

LIVING LAW AND HYBRID JUSTICE: THE INTEGRATION OF CUSTOMARY CRIMINAL LAW IN INDONESIA'S 2023 NATIONAL CRIMINAL CODE

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Abstract

The 2023 Indonesian Criminal Code represents a significant shift in Indonesia's legal framework by recognizing living law, particularly customary criminal law, as an integral part of the national legal system. This transformation challenges the traditional legal positivism inherited from colonial rule and introduces a more pluralistic and socially responsive approach to law. The recognition of living law, as stipulated in Article 2, allows customary law to function alongside formal legal provisions, provided it aligns with the values of Pancasila, the 1945 Constitution, and internationally recognized human rights principles. This acknowledges the ongoing role of customary law in regulating social behavior and resolving disputes, particularly in indigenous communities across Indonesia. However, the integration of customary law into the formal criminal justice system presents challenges. While the substantive aspects of customary law are recognized, procedural guidelines remain underdeveloped, creating potential legal uncertainty. This lack of clarity could lead to inconsistent application across different regions and undermine public trust in the justice system. The need for government regulation to clarify the procedures for recognizing and applying customary law is evident. Without such regulations, there is a risk that customary law could be arbitrarily invoked, potentially conflicting with human rights and constitutional principles. The recognition of living law provides an opportunity to enrich Indonesia's legal system by incorporating restorative justice practices prevalent in customary law. These practices focus on reconciliation and repairing relationships rather than retributive punishment, aligning with the values of many indigenous communities. However, ensuring that customary law respects fundamental human rights, such as gender equality and protection against inhumane treatment, remains essential. Ultimately, while the integration of living law in Indonesia's legal system is a positive step, it requires clear procedural standards and oversight mechanisms to ensure fairness, consistency, and respect for human rights.

Keywords: *Living Law; Hybrid Justice System; Customary Criminal Law; Indonesian Criminal Code; Legal Pluralism.*

A. Introduction

The history of criminal law in Indonesia cannot be separated from the long experience of colonialism and the nation's efforts to break free from the legal system inherited from the Dutch.¹

¹ Harison Citrawan, Budi Suhariyanto, and Aghia Khumaesi Su'ud, "Postcolonial Social Control and the Historicisation of Crimes in Indonesia's Penal Practices," in *The Palgrave Handbook of Criminology and the Global South*, ed. Roxana Pessoa Cavalcanti et al. (Cham: Springer Nature Switzerland, 2025), 1–16,

For more than a century, the criminal law applicable in Indonesia was based on the *Wetboek van Strafrecht voor Nederlandsch-Indië* (WvS) of 1918, which continued to apply nationwide as the Indonesian Criminal Code after independence.² The WvS was characterized by a centralized and positivistic orientation, strongly emphasizing legal certainty through codification as the primary source of criminal law. In practice, this colonial criminal law system often overlooked the reality of legal pluralism in Indonesia, where customary law (*adat law*) continued to exist and function as a mechanism of social control in many regions.³ The gap between universalistic positive law and the particularistic nature of customary law generated dissatisfaction, both academically and practically, regarding the legitimacy of the national criminal law system.⁴

The reform of Indonesian criminal law was ultimately realized through Law Number 1 of 2023 on the Indonesian Criminal Code, which was enacted on 2 January 2023.⁵ The 2023 Criminal Code is considered a historic milestone because, for the first time, Indonesia possesses a national codification of criminal law that emerged from a domestic legislative process rather than a colonial legacy.⁶ One of the most significant innovations of the Code is the recognition of customary

https://doi.org/10.1007/978-3-031-74932-2_85-1; Robert Cribb, "Legal Pluralism and Criminal Law in the Dutch Colonial Order," *Indonesia*, no. 90 (2010): 47–66, <https://doi.org/10.2307/20798232>; Cees Fasseur, "Colonial Dilemma: Van Vollenhoven and the Struggle Between Adat Law and Western Law in Indonesia," in *The Revival of Tradition in Indonesian Politics* (Routledge, 2007), 70–87; Islamul Haq et al., "Legal Harmony: Integration of Customary, National, and Islamic Criminal Law in the Toraja Ma'rambu Langi," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 20, no. 2 (2025): 559–87, <https://doi.org/10.19105/al-lhkam.v20i2.17680>; Nanang Nurcahyo et al., "Reform of the Criminal Law System in Indonesia Which Prioritizes Substantive Justice," *Journal of Law, Environmental and Justice* 2, no. 1 (2024): 89–108, <https://doi.org/10.62264/jlej.v2i1.91>.

² Surya Oktarina, Azis Budiarto, and Rineke Sara, "Implementation of Pancasila Value in Criminal Law Renewal," *Proceedings of the 2nd Multidisciplinary International Conference, MIC 2022, 12 November 2022, Semarang, Central Java, Indonesia*, February 14, 2023, 1–8, <https://doi.org/10.4108/eai.12-11-2022.2327294>.

³ Yoserwan, "Implications of Adat Criminal Law Incorporation into the New Indonesian Criminal Code: Strengthening or Weakening?," *Cogent Social Sciences* 10, no. 1 (December 2024): 2289599, <https://doi.org/10.1080/23311886.2023.2289599>; Tody Sasmitha Jiwa Utama, "Between Adat Law and Living Law: An Illusion of Customary Law Incorporation into Indonesia Penal System," *The Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (May 2021): 269–89, <https://doi.org/10.1080/07329113.2021.1945222>; Maarten Manse, "The Plural Legacies of Legal Pluralism: Local Practices and Contestations of Customary Law in Late Colonial Indonesia," *Legal Pluralism and Critical Social Analysis* 56, no. 3 (September 2024): 328–48, <https://doi.org/10.1080/27706869.2024.2377447>; Syahriza Alkohir Anggoro and Tunggul Anshari Setia Negara, "The Struggle for Recognition: Adat Law Trajectories under Indonesian Politics of Legal Unification," *International Journal on Minority and Group Rights* (Leiden, The Netherlands) 29, no. 1 (August 2021): 33–62, <https://doi.org/10.1163/15718115-bja10040>.

⁴ Hamid Noor Yasin and Ade Saptomo, "The Position of Customary Criminal Law in Positive Law in Indonesia," *Doktrin: Jurnal Dunia Ilmu Hukum Dan Politik* 2, no. 2 (January 2024): 142–50, <https://doi.org/10.59581/doktrin.v2i2.2592>.

⁵ Parningotan Malau, "Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 1 (June 2023): 837–44, <https://doi.org/10.37680/almanhaj.v5i1.2815>.

⁶ Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (April 2023): 190–214, <https://doi.org/10.1080/10383441.2023.2243772>.

criminal law, or living law, as provided in Article 2.⁷ This provision stipulates that the law living within society may be applied as long as it does not conflict with Pancasila, the 1945 Constitution, human rights, and the general principles of law recognized by the community of nations. Accordingly, the 2023 Criminal Code explicitly acknowledges the existence of customary law as a legitimate source of criminal law within the national legal system.

This recognition also revives the discourse on the concept of living law, first introduced by Eugen Ehrlich⁸ in the early twentieth century in his work *Grundlegung der Soziologie des Rechts*. Ehrlich⁹ emphasized that the law that truly lives and regulates society is not the law written in statutes, but rather the law that develops and is observed in the everyday practices of social life.¹⁰ In Indonesia, this idea was further developed by Satjipto Rahardjo¹¹ through the theory of progressive law, which views law as a means to achieve substantive justice rather than merely procedural justice.¹² In the context of criminal law, living law refers to customary criminal law that has long functioned as a social instrument for maintaining harmony, resolving conflicts, and restoring balance within indigenous communities.

However, the recognition of customary criminal law in the 2023 Criminal Code still leaves significant unresolved issues. The regulation primarily covers the substantive dimension of criminal law, while the procedural aspects of customary criminal law remain explicitly unregulated. This situation creates legal uncertainty in judicial practice, particularly when judges are confronted with cases involving customary norms. Questions arise as to what formal mechanisms are available for judges to accept, assess, and enforce customary criminal law within the judicial process. Without a clear procedural framework governing customary criminal law, this normative recognition risks remaining merely declaratory rather than effectively implemented.

⁷ Aris Hardianto et al., "Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila," *Journal of Law and Legal Reform* 5, no. 3 (October 2024): 1029–66, <https://doi.org/10.15294/jllr.v5i3.13923>.

⁸ Eugen Ehrlich, *Grundlegung Der Soziologie Des Rechts* (Verlag von Duncker & Humblot, 1913).

⁹ Ehrlich, *Grundlegung Der Soziologie Des Rechts*.

¹⁰ Marc Hertogh, "Sociology of the Living Law: Exploring the Other Hemisphere of the Legal World," *Research Handbook on the Sociology of Law*, January 1, 2020, 124–35, <https://doi.org/10.4337/9781789905182.00018>.

¹¹ Satjipto Rahardjo, "Hukum Progresif: Hukum Yang Membebaskan," *Jurnal Hukum Progresif* 1, no. 1 (2011): 1–24, <https://doi.org/10.14710/hp.1.1.1-24>.

¹² Wawan Andriawan, "Pancasila Perspective on the Development of Legal Philosophy: Relation of Justice and Progressive Law," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 5, no. 1 (June 2022): 1–11, <https://doi.org/10.24090/volksgeist.v5i1.6361>.

Table 1. Examples of Customary Law in Indonesia

| Indigenous Regions/Communities | Customary Name/Tradition | Type of Regulation/Sanction | Main Characteristics |
|---------------------------------|-------------------------------------|--|---|
| Maluku | Sasi | Prohibition on taking marine/forest products during a certain period; violators are subject to fines or social exclusion. | Maintaining environmental sustainability and social discipline |
| Bali & Lombok | Awig-Awig | Regulate minor crimes such as theft of crops or violations of morality; sanctions include fines or community service. | Emphasizing traditional village harmony and spiritual balance |
| Papua | Bayar Kepala | Settlement of serious crimes (e.g. murder) through compensation in kind or money | Prioritize the restoration of inter-group relations and prevent conflict |
| West Sumatra | Minangkabau Customs (KAN) | Customary land disputes and criminal acts are resolved with compensation or customary fines. | Based on deliberation and consensus by the ninik mamak |
| Aceh | Customary Courts (Qanun No. 9/2008) | Handling domestic disputes, minor theft; sanctions in the form of an apology or compensation | Formally recognized in the regional legal system and in accordance with Islamic law |
| Central Kalimantan (Dayak) | Dayak Customary Fines | Cases of fighting or environmental violations are subject to fines in the form of pigs, gongs or buffalo. | Emphasizing cosmic balance and social reconciliation |
| South Sulawesi (Bugis-Makassar) | Pangngadereng | Regulate customary criminal norms related to morality and honor; sanctions in the form of ostracism or fines | Based on the values of siri' na pacce (honor and solidarity) |
| Toraja | Aluk Todolo | Violations of customs are subject to sanctions in the form of ostracism or the obligation to carry out rituals. | Based on cosmological values and balance with ancestors |
| East Nusa Tenggara (Manggarai) | Golo Old Customs | Customary violations such as livestock theft are resolved through payment of compensation. | Prioritize extended family deliberations and social recovery |
| West Kalimantan (Dayak Iban) | Ngabayat | Customary violations such as destroying forests or stealing are subject to customary fines in the form of agricultural produce or livestock. | Aimed at maintaining ecological balance and communal solidarity |

Source: Compiled from various sources

Legal pluralism in Indonesia is, in fact, an empirical reality that cannot be ignored.¹³ From Sabang to Merauke, indigenous communities maintain systems of norms and criminal sanctions rooted in local values. In Maluku, for example, the tradition of *sasi* is recognized as a form of customary prohibition regulating the use of natural resources, with sanctions for violations

¹³ Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (Routledge, 2013).

typically taking the form of fines or social exclusion.¹⁴ In Bali and Lombok, awig-awig functions as the customary law of traditional village communities (*desa pakraman*), encompassing regulations on minor offenses such as the theft of agricultural produce or violations of moral and social norms.¹⁵ In Papua, customary dispute resolution mechanisms are commonly reflected in the practice of *bayar kepala*, or the provision of material compensation as a form of reparation for criminal acts. These examples demonstrate that customary criminal law operates on principles of restorative justice, emphasizing the restoration of social relationships and communal balance rather than mere punishment.¹⁶

The authority of customary law within the national legal system has also gained legitimacy through judicial practice. Supreme Court Decision No. 1644 K/Pid/1988 affirmed that the settlement of criminal cases through customary mechanisms may be taken into consideration by judges in rendering their decisions. Meanwhile, Supreme Court Decision No. 42 PK/Pid/1994 recognized customary settlement as a ground for the inadmissibility of prosecution (*grond van niet ontvankelijkheid van vervolging*). These precedents demonstrate that customary law is not only socially recognized but has also received formal acknowledgment within criminal justice practice. Nevertheless, inconsistencies remain, as such recognition tends to be case-specific and has not been supported by a systematic regulatory framework.¹⁷

Comparatively, many countries with indigenous populations face similar challenges and have developed hybrid justice systems to address them. In Papua New Guinea, the *Village Courts Act 1973* grants authority to village courts to resolve minor criminal cases through the application of local customary law.¹⁸ These courts operate formally within the state legal system while still accommodating customary-based dispute resolution mechanisms. In Canada, First Nations Courts handle criminal cases through community-based approaches that emphasize the restoration of

¹⁴ H. Oja et al., "The Role of Indigenous Peoples (LMA) in The Control of Forest and Land Fires in Merauke," *IOP Conference Series: Earth and Environmental Science* 235, no. 1 (February 2019): 1–7, <https://doi.org/10.1088/1755-1315/235/1/012061>.

¹⁵ Husnul Qodim, "Nature Harmony and Local Wisdom: Exploring Tri Hita Karana and Traditional Ecological Knowledge of the Bali Aga Community in Environmental Protection," *Religious: Jurnal Studi Agama-Agama Dan Lintas Budaya* 7, no. 1 (March 2023): 1–10, <https://doi.org/10.15575/rjsalb.v7i1.24250>.

¹⁶ Ricarda Arsensius, Handoyo Prasetyo, and Slamet Tri Wahyudi, "Local Wisdom in The Process of Criminal Law Enforcement in Papua (Case Study Of Handling Criminal Actions Preceded by Traditional Fine in Wamena, Jayawijaya District)," *MSJ: Majority Science Journal* 2, no. 2 (May 2024): 281–91, <https://doi.org/10.61942/msj.v2i2.186>.

¹⁷ Darlian Pone et al., "Analysis of The Role Based on The Customary Criminal Justice System of Dayak Bangkalaan in The National Criminal Justice System," *Syntax Literate ; Jurnal Ilmiah Indonesia* 9, no. 3 (March 2024): 1616–23, <https://doi.org/10.36418/syntax-literate.v9i3.14826>.

¹⁸ Lailan Sururi, Dahlan Ali, and Teuku Muttaqin Mansur, "Penyelesaian Sengketa Melalui Peradilan Gampong," *Kanun Jurnal Ilmu Hukum* 21, no. 1 (May 2019): 61–76, <https://doi.org/10.24815/kanun.v21i1.11407>.

social relationships rather than punishment. Meanwhile, in New Zealand, the Māori Land Court and Rangatahi Courts integrate Māori legal principles into the modern judicial system by prioritizing deliberation and restoration as methods of dispute resolution. These models demonstrate that the integration of customary law into formal legal systems can be achieved without undermining the principles of a modern rule-of-law state.¹⁹

Indonesia has, in fact, had a similar experience through the customary justice system in Aceh, which is regulated under Qanun No. 9 of 2008. This institution is authorized to resolve customary disputes, including minor criminal offenses, with the recognition that customary decisions may have legal force as long as they do not conflict with national legal principles. Data from the Sharia Courts of Aceh indicate that between 2015 and 2020, hundreds of cases were resolved through customary justice mechanisms, ranging from family disputes to minor theft. This experience demonstrates the effectiveness of customary mechanisms as a means of dispute resolution that is efficient, low-cost, and capable of restoring social harmony.²⁰

Nevertheless, several serious challenges remain. First, there is a risk of conflict between customary norms and human rights principles. For example, some indigenous communities still impose sanctions such as social exclusion or certain rituals that may potentially violate the principle of non-derogable rights. Second, the absence of standardized customary criminal procedure creates uncertainty regarding the procedures that judges should follow when dealing with cases involving customary law. Third, there is a risk of overlapping authority between customary institutions and formal judicial bodies, which may lead to legal uncertainty.

The concept of hybrid justice systems offers a potential solution by combining the strengths of customary law and state law. Within this framework, the outcomes of customary dispute resolution may be recognized by formal courts as part of the legal process, while state courts continue to function as supervisory institutions to ensure that customary sanctions do not conflict with Pancasila, the 1945 Constitution, or human rights principles. A hybrid system can provide a more contextual form of justice that is responsive to community needs while at the same time preserving the universal principles of modern law.

The urgency of this discussion becomes increasingly clear when we examine data on conflict resolution within indigenous communities. These communities often view state courts as slow,

¹⁹ Valmaine Toki, "Indigenous Courts," *Oxford Research Encyclopedia of Criminology and Criminal Justice*, July 30, 2020, 1–7, <https://doi.org/10.1093/acrefore/9780190264079.013.655>.

²⁰ Nurdin MH et al., "Using Mediation Method in Customary Justice of Aceh-Indonesia," *International Asia Of Law and Money Laundering (IAML)* 3, no. 2 (June 2024): 115–20, <https://doi.org/10.59712/iaml.v3i2.96>.

bureaucratic, and disconnected from local socio-cultural contexts. In contrast, customary mechanisms are perceived as more just because they consider kinship relations, cosmological values, and social balance. This disparity underscores the need to integrate customary mechanisms into the formal legal system to prevent contradictory legal dualism.

This study employs a doctrinal legal research method as the primary analytical framework. The doctrinal approach is selected because the object of this research consists of both written and unwritten legal norms related to the recognition of living law in the 2023 Indonesian Criminal Code and its relevance to a criminal justice system based on hybrid justice systems. Doctrinal legal research focuses on the analysis of legal texts, principles, and doctrines, enabling the researcher to examine how customary criminal law is recognized, positioned, and integrated within the national legal system. Within this framework, law is understood as a set of normative rules governing human behavior rather than merely a social phenomenon.

B. The Normative Construction of Living Law in the 2023 Indonesian Criminal Code

One of the most prominent features of the National Criminal Code enacted through Law Number 1 of 2023 is the explicit recognition of *living law*, or the law that exists and operates within society.²¹ This provision is stipulated in Article 2 paragraph (1), which states that “the provisions referred to in Article 1 paragraph (1) do not diminish the applicability of the law living in society that determines a person may be punished even though the act is not regulated in this Code.” This formulation represents a fundamental shift from a rigid and positivistic codification paradigm toward a more pluralistic, open, and socially responsive legal paradigm.

This provision has direct implications for the principle of legality in criminal law. Traditionally, the principle of *nullum crimen sine lege*, as stipulated in Article 1 paragraph (1) of the 2023 Criminal Code, affirms that no act may be punished except on the basis of a pre-existing statutory provision. However, Article 2 provides an exception by recognizing the existence of customary law as a source of criminal law. Consequently, the principle of legality in the new Criminal Code is no longer absolute as in the tradition of legalism, but rather relative, allowing

²¹ Umi Rozah and Aldi Yudistira, “Penal Policy Analysis of The Formulation of Customary Law in The 2023 KUHP,” *Indonesian Journal of Criminal Law Studies* 10, no. 1 (2025): 83–114, <https://doi.org/10.15294/ijcls.v10i1.19939>; Henny Saida Flora and Ratna Deliana Erawati, “The Orientation and Implications of New Criminal Code: An Analysis of Lawrence Friedman’s Legal System,” *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 1 (2023): 113–25, <https://doi.org/10.29303/ius.v11i1.1169>; Dessy Adhya Purwandiny et al., “The Limitations of Living Law as a Principle of Material Legality in the Renewal of Criminal Law,” *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 3 (2025): 779–90, <https://doi.org/10.29303/ius.v13i3.1773>.

room for unwritten norms that live within society. From a theoretical perspective, this represents a compromise between legal certainty and substantive justice, whereby law that emerges from social practices and is recognized by the community may attain legitimacy comparable to that of written law.

Article 2 paragraph (2) further clarifies the conditions for the application of *living law*, stipulating that such law applies only within the community where it exists, insofar as the matter is not regulated in the Criminal Code, and provided that it is consistent with the values of Pancasila, the 1945 Constitution, human rights, and the general principles of law recognized by the community of nations. This formulation contains two layers of normative safeguards. First, there is a territorial limitation that ensures the applicability of customary law only within the specific communities where such law exists, thereby preventing generalization that could lead to inter-regional inequality. Second, there is an ideological and constitutional limitation ensuring that customary law must not conflict with the fundamental values of the state, the constitutional rights of citizens, or the principles of international law. In this sense, Article 2 functions as a “bridge” that connects the plurality of local legal systems with the broader framework of national and global law.

The requirement of harmonization with Pancasila carries significant meaning. As the philosophical foundation of the state, Pancasila functions as the source of all sources of law, meaning that customary law that contradicts the values of humanity, social justice, or respect for human dignity cannot be applied. For example, customary practices that still employ forms of physical punishment degrading to human dignity cannot serve as a basis for criminal sanctions because they conflict with the second principle of Pancasila, “Just and Civilized Humanity.” In this way, the 2023 Criminal Code affirms that the recognition of customary law is not absolute but rather selective and conditional, ensuring its consistency with the philosophical foundations of the state.

The connection with the 1945 Constitution is also clearly evident. The Indonesian Constitution guarantees the right of every person to have their dignity and fundamental rights recognized, respected, and protected without discrimination.²² Therefore, the application of customary law must not negate the principle of equality before the law as affirmed in Article 27

²² Seri Mughni Sulubara, T. Saiful Basri, and Iskandar Iskandar, “Analisis Konstitusional Terhadap Perlindungan Hak Asasi Manusia Dalam Sistem Hukum Indonesia,” *Jurnal Kabar Masyarakat* 2, no. 4 (November 2024): 198–211, <https://doi.org/10.54066/jkb.v2i4.2653>.

paragraph (1) of the 1945 Constitution. The recognition of *living law* must be placed within a constitutional framework that preserves the unity of the national legal system without denying local diversity. This is essential to prevent discriminatory practices that may arise in the application of customary law, such as unequal treatment toward women or minority groups.

Article 2 paragraph (2) of the 2023 Criminal Code places human rights as a normative standard for the application of customary law. This means that although customary law originates from local wisdom, it must still be assessed in light of universally recognized human rights principles. For instance, certain indigenous communities may continue to impose sanctions such as severe social exclusion or burdensome ritual obligations, but such measures may be challenged if they infringe upon non-derogable rights, including the right to life, freedom from torture, or the right to humane treatment. Through this provision, the 2023 Criminal Code seeks to strike a balance between respect for cultural identity and the state's obligation to ensure the protection of human rights.

In addition to Pancasila, the 1945 Constitution, and human rights principles, Article 2 also requires that customary law be consistent with the general principles of law recognized by the community of nations. This provision indicates that the normative construction of *living law* in the new Criminal Code is not solely domestically oriented but also cosmopolitan in character. International legal principles such as *due process of law*, *fair trial*, and the *proportionality of punishment* serve as important parameters for assessing the validity of customary law. In this way, Indonesia positions itself within a global trend that acknowledges legal pluralism while maintaining adherence to universal standards that safeguard human rights and uphold the principles of a democratic rule-of-law state.

Interestingly, Article 2 paragraph (3) delegates authority to the government to further regulate the procedures and criteria for determining the law living within society through a Government Regulation.²³ This provision is important to prevent arbitrary claims regarding the existence of customary law. Without a clear mechanism for its determination, there is a risk that customary law may be used as a justification for practices that contradict the principles of justice and human rights. The Government Regulation is expected to function as a normative instrument providing objective criteria, including who has the authority to determine the existence of

²³ Milenia Ramadhani, "Tantangan Implementasi Pengakuan Hukum Adat Dalam Kitab Undang-Undang Hukum Pidana Baru Di Indonesia," *COMSERVA: Jurnal Penelitian Dan Pengabdian Masyarakat* 4, no. 3 (July 2024): 714–22, <https://doi.org/10.59141/comserva.v4i3.1394>.

customary law, how the verification process should be conducted, and how such law should be harmonized with the national legal system.

However, although the Criminal Code recognizes the applicability of customary law in its substantive dimension, a fundamental weakness remains, namely the absence of regulations concerning customary criminal procedural law. The Code only acknowledges the substance of customary norms that may serve as a basis for criminal liability, but it does not provide guidance on how customary judicial procedures should be conducted. As a result, even though judges may rely on customary law in their considerations, there are no standardized procedures to ensure the validity of evidence, the authority of customary institutions, or the protection of defendants' rights in customary proceedings. This situation has the potential to create legal uncertainty, as no uniform practice exists across Indonesia.

The absence of customary criminal procedural law in the Criminal Code creates serious problems in legal practice.²⁴ For example, what is the legal status of decisions issued by customary institutions when the same case is later brought before a district court? Can customary settlement serve as a ground for the inadmissibility of prosecution (*grond van niet ontvankelijkheid van vervolging*), as previously recognized by the Supreme Court in Decision No. 42 PK/Pid/1994? Without clear regulations, there is a risk of conflicting decisions between customary institutions and formal courts. Such a situation not only creates legal uncertainty but may also undermine public confidence in the justice system.

The normative construction of *living law* in the Criminal Code also has significant implications for the principle of legal certainty. On the one hand, the recognition of customary law broadens the scope of the principle of legality, enabling the legal system to accommodate the substantive justice that exists within society. On the other hand, the varying application of customary law across different regions may create uncertainty for citizens.²⁵ A person may be punished in one region for violating customary law, while the same act may not be punishable in another region. This situation raises important questions regarding the principle of equality before the law. Therefore, further regulation in the form of a Government Regulation is crucial to balance legal certainty with local flexibility.

²⁴ Budi Suhariyanto, "Problema Penyerapan Adat Oleh Pengadilan Dan Pengaruhnya Bagi Pembaruan Hukum Pidana Nasional," *Mimbar Hukum* 30, no. 3 (November 2018): 421–35, <https://doi.org/10.22146/jmh.33227>.

²⁵ Sophian Yahya et al., "Indonesian Criminal Code, Living Law and Control in Law Enforcement in Indonesia," *SASI* 29, no. 4 (October 2023): 705–16, <https://doi.org/10.47268/sasi.v29i4.1697>.

Article 54 letter (k) of the 2023 Criminal Code reinforces the relevance of *living law* in judicial considerations. The provision states that in sentencing, judges must take into account “the legal values and sense of justice living within society.” Through this provision, customary law is recognized not only as a basis for criminal liability under Article 2, but also as a factor that must be considered in determining the type and severity of punishment. In other words, *living law* operates in two dimensions: as a basis for criminalization and as a guideline for sentencing. Consequently, judges are required to possess a high degree of social and cultural sensitivity in order to interpret local values appropriately without violating universal legal principles.

The recognition of customary law is further strengthened by Article 66 paragraph (1) letter (f), which includes “the fulfillment of local customary obligations” as one form of additional punishment. This provision represents a progressive development because it explicitly incorporates customary sanctions into the national sentencing system.²⁶ Additional punishment in the form of customary obligations allows judges to impose sanctions that are more culturally contextual, such as participation in customary rituals, payment of customary fines, or the performance of community service in accordance with local norms. In this way, the Indonesian sentencing system can become more responsive to community needs while also strengthening the legitimacy of the justice system.

These provisions demonstrate that the normative construction of *living law* in the 2023 Criminal Code is integrative in nature. Article 2 serves as the entry point for the recognition of customary law, Article 54 positions it as a guideline for judicial consideration, and Article 66 provides space for customary sanctions within the formal sentencing system. However, this integration remains incomplete because it is not accompanied by procedural rules that ensure certainty and uniformity in its application. In the absence of customary criminal procedural law, the recognition of *living law* risks remaining merely declaratory and difficult to implement consistently across Indonesia.

C. Customary Criminal Law as Living Law (Practice, Jurisprudence, and Social Dynamics)

Customary criminal law within the framework of the national legal system is positioned as *living law*, namely law that exists and is observed in society even without being formally codified

²⁶ Adi Kusyandi, Sahda Salsabila, and Murtiningsih Murtiningsih, “Kedudukan Hukum Pidana Adat Dalam Hukum Pidana Indonesia,” *Yustitia* 9, no. 2 (December 2023): 249–58, <https://doi.org/10.31943/yustitia.v10i2.205>.

in legislation.²⁷ This concept is consistent with the ideas of Eugen Ehrlich²⁸, who argued that the center of gravity of legal development lies not in legislation or judicial decisions, but in society itself. Accordingly, customary criminal law is not merely regarded as a residue of tradition, but as a social mechanism that effectively regulates the behavior of community members.²⁹ From a criminal law perspective, customary law performs a dual function: first, as a substantive norm that defines wrongful conduct; and second, as a means of social integration that emphasizes the restoration of relationships rather than mere retribution.

In the Indonesian context, customary criminal law finds its juridical basis in Article 2 of the 2023 Criminal Code, which recognizes the applicability of law living within society. However, this recognition is conditional, namely that customary law must be consistent with Pancasila, the 1945 Constitution, human rights, and the general principles of law recognized by the community of nations. This provision reflects a balance between cultural relativism and legal universalism. In other words, customary criminal law is recognized as valid insofar as it does not negate constitutional principles and human rights protections.

One of the fundamental issues concerns the relationship between customary criminal law and the principle of legality (*nullum crimen, nulla poena sine lege*).³⁰ This principle constitutes a cornerstone of modern criminal law, ensuring legal certainty, preventing arbitrariness, and protecting the rights of citizens. With the recognition of *living law*, the principle of legality is no longer absolute but becomes relative. This means that a person may be punished on the basis of customary norms even when the conduct is not explicitly regulated in the Criminal Code. From the perspective of classical criminal law theory, particularly Feuerbach's doctrine of *psychologische Zwang*, the principle of legality serves to create a general deterrent effect by

²⁷ Rahmi Dwi Sutanti et al., "Customary Law as an Instrument of Restorative Justice: An Alternative Approach to Criminal Conflict Resolution in Plural Legal Systems," *Clio. Revista de Historia, Ciencias Humanas y Pensamiento Crítico* 10, no. 5 (2025): 1348–81, <https://doi.org/10.5281/zenodo.15453907>.

²⁸ Ehrlich, *Grundlegung Der Soziologie Des Rechts*.

²⁹ Mabur Syah et al., "Cuci Kampung as a Mechanism of Restorative Justice: Integrating Customary Law and Islamic Principles in the Rejang Lebong, Indonesia," *Justicia Islamica* 22, no. 2 (2025): 357–80, <https://doi.org/10.21154/justicia.v22i2.11642>; Satriya Nugraha, Nuraliah Ali, and Vicka Prama Wulandari, "Between Customary Justice and Criminal Accountability: Dayak Bakumpai Adat Law in Domestic Violence Resolution," *Prophetic Law Review* 7, no. 2 (2025): 256–83, <https://doi.org/10.20885/plr.vol7.iss2.art5>; Erniwati Erniwati et al., "Customary Sanctions for Strengthening Moral Order and Social Harmony in South Sumatra Communities," *De Jure: Jurnal Hukum Dan Syar'iah* 17, no. 2 (2025): 417–37, <https://doi.org/10.18860/j-fsh.v17i2.32262>.

³⁰ Noora Arajärvi, "Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality," *Tilburg Law Review* (Leiden, The Netherlands) 15, no. 2 (October 2010): 163–82, <https://doi.org/10.1163/22112596-90000011>; Beni Puspito and Ali Masyhar, "Dynamics of Legality Principles in Indonesian National Criminal Law Reform," *Journal of Law and Legal Reform* 4, no. 1 (2023): 109–22, <https://doi.org/10.15294/jllr.v4i1.64078>.

providing clear legal certainty. If customary criminal law is recognized without clear codification, doubts arise as to whether members of society can truly know which acts are prohibited and what sanctions may be imposed. However, from the perspective of modern criminal law, which places greater emphasis on substantive justice, the recognition of *living law* may be understood as a corrective to rigid legal positivism.

Satjipto Rahardjo³¹, through his concept of progressive law, offered a sharp critique of legalistic perspectives that place statutory texts as the sole center of legal orientation.³² For Rahardjo³³, law should not be confined to mere formal and procedural dimensions but must consistently reflect the values of humanity and substantive justice. Progressive law is grounded in the belief that law serves as an instrument for achieving broader social goals, making flexibility in the interpretation and application of law a necessity. In this context, the recognition of customary criminal law as *living law* in the 2023 Criminal Code may be viewed as a concrete manifestation of this progressive paradigm, placing substantive justice above rigid formal legal certainty. By recognizing the law living within society as one of the sources of criminal law, the state consciously opens space for local values and customary conflict-resolution mechanisms to contribute to the national legal system. However, this recognition also raises serious challenges, particularly in relation to the harmonization with the principle of legality as a fundamental principle of modern criminal law. Without clear procedural mechanisms and normative guidelines, the application of *living law* may lead to legal uncertainty, unequal treatment across regions, and even potential violations of human rights. Therefore, although progressive law encourages a legal system oriented toward substantive justice, systematic institutional and procedural instruments remain necessary to maintain a balance between flexibility, legal certainty, and the protection of citizens' rights.

From the perspective of the sociology of law, law is not understood merely as a set of written rules issued by the state, but is viewed more broadly as a mechanism of social control that functions to maintain order, stability, and the continuity of social life. This mechanism ensures that social interactions proceed in accordance with commonly accepted norms and values, while sanctions are imposed when deviations occur. Donald Black³⁴, a prominent sociologist of law, emphasized

³¹ Rahardjo, "Hukum Progresif: Hukum Yang Membebaskan."

³² Hyronimus Rhati, "Landasan Filosofis Hukum Progresif," *Justitia et Pax* 32, no. 1 (October 2016): 33–51, <https://doi.org/10.24002/jep.v32i1.760>.

³³ Rahardjo, "Hukum Progresif: Hukum Yang Membebaskan."

³⁴ Donald J. Black, *The Behavior of Law* (Academic Press, 1976).

that law represents one of the most organized and institutionalized forms of social control because it is enforced by official authorities such as the police, prosecutors, and judges. However, according to Black³⁵, law is not the only means of regulating human behavior. In everyday social life, communities also possess other mechanisms of social control that perform similar functions, even though they are not always institutionalized in formal structures, namely through customs, religion, and morality.

Customary norms operate through the authority of long-established traditions passed down across generations. They contain prohibitions, obligations, and sanctions that are accepted and obeyed by community members because of their strong social legitimacy. Religion, on the other hand, introduces norms derived from transcendental beliefs, with sanctions that are not only worldly but also eschatological, thereby giving them a particularly strong binding force. Morality functions through individual conscience and social pressure, which, although lacking formal sanctions, remain effective in guiding behavior because they are closely linked to reputation, shame, and social recognition. From the perspective of the sociology of law, these three mechanisms together with state law form a complex network of social control. Customary criminal law operates within this framework by regulating individual and collective behavior through sanctions that are social, symbolic, and communal in nature. Examples such as *sasi* in Maluku, *awig-awig* in Bali, and *bayar kepala* in Papua illustrate how customary law functions as an effective mechanism of social control. Violations are not always addressed through imprisonment, but rather through the restoration of social relationships by means of fines, rituals, or compensation. Analysis through social control theory demonstrates that customary criminal law remains closely connected to society because it grows from values that are voluntarily observed rather than externally imposed. Unlike state criminal law, which is primarily oriented toward legal certainty, customary law is more strongly oriented toward harmony and social balance.

Supreme Court jurisprudence plays a significant role in affirming the existence of customary criminal law as part of the national legal system. In Supreme Court Decision No. 1644 K/Pid/1988, the Court affirmed that judges, in imposing criminal judgments, may take into account settlements that have already been carried out through customary mechanisms.³⁶ In the case, the indigenous community had resolved the violation through deliberation and the payment of compensation

³⁵ Black, *The Behavior of Law*.

³⁶ Abdul Malik Mufty, "Penerapan Sistem Peradilan Pidana Adat Sebagai Alternative Dispute Resolution Dalam Perkara Tindak Pidana Ringan Berbasis Nilai Keadilan Pancasila," *Rio Law Jurnal* 6, no. 1 (December 2025): 453–63, <https://doi.org/10.36355/rlj.v6i1.1576>.

accepted by the victim. The Supreme Court considered that such actions carried significant social restorative value and therefore deserved to be taken into account as a mitigating factor in sentencing. This decision reflects the principle of restorative justice, in which the resolution of a case focuses not only on retribution or punishment but also on the restoration of social relationships within the community.

Even more progressive is Supreme Court Decision No. 42 PK/Pid/1994, which provided stronger legitimacy for customary dispute resolution. In this decision, the Court held that the settlement of a criminal case through customary mechanisms could serve as a valid ground for the inadmissibility of prosecution (*grond van niet ontvankelijkheid van vervolging*). This means that when a legal violation has been fully resolved through customary institutions and accepted by both the victim and the offender, the state does not necessarily need to continue formal judicial proceedings. This decision marked an important milestone in the recognition of customary criminal law, as for the first time the Court explicitly placed customary settlement as a legitimate substitute for formal law enforcement. From a theoretical perspective, these two decisions illustrate the practice of interlegality, a concept introduced by Boaventura de Sousa Santos³⁷ to describe the interaction, overlap, and negotiation between formal state law and non-formal legal systems such as customary law. Interlegality suggests that in social reality the boundaries between state law and customary law are not rigid but fluid and mutually interactive. Through these judicial precedents, the Supreme Court has recognized that customary legal systems can coexist with national law and may even function as legitimate mechanisms for resolving criminal cases. These decisions also carry important implications for the principles of legality and legal certainty. In classical theory, the principle of legality requires that only written law may serve as the basis for criminal punishment. However, through its jurisprudence, the Supreme Court has expanded the meaning of legality by recognizing *living law* as a source of criminal law. Consequently, legal certainty is no longer understood solely as textual certainty but also as substantive certainty derived from the recognition of norms that genuinely live within society.

An analysis based on John Griffiths³⁸ theory of legal pluralism provides a deeper understanding of the position of customary criminal law within the Indonesian legal system.

³⁷ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, Law in Context (Butterworths, 2002).

³⁸ John Griffiths, "What Is Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (January 1986): 1–55, <https://doi.org/10.1080/07329113.1986.10756387>.

Griffiths³⁹ distinguishes between *weak legal pluralism* and *strong legal pluralism*. In the concept of *weak legal pluralism*, non-state legal systems such as customary law or religious law are recognized only insofar as they are accommodated and institutionalized by state law. In other words, the existence of such legal systems depends entirely on state legitimacy and remains subordinate to it. By contrast, *strong legal pluralism* recognizes that non-state legal systems may exist independently and possess their own authority without being fully dependent on state law.⁴⁰ When analyzed in the Indonesian context, Article 2 of the 2023 Criminal Code, which recognizes *living law* including customary criminal law, demonstrates a strong tendency toward *strong legal pluralism*. Customary law is no longer positioned merely as a supplementary instrument or as “social evidence” in judicial consideration, but is explicitly recognized as a legitimate source of criminal law. This means that customary law possesses an autonomous position as a basis for determining whether a person may be punished, even when the act is not expressly regulated in the Criminal Code. Through this recognition, Indonesia affirms that the national legal system is not monolithic but open to the plurality of norms that exist within society.

Customary criminal law has an orientation that differs from modern criminal law, which tends to be retributive in nature.⁴¹ Customary sanctions often take the form of compensation, rituals, or social exclusion aimed at restoring social balance. This approach is consistent with the theory of restorative justice developed by Howard Zehr⁴², which emphasizes the involvement of victims, offenders, and the community in the resolution of criminal offenses.⁴³ Restorative justice is oriented toward the restoration of harm and social reconciliation rather than punishment alone. In sentencing theory, the orientation of customary criminal law is closer to an integrative model that combines retributive, preventive, and restorative elements. For example, in the practice of *bayar kepala* in Papua, sanctions not only provide compensation to the victim but also help prevent inter-tribal conflict while restoring social relationships. This analysis demonstrates that customary

³⁹ Griffiths, “What Is Legal Pluralism?”

⁴⁰ Jaelyn L. Neo, “State Legal Pluralism and Religious Courts: Semi-Autonomy and Jurisdictional Allocations in Pluri-Legal Arrangements,” *The Oxford Handbook of Global Legal Pluralism*, January 1, 2020, 879–900, <https://doi.org/10.1093/oxfordhb/9780197516744.013.8>.

⁴¹ Ade Adhari et al., “Customary Delict of Penglipuran Bali in the Perspective of the Principle of Legality: A Dilemma and Arrangements for the Future,” *Journal of Indonesian Legal Studies* 6, no. 2 (2021): 411–36, <https://doi.org/10.15294/jils.v6i2.50555>.

⁴² Howard Zehr, *Changing Lenses: Restorative Justice for Our Times* (MennoMedia, 2015).

⁴³ Cherie Dawson-Edwards, “Restorative Justice,” *The Encyclopedia of Crime and Punishment*, December 28, 2015, 1–5, <https://doi.org/10.1002/9781118519639.wbecpx163>.

criminal law may be understood as an indigenous restorative justice system that deserves consideration in the reform of Indonesian criminal law.

Customary criminal law operates within a dynamic social context. Globalization, urbanization, and modernization often weaken the authority of customary institutions. In urban areas, customary law tends to lose relevance as communities become more integrated into the state legal system. However, in rural areas or in indigenous communities where traditional institutions remain strong, customary criminal law continues to be practiced and is often perceived as more just and effective. Significant challenges arise when customary norms potentially conflict with principles of human rights and equality. For example, gender-based discrimination in certain indigenous communities may lead to violations of the principle of equality before the law. From the perspective of Lon Fuller's⁴⁴ natural law theory, a sound legal system must satisfy the requirements of internal morality, including universal justice. Therefore, although customary criminal law is recognized, its application must remain subject to constitutional principles and human rights standards.

From an academic perspective, the recognition of customary criminal law as *living law* strengthens the paradigm of legal pluralism within the Indonesian legal system. With the enactment of Article 2 of the 2023 Criminal Code, the state formally acknowledges that criminal law derives not only from codified legislation but also from norms that exist and operate within society. However, this recognition must be accompanied by clearer normative and procedural frameworks to ensure consistent implementation. From the perspective of criminal law theory, the existence of customary criminal law enriches the discourse on the functions of criminal law. It demonstrates that punishment does not have to be synonymous with imprisonment, but may instead take the form of mechanisms that are more contextual, symbolic, and restorative. In this sense, customary criminal law can be understood as a concrete manifestation of a community-based justice system that brings law closer to society.

D. Hybrid Justice Systems as a Model for the Integration of Customary Criminal Law into the National Judicial System

The concept of hybrid justice systems emerges from the idea of legal pluralism, which views state law not as a stand-alone system but as one that coexists with customary law, religious law,

⁴⁴ Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969).

and other social norms.⁴⁵ Hybrid justice goes beyond merely recognizing the existence of customary law; it seeks to integrate it into the formal state legal system so that complementary mechanisms can be developed. In the framework of legal pluralism theory proposed by John Griffiths⁴⁶, this phenomenon can be categorized as a form of *strong legal pluralism*, in which state law and customary law operate alongside each other and are subsequently formalized through state mechanisms.

In the context of criminal law, a hybrid system means that formal state courts may accommodate the resolution of cases through customary law, whether as an alternative to prosecution, as a basis for judicial consideration, or as a form of additional criminal sanction. This model differs from legal dualism because customary law does not operate separately but is recognized as an integral part of the judicial system. In other words, hybrid justice represents a form of legal hybridization in which customary law gains formal legitimacy while preserving its socio-cultural character.

From the perspective of Satjipto Rahardjo's⁴⁷ progressive legal theory, hybrid justice represents an expression of law that evolves in response to societal needs. Law is not viewed merely as a set of texts, but as a means of achieving substantive justice. Within this framework, customary law is positioned as an instrument of restorative justice that emphasizes the restoration of social relationships, while state law functions as a supervisory mechanism to ensure consistency with universal principles such as human rights and legal certainty.

1. Papua New Guinea (Village Courts Act 1973)

Papua New Guinea adopted the Village Courts model through legislation enacted in 1973. Village Courts are granted authority to resolve minor criminal cases, family disputes, and customary violations based on local norms. Judges or magistrates are typically selected from respected customary leaders within the community. Their decisions are legally recognized and binding, subject to limited supervision by the formal court system. This mechanism demonstrates a strong integration between customary law and state law. The main strengths of this model lie in its accessibility and social legitimacy. Because the courts are led by customary leaders, their decisions tend to be widely accepted by the community and enjoy a high level of compliance. In

⁴⁵ Werner Menski, "Remembering and Applying Legal Pluralism: Law as Kite Flying," in *Concepts of Law* (Routledge, 2016), 103–20.

⁴⁶ Griffiths, "What Is Legal Pluralism?"

⁴⁷ Rahardjo, "Hukum Progresif: Hukum Yang Membebaskan."

addition, dispute resolution is generally faster and less costly than proceedings in formal courts. However, the model also presents certain weaknesses, particularly the potential inconsistency with human rights standards, such as in cases involving gender discrimination. To address these concerns, the government of Papua New Guinea has provided human rights training for village magistrates to ensure that customary decisions remain within the framework of universal legal principles.⁴⁸

2. Canada (First Nations Courts)

In Canada, First Nations Courts have been developed since 2006 to handle cases involving Indigenous communities. The system is oriented toward restorative justice, involving victims, offenders, families, and the broader community in the judicial process. Sentences typically take the form of compensation, community service, or participation in culturally based rehabilitation programs. The state recognizes these decisions as part of the formal justice system, giving them the same legal status as those issued by ordinary courts. This model demonstrates a harmonious integration of Indigenous values with formal law. The state provides the legal framework and oversight, while Indigenous communities contribute substantive values and local practices. One of the main advantages of this approach is the sense of ownership it creates toward the justice system, which contributes to reducing recidivism rates. Nevertheless, challenges remain, particularly the limited capacity of Indigenous communities to handle more complex cases.⁴⁹

3. New Zealand (Māori Courts)

New Zealand provides strong recognition of Māori law through institutions such as the Māori Land Courts and judicial mechanisms that integrate customary principles. In criminal cases, Māori values are often taken into account as relevant factors in sentencing. Judges may impose sanctions that are consistent with Māori traditions, such as participation in customary rituals or service to the community. Concepts such as *whānau* (extended family) and *iwi* (tribe) serve as important frameworks for understanding collective responsibility within the justice process.⁵⁰ The

⁴⁸ Michael Goddard, "Substantial Justice," *Substantial Justice*, December 31, 2022, 1–303, <https://doi.org/10.1515/9781845459222/html>.

⁴⁹ Elena Marchetti and Riley Downie, "Indigenous People and Sentencing Courts in Australia, New Zealand, and Canada," in *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford University Press, 2014), 360–85, <https://doi.org/10.1093/oxfordhb/9780199859016.013.001>.

⁵⁰ Stephanie Vieille, "Māori Customary Law: A Relational Approach to Justice," *The International Indigenous Policy Journal* 3, no. 1 (March 2012): 1–20, <https://doi.org/10.18584/iipj.2012.3.1.4>.

strength of the New Zealand model lies in its consistent integration of customary law into the state legal system without losing the substantive values of Māori traditions. This system has helped strengthen Indigenous identity while reducing potential conflicts between Indigenous communities and the state. However, one of its main limitations is the criticism that such integration remains largely controlled by the state, meaning that Māori autonomy is not yet fully guaranteed.

The experiences of Papua New Guinea, Canada, and New Zealand offer valuable lessons that could be adapted to Indonesia's legal system, particularly in the integration of customary law within the national framework. These countries provide insightful examples of how customary justice systems can coexist with formal legal institutions, emphasizing a hybrid approach that balances respect for indigenous traditions with adherence to national legal principles. By drawing on these models, Indonesia can enhance the recognition and application of customary law, ensuring it aligns with the nation's democratic values and human rights standards. Several key elements from these international examples could be adapted to the Indonesian context, fostering a more inclusive and effective justice system.

Formal Legitimacy is one of the primary aspects that Indonesia could draw from the Village Courts in Papua New Guinea. These courts provide a clear legal basis for customary justice, ensuring that traditional practices are officially recognized and integrated into the legal system. In Indonesia, while there is a legal recognition of customary law at a normative level, such as in Article 2 of the 2023 Criminal Code and in regional regulations like the Aceh Qanun, there is no comprehensive national framework that explicitly legitimizes customary justice institutions. By adopting a hybrid model, Indonesia could establish national regulations that formally recognize customary decisions as legally valid, provided they do not conflict with Pancasila, the 1945 Constitution, and core human rights principles. This would create a clearer, more structured system for the application of customary law, offering greater legal certainty and enabling local communities to rely on customary justice within a well-defined legal framework. Such a move would align with the constitutional principles of Indonesia, while respecting the rich cultural diversity across its regions.

Restorative Justice is another area where Indonesia can learn from Canada's experience, particularly in integrating restorative justice practices into the criminal justice system. In Canada, First Nations Courts have demonstrated how traditional mechanisms, which emphasize healing and reconciliation, can be integrated with formal criminal law processes. These courts allow offenders to make amends for their actions through culturally relevant rituals or practices, which

often involve restitution or public apologies, rather than focusing solely on punitive measures. Indonesia could adopt a similar approach, integrating customary-based restorative justice mechanisms into its criminal law system. This could include recognizing traditional settlements that emphasize compensation, apology, or community-based rituals as legitimate alternatives to conventional criminal sanctions. The 2023 Criminal Code already allows for community service penalties and additional sanctions in the form of customary obligations, thus providing a foundation for restorative justice practices. By recognizing these alternatives, Indonesia could promote a justice system that prioritizes rehabilitation over retribution, fostering social harmony and reducing recidivism.

Human Rights Supervision is another critical element that needs to be addressed in the integration of customary law, as shown by Papua New Guinea's approach. In Papua New Guinea, customary decisions are subject to oversight to ensure compliance with national human rights standards. This includes prohibiting extreme forms of punishment, such as physical sanctions or practices that degrade human dignity. Indonesia could adopt a similar model by ensuring that customary justice decisions are subject to judicial or institutional oversight to safeguard human rights. The role of oversight institutions, such as the National Human Rights Commission (Komnas HAM), would be vital in ensuring that customary practices do not infringe upon individuals' rights. This could include reviewing certain customary practices, such as those involving corporal punishment or exclusionary practices, to ensure they do not violate constitutional guarantees or international human rights conventions to which Indonesia is a party. By incorporating a strong oversight mechanism, Indonesia can balance the recognition of customary law with its commitment to human rights, preventing potential abuses while allowing for the meaningful participation of local communities in the justice process.

Lastly, the Integration of Customary Values in Sentencing is a principle that Indonesia could adopt from New Zealand, where Māori courts have successfully integrated customary values into the judicial process. In New Zealand, customary values play a crucial role in the sentencing decisions of judges, allowing for a more culturally sensitive approach to justice. The 2023 Criminal Code of Indonesia already provides a legal foundation for this by referring to "the legal values and sense of justice living within society" as guidelines for sentencing. This clause opens the door for judges to incorporate customary law into their decisions, acknowledging that local practices and values play a significant role in determining appropriate sentences. To build on this, Indonesia could further refine this approach by formally requiring judges to seek input from customary institutions in certain cases, particularly those involving indigenous peoples or community-based

offenses. This would ensure that sentencing reflects the values and norms of the community involved, promoting a more holistic and culturally relevant approach to justice.

By integrating these elements—formal legitimacy, restorative justice, human rights oversight, and the incorporation of customary values in sentencing—Indonesia can create a more inclusive and adaptive legal system. The lessons from Papua New Guinea, Canada, and New Zealand offer practical guidance for balancing the need for a unified legal system with the recognition of local customs and traditions. Through a hybrid justice system that incorporates these principles, Indonesia can foster a more equitable and culturally responsive justice system that aligns with both national values and international human rights standards. This approach not only strengthens legal pluralism but also provides a framework for addressing the diverse needs of Indonesia's multi-ethnic and multi-cultural society. Ultimately, such a system would contribute to a justice system that is more accessible, fair, and reflective of the nation's rich cultural heritage.

Pancasila, as the philosophical foundation of the state and the source of all sources of law, functions as the primary parameter for integrating customary law into the national judicial system. The first principle, Belief in the One and Only God, affirms that customary law containing religio-magical elements should be respected, provided that it does not negate the principle of religious freedom guaranteed by the Constitution.⁵¹ The second principle, Just and Civilized Humanity, serves as a normative safeguard ensuring that customary law does not include sanctions or practices that degrade human dignity, since respect for humanity constitutes the foundation of justice. The third principle, the Unity of Indonesia, provides guidance that the diversity of customary norms must not lead to fragmentation or disintegration of the national legal system; any hybrid justice system developed must maintain a balance between pluralism and legal unity. The fourth principle, Democracy Guided by the Inner Wisdom of Deliberation and Representation, reflects that customary dispute resolution based on deliberation represents a form of deliberative democracy consistent with Indonesia's tradition of collective participation. Finally, the fifth principle, Social Justice for All Indonesian People, requires that customary law function as an instrument for equitable justice and social restoration rather than as a means of discrimination or exclusion. Accordingly, Pancasila provides both an ethical and philosophical framework to ensure

⁵¹ Joko Setiyono and Aga Natalis, "Universal Values of Pancasila in Managing the Crime of Terrorism," *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 15, no. 2 (July 2023): 48–63, <https://doi.org/10.5130/ccs.v15.i2.8084>.

that the integration of customary law through hybrid justice systems remains consistent with the fundamental values of the nation and with the vision of a Pancasila-based rule-of-law state.

The Constitution also provides a normative foundation for the integration of customary law. Article 18B paragraph (2) of the 1945 Constitution states that “the State recognizes and respects customary law communities along with their traditional rights as long as they remain in existence and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia.” This provision constitutes the constitutional basis for the existence of customary justice institutions. In addition, the principle of equality before the law, as stipulated in Article 27 paragraph (1) of the 1945 Constitution, must serve as a guideline to ensure that a hybrid system does not produce discrimination. All citizens, whether living in customary territories or urban areas, must receive equal legal protection. Oversight mechanisms for customary justice institutions must therefore be regulated to ensure consistency with constitutional rights. Article 28I paragraph (1) of the 1945 Constitution affirms non-derogable rights, including the right to life and freedom from torture; consequently, customary sanctions that violate these principles must be considered invalid. This principle is consistent with the normative safeguards in Article 2 of the 2023 Criminal Code, which require conformity with human rights standards.

The integration of customary law into the national judicial system through a hybrid model requires harmonization with human rights principles and modern legal standards. Such harmonization may be achieved through three main measures. First, procedural standardization is necessary to establish a clear framework of customary procedural law so that processes remain transparent, fair, and accountable. Second, substantive synchronization is required to ensure that customary norms do not conflict with constitutional principles and human rights protections. Third, institutional coordination should be developed through mechanisms of cooperation between customary institutions and state courts. Through these mechanisms, customary law would function not merely as a supplementary element but as an integral component of the national criminal justice system. Formal courts would retain ultimate supervisory authority, while customary decisions would be recognized as legally valid and binding.

Indonesia could adopt a hybrid model of justice, which integrates customary law within the formal judicial system while respecting the cultural diversity of its regions. This model would allow for a harmonious coexistence between the state's legal framework and indigenous practices, thus strengthening the overall legal system and promoting access to justice for local communities. The hybrid model would involve several key characteristics, each designed to ensure that

customary law is effectively recognized, implemented, and overseen within a national legal context.

National Recognition is essential for the legitimacy of customary law within the national legal system. A Government Regulation should be issued as an implementing regulation of Article 2 of the 2023 Criminal Code. This regulation would define the criteria, procedures, and mechanisms for recognizing customary law in a formalized manner. Such a regulation would provide clarity on how customary law is validated and the process by which customary decisions are acknowledged as legally valid. This process would include safeguards to prevent arbitrary or harmful claims of custom, ensuring that customary practices align with the principles of justice and do not cause harm to the community. The regulation could set forth clear criteria for the recognition of customary practices, requiring them to be consistent with fundamental values such as respect for human rights and national constitutional principles.

Formal Customary Courts would serve as local institutions for administering justice based on customary law. These courts would be established with clear legal authority granted by the state, ensuring that their decisions are legally recognized. By establishing formal customary courts, Indonesia could provide a structured avenue for resolving disputes that are culturally sensitive and tied to indigenous norms. These courts could be authorized to handle minor criminal cases, such as petty theft, family disputes, or violations of customary norms. This approach would place customary law within the formal judicial system, enhancing its legitimacy and providing a mechanism for its enforcement. Additionally, the formalization of these courts would help strengthen community-based dispute resolution by giving it legal backing, ensuring that customary justice is not merely an informal, extrajudicial process, but rather an integral part of the nation's justice system.

A Restorative Pathway could be an essential component of the hybrid justice model. This mechanism would allow certain criminal cases to be diverted to customary forums, provided that all parties involved—the victim, the offender, and the relevant community—consent. Restorative justice focuses on repairing harm rather than punishing the offender, and it is often more aligned with the values of indigenous communities. In this approach, offenders would have the opportunity to engage in restorative rituals, make reparations, or participate in other forms of community-based resolutions. However, it is crucial that the state maintains supervision of this process to ensure that the outcomes adhere to national legal standards and human rights protections. This oversight could be exercised through prosecutors, judges, or other relevant authorities, ensuring that restorative justice mechanisms do not contradict national law or violate the rights of vulnerable individuals.

Human Rights Supervision is an essential safeguard to ensure that customary justice does not perpetuate harmful or discriminatory practices. While customary law reflects the cultural values and traditions of a community, it is critical to ensure that these practices do not violate the principles of non-discrimination, dignity, and human rights. Institutions such as the National Human Rights Commission (Komnas HAM) or other independent oversight bodies should be empowered to monitor and evaluate the decisions made by customary justice systems. This oversight would be crucial to prevent instances of abuse or practices that marginalize certain groups, such as women, children, or minority communities. Without proper supervision, as seen in countries like Papua New Guinea, customary justice systems could inadvertently promote discriminatory practices that conflict with international human rights standards. By embedding human rights supervision into the customary justice process, Indonesia could ensure that its hybrid model adheres to both local traditions and global human rights norms.

Finally, Integration into Sentencing would be a crucial step in recognizing the role of customary law within the national legal framework. Judges in formal courts should have the authority to consider the outcomes of customary settlements when determining criminal sentences. This would allow the court to take into account whether an offender has fulfilled any customary obligations, such as paying customary fines, participating in restorative rituals, or completing community service. Such integration would help bridge the gap between customary justice and formal legal systems, allowing for a more comprehensive approach to sentencing. By recognizing customary settlements as part of the criminal punishment process, Indonesia would foster a more inclusive and culturally sensitive approach to justice, making customary law not just an informal mechanism but an integral component of the national legal system.

A model of this kind would demonstrate that legal pluralism in Indonesia goes beyond declaratory recognition and is genuinely implemented through institutional, procedural, and substantive arrangements consistent with Pancasila, the 1945 Constitution, and universal human rights principles.

E. Conclusion

The recognition of living law in the Indonesian Criminal Code of 2023, particularly the acknowledgment of customary law within society, marks a significant shift in Indonesia's legal landscape. Historically, Indonesia's legal system has been rigid and positivist, emphasizing written law as the sole source of legal authority. However, with the recognition of living law in the

Indonesian Criminal Code of 2023, Indonesia is moving toward a more pluralistic and socially responsive legal system, one that is attuned to local customs and values.

Article 2 of the Criminal Code explicitly states that customary law can be applied within society, provided it does not conflict with Pancasila, the 1945 Constitution, human rights, or international legal principles. This provision signifies that customary law is now officially recognized as an integral part of the national legal framework, as long as it adheres to the basic values of the state and universally accepted norms. The law grants indigenous communities the right to resolve disputes and impose sanctions based on local traditions, without undermining the fundamental human rights protected by the Constitution.

The recognition of living law goes beyond its formal acknowledgment in the legal system; it also introduces a model of justice that focuses on substantive justice rather than mere retribution. In many indigenous communities, justice is often achieved not through punitive measures like imprisonment, but through restorative practices such as compensation, social rituals, or reconciliation. This approach is more aligned with the social fabric and values of these communities, which prioritize the restoration of relationships over punishment. For instance, in certain regions, customary law addresses violations by requiring fines, rituals, or compensation that aim to heal the social rift caused by the wrongdoing, rather than incarcerating the offender.

However, a significant challenge remains in implementing living law effectively. While the Criminal Code recognizes the substance of customary law as a basis for criminal liability, it does not provide a clear procedural framework for its application. The absence of procedural guidelines creates uncertainty, particularly regarding how customary decisions interact with formal judicial systems. For example, there is no standardized method for recognizing the validity of decisions made by customary institutions or integrating those decisions into the broader legal framework. This lack of clarity could lead to inconsistencies in how customary law is applied across regions, potentially confusing the public and creating legal disputes about which norms are binding in specific cases.

The need for further regulatory measures is clear. A government regulation that clarifies the procedures for recognizing and applying customary law is essential. Such regulations would establish the criteria for validating customary norms and provide a framework for how these norms should be incorporated into the formal legal system. Without such safeguards, there is a risk that customary law could be invoked arbitrarily, leading to practices that violate human rights or undermine justice, especially in cases involving vulnerable groups such as women or minorities.

Nonetheless, the integration of customary law into the criminal justice system has significant potential to enrich Indonesia's legal framework. It acknowledges the country's cultural diversity and provides an avenue for indigenous practices to be respected within the formal legal system. By recognizing customary law, the legal system becomes more inclusive, allowing it to adapt to the specific needs and traditions of various communities. This recognition can foster greater social cohesion and strengthen the legitimacy of the justice system by making it more reflective of the lived experiences of ordinary people.

Yet, for this integration to be effective, clear procedural standards must be established. Without a standardized process for implementing customary law, legal uncertainty will persist, and there is a risk that judicial decisions may be inconsistent or conflict with human rights standards. Therefore, it is crucial that the government creates regulatory measures that outline how customary law is to be recognized and applied in practice, ensuring that it is compatible with national constitutional principles and international human rights conventions.

The application of customary law can also contribute to a more restorative approach to justice. Restorative justice, which focuses on healing and reconciliation, is often better aligned with the values of indigenous communities than the retributive justice typically found in state courts. In many cases, traditional dispute resolution mechanisms emphasize repairing the harm caused by criminal acts, rather than punishing offenders. This approach provides a framework for addressing wrongdoing in a way that restores social balance and community harmony. For instance, in Papua, the practice of *bayar kepala* (head payment) involves compensating the victim, but also serves as a means to prevent inter-tribal conflict, thus fostering social peace.

Despite the advantages of restorative justice, it is essential that customary law remains subject to oversight to ensure it does not violate fundamental human rights. Practices such as corporal punishment or gender-based discrimination should be prohibited under the principle of equality before the law, as enshrined in the 1945 Constitution. Independent oversight bodies, such as Indonesia's National Commission on Human Rights (Komnas HAM), could play a vital role in monitoring and ensuring that customary law does not lead to harmful practices or discrimination.

Ultimately, the recognition of living law in the Indonesian legal system through the 2023 Criminal Code is a positive step toward a more inclusive and culturally responsive legal system. However, for this to be successfully implemented, clear procedural guidelines and oversight mechanisms must be put in place to ensure that customary law is applied fairly and consistently. By striking a balance between respecting local traditions and adhering to national and international human rights standards, Indonesia can create a legal system that better serves its diverse population

while ensuring justice for all. This approach would not only strengthen legal pluralism but also provide a more accessible, fair, and culturally sensitive justice system.

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