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Research Article

The Position of Customary Criminal Law in Law No. 1 of 2023 on the Criminal Code

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Abstract. Law Number 1 Year 2023 on the Criminal Code (KUHP) is a form of national criminal law reform that recognises the existence of customary criminal law. However, it has not been regulated in detail how the implementation and position of customary criminal law as a reason for criminal prosecution, and there are fundamental differences between the two concepts of the legal system. The problems in this research are how the position between customary criminal law and national criminal law in the new Criminal Code, how the legal certainty of the regulation of customary criminal law in the new Criminal Code, and how the challenges in enforcing customary criminal law using the current criminal justice system in Indonesia. This research uses normative juridical method with regulatory and conceptual approaches. The results show that the applicability of customary criminal law is limited to the area where the law lives and applies to customary criminal acts committed in the area where the law lives. The position of customary criminal law can be valid as a reason for criminal prosecution if the customary law that is still alive in the community has been stipulated in the form of Regional Regulations, and customary offences that are similar to offences in the New Criminal Code will be ruled out, and the classification of customary sanctions as additional sanctions, positioning customary penalties to be complementary or secondary, because additional sanctions can only be imposed together with the main sanctions. Legal certainty towards the regulation of customary criminal law is highly dependent on the formulation of the elements of each offence of customary criminal law stipulated in regional regulations. The current criminal justice system in Indonesia (KUHAP) cannot realise the objectives of customary criminal law. The objectives, characteristics, and procedures in the concept of customary law are contrary to those in the criminal justice system. Restorative Justice can be utilised as an alternative to the settlement of customary criminal cases when the New Criminal Code comes into effect.

Keywords: Legal Position; Customary Law; Criminal Law; Customary Crimes

1. Introduction

Criminal law is part of a country's legal system that regulates behaviour in society. The law is coercive and binding, which implies that its implementation carries real consequences. These consequences can be in the form of criminal sanctions, such as imprisonment or fines, or other sanctions, such as rehabilitation or parole (Ramadhani, G S & Arief P Barda Nawawi, 2012).

The Criminal Code (KUHP) currently used and applicable in Indonesia is a relic of the colonial era made by the Dutch colonials, which was enforced since the colonial period. The government then passed Law No. 1 of 1946 concerning Criminal Law on 26 February 1946. The enactment of the Act was the legal basis for the amendment of the *Wetboek van Strafrecht* of the Dutch East Indies into the *Wetboek van Strafrecht* (WvS), later known as the Criminal Code.

It is recognised that the current criminal law is a Dutch colonial legacy, which is ahistorical in nature as its existence is not in line with the development of society. Whether we realise it or not, politically and sociologically the enactment of this colonial criminal law has caused its own problems, because it does not follow the conditions and developments of society, therefore it is necessary to reform the criminal law.

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On 2 January 2023, Law Number 1 Year 2023 on the Criminal Code (KUHP) was passed, hereinafter referred to as the New KUHP, which will be effectively enacted in 2026. In this KUHP reform, there are 4 (four) missions that become the objectives of the reform, namely decolonialisation, democratisation, consolidation, and harmonisation of criminal law (Rodliyah & Salim H.S, 2024). The New Criminal Code contains provisions on customary criminal law, this provision is one of the realisation of the first mission of the New Criminal Code, namely decolonialisation. Recognition of the laws that live in the community balances the dominance of the principle of legality that has prevailed so far.

The principle of legality in Article 1 paragraph (1) of the Old Criminal Code, which states that every act referred to as a criminal offence must first be regulated in a regulation and cannot be applied retroactively, is seen as a standard of validity that is still valid today. However, in the New Criminal Code, there is an expansion of the formulation of the principle of legality, particularly the formulation of the principle that emphasises material legality in Article 2 paragraphs (1) and (2):

> (1) The provisions as referred to in Article 1 paragraph (l) shall not prejudice the applicability of the law living in the community which determines that a person should be punished even though the act is not regulated in this Law.
> (2) The law that lives in the community as referred to in paragraph (1) shall apply in the place where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognised by the community of nations.

If seen in the Elucidation of Article 2 paragraph (1) of the New Criminal Code, what is meant by "laws that live in the community" is customary law that determines that a person who commits certain acts should be punished. The law that lives in the community in this article relates to unwritten laws that are still valid and developing in the life of the community. In accordance with what is stated in the Elucidation of Article 2 paragraph (1) that customary law is law that lives in the community and is not written, the New Criminal Code does not contain articles on customary criminal offences. However, there is an additional criminal sanction for customary criminal offences in Article 66 paragraph (1) letter f, namely the fulfilment of local customary obligations.

In the Elucidation of Article 2 paragraph (2), the applicability of customary criminal law is limited to every person who violates customary criminal law in the area where the customary criminal law lives. The forms of customary punishment in each region have differences and similarities so as to adjust to the living law in the region, so in the Elucidation of Article 2 paragraph (1), the forms of customary punishment will be regulated in each Regional Regulation. However, when customary criminal law is formulated in the form of Regional Regulations, the concept of customary law will not emerge and decolonialisation which is the mission of the New Criminal Code becomes vague due to the return of the dominance of the principle of legality, then it is necessary to examine more deeply the position of customary punishment as a basis for criminal prosecution.

Prior to its inclusion in the New Criminal Code, recognition of customary law has been contained in the 1945 Constitution Article 18B paragraph (2), which reads "The State recognises and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law." The state has guaranteed the existence of customary law communities under the conditions stipulated in the law. Customary law communities are territorial or geological community units that have their own wealth, have citizens who can be distinguished from other legal communities and can act inwardly or outwardly as a legal entity (legal subject) that is independent and governs themselves (Husen Alting, 2010). Recognition of customary law is also contained in Article 27 of the *United Nations Declaration on the Rights of Indigenous Peoples*, that States are required to establish and implement, in conjunction with the indigenous pe*oples* concerned, a fair, independent, impartial, open and transparent process for granting recognition, open and transparent, in giving due recognition to indigenous peoples' laws, traditions, customs and tenure systems, to recognise and determine indigenous peoples' rights to their lands, territories and other resources, including those traditionally owned or otherwise controlled or used. Indigenous peoples have the right to participate in these processes.

Customary law is the law that regulates the behaviour of Indonesian people in relation to each other, whether it is the totality of the customs, habits and morals that actually live in the indigenous community because they are adopted and maintained by the members of that community, or it is the totality of the rules regarding sanctions for violations stipulated in the decisions of the customary rulers (those who have authority and power to make decisions in the indigenous community, namely in the decisions of the lurah, penghulu, wali tanah, kepala adat, and judges) (Moh. Koesno, 1992). Long before Indonesia's independence and even before the arrival of Europeans to the archipelago, customary law communities already had their own legal system that was used as a guide in community life. The form of customary law is in the form of unwritten law, written law (the smallest part found in the environment of indigenous peoples such as laws and regulations issued by kings or sultans in the past), and written legal descriptions (Bushar Muhammad, 1984). In the practice of customary law, there is no problem that cannot be resolved and the goal is the achievement of a safe, peaceful, prosperous society, both between the parties concerned and the community as a whole. Within the framework of this goal, in customary law, every conflict obtains a complete resolution, namely a comprehensive settlement, which answers all existing and possible aspects in the future, and there are no more problems in the future (Rosdalina, 2017).

Customary law communities resolve disputes through deliberation or kinship channels, because in deliberation an amicable agreement can be made that benefits both parties. In addition, deliberation aims to realise peace in society. The pattern of deliberation or kinship is applied not only to civil disputes, but also criminal ones. In the customary law system, there is no division of law into public and private law. The culture of kinship is what gives birth to the local wisdom dimension of customary law.

From the explanation above, it can be seen the difference between the concept of criminal law that has been applicable in Indonesia and the concept of customary law. customary criminal law is usually inversely proportional in terms of its provisions, especially in formal law (procedure for implementation). For example, in terms of the severity of punishment, if the criminal law has stated the amount of punishment in writing, while customary criminal law sentences the punishment according to the level of harm caused. Furthermore, criminal law is rigid or rigid which is difficult to change, while customary criminal law is flexible and dynamic which can continue to develop in accordance with the times, then the source of criminal law comes from written regulations made by the authorities or authorised institutions while customary criminal law is formed from customary customs, traditions, and culture that apply in a group of indigenous peoples (Nurchaesar, D. & Arafat, M. R, 2021). The flexible and dynamic nature of customary law is contrary to legal certainty, which has been one of the goals. Therefore, the matters described above will be studied and analysed more deeply related to the enactment of customary criminal law in the New Criminal Code.

2. Research Method

In conducting research, accurate data is needed, both primary data and secondary data. In order to obtain the data required for this writing that meets the requirements, both quality and quantity, certain research methods are used. The research method in this writing is a normative juridical method, where normative juridical research is legal research carried out by researching library materials or secondary data (Soerjono Soekanto & Sri Pamudji, 2011). Based on the background above, the problem formulation in this research focuses on the Position of Customary Criminal Law in Law No. 1 of 2023 concerning the Criminal Code.

3. Results and Discussion

3.1 The Position between Customary Criminal Law and National Criminal Law in the New Criminal Code.

Customary criminal law in Indonesia has grown for a long time, reflecting the rich culture and traditions that live in communities in various regions. Even before the colonial period, each ethnic community already had its own criminal law system that developed in line with local values and norms (Asliani Harahap, 2018). With a variety of languages, cultures and customs in society, there are also a variety of rules and norms that live and grow and develop in each community. In every community in the territory of Indonesia, has its own customary law that is different from each other and in each customary law also known customary sanctions that apply to every person who commits a crime or violates the rules and norms that are contrary to the public interest.

The recognition of customary law in the New Criminal Code, on the one hand, confirms the existence of customary criminal law as an integral part of the national criminal law system. However, on the other hand, the formalisation process also raises various issues and consequences, especially in relation to its position as the basis for criminal prosecution. In Article 2 paragraphs (1) and (2) of Law Number 1 Year 2023 on the Criminal Code (KUHP):

> (1) The provisions referred to in Article 1 paragraph (l) shall not prejudice the applicability of the law living in the community which determines that a person should be punished even though the act is not regulated in this Law.
> (2) The law that lives in the community as referred to in paragraph (1) shall apply in the place where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognised by the community of nations.

Article 2 paragraph (1) seems to override the origin of legality and elevate the law that lives in the community (customary law) to an equal position as a basis for criminal prosecution. However, in the elucidation of Article 2, the applicability of customary criminal law is limited only in the area where the law lives and applies to customary criminal acts committed in the area where the law lives.

The position of customary criminal law can be valid as a reason for criminal prosecution if the customary law that is still alive in the community has been stipulated in the form of Regional Regulation. However, customary law formulated in the form of Regional Regulations is not in accordance with the nature of customary law which is flexible/dynamic and unwritten (its formation is not through a legislative process).

Although customary criminal law is recognised and included in the New Criminal Code, the enforceability of customary criminal law still uses a positivistic paradigm. The change in the form of unwritten customary law that lives in the community into Regional Regulations formulated through the legislative process will eliminate the flexible nature of customary law that quickly adapts to the dynamics that occur in society, and the vision of decolonialisation which is one of the objectives of the formulation of customary law content in the New Criminal Code is not maximally realised.

According to M. Misbahul Mujib, the existence of customary law in the modern context has a real influence on the implementation of written law, including the constitution and other laws and regulations. From a historical perspective, this condition reflects the impact of the entry of the colonial legal system into the original Indonesian legal system. During the colonial period, the government applied the principle of concordance, which adopted the colonial legal system while still recognising the existence of customary norms, as long as violations of these norms qualify as law (Misbahul Mujib M, 2013).

The state needs to change its perspective on the existence of customary law and customary law communities. Both must be seen as an inseparable part of the nation's identity, so that their treatment must also be in line with the concept of customary law itself. This mindset can be an entry point to understand the ideals of Indonesian law as the basis for the development of the national legal system (Sulaiman, 2017).

Then related to the position of the enactment of customary criminal law in the New Criminal Code, based on Article 2 paragraph (2), customary offences that can apply or will be formulated in the form of Regional Regulations are offences that have not been accommodated in the formulation of criminal offences in the New Criminal Code, which means that when there is a form of criminal offence that has been regulated in the New Criminal Code, even though in customary law the act is a customary offence, the enforcement of the criminal offence still refers to the regulation of criminal offences in the New Criminal Code and does not become a customary offence.

From the perspective of legal pluralism, one legal system is equal to another legal system. According to Satjipto Rahardjo in Anthon Feddy Susanto, since the emergence of modern law which is central to the state, other types of law such as customary law and other customs have begun to be displaced. Even if these types of law still apply, then it all happens because of *the* "kindness" of *state* law (*by the grace of state law*). There are several types of legal pluralism: (Anthon Feddy Susanto, 2005)

a. Relative Pluralism, Weak Pluralism which refers to a legal construction in which the dominant rule of law makes room, implicitly or explicitly, for other types of law, for example customary law or religious law. State law validates and recognises the existence of other laws and includes them in the state legal system.
b. Strong or Descriptive Pluralism which refers to a situation in which two or more legal systems coexist, with their respective bases of legitimacy and validity.

Based on the division of types above, it is clear that the position of customary law in the New Criminal Code falls into the type of weak legal pluralism, starting from its validity which will apply if it has been formulated in the form of regional regulations, in other words, it must go through the legislative process and customary offences that are similar to the offences in the New Criminal Code will be ruled out. In this case, state law is superior to other legal systems, or in other words, the fact of legal diversity is accepted as long as it is recognised by the state. The issue of state recognition and the integration of folk laws into state law.

Long before the enactment of Law No. 1 of 2023 on the Criminal Code, the position of customary law was more balanced, especially in the province of Aceh. Regarding customary disputes or disputes, Article 13 of Aceh Qanun No. 9/2008 on the Development of Customary Life and Customs, states:

(1) Adat and customary disputes include:
   a. domestic disputes;
   b. disputes between families related to faraidh;
   c. disputes between citizens;
   d. khalwat meusum;
   e. disputes over property rights;
   f. theft within the family (petty theft);
   g. disputes over sehareukat property;
   h. petty theft;
   i. theft of domestic livestock;
   j. customary offences concerning livestock, agriculture and forests;
   k. disputes at sea
   l. disputes in the marketplace;
   m. light maltreatment;
   n. forest burning (on a small scale to the detriment of indigenous communities);
   o. harassment, slander, incitement and defamation;
   p. environmental pollution (light scale);
   q. threats (depending on the type of threat); and
   r. other disputes that violate adat and customs.
(2) The settlement of adat and adat istiadat disputes/disputes as referred to in paragraph shall be settled in stages.
(3) Law enforcement officials shall provide an opportunity for disputes to be resolved first by adat in the Gampong or other name.

From the description of article 13 above, it can be seen that the position of customary law is more balanced and side by side with the National Criminal Code, although its enactment must go through a legislative process first, thus changing the nature of the form of customary law which is unwritten law. Some of the customary criminal offences contained in Article 13 paragraph (1) of Aceh Qanun No. 9/2008 on the Development of Customary Life and Customs are criminal offences that have already been formulated in the Criminal Code, but these criminal offences can still be resolved through customary justice first. This is confirmed in paragraph (3).

Then, the New Criminal Code contains customary criminal sanctions precisely in Article 66 paragraph (1) letter f, namely, the fulfilment of local customary obligations. The content of customary sanctions in the New Criminal Code is included in the category of additional punishment, this provision has a number of implications. First, by classifying customary sanctions as additional sanctions, the position of customary punishment becomes complementary or secondary, because additional sanctions can only be imposed together with the main sanctions. Whereas, in practice, some customary violations can actually be resolved only by applying customary sanctions without the need to be accompanied by the main sanction. This raises a dilemma regarding the possibility of applying customary sanctions independently. Another implication of this provision is that the enforcement of customary

sanctions is not imperative, but depends entirely on the discretion of the judge. In addition, the provision shows that the implementation of customary sanctions is carried out within the framework of the state justice system, not through the mechanism of customary justice institutions or customary communities, which in turn has the potential to reduce the autonomy of the customary institutions themselves (Damianus Rama Tene, 2023).

3.2 Legal Certainty of Customary Criminal Law Arrangement in the New Criminal Code

Legal certainty is a theory born from the development of legal positivism that developed in the 19th century. Legal certainty is closely related to positive law, namely a law that applies in a state area and or certain conditions in written form (Legislation). These rules in principle regulate or contain general provisions that guide the behaviour of every individual in society. The existence of such legal rules and the implementation of these rules will lead to legal certainty.

Legal certainty can be understood as the application of law that is consistent with the normative provisions contained in laws and regulations. This allows the community to have confidence that the applicable law can really be implemented as it should. In understanding the essence of legal certainty, it should be noted that this value has a close relationship with the existence of positive legal instruments and the active role of the state in actualising the positive law in practice.

Legal certainty is fundamental in criminal law, clearly stated in Article 1 paragraph (1) of Law Number 1 Year 2023 on the Criminal Code, which reads: "There is no single act that can be subject to criminal sanctions and/or actions, except on the strength of criminal regulations in laws and regulations that have existed before the act was committed".

Thus, for the sake of legal certainty, every act that is included in a criminal offence and can be held criminally liable is an act that has first been regulated in legislation. Concerns regarding the guarantee of legal certainty arose after the inclusion of customary criminal law in Article 2 of Law Number 1 Year 2023 on the Criminal Code, which reads: "The provisions as referred to in Article 1 paragraph (l) shall not prejudice the applicability of the law living in the community which determines that a person should be punished even though the act is not regulated in this Law."

Article 2 of the New Criminal Code balances the origin of formal legality by promoting the principle of material legality as promoted by Barda Nawawi. According to Barda Nawawi, the formal formulation of law in the law should be seen as one of the objective benchmarks in determining whether an act is classified as against the law, however, the formal or objective measure still needs to be reviewed materially, namely by considering whether the act is really contrary to the sense of justice and legal awareness that develops in the community, or with the *living law* in the community (Barda Nawawi Arief, 2016). In essence, customary criminal law is an unwritten and flexible law, constantly changing following the development of the community where the law lives. The procedure of settlement and sanctioning in customary law is also different from the national criminal law. This is in contradiction with the principle of legality, which is the fundamental of criminal law as it is known and understood so far.

If only guided by Article 2 of the New Criminal Code, there will certainly be legal uncertainty, because there is only recognition of the validity of customary criminal law without formulating the offences of customary criminal law referred to in the New Criminal Code, this is contrary to the principle of legality. The principle of legality which aims to provide legal certainty consists of several things, namely: (Perkasa Aliyht & Rena Yulia, 2023).

a. *Lex scripta* (punishment must be based on written law).
b. *Lex certa* (laws formulated in detail and carefully, the form and severity of punishment must be clearly determined and distinguishable).
c. *Lex praevia* (prohibition of retroactivity).
d. *Lex stricta* (the law must be formulated strictly, prohibition of punishment on the basis of analogy).

According to I. Sriyanto, the values in Customary Criminal Law do need to be accommodated in the process of forming the national Criminal Code. However, the most important thing is to identify norms that have a universal nature and can be accepted by all Indonesian people. Thus, these values will be merged into part of the national criminal law, no longer standing as a rule of customary law. In this position, the national criminal law remains based on a sense of justice and values that live in society (I. Sriyanto, 1991). However, this is difficult to implement considering that Indonesia consists of a diversity of ethnicities, cultures, and religions, so there are differences in the basic values that live in between community groups in Indonesia.

In order to ensure legal certainty and still carry the spirit of decolonialisation as one of the objectives of the reform of the Criminal Code, the recognition of customary law in Article 2 of the new Criminal Code will be continued by formulating customary criminal law offences in Regional Regulations (Perda). The formulation of customary criminal law offences in the form of local regulations is considered to be able to overcome the problem of legal certainty, but it eliminates the flexible and dynamic nature of customary law.

The formulation of customary criminal law offences in the form of local regulations is a challenge to the authorised institutions in the legislative process in the regions. Article 3 of the New Criminal Code explains that the procedures and criteria for customary criminal law offences to be stipulated in the form of local regulations are regulated in government regulations, but until now the government regulations have not been issued, resulting in a potential legal vacuum when the New Criminal Code comes into effect in 2026.

Legal certainty towards the regulation of customary criminal law is highly dependent on the formulation of the elements of each customary criminal law offence stipulated in the Perda later. Considering that the available criminal law enforcement mechanism does not yet contain special procedures for the settlement of customary criminal law offences.

3.3 Challenges in the Enforcement of Customary Criminal Law Using the Current Criminal Justice System in Indonesia.

The legal system in Indonesia is a mixed system consisting of several legal systems that influence each other. In this context, customary law occupies a position as an original law derived from the culture and values of Indonesian society. However, the national legal system is not only shaped by customary law, but is also influenced by other legal systems, namely religious law and colonial legacy law, which have also given colour and shaped the dynamics of law in Indonesia to date.

Customary law is a legal system that was born and developed from customary practices that live in local communities. As a generally unwritten law, customary law emphasises the values of harmony, balance and togetherness in the social life of the community. Religious law is generally reflected through the dominance of the implementation of Islamic sharia, especially in aspects of civil law such as marriage, family relations, and inheritance. This religious law is binding for followers of Islam and contributes to the creation of social order and stability in society. The colonial legacy law in Indonesia mainly refers to the Continental European legal system. This system is based on the principle of codification, which makes written law the main basis for law enforcement. Consequently, there is a dominance of written law in the national legal system, even though the original Indonesian law, namely customary law, is basically unwritten and prioritises local values that live in society (Irsyaf Marsal, 2024).

From the description above, it can be seen that the criminal justice system in Indonesia is also inseparable from the influence of the European continental legal system that prioritises positive law and legal certainty. The criminal justice system in Indonesia refers to Law Number 8 Year 1981 on Criminal Procedure, known as the Criminal Procedure Code (KUHAP).

KUHAP introduces the concept of an integrated criminal justice system, based on the principle of functional differentiation between law enforcement agencies. This principle asserts that each institution, such as the police, prosecutor's office, courts, and correctional institutions, have different roles, functions, and authorities, but are interconnected and supportive in the overall law enforcement process (Nursyamsudin, N., & Samud, S, 2022).

The criminal justice system regulated in KUHAP is organised into three main stages, namely the preadjudication stage (before the court session), the adjudication stage (trial process), and the post-adjudication stage (after the trial). In this regard, there is a view that emphasises the importance of the adjudication stage as the most decisive stage in the entire criminal justice process. This view refers to the provisions of the Criminal Procedure Code which emphasise that every decision, in whatever form, must be based on facts, circumstances and evidence obtained legally through the examination process at trial. Therefore, the integrity and fairness of a criminal justice system that respects the rights of defendants as citizens will be most clearly reflected in the implementation of the adjudication stage (Muladi, 1995).

The existing criminal justice system serves as a guideline in the process of enforcing the material criminal law, namely the Criminal Code. However, the Criminal Procedure Code applicable in Indonesia now refers to the old Criminal Code, which prior to the reformation was not yet known as the principle of material legality or the recognition of the position of customary law as the basis for criminal prosecution as a counterbalance to the principle of formal legality. The law enforcement procedures available in KUHAP are limited to offences that have been clearly and in detail formulated in the Criminal Code. This will become a new problem when the New Criminal Code which contains provisions on customary criminal law will be effective in 2026.

System according to R. Subekti is an orderly arrangement or order, a whole consisting of parts related to each other, arranged according to a plan or pattern, the result of a thought to achieve a goal (Subekti, R. and Ridwan Syahrani, 2002). If the elements between the criminal justice system and the customary law system are of course different, especially in the objectives to be achieved from law enforcement. The customary criminal law system aims to restore the existing conditions in society both to victims, perpetrators and the community environment or restorative justice, while the criminal law system aims to provide a deterrent effect on the perpetrators of criminal offences or *retributive*.

Law enforcement agencies that are organs of the criminal justice system are not prepared and do not have the foundation to enforce the law in accordance with the concept of customary law. When looking at the three components that ensure a legal system can run according to its purpose according to Lawrence Milton Friedman, which consists of legal structure, legal substance, and legal culture. According to Lawrence Milton Friedman, the legal system must include substance, structure, and legal culture (Lawrence M. Friedman, 2019).

First, the legal structure, namely the institutions and law enforcement officials in the criminal justice system consisting of police, prosecutors, and judges, are not institutions similar to those in the customary law system. Secondly, the substance of the law, namely the legal rules applicable in the current Indonesian criminal justice system (KUHAP) do not regulate criminal case settlement procedures in accordance with the concept of customary law. Third, legal culture, namely all habits, ways of thinking, and ways of acting by legal officials that have been running for decades, where everything can only be done according to what is first written in the legislation, while in customary criminal law, customary judicial institutions and traditional leaders who become decision makers can act more flexibly in resolving a case related to customary offences, only focusing on the aim of restoring balance in society.

From the description above, it can be concluded that the enforcement of customary criminal law contained in the New Criminal Code using the current criminal justice system in Indonesia (KUHAP) cannot realise the objectives of customary criminal law. The objectives, characteristics, and procedures that exist in the concept of customary law are contrary to what exists in the criminal justice system. However, there is still an alternative so that the content of customary criminal law in the New Criminal Code can still run according to the values and objectives contained in the concept of customary law, namely through *Restorative Justice* (RJ).

The word *Restorative Justice* comes from the English language, consisting of two words, namely "*restoration*" which means repair, recovery, or restoration, and "*justice*" which means justice. (*Restorative*) means (noun) medicine that heals/strengthens/refreshes (adjective) that strengthens, heals, or refreshes. Thus the definition of restorative justice according to language is healing justice, or restorative justice (Hanafi Arief & Ningrum Ambarsari, 2018).

Restorative Justice is a process in which the parties concerned in a particular offence meet together to resolve the issue together on how to resolve the consequences of the offence for the benefit of the future (Mariam Liebman, 2007). In relation to the implementation of *restorative* justice, each law enforcement agency that is an organ in the Indonesian criminal justice system has guidelines for the implementation of *restorative justice*.

The police can conduct RJ based on the National Police Chief Regulation Number 8 of 2021 on Handling Criminal Offences Based on Restorative *Justice*. This Perkap regulates how the police can resolve criminal cases through a restorative justice approach at the investigation and investigation stages. Prosecutors can conduct RJ based on the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. Judges can conduct RJ based on the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2024 concerning Guidelines for Adjudicating Criminal Cases Based on Restorative Justice.

The regulations that serve as the basis and guidelines for police, prosecutors, and judges to conduct RJ are actually intended for the settlement of minor criminal cases. However, this can be utilised as an alternative to the settlement of customary criminal cases when the New Criminal Code comes into effect, until the completion of the reform of the Criminal Procedure Code which contains rules related to the procedure for resolving customary criminal law cases. The resolution of customary criminal cases through RJ is carried out by involving local customary leaders so that the values and objectives contained in the concept of customary law can still be realised.

4. Conclusions

The applicability of customary criminal law is limited only in the area where the law lives and applies to customary criminal acts committed in the area where the law lives. The position of customary criminal law can be valid as a reason for criminal prosecution if the customary law that is still alive in the community has been stipulated in the form of Regional Regulations, and customary offences that are similar to offences in the New Criminal Code will be ruled out, and the classification of customary sanctions as additional sanctions, positioning customary punishment to be complementary or secondary, because additional sanctions can only be imposed together with the main sanctions. Legal certainty towards the regulation of customary criminal law is highly dependent on the formulation of the elements of each offence of customary criminal law stipulated in regional regulations. The current criminal justice system in Indonesia (KUHAP) cannot realise the objectives of customary criminal law. The objectives, characteristics, and procedures in the concept of customary law are contrary to those in the criminal justice system. *Restorative Justice* can be utilised as an alternative to the settlement of customary criminal cases when the New Criminal Code comes into effect.

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