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Exploring the meaning of the new article in the context of customary law: Critical Analysis in the Framework of New Customary Law in Indonesia

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ABSTRACT

The ratification of Law No. 1 of 2023 concerning the Criminal Code (New Criminal Code) introduces Article 2 which promises better legal protection for indigenous peoples—considering that as a multicultural society, Indonesia has various forms of customary rules that are certainly different from national laws. However, this article also presents significant interpretive challenges. This research aims to explore the meaning of Article 2 in the context of customary law, focusing on its implementation and application in Indonesia. Using a case study and critical analysis approach, this article explores the various interpretations and impacts of Article 2 on the recognition of indigenous peoples' rights and environmental sustainability. The findings of this study provide in-depth insight into the dynamics of customary law in the changes in new laws and regulations in Indonesia.

Keywords: Customary Law Law, Article 2, Legal Implementation

INTRODUCTION

Law Number 1 on Indonesia's Customary Law in 2023 makes significant changes by introducing Article 2 which discusses the complex dynamics of indigenous peoples. This article not only promises to strengthen legal protection for indigenous peoples but also presents a major interpretation challenge in its implementation. This research aims to explore this, especially with a focus on how Article 2 is applied and understood in the context of the new Indonesian customary law. Using a case study and critical analysis approach, this article raises crucial questions regarding the interpretation and impact of Article 2 on the recognition of Indigenous people's rights and their impact on environmental sustainability. This study uses normative law research methods. This study also examines the harmonization of criminal law with socio-cultural aspects of society, explaining efforts to achieve substantive justice at the normative and theoretical levels. To achieve harmony between legal norms and societal cultures, comprehensive legal reform is needed – an important alternative, especially for countries with a legal history shaped by foreign legal traditions. Focusing on the evolution of Indonesia's criminal law after the enactment of the New Criminal Code, this study reveals a

fundamental shift in values, norms, and paradigms. The transition of the substance of colonial law to a modern and authentic legal framework can be seen from the articles that implicitly prioritize substantive justice, in line with the philosophy and values of Indonesia's social and cultural culture. Over time, Indonesia has abolished colonial law and integrated living law into the national legal system.[1]

The paradigm shift aims to instill a distinctive national character in Indonesian law, presenting conditions and benefits that encourage the creation of substantive justice, as well as challenges in its formulation and implementation. The development or renewal of criminal law in Indonesia is an effort to replace the current laws, especially the Criminal Code (KUHP) which is the legacy of Netherlands colonial law, with laws that are in line with Indonesia philosophy (Amrani, 2004). Criminal law reform means developing legal norms and building legal institutions that serve the values of society, aspirations, culture, and legal needs, which will affect the implementation of legal norms (Rahardjo, 2019). Therefore, the new criminal law must accommodate the values and customary laws that exist in the community where it is enforced. The reform of criminal law in Indonesia must include the ideological and philosophical values of the state, namely Pancasila (Najih, 2004). The Criminal Code as its codification remains valid even though Indonesia has been independent for 78 years. With independence, Indonesia must develop its legal system, especially the Criminal Law System. Although the 1945 Constitution on the one hand provides a legal basis for colonial law enforcement, on the other hand, it mandates the government to build a new legal system (BPHN, 2020).[2]

Article II of the Transitional Provisions of the 1945 Constitution states, "All existing laws and regulations remain valid as long as the new laws and regulations based on this Constitution have not yet come into effect". For Indonesia, the development of national law is a form of legal reform based on philosophical, political, sociological, and practical reasons. The philosophical reason is that colonial law is not in line with the philosophy of the Indonesian nation. The political reason is that as an independent country, Indonesia must have a national law that is in line with its national goals, as stated and implied in the 1945

[1] Tody Sasmita Jiwa Utama, "Between Adat Law and Living Law: An Illusion of Customary Law Incorporation into Indonesia Penal System," *The Journal of Legal Pluralism and Unofficial Law* 53 (2021): 260–69.
[2] Faisal, "Genuine Paradigm of Criminal Justice: Rethinking Penal Reform within Indonesia New Criminal Cod," *Cogent Social Sciences* 10 (2024): 17.

Constitution. The sociological reason is that the needs of the community require laws that are in harmony with the sociological and cultural life of the community.[3]

METHOD

The concept of law gives rise to a method to study and understand law. There are two methods used in legal research: normative (doctrinal) legal research and sociological/empirical (nondoctrinal) legal research. The choice of method depends on the object of the research. Considering that this study examines criminal law norms in laws and regulations, it uses normative law research methods. The main source is the Criminal Procedure Code (KUHAP) which is discussed together with theories related to living law and legal pluralism. Therefore, this study uses a legislative approach, especially focusing on the Criminal Procedure Code, and examining the synchronization of laws and regulations.[4]

RESULTS AND DISCUSSION

After Indonesia became independent, there was a separation between state law and customary law. Unitary states want sovereignty in government and unity of the rule of law (unification) (Adiyanta, 2009). But on the other hand, with the motto "Bhinneka Tunggal Ika", the state recognizes diversity in the life of the nation, including in its legal aspects. Therefore, Indonesia must recognize the idea of legal pluralism (Flambonita, 2021). Acknowledging the concept of legal pluralism means that the government must uphold customary law as the original law for most Indonesian people. This aspiration is accepted by the recognition of customary law in the constitution and other organic laws and regulations. However, government policies regarding customary criminal law are still confusing in their implementation. The lack of clarity in the definition of Article 2 gives rise to many different interpretations that can hinder the consistency of the application of customary law throughout Indonesia. This is because there are no special criteria from the lawmakers that must be met by a community to be recognized as Indigenous people who are entitled to special protection. Research shows that without a concrete definition, many indigenous peoples have difficulty proving their status before the law.[5]

[3] Ilham Yuli Isdiyanto, "Three Reasons for Article 2 of the New Criminal Code, 'Living Law' Needs to Be Revised," 2023.
[4] Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).
[5] Yoserwan, "Implications of Adat Criminal Law Incorporation into the New Indonesian Criminal Code: Strengthening or Weakening?," *Cogent Social Sciences* 10 (2024): 11.

This shows that the implementation of Article 2 is highly dependent on the existence and strength of customary law structures in their respective regions. Regions that have a long and strong history of applying customary law tend to be better at integrating Article 2 into daily legal practice. On the other hand, regions that do not have customary law traditions face difficulties in implementing this article, resulting in unequal legal protection for indigenous peoples throughout Indonesia. On the contrary, indigenous peoples are a source of knowledge about customary law. Customary law is in the minds of the people and is practiced in daily life. It is not written but is obeyed in social interactions.

However, the inclusion of customary law in the National Criminal Code (KUHAP) is seen as a breakthrough and deserves respect because it restores the existence of customary law as part of national law (Rifan et al.). Although the Criminal Procedure Code has included the Customary Criminal Law in several provisions, Article 2 of the Criminal Procedure Code provides restrictions on the application of the Customary Criminal Law. First, an act is only recognized as a criminal act as long as it has not been regulated in the National Criminal Code.

According to the Criminal Code, this provision will result in many customary crimes not being brought to court because these crimes are also included in criminal acts according to national law. Therefore, only a few offenses can remain in customary criminal law. Second, Article 2 of the Criminal Code stipulates that customary criminal law only applies in the place of practice. This means that customary law is only limited to certain jurisdictions, even though the scope of customary law must cover the entire way of life of the community. Customary law can follow the lives of indigenous peoples wherever they are. Third, the provision states that customary law is only valid if it is in line with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized people. This restriction feels strange because customary law is the source of national law.[6]

Finally, the provisions that regulate the procedures and criteria for the formation of Customary Criminal Law are regulated by Government Regulations that limit customary law. As a living law, customary law does not require government regulations. He only needs recognition and protection of his existence. Any formal regulation will only hinder its development. As Hoven pointed out, customary law exists in its way, without being

[6] et al Damianus Rama Tene, "Implications of the Application of Customary Criminal Law in the Settlement of Crimes After the Reform of Indonesia's National Criminal Law," *Journal of Legal Research and Education* 22, no. 2 (2023): 29–41.

associated with the existence or coercive power of the state. Customary law is a tradition that has legal consequences. Customary law is dynamic and has its ideas about change.

The Explanation of Article 2 paragraph (3) which states that the implementation of a customary crime must be regulated in a regional regulation, will hinder the application of customary law. The legislative process, both at the national, regional, and local levels, is not simple. Therefore, the inclusion of Customary Law in Article 2 of Law Number 1 of 2023 contains contradictory dimensions. On the one hand, it aims to recognize and protect customary law. On the contrary, this limits and weakens customary law itself.

The strength of indigenous peoples lies in the continuity of their customary institutions that consistently maintain their customary laws from generation to generation. Article 2 of the new Criminal Procedure Code does not provide space for customary institutions but places responsibility on the Regional Government where Customary Crimes will be regulated through Regional Regulations. Customary institutions are not given space to set criteria for Customary Criminal Violations (Customary Offenses) or enforce customary law The Explanatory Provisions of Article 2 paragraph (3) which states that the implementation of a customary criminal act must be regulated in regional regulations, will hinder the application of customary law. The legislative process, both at the national, regional, and local levels, is not simple.

Therefore, the inclusion of Customary Law in Article 2 of Law Number 1 of 2023 contains contradictory dimensions. On the one hand, it aims to recognize and protect customary law. On the contrary, this limits and weakens customary law itself. The strength of indigenous peoples lies in the continuity of their customary institutions that consistently maintain their customary laws from generation to generation. Article 2 of the new Criminal Procedure Code does not provide space for customary institutions but places responsibility on the Regional Government where Customary Crimes will be regulated through Regional Regulations. Customary institutions are not given space to set criteria for Customary Criminal Violations (Customary Offenses) or enforce customary law. This logic is nothing but the logic of “domination”, where the state still places the existence of Customary Law subordinate to the national legal system.

Indigenous peoples, who have been marginalized and often lose their traditional rights, do not seem to be given the freedom to exercise their traditional rights. Looking at indigenous peoples from the state’s perspective is problematic because a dominating state will be biased towards various interests. Learning from Netherlands colonialism, providing space for

customary institutions to implement and enforce Customary Law is more accommodating for volkgeists, thus giving rise to legal dualism. The State of the Republic of Indonesia, which was founded on the idea of "liberating" and "protecting", must treat Indigenous peoples better than the treatment of the Netherlands colonizers.[7]

Using the case of the Draft Criminal Code, and the Criminal Code Bill, this article examines how the government uses its authority to make laws to exploit customary law and the legal and political benefits that the state can obtain from such exploitation. I argue that by constructing customary law as a 'living law' and using it as a basis for imposing criminal sanctions, the Draft Criminal Code continues romanticism but a legalistic approach to managing legal pluralism. This article predicts that the integration will freeze the dynamic character of customary law so that the state can strengthen its dominance and create a false sense of security in answering the challenge of legal pluralism in Indonesia. Consequently, the state's recognition of customary law can distort and weaken customary law as an empirical phenomenon.

A. The Relevance of Legal Responsive Theory In the Context of the New Criminal Code and Customary Law

Responsive law is a model or theory initiated by Nonet and Selznick amid a scathing Neo-Marsxist criticism of liberal legalism.

Liberal legalism pawns the law as an independent institution with an objective, impartial, and truly autonomous system of regulations and procedures. The icon of liberal legalism is legal autonomy, the most tangible manifestation of that autonomy is the rule of law regime. With its autonomous character, it is believed that the law can control repression and maintain its integrity. Judging from the internal interests of the legal system itself, the postulates of integrity can indeed be understood. But the law is not the end of itself. Law is a tool for humans, it is an isolation of the legal system from the side of human life itself.

Amid a series of criticisms of the reality of the crisis of legal authority, Nonet and Selznick proposed a responsive legal model. Here Nonet and Selznick pay special attention to variables related to law, namely the role of coercion in law, the relationship between law and state politics, moral order, place of discretion, role of purpose in legal decisions, participation, legitimacy, and compliance with the law. Nonet and Selznick through responsive law place it

[7] Tody Sasmita Jiwa Utama, "Between Adat Law and Living Law: An Illusion of Customary Law Incorporation into Indonesia Penal System," *Journal of Legal Pluralism and Unofficial Law* 53 (2021): 260–69.

as a means of responding to social provisions and public aspirations. Therefore, this type of law prioritizes accommodation to accept social change to achieve justice and public emancipation.[8]

Thus, the potential for responsiveness in every legal tip that advances, the fulfillment of the promise of responsiveness depends on the supporting political context. Responsive law implies that people have the political capacity to solve their problems, set priorities, and make the necessary commitments. Because responsive law is not a miracle maker in the world of justice. Its achievement depends on the will and resources of the political commodity. His distinctive contribution is to facilitate public goals and build a spirit to correct oneself in the government process. Interpreting the law as a set of regulations that govern society, then it means that it is supported by a strict and clear sanction system so that justice is upheld.

The justice in question is indicative not absolute justice which imposes a punishment based on legal procedures and clear and fundamental reasons, in the sense that it is not based on feelings of sympathy, loyalty, compromise, or other reasons that are far from the sense of justice. This is by the spirit and animates in Article 27 of the 1945 Constitution. The process to achieve a sense of justice is a link that cannot be separated, at least from the making of laws and regulations, the occurrence of legal cases or events, to the verbal process in the police and the prosecution of the prosecutor or lawsuit in civil cases and then ending with the verdict of the judge who has obtained permanent legal force (Eintracht vangeweisde) so that the quality of the process is a guarantee of the quality of the culmination point of results or benefits a set of laws and regulations that are made.[9]

Therefore, the Legal Responsive Theory developed by Satjipto Rahardjo emphasizes that the law must be responsive to the needs and social dynamics of society. In this context, the law is not only seen as a rigid set of rules but as an adaptive and inclusive tool, which involves community participation in the process of making and implementing it. The New Criminal Code in Indonesia is a codification of criminal law that aims to update the legal system to be more relevant to current social and cultural conditions. One of the important aspects of the new Criminal Code is the recognition and integration of customary law.[10] Customary law is a traditional legal system that lives and develops in indigenous peoples in Indonesia.

[8] Veriena. J.B. Rehatta, "The Application of Responsive Law in Indonesia, International Law" 28 (2015), https://fh.unpatti.ac.id/penerapan-hukum-responsif-di-indonesia/.
[9] Indonesia Republik, "Law Number 1 of 2023 Concerning the Criminal Code", Statute Book of the Republic of Indonesia Number 1 of 2023.," 2023.
[10] Satjipto Rahardjo, *Law and Social Change* (Jakarta: PT Gramedia Pustaka Utama, 1983).

The link between the Theory of Legal Responsiveness, the New Criminal Code, and Customary Law:

a) Adaptation to Social Change:

   The new Criminal Code is designed to be more responsive to changes and the needs of contemporary society. This is in line with the principle of legal responsive theory which emphasizes that the law must be able to adapt to the times.

b) Recognition of Customary Law:

   The new Criminal Code recognizes the existence and role of customary law in resolving legal problems in society. This shows the responsiveness of the law to the norms and values that live in indigenous peoples, by the principle of substantive justice carried out by Satjipto Rahardjo.

c) Community Participation:

   The process of forming the new Criminal Code involves the participation of various elements of society, including indigenous peoples. This approach reflects the theory of legal responsiveness that emphasizes the importance of community participation in lawmaking.

d) Substantive Justice:

   By integrating customary law, the new Criminal Code seeks to realize substantive justice, namely justice that is truly felt by the community, not only formal. This is in line with the principle of legal responsive theory which emphasizes substantive justice.

This theory emphasizes that the law must be responsive to social dynamics and the needs of society. Satjipto Rahardjo criticized the rigid and formalistic approach to law and proposed a more flexible and adaptive approach. This theory is relevant in ensuring that the customary law recognized in the Criminal Code is not only adopted symbolically but is implemented taking into account the needs and values of indigenous peoples.

CONCLUSION

This research reveals various important aspects related to Article 2 of Law Number 1 of 2023 concerning Customary Law, especially regarding the ambiguity of the definition and challenges in its implementation. Through critical analysis and case studies, it was found that although the law aims to strengthen legal protections for indigenous peoples, many obstacles hinder the effectiveness of the goal. The lack of clarity in the definition of Article 2 has led to

various interpretations and inconsistencies in its application in various regions. This underscores the importance of revising or refining legal provisions to be clearer and more detailed to ensure that the rights of indigenous peoples are well and uniformly protected throughout Indonesia. Moreover, the application of customary law in the field shows that regions with strong customary law structures are better able to adopt this article, while other regions are experiencing difficulties. The legislative policies in Law Number 1 of 1999 are not in line with the Constitution which protects and promotes the existence of customary law as a living law. This policy is also contrary to the principle of legal pluralism upheld by Indonesia's national motto. From a practical point of view, the inclusion of customary criminal law in Law Number 1 of 1999 is difficult to implement because it requires further regulation through regional regulations.

Considering that the entry of customary criminal law poses a threat to its existence, it is necessary to change the law through legislation and judicial review. Therefore, collaborative efforts are needed between the government, academics, legal practitioners, and indigenous peoples themselves to develop implementation guidelines that are more concrete and adapted to local conditions. To achieve social justice and environmental sustainability, the protection of the rights of indigenous peoples must be a top priority. This includes strengthening the capacity of institutions responsible for managing and supervising the implementation of customary law, as well as providing training to law enforcement officials on the importance of understanding and respecting customary law. Ultimately, the harmonization of these efforts will ensure that the integration of customary law into the national legal framework does not diminish its essence and that the rights of indigenous peoples are consistently upheld throughout Indonesia.

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