

## Criminal Policy in Law Number 1 Of 2023 Concerning the Criminal Code

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**ABSTRACT:** This research aims to: (1) find out criminal policy in Law Number 1 of 2023 concerning the Criminal Code regarding criminalization and decriminalization material and (2) find out criminal policy in Law Number 1 of 2023 concerning the Criminal Code regarding the material of its general provisions. This type of legal research uses normative juridical research, using a historical approach, a conceptual approach, a statute approach, and a comparative approach. The types and sources of legal materials are primary legal materials and secondary legal materials that are analyzed qualitatively to be presented analytically descriptively. The results of the study show that (1) the criminal policy in Law Number 1 of 2023 concerning the Criminal Code regarding criminalization and decriminalization material is part of the Indonesian government's efforts to update criminal law to be more in line with current social, cultural, and community needs. (2) The criminal policy in Law Number 1 of 2023 concerning the Criminal Code regarding the material of its general provisions is because conditions of development of the modern era making the central government of Indonesia adheres to the principle of legality and the principle of retroactivity which is pseudo in nature and to interpret the form of adoption of these principles, extensive and grammatical interpretation analysis is used in the latest Criminal Code in Articles 1 - 3 of Law Number 1 of 2023.

**KEYWORDS:** Criminalization, Decriminalization, The Law Number 1 of 2023.

### I. INTRODUCTION

Criminal policy is an integral part of social policy. In addition to social protection policy and community protection policy (social safety policy) to achieve certain goals, one of which is legal justice for the community. Legal policy in a narrow sense is the politics of law enforcement while in a broad sense it is defined as a culture of unlawful acts that can occur and which can actually occur (onrecht in potente and onrecht in actoe).<sup>1</sup>

In addition, criminal law reform efforts essentially involve the field of criminal policy, which is closely related to penalization policy, criminal policy and social policy.<sup>2</sup> Therefore, criminal law reform must be part of a rational political effort aimed at updating legal content so that criminal law enforcement can be achieved effectively,<sup>3</sup> combating crime to protect society, as well as addressing many social and humanitarian issues in order to achieve the goal of the national sentencing mechanism which is the protection of society and its welfare.<sup>4</sup>

As for the outline, the legal history of Indonesian criminal policy is divided into four parts, namely the pre-colonial, Dutch colonial, Japanese occupation, as well as the independence period and the history of the formation of criminal law after independence is divided into:<sup>5</sup> RIS period, Old Order period, New Order period, and Reformation period. The precolonial period began with many documents proving that the archipelago had enacted criminal norms in the form of customary criminal norms. These customary criminal norms were applied separately according to the territory of each kingdom, both in writing and unwritten. In other words, several kingdoms in the archipelago recorded, recorded and enforced criminal norms that were passed down from one generation to the next.<sup>6</sup>

Then, after the entry of the Dutch people into the archipelago, Indonesia at that time adopted legal dualism, namely Old Dutch Law or Dutch Ship Law and Customary Law. Old Dutch Law, which refers to Roman Law, was brought to the archipelago along with merchant ships under the leadership of Cornelis de Houtman. Dutch Ship Law continued to apply until a few years after the

<sup>1</sup> Nyoman Sriat Putra Jaya, 2017, *Pembaharuan Hukum Pidana*, Semarang: Pustaka Rizki Putra, hlm. 67.

<sup>2</sup> Bakhtiar, Handar Subhandi. "Legal Regulation of Forensic Autopsies in the Criminal Investigation Process: A Study of Concepts and Legal Reform." *Journal of Law, Politic and Humanities* 4.5 (2024): 1763-1769.

<sup>3</sup> Barda Nawawi Arief, 2005, *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan*. Cet. 1. Bandung: Citra Aditya Bakti, hlm. 23.

<sup>4</sup> *Ibid.*, hlm. 3.

<sup>5</sup> Nyoman Sriat Putra Jaya, 2017, *Pembaharuan Hukum Pidana*. Semarang: Pustaka Rizki Putra, hlm. 29.

<sup>6</sup> Barda Nawawi Arief, *Loc.cit*

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VOC was established on March 20, 1602. But as time went on, Dutch Law was no longer able to solve criminal law problems in a number of trading ports in the archipelago. Due to the poor criminal situation at that time, the VOC corporation felt the need to enact a new criminal code. At the end of the 19th century, the Dutch colonial government unified or homogenized the criminal law by drafting a new criminal law, namely the *Wetboek van Strafrecht* 1881.<sup>7</sup>

As the colonial period progressed, the Dutch surrendered to the Japanese army and there was an occupation of the archipelago (ancient Indonesia) by the Dutch to Japan where the Japanese army entered the Dutch East Indies on March 8, 1942 replacing the Dutch occupation of Indonesia. For three years, the Japanese occupation had little impact on criminal policy in Indonesia. The Japanese government then restored the legal regulations of the Dutch era on the basis of *Gun Seirei* through *Osamu Seirei*. Namely, the Japanese military government issued *Osamu Seirei* Number 1 of 1942. Article 3 of the regulation states that: all government bodies and their powers, laws, and criminal laws of the previous government, are still recognized as valid by the Japanese government for the time being.

So entering the era of independence of the Republic of Indonesia from a government characterized by colonialism for more than 350 years, the day after Indonesia's independence, precisely on August 18, 1945, the 1945 Constitution of the Republic of Indonesia came into force. Article II of the Transitional Rules in the 1945 Constitution states that: "All state bodies and criminal regulations that existed during the colonial rule shall continue to apply, until the establishment of new laws according to this Constitution."

Thus, the national criminal regulations after independence included the criminal regulations of the *Wetboek van Strafrecht voor nederlandsch-Indie* of 1915 as well as the regulations of the Japanese government which were still in force. The criminal regulations applicable in Indonesia at that time were regulations issued by the Dutch East Indies government in 1915. Changed the name *Wetboek van Strafrecht voor Nederlandsch-Indie* from the regulation called *Wetboek van Strafrecht* and then translated into the Criminal Code (KUHP).<sup>8</sup>

Likewise, the implementation of criminal policy in the old order era led by Ir. Soekarno to the new order initiated by President Soeharto and towards the reform period led by the third President BJ. Habibie, the fourth President Abdurrahman Wahid, the fifth President Megawati Soekarnoputri to the sixth President Susilo Bambang Yudhoyono still used the old Criminal Code colonial regulations but added the Special Crime Law formed during the reform period because of the policy of national punishment rules that existed in the post-independence period, especially the reform era, not yet contained in the old Criminal Code.<sup>9</sup>

Furthermore, the government of the Republic of Indonesia, which was recently led by the seventh president of the Republic of Indonesia Joko Widodo, took the initiative to carry out a criminal policy reform agenda in the form of unification of various criminal sanctions rules within the general rules of the Criminal Code and special criminal rules outside the Criminal Code to be codified to unification with the establishment of Law Number 1 of 2023 concerning the Criminal Code which will be enacted in early 2026.<sup>10</sup>

Then, after the passing and signing of Law Number 1 of 2023 by President of the Republic of Indonesia Joko Widodo, it still caused problems in the community and a legal vacuum where the new criminal sanctions rules in the law gave rise to criminalized offenses that were considered to violate the human rights of freedom of speech of the Indonesian people such as the offense of insulting the head of state and deputy head of state in public with certain criminal threats revived and various other criminalized offenses. As well as a form of decriminalization is also contained in the new law where the regulations listed are eliminating the rules of sanctions with colonialization elements that harm many parties including related state institutions so that the Indonesian government revokes several articles and reduces the threat of sanctions in the law which are considered to be burdensome for perpetrators of corruption of state money, and perpetrators of money laundering, causing legal injustice for some parties who protest against the enactment of these criminal rules.

In addition, this law produces hundreds of articles and derivative criminal regulations that include new general rules regarding criminal sanctions in general and also contain special criminal rules categorized as special criminal acts contained in the regulation of Law No. 1 of 2023 and when connected to the material of general provisions in Book I of the Criminal Code, it is necessary to explain in more detail the mechanism for implementing criminal policy in Indonesia's criminal regulations.<sup>11</sup> Therefore, based on the background mentioned above, the author compiles this article research with the formulation of the problem, namely How is criminal policy in Law Number 1 of 2023 concerning the Criminal Code Related to Criminalization and

<sup>7</sup> Barda Nawawi Arief, 2008, *RUU KUHP Baru, Sebuah Restrukturisasi/Rekonstruksi Sistem Hukum Pidana Indonesia*. Semarang: Badan Penerbit Universitas Diponegoro, hlm. 36

<sup>8</sup> Moeljatno, 1985, *KUHP Kitab Undang – Undang Hukum Pidana*, Jakarta: Bina Aksara, hlm. 29

<sup>9</sup> Harefa, Beniharmoni, and Salma Agustina. "Tradisi bakar batu dalam perspektif KUHP baru." *Jurnal Interpretasi Hukum* 5.1 (2024): 837-845.

<sup>10</sup> <https://www.menpan.go.id/site/berita-terkini/berita-daerah/berlaku-tiga-tahun-lagi-kuhp-bukan-untuk-lindungi-presiden> diakses pada tanggal 19 Maret 2024 jam 19.22 wib

<sup>11</sup> <https://news.detik.com/berita/d-6495235/kuhp-baru-jadi-uu-pertama-di-2023-yang-diteken-jokowi> diakses pada tanggal 11 April 2024 jam 20.45 wib

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Decriminalization Material? with the research objectives, namely To understand criminal policy in Law Number 1 of 2023 concerning the Criminal Code Related to Criminalization and Decriminalization Material.

### **II. RESEARCH METHODS**

The type of research used by researchers is normative juridical research. Therefore, this research consists of primary legal materials and secondary legal materials. Literature sources obtained from literature studies come from primary legal materials such as the Criminal Code, Criminal Procedure Code and related laws regarding criminal law and criminal offenses outside the Criminal Code. Meanwhile, secondary legal materials are obtained from legal journals, law books and research results of previous legal experts.<sup>12</sup>

The research approaches used are historical approach method, conceptual approach method, legislation approach method, and comparative approach method. The historical approach is carried out by tracing and examining the history of the formation of the Criminal Code and to understand the criminal policy of the enactment of Law Number 1 of 2023 concerning the Criminal Code by the Indonesian government as well as knowing the historical development of Indonesian politics in formulating the formulation of national criminal law policy in the country of Indonesia.

The historical approach of the writing of this thesis is to understand and trace the crime policy or official line (policy) on criminal rules that will be enforced either by making new laws or by replacing old laws, in order to achieve the goal of state order. According to Peter Mahmud Marzuki in his book Legal Research, the purpose of the historical approach in writing this thesis is for the author to better understand the changes and developments in the historical philosophy that underlie the legal rules under study, in this case understanding the regulations of Law Number 1 of 2023 concerning the Criminal Code.<sup>13</sup> In addition, the conceptual approach of writing this thesis is to analyze conceptually and structurally, explain in the form of legal interpretation, and analyze the author's point of view on criminal policy contained in Law Number 1 of 2023 both criminalization, decriminalization, and general provisions.

The statute approach is based on various criminal regulations and other legal regulations applicable in Indonesia where the writing of this thesis is a research related to the results of the preparation of laws by legal experts and refers to the rules enacted in Indonesia or is basically a research activity that will examine the internal aspects of positive law in Indonesia. The comparative approach in this thesis is based on comparing existing laws and regulations enacted in Indonesia. Namely by comparing one legal document with other legal documents that are applicable and binding in Indonesia.<sup>14</sup>

### **III. DISCUSSION AND RESULT**

#### **Criminal Policy in Law Number 1 Year 2023 Related to Criminalization and Decriminalization Materials**

Detailed juridical examination of the analysis of criminal policy, especially on criminalization and decriminalization material<sup>15</sup> In Law Number 1 Year 2023, the research will be reviewed and traced on the form of criminal threats contained in Articles 240-252 of the New Criminal Code and the form of criminal threats that fall into the category of decriminalization in Article 408 to Article 412 of the New Criminal Code. Some of these articles are very interesting to be studied and discussed by the author as a very important understanding of criminalization in the community, especially the legislators in order to anticipate the bad consequences that could occur from the weak enforcement of these articles in the future.

One of them is regarding the criminalization material in Article 240 to Article 252 of the New Criminal Code, the elements of which read as follows:

Article 240 paragraph (1):<sup>16</sup> Any person who in public orally or in writing insults the government or a state institution, shall be punished with imprisonment of 1 (one) year and 6 (six) months or a maximum fine of category II. Article 240 paragraph (2): In the event that the criminal offense as referred to in paragraph (1) results in a riot in the community, shall be punished with a maximum imprisonment of 3 (three) years or a maximum fine of category IV. Article 240 paragraph (3): Criminal offense as referred to in paragraph (1) may only be prosecuted based on the complaint of the insulted party. Article 240 paragraph (4): The complaint as referred to in paragraph (3) shall be made in writing by the head of the government or state institution.

Then, look at Article 241 paragraph (1) which reads: Every person who broadcasts, shows, or attaches writings or pictures so that they are visible to the public, listens to recordings so that they are heard by the public, or disseminates by means of information technology containing insults against the government or state institutions, with the intention that the contents of the insult are known to the public, shall be punished with a maximum imprisonment of 3 (three) years or a maximum fine of category IV.

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<sup>12</sup> Soekanto, Soerjono. *Penelitian Hukum Normatif*, Jakarta: Pustaka Tinta Mas, 1986, hlm. 21.

<sup>13</sup> *Ibid.*, hlm. 22 – 23.

<sup>14</sup> Bahiej, Ahmad. *Hukum Pidana*. Yogyakarta: Teras, 2009, hlm. 23

<sup>15</sup> Saptono Rahardjo, 2018, *Kitab Undang - Undang Hukum*, Buana Ilmu Populer, Jakarta, hlm. 89.

<sup>16</sup> Lihat Pasal 240 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

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Article 241 paragraph (2) explains: In the event that the criminal offense as referred to in paragraph (1) results in a riot in the community, shall be punished with imprisonment of 4 (four) years or a maximum fine of category IV. Article 241 paragraph (3) explains: Criminal offense as referred to in paragraph (1) may only be prosecuted based on a complaint from the insulted party. Article 241 paragraph (4): The complaint as referred to in paragraph (3) shall be made in writing by the head of the government or state institution.<sup>17</sup>

Looking at the criminal formulation in Article 240 to Article 241 of the New Criminal Code, stating the criminal act of insulting the government or state institutions, the author conducts a theoretical study and analysis that acts that degrade or damage the honor or revile the authority and image of the government or state institutions in public orally or in writing, including by defaming or slandering the sovereign government so that the Indonesian government must criminalize the actions of a person or group of people who commit criminal acts of insult to the government or state institutions. Because the act of insulting the government or state institutions is an act that does not reflect a sense of obedience and politeness to the ruler where the ruler in this case the government has a very large obligation to serve, love, protect the rights of the majority of its people as well as provide, and make decisions that are central to the livelihood of many people as stated in Article 27 of the 1945 Constitution of the Republic of Indonesia.<sup>18</sup>

Therefore, it is not appropriate to insult the government or state institutions frontally because the livelihood services to its people are considered poor by some groups in society.

Article 242 reads:<sup>19</sup> Every person who publicly expresses feelings of hostility, hatred, or contempt for one or more groups or groups of the Indonesian population based on race, nationality, ethnicity, skin color, gender, mental disability, or physical disability, shall be punished with imprisonment of up to 3 (three) years or a maximum fine of category IV.

Furthermore, Article 243 paragraph (1): Every person who broadcasts, shows, or attaches writings or pictures so that they are visible to the public or listens to recordings so that they are audible to the public or disseminates by means of information technology, which contains statements of hostile feelings with the intention that the contents are known or better known to the public, against one or several groups or groups of the Indonesian population based on race, nationality, ethnicity, skin color, religion, belief, gender, mental disability, or physical disability which results in violence against persons or goods, shall be punished with imprisonment for a maximum of 4 (four) years or a maximum fine of category IV. In Article 243 paragraph (2): If Every Person as referred to in paragraph (1) commits the Criminal Offense in the exercise of his/her profession and at that time 2 (two) years have not passed since the decision of conviction which has obtained permanent legal force for committing the same Criminal Offense, the perpetrator may be subject to additional punishment in the form of deprivation of rights as referred to in Article 86 letter f of the New Criminal Code.<sup>20</sup>

Then looking to Article 244 reads:<sup>21</sup> Every person who makes distinction, exclusion, restriction, or selection based on race and ethnicity which results in the revocation or reduction of recognition, acquisition or exercise of human rights and basic freedoms in an equality in the civil, political, economic, social and cultural fields, shall be punished with imprisonment of 1 (one) year or a maximum fine of category III.

Then, the author analyzes Article 242 to Article 244 of the New Criminal Code which explains the criminal act of discrimination against race, ethnicity, tribe, and certain groups of citizens. This article needs to be applied by the Government of Indonesia through Law Number 1 Year 2023 to criminalize acts of discrimination of others because it can cause division, unrest, and commotion in the surrounding community where the Indonesian government considers this criminal offense of racial and ethnic discrimination to be very incompatible with humanitarian values and the value of unity stated in Pancasila and the 1945 Constitution.<sup>22</sup>

Therefore, it is still important to regulate even in Law Number 1 Year 2023 a separate article is made, namely Article 242 to Article 244 to ensure that there is no ethnic conflict and discrimination. It is important to criminalize the act of discrimination because it guarantees the equal rights and differences of various tribes, religions, ethnicities, and races in Indonesia. The form of criminalization of racial discrimination of a person that has been regulated clearly, concretely, and firmly in Law Number 1 of 2023 is aimed at avoiding national divisions that can threaten the Unitary State of the Republic of Indonesia. Also, law enforcement officials must act firmly and strictly in dealing with various racial discrimination conflicts following these three articles.

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<sup>17</sup> Lihat Pasal 241 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>18</sup> Lihat Pasal 27 Undang - Undang Dasar Negara Republik Indonesia Tahun 1945

<sup>19</sup> Lihat Pasal 242 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>20</sup> Lihat Pasal 243 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>21</sup> Lihat Pasal 244 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>22</sup> Lihat Preamble Undang – Undang Dasar Negara Republik Indonesia Tahun 1945 Alinea Keempat

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Article 245 reads: Every person who commits deprivation of life, persecution, rape, obscene acts, theft with violence, or deprivation of liberty based on racial and ethnic discrimination, the punishment may be increased by 1/3 (one third).<sup>23</sup>

Likewise, with the formulation of Article 245 of the New Criminal Code, the author theoretically analyzes the offenses of deprivation of life, persecution, rape, obscene acts, theft with violence based on racial and ethnic discrimination should be criminalized by the central government of Indonesia because this kind of crime is inhumane, uncivilized, and not in accordance with eastern culture that upholds tolerance and tolerance that has been adopted by the Indonesian nation in the basic philosophy of Pancasila.

Furthermore, in Article 246: Shall be punished with a maximum imprisonment of 4 (four) years or a maximum fine of category V, every person who in public orally or in writing: a. incites people to commit a criminal offense; or b. incites people to resist the public authority with violence.<sup>24</sup> Then move on to Article 247 which reads: Every person who broadcasts, demonstrates, or attaches writings or pictures so that they are visible to the public, or listens to recordings so that they are audible to the public, or disseminates by means of information technology that contains incitement to commit a criminal offense or to resist the public authority with violence, with the intention that the content of the incitement is known or better known by the public, shall be punished with a maximum imprisonment of 4 (four) years and 6 (six) months or a maximum fine of category V.<sup>25</sup>

In addition, the author analyzes the criminalization material in Article 246 and Article 247 of the New Criminal Code or Law Number 1 of 2023 which explains the criminal acts committed in public orally or in writing by any person who incites others to commit a criminal act or the act of inciting others to fight the public authorities with violence plus the act is widely heard in the community by broadcasting through technological means, the two articles of criminal formulation above must be regulated, formulated, and applied by the central government of Indonesia in order to criminalize the evil act of incitement of others because incitement that is inviting to attack someone or the ruler especially by means of violence does not reflect the value of a just and civilized humanity as contained in the second principle of Pancasila and the form of incitement to others to commit a crime has violated and damaged the value of decency, the value of courtesy, and the value of tolerance contained in Article 28 of the 1945 Constitution.

Therefore, according to the author, the imposition of a maximum prison sentence of 4 (four) years and 6 (six) months is appropriate and fair sanctions for the perpetrators of the crime and or it can also be added with the provision of the heaviest fine, namely category V to create a strong deterrent effect on the criminal act of incitement of others in order to realize a complete, solid, and essential form of justice for the people of Indonesia because the people feel uneasy about the incitement and refer to the theory of fairness initiated by John Rawls which states that justice in the basic structure of society is a goal and agreement.

That way, the Indonesian people agree that the crime of incitement of others must be criminalized so that there are no more incitements to others to harm someone or a legitimate and sovereign ruler because it is allegedly disrupting the joints of life and tranquility of the Indonesian people and causing unrest and anxiety for the community in carrying out their activities which have been protected by the Indonesian Government following the legal guidelines as stated in Article 27 to Article 33 of the 1945 Constitution.<sup>26</sup>

Then, Article 248 paragraph (1) of the New Criminal Code reads: Every person who encourages another person as referred to in Article 20 letter d to commit a criminal offense and the criminal offense or its punishable attempt does not occur, shall be punished with a maximum imprisonment of 6 (six) years or a maximum fine of category IV. Article 248 paragraph (2) reads: Every person as referred to in paragraph (1) shall not be sentenced to a punishment more severe than that applicable to the attempt to commit such Criminal Offense or if such attempt is not punishable, then no punishment more severe than that applicable to such Criminal Offense shall be imposed. Article 248 paragraph (3) reads: The provisions referred to in paragraph (1) and paragraph (2) of Article 248 shall not apply if the non-occurrence of the criminal act or the attempt which is punishable is due to his/her own will.<sup>27</sup>

Then, looking at the criminal formulation of Article 248 of the New Criminal Code, especially in paragraph 1, the author has theoretically analyzed this offense which states that a person who moves another person to commit a criminal offense shall be punished with a maximum imprisonment of 6 years or a maximum fine of category IV, then according to the theory of the purpose and utility of law initiated by Gustav Radbruch and Jeremy Bentham which states that the law essentially aims to produce pleasure or happiness for the most people.<sup>28</sup>

So, it is fitting that an act where a person who encourages others to commit a criminal act should be criminalized with a heavy sanction in the form of imprisonment of 6 years or a maximum fine of category IV, so that the formulation of these sanctions is

<sup>23</sup> Lihat Pasal 245 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>24</sup> Lihat Pasal 246 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>25</sup> Lihat Pasal 247 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>26</sup> Lihat Pasal 27 sampai Pasal 33 Undang – Undang Dasar Negara Republik Indonesia Tahun 1945

<sup>27</sup> Lihat Pasal 248 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>28</sup> Dr. Ni'matul Huda, SH, Mhum & R. Nazriyah., *Loc.cit.*

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accurate and can have a deterrent effect on the perpetrators because this kind of action is very damaging to the joints of the life of the nation and state and does not reflect the value of mutual cooperation and populist values listed in the fourth principle of Pancasila.<sup>29</sup>

The act of mobilizing the masses / other people to commit a criminal offense is an anarchist act that can disrupt the running of the sovereign government in the country of Indonesia so that the function of implementing policies relating to the livelihood of many people becomes unmanageable and neglected. Therefore, the Indonesian government based on Article 248 of the New Criminal Code must strictly criminalize the perpetrators or everyone who moves other people or the masses to commit a criminal act for the sake of the smooth running of the sovereign government of Indonesia and the acceleration of national development in order to realize social justice, prosperous life, and pleasure for the majority of Indonesian people in the present and future.

Article 249 of the New Criminal Code reads: Every person who in public orally or in writing offers to provide information, opportunity, or means to commit a criminal offense, shall be punished with a maximum imprisonment of 1 (one) year or a maximum fine of category II.<sup>30</sup> As well as in Article 250 of the New Criminal Code which explains that paragraph (1): Every person who broadcasts, shows, or attaches writings or pictures so that they are visible to the public, or listens to recordings so that they are audible to the public, or disseminates by means of information technology an offer to provide information, opportunities, or facilities to commit a criminal offense with the intention that the offer is known or better known by the public, shall be punished with a maximum imprisonment of 9 (nine) months or a maximum fine of category II.

Article 250 paragraph (2): If Every Person as referred to in paragraph (1) commits such act in the exercise of his/her profession and at that time 2 (two) years have not passed since a verdict of conviction which has obtained permanent legal force for committing the same Criminal Offense, may be sentenced to additional punishment in the form of revocation of rights as referred to in Article 86 letter f.<sup>31</sup>

Furthermore, looking at the criminal formulation in Article 249 to Article 250 of the New Criminal Code, stating that a person in public orally or in writing offering to provide information, opportunity, or means to commit a Criminal Offense, shall be punished with a maximum imprisonment of 1 (one) year or a maximum fine of category II and the act of a person playing a recording so that it is heard by the public, or disseminating by means of information technology that contains an offer to provide information, opportunities, or facilities to commit a criminal act shall be punished with a maximum imprisonment of 9 months or a maximum fine of category II, then analyzed using the theory of fairness created by John Rawls which states that justice in the basic structure of society is a goal and agreement.<sup>32</sup>

Thus, the Indonesian people agree that this kind of action must be criminalized or the application of sanctions for such actions because this perpetrator offers a means to commit a criminal act coupled with the offer being disseminated through the use of information technology to commit a crime or criminal act in the community, which greatly disturbs the security, peace and integrity of the Indonesian people where the act of incitement is an effort to invite, and accommodate other Indonesians to commit a criminal act in the community because it is facilitated by the criminal with physical means, online means,<sup>33</sup> and other channeling media owned by the perpetrators of the criminal offense. This is very damaging to the values of unity adopted by the Indonesian people as stated in the third principle of Pancasila.

Then the article that is categorized as other criminalization which is used as the scope of analysis by the author in Article 251 of the New Criminal Code paragraph (1): Every person who gives medicine or asks a woman to use medicine by telling or causing the expectation that the medicine can cause the abortion, shall be punished with imprisonment of 4 (four) years or a maximum fine of category IV. Article 251 paragraph (2) reads: If Every Person as referred to in paragraph (1) commits such act in the exercise of his/her profession, he/she may be sentenced to additional punishment in the form of revocation of rights as referred to in Article 86 letter f.<sup>34</sup>

With regard to that, The author theoretically examines the criminalization material, especially in Article 251 of the New Criminal Code regarding the act of giving drugs or asking a woman to use drugs with the expectation that the drug can cause the abortion to be sentenced to 4 years in prison where the prison sanction is strong enough and can make the perpetrator of the drug provider deterrent. When analyzing the criminal policy on the criminal act of aborting a baby's fetus by an ordinary citizen and or by a person with the profession of mantri / midwife / and similar occupations listed in Law Number 1 of 2023 Article 251 of the New Criminal Code, the act of aborting the pregnancy has violated human rights and the government of Indonesia needs to criminalize the act. Indonesia needs to criminalize the act so that the Indonesian people understand that the act of offering to terminate the pregnancy or in medical terms the criminal act of offering abortion then the act includes a violation of individual

<sup>29</sup> Lihat Preamble Undang – Undang Dasar Negara Republik Indonesia Tahun 1945 Alinea Keempat

<sup>30</sup> Lihat Pasal 249 Undang – Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>31</sup> Lihat Pasal 250 Undang – Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>32</sup> John Rawls, *Loc.cit.*

<sup>33</sup> Noor Rahmad, “*Kajian Hukum terhadap Tindak Pidana Penipuan Secara Online*”, Media Jurnal Hukum Ekonomi Syariah, Vol. 03, No. 2 (2019), hlm. 103-117

<sup>34</sup> Lihat Pasal 251 Undang – Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

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human rights where a baby in the womb should be removed by the process of birth is good and natural not by means of the use of drugs that can kill the baby in the womb so that the baby born from the mother's belly did not get his life as it should and the crime of abortion is not in accordance with the value of humanity and the value of equal rights embraced by the Indonesian nation as stated in the Preamble of the 1945 Constitution of the Republic of Indonesia.<sup>35</sup>

And switch to Article 252 paragraph (1): Any person who declares himself to have supernatural powers, informs, gives hope, offers, or provides assistance services to others that because of his actions can cause illness, death, or mental or physical suffering of a person, shall be punished with a maximum imprisonment of 1 (one) year 6 (six) months or a maximum fine of category IV. And Article 252 paragraph (2) reads in part: If Every Person as referred to in paragraph (1) commits the act for profit or makes it a livelihood or habit, the punishment may be increased by 1/3 (one-third) of confinement.<sup>36</sup>

So analyzed by the author according to the theory of the purpose and utility of law pioneered by Gustav Radbruch and Jeremy Bentham which states that the law essentially aims to produce pleasure or happiness for many people so that in the application of criminal policy in Law Number 1 of 2023 concerning the Criminal Code, especially in Article 252 paragraph (1) to criminalize the actions of everyone who claims to have supernatural knowledge is quite appropriate where the legal utility if witchcraft is punished can protect and maintain peace for Indonesian citizens to avoid witchcraft so that a sense of satisfaction, peace, tolerance, and tranquility can be fully owned by Indonesian people who do not commit acts of witchcraft and / or accept services from witch doctors who offer their magic to use other people for the sake of subtly or supernaturally hurting someone who is disliked by certain people either in the relationship of corporate business competition, or trying to get a promotion from the person they are targeting.

Then, the author examines in more depth theoretically the criminalization material in Article 252 of the New Criminal Code regarding the act of claiming to have supernatural knowledge<sup>37</sup> This is where the criminal policy against criminal acts listed in Law Number 1 of 2023 which explains that witchcraft is the act of a person declaring himself to have supernatural knowledge that hurts others invisibly so that the Indonesian government needs to criminalize the act of witchcraft so that the Indonesian people can know and understand that the existence of witchcraft is strongly believed to exist. However, for some people, especially in large urban areas, this is considered a fabrication, especially since Indonesia is a developing country, where some people still have a primitive mindset.

The absence of a separate law regulating the problem of witchcraft encourages people who believe in the existence of witchcraft crimes in society, to take vigilante action against perpetrators suspected of having witchcraft, and it is also believed that people in several regions in Indonesia often practice witchcraft, so there are often persecutions and even murders by some people or even by the local masses under the pretext of witchcraft.<sup>38</sup>

In this regard, the crime of witchcraft is a material offense that can be punished if it causes suffering because the act can cause illness, death, and or mental or physical suffering to someone and other mystical acts such as the crime of witchcraft is used by the perpetrator to seek illicit gain or make it a common habit to use other people.<sup>39</sup> The crime of witchcraft is also a new crime unique to Indonesia that needs to be criminalized because it is very criminogenic (can cause other crimes to occur) and very victimogenic (can potentially cause losses to various interests). The crime of witchcraft is difficult to categorize as a crime of fraud alone, because the criminogenic and victimogenic aspects are multidimensional. In addition, the criminalization of witchcraft is also intended to protect the Indonesian people from various things such as: Individual interests (for example preventing fraudulent practices), as well as social interests (for example protecting the spiritual rights and peace of religious life) of the Indonesian people who are harassed by shirk acts such as this witchcraft crime.

So according to the theory of the purpose and utility of law initiated by Gustav Radbruch and Jeremy Bentham, which states that the law essentially aims to create real and ultimate justice<sup>40</sup> and produce pleasure or happiness for the most people<sup>41</sup> so that the application of criminal policy in Law Number 1 of 2023, especially in article 252 paragraph (1) to criminalize the act of witchcraft, should be applied because its legal utility if the perpetrators of witchcraft are convicted can protect, protect, and maintain harmony and peace for Indonesian citizens from the dangers posed by this witchcraft crime. In addition, the crime of witchcraft is very detrimental and threatens other individuals and the lives of the surrounding community, this witchcraft crime can be carried out both from a distance and a close distance, which usually has fatal consequences for victims affected by witchcraft. For example, victims can experience unusual diseases, even in some conditions in society can lead to the death of a

<sup>35</sup> Lihat Preamble Undang – Undang Dasar Negara Republik Indonesia Tahun 1945 Alinea Keempat

<sup>36</sup> Lihat Pasal 252 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>37</sup> Nor Eka Miftakhul Jannah & Ifahda Pratama Hapsari., 2023, “*Kriminalisasi Pelaku Santet Menurut Hukum Positif di Indonesia*,” Unes Law Review, Vol. 6, No. 1.

<sup>38</sup> *Ibid.*,

<sup>39</sup> *Ibid.*,

<sup>40</sup> Dr. Ni'matul Huda, SH, Mhum & Nazriyah, *Loc.cit.*

<sup>41</sup> Darji dalam Hyronimus Rhiti Darmodihardjo, *Loc.cit.*

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person. Therefore, the criminalization of witchcraft that has been carried out by the Indonesian central government aims to increase the sense of security, peace, and true justice for the majority of the Indonesian people.

Furthermore, the articles included in the decriminalization category according to the author's analysis specifically cover Articles 408 to 412 of the New Criminal Code, the elements of which read as follows:

In Article 408 the formulation of criminal offense reads as follows:<sup>42</sup> Any person who openly demonstrates, offers, disseminates in writing, or shows in order to obtain a pessary to a child, shall be punished by a maximum fine of category I. Article 409 reads the formulation of the criminal offense: Any person who without right openly demonstrates a device for termination of pregnancy, offers, broadcasts a writing, or shows how to obtain a device for termination of pregnancy, shall be punished by a maximum imprisonment of 6 (six) months or a maximum fine of category II.<sup>43</sup>

Then, with regard to that, the author examines theoretically the decriminalization material contained in Article 408 and Article 409 of the New Criminal Code regarding a person openly demonstrating, offering, broadcasting writing, or showing his desire to be able to obtain a pessary is punishable by a category I fine as well as a person offering or demonstrating a tool to terminate a pregnancy is imprisoned for a maximum of 6 (six) months or a maximum fine of category II.

Then it is analyzed using the theory of legal utility initiated by Gustav Radbruch and Jeremy Bentham which states that the law essentially aims to create justice which should be real<sup>44</sup> and essential and produces pleasure or happiness for the most people<sup>45</sup> Therefore, the implementation of criminal policy in Law Number 1 Year 2023 Article 408 and Article 409 by decriminalizing criminal sanctions with a category I fine for the act of a person to be able to obtain a pessary and the application of decriminalization of criminal sanctions with 6 months imprisonment or a maximum fine of category II for the act of a person showing a tool to terminate a pregnancy.

So according to the author, the criminal policy is accurate enough to apply the two articles, but their enforcement must be emphasized especially to retailers in modern markets or supermarkets that sell pregnancy prevention devices in their retail businesses where pregnancy prevention devices are marketed at economical and affordable prices to buyers in order to increase the turnover of the modern market trade and on the other hand can help the role of the Indonesian government in order to prevent the number of pregnancies. On the other hand, it can help the role of the Indonesian government in order to prevent pregnancy in an inclusive amount and increase the efforts of the Indonesian state in empowering family planning in Indonesia so that if it is proven that there is a mistake by retailers who sell poor quality pregnancy prevention devices that can cause sexually transmitted diseases such as HIV and cause other sexual disorders for the people of Indonesia, they can be punished with the penalties listed in Article 408 and Article 409 of the New Criminal Code.

Then, looking at Article 410 paragraph (1) reads: The act as referred to in Article 408 shall not be punishable if committed by an authorized officer in the context of the implementation of family planning, prevention of sexually transmitted infectious diseases, or for the purposes of education and health counseling. Article 410 paragraph (2) reads: The acts referred to in Article 409 shall not be punished if committed in the interests of science/education. Article 410 paragraph (3) reads: The authorized officer as referred to in paragraph (1) includes competent volunteers assigned by the authorized officer.<sup>46</sup>

Another case with Article 410 of the New Criminal Code, the author has theoretically analyzed the offense of displaying pregnancy prevention devices and displaying tools to terminate the pregnancy if it is carried out by official officials authorized in the field of family empowerment such as officers authorized in the context of implementing family planning, as well as in the context of health education in the community, the act must be decriminalized, As well as in the context of health counseling in the community, the act must be decriminalized as explicitly stated in the regulations of Law No. 1 of 2023 because these officials have been permitted by the Indonesian state to be in charge of demonstrating pregnancy prevention tools and demonstrating tools to abort the womb for the purpose of educating and providing social counseling to the Indonesian people about the importance of sexual health from avoiding infectious diseases.

Then, the Indonesian central government made various efforts to improve the level of family health in the community, one of which was by issuing health programs, such as the Family Planning Program and the Reproductive Health Education Program. In the implementation of these programs, the act of demonstrating the means and means of preventing pregnancy cannot be avoided as a form of social counseling to empower family planning in Indonesia. Therefore, there are concrete programs mentioned above that are carried out by various parties in related government agencies to succeed the sexual health program created by the central government. As well as in order to carry out the role of implementing family planning launched by the Indonesian government, the authorized official may not be sanctioned or revoked the criminal provisions in terms of being decriminalized by the

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<sup>42</sup> Lihat Pasal 408 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>43</sup> Lihat Pasal 409 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>44</sup> Dr. Ni'matul Huda, SH, Mhum & Nazriyah., *Loc.cit.*,

<sup>45</sup> Darji dalam Hyronimus Rheti Darmodihardjo., *Loc.cit.*,

<sup>46</sup> Lihat Pasal 410 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

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Indonesian government based on the legal rules of Law Number 1 of 2023 Article 410 Paragraph 1, Paragraph 2, and Paragraph 3.<sup>47</sup>

Then, in article 411 the criminal formulation reads:<sup>48</sup> Every person who has carnal knowledge of a person who is not his husband or wife shall, being guilty of adultery, be punished by a maximum imprisonment of 1 (one) year or a maximum fine of category II. And moving on to Article 412 paragraph (1) the formulation of the punishment reads as follows: Every person who cohabits as husband and wife outside of marriage shall be punished with imprisonment for a term not exceeding 6 (six) months or a maximum fine of category II. Article 412 paragraph (2): No prosecution shall be conducted against the criminal offense as referred to in paragraph (1) except upon the complaint of: a. husband or wife for a person who is bound by marriage; or b. parents or children for a person who is not bound by marriage. Parents or children for people who are not bound by marriage. As well as article 412 paragraph (3): The provisions of Article 25, Article 26, and Article 30 shall not apply to the complaint as referred to in paragraph (2).<sup>49</sup>

In addition, the author theoretically analyzes and interprets the decriminalization material contained in Article 411 and Article 412 paragraph 1 of the New Criminal Code which explains the act of a person having sexual intercourse with a person who is not his husband or wife, shall be punished for adultery, with a maximum imprisonment of 1 (one) year and the act of a person living together as husband and wife outside of marriage shall be punished with a maximum imprisonment of 6 months or a maximum fine of category II.

So, analyzed with the theory of Criminal Law Development which states that a criminal law regulation in a country can actually function flexibly and follow the times so that the principle of freedom of the community is respected in following the existing times where committing acts such as adultery and or acts of living together as husband and wife outside of marriage in various regions of Indonesia can still be tolerated in certain areas in Indonesia where there are many foreign tourists such as in Bali and Nusa Tenggara because they respect and respect the freedom of human rights and privacy of living together<sup>50</sup> Many foreign tourists are allowed to live together even though they are not husband and wife for foreign tourists as long as they do not interfere with the local culture of harmony adopted by the tribes in the area.<sup>51</sup>

Then, punishment of adultery perpetrators in Indonesia must still be carried out if it is proven that they violate the values of decency and decency in the area, but the sanctions are not severe, only one year imprisonment or for someone who commits an act of living together as husband and wife outside of marriage is punished with a maximum imprisonment of only 6 months as an effort to decriminalize the Indonesian government to reduce criminal sanctions against adultery and acts of living together with husband and wife outside of marriage because it follows the development of freedom of association in Indonesia where the Old Criminal Code regulations are still considered burdensome for adultery perpetrators and limit the freedom of foreign tourists in Indonesian territory.

And this criminalization is also intended to maintain local customs preserved by the Indonesian government where the act of living together by husband and wife must be within the scope of a legal marriage.<sup>52</sup> Thus, the previous regulations that turned out to be burdensome and limited the freedom of the criminal offender<sup>53</sup> As well as still not having a clear regulation in the Old Criminal Code, now the acts of adultery and cohabitation of husband and wife outside of marriage have had their sanctions lightened and exceptions to prosecution stipulated in the criminal formulations listed in Article 411 and Article 412 of the New Criminal Code Paragraph 1 to Paragraph 3.

Then, in general, it can also be stated and formulated other forms of categories classified as criminalization and decriminalization regulated in Law Number 1 Year 1946 on the Old Criminal Code and Law Number 1 Year 2023 on the New Criminal Code based on the author's search for the two legal documents, namely as follows:

Main Indicators	Categories of Criminalization	Categories of Decriminalization
<b>Criminal Defamation of the Head of State and Deputy Head of State</b>	The New Criminal Code criminalizes insulting the president and vice president, but provides clearer limits to protect freedom of speech. Insults against the president are punishable if committed publicly or through electronic media, but	-

<sup>47</sup> Handoko, Duwi., "Klasifikasi Dekriminalisasi Dalam Penegakan Hukum Di Indonesia", Jurnal HAM, Volume 10, Nomor 2, Desember 2019.

<sup>48</sup> Lihat Pasal 411 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>49</sup> Lihat Pasal 412 Undang - Undang Nomor 1 Tahun 2023 Tentang Kitab Undang – Undang Hukum Pidana

<sup>50</sup> Rimbun Purba., et al., (2022), "Pertanggungjawaban Pidana Terhadap Pelaku Semen Leven (Kohabitasi Di Tanjung Pinang Tahun 2020)," Student Online Journal UMRAH-Ilmu Sosial dan Ilmu Politik Vol. 3, No. 1.

<sup>51</sup> Ibid.,

<sup>52</sup> Ibid.,

<sup>53</sup> Ibid.,

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	constructive criticism of the government is not included in this category listed in Articles 218-220 of the New Criminal Code. While the Old Criminal Code prohibited insults directed against the rulers of the Dutch East Indies, it has adjusted the criminalization of insults against the Indonesian president after independence.	
<b>Punishment of Actions of a Person or Group of People Committing Criminal Offenses of Abusive Insults and Profanity to the Government</b>	The New Criminal Code criminalizes the actions of a person or group of people who commit criminal acts such as insulting, swearing, or abusing the government and state institutions. Abusive insults against the government and state institutions are punishable if committed publicly or through electronic media. The punishment for abusive insults to the government and state institutions are listed in Articles 240-241 of the New Criminal Code. Meanwhile, the Old Criminal Code has not clearly regulated abusive insults in electronic media against the government and state institutions.	-
<b>Punishment for Criminal Acts of Discrimination against Race, Ethnicity, Tribe, and Certain Groups of Citizens</b>	The New Criminal Code states the criminalization of criminal acts of discrimination against race, ethnicity, tribe, and certain groups of citizens. Criminalization of perpetrators who commit racism or discrimination of race, ethnicity, tribe, and certain groups of citizens can cause conflict in the community and can be punished if it is done publicly or through electronic media. This punishment has been listed in Articles 242 - 244 of the New Criminal Code. Meanwhile, the Old Criminal Code has not clearly regulated the criminalization of racial, ethnic, tribal, and class discrimination of certain citizens in Indonesia.	-
<b>Punishment of Perpetrators of Deprivation of Life, Persecution of Persons, Rape, Obscene Acts, Theft with Violence Based on Racial and Ethnic Discrimination</b>	The New Criminal Code states that the criminalization of the offenses of deprivation of life, persecution of persons, rape, obscene acts, and theft with violence is based on racial and ethnic discrimination because it can cause division, unrest, and cause disturbances in society because the Indonesian government considers these offenses to result in violations of human rights in Indonesian society, which is very incompatible with the human values stated in Pancasila and the 1945 Constitution. This punishment is already listed in Article 245 of the New Criminal Code. Meanwhile, the Old Criminal Code has not clearly regulated the punishment of criminal acts of deprivation of life, persecution of persons, rape, obscene acts, and theft with violence based on racial and ethnic discrimination.	-
<b>Punishment for the Crime of Inciting Others to Commit a Criminal</b>	The New Criminal Code criminalizes criminal acts committed in public orally or in writing by any person who incites another person to commit	-

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<b>Offense by Any Person</b>	a criminal act or the act of inciting another person to resist the public authority with violence plus the act is widely heard in the community by broadcasting through technological means. This punishment is listed in Articles 246 - 247 of the New Criminal Code. Meanwhile, the Old Criminal Code does not specifically regulate the criminal offense of every person who incites others to commit a criminal offense.	
<b>Punishment of Every Person Who Moves Other People or Masses to Commit a Criminal Offense</b>	The New Criminal Code states the criminalization of the perpetrators or everyone who moves other people or the masses to commit a criminal act because the act includes anarchist acts that can damage the life of the Indonesian nation. This criminalization is listed in Article 248 of the New Criminal Code. Meanwhile, the Old Criminal Code has not clearly regulated the criminal act of a person mobilizing other people or the masses to commit a criminal act.	-
<b>Punishment for the Act of Every Person Offering Means to Commit a Crime</b>	The New Criminal Code criminalizes the act of a person offering the means to commit a criminal act because the act of offering the means to commit a criminal act coupled with the offer being disseminated through the use of information technology is very disturbing to the security, peace, and integrity of the Indonesian people. This punishment is listed in Articles 249 - 250 of the New Criminal Code. Meanwhile, the Old Criminal Code has not clearly regulated the criminal offense of a person offering various means to commit a criminal offense.	-
<b>Criminalization of Abortion Offenders</b>	The New Criminal Code criminalizes criminals who offer abortion pills to pregnant women who want to abort their fetus because the act of giving drugs or offering a pregnant woman to use drugs with the expectation that the drugs can cause the abortion is a violation of humanity which is also contrary to the value of human rights adopted by the Indonesian state. <sup>54</sup> The criminalization of the act of offering abortion is threatened by Article 251 of the New Criminal Code. Meanwhile, the Old Criminal Code does not specifically regulate the criminal offense of offering the crime of abortion.	-
<b>Criminalization of the Crime of Declaring Himself to Have Psychic Knowledge</b>	The New Criminal Code states the criminalization of the actions of a person who has declared himself to have supernatural knowledge because if this criminal act with the term witchcraft is punished, it can protect and maintain peace for Indonesian citizens to avoid witchcraft so that a sense of satisfaction, peace, and tranquility can be owned by Indonesian people who do not commit	-

<sup>54</sup> Tsabitha Afnan Putri Wahyudhi & Beniharmoni Harefa. 2023. Penentuan Status Korban Pemerkosaan Guna Melakukan Aborsi Pasca Pengesahan Undang-undang Nomor 1 Tahun 2023. JURNAL MERCATORIA Vol. 16 (1)

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	witchcraft. Criminalization of this kind of act is threatened by Article 252 of the New Criminal Code. Meanwhile, the Old Criminal Code does not specifically regulate the criminal act of someone who claims to have supernatural knowledge.	
<b>Criminalizing Fake News &amp; Hoax News</b>	The New Criminal Code states the criminalization of criminal provisions related to the dissemination of false news and hoax news that can cause disturbances in the community, which are specifically included in the provisions related to the crime of dissemination of misleading electronic information included in Articles 263-264 of the New Criminal Code. Meanwhile, the Old Criminal Code does not specifically regulate the criminal offense of spreading false news and hoax news.	-
<b>Punishment for Defamation of Certain Religions</b>	The New Criminal Code criminalizes defamation of certain religions, but its provisions are more detailed and sensitive to Indonesia's religious diversity. Insults to religion, acts that obstruct religious practice, and the spread of religion-based hatred can be given criminal sanctions by the Indonesian government through law enforcement in Articles 300 - 305 of the New Criminal Code. Meanwhile, in the Old Criminal Code, blasphemy is regulated in general, with criminal provisions for actions that are only considered to denigrate religion in public.	-
<b>Criminalization of ITE Crimes</b>	The New Criminal Code criminalizes modern crimes in the field of Information, Technology and Electronics by introducing criminal offences related to the use of information technology in cyberspace including cybercrime. This includes crimes such as hacking, data theft, and misuse of information via the internet listed in Articles 332-334 of the New Criminal Code. Meanwhile, the Old Criminal Code does not explain the regulation of information technology crimes or cybercrime, because at that time information technology had not yet developed.	-
<b>Criminalization of Dissemination of Information that Disrupts Public Privacy</b>	The New Criminal Code criminalizes offenses related to the illegal dissemination of people's personal information or without the permission of the owner of the information. This includes the dissemination of personal data, video recordings, or digital information that can damage a person's privacy. The criminalization of the dissemination of people's personal information carried out by any means accessing electronic systems is subject to criminal sanctions listed in Article 335 of the New Criminal Code. Meanwhile, the Old Criminal Code has not regulated in detail the dissemination of information or violation of	-

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	public privacy.	
<b>Sentencing for crimes of animal abuse</b>	The New Criminal Code criminalizes the crime of mistreatment of animals as an active response to the Indonesian government's increasing awareness of the importance of protecting animals in the country. <sup>55</sup> The scope of criminal offenses specifically against animal abuse both livestock and wild animals as well as illegal exploitation of animals is listed in Articles 337 - 338 of the New Criminal Code. Meanwhile, the old Criminal Code did not specifically regulate the protection of animal crimes.	-
<b>Conviction of Offenders Who Openly Show, Offer, and Demonstrate Their Desire to Obtain Pregnancy Preventers and Abortifacients</b>	-	The New Criminal Code declares the decriminalization of the act of a person openly showing, offering, broadcasting writing, or showing his/her desire to be able to obtain a means of preventing pregnancy and the act of a person offering or showing a tool to terminate pregnancy, then the legal sanctions for perpetrators who commit these acts are only lightly punished, namely category I fines for the act of a person to be able to obtain a means of preventing pregnancy and criminal sanctions with 6 months imprisonment or category II fines for the act of a person showing a tool to terminate pregnancy for medical purposes and in order to help the Indonesian government launch a family planning program in Indonesia. This punishment is listed in Articles 408 - 409 of the New Criminal Code. Meanwhile, the Old Criminal Code has not yet regulated the reduction of sanctions for perpetrators who offer or demonstrate the means of preventing pregnancy or the perpetrators of the crime of offering the means of termination of pregnancy.
<b>Criminalization of the Act of Displaying a Pregnancy Preventer or an Abortifacient by an Authorized Official</b>	-	The New Criminal Code declares decriminalization of the offense of acts committed by an authorized official in the field of national family empowerment to demonstrate the means of preventing pregnancy or

<sup>55</sup> Handar Subhandi Bakhtiar & Azhara Devica Risnanda. 2023. Perlindungan Hukum Dalam Klasifikasi Bentuk Kekerasan Terhadap Hewan Di Indonesia, Res Nullius Law Journal, Vol. 5, No. 2.

		demonstrating the means to terminate pregnancy because the official has been authorized by the state to serve as a family empowerment counselor to demonstrate the means of preventing pregnancy or demonstrating the means to terminate pregnancy for the purpose of educating and providing social counseling to the Indonesian people on the importance of sexual health to avoid infectious diseases. This criminalization is listed in article 410 of the New Criminal Code. Meanwhile, the Old Criminal Code has not yet regulated the elimination of sanctions for authorized officials who educate or demonstrate pregnancy prevention devices or offer or demonstrate abortifacient devices.
<b>Criminalization of Cohabitation of Husband and Wife outside of Marriage</b>	The New Criminal Code states the criminalization of the crime of cohabitation between husband and wife outside the bonds of marriage through the expansion of the definition of adultery, namely the crime of extramarital sexual intercourse between two people who live together without being bound by marriage, regulated in articles 411 and 412 of the New Criminal Code based on certain conditions. Meanwhile, in the old Criminal Code, the crime of adultery and the crime of decency were already regulated, but were more limited to acts of sexual intercourse outside of marriage involving married parties.	-
<b>Reduction of Criminal Sanctions for Adultery and Cohabitation of Husband and Wife outside of Marriage</b>	-	The New Criminal Code declares the decriminalization of adultery and also the act of living together with husband and wife outside the bond of marriage for foreign tourists living in Indonesia. The punishment is reduced for those who respect the value of decency adopted by local customs because it follows the development of freedom of association in Indonesia where the Old Criminal Code regulations are still considered burdensome for adultery offenders and limit the freedom of foreign tourists in Indonesian territory. This

		punishment regulation is listed in Article 411 and Article 412 of the New Criminal Code Paragraph 1 to Paragraph 3. Meanwhile, the Old Criminal Code has not clearly regulated the reduction of criminal sanctions for adultery and cohabitation of husband and wife outside of marriage.
<b>Sentencing in cases of sexual harassment</b>	The New Criminal Code criminalizes sexual harassment, including physical harassment, verbal harassment, and cyber harassment. This reflects the broader protection of victims of sexual harassment and violence in Indonesia contained in Articles 414-417 of the New Criminal Code. Meanwhile, the Old Criminal Code does not specifically regulate sexual harassment, there are only general criminal provisions on the offense of decency.	-
<b>Elimination of Sanctions for Victims of the Crime of Defamation</b>	-	The New Penal Code decriminalizes by waiving the sanction for the treatment received by the victim who is slandered by the perpetrator who falsely accuses him/her in court if the judge decides that the victim of slander cannot be punished for the false accusation. This criminalization regulation is stated in Article 435 of the New Criminal Code. Meanwhile, the criminal regulations in the Old Criminal Code related to the elimination of sanctions for victims of criminal acts of slander are not regulated more specifically.
<b>Imposing Penalties for Attempted Persecution</b>	-	The New Penal Code decriminalizes the crime of attempted maltreatment by waiving the sanction for attempts made by the perpetrator of maltreatment against the victim that does not cause an obstacle for the victim to carry out his/her profession of livelihood. This criminalization regulation is contained in Article 471 of the New Criminal Code. Meanwhile, the Old Criminal Code does not explicitly regulate the removal of sanctions for attempted maltreatment.
<b>Criminal Regulation on</b>	The New Criminal Code states the criminalization	-

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<b>Acts of Terrorism and Corruption</b>	of acts of terrorism and corruption through special criminal arrangements for terrorism and corruption crimes more clearly in Articles 600 - 602 for Terrorism Crimes and Article 603 for Corruption Crimes. The government stated that corruption is considered as a special criminal offense that can be sanctioned through the New Criminal Code including imposing large fines and life imprisonment to perpetrators of corruption. In addition, the Indonesian government stated that the criminalization of the crime of Terrorism can be sanctioned through the New Criminal Code because it has its own criminal category with severe sanctions up to the death penalty as the heaviest sentence for perpetrators of terrorism in Indonesia. Meanwhile, the Old Criminal Code does not explicitly regulate the criminal acts of terrorism and corruption, which are still regulated in special laws outside the Old Criminal Code.	
<b>Criminalization of Crimes of Public Officials</b>	The New Criminal Code criminalizes criminal acts committed by public officials or state apparatus, including criminal acts related to abuse of power in government, & ethical violations in public services in Indonesia. The criminalization of public officials is expressly regulated by the Indonesian government as part of enforcing budget accountability in the public sector (Articles 604-606 of the New Criminal Code). Meanwhile, the Old Criminal Code in its regulation of criminal acts by state apparatus (such as civil servants or public officials) is not specifically regulated in the Old Criminal Code.	
<b>Sentencing for drug crimes</b>	<p>The New Criminal Code states the criminalization of various criminal acts related to narcotics abuse where these criminal acts are subject to severe sanctions for drug dealers and users, but can also provide space for rehabilitation for drug users as an alternative form of imprisonment listed in articles 609 - 611 of the New Criminal Code. Meanwhile, the Old Criminal Code does not specifically regulate the criminalization of narcotics abuse because this special regulation is still in a separate law outside the Criminal Code as a special criminal offense of narcotics in a special law.</p> <p>Translated with <a href="https://www.DeepL.com/Translator">www.DeepL.com/Translator</a> (free version)</p>	

With regard to the various categories of criminal acts classified as criminalization and decriminalization described above by the author, the criminalization and decriminalization policies in Law Number 1 of 2023 concerning the Criminal Code are part of the Indonesian central government's efforts to update the national criminal law to be more in line with the current social, cultural and community needs.

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In the new Criminal Code, the so-called criminalization in the form of several actions that were previously not expressly regulated must now be criminalized under the new criminal law regulations, with the aim of protecting the public and creating public order in the Indonesian state in accordance with the eastern principles adopted by the Indonesian people.<sup>56</sup>

Then, the principles of criminalization policy include according to leading Indonesian criminal law expert Prof. Soedarto are: First, the goal of national development is to create a just and prosperous Indonesian society both physically and spiritually based on the Indonesian philosophy of life, namely Pancasila.<sup>57</sup> Therefore, the focus of the application of criminal law is to protect society and prevent criminal acts. Second, the principle of the consequences arising from the criminal act, namely actions that grow in the surrounding community causing harm both physically and mentally to individuals and the national community. Third, the principle of efficiency of the cost of punishment of criminal sanctions issued by the government must be in line with the results obtained or better known as the principle of “cost and benefit”. Finally, the principle of human resources of Indonesian law enforcers should not exceed the limits of their duties in punishing or criminalizing someone who is considered guilty of committing a criminal offense.<sup>58</sup> Meanwhile, what is called decriminalization material is the process of certain actions that were previously considered criminal acts and then removed or reduced the criminal nature, on the grounds that these actions are no longer considered as actions that harm society or there are other mechanisms that are more appropriate to handle them.<sup>59</sup>

Some principles of decriminalization policy in the new Criminal Code include: Ineffective articles, namely the elimination or revision of articles that are considered ineffective or no longer relevant to the times, such as various colonial criminal acts related to state morality that are no longer in accordance with the values of modernity in today's society; Excessive criminalization, namely eliminating, reducing, or removing criminal sanctions for acts that were previously overly criminalized or criminal acts that can be resolved through non-penal mechanisms, such as mediation or out-of-court settlements; Reduction of sanctions, namely reducing the threat of criminal sanctions for certain criminal acts, especially for criminal acts that are considered minor or can be recovered through administrative sanctions or fines.<sup>60</sup>

Then, according to the inspiration of the theory of justice expressed by the Greek legal philosopher Aristotle, justice in general or conventionally has a close relationship with compliance with the law.<sup>61</sup> The law also explicitly states that changes in a country's sentencing laws can result in the criminalization or decriminalization of certain groups of people and that people are required to comply with the laws.

This is clearly not in line with the principle of justice for the equality of individuals<sup>62</sup> who are punished for not changing the country's regulations. Based on the view of the theory of justice<sup>63</sup> Specifically, regarding the theory of individual justice that is aligned with the proportion of legal utility, the proportion of utility that should be obtained by an individual or individual criminal offender for the actions that have occurred is in the form of release or reduction of suffering that the criminal offender goes through.

This is because the criminal act he committed is no longer considered a criminal offense in a country because it has undergone a change in the overall paradigm of punishment following the changing times so that true justice can be felt by a person or individual.<sup>64</sup>

In addition, the view of the changing mechanism of punishment in a country as a whole is aligned with the theory of national criminal law development put forward by Indonesian criminal law experts, Prof. Mochtar Kusumaatmadja stated in his legal work that “Criminal law development is a tool for social punishment reform” which is based on the assumption that the existence of a strong order or order in the development and legal reform efforts in a country is a form of punishment that is desired or considered (absolutely) necessary by the government in a country.<sup>65</sup>

Thus, another hypothesis contained in the concept of criminal law development as a tool of state criminal reform is that legal regulations in the sense of criminal law enforcement in a country must change every time following the times or criminal law regulations can actually function flexibly as a means of regulating society following the principles of punishment contained in the philosophy of a country.<sup>66</sup>

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<sup>56</sup> Barda Nawawi Arief, *Kebijakan Formulasi Ketentuan Pidana dalam Peraturan Perundang-Undangan* (Semarang: Pustaka Magister, 2012), hlm. 133.

<sup>57</sup> *Ibid.*,

<sup>58</sup> *Ibid.*,

<sup>59</sup> Faisal, F., & Rahayu, D. P. (2021). Tujuan Pemidanaan Undang-Undang Minerba Dalam Perspektif Kebijakan Kriminalisasi. *Jurnal Bina Hukum Lingkungan*, 5 (2).

<sup>60</sup> *Ibid.*,

<sup>61</sup> Aristoteles, *Nicomachean. Loc.cit.*,

<sup>62</sup> *Ibid.*,

<sup>63</sup> *Ibid.*,

<sup>64</sup> John Rawls., *Loc.cit.*

<sup>65</sup> Ayu Efridadewi, *Loc.cit.*

<sup>66</sup> Mochtar Kusumaatmadja., *Loc.cit.*

## Criminal Policy in Law Number 1 Of 2023 Concerning the Criminal Code

And if it is related to this theory, then the existence of criminalization and decriminalization in a country, especially Indonesia, is due to changes in the mechanism of punishment based on the principle of modernity development, making certain acts must be considered new criminal acts if they have not been regulated in previous criminal regulations and other acts must also be recognized as no longer criminal acts following new criminal regulations.<sup>67</sup>

It is an important consideration that the rights of offenders are not only limited to the rights they receive while serving their sentence, but they are also entitled to other relief benefits from the amended regulation.<sup>68</sup>

Then, analyzed according to the theory of legal objectives pioneered by legal philosopher Gustav Radbruch said in his legal work that the purpose and utility of the law of punishment of a country's sanctions should aspire to create true justice and pleasure for the majority of its people.<sup>69</sup> Thus, the criminal law in a country as a whole must be adhered to by the society even though the nature of the sanctions is discriminatory and unfair, but it must be accompanied by an evaluation of the adjustment of legal formation in the society of a country every time.<sup>70</sup>

In addition to Gustav Radbruch's theory, another theory regarding the utility of law was also initiated by a legal philosopher from England, Jeremy Bentham, who put forward his theory that law provides utility and happiness to the wider community. Based on the social philosophy of a country that states every society wants happiness and the law is a tool to realize this happiness.<sup>71</sup> Thus, the utility of the law must be measured by the extent to which a particular sentencing policy provides great happiness and satisfaction to the people of a particular country.

Based on this theory, the presence of criminalization and decriminalization in the Republic of Indonesia due to the changing times that occur must be with any steps and processes that can create true, complete, concrete justice and also pleasure for the majority of the Indonesian people.<sup>72</sup>

Thus, the determination of criminal policy contained in Law Number 1 of 2023 concerning the Criminal Code related to criminalization and decriminalization material seeks a balance between the protection of public interests and human rights, protecting the rights of Indonesian citizens from arbitrary actions of the government in the context of national law enforcement.<sup>73</sup> As well as ensuring that Indonesian criminal law can accommodate social changes and global developments.<sup>74</sup> The changes made to the Criminal Code aim to create a legal system that is fairer, more effective, more comprehensive, and more in line with the values of modernity in Indonesia's pluralistic society.<sup>75</sup>

## CONCLUSIONS

Based on the results of the research and discussion above, the author concludes that the criminal policy in Law Number 1 of 2023 concerning the Criminal Code related to criminalization and decriminalization material is part of the Indonesian government's efforts to update the national criminal law to be more in line with the current social, cultural and community needs. Some examples of criminalization policies in Law Number 1 Year 2023 include: the act of living together as husband and wife outside the bonds of marriage, the act of a person claiming to have supernatural knowledge, insulting the president and vice president, the act of doctors performing abortions, the spread of banned ideologies and other criminalized acts. In addition, examples of decriminalization policies in Law Number 1 of 2023 include the elimination of ineffective criminal articles such as article 435 and article 471, reducing excessive criminal offenses and reducing sanctions such as article 408 and article 409.

Furthermore, criminal policy in Law No. 1 of 2023 on the Criminal Code related to the material of its general provisions is due to the conditions of the development of the modernization era making the Indonesian central government adhere to the principle of legality and the principle of retroactivity which is pseudo and to interpret the form of adoption of these principles, an extensive and grammatical interpretation analysis is used in the latest Criminal Code in Article 1 - Article 3 of Law No. 1 of 2023.

Thus, the material of criminalization and decriminalization along with the material of general provisions contained in the regulation of Law Number 1 Year 2023 on the Criminal Code consisting of Book I and Book II are basically aimed to balance, regulate, order, and integrate the protection of public interest and human rights, as well as to ensure in the future that Indonesian criminal law can accommodate various social changes, cultural diversity, and global developments.

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<sup>67</sup> Barda Nawawi Arief, *Loc.cit.*

<sup>68</sup> *Ibid.*,

<sup>69</sup> F Rosalina, 2022, "Mengembalikan Ide Dasar Keseimbangan Tujuan Pemidanaan," *Ajudikasi: Jurnal Ilmu Hukum* Vol. 6, No. 2

<sup>70</sup> *Ibid.*,

<sup>71</sup> Darji dalam Hyronimus Rhiti Darmodihardjo, *Loc. Cit.*

<sup>72</sup> *Ibid.*,

<sup>73</sup> Chazawi, 2022, *Pelajaran Hukum Pidana Bagian I*, Raja Grafindo Persada, Jakarta, hlm. 2.

<sup>74</sup> Irwan Triadi & Aura Nasya Madhani Harahap. 2024. Dampak Penyalahgunaan Kekuasaan Oleh Pejabat Negara, *Jurnal Ilmiah Multidisiplin*, Vol. 1, No. 5.

<sup>75</sup> *Ibid.*,

**REFERENCES**

- 1) Bahiej, Ahmad. Hukum Pidana. Yogyakarta: Teras, 2009, hlm. 23
- 2) Bakhtiar, Handar Subhandi. "Legal Regulation of Forensic Autopsies in the Criminal Investigation Process: A Study of Concepts and Legal Reform." *Journal of Law, Politic and Humanities* 4.5 (2024): 1763-1769.
- 3) Barda Nawawi Arief, 2005, *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan*. Cet. 1. Bandung: Citra Aditya Bakti, hlm. 23.
- 4) Barda Nawawi Arief, 2008, *RUU KUHP Baru, Sebuah Restrukturisasi/Rekonstruksi Sistem Hukum Pidana Indonesia*. Semarang: Badan Penerbit Universitas Diponegoro, hlm. 36
- 5) Barda Nawawi Arief, *Kebijakan Formulasi Ketentuan Pidana dalam Peraturan Perundang-Undangan* (Semarang: Pustaka Magister, 2012), hlm. 133.
- 6) Chazawi, 2022, *Pelajaran Hukum Pidana Bagian I*, Raja Grafindo Persada, Jakarta, hlm. 2.
- 7) F Rosalina, 2022, "Mengembalikan Ide Dasar Keseimbangan Tujuan Pemidanaan," *Ajudikasi: Jurnal Ilmu Hukum* Vol. 6, No. 2
- 8) Faisal, F., & Rahayu, D. P. (2021). Tujuan Pemidanaan Undang-Undang Minerba Dalam Perspektif Kebijakan Kriminalisasi. *Jurnal Bina Hukum Lingkungan*, 5 (2).
- 9) Handar Subhandi Bakhtiar & Azhara Devica Risnanda. 2023. *Perlindungan Hukum Dalam Klasifikasi Bentuk Kekerasan Terhadap Hewan Di Indonesia*, *Res Nullius Law Journal*, Vol. 5, No. 2.
- 10) Handoko, Duwi., "Klasifikasi Dekriminalisasi Dalam Penegakan Hukum Di Indonesia", *Jurnal HAM*, Volume 10, Nomor 2, Desember 2019.
- 11) Harefa, Beniharmoni, and Salma Agustina. "Tradisi bakar batu dalam perspektif KUHP baru." *Jurnal Interpretasi Hukum* 5.1 (2024): 837-845.
- 12) <https://news.detik.com/berita/d-6495235/kuhp-baru-jadi-uu-pertama-di-2023-yang-diteken-jokowi> diakses pada tanggal 11 April 2024 jam 20.45 wib
- 13) <https://www.menpan.go.id/site/berita-terkini/berita-daerah/berlaku-tiga-tahun-lagi-kuhp-bukan-untuk-lindungi-presiden> diakses pada tanggal 19 Maret 2024 jam 19.22 wib
- 14) Irwan Triadi & Aura Nasya Madhani Harahap. 2024. *Dampak Penyalahgunaan Kekuasaan Oleh Pejabat Negara*, *Jurnal Ilmiah Multidisiplin*, Vol. 1, No. 5.
- 15) Moeljatno, 1985, *KUHP Kitab Undang – Undang Hukum Pidana*, Jakarta: Bina Aksara, hlm. 29
- 16) Noor Rahmad, "Kajian Hukum terhadap Tindak Pidana Penipuan Secara Online", *Media Jurnal Hukum Ekonomi Syariah*, Vol. 03, No. 2 (2019), hlm. 103-117
- 17) Nor Eka Miftakhul Jannah & Ifahda Pratama Hapsari., 2023, "Kriminalisasi Pelaku Santet Menurut Hukum Positif di Indonesia," *Unes Law Review*, Vol. 6, No. 1.
- 18) Nyoman Sriat Putra Jaya, 2017, *Pembaharuan Hukum Pidana*, Semarang: Pustaka Rizki Putra, hlm. 67.
- 19) Nyoman Sriat Putra Jaya, 2017, *Pembaharuan Hukum Pidana*. Semarang: Pustaka Rizki Putra, hlm. 29.
- 20) Rimbun Purba., et al., (2022), "Pertanggungjawaban Pidana Terhadap Pelaku Semen Leven (Kohabitasi Di Tanjung Pinang Tahun 2020)," *Student Online Journal UMRAH-Ilmu Sosial dan Ilmu Politik* Vol. 3, No. 1.
- 21) Saptono Rahardjo, 2018, *Kitab Undang - Undang Hukum*, Buana Ilmu Populer, Jakarta, hlm. 89.
- 22) Soekanto, Soerjono. *Penelitian Hukum Normatif*, Jakarta: Pustaka Tinta Mas, 1986, hlm. 21.
- 23) Tsabitha Afnan Putri Wahyudhi & Beniharmoni Harefa. 2023. *Penentuan Status Korban Pemerkosaan Guna Melakukan Aborsi Pasca Pengesahan Undang-undang Nomor 1 Tahun 2023*. *JURNAL MERCATORIA* Vol. 16 (1)
- 24) *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*
- 25) *Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana*



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