



CRIMINAL LAW POLICY ON DAYAK DOLOP CUSTOMARY OFFENCES IN THE PERSPECTIVE OF ARTICLE 2 OF LAW NUMBER 1 OF 2023



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Abstract

This study examines the position of dolop, the submersion ordeal practised by the Ngaju Dayak of Central Kalimantan, within the criminal law policy established by Article 2 of Law Number 1 of 2023 on the Criminal Code. It responds to a gap in the scholarship, which has read the living law clause as a question of substantive criminalisation while leaving the adjudicative and evidentiary institutions of adat unexamined. The research is normative juridical, combining statutory, conceptual and comparative approaches, and analyses the 1945 Constitution, Law Number 1 of 2023, Law Number 23 of 2014 and related instruments, supported by indexed journal articles and published ethnographies. The findings disclose a recognition asymmetry: Article 2 paragraph (1) absorbs the substantive norms of adat and Articles 66 and 96 absorb its sanctions, but neither the Code nor its delegated regulation addresses the adat forum or its modes of proof, leaving dolop in a normative blind spot. Six collisions of vertical, competence-based, horizontal, certainty-based, human rights-based and procedural character are identified in the implementation chain, and a seventh consequence follows directly: the Damang who convenes the proceeding is personally exposed to criminal liability for the procedure through which the very norms the Code invites him to declare have always been enforced. The article concludes that criminal law policy should adopt filtered absorption, retaining the restorative core of dolop while withdrawing the ordeal, which fails the human rights filter. Its contribution is a four-component framework for testing adat institutions against the living law clause.

Abstrak

Studi ini mengkaji kedudukan dolop, yaitu ordal penyelaman yang dipraktikkan masyarakat Dayak Ngaju di Kalimantan Tengah, di dalam kebijakan hukum pidana yang dibentuk oleh Pasal 2 Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana. Kajian ini menjawab kesenjangan literatur yang membaca klausul hukum yang hidup semata-mata sebagai persoalan kriminalisasi materiil dan mengabaikan institusi peradilan serta pembuktian adat. Penelitian ini bersifat yuridis normatif dengan pendekatan perundang-undangan, konseptual, dan komparatif, serta menganalisis Undang-Undang Dasar 1945, Undang-Undang Nomor 1 Tahun 2023, Undang-Undang Nomor 23 Tahun 2014, dan peraturan terkait, yang didukung sejumlah artikel jurnal terindeks dan etnografi. Temuan penelitian menunjukkan adanya asimetri pengakuan: Pasal 2 ayat (1) menyerap norma materiil adat dan Pasal



66 serta Pasal 96 menyerap sanksinya, tetapi baik Kitab Undang-Undang Hukum Pidana maupun peraturan pelaksanaannya tidak menyentuh forum adat dan cara pembuktiannya, sehingga dolop berada dalam ruang kosong normatif. Enam benturan bersifat vertikal, kewenangan, horizontal, kepastian, hak asasi manusia, dan prosedural teridentifikasi dalam rantai implementasinya, dan satu konsekuensi ketujuh mengikuti secara langsung: Damang yang memimpin proses tersebut secara pribadi terancam pertanggungjawaban pidana atas prosedur yang selama ini justru menegakkan norma yang oleh Kitab Undang-Undang Hukum Pidana ia diundang untuk menyatakannya. Artikel ini menyimpulkan bahwa kebijakan hukum pidana seharusnya menempuh penyerapan tersaring, dengan mempertahankan inti restoratif dolop dan menarik keluar praktik ordalnya. Kontribusinya adalah kerangka empat komponen untuk menguji institusi adat terhadap klausul hukum yang hidup.

INTRODUCTION

On 2 January 2026 Law Number 1 of 2023 on the Criminal Code entered into force and brought to a close more than a century of reliance on a penal statute inherited from the colonial administration. The most consequential feature of the new Code is not the recalibration of its penalties but the opening of the codified system to unwritten norms through Article 2, which provides that the legality principle in Article 1 paragraph (1) does not diminish the operation of the living law in society determining that a person deserves punishment even though the conduct is not regulated in the Code (Butt, 2023; Hiariej, 2021). Among the Ngaju Dayak of Central Kalimantan one such norm complex continues to operate with undiminished authority. Dolop is a submersion ordeal convened when ordinary proof has failed: the disputing parties, or champions appointed on their behalf, are simultaneously immersed in a river while holding a stake driven into the bed, and the party who surfaces first is declared to be in the wrong. The proceeding is opened by the Damang Kepala Adat, attended by the Kerapatan Mantir Perdamaian Adat, preceded by ritual purification and an oath sworn before Ranying Hatalla Langit, and closed by the imposition of singer calculated in units of jipen upon the losing party. It is convened for accusations of sorcery, for sexual transgression, for boundary disputes and for takings unattested by witnesses, and its outcome is accepted by the community as final in a way that judgments of the state courts frequently are not. The practice is therefore not a folkloric residue but a functioning adjudicative institution, and the entry into force of Article 2 makes the question of its legal status unavoidable.

The scholarship that has grown around the living law clause has nevertheless approached it from a single direction. A substantial body of work examines the tension between Article 2 and the written legality principle and warns of the erosion

of legal certainty that follows from admitting unwritten prohibitions into a codified system (Ali & Wibowo, 2023; Christianto, 2021). A second body of work addresses the substantive delik adat that the clause is expected to accommodate and the criteria by which they might be identified and compiled (Anwar & Nurjaya, 2022; Faisal & Rustamaji, 2022). A third strand concentrates on the sanction, mapping the fulfilment of local customary obligation onto the catalogue of additional punishments (Kurniawan & Nugroho, 2023). Studies of Dayak legal institutions in particular have concentrated upon land, upon the revitalisation of adat bodies after the reformation, and upon the restorative settlement of interpersonal disputes (Prasetyo & Setiawan, 2022; Sulistyanta & Utomo, 2022). What is absent from all three strands is the institution that stands between the norm and the sanction. No study has asked how the recognition architecture of Article 2 treats an adat forum and, more sharply, an adat method of establishing truth. The gap is not incidental. It is produced by an analytical habit of treating customary law as a body of prohibitions and remedies rather than as a complete legal order possessing its own procedure and its own epistemology of proof (Griffiths, 1986; Merry, 1988).

Evaluated against the questions they set themselves, the existing studies are largely successful, and their limitations are limitations of scope rather than of execution. The legal pluralism literature has demonstrated convincingly that the Indonesian state absorbs adat selectively and instrumentally, recognising those elements that can be rendered legible to administrative categories and leaving the remainder in a condition of tolerated informality (Bedner & van Huis, 2008; von Benda-Beckmann & von Benda-Beckmann, 2011; Simarmata, 2018; Lukito, 2013). The constitutional literature has established that the recognition granted by Article 18B paragraph (2) of the 1945 Constitution is conditional and that its conditions have never been operationalised with precision (Arizona, 2022; Nurjaya, 2019). Where procedure has been addressed at all, it has been addressed within the restorative justice frame, which presupposes a deliberative and consensual process oriented towards the repair of relationships (Irianto, 2020; Riyanto & Wijaya, 2021). That frame does not fit dolop. The submersion ordeal is neither deliberative nor consensual in any meaningful sense; it is aleatory, physically coercive and indifferent to the reasoning of the parties. Positioning it within the restorative literature therefore misdescribes it, and positioning it within the substantive literature on delik adat mistakes a mode of proof for a prohibition. A distinct analytical position is required, and the semi-autonomous character of the customary field, in which a community generates and enforces rules while remaining susceptible to the pressures of the surrounding state order, supplies the frame within which that position can be constructed (Moore, 1973).

This article accordingly asks two questions. First, how is dolop positioned within the recognition architecture constructed by Article 2 of Law Number 1 of 2023 and by the Government Regulation to which paragraph (3) delegates the procedures and criteria for determining the living law? Second, what regulatory collisions arise from the operationalisation of that architecture, and what response should Indonesian criminal law policy adopt towards dolop in consequence? The argument advanced here is that Article 2 produces a recognition asymmetry. The clause and its companion provisions absorb the substantive norm and the sanction of adat while remaining silent upon the forum and the mode of proof, with the result that the most legally hazardous element of dolop is precisely the element that the Code does not address. It follows that dolop cannot be evaluated as a single object. It must be disaggregated into four analytically distinct components, each tested separately against the cumulative filters of Article 2 paragraph (2), and the policy that emerges from that test is neither wholesale recognition nor wholesale prohibition but filtered absorption. The argument is developed by mapping the architecture, by identifying the collisions that its implementation generates, and by tracing the transformative consequences for the legality principle itself.

METHODS

This research is normative juridical in character and is directed towards the prescriptive analysis of positive law rather than the measurement of social behaviour. Three approaches are combined. The statutory approach is used to examine the internal coherence of the recognition architecture and its relationship with instruments of higher and equal rank. The conceptual approach is used to construct the four-component disaggregation of dolop and the cumulative filter test derived from Article 2 paragraph (2), drawing upon the doctrines of legality, legal pluralism and criminal law policy. The comparative and historical approach is used to situate the submersion ordeal within the wider family of ordeals as instruments of proof, which permits the specific features of dolop to be distinguished from the general category to which it belongs (Bartlett, 1986; Leeson, 2012).

One feature of the legal situation must be stated at the outset because it governs how the analysis below should be read. The Government Regulation contemplated by Article 2 paragraph (3), which is to prescribe the procedures and criteria for determining the living law, had not been promulgated at the time of writing. The implementation chain examined in the Result section is therefore reconstructed from the preparatory materials, from the structure of the delegation itself and from the pattern of comparable delegations in Indonesian legislative practice. The collisions identified are accordingly collisions of the model rather than of an enacted text. This does not diminish their analytical force, since the model is the one the responsible

ministry has publicly contemplated and since several of the collisions arise from the choice of instrument rather than from its content, but it does mean that the analysis is anticipatory in part and will require revision once the Regulation is issued. Readers should treat Figure 1 as a projection of the contemplated chain rather than as a description of an operative one.

The materials analysed are secondary in the sense proper to doctrinal research. Primary legal materials comprise the 1945 Constitution of the Republic of Indonesia, in particular Articles 18B paragraph (2), 28A, 28D paragraph (1) and 28I paragraph (1); Law Number 1 of 2023 on the Criminal Code, in particular Articles 1, 2, 54, 66 and 96; Law Number 20 of 2025 on Criminal Procedure; Law Number 48 of 2009 on Judicial Power; Law Number 39 of 1999 on Human Rights; Law Number 12 of 2005 ratifying the International Covenant on Civil and Political Rights; Law Number 23 of 2014 on Regional Government; Law Number 12 of 2011 as amended by Law Number 13 of 2022 on the Formation of Legislation; and Regional Regulation of Central Kalimantan Province Number 16 of 2008 on Dayak Customary Institutions. Secondary legal materials comprise articles published in journals indexed by Scopus or accredited at the first tier of the national index, together with monographs on adat law and on Indonesian criminal law policy, and published ethnographic accounts of dolop and of the Kerapatan Mantir Perdamaian Adat. Tertiary materials comprise legal dictionaries and encyclopaedic entries used to stabilise terminology. Collection was conducted through documentary study between January and May 2026, that is, in the months immediately following the entry into force of the Code, so that the analysis addresses the Code as operative law rather than as a projected reform.

Analysis proceeds in three stages and is qualitative and prescriptive throughout. The first stage is a content analysis of the primary legal materials, in which every provision bearing upon the recognition of unwritten norms is extracted and coded according to the component of the customary order that it addresses, whether norm, forum, mode of proof or sanction. The second stage is a harmonisation test in which each extracted provision is examined vertically against instruments of higher rank and horizontally against instruments of equal rank, and the resulting incompatibilities are classified as vertical, competence-based, horizontal, certainty-based, human rights-based or procedural. The third stage applies the cumulative filters of Article 2 paragraph (2) to each component of dolop separately, using conformity with the values of Pancasila, with the 1945 Constitution, with human rights and with the general principles of law recognised by civilised nations as the four criteria of assessment, supplemented by the two threshold conditions of locality and of non-regulation in the Code.

Reliability is pursued through source triangulation, in which every proposition concerning the practice of dolop is supported by at least two independent published accounts, and validity is pursued through the systematic separation of descriptive statements about the practice from normative statements about its legal status. The principal limitation of the design is the absence of primary field data, which means that the frequency and contemporary geographical distribution of the practice are reported as they appear in the published literature and are not independently verified.

RESULT AND DISCUSSION

RESULT

The Forms and Manifestations of Dolop as a Customary Institution

The submersion ordeal is not an isolated ritual act but the terminal stage of a graduated procedure that the Ngaju Dayak apply to disputes which ordinary means have failed to resolve. The sequence begins with a report to the mantir adat of the village, who attempt settlement by deliberation. Where deliberation fails and the dispute turns upon a contested question of fact rather than upon a contested question of entitlement, the matter is elevated to the Damang Kepala Adat, who convenes the Kerapatan Mantir Perdamaian Adat. It is at this point that the distinctive character of the institution emerges. The Kerapatan does not proceed to a finding of fact by weighing testimony; it establishes that the ordinary instruments of proof are exhausted, and it then offers the parties the ordeal as the means of resolution. Consent is formalised in an undertaking by which both parties accept the outcome in advance and renounce further recourse. A date and a stretch of river are appointed, ritual purification is performed, and an oath is sworn invoking the highest deity of the Kaharingan cosmology as the guarantor of the result. The two parties, or the champions they have appointed, are then immersed simultaneously while grasping a stake fixed in the riverbed, observed by the assembled community on both banks. The party who first releases the stake and surfaces is declared to be in the wrong, and the finding is treated as conclusive.

The consequences that follow the finding are material rather than merely symbolic. The losing party bears *singer*, a customary liability calculated in units of *jipen* and payable to the injured party, and may additionally bear ritual obligations directed towards the restoration of cosmological balance in the settlement. In grave cases the sanction extends to exclusion from the community. The institution therefore performs three functions simultaneously. It determines a disputed fact, it allocates liability, and it delivers compensation to a victim within a timeframe and at a cost that the formal system does not match. Published accounts locate its continuing use principally in the riverine settlements of the Kahayan, Kapuas and Katingan basins,

and record that it is invoked most often in accusations of sorcery, in allegations of sexual transgression falling under the category of sumbang, in boundary disputes and in accusations of taking property where no witness is available. These are categories in which the evidentiary threshold of the formal criminal process is difficult or impossible to satisfy, which indicates that the ordeal survives in the interstices left by state proof.

Placing this description alongside the text of Law Number 1 of 2023 discloses that the institution does not present itself to the Code as a single object. Four components can be distinguished, and each stands in a different relation to the recognition architecture. The first is the substantive norm, that is, the prohibition whose violation has been alleged. The second is the forum, comprising the Damang Kepala Adat and the Kerapatan Mantir Perdamaian Adat. The third is the mode of proof, that is, the ordeal itself as an epistemic instrument for the establishment of contested fact. The fourth is the sanction, comprising singer and the associated ritual obligations. The Code addresses the first and the fourth expressly, is silent upon the second, and is silent upon the third except in so far as the general filters of Article 2 paragraph (2) may be read to reach it. Table 1 sets out this disaggregation together with the point of contact, if any, between each component and the provisions of the Code.

Table 1. Disaggregation of Dolop and Its Recognition Status under Law Number 1 of 2023

Component of dolop	Empirical form in Ngaju Dayak practice	Point of contact in Law Number 1 of 2023	Recognition status
Substantive norm	Prohibitions on sorcery, sumbang, encroachment on cultivated boundaries and unwitnessed taking	Article 2 paragraph (1), read with the cumulative filters of paragraph (2)	Absorbed, subject to determination and filtering
Forum	Damang Kepala Adat sitting with the Kerapatan Mantir Perdamaian Adat	No provision; regional regulation recognises the institution but not its penal jurisdiction	Unaddressed; normative blind spot
Mode of proof	Simultaneous submersion holding a fixed stake; the first party to surface is declared to be in the wrong	No provision; reached only indirectly through the human rights filter of Article 2 paragraph (2)	Excluded by operation of the filter
Sanction	Singer calculated in units of jipen, ritual restoration and, in grave cases, exclusion	Article 66 on additional punishments and Article 96 on substitution by a category II fine	Absorbed as a judicially imposed obligation
Finality	Advance undertaking by the parties to accept the outcome and to renounce further recourse	No provision; incompatible with the right of access to the courts	Without legal effect in the state forum

Source: Processed from Law Number 1 of 2023 and published ethnographic accounts, 2026

The Factors that Sustain the Practice

The persistence of dolop is not adequately explained by the inertia of tradition, and six factors of a different order can be identified. The first is epistemic. Within the Kaharingan cosmology the truth of a contested allegation is not something that human deliberation discovers but something that a superior agency discloses, and the ordeal is the instrument through which disclosure is solicited. This places the institution in a recognisable comparative family. The judicial ordeal by water in medieval Europe, the oath procedures of early Islamic adjudication and the poison ordeals recorded across insular Southeast Asia all share the structure of referring an insoluble question of fact to a non-human arbiter, and all were displaced historically not by disproof but by the institutional consolidation of courts capable of weighing evidence (Bartlett, 1986; Kusumaatmadja & Sulistyowati, 2023). The comparison matters for policy because it indicates that the ordeal recedes when a credible alternative forum becomes available, and not when it is prohibited.

The second factor is institutional and concerns the accessibility of that alternative. The formal criminal process requires a minimum quantum of lawful evidence before a court may convict, and the categories in which dolop is invoked are precisely those in which that quantum cannot be assembled. An accusation of sorcery is not susceptible of proof by any lawful means; an allegation of sexual transgression between adults in a remote settlement will rarely produce independent testimony; a boundary dispute in an area of customary tenure will rarely produce documentary title. The predictable consequence is that reports are not proceeded with, and the community reads that outcome not as the operation of a protective evidentiary standard but as the refusal of the state to resolve its disputes. The third factor is structural and follows from the shape of state recognition itself. Regional regulation recognises the Damang and the Kerapatan as institutions and confers upon them authority to settle customary disputes, but it does not specify the procedures they may employ. Recognition of the body without regulation of its method leaves the method to be determined by the body, and the ordeal survives inside a space that state law has opened and then declined to fill.

The fourth factor is political. The revival of adat identity after 1998 and the constitutional acknowledgement of customary law communities have given the institutions of the Ngaju an authority they had not previously enjoyed under the New Order, and the assertion of jurisdiction has become a means of asserting identity (Arizona, 2022; Nurjaya, 2019; Davidson & Henley, 2007). The fifth factor is economic. Singer operates as a functioning compensation mechanism which transfers value to the injured party promptly and at low cost, whereas the formal system offers restitution only through mechanisms that are slow, expensive and frequently unenforced. The sixth factor is legal-cultural and concerns finality. Because the

parties have undertaken in advance to accept the outcome, and because the community has witnessed the proceeding, the finding produces social closure. Judgments of the state courts, delivered at a distance and subject to successive appeals, frequently do not (Tanya & Parera, 2021). Taken together these factors indicate that the ordeal is sustained by a deficit in the supply of authoritative dispute resolution, and that a policy which addresses only the practice while leaving the deficit untouched will displace the institution without replacing its function. The availability of parallel fora also means that disputants themselves choose between them according to the outcome each is expected to yield, a dynamic long recognised in the pluralism literature (von Benda-Beckmann, 1981).

The comparative record indicates what the displacement of an ordeal actually requires. Trial by water and by hot iron disappeared from Latin Christendom not because they were forbidden but because the withdrawal of clerical participation after 1215 deprived them of the authority upon which they depended, and the vacuum was filled by procedures that communities proved willing to accept; the oath procedures of classical Islamic adjudication were likewise confined rather than abolished (Bartlett, 1986). In each instance the interval between prohibition and disappearance was measured in generations. The implication for Indonesian criminal law policy is direct. A prohibition of dolop unaccompanied by any improvement in the capacity of the state forum to resolve the categories of dispute in which it is invoked would not end the practice. It would drive it out of the sight of the Damang, who at present convenes it publicly and records its outcome, and into private arrangements for which no institution is answerable.

The operationalisation of Article 2 encounters a second and independent set of difficulties which arise not from the practice but from the design of the delegation. Paragraph (3) confers upon a Government Regulation the task of prescribing the procedures and criteria for determining the living law, and the implementation model that has emerged in the preparatory materials contemplates an inventory prepared by customary institutions, verification by regional government together with the regional office of the responsible ministry, determination through a regional regulation, and registration in a national compendium. Each stage of that chain generates a collision with an instrument that governs it. The collisions are of six distinguishable kinds, and they are not cumulative variations upon a single defect: some are vertical, involving an instrument of higher rank; one concerns the allocation of competence between levels of government; one is horizontal, involving an instrument of equal rank; one concerns the internal coherence of the Code; one concerns the compatibility of the recognised norm with human rights obligations; and one concerns the law of criminal

procedure. Table 2 sets out the matrix (Mukhlis & Fitryantica, 2023; Rahmatullah, 2024).

Table 2. Matrix of Normative Collisions in the Operationalisation of Article 2 of Law Number 1 of 2023

Instrument in issue	Governing provision	Normative claim asserted	Point of collision	Type
Government Regulation under Article 2 paragraph (3)	Article 18B paragraph (2) of the 1945 Constitution	Recognition of customary law communities and their traditional rights is to be regulated by an Act	A Government Regulation is used to give penal effect to a matter the Constitution reserves to legislation	Vertical
Determination by regional regulation	Articles 9 and 10 of Law Number 23 of 2014	Judicial affairs are an absolute affair of central government and are not devolved	The region is made the instrument for establishing what conduct is punishable	Competence
Sanctions in a regional regulation	Article 15 paragraph (2) of Law 12/2011 as amended by Law 13/2022	Regional sanctions may not exceed six months of imprisonment or a fine of fifty million rupiah	Customary offences determined regionally may carry consequences beyond the statutory ceiling	Horizontal
Article 2 paragraph (1) of the Code	Article 1 paragraph (1) of the Code and Article 28D paragraph (1) of the Constitution	Punishment requires a prior written rule, and analogy is prohibited	An unwritten prohibition is admitted as a basis of punishment within a codified system	Certainty
The ordeal as a mode of proof	Article 8 paragraph (1) of Law 48/2009, Law 39/1999 and Article 14 ICCPR	The presumption of innocence and the right to a fair hearing before a competent tribunal	Guilt is determined by physical endurance rather than by the assessment of evidence	Human rights
Evidential use of the outcome	The law of criminal procedure governing lawful means of proof	Only the enumerated means of proof may support a finding of guilt	A customary finding has no status among the enumerated means and cannot be received as such	Procedural

Source: Processed from primary legal materials, 2026

The Transformative Implications of the Recognition Architecture

The first implication concerns the legality principle itself. It is inaccurate to describe Article 2 as an exception to Article 1, because an exception would suspend the principle in a defined class of cases whereas Article 2 leaves the principle intact and adds a second tier beneath it. The written Code continues to define the outer boundary of punishability, and the unwritten norm operates within that boundary only where it satisfies the threshold conditions of locality and of non-regulation and passes the four cumulative filters. What results is not the displacement of legality but its stratification: a tiered legality in which the upper tier is written, general and exclusive as to the maximum reach of the criminal law, and the lower tier is unwritten, local and permissive only as to conduct that the upper tier has not addressed. This reading is more faithful to the text than the familiar characterisation of the clause as a

concession to pluralism, and it has an immediate consequence for the burden of justification. Because the lower tier operates by permission of the upper, the party asserting the application of an unwritten norm carries the burden of demonstrating that each filter is satisfied, and any doubt resolves against punishability.

The second implication is the recognition asymmetry which constitutes the central finding of this study. The Code addresses the customary order at two points only. Article 2 paragraph (1) addresses the substantive norm and Articles 66 and 96 address the sanction, the latter by converting the fulfilment of customary obligation into an additional punishment imposable by the state court and substitutable by a fine. Between those two points lies the whole institutional apparatus through which a customary order actually operates, and the Code says nothing of it. Law Number 1 of 2023 therefore does not open a door that had been closed. It re-enacts, at the level of a general codification and with a more elaborate set of filters, the same selective absorption that has governed the relationship between the state and customary criminal law for three quarters of a century. What the new Code adds is not a change of principle but an obligation of determination, and it is that obligation, discharged through a Government Regulation and through regional legislation, that generates the collisions recorded in Table 2.

The third implication follows directly and concerns the criminal liability of those who convene the proceeding. Because the ordeal is not recognised, it derives no protection from Article 2, and the ordinary provisions of the Code apply to what occurs in the water. Where a participant drowns or suffers serious injury, the provisions on negligence resulting in death or in serious bodily harm are engaged against those who organised and supervised the immersion, and the advance undertaking by which the parties accepted the outcome affords no defence, since consent is not a ground excluding criminal liability in Indonesian law and cannot in any event be given to the risk of death. The position of the Damang is therefore acutely exposed: the same statute that invites him to declare the substantive norms of his community leaves him personally answerable for the procedure by which those norms have always been enforced. Any implementing regulation that purported to validate the ordeal in order to relieve that exposure would exceed the delegation, because paragraph (3) confers power to prescribe the procedures and criteria for determining the living law and confers no power to authorise a mode of proof or to create an adjudicative forum.

The fourth implication concerns the criminal process. The outcome of a dolop cannot enter a criminal trial as proof of the fact it purports to establish, because the law of criminal procedure admits only the enumerated means of proof and a

customary finding is not among them. A distinction must nevertheless be drawn that neither the Code nor its preparatory materials draws. The outcome is inadmissible as proof of the underlying allegation; the occurrence of the proceeding is a fact like any other and may be proved by witnesses in a prosecution arising out of the immersion itself, or as evidence of the state of relations between the parties. Conflating the two would either exclude relevant evidence of what physically took place or admit an aleatory finding as proof of guilt, and investigators and prosecutors presently have no guidance on the point (Suhariyanto, 2020).

The fifth implication concerns the filters themselves, which have not previously been applied component by component to a single institution. Applying them in that manner produces a differentiated rather than a unitary verdict upon the institution as a whole. The substantive norms underlying most dolop proceedings survive the filters in part: prohibitions upon encroachment and upon unwitnessed taking are consistent with Pancasila and with constitutional values, although they will frequently be superseded by the corresponding provisions of the Code itself and so fail the threshold condition of non-regulation, while a prohibition upon sorcery raises acute difficulties of certainty and of freedom of belief. The forum survives the filters in principle, since nothing in Pancasila or in the Constitution forbids the existence of a customary body, but it is unaddressed by the Code and therefore cannot generate penal consequences of its own force. The sanction survives, and indeed is expressly provided for. The mode of proof fails, and fails on every filter rather than merely on one (Marzuki & Wahyuni, 2023). Table 3 records the assessment.

Table 3. Assessment of the Components of Dolop against the Cumulative Filters of Article 2 Paragraph (2)

Filter	Indicator applied	Substantive norm	Mode of proof (the ordeal)	Sanction (singer)
Values of Pancasila	Consistency with belief in one God, just humanity, unity, deliberation and social justice	Satisfied for property and boundary norms; contested for sorcery	Not satisfied; endurance is substituted for the deliberation that the fourth principle requires	Satisfied; restitution advances social justice
The 1945 Constitution	Articles 18B (2), 28A, 28D (1) and 28I (1)	Satisfied where the norm is certain and locally ascertainable	Not satisfied; the right to life and to a fair legal process is engaged	Satisfied where imposed by a competent court
Human rights	Law Number 39 of 1999 and Article 14 of the ICCPR	Satisfied where the norm does not target belief or status	Not satisfied; the presumption of innocence is inverted and physical risk is imposed	Satisfied where proportionate to the harm
General principles recognised by civilised nations	Presumption of innocence, proportionality, prohibition of	Satisfied only where the prohibition is ascertainable in advance	Not satisfied; the result is aleatory and unreviewable	Satisfied where quantified by a knowable standard

Filter	Indicator applied	Substantive norm	Mode of proof (the ordeal)	Sanction (singer)
	analogy and of arbitrariness			
Threshold: locality	Operation confined to the place in which the law lives	Satisfied within the Ngaju settlements concerned	Satisfied as a matter of fact but immaterial once the filters fail	Satisfied
Threshold: non-regulation	Conduct not already regulated in the Code	Frequently not satisfied; theft and encroachment are regulated	Not applicable; the ordeal is a mode of proof and not conduct	Not applicable; expressly regulated
Outcome	Cumulative assessment	Partially absorbed	Excluded	Absorbed

Source: Processed from Article 2 paragraph (2) of Law Number 1 of 2023, 2026

The results reported above can finally be assembled into a single representation of the implementation chain contemplated by Article 2 paragraph (3) and of the points at which that chain meets an incompatible instrument. Figure 1 traces the six stages, marks against each the collision identified in Table 2, and then represents the filtering of the four components of dolop and the policy outcome that follows. As stated in the Methods, the chain depicted is the contemplated model rather than an enacted instrument. The representation makes visible a feature that the tables state separately: the collisions are concentrated in the middle of the chain, where a norm generated by a community is converted into an instrument of the state, and they are least severe at the two ends. The vulnerability of the scheme therefore lies not in recognition as such but in the machinery of determination, and a policy relocating determination from regional legislation to judicial finding, case by case and subject to appeal, would eliminate four of the six collisions without abandoning the recognition that Article 2 intends.

The concentration of collisions in the middle of the chain also explains why the difficulty has proved resistant to the remedies most commonly proposed. Where the defect lies in the instrument through which a communal norm is converted into an instrument of the state, neither a more careful inventory at the community end nor a more rigorous filtering at the adjudicative end will remove it, because the conversion itself is the operation that exceeds the competence of the instrument performing it. Comparative work on Indonesian recognition regimes has repeatedly found that the decisive variable is not the generosity of the recognition granted but the administrative form in which it is delivered, since that form determines which elements of a customary order survive translation and which are discarded as unrepresentable (Simarmata, 2018; Butt, 2023). Read in this light, Figure 1 should be understood not as a diagram of procedural steps but as a map of the successive points at which the recognition promised by Article 2 paragraph (1) is narrowed by the machinery contemplated in paragraph (3).

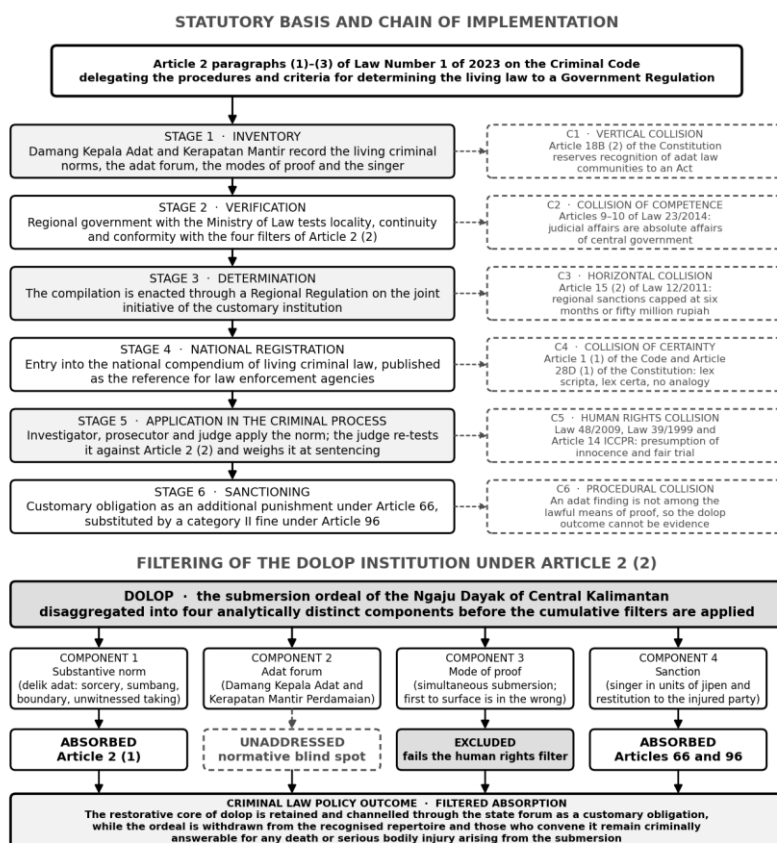


Figure 1. The Implementation Chain of the Government Regulation under Article 2 of Law Number 1 of 2023 and Its Points of Regulatory Collision

Source: Constructed by the author, 2026

DISCUSSION

Four Propositions Taken Together

The results establish four propositions that may now be taken together. First, dolop is not a unitary object of legal assessment but a composite of four components, and the recognition architecture of Law Number 1 of 2023 treats those components differently: the substantive norm is admitted through Article 2 paragraph (1), the sanction is admitted through Articles 66 and 96, the forum is unaddressed, and the mode of proof is excluded by the operation of the filters in paragraph (2). Second, the operationalisation of the clause through a Government Regulation and regional determination generates six collisions of distinct kinds, concentrated at the stages of determination and application. Third, the practice is sustained by a deficit in the supply of authoritative dispute resolution rather than by attachment to ritual, which means that its prohibition alone would not end it. Fourth, the clause does not displace legality but stratifies it, producing a tiered structure in which the unwritten norm operates by permission of the written and carries the burden of justification. These

propositions are mutually reinforcing, and their combination yields the policy conclusion of filtered absorption rather than either wholesale recognition or wholesale prohibition.

Causes: A Recognition Strategy Organised Around Translation

The causes of this configuration lie in the drafting history and in the analytical habits it reflects. The living law clause was formulated as a response to a criticism directed at the colonial Code, namely that it imposed a single set of prohibitions upon a plural society, and the response was framed at the level at which the criticism had been made, that is, at the level of prohibitions. The drafters accordingly asked which conduct a community treats as punishable and did not ask how the community determines that the conduct occurred. The same habit is visible in the treatment of the sanction, which is admitted only after being converted into a form the state court can impose. What the Code recognises, therefore, is not a customary legal order but two extracts from it, selected because they map onto categories the state already possesses. The silence upon the forum and upon proof is the predictable consequence of a recognition strategy organised around translation rather than around accommodation, and it reproduces at the level of the criminal law the selective absorption that the pluralism literature has long identified in the treatment of customary tenure (Bedner & van Huis, 2008; von Benda-Beckmann & von Benda-Beckmann, 2011; Simarmata, 2018).

This diagnosis can be stated more precisely using the vocabulary of comparative procedure. Legal systems differ not only in the norms they enforce but in the model of authority through which they determine facts, and a system organised around the hierarchical application of policy will assimilate an alien procedure only by converting it into an instrument its own officials can operate (Damaska, 1986). The conversion performed by Articles 66 and 96 is exactly of this kind: the customary obligation survives, but only as an additional punishment imposed by a state judge and substitutable by a fine calculated in a state unit of account. What cannot be converted in this way is a mode of proof, because a mode of proof is not an output that can be re-expressed in the receiving system's units but a method of reaching outputs, and the two systems reach them by incompatible routes. The silence of the Code is therefore not merely an oversight of drafting but the point at which a translation-based strategy encounters something untranslatable, and recognising it as such explains why the omission has proved so durable across successive drafts.

Effects: Exposure, Evidential Confusion and Institutional Selection

The effects of that silence are neither symbolic nor deferred. The most immediate is the exposure of the Damang and the mantir to criminal liability for negligence should an immersion end in death or serious injury, an exposure that the statute creates by inviting the declaration of customary norms while withholding any protection for the procedure through which those norms have been enforced. A second effect is evidential confusion. Investigators and prosecutors confronted with a completed dolop have no guidance as to whether its outcome may be relied upon, and the distinction developed above between the inadmissible outcome and the admissible occurrence is nowhere drawn in the Code or in its preparatory materials. A third effect is institutional. Because determination is routed through regional legislation, a customary institution that wishes its norms to be recognised must present them in a form acceptable to a regional legislature, which selects for norms that are codifiable and against norms that are procedural, and the effect over time will be to accelerate precisely the transformation of customary orders into lists of prohibitions that the clause was intended to resist. A fourth effect is constitutional, since the use of a Government Regulation to give penal effect to communal norms leaves the entire scheme vulnerable to challenge.

The third of these effects deserves emphasis because it operates slowly and is therefore easy to overlook. A recognition procedure is never neutral as between the elements of the order it recognises; it rewards those elements that can be presented in the form the procedure demands and penalises those that cannot. Where the form demanded is a schedule annexed to a regional regulation, the elements rewarded will be discrete prohibitions with identifiable elements and specified consequences, and the elements penalised will be everything that gives a customary order its procedural and relational character. Over a generation, adat communities seeking recognition will learn to present themselves as possessing codes, and the presentation will in time become the reality. The clause was introduced to protect legal pluralism; the machinery through which it is to be implemented may, if left in its present form, prove to be an efficient instrument for eroding the very pluralism it was meant to preserve (Tamanaha, 2008; Lukito, 2013).

Reconsidering the Rationality of the Ordeal

An objection should be confronted directly, because it bears upon the human rights assessment and because the recent literature has given it a sharper form than it once had. It might be said that the analysis above treats the ordeal as simply irrational, and that this is both condescending and analytically lazy. Leeson (2012) has argued, on the basis of the medieval European record, that judicial ordeals could function as an effective screening device precisely because participants believed in

their efficacy: a guilty party who believed that God would reveal his guilt would confess or settle rather than submit, while an innocent party would submit willingly, so that the population actually reaching the ordeal was disproportionately innocent, and priests who understood this could and did administer the procedure so as to acquit. On this account the ordeal was not a random device but a mechanism exploiting belief to extract information otherwise unobtainable.

The argument has genuine force and the parallel to dolop is close, since the Kaharingan oath performs exactly the belief-generating function that Leeson's account requires, and since the graduated procedure described in the Result section, in which the ordeal is offered only after deliberation has failed, gives ample opportunity for settlement by a party unwilling to submit. Two considerations nevertheless prevent the argument from rescuing the practice for Indonesian criminal law policy. The first is that the screening mechanism depends entirely upon the universality of the belief, and in contemporary Central Kalimantan, where Kaharingan coexists with Christianity and Islam and where younger community members are educated in state schools, that universality cannot be assumed; where belief is partial, the screening property degrades and the aleatory property dominates. The second is that the medieval mechanism worked because the administering cleric retained discretion to manipulate the outcome, whereas submersion admits of no equivalent discretion: the party who surfaces first surfaces first, and the officiant cannot adjust the result. The comparison therefore establishes that the ordeal is intelligible rather than absurd, which is worth establishing, but it does not establish that it is compatible with the presumption of innocence, and the filter assessment in Table 3 stands.

Comparison with Previous Studies

These findings depart from the existing literature in three respects. Studies of the living law clause have generally treated the tension between Articles 1 and 2 as a binary opposition between certainty and pluralism, and have divided accordingly between those who regard the clause as a threat to legality and those who regard it as an overdue accommodation (Ali & Wibowo, 2023; Christianito, 2021; Hiariej, 2021; Santoso & Anugerah, 2023). The tiered legality developed here reframes that opposition as a relation of ordered permission and thereby dissolves it, which neither camp has attempted. Studies of customary sanctions have examined Articles 66 and 96 in isolation and have concluded that the Code accommodates adat satisfactorily (Faisal & Rustamaji, 2022; Kurniawan & Nugroho, 2023); reading those provisions together with the silence upon forum and proof shows that what is accommodated is an extract rather than an order, and that the conclusion of satisfactory accommodation rests upon an incomplete survey. Studies of Dayak dispute settlement have located

dolop within the restorative justice frame and have emphasised its reconciliatory outcome (Prasetyo & Setiawan, 2022; Sulistyanta & Utomo, 2022); the present analysis accepts that the sanction is restorative but shows that the mode of proof is not, and that treating the institution as a single restorative object conceals the component that fails every filter. The disagreement is therefore analytical rather than evaluative.

A fourth departure concerns the literature on legal pluralism itself. That literature has generally analysed state recognition of custom as a question of scope, asking how much of a customary order the state admits and on what conditions (Griffiths, 1986; Merry, 1988; Tamanaha, 2008). The present analysis suggests that scope is the wrong axis. What matters is not how much is admitted but which components are admitted, because the components stand in a functional relation to one another: a norm without a forum is unenforceable by the community that generated it, and a sanction detached from the procedure that triggered it becomes an instrument of the receiving system rather than of the originating one. Selective absorption of the kind documented here does not produce a smaller version of the customary order; it produces something of a different kind, in which the community supplies content and the state supplies procedure. Whether that outcome is desirable is a separate question on which this study takes no position beyond the specific case of the ordeal; that it is the actual outcome of the present architecture is the finding advanced.

Three recommendations follow. Conceptually, the assessment of any customary institution against Article 2 should proceed by disaggregation into norm, forum, proof and sanction, since an undifferentiated assessment will either recognise a hazardous procedure along with an acceptable norm or prohibit an acceptable norm along with a hazardous procedure; the four-component framework advanced here is offered as a general instrument for that purpose. Methodologically, doctrinal analysis of the living law clause should be combined with ethnographic description, because the components that the Code omits are visible only in accounts of practice and are invisible in the text; the present study is itself limited in this respect and its propositions about practice require field verification.

As to policy, four measures are proposed. The implementing regulation should state expressly that determination extends to substantive norms and to customary obligations and does not extend to modes of proof or to the jurisdiction of customary bodies. Determination should be relocated from regional legislation to judicial finding in the individual case, which would remove the collisions of competence and of horizontal inconsistency and would substitute a reviewable decision for a legislative act (Suhariyanto, 2020; Rahmatullah, 2024). The Kerapatan Mantir Perdamaian Adat should be strengthened as a forum of deliberative settlement with formal linkage to

the district court, so that the deficit which sustains the ordeal is addressed rather than merely condemned. And a protocol should be issued to investigators and prosecutors distinguishing the inadmissible outcome of an ordeal from its admissible occurrence.

The sequencing of these measures matters as much as their content, and the comparative record supports a particular order. Because the ordeal is sustained by a deficit in authoritative dispute resolution rather than by attachment to ritual, and because the historical displacement of ordeals elsewhere followed the availability of a credible alternative rather than the issuance of a prohibition, the strengthening of the customary forum should precede rather than follow any measure directed at the practice itself. A prohibition issued first would drive the proceeding into private arrangements beyond the reach of the Damang, who at present convenes it publicly; a credible forum established first would reduce the occasions on which the ordeal is sought, and would leave a subsequent prohibition with little work to do. This is the practical content of filtered absorption: the state withdraws the procedure it cannot accept while supplying the function that procedure was performing.

CONCLUSION

This study set out to determine how dolop is positioned within the recognition architecture of Article 2 of Law Number 1 of 2023 and what regulatory collisions arise from the operationalisation of that architecture. The answer to the first question is that the institution is not positioned as a whole at all. Disaggregated into its four components, the substantive norm is admitted by paragraph (1) subject to the threshold conditions and the cumulative filters, the sanction is admitted by Articles 66 and 96 as a judicially imposed obligation substitutable by a fine, the forum is left entirely unaddressed, and the mode of proof fails every filter in paragraph (2) and is thereby excluded. The answer to the second question is that six collisions of distinct kinds attend the implementation chain: a vertical collision with the reservation of recognition to an Act by Article 18B paragraph (2) of the Constitution, a collision of competence with the allocation of judicial affairs to central government, a horizontal collision with the ceiling upon regional sanctions, a collision of certainty with Article 1 paragraph (1) of the Code, a human rights collision with the presumption of innocence, and a procedural collision with the law of proof. These collisions cluster at the stages of determination and application, which indicates that the vulnerability of the scheme lies in its machinery rather than in the principle of recognition itself, and that relocating determination to judicial finding would eliminate four of the six.

The contribution of the study is threefold. Conceptually it advances the four-component disaggregation of customary institutions as a general instrument for the application of the living law clause, replacing the undifferentiated assessment that

has prevailed and making it possible to admit a norm while withdrawing a procedure. Theoretically it reformulates the relation between Articles 1 and 2 as a tiered legality in which the unwritten operates by permission of the written and carries the burden of justification, which offers a more textually faithful account than the prevailing characterisation of the clause as an exception to legality and dissolves the opposition between certainty and pluralism upon which much of the existing debate rests. Practically it identifies the recognition asymmetry as the principal defect of the present scheme, distinguishes the inadmissible outcome of an ordeal from its admissible occurrence for the guidance of investigators and prosecutors, and specifies the amendments to the implementing regulation that would confine determination to its proper subject matter. The policy that follows is filtered absorption: the restorative core of dolop is retained and channelled through the state forum, and the ordeal is withdrawn while the deficit that sustains it is addressed by strengthening the customary forum as an institution of deliberative settlement.

Two limitations qualify these conclusions and indicate the direction of further work. The first is the absence of primary field data. The propositions advanced here concerning the frequency, the geographical distribution and the contemporary ritual sequence of dolop rest upon published ethnographic accounts and upon reported cases, and although each has been supported by at least two independent sources, none has been verified by the author in the field; a subsequent study combining doctrinal analysis with interviews of Damang, mantir and district court judges in the Kahayan, Kapuas and Katingan basins would test the descriptive premises upon which the normative argument rests. The second is that the implementing regulation contemplated by Article 2 paragraph (3) was not yet in force at the time of writing, so the implementation chain analysed above is reconstructed from preparatory materials and may differ from the instrument finally promulgated; the collisions identified are collisions of the model rather than of an enacted text, and the analysis will require revision once the regulation is issued. A comparative extension examining how other Indonesian customary orders that employ non-deliberative modes of proof are treated under the same clause would further test the generality of the four-component framework.

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The author declares that he has no known competing financial interests or personal relationships that could have influenced the work reported in this paper.

ADDITIONAL INFORMATION

The views expressed in this article are those of the author alone and do not represent the position of any institution.

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