possesses a distinctive value typology, which results in legal variability between societies.[27] Theoretically, customary criminal law constitutes a legitimate source of law, since law is understood to arise organically from communal practice. Consequently, although unwritten, customary criminal law may furnish a valid foundation for criminal prosecution. Article 2 of Law No. 1/2023 on the Criminal Code represents a paradigm shift in the principle of legality, transitioning from a purely formal approach to one that embraces both formal and material legality.[28]

Even prior to Article 2 of Law No. 1/2023, Indonesian judges were required to consider prevailing societal norms when adjudicating cases to ensure equitable outcomes. This obligation is enshrined in Article 5 (1) of Law No. 48/2009 on Judicial Power; Article 5 (3)(b) of Emergency Law No. 1/1951 regarding Temporary Measures to Organise the Unity of the Power Structure and Procedures of Civil Courts; and Article 1(2) of MPR-RI Decree No. III/MPR/2000 on Sources and hierarchy of law.

Although this rule formally recognises unwritten law as a legal source, its application remains contingent upon judicial discretion and the judge's willingness to incorporate such sources.[29] Legally, it is clear that unwritten or customary law is a primary source that merits exploration and consideration, as it embodies the values, cultural practices, and societal structures of Indonesia.[30]

Muladi advocates that Criminal Code reform must account for human conditions, environmental considerations, and Indonesian traditions, committing to recognise living law both as a source of positive and negative law. This stance clarifies that criminal law reform must neither disregard Indonesian tradition nor overlook societal legal norms, thereby underscoring the importance of customary criminal law.[31]

Under the negative function of customary criminal law, the territorial principle holds that if an act fulfils statutory elements yet the community does not

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26 Brian Z Tamanaha, "Law and Society," *St. John's Legal Studies Research Paper* 09, no. 0167 (February 2009): 1–24, http://ssrn.com/abstract.

27 Tamanaha.

28 Sudarto, *Hukum Pidana 1*, Revisi (Semarang: Yayasan Sudarto, 2023)..

29 GE Rusdi Antara, I. Nyoman Budiana, and IA Sadnyini, "Formulation of Customary Criminal Law in Future Criminal Code and Legal Enforcement in Indonesia," *Substantive Justice International Journal of Law* 4, no. 2 (2021): 164–81, https://doi.org/10.33096/substantivejustice.v4i2.149.

30 Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratizing Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (3 April 2023): 190–214, https://doi.org/10.1080/10383441.2023.2243772.

31 Prasetyo, Aunuh, dan Fajrin..

regard it as criminal, Article 2(1) may justify its exclusion from prosecution. This exclusion is further supported by Article 35 of Law No. 1/2023.[32] Conversely, the positive function recognises customary criminal law as a legitimate basis for criminal punishment, even without formal codification. Where a community collectively deems an action criminal, such normative consensus may serve as a legitimate basis for sanction. This principle aligns with the view that the illegality of material acts, as understood through positive functions, signifies that law is inseparable from societal norms, locating the source of customary criminal law within the community itself.[33]

Concerning applicability, Nyoman Serikat Putra Jaya proposes specific criteria for customary criminal law. He asserts that customary criminal law, as a foundation for national criminal law, must satisfy three conditions: (1) it must remain a living tradition in Indonesian society; (2) it must not impede the realisation of a just and prosperous society; and (3) it must correspond to the noble values enshrined in Pancasila.[34]

This aligns with Article 2(2) of Law No. 1/2023, which stipulates that enforcement of customary criminal law must adhere to Pancasila, the 1945 Constitution, human rights, and principles of international law. The article implies that customary criminal law must be identified, rather than spontaneously assumed. Quoting Fitzgerald,[35] several conditions must be met for customs to be socially accepted as law. First, the custom must be just, broadly accepted and demonstrably beneficial, with a clear and rational basis. Second, it must be practised openly. Third, it must be well-established, having originated over time and acquired significant historical and philosophical credibility, thereby earning intergenerational societal trust. When these conditions are satisfied, customs may evolve into binding legal norms. Three further requirements are necessary for this transformation: (1) a sustained material practice over a long period; (2) an intellectual consensus recognising the practice as a legal obligation; and (3) customary sanctions imposed when the norm is breached.

The theoretical and legal foundation is supported by several Supreme Court decisions recognising customary criminal law as a basis for criminal punishment, as follows:

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32 Setya Indra Arifin, "Rekonstruksi Sifat Melawan Hukum Pidana Materiil Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Kuhp," *AL WASATH Jurnal Ilmu Hukum* 4, no. 1 (30 April 2023): 29–42, https://doi.org/10.47776/alwasath.v4i1.638..

33 Beni Kharisma Arrasul, "Eksistensi Hukum Pidana Adat dalam Rancangan KUHP: Problematika Asas Legalitas dan Over-Kriminalisasi," *UNES Law Review* 6, no. 1 (September 2023), https://doi.org/10.31933/unesrev.v6i1.

34 Barda Nawawi Arief, *Tujuan dan Pedoman Pemidanaan (Perspektif Pembaharuan & Perbandingan Hukum Pidana)*, 8 ed. (Semarang: Pustaka Magister, 2022).

35 Rozah, *Fisafat pemidanaan dalam sistem pemidanaan KUHP 2023 (Aplikasi dalam Kebijakan Hukum Pidana)*.

Table 1. Decision of the Supreme Court of the Republic of Indonesia

MARI's Verdict	Core Decision
No. 948/K/Pid/1996 dated 15 November 1996	If an act has been resolved through customary law in force in the community and the local Customary Court has tried the perpetrator by imposing a sanction in the form of a customary fine, which the perpetrator then pays, then the act can no longer be prosecuted using the Criminal Code (KUHP). This provision aims to avoid double criminalisation.
No. 1644/K/Pid/1988 dated May 15, 1991	In principle, it also recognises the existence of customary criminal law through local customary courts. In this context, district courts and high courts are considered not to respect customary court decisions if they decide on cases that have received customary sanctions and the sanctions have been implemented by the accused or perpetrator.

Source: processed from the Decision of the Supreme Court of the Republic of Indonesia

Although these decisions, as narrated in **Table 1**, affirm the legitimacy of customary sanctions, their practical impact remains limited. Therefore, integration with criminal procedural law is necessary to ensure legal certainty and prevent double punishment. These rulings demonstrate the legitimate recognition of customary criminal law within Indonesian jurisprudence and affirm the validity of Article 2 of Law No. 1/2023, which preserves customary legal institutions.[36]

Customary criminal law thus emerges as a strategically significant issue, as the Criminal Code, derived from Dutch colonial law and grounded in legal positivism, has historically emphasised formal legality since independence.[37] This emphasis has tended to marginalise uniquely Indonesian legal traditions that reflect the nation's identity. The formal legality principle of the KUHP restricts space for customary criminal law, exacerbating societal perceptions of injustice.

Sunaryati Hartono metaphorically describes customary law as the foundation upon which national law, the superstructure, is constructed. Consequently, robust national law inherently depends on customary law; together, they form a complementary unity akin to a modern building's foundation and structure. Recognising the role of customary criminal law within the new Criminal Code underscores the global relevance of legal pluralism. It departs from the notion of law as monolithic and static, instead portraying it as pluralistic, dynamic, and deeply influenced by social context, culture, and diverse societal values.[38]

Philosophically, Article 2 of Law No. 1/2023 embodies the *nulla poena sine jure* principle*,* affirming that no crime exists without pre-existing law. Here, 'law' is construed broadly to include both codified statutes and unwritten customary

36 Eddy O.S. Hiarej dan Topo Santoso, *Anotasi KUHP Nasional* (Rajawali Pers, 2025).

37 Lutfi Arif Susanto, "Teori Hukum Dalam Sistem Hukum Di Indonesia," *Sangaji : Jurnal Pemikiran Syariah dan Hukum* 8, no. 2 (9 Oktober 2024): 199–212, https://doi.org/10.52266/sangaji.v8i2.3176.

38 Menski, "Flying Kites in a Global Sky," January 2011.

norms.[39] Customary criminal law is thus recognised in the new Criminal Code as a manifestation of balanced legal principles, enabling its application in both promotive and permissive functions in criminalisation.[40]

The foregoing analysis systematically demonstrates that Article 2 of Law No. 1/2023 recognises customary criminal law, thereby cementing its theoretical foundations in legal pluralism and law-and-society scholarship, and aligning legal theory with practice. The author's constructions can be delineated as such:

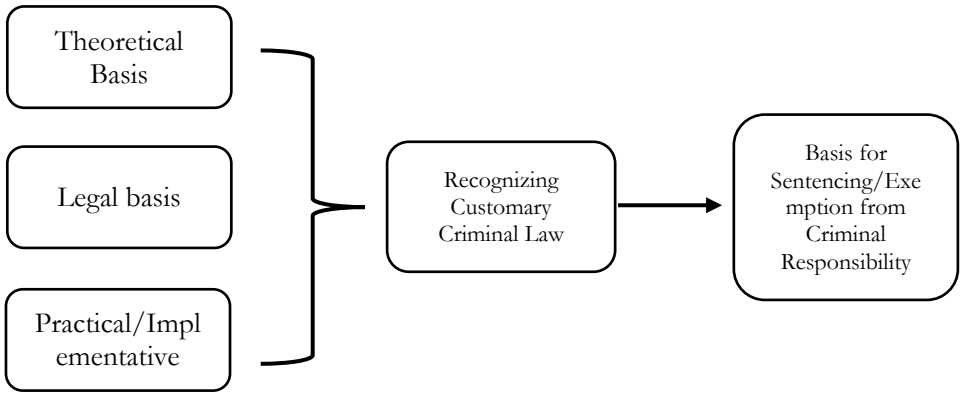

Figure 1. Construction of Customary Criminal Law Recognition
Source: processed by the author from various sources

Based on **Figure 1**, the National Criminal Code Reform incorporates provisions acknowledging customary law. Through a legal pluralism approach, it is anticipated that such recognition will make a meaningful contribution to social justice.[41]

Potential Reduction of Recognition of Customary Criminal Law in the Indonesian Criminal Code

The previous discussion provides an overview of the position and recognition of customary criminal law, both before and after the enactment of Law No. 1/2023, particularly since its passage. Customary criminal law serves as a basis for both positive and negative criminalisation. In Law No. 1/2023, in addition to formally recognising customary criminal law, there exists a potential reduction of customary law itself, as stated in Article 2(3) of Law No. 1/2023, which stipulates that "*provisions on procedures and criteria for determining living laws in*

39 Hiarej dan Santoso, *Anotasi KUHP Nasional.*

40 Yoghi Arief Susanto and Mujiono Hafidh Prasetyo, "Customary Criminal Law in the New Criminal Code: Between Positive and Negative Functions," *International Journal of Multidisciplinary Research and Analysis* 8, no. 6 (June 2025): 3113–3120, https://doi.org/10.47191/ijmra/v8-i06-05.

41 Menski, "Flying Kites in a Global Sky," January 2011.

society are regulated by Government Regulations". Its provision clarifies that *"Government Regulations in these provisions are guidelines for regions in determining living laws in society in Regional Regulations"*.

This approach carries the risk of politicising and formalising customary criminal law, potentially leading to its recolonisation by this law. As Djojodigoeno explained, customary law endures within the community through shared beliefs and practices, applied with integrity and a sense of justice. Due to its dynamic, adaptive, and unwritten nature, he argued that codification is unnecessary and may undermine its organic character.[42]

In alignment with Djojodigoeno's view, Tamanaha also argued that formality and legality in law have inherent limitations, as the organisation of the state and the societal dynamics cannot be fully achieved by relying solely on these formal legal aspects. Legal products that overly emphasise formality and legality often fail to deliver sufficient social benefits to society. For example, complex and convoluted bureaucratic procedures, intended to ensure legal certainty, can hinder societal interests.[43]

The theoretical basis suggests that codifying customary criminal law may be perceived as failing to benefit the customary community, complicating the achievement of legal certainty, and potentially transforming its dynamic and dialogical characteristics into a rigid formality.[44]

Ontologically, customary law derives its authority from the collective adherence and support of indigenous people, whose decisions are executed with full conviction. Consequently, customary law is not formally written or codified; rather, it is inherent and regarded as an integral part of the community's life, originating from the values of law and justice that the community upholds.[45] Von Savigny argued that law is the essence of the nation's soul, encapsulated by his motto "*Das recht wird nich gemacht, es ist und wird mit dem volke*" meaning that law is not created but exists and evolves with the soul of the nation. This vision resonates with global critiques of legal centralism and supports decentralised, culture-based legal authority.

Savigny's view aligns with that of Menski's, who noted that many remain confined by a narrow definition of law. In contrast, law manifests in various forms, shaped by the context of time and place. Menski criticised the positivist

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42 Sulastriyono Sulastriyono dan Sartika Intaning Pradhani, "Pemikiran Hukum Adat Djojodigoeno dan Relevansinya Kini," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30, no. 3 (15 Oktober 2018): 448, https://doi.org/10.22146/jmh.36956.

43 Brian Z Tamanaha, "The History and Elements of the Rule of Law," *Singapore Journal of Legal Studies*, 1 December 2012, 232–47, https://search.informit.org/doi/10.3316/informit.224175833222280.

44 Nilna Aliyan Hamida, "Customary Law and Legal Pluralism in Indonesia: Toward A New Perspective?" *Indonesian Journal of Law and Society* 3, no. 1 (March 19, 2022): 1, https://doi.org/10.19184/ijls.v3i1.26752.

45 Rozah, *Fisafat pemidanaan dalam sistem pemidanaan KUHP 2023 (Aplikasi dalam Kebijakan Hukum Pidana)*.

approach and efforts to create a universal legal model, which disregards the diversity and dynamism of law as it exists in society. He emphasised that law is inherently plural, even though this plurality is not always immediately visible.[46]

This argument provides an understanding that formalising customary criminal law into Regional Regulations, as stipulated in Article 2(3) of Law No. 1/2023, only offers legal certainty. However, in this research, the author argues that such codification risks undermining the normative pluralism inherent in customary institutions, which evolve and develop within these customary communities.

In this regard, the critiques offered by Savigny and Menski provide a solid foundation for further discussion. Focusing exclusively on formal legal provisions, while neglecting the principles of legal pluralism, risks stifling the development and evolution of customary criminal law. The government must recognise that customary criminal law reflects the noble values of society, thereby securing high legitimacy and effectiveness. Law and society influence each other in two reciprocal directions. On one hand, society views the law as a reflection of its values, forming a consensus to adhere to it. On the other hand, the law asserts its authority to be obeyed by society.

The procedural formalisation of customary criminal law through regional regulations is problematic, particularly if it significantly addresses the types of customary crimes within society. This approach could severely restrict the space for the continued development of customary criminal law. Moreover, if customary criminal law is codified into specific crimes with associated sanctions, it will shift from material to formal legality, thus losing its distinctive characteristic as customary law.

As part of a comparative study, Bronislaw Malinowski's research on Melanesian tribal societies concluded that the order within these communities is grounded in the existence of law. This law is not the type formulated by government or formal authorities, but is based on norms that develop organically within the community. For Melanesian society, law consists of reciprocal obligations among community members, realised through relationships of giving and receiving, passed down across generations, and encompasses various facets of social life.

In a similar vein, Eugen Ehrlich argued that the element of being "formed by a certain authority" is not essential in the legal sense. This implies that law can exist independently of formal authorities, such as legislators or judges tasked with creating legal statutes and jurisprudence. Given that law regulates social life, every societal subsystem, including small units as families, is capable of generating its own legal norms. Malinowski and Ehrlich's views demonstrate that law has a broad meaning, extending beyond formal statutory norms.[47]

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46 Menski, "Flying Kites in a Global Sky," January 2011.

47 Tamanaha, "Law and Society."

Research conducted in Central Kalimantan Province shows that the indigenous Dayak people consistently implement and adhere to customary criminal law as a means of preserving local wisdom derived from their cultural practices. Interestingly, Dayak customary law is not entirely unwritten, as it incorporates elements that are also codified in practice.[48]

These two studies highlight an important insight: codifying and formalising customary criminal law through Regional Regulations are not essential components of law. Customary criminal law is shaped by the collective awareness of each community, formed through social interaction and sustained across generations. Crucially, its validity does not depend on formal enactment by authorities such as the legislators or judges; rather, it is grounded in the lived practices and normative beliefs of the community.

Customary criminal law emerged to regulate acts that violate the communal sense of justice and peace, thereby restoring balance. To restore this balance, customary law distinguishes itself from positive law, particularly in Indonesian criminal law, which tends to adopt an individualistic approach due to its Western origins.[49] The key differences are outlined in **Table 2** below.

Table 2. Differences between Customary Law and Positive Criminal Law

Customary law	Positive Criminal Law
Relatives or family members bear the responsibility for criminal acts committed by their kin.	The Criminal Code holds only individuals accountable; legal entities, such as villages, families, or kin, are not criminally responsible for the actions of their members.
In customary law, there is no requirement to prove intent or negligence.	Criminal acts are punishable only if committed with intent or negligence.
Customary law requires all those involved in a crime to undergo customary sanctions to restore balance.	The Criminal Code recognises aiding and abetting as a criminal act.
Customary crimes do not recognise attempts but punish based on the losses sustained by the victim or breaches of public order.	The Criminal Code defines attempted crimes, such as assault, as punishable offences.
Customary law is dynamic, evolving with the emergence of new regulations reflecting shifts in societal values and perceptions of justice.	The Criminal Code is based on pre-existing legal principles, where laws are fixed and defined in advance.

Source: adapted from the book by Nyoman Serikat Putra Jaya

[48] Zaimuariffudin Shukri Nordin et al., "Integrating Islamic Law and Customary Law: Codification and Religious Identity in the Malay Buyan Community of Kapuas Hulu," *Journal of Islamic Law* 6, no. 1 (February 28, 2025): 89–111, https://doi.org/10.24260/jil.v6i1.3410.

[49] Rena Yulia, Aliyth Prakarsa, and Mahrus Ali, "Restoring the Conflicts among Societies: How Does Baduy Society Settle the Criminal Cases through Restorative Justice?," *Academic Journal of Interdisciplinary Studies* 12, no. 3 (May 5, 2023): 193, https://doi.org/10.36941/ajis-2023-0071.

Customary law is inherently diverse, and today, customary communities have adapted their governance structures to align with the formal state system while continuing to uphold their traditional practices. For instance, Minangkabau customary law applies the principle of *"Adat Salingka Nagari,"* meaning that customary law operates within the confines of the *nagari* (village). This suggests that each *nagari* can have distinct customary rules, even within the same geographical region, reflecting the existence of a customary governance structure at the most localised level. Minangkabau custom serves as a tangible example of legal pluralism, where customary norms and religious teachings are integrated and balanced, as exemplified in the principle of *"adat basandi syara', syara' basandi Kitabullah"*.[50]

In the example of Minangkabau Customary law, as previously discussed, each region can implement state law alongside customary law, thereby adopting a model of legal pluralism. There exists a risk of failure if customary law is formalised into uniform regional regulations that do not accommodate intra-regional variations, as this could undermine the legitimacy of customary norms.

Theoretical frameworks and examples of Minangkabau Customary law practices demonstrate that regional regulations are not necessary to govern customary criminal acts, as such regulation is not a fundamental component of customary law. The formulation of Article 2(1) and (2) of Law No. 1/2023 offers robust recognition and legitimacy to the validity of customary criminal law. Recognition should not be construed as subordination to a hierarchical regulatory framework, which could diminish the autonomy of customary criminal law. Tamanaha also criticised laws that prioritise formal legality, arguing that they fail to provide social benefits to the community, as they force individuals to navigate complex bureaucratic systems.

As a legal institution, customary law possesses the authority to resolve disputes among its community members. Customary court are formed and managed by the community itself, involving its members directly in the process.[51] Customary justice encompasses characteristics of law, culture, moral values, and religion, facilitating problem-solving through deliberation.[52]

The formalisation of existing Customary courts may have adverse consequences, potentially undermining their traditional functions and the

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50 Dr Lucy Finchett-Maddock, "Observing the Impact of RUPES in Paninggahan, West Sumatra: Implementation, Integration, and Reactions of Normative Reward Frameworks and Assessments for the Future," ICRAF Fellowship, tt, https://www2.cifor.org/ard/documents/d1/Report_Lucy.pdf.

51 Herlambang P. Wiratraman, "Customary Court in Indonesia's Judiciary System: A Socio-Legal Inquiry," *Journal of Asian Social Science Research* 4, no. 1 (August 12, 2022): 43–62, https://doi.org/10.15575/jassr.v4i1.62.

52 Nur Rochaeti dan Rahmi Dwi Sutanti, "Kontribusi Peradilan Adat Dan Keadilan Restoratif Dalam Pembaruan Hukum Pidana Di Indonesia," *Masalah-Masalah Hukum* 47, no. 3 (30 Juli 2018): 198, https://doi.org/10.14710/mmh.47.3.2018.198-214.

community-based legitimacy they hold. As outlined in the Papua Special Autonomy Law, Customary Courts are authorised to handle criminal cases involving Papuan indigenous people, with the provision for an appeal to be filed in the District Court. However, intervention by the formal criminal justice system prior to the customary court's resolution can lead to jurisdictional conflicts. This creates a significant risk of contradiction between the Customary Court and the District Court, especially due to the overlap in legal subjects, case objects, and principles of criminal responsibility in both systems.[53]

This context provides a deeper understanding of the importance of legal pluralism, allowing the law to make a substantive contribution to social justice. Suppose inclusion in the Regional Regulation is deemed necessary. In that case, its focus should shift from prescribing or codifying specific types of customary crimes and sanctions, as such codification would undermine the inherently flexible and evolving nature of customary criminal law. Instead, the regulation should serve solely to affirm and reinforce the legitimacy of practices that customary communities have long observed and maintained. Such regulatory instruments should not become tools of state control or oppression. The role of the state should be confined to providing protection and recognition, rather than forcing formalisation.[54]

It would be more pragmatic to compile guidelines for handling cases where customary criminal law serves as the basis for sentencing, in both its positive and negative functions. These guidelines would provide a clear framework for judges to incorporate customary law, thereby fostering integration and mutual respect between customary criminal law and state laws.[55] Recognition through formalisation should not be used as a means of hierarchical subordination of higher legal provisions.

It is crucial to adopt a broader perspective on criminal law, one that extends beyond codified provisions to recognise the importance of unwritten norms. Equal attention and consideration must be given to both the theoretical and practical frameworks that support its implementation. In the context of increasing socio-cultural complexity in the global era, this demands a shift toward a more pluralistic, open, and contextually sensitive legal paradigm – one that acknowledges the coexistence of multiple legal systems and adapts to diverse societal realities.

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53 B. Suhariyanto et al., "Reconstruction of the Intersection of the Customary Court and State Criminal Court for Indigenous Communities in Papua," *Journal of Indonesian Legal Studies* 9, no. 2 (2024): 1107–36, https://doi.org/10.15294/jils.v9i2.19155.

54 Muhammad Junaidi and Yoghi Arief Susanto, "Reformulation of Customary Criminal Law in the National Criminal Code Based on the Formation of Legislation," *Journal of Indonesian Legal Development* 7, no. 1 (2025): 43–60, https://doi.org/10.14710/elipsoida.%Y.22971.

55 Suhariyanto et al., "Reconstruction of the Intersection of the Customary Court and State Criminal Court for Indigenous Communities in Papua."

Conclusion

Article 2 of Law No. 1/2023 concerning the Criminal Code formally recognises customary criminal law. From theoretical, legal, practical, and philosophical perspectives, this recognition is a vital step in affirming the legitimacy of customary criminal law within Indonesia's legal system. However, operationally, this recognition carries the risk of normative reduction, particularly through the subordination of customary criminal law to Regional Regulations, as outlined in Article 2(3) of Law No. 1/2023.

This revision of the Criminal Code should be viewed as a progressive development in Indonesian law. A nation prosperous in its diversity of tribes, cultures, languages, and beliefs will shape the law within each community where it thrives. This diversity must be maintained, respected, preserved, and even strengthened, as it constitutes *the Indonesian Way*. Indonesia's legal diversity has long been marginalised due to the enduring influence of Dutch colonial criminal law, which is characterised by a rigid adherence to the principle of formal legality. This has frequently led to the perception that customary criminal law, rooted in longstanding communal traditions and practised across generations, is incompatible with state law.

To preserve Indonesia's rich, pluralistic legal identity, the state must ensure that the formal recognition of customary law does not become a tool for assimilation but a framework for legal coexistence with mutual respect, adapting to the challenges of today's complex global environment.

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