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Formulating Living Law in Customary Villages: Institutional Models and Limits Under the New Indonesian Criminal Code

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Abstract

The purpose of this paper is to understand and explore the Recognition of Customary Law and the Role of Customary Villages in the New Criminal Code. The Village Law recognizes Customary Villages and grants them authority regarding the rights of origin and the development of customary law. This recognition is reinforced by Article 2 of Law No. 1 of 2023 concerning the Criminal Code, which equates customary crimes with crimes in the law. This normative legal research examines how the Criminal Code formulates customary law and the role of Customary Villages in its implementation. The results indicate that the formulation of customary crimes in the Criminal Code aims to improve justice and respect living customary law. It offers models for regulating customary sanctions that can be formulated by customary villages, where the Criminal Code only regulates in general, with one detailed model to be regulated through a Regional Regulation (Perda).

1. Introduction

In the past decade, the state has increased its fulfillment of its obligation to grant rights that support the existence of customary law communities. This recognition has been further solidified nine years ago through Law Number 6 of 2014 concerning Villages, which explicitly recognizes the position of customary law communities.[1] Although the law does not directly mention 'customary law communities,' it is stipulated in the subsequent provisions (Article 96) that the requirement for establishing a customary village is that it must originate from a customary law community. This recognition is considered positive for customary law communities,[2] given that their existence was often considered vague to that period.

[1] Bedner, Adriaan, and Stijn van Huis. "The Return of the Native in Indonesian Law: Indigenous Rights Petitioning in Central Sulawesi." *Bijdragen Tot De Taal-, Land- En Volkenkunde* 164 no. 2/3 (2008): 193–222.

[2] Benda-Beckmann, Franz von, and Keebet von Benda-Beckmann.. "Myth and Reality in the Dispute Properties of Adat and State Law in Indonesia." *The Journal of Legal Pluralism and Unofficial Law* 43, no. 63 (2011): 1–40

Historically, Article 18 of the 1945 Constitution (Undang-Undang Dasar tahun 1945) recognized the existence of customary law communities by considering their fundamental rights (hak asal-usul) when determining the form and structure of customary village governance. The explanation within this constitution also mentioned the existence of approximately 250 autonomous regions and customary communities like *desa* in Java and Bali, *negeri* in Minangkabau, and *dusun* and *marga* in Palembang, which were considered to possess an original and distinct structure.[3] Unfortunately, this constitutional recognition was not followed up with strengthening through further legislation; instead, the position of customary law communities was weakened. An example is the abolition of customary courts through Emergency Law Number 1 of 1951 concerning Temporary Measures to Organize the Unity of Structure of Authority and Procedure of Civil Courts. Although that Emergency Law still recognized customary law in Article 5 paragraph (1) letter b, the abolition of Customary Courts rendered that recognition meaningless because it could not be enforced. This relates to the principle of legality in the Criminal Code (KUHP), which stipulates that something cannot be penalized if it is not regulated in statutory regulations, thereby leaving unwritten law or living law in the community without a place as a source of positive law.[4]

The existence of Customary Law Communities once again gained strength through the amendment of the 1945 Constitution (UUD 1945), as enshrined in Article 18B. This Article affirms the state's recognition and respect for customary community units (kesatuan masyarakat adat) along with their traditional rights, provided they remain extant (lestari), are aligned with societal development, and adhere to the principles of the Unitary State of the Republic of Indonesia as regulated by law. In the reformation era, a fundamental difference from the Old Order and New Order eras is the recognition of the existence of customary communities as customary villages. With the status of a village entity that forms part of the government administration, the existence of customary law communities is now more tangibly felt by their members. Administratively, their position and territory are recognized, customary law can be applied more freely, and there is even state funding support to ensure the sustainability of the customary law communities themselves.

Earlier this year, the state once again reinforced the existence of customary law communities, particularly in the aspect of legal application, through Law Number 1 of 2023 concerning the Criminal Code (the new KUHP). Article 2 of the new KUHP contains a provision stating that the enforceability of Article 1 paragraph (1) does not diminish the application of customary law (living law) within the community, which allows a person to be penalized even if their act is not regulated by statute. The elucidation of that Article defines 'living law in the community' as customary law. This recognition of customary law is crucial because, until now, customary law cases accommodated in national law have been limited to the realm of private law, while the criminal law sphere has not been encompassed. With this recognition, after the new KUHP becomes effective three years from now, the customary criminal law applicable in customary villages can also be automatically enforced.

[3] Elucidation of the 1945 Constitution

[4] Barda Nawawi Arief, *Beberapa Aspek Pengembangan Ilmu Hukum Pidana (Menyongsong Generasi Baru Hukum Pidana Indonesia), Pidato Pengukuhan Guru Besar Hukum Universitas Diponegoro*, (Semarang, 1994), 25

The issue with the regulation in this new Criminal Code (KUHP) lies in the fact that most of the provisions concerning customary law are regulated in Book I, which contains fundamental criminal principles, while Book II, which specifically regulates real (specific) criminal offenses, does not yet adequately cover them. Therefore, it is important to delve into the aims and substance of these regulations. Furthermore, considering that this regulation relates to customary law and that customary law communities are formally accommodated within customary villages (desa adat) today, a question arises regarding the extent to which customary villages can play a role in formulating real customary law offenses and what their role will be in the implementation when the KUHP becomes effective.

Based on the background elaborated, the author is interested in examining the role of customary villages in the formulation of customary criminal offenses and the implementation of sanctions for criminal offenses that genuinely harm the community in terms of cultural values and sacredness, so that in the future, judges can rule upon laws that align with the sense of justice in the community.

The enactment of Law Number 1 of 2023 concerning the Criminal Code (New Criminal Code) marks a new era in the unification of national criminal law.[5] One of the most fundamental reforms is the recognition of "law living in society" (*living law*), as stipulated in Article 2, paragraph (1), in conjunction with Article 597 of the New Criminal Code.[6] However, this recognition creates a fundamental conflict of norms between the principle of formal legality (*nullum delictum sine lege scripta*) and the validity of customary law, which relies on unwritten law.[7] Article 2 paragraph (2) of the New Criminal Code dictates that the enforceability of customary offenses and sanctions must be regulated under Regional Regulations (Perda).[8] This provision creates a positivization dilemma: when customary law is forced into the formal structure of Regional Regulations—a political product of state law enactment by Regional People's Representative Councils (DPRD) and Regional Governments[9] the original flexible, responsive, and contextual character of customary law risks being erased. Rigid positivization has the potential to domesticate *living law* into static local criminal law,[10] which contradicts the intrinsic nature of customary law enforcement.

Previous studies generally focused on theoretical debates between legal positivism and the existence of customary law post-1963 National Legal Seminar or the history of legal unification through Emergency Law No. 1 of 1951.[11] Diverging from conventional literature, this article offers a conceptual contribution in the form of the Dynamic Limitative Delegation Model. This model reconstructs the harmonization pathway for formalizing customary offenses so as not to suppress the authority of Customary Villages as the primary source of living law.

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[5] Indonesia, Law Number 1 of 2023 concerning the Criminal Code, State Gazette of the Republic of Indonesia of 2023 Number 1, Supplement to the State Gazette Number 6842.

[6] Ibid., Art. 2 para. (1) in conjunction with Art. 597.

[7] Barda Nawawi Arief, Pembaharuan Hukum Pidana dalam Perspektif Kajian Perbandingan. (Bandung: Citra Aditya Bakti, 2018), pp. 45-48.

[8] Indonesia, Law Number 1 of 2023..., Art. 2 para. (2).

[9] Jimly Asshiddiqie, Perihal Undang-Undang, (Jakarta: Rajawali Pers, 2014), p. 112.

[10] Hauser-Schäublin, Brigitta. "Adat, Customary Law, and the Cultural Heritage of Bali." *Asian Journal of Social Science* 41, no. 5 (2013): 467–488

[11] Soerjono Soekanto, Kedudukan Hukum Adat dalam Sistem Hukum Nasional [The Position of Customary Law in the National Legal System], (Jakarta: UI Press, 2012), p. 89.

Witiring Purpose article is the general objective of this research is to examine the development model for the formulation of customary criminal offenses (*delik adat*) and the implementation of sanctions classified as additional punishment under the new Criminal Code within customary villages and The specific objective of this research is to identify the role customary villages can play in assisting the formulation of customary criminal offenses to ensure synergy with the additional punishments stipulated in the new Criminal Code.

2. Research Methods

This study employs a doctrinal legal research methodology utilizing the statute approach, conceptual approach, and comparative socio-legal approach.[12] Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law No. 1 of 2023 (New Criminal Code), Law No. 6 of 2014 in conjunction with Law No. 3 of 2024 concerning Villages, and Law No. 13 of 2022 concerning the Formation of Legislation. Legal materials were analyzed qualitatively and prescriptively to formulate the model for customary offense codification. This study is characterized by its effort to address identified gaps within legal principles or norms. Rather than formulating hypotheses, this research is supported by a theoretical framework and legal materials from various levels (primary, secondary, and tertiary). The core of this research is grounded in positive law (statutory regulations), subsequently observing the implementation and societal response to these normative systems.[13]

The approaches used are the statutory approach and the case approach. The statutory approach is used to examine positive regulations in designing development models for the formulation of customary criminal offenses (*delik pidana adat*) as the implementation of additional punishment in the new Criminal Code. Meanwhile, the case approach is employed to assess the extent to which the Indonesian criminal justice system can accommodate the public's sense of justice. The sources of legal materials in this research are secondary data, which are divided into: Primary Legal Materials (for example, the 1945 Constitution, the Criminal Code (KUHP), Secondary Legal Materials, which function to provide explanations of the primary legal materials (including journals, research findings, seminar reports, and case examples); and Tertiary Legal Materials, which provide guidance and additional understanding (such as legal dictionaries, general dictionaries, and relevant supplementary materials outside the scope of law).

The technique for collecting legal materials in this research involves documentation and note-taking. Primary legal materials are obtained through documentation (by citing articles relevant to the research problem), while secondary legal materials are collected through the note-taking technique. Overall, this technique focuses on documenting and recording the necessary legal materials from various literature that align with the core subject matter. This research applies the Qualitative Legal Material Analysis Method. Through this method, all materials are carefully

[12] Peter Mahmud Marzuki, Penelitian Hukum: Edisi Revisi [Legal Research: Revised Edition], (Jakarta: Kencana Prenada Media Group, 2021), pp. 133-136.

[13] Mamudji, Sri dan Soerjono Soekanto. Penelitian Hukum Normatif. (Jakarta, Raja Grafindo Persada, 2004), 33.

elaborated, presented, and explained in an orderly, structured, and effective sentence arrangement to ensure clarity of understanding. The qualitative analysis yields descriptive findings, which serve to accurately explain the characteristics of the phenomenon and identify potential relationships between social symptoms.

3. Result and Discussion

3.1. The Development Model for the Formulation of Customary Criminal Offenses in the Implementation of Additional Punishment under the New Criminal Code

In this sub-discussion, the author interprets the word 'formulation' in two contexts: as the active process when the legislature drafts a provision, and as the final result in the form of the legally enacted substance of the law. Stemming from this formulation process, customary criminal law is recognized based on the living law (unwritten law) within society. This recognition is granted because the customary law remains applicable and effective in the community. Nevertheless, in the practice of law enforcement in court, the existence of this customary law must still be considered, and its values taken into account to resolve cases.[14] The effectiveness of customary criminal law is the basis for its inclusion into the system of the new Criminal Code (*Kitab Undang-Undang Hukum Pidana* or KUHP), as explained in the KUHP Academic Manuscript.

The recognition of unwritten or customary law in the Indonesian legal system is anchored in three fundamental statutory and policy bases. First, Article 5 Paragraph (3) Sub-paragraph b of Emergency Law No. 1 of 1951 explicitly validates acts considered criminal under the living law of the community even when absent from the general Criminal Code (KUHP). It establishes that if an imposed customary sanction is rejected by the convicted individual or deemed overly severe by a judge, a substitute penalty of up to three months' detention and/or a fine not exceeding five hundred rupiah may be applied. However, if the severity of the customary sanction exceeds those baseline limits, the defendant can face a substitute punishment of up to ten years' imprisonment, ensuring that obsolete or inappropriate customary penalties are replaced by standardized state alternatives.

Second, the foundational doctrine was significantly shaped by the Resolution on Criminal Law derived from the First National Law Seminar in 1963. The resolution's fourth point establishes that while criminal offenses primarily consist of acts codified in the KUHP or statutory laws, this framework does not preclude the recognition of prohibitions originating from living customary law, provided that the customary sanctions remain consistent with national dignity and do not impede social progress. Furthermore, its eighth point explicitly mandates that elements of both Religious Law and Customary Law must be systematically integrated into the national criminal legal framework.

Third, this recognition is reinforced by successive iterations of the Law on Judicial Power, originally enacted as Law No. 14 of 1970 and subsequently amended by

[14] Randa, Frans, and Untung Lasianto.. "The Dynamic Interaction Between State Law and *Adat* Law in Village Governance: Lessons from Bali." *Journal of Legal, Ethical and Regulatory Issues* 22 no. 4 (2019): 1–12.

Law No. 35 of 1999, Law No. 4 of 2004, and Law No. 48 of 2009. Under Article 14 Paragraph (1), courts are prohibited from refusing to examine or adjudicate a case on the grounds of absent or unclear statutory law, creating a positive obligation to hear every matter. Complementing this, Article 23 Paragraph (1) mandates that all judicial decisions must explicitly ground their reasoning in relevant statutory provisions or unwritten legal sources, while Article 27 Paragraph (1) obligates judges, as enforcers of law and justice, to continuously explore, follow, and comprehend the living legal values within society. The discussion above concerns the reasons and objectives for the recognition of the living law in the community that determines whether a person is subject to punishment. Furthermore, the discussion related to the result of the formulation of the living law in the community is formalized by the legislature using three terms: the living law in the community that determines whether a person is subject to punishment, legal and justice values in the community, and the fulfillment of customary obligations.

Oftentimes, the new provisions in the Criminal Code (KUHP) are narrowly understood, suggesting that the living law (customary law) must be entirely separate from the provisions already regulated in the new KUHP. According to this narrow view, there should be no overlap; if a case (such as assault/battery) is already regulated in the KUHP, then customary law should no longer be able to enforce it or impose sanctions. However, the author holds a different view. The author argues that if we refer to the basis for the recognition of unwritten law, specifically Article 1 paragraph (1) letter b of Law No. 1 of 1951, it stipulates that the living law (customary law) covers two types: those that have no equivalent in the KUHP and those that have an equivalent in the KUHP. Both types of customary law are subject to criminal sanctions. By way of illustration, if an individual commits assault/battery in a customary village—an act regulated in the KUHP and also regulated by local customary law—a crucial question arises: Can the perpetrator, in addition to being sanctioned for assault/battery based on the KUHP, also be subjected to customary sanctions?

Regarding this question, the author's opinion is that the offender can be subjected to double sanctions (KUHP sanctions and customary sanctions). This view is supported by Article 97 of the new KUHP, which states that the additional punishment in the form of fulfillment of local customary obligations can be imposed even if the specific type of sanction is not explicitly listed in the formulation of the relevant criminal offense, as long as it adheres to the provisions in Article 2 paragraph (2) of the KUHP. This provision of Article 97 grants authority to the judge to impose sanctions in the form of fulfillment of customary obligations as an additional punishment in offenses already regulated in the KUHP, provided that the criminal offense meets the criteria for the recognition of living law as stipulated in Article 2 paragraph (2).

The adoption of *living law* in Article 2 paragraph (1) in conjunction with Article 97 of the New Criminal Code entails legal consequences involving the application of an Open Norm structure with limitatively delegated authority.[15] Under this construction, the Criminal Code does not freeze customary offenses into static rules, but rather attributes explanatory authority to Regional Regulations. However, the positivization dilemma emerges when the inherent flexibility of customary law is forced into the rigid positivism of state legislation. Therefore, the involvement of Customary Villages must

[15] Indonesia, Law Number 1 of 2023..., Art. 97.

not merely be positioned as a public consultation object (meaningful participation pursuant to Constitutional Court Decision No. 91/PUU-XVIII/2020)[16] during the drafting of Regional Regulations, but as the primary source determining the threshold of customary sanctions binding as supplementary penalties. Regional Regulations should not exhaustively enumerate customary offenses, but rather serve as an enabling clause validating a Dynamic Customary Compilation directly managed by local Customary Village institutions.[17]

The author's view in the above statement can be reinforced by the sentence contained in the Academic Manuscript of the Criminal Code Bill (RUU KUHP) published by BPHN in 2015, which states :

> *"Another aspect of societal protection is the protection of victims and the restoration of the disturbed balance of values within the community. To meet this aspect, the reform of the Criminal Code (KUHP) needs to provide types of sanctions in the form of 'payment of compensation' and 'fulfillment of customary obligations.' These two types of sanctions are included as additional punishments because, in reality, it is often revealed that a purely formal juridical resolution – by imposing only principal criminal sanctions on the defendant – is not yet felt by community members to be a comprehensive resolution of the problem."*[18]

The model for formulating customary criminal offenses (*delik pidana adat*) in Indonesia, as regulated in Article 2 paragraph (1) of the New Criminal Code (KUHP), represents a progressive step in recognizing the living law. The main challenge is how to position the unwritten and dynamic nature of customary offenses within the framework of national codification that upholds the principle of legality (*nullum delictum sine praevia lege poenali*).

Looking at the regulations concerning the sanctions contained in the new Criminal Code (KUHP), the author can conclude that the model implemented by this new KUHP refers to the Open Norm model, which has limited characteristics (delegasi limitatif). Why is this said to be the case?. Open Norm signifies a statutory provision that does not formulate a criminal act in detail and exhaustively, but instead refers to a norm or criterion that exists outside the statute itself. In the context of customary offenses (*delik adat*), the New KUHP is characterized as an Open Norm because:

- **External Reference:** Article 2 paragraph (1) of the New KUHP does not list customary offenses one by one. Instead, it refers to the 'law living in the community' as the legal source that determines whether a person is subject to punishment.
- **Need for Interpretation:** The application of this article requires active interpretation by the judge, who must explore and confirm the validity of the customary criminal norm in a specific location before imposing a punishment.

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[16] Constitutional Court of the Republic of Indonesia, Decision Number 91/PUU-XVIII/2020 regarding Formal Judicial Review of Law Number 11 of 2020 concerning Job Creation, Paragraph [3.18].

[17] Suartini, Ni Luh, I Gusti Ayu Ketut Rachmi Handayani, and Pujiyono Pujiyono. "The Existence of *Awig-Awig* in Resolving Customary Disputes within Balinese Customary Villages." *International Journal of Criminology and Sociology* 9 (2020): 1420–1428.

[18] Tim Penyusun, Draft Naskah Akademik RUU KUHP (Jakarta: BPHN, 2015), 108.

Furthermore, the characteristic of limitative delegation emerges from the capacity of the Criminal Code (KUHP)—as the highest form of criminal law regulation, possessing the same hierarchy as a statute (*undang-undang*)—meaning the KUHP can delegate specific norms to regulations below it. This implies that the delegation of authority to criminalize based on the living law is granted with strict limitations and criteria by the statute.

Consideration of the principle of justice in Article 2 of the new Criminal Code (KUHP) can be seen by examining the elements contained within it, namely:

- **Formal Requirement:** The living law must be established in a local regulation (*peraturan daerah*) or a local customary decision (**formal limitation**).
- **Material Restriction:** The living law must not conflict with Pancasila, the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945), universal human rights, and the general legal principles recognized by the nation's civilization.

Thus, the Open Norm nature opens the door for local customary and regional law to independently define criminal offenses, derived from the sense of justice and cosmic values within the community, while the Limitative Delegation serves as a 'safety fence' to prevent customary sanctions that are inhumane or conflict with national law.

3.2. The Role of Customary Villages in the Implementation of Customary Criminal Offense Formulation as an Additional Sanction under the New Criminal Code

To avoid conflicts between the formal legality principle of the Criminal Code and the rigidity of regional legislation, a three-tier coordination framework is established (Customary Village Governance – Regional Legislators – General Judiciary/District Court Judges), as presented in Table 1:

Table 1. Typological Comparison of Customary Offense and Sanction Formulations

Parameter	Static Codification Model (Conventional)	Dynamic Limitative Delegation Model (Recommended)
Regulatory Form	All offenses & sanctions are exhaustively detailed in Regional Regulations.	Regional Regulations set framework norms & criteria; details remain in Customary Village Regulations (Awig-Awig/Parem).
Nature of Norms	Rigid, static, difficult to amend.	Dynamic, adaptive to evolving local values.
Role of Customary Villages	Passive consultation object.	Primary compiler & active manager of dynamic compilations.
District Court Judge Position	Applies Regional Regulations in a purely legalistic manner.	Explores customary values via mandatory ex officio consideration upon Customary Council recommendations.

Source: Author's conceptual reconstruction (2026).

The execution of customary sanctions as the fulfillment of customary obligations (Article 97 of the New Criminal Code) requires systematic integration between formal

law and customary justice.[19] District Court judges adjudicating criminal cases involving breaches of *living law* are mandated to place customary justice-based restorative justice mechanisms as the principal reference in imposing supplementary penalties.[20] Consequently, customary court decisions are not ignored; instead, they gain executable force through state court judgments without diminishing the magico-religious equilibrium of the local customary community.[21]

The recognition of the existence of living law in the community contained in the new Criminal Code (KUHP) is not yet final. The regulation concerning this living law is formulated only on the most basic aspect, namely in Article 597 (or the intended related provisions, such as Article 2 and Article 597 of the New KUHP). Beyond that, the specific details regarding the type, scope, and mechanism for applying the living law that can determine criminalization have not yet been clearly established. Therefore, much difficult work remains to be done going forward. Two fundamental tasks are awaiting us:

a. Formulation: This includes the formal aspect (the procedure and the legitimate regulatory container for establishing it) and the material aspect (the formulation of the specific elements of the customary criminal offense itself).

b. Implementation Mechanism: The determination of the procedure for executing the provisions of the living law in the practice of law enforcement.

Based on the background above, this sub-discussion examines the strategic role of the Customary Village (*Desa Adat*) across three main dimensions in relation to the recognition of living law under Indonesia's new Criminal Code (KUHP). The first dimension concerns the mandatory involvement of the Customary Village as the primary source and compiler of customary criminal offenses. It is legally and logically imperative to involve the Customary Village in drafting the Local Regulation (*Peraturan Daerah/Perda*) concerning living law, as the government cannot unilaterally codify norms whose source and implementation rest entirely within the customary community. Furthermore, active community engagement is constitutionally mandated by Constitutional Court Decision Number 91/PUU-XVIII/2020, which requires meaningful public participation comprising three prerequisites: the right to be heard, the right to be considered, and the right to receive an explanation. This constitutional standard was subsequently formalized by the legislature through Article 96 of Law Number 13 of 2022, which expanded public participation rights across nine detailed provisions, granting affected individuals and groups the right to provide verbal or written input online or offline, access academic manuscripts, and receive feedback through public hearings, working visits, or seminars. Ultimately, while the central government will issue a Government Regulation (*Peraturan Pemerintah/PP*) to guide regional governments in establishing living law criteria, the Customary Village

[19] Indonesia, Law Number 1 of 2023..., Art. 66 para. (1) sub-para. f in conjunction with Art. 97.

[20] Satjipto Rahardjo, Hukum Responsif: Memahami Hukum dalam Konteks Sosial [Responsive Law: Understanding Law in a Social Context], (Yogyakarta: Genta Publishing, 2010), pp. 78-82.

[21] I Gede Widhiana Swastha, Hukum Pidana Adat di Indonesia: Eksistensi dan Relevansinya [Customary Criminal Law in Indonesia: Existence and Relevance], (Denpasar: Udayana Press, 2024), pp. 134-138.

remains the indispensable catalyst for providing the raw legal inventory for Perda drafting.

The second dimension addresses the role of the Customary Village in the official formulation process of living law offenses and the resolution of conceptual tensions between customary law and modern criminal law. As the sole generator of norms and ultimate implementer of sanctions binding individuals within its *locus delicti*, the Customary Village must navigate the intrinsic nature of customary delicts. As defined by B. Ter Haar in *Azas-Azas Hukum Adat*, a customary delict is a unilateral action violating rules that disturb both physical (*bandawi*) and non-physical equilibrium, triggering a customary reaction aimed at restoring balance, typically through monetary or material compensation. This fluid nature directly contradicts modern criminal law principles, which strictly separate criminal from civil matters, rigidly enforce the principle of legality to exclude analogy, rely on judicial or *ex officio* initiation, and focus criminal responsibility on individual remorse rather than communal balance restoration. Consequently, formalizing customary law into a concrete Perda demands extreme caution to avoid turning living law into state-dominated "dead law" or creating rigid administrative barriers that sever the law from its living origin. To ensure legitimacy and compliance, the draft prepared by the Customary Village must explicitly document sanctions in a Perda or Customary Village Regulation as required by Article 2 paragraph (2) of the new KUHP, while strictly adhering to constitutional limitations by not conflicting with Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by civilized nations.

The third dimension explores the role of the Customary Village in enforcing living law offenses, which can be projected through five distinct judicial and procedural models. Under the Summary Procedure Model, customary cases contained within a Perda are processed similarly to minor violations or petty offenses. The Ordinary Procedure Model applies when a customary offense intersects with a statutory crime in the national KUHP, requiring a complete sequential legal process from investigation and prosecution to court trial. The Special Judicial Body Model draws inspiration from Aceh's *Mahkamah Syar'iyah* established under Law Number 18 of 2001, wherein the enabling Perda must regulate both substantive customary offenses and special formal procedural law tailored to village dispute resolution. The Separate Judicial Institution Model relies on independent customary judicial bodies operating alongside formal courts, taking cues from the Papua Special Autonomy Law (Law Number 21 of 2021). Finally, the Customary Justice Model allows cases to be resolved entirely within the Customary Village's internal institution; while challenging to implement due to the general requirement for statutory-level authorization, it can be validly anchored through a unified district-wide Perda agreed upon by local customary villages.

In their implementation, these models of customary law enforcement can be chosen individually or executed synergistically (concurrently). The primary requirement for implementing these models is that the location where the criminal offense occurred (*locus delicti*) must be within the territory of a Customary Village that is recognized by the Local Regulation (*Peraturan Daerah/Perda*) as still having and

applying customary punishment,[22] as mandated by the new Criminal Code (KUHP). The perpetrator of the criminal offense can be a resident of the Customary Village or an outsider. Meanwhile, the victim can consist of: 1. An Individual (a Customary Village resident); 2. The entire Customary Village as a legal entity (collective victim). Cases where the entire Customary Village becomes the victim (either concurrently with an individual victim or not) occur when the criminal offense damages an area considered 'sacred.' For example, violations in a sacred location that require the village to perform a cleansing and restoration ceremony.

4. Conclusion

The implementation of customary offenses and sanctions within the New Criminal Code necessitates a fundamental paradigm shift—moving away from rigid legal formalization toward a more responsive model of recognition. Rather than allowing state authority to domesticate and freeze customary law through restrictive Regional Regulations (*Perda*), the integration process must uphold the organic and living nature of indigenous legal traditions. Consequently, this study emphasizes two pivotal conclusions. First, the optimal formulation model for customary sanctions must adopt a dynamic limitative delegation approach, wherein Regional Regulations establish only general principles and overarching sanction criteria, while the specific identification and evolution of customary offenses are delegated to Customary Village Regulations (*Awig-Awig/Parem*) consolidated within a Dynamic Customary Compilation. Second, Customary Villages must be formally recognized as the primary executors of restorative justice in enforcing supplementary penalties under Article 97 of the New Criminal Code, requiring judges to treat customary resolutions as mandatory considerations in delivering final verdicts.

To ensure the effective and harm-free implementation of customary law within the national legal system, strategic policy measures must be executed by both local lawmakers and the judicial administration. First, Regional Governments and Regional People's Representative Councils (DPRD) should formulate Regional Regulations (*Perda*) on *living law* using a flexible framework regulation model. Rather than freezing customary offenses into static, rigid statutory definitions, this framework should incorporate a Dynamic Customary Compilation managed and updated directly by Customary Villages (*Desa Adat*), thereby preserving the organic evolution of local norms. Second, the Supreme Court of the Republic of Indonesia must issue a targeted Supreme Court Regulation (*PERMA*) establishing clear procedural guidelines for criminal proceedings involving supplementary penalties in the form of customary obligations under Article 97 of the New Criminal Code. This regulatory intervention is essential to provide district court judges with procedural clarity and legal certainty, ensuring that the adjudication and execution of customary sanctions remain structurally integrated with formal judicial processes while respecting local customary authority.

[22] Windia, Wayan P., and I Ketut Sudantra. "Harmonization of State Law and Customary Law (*Awig-Awig*) in Environmental Management in Bali." *Journal of East Asia and International Law* 14, no. 2 2021: 311–329.

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Law

Undang-Undang Dasar 1945

Undang-Undang Nomor 1 Tahun 2023 tentang Kitab UndangUndang Hukum Pidana (Lembaran Negara Republik Indonesia Tahun 2023 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 6842);

Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 yang menguji UndangUndang Nomor 11 Tahun 2020 tentang Cipta Kerja terhadap Undang-Undang Dasar Negara Republik Indonesia;

Undang-Undang Nomor 18 Tahun 2001 tentang Otonomi Khusus bagi Daerah Istimewa Aceh Sebagai Provinsi Nanggroe Aceh Darussalam.