

The Juridical Recognition and Implementation of Living Law Decisions by State Courts in Indonesia

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Abstrak

Artikel ini membahas tentang pengakuan dan integrasi hukum adat dalam sistem hukum nasional, khususnya hukum pidana adat. Tantangan utamanya adalah bagaimana mengakui hukum pidana adat tanpa mengorbankan prinsip legalitas, kepastian hukum, dan hak konstitusional. Penelitian ini menggunakan metode yuridis-normatif melalui tiga pendekatan utama yakni perundang-undangan, konseptual, dan kasus. Data yang dianalisis meliputi Undang-Undang Dasar 1945, Undang-Undang Darurat Nomor 1 Tahun 1951, Undang-Undang Kekuasaan Kehakiman, Undang-Undang Kitab Undang-Undang Hukum Pidana, dan putusan pengadilan yang relevan. Hasil penelitian menunjukkan bahwa hukum pidana adat dapat diterima sebagai sumber hukum tidak tertulis, tetapi dengan batasan tertentu. Hukum adat harus masih relevan, diterima, dan ditaati oleh masyarakat adat. Namun, penerapannya harus sesuai dengan Pancasila, hak asasi manusia, dan prinsip negara hukum. Hakim memiliki peran penting dalam menilai pengaruh penyelesaian adat terhadap penuntutan, pemidanaan, atau pencegahan pemidanaan ganda. Mereka harus memastikan bahwa penerapan hukum adat tidak bertentangan dengan prinsip-prinsip tersebut.

Kata kunci: hukum adat; hukum pidana adat; local genius

Abstract

This article looks at how living law, customary criminal law fits into Indonesias national criminal law system. The main question is how to include criminal law without hurting the principles of legality, legal certainty and constitutional protections. A normative juridical method is used, which involves analyzing laws and court decisions. The analysis includes The 1945 Constitution of the Republic of Indonesia, Emergency Law Number 1 of 1951, Law Number 48 of 2009 on Judicial Power, Law Number 1 of 2023 on the National Criminal Code, Relevant court decisions, The study finds that customary criminal law is a source of unwritten law. It is recognized when it reflects norms that're still alive accepted and obeyed by customary communities. However its use must align with Pancasila, human rights, proportionality and the rule of law. Judges play a role in deciding if customary settlements can affect prosecution, sentencing or preventing double punishment. at the end living law that comes from indigenous peoples should be seen as a controlled expansion of law sources, guided by the constitution. The integration of criminal law requires careful consideration to ensure it works with the existing legal system. This means balancing law with national laws and constitutional protections. The role of judges is crucial, in making this balance work.

Keywords: living law; customary criminal law; local genius

INTRODUCTION

People in the Nusantara area had their rules a long time ago even before Indonesia became a country. These rules were followed by everyone in their communities. They were not always written down. People still knew they had to follow them. The rules came from what people thought was right and wrong and from what they did every day. The people in these communities knew what was fair and what was not. They knew when something was out of balance. So customary law is like a law that people actually live by. It comes from the way people really live and what they think is just. Customary law is not something old that people used to do. It is a system that helps people get along with each other solves problems and makes things again when something important to the community is threatened. Customary law does this by regulating how people interact with each other and by restoring balance in the community when it is needed as noted by people, like Koesnoe and Soepomo who wrote about this a time ago. ¹

The thing about law in Indonesia is that it shows the countrys legal system is not just about written laws made by the state. Indonesias legal system is really about laws existing together in the same place. You have laws made by the state, law and sometimes religious law all playing a role in peoples daily lives. When you look at it this way customary law is legitimate because people in the community recognize it follow it and practice it not just because the state says so.² So customary law is a source of law that comes from society. It is important for understanding what is fair and just especially when written laws do not fully get what people in a local community think is right.³ Customary law is really important in Indonesia because it helps people understand what is fair and, in their own community.

The Dutch colonial period was a time when the local customs and traditions of the people were given recognition by the colonial government. This recognition can be seen in the way the government referred to the laws and customs of the indigenous people in documents like the *Algemene Bepalingen van Wetgeving*, the *Reglement op het Beleid der Regering van Nederlands-Indie* and the *Indische Staatsregeling*. The term *adatrecht* was officially used on which meant that the local customs and traditions were now a part of the colonial legal system.

However the Dutch colonial government did not recognize the customs and traditions just to give the indigenous people more freedom. The recognition of law was also a way for the colonial government to control the indigenous people. The colonial government wanted to regulate and classify the communities and

¹ M. Koesnoe, *Catatan-catatan terhadap hukum adat dewasa ini* (Airlangga University Press, 1979).; M. Koesnoe, *Hukum adat sebagai suatu model hukum: Bagian I historis* (Mandar Maju, 1992).; Soepomo, *Bab-bab tentang hukum adat* (Cet. 4) (Universitas, 1966).

² J. Griffiths, "What is legal pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1-55, <https://doi.org/10.1080/07329113.1986.10756387>.; S. E. Merry, "Legal pluralism," *Law & Society Review* 22, no. 5 (1988): 869-896, <https://doi.org/10.2307/3053638>.; F. P. Disantara, "Konsep pluralisme hukum khas Indonesia sebagai strategi menghadapi era modernisasi hukum," *Al-Adalah: Jurnal Hukum dan Politik Islam* 6, no. 1 (2021): 1-36.

³ B. Z. Tamanaha, "Understanding legal pluralism: Past to present, local to global," *Sydney Law Review* 30, no. 3 (2008): 375-411.; F. von Benda-Beckmann, "Who's afraid of legal pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 34, no. 47 (2002): 37-82, <https://doi.org/10.1080/07329113.2002.10756563>.

customary law was a tool for them to do.⁴ So while customary law was recognized it was still, under the control of the government and the colonial state law was the most important source of power.

After Indonesia became independent the customary law changed from something that the colonial government controlled to a part of the countrys laws. People no longer just saw law as something that the government administered but it became a legitimate part of the constitution. The 1945 Constitution of the Republic of Indonesia says in Article 18B paragraph 2 that the state acknowledges and respects law communities and their traditional rights as long as these rights are still practiced do not go against how society is developing and are in line with the principle of the Unitary State of the Republic of Indonesia. The Constitution also says in Article 28I paragraph 3 that it will protect the identity and the rights of traditional communities. These rules show that customary law is recognized by the constitution. The recognition is not absolute. Customary law has to satisfy certain conditions: it has to be practiced in the community it has to be in accordance with society it must not conflict with the laws of the land and it must fit into the national legal framework of the Republic of Indonesia.⁵

From a point of view Emergency Law Number 1 of 1951 was a big moment in the relationship between customary law and the state judiciary. This law said that the country wanted to have one judicial system so it got rid of many customary and self-governing courts that used to be independent. Article 1 of Emergency Law Number 1 of 1951 shows that the state wanted to have one judiciary, which means that state courts would handle criminal cases. However just because customary courts were abolished it does not mean that customary law was no longer valid. Article 5 paragraph (3) subparagraph b of Emergency Law Number 1 of 1951 actually allowed state courts to think about the law that people live by especially in cases where something was considered wrong by customary law but was not always against the colonial Criminal Code. This is what we see in the laws of Republik Indonesia, 1951 and what people, like Jaya, 2005 and Mulyadi 2016 have said about Emergency Law Number 1 of 1951 and law.⁶

Thus it is important to tell apart the abolition of courts as institutions and the recognition of customary law as basic rules. Customary courts no longer were part of the states court system after the courts were unified. Customary values, norms

⁴ R. Bukido, *Hukum adat* (Deepublish, 2017).; P. Burns, *The Leiden legacy: Concepts of law in Indonesia* (KITLV Press, 2004).; M. B. Hooker, *Adat law in modern Indonesia* (Oxford University Press, 1978).; L. Mulyadi, "Putusan pidana adat dalam praktik peradilan negara Indonesia [Makalah nasional]" (2024).

⁵ Republik Indonesia, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945" (1945).; C. D. Wulansari, *Hukum adat Indonesia: Suatu pengantar* (Cet. 5) (Refika Aditama, 2010).; R. Simarmata, "Kedudukan dan peran peradilan adat pasca-unifikasi sistem peradilan formal," *Undang: Jurnal Hukum* 4, no. 2 (2021): 281–308, <https://doi.org/10.22437/ujh.4.2.281-308>.

⁶ Republik Indonesia, "Undang-Undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil. Lembaran Negara Tahun 1951 Nomor 9, Tambahan Lembaran Negara Nomor 8" (1951).; N. S. P. Jaya, *Relevansi hukum pidana adat dalam pembaharuan hukum pidana nasional* (Citra Aditya Bakti, 2005).; L. Mulyadi, "Eksistensi hukum pidana adat di Indonesia: Pengkajian asas, norma, teori, praktik dan prosedurnya," *Litigasi* 17, no. 2 (2016): 3284–3313, <https://doi.org/10.23969/litigasi.v17i2.138>.

and sanctions could still be used by judges in state court cases. As a result customary decisions or settlements do not have the official power as state court judgments. Yet they are still important as facts legal facts and things judges consider when determining guilt, restoration and what the community thinks is just. In this situation customary leaders still played a role. It changed from having formal authority to punish to having socio-cultural authority. This new role helped with resolving disputes balancing the community and showing that customary norms are still alive in a community. The shift, in role of leaders is also discussed by David et al. 2022; Herlius, 2022; Ter Haar Bzn., 1976.

This construction is also supported by a law in Indonesia. The Law Number 48 of 2009 talks about Judicial Power. It says that judges must understand what is fair in society. They have to explore, know, understand and follow the values that people live by. This is stated in Article 5 paragraph 1. The regulations also said that courts cannot refuse to handle a such case with indigenous aspect. Based on "*Ius Curia Novit*" principle the judges cannot deny a case because the law is unclear or not present. This is written in Article 10 paragraph 1.

Judges may use other sources to make decisions. Article 50, paragraph 1, states that judges are permitted to refer to these sources. They are not required to follow only written law. All of these rules help judges to act fairly. These rules connect written law with what society considers fair. Judges do not merely apply the law as it is written. They ensure that justice is upheld in a manner deemed appropriate by society. Some argue that judges should not merely follow the law. They contend that judges must consider what society deems fair. In this way, justice can be achieved. Written law is not always sufficient to ensure that justice is realized. This idea is supported by experts, including experts from the Republic of Indonesia in 2009, Rahardjo in 2009, and Suhariyanto in 2018.

The new Law Number 1 of 2023 on the Criminal Code shows that the government is changing the way it thinks about what is legal. Law Number 1 of 2023 on the Criminal Code is moving away from only following written rules and is now also considering what is really fair. Article 2 of the National Criminal Code says that the law recognizes the idea of living law as long as it agrees with Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and the basic principles of law that are accepted by most countries. This means that the government is striving to strike a balance between being fair and adhering to the rules. The government wants to ensure that the public is treated fairly. The government also wants to ensure that the laws are clear and easy to understand. Therefore, when it comes to norms, the government must exercise caution. The government must ensure that these norms remain widely accepted, do not conflict with the Constitution, and are not used to discriminate against the public. The recognition is not absolute. Customary law has to satisfy certain conditions: it has to be practiced in the community it has to be in accordance with society it must not conflict with the laws

The Republic of Indonesia is trying to make its laws more fair and just. Law Number 1 of 2023 on the Criminal Code is a step in that direction. The idea of living law is a part of Law Number 1 of 2023 on the Criminal Code, and it will be important to see how it is used in the future.⁷

⁷ Republik Indonesia, "Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana. Lembaran Negara Republik Indonesia Tahun 2023 Nomor 1, Tambahan Lembaran

This study is important because it looks at how state courts treat decisions that come from the law that people actually use in their lives. It is important to learn about this because it helps us understand where customary law fits into the system. We need to know how judges make decisions when they are dealing with law. They have to decide if they will accept it reject it or use it as part of their judgments. To do this study we need to look at the laws and principles that're already in place. We will look at what the law says about law and how it should be used. We will also try to understand what living law and legal pluralism mean. We will look at court cases to see how judges have handled law in the past. This will help us see if the judges are consistent in how they use law. We are using a different methods to do this study. We are looking at the laws and the constitution to see what they say about law. We are also trying to understand the ideas behind living law and how it fits into the system.⁸

Criminal law is not merely a tool used by the government to determine what constitutes a breach of the law and to punish people. Criminal law is also a means of maintaining order, ensuring fairness, and ensuring that the public feels that justice is being upheld. Customary law is particularly important in this context as it is derived from the community's daily customs, the values that they hold dear and the way in which they live their lives. We should not therefore see the law as something outmoded. The law is a set of rules which the community actually obeys. The law can be a guide as to what is good and what is bad in community. Customary law is a system that has a great influence on the behavior of the community. This has been written by scholars who have researched it, such as Koesnoe, Soepomo and Wulansari. They say we need to look at the law as a way to judge what people are doing and decide what is right in community.⁹

When we talk about the law we have to think about what is fair and just. And the idea that the law is something alive and changing is very important, because it is bound up with the principle of legality and the idea that there are laws that are not written down. Modern law for criminals is based on an important principle that says you can't punish someone for something unless it was illegal before they did it. The point of the law is basically you can't be in trouble for anything unless you clearly did something illegal. In Indonesia things are a little different because there are different local customs and values. If we followed the law like it is written it could be a problem because it does not always match what the community thinks is fair. That is where customary law for criminals comes in. This type of law helps balance the need for the law with the need, for justice that makes sense to the community.¹⁰

Negara Nomor 6842" (2023).; A. S. Magala, "Akomodasi hukum yang hidup dalam KUHP baru Indonesia menurut perspektif hukum progresif," *Jurnal Spektrum Hukum* 20, no. 2 (2023): 115–127, <https://doi.org/10.56444/sh.v20i2.4345>.

⁸ L. Mulyadi, "Eksistensi hukum pidana adat di Indonesia: Pengkajian asas, norma, teori, praktik dan prosedurnya," *Litigasi* 17, no. 2 (2016): 3284–3313, <https://doi.org/10.23969/litigasi.v17i2.138>; R. Simarmata, "Kedudukan dan peran peradilan adat pasca-unifikasi sistem peradilan formal," *Undang: Jurnal Hukum* 4, no. 2 (2021): 281–308,

⁹ M. Koesnoe, *Catatan-catatan terhadap hukum adat dewasa ini* (Airlangga University Press, 1979).; Soepomo, *Bab-bab tentang hukum adat* (Cet. 4) (Universitas, 1966).; C. D. Wulansari, *Hukum adat Indonesia: Suatu pengantar* (Cet. 5) (Refika Aditama, 2010).

¹⁰ Darmawan, Yono Sugi Anom, Amelia Karima Eliana, and Jennifer Kristian Mantiri. 2026. "A Critical Constitutional Analysis of Expanding the State Budget Deficit Limit through a Government

The law experts Hiariej, Julyano, Sulistyawan and Tongat have written about this. They have talked about it in their work like Hiariej did in 2016 and Julyano and Sulistyawan did in 2019 and Tongat and others did in 2020.

This research uses three approaches to get a better understanding of the law. The statutory approach is one of them. We use the approach to look at the laws that support living law and customary criminal law. We are talking about the laws such as Article 18B paragraph 2 and Article 28I paragraph 3 of the 1945 Constitution of the Republic of Indonesia. We also look at Article 5 paragraph 3 subparagraph b of Emergency Law Number 1 of 1951 Law Number 48 of 2009 on Judicial Power and Article 2 of Law Number 1 of 2023 on the National Criminal Code. The statutory approach is important because it helps us understand how the law is changing from being very strict to being more flexible, in criminal law, which is the law of the Republic of Indonesia. We need to understand this change to see how living law and customary criminal law are becoming a part of criminal law.

The study looks at legal ideas. These ideas include living law, customary criminal law, and legal pluralism. The principle of legality, justice, proportionality, and the rule of law are also examined. This study uses an approach that tries to explain criminal law. Customary criminal law is not an exception to the principle of legality. Instead, it is a controlled expansion of law. This expansion is controlled by the constitution. The approach helps to clarify a problem. There is tension between being certain and being fair. This tension exists in the recognition of law. Unwritten law is part of the criminal justice system. Unwritten law forms part of the criminal justice system. This study seeks to address this tension. It examines criminal law and the principle of legality. These two concepts are crucial as they aid in understanding the criminal justice system.

A case-study approach is employed to analyse court rulings that demonstrate how state courts handle criminal law and customary resolutions in criminal cases. This approach helps to determine whether judges accept, limit, or reject the use of customary law in their rulings. By analysing court rulings, this study examines the extent to which customary resolutions may influence prosecution, sentencing, and judicial considerations, or prevent punishment based on the principle of *ne bis in idem*. The legal literature used in this research is both primary and secondary. The main sources used are the 1945 Constitution of the Republic of Indonesia, Emergency Law Number 1 of 1951, Law Number 48 of 2009 concerning the Judicial Power, Law Number 1 of 2023 concerning the Criminal Code, and relevant court decisions.

The analysis also seeks to analyze to what extent customary criminal law is recognized and applied by state courts. Thus, the present study provides an argument on the incorporation of customary law into the criminal justice system. This argument is in accordance with legality, legal certainty, human rights, proportionality and constitutional principles.

Regulation in Lieu of Law (Perppu): Assessing the 'Compelling Urgency' Requirement." *Adagium: Jurnal Ilmiah Hukum* 4 (2): 473–505. <https://doi.org/10.70308/yzgspc12>.

RESEARCH METHOD

This study uses a normative juridical research method by examining legal norms, principles, doctrines, and court decisions on the recognition and application of living law in the criminal justice system in Indonesia. Normative juridical research is directed to the analysis of law as a normative system including legal principles, statutory regulations, judicial decisions and legal doctrines.¹¹

Secondly, the analysis of legal concepts and doctrines such as living law, customary criminal law, legal pluralism, the principle of legality, restorative justice and the rule of law is approached conceptually. The approach is intended to understand the theoretical basis of the constitutional recognition of customary criminal law as a source of unwritten law in the Indonesian legal system .

Third, the case approach is followed by reviewing relevant judicial decisions on the treatment of customary settlements and living law by state courts. Court decision analysis seeks to assess the extent to which judges acknowledge, restrict, or incorporate customary criminal law into judicial reasoning and criminal adjudication.¹²

The legal material of this study is the primary legal material and the secondary legal material. The main legal materials are the 1945 Constitution of the Republic of Indonesia, Emergency Law Number 1 of 1951, Law Number 48 of 2009 on Judicial Power, Law Number 1 of 2023 concerning the National Criminal Code, and related court decisions. Secondary legal materials such as legal textbooks, journal articles, scientific papers and other scholarly writings on customary law, criminal law, legal pluralism and criminal law reform in Indonesia.¹³

Legal materials were collected by the method of literature study and analyzed qualitatively by descriptive-analytical techniques . The analysis was conducted by statutory interpretation, doctrinal review, and comparative study of the opinions of scholars and judicial reasoning, to determine the juridical status, constitutional limits, and practical implementation of living law in the Indonesian criminal justice system.

RESULTS AND DISCUSSION

The Integration of Customary Criminal Law into the Indonesian Criminal Justice System: A Normative Analysis of Legality Limits and the Role of Judges in Court Decisions

Customary criminal law is like a set of rules that everyone knows but which are not written down. These rules explain what is considered wrong and what consequences a person will face if they commit a certain act. This differs from state law, which usually imposes penalties through the courts. Customary criminal law is more about making things right again. It wants to bring balance to the community. This can be done by saying sorry paying back or doing a ritual. The goal of criminal law is to make harmony again between the person who did something wrong the victim, their families and the community. This is important because it shows that we

¹¹ Marzuki, Peter Mahmud. 2017. *Penelitian Hukum*. Rev. ed. Jakarta: Prenada Media.

¹² Ibid, hal.56

¹³ Soekanto, Soerjono, and Sri Mamudji. 1995. *Penelitian hukum normatif: Suatu tinjauan singkat*. 4th ed. Jakarta: Raja Grafindo Persada.

do not always have to punish people when they do something. Sometimes we can just try to fix the harm that was done and make everyone get along again. Many people have written about this like Haveman in 2002 Jaya in 2005 Ter Haar Bzn in 1976. Widnyana in 2013. Customary criminal law is a way to restore harmony. It is very important, to the community.¹⁴

The Indonesian Constitution of 1945 Article 18B paragraph 2 says that the state respects and recognizes law and its traditional rights. This recognition is as long as customary law is still practiced, fits with the development of society, and matches the Unitary State of Indonesia. The Constitution also affirms the importance of respecting identity and the rights of traditional communities in Article 28I paragraph 3. These constitutional provisions mean that customary law is a part of Indonesia's law. The conditions for recognition are important to prevent enforcement. The goal is to ensure customary law aligns with the rule of law, human rights, and protects dignity. The 1945 Constitution and scholars, like Simarmata, support these conditions.

The law in our country has always recognized the importance of customary criminal law. This started with Emergency Law Number 1 of 1951. This law got rid of customary courts and self-governing courts as separate institutions that made their own decisions. However, it did not completely do away with law as something that people live by. Article 5 paragraph 3 sub paragraph b of Emergency Law Number 1 of 1951 made it possible for state courts to consider things that people thought were wrong, even if they were not exactly the same as what is written in the Criminal Code. This shows that the state wanted to have one set of rules for the courts but also wanted to include the values of customary law in the way the state handled criminal cases. Customary criminal law is still something that is considered in our country. The state is trying to balance customary criminal law with the official laws of the land, as seen in the work of Republik Indonesia in 1951 and the writings of Mulyadi in 2016 and Jaya in 2005, who all wrote about customary criminal law.¹⁵

From the perspective of criminal law, Article 5 paragraph (3) sub-paragraph b of Emergency Law Number 1 of 1951 performed a complex normative function. First, it recognized that certain acts considered reprehensible under customary law could be punishable even if they were not explicitly regulated in the Criminal Code. Second, it granted judges authority to assess the proportionality between customary sanctions and substitute criminal punishment. Third, it helped prevent double punishment where the offender had already fulfilled an appropriate customary sanction. Thus, the provision did not merely serve as a basis for recognizing customary criminal law, but also functioned as a legal mechanism connecting

¹⁴ R. H. Haveman, *The legality of adat criminal law in modern Indonesia* (Mandar Maju, 2002).; N. S. P. Jaya, *Relevansi hukum pidana adat dalam pembaharuan hukum pidana nasional* (Citra Aditya Bakti, 2005).; B. Ter Haar Bzn., *Azas-azas hukum adat* (S. Poesponoto, Trans.) (Pradnya Paramita, 1976).; I. M. Widnyana, *Hukum pidana adat dalam pembaharuan hukum pidana* (PT Fikahati Aneska bekerja sama dengan BANI Arbitration Center, 2013).

¹⁵ R. H. Haveman, *The legality of adat criminal law in modern Indonesia* (Mandar Maju, 2002).; N. S. P. Jaya, *Relevansi hukum pidana adat dalam pembaharuan hukum pidana nasional* (Citra Aditya Bakti, 2005).; B. Ter Haar Bzn., *Azas-azas hukum adat* (S. Poesponoto, Trans.) (Pradnya Paramita, 1976).; I. M. Widnyana, *Hukum pidana adat dalam pembaharuan hukum pidana* (PT Fikahati Aneska bekerja sama dengan BANI Arbitration Center, 2013).

customary law with the principles of proportionality, justice, and protection against double punishment within the state criminal justice system.¹⁶

Judges play a role in recognizing the laws that people usually follow. When the customary courts were stopped, judges in state courts became the people who decide if a customary rule can be seen as a law that people actually follow. They also decide if a customary settlement can be used in a case. The law says judges have to do this. Article 5 of Law Number 48 of 2009 on Judicial Power says judges have to look into the values and sense of justice that people in society follow.¹⁷ Article 10 says courts cannot say they will not hear a case just because the law is not clear. Article 50 says judges can use laws when making decisions. So, judges do not just have to follow what the law says. They also have to think about what is fair in each case. Judges have to understand the law in a way that makes sense for the people. This is what Republik Indonesia said in 2009. It is also what Rahardjo said in 2009 and Suhariyanto said in 2018. Judges have to make sure the law is fair and for everyone, and that is a big responsibility for judges.¹⁸

The application of criminal law has to be kept in check by the basic principles of modern criminal law. We cannot let the recognition of living law become a reason to criminalize things without any limits. In a country that follows the rule of law, any time individual freedom is restricted by punishment, it has to follow certain principles. These principles are that the law must be clear, it must not discriminate, it must be proportionate, and it must respect rights. So, judges have to make sure that the customary norm they are using is really still alive and is known, accepted, and obeyed by the people it affects. Judges have to check if customary punishments fit with the Constitution, Pancasila values and basic justice principles.¹⁹ These rules are necessary to avoid any confusion in the application of law in criminal cases. This is because sentences could be decided based on unfair local norms.²⁰ Some research also support this idea.

Indonesia's criminal law reform, set out in Law No. 1 of 2023 (Judika), has once again amended the customary law system as follows. Article 2 of the Criminal Code states that the law applicable within society is such that an act is punishable if recognised as such within the Unitary State of the Republic of Indonesia, based on the 1945 Constitution, human rights and international law. In this article, there is no

¹⁶ B. Ter Haar Bzn., *Azas-azas hukum adat* (S. Poesponoto, Trans.) (Pradnya Paramita, 1976).; I. M. Widnyana, *Hukum pidana adat dalam pembaharuan hukum pidana* (PT Fikahati Aneska bekerja sama dengan BANI Arbitration Center, 2013).

¹⁷ S. C. Pawana, "Polemik atas konsep "hukum yang hidup" dalam pembaharuan KUHP di Indonesia," *Judicatum: Jurnal Dimensi Catra Hukum* 1, no. 1 (2023): 51–62,

¹⁸ R. H. Haveman, *The legality of adat criminal law in modern Indonesia* (Mandar Maju, 2002).; N. S. P. Jaya, *Relevansi hukum pidana adat dalam pembaharuan hukum pidana nasional* (Citra Aditya Bakti, 2005).; B. Ter Haar Bzn., *Azas-azas hukum adat* (S. Poesponoto, Trans.) (Pradnya Paramita, 1976).; I. M. Widnyana, *Hukum pidana adat dalam pembaharuan hukum pidana* (PT Fikahati Aneska bekerja sama dengan BANI Arbitration Center, 2013).

¹⁹ *Judicatum: Jurnal Dimensi Catra Hukum* 1, no. 1 (2023): 51–62, <https://doi.org/10.35326/judicatum.v1i1.4045>;

²⁰ R. H. Haveman, *The legality of adat criminal law in modern Indonesia* (Mandar Maju, 2002).; N. S. P. Jaya, *Relevansi hukum pidana adat dalam pembaharuan hukum pidana nasional* (Citra Aditya Bakti, 2005).; B. Ter Haar Bzn., *Azas-azas hukum adat* (S. Poesponoto, Trans.) (Pradnya Paramita, 1976).; I. M. Widnyana, *Hukum pidana adat dalam pembaharuan hukum pidana* (PT Fikahati Aneska bekerja sama dengan BANI Arbitration Center, 2013).

fixed set of regulations that must be followed, but there is room for manoeuvre. Within the concept of national criminal law, we have not lost provisions for unwritten laws; however, these must comply with the Aji Clause of the Constitution and human rights. The explanatory notes to the provisions demonstrate the state's efforts to recognise the existence of legal norms applicable in our country without rendering the provisions of our criminal law obscure and chaotic.²¹ This step is intended to make the criminal justice system in Indonesia more human rights-centred. Law No. 1 of 2023 (Judika) demonstrates that Indonesia has taken a step towards incorporating both doctrinal and customary law. The hope is that Indonesia can establish a criminal legal system that truly delivers justice for all.²²

However, Article 2 of the National Criminal Code also presents normative challenges. One of the main challenges relates to how to determine whether a customary norm is genuinely applicable law, rather than merely a unilateral claim by a particular group. Furthermore, the regulation of customary criminal offences through local regulations requires careful scrutiny to prevent excessive fragmentation of criminal law across different regions. If every region is permitted to formulate customary criminal offences without clear guidance, the national criminal justice system risks losing a minimum level of uniformity in protecting the rights of citizens. Therefore, national parameters are required regarding the evidentiary requirements for the validity of customary law, the forms of customary sanctions that may be recognised, their legal standing in relation to state criminal judgments, and the relationship between customary sanctions and the principle of *ne bis in idem*.²³

In the courts a big problem is how judges should handle agreements made between people before or, during a trial. If someone who did something has already been punished in a way that is fair and things are okay again the judge has to think carefully about whether they should be punished again by the state. This is because it would not be fair to punish them for the same thing. On the hand if the punishment was not fair or did not happen or if it does not protect the victim the state court can still go ahead with the trial to make sure things are fair and people are protected. So just because people have made an agreement it does not mean the state cannot get involved and punish someone. It should be something the judge thinks about when deciding whether to go ahead with a trial how severe the punishment should be or what kind of punishment is fair. This is what David and other people said in 2022. Also what Herlius said in 2022 and Simarmata said in 2021.²⁴

²¹ T. S. J. Utama, ““Hukum yang hidup” dalam Rancangan Kitab Undang-Undang Hukum Pidana (KUHP): Antara akomodasi dan negasi,” *Masalah-Masalah Hukum* 49, no. 1 (2020): 14–25, <https://doi.org/10.14710/mmh.49.1.2020.14-25>.

²² Republik Indonesia, “Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana. Lembaran Negara Republik Indonesia Tahun 2023 Nomor 1, Tambahan Lembaran Negara Nomor 6842” (2023).;

²³ A. Yanto and F. Hikmah, “Akomodasi hukum yang hidup dalam Kitab Undang-Undang Hukum Pidana Nasional menurut perspektif asas legalitas,” *Recht Studiosum Law Review* 2, no. 2 (2023): 81–91, <https://doi.org/10.32734/rslr.v2i2.14162>.

²⁴ Haris, O. K. David and H. Handrawan, “Penguatan putusan hukum adat melalui penetapan pengadilan dalam penyelesaian perkara tindak pidana umum,” *Halu Oleo Legal Research* 4, no. 1 (2022): 76–88, <https://doi.org/10.33772/holresch.v4i1.25163>;

Based on the foregoing analysis, customary criminal law within the Indonesian criminal law system may be affirmed as a limitedly recognized source of unwritten law. Such recognition derives from the Constitution, Emergency Law Number 1 of 1951, the Law on Judicial Power, and now the National Criminal Code. However, this recognition must be situated within the framework of the rule of law, which guarantees legality, legal certainty, proportionality, victim protection, and human rights. Accordingly, living law in criminal law should not be understood as an unrestricted exception to the legality principle, but as a limited expansion of criminal law sources that remains controlled by the Constitution and the principles of modern criminal law.

When we look at the criminal law system, we can see that customary criminal law is a source of unwritten law that is recognized, but only to a certain extent. This recognition is derived from the Constitution, Emergency Act No. 1 of 1951, the Judicial Power Act, and the Criminal Code. However, we must bear in mind that this recognition forms part of the principle of the rule of law, which ensures that everything is lawful, certain and proportionate, whilst protecting victims and human rights. Thus, when we speak of customary law within the legal system, we must not regard it as an exception to the rule that everything must be lawful. Rather, it is a means of expanding the sources of criminal law, whilst remaining subject to the Constitution and the principles of modern criminal law.²⁵ Therefore, when conducting research on how customary criminal law is recognised and utilised within the Indonesian criminal justice system, we must focus on how state courts apply it in their judgments. We need to use a juridical method because we are dealing with legal norms, principles, doctrines, and court decisions.²⁶ We will look at the laws that allow living law to be recognized, such as the 1945 Constitution, Emergency Law Number 1 of 1951, the Law on Judicial Power, and the National Criminal Code. We will also try to understand concepts like the legality principle, legal pluralism, customary criminal law, and restorative justice. Additionally, we will look at cases to see how judges actually use customary law in criminal cases. By doing this, we hope to get a picture of where customary law fits into the national criminal law system, as discussed by Indonesian criminal law experts like Marzuki, Soekanto, Mamudji, Mulyadi, and Simarmata.²⁷

The Existence and Integration of Living Law within the Indonesian National Criminal Law System: The Tension Between the Principle of Legality and Substantive Justice in Court Decisions

As discussed earlier, customary criminal law remains one of the recognized sources of law in Indonesia, although its application is subject to certain limitations. Its existence is supported by the Constitution, the Criminal Code, and other statutory

²⁵ F. Herlius, "Kaidah hukum adat dalam penuntutan demi keadilan berbasis kearifan lokal," *Perspektif: Kajian Masalah Hukum dan Pembangunan* 27, no. 2 (2022): 94–103, <https://doi.org/10.30742/perspektif.v27i2.831>;

²⁶ R. Simarmata, "Kedudukan dan peran peradilan adat pasca-unifikasi sistem peradilan formal," *Undang: Jurnal Hukum* 4, no. 2 (2021): 281–308, <https://doi.org/10.22437/ujh.4.2.281-308>.

²⁷ L. Mulyadi, "Eksistensi hukum pidana adat di Indonesia: Pengkajian asas, norma, teori, praktik dan prosedurnya," *Litigasi* 17, no. 2 (2016): 3284–3313, <https://doi.org/10.23969/litigasi.v17i2.138>;

regulations, provided that it complies with the fundamental principles of justice, legal certainty, and the protection of human rights. These principles ensure that customary criminal law contributes to the realization of justice while remaining consistent with the broader framework of the Indonesian legal system.

In Indonesia, lawmaking is not solely the responsibility of the state. Communities also play an important role in shaping legal norms and values. As a nation characterized by rich ethnic, cultural, and social diversity, Indonesia requires a legal system that reflects the values and traditions of its various communities. Consequently, the law should encompass not only formal statutory rules but also the living norms and customs that continue to guide local societies.

The purpose of law extends beyond imposing punishment for wrongdoing. It also serves to maintain public order, protect individuals, and promote justice within society. In this context, customary law represents the collective values, traditions, and social norms that have governed community life for generations. Rather than being merely a collection of historical rules, customary law is a living legal system that continues to function effectively in many parts of Indonesia.

As an integral part of social life, customary law enables communities to assess conduct, resolve disputes, and preserve social harmony according to their shared values. For this reason, customary criminal law continues to hold significant relevance within Indonesia's legal system. Its enduring role demonstrates that legal regulation is not based solely on statutory provisions but is also influenced by social norms that have developed organically within society.

A number of scholars have examined the significance of customary law in Indonesian legal development, including Koesnoe,²⁸ Soepomo²⁹, and Wulansari.³⁰ Their works demonstrate that customary law has made a substantial contribution to the evolution of Indonesia's legal system and continues to provide a framework for resolving disputes and evaluating conduct in accordance with community values. The recognition of customary law is therefore essential to promoting justice, maintaining social order, and fostering an inclusive legal system in which formal law and living law complement one another. This perspective underscores the continuing importance of customary law in the development of Indonesia's national legal system.

In discussing criminal law, the concepts of fairness and justice are fundamental. One of the cornerstones of modern criminal law is the principle of legality, which provides that no person may be punished for an act unless it has been clearly established as a criminal offense by law before the act was committed. This principle protects individuals from arbitrary prosecution and punishment while ensuring legal certainty by enabling citizens to understand in advance which conduct is prohibited.

Nevertheless, the application of criminal law in a pluralistic society such as Indonesia cannot rely exclusively on written legislation. Indonesia's diverse cultural, ethnic, and customary communities maintain social norms that are not

²⁸ M. Koesnoe, *Catatan-catatan terhadap hukum adat dewasa ini* (Airlangga University Press, 1979).

²⁹ Soepomo, *Bab-bab tentang hukum adat* (Cet. 4) (Universitas, 1966).

³⁰ C. D. Wulansari, *Hukum adat Indonesia: Suatu pengantar* (Cet. 5) (Refika Aditama, 2010).

always reflected in statutory law. As a result, certain forms of conduct may be regarded as wrongful by a community even though they are not explicitly regulated by legislation. In such circumstances, customary law, as a form of living law, plays an important role. It embodies the unwritten values, norms, and traditions that continue to govern the lives of local communities and provide standards for evaluating conduct and resolving disputes. By complementing formal legal rules, customary criminal law helps narrow the gap between positive law and society's sense of justice. Its recognition therefore promotes a more balanced legal system that upholds both legal certainty and substantive justice in accordance with Indonesia's social and cultural diversity.

The relationship between the principle of legality and customary criminal law has attracted considerable scholarly attention. Among those who have examined this issue are Hiariej,³¹ Julyano and Sulistyawan,³² and Tongat et al.³³, who discuss the challenges and opportunities involved in integrating customary legal values into Indonesia's contemporary criminal law system.

Based on the foregoing discussion, customary criminal law may be regarded as a recognized source of unwritten law within Indonesia's legal system. Its existence is acknowledged in the Constitution, Emergency Law Number 1 of 1951, the Law on Judicial Power, and the National Criminal Code. However, its application must remain consistent with the principles of the rule of law, including legality, legal certainty, proportionality, the protection of victims, and respect for human rights. Accordingly, the recognition of living law should not be understood as an exception to the principle of legality. Rather, it represents an expansion of the sources of criminal law that remains subject to constitutional safeguards and the fundamental principles of modern criminal justice.

Customary criminal law consists of norms that identify certain conduct as a disturbance to the balance of community life and prescribe customary sanctions to restore that balance. Unlike state criminal law, which primarily emphasizes punishment, customary law is generally restorative in nature. Its sanctions commonly take the form of reconciliation, apologies, compensation, or traditional ceremonies intended to repair relationships and re-establish harmony between the offender, the victim, their families, and the wider community. This restorative orientation illustrates that the resolution of criminal conduct does not always require punitive measures but may instead prioritize repairing harm, restoring social equilibrium, and promoting reconciliation. Such an approach has been widely recognized in the literature, including the works of Haveman,³⁴ Jaya,³⁵ Ter Haar

³¹ E. O. S. Hiariej, *Prinsip-prinsip hukum pidana* (Cahaya Atma Pustaka, 2016).

³² M. Julyano and A. Y. Sulistyawan, "Pemahaman terhadap asas kepastian hukum melalui konstruksi penalaran positivisme hukum," *Crepido* 1, no. 1 (2019): 13–22, <https://doi.org/10.14710/crepido.1.1.13-22>.

³³ Prasetyo, S. N., Aunuh, N. Tongat and Y. A. Fajrin, "Hukum yang hidup dalam masyarakat dalam pembaharuan hukum pidana nasional," *Jurnal Konstitusi* 17, no. 1 (2020): 157–177, <https://doi.org/10.31078/jk1717>.

³⁴ R. H. Haveman, *The legality of adat criminal law in modern Indonesia* (Mandar Maju, 2002).

³⁵ N. S. P. Jaya, *Relevansi hukum pidana adat dalam pembaharuan hukum pidana nasional* (Citra Aditya Bakti, 2005).

Bzn.,³⁶ and Widnyana,³⁷ all of whom emphasize the continuing significance of customary criminal law in achieving justice within Indonesian society.

The Indonesian criminal law system recognizes customary criminal law as a source of unwritten law. Although it is not codified, its existence is acknowledged by the Constitution, Emergency Law Number 1 of 1951, the Law on Judicial Power, and the National Criminal Code. Nevertheless, the application of customary criminal law is not without limits. It must remain consistent with the principles of the rule of law, including fairness, legal certainty, proportionality, and respect for human rights. In this way, the recognition of customary criminal law complements the national legal system while ensuring that its implementation remains compatible with constitutional values and fundamental legal principles. Customary criminal law should not be seen as a way to get around the rules of law. Instead, it should be a way to expand the sources of criminal law, and it should always be controlled by the Constitution and the principles of modern criminal law. The 1945 Constitution of the Republic of Indonesia says that the state recognizes and respects law communities and their traditional rights. This is stated in Article 18B paragraph (2), which says that these communities and rights are recognized as long as they are still alive, make sense in today's society, and do not go against the principles of the Unitary State of the Republic of Indonesia. Another part of the Constitution, Article 28I paragraph (3), says that the country respects identity and the rights of traditional communities. These two parts of the Constitution show that customary law is a part of Indonesia's system, but only if it meets certain conditions. In the context of law, these conditions are crucial to ensure that customary law is applied fairly and consistently with the rule of law, human rights, and the protection of human dignity according to Republik Indonesia and Simarmata.

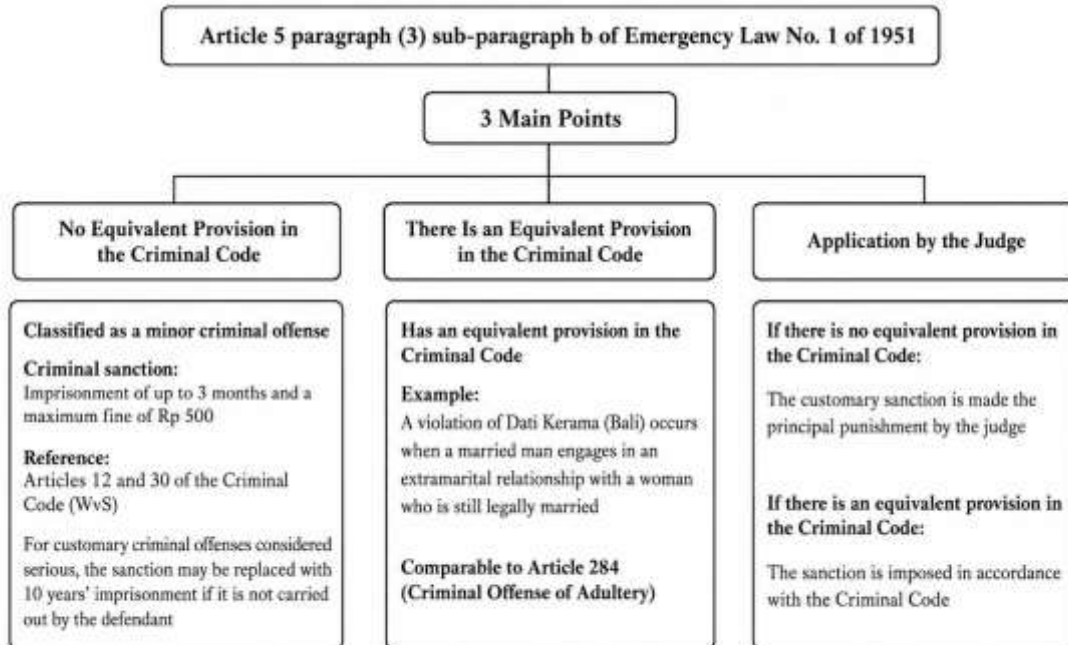
The law in Indonesia has always recognized the importance of customary criminal law. This started with Emergency Law Number 1 of 1951. This law stopped customary courts and self-governing courts from being independent. However, it did not get rid of customary law. Customary law is still a part of society. Article 5 of Emergency Law Number 1 of 1951 says that state courts can consider acts that are against customary law, even if they are not against the Criminal Code. This shows that the state wants to have a unified judicial system, but it also wants to include customary values in state criminal proceedings. The recognition of customary criminal law is also found in the 1945 Constitution of the Republic of Indonesia. Article 18B says that the state recognizes law communities and their traditional rights. This is as long as they are still alive and in line with the development of society. The state also has to make sure that these rights are consistent with the principle of the Unitary State of the Republic of Indonesia. Article 28I also says that the state respects identity and the rights of traditional communities. These two articles in the Constitution show that customary law is a part of Indonesia's legal system. However, this recognition is conditional. In the context of law, these conditions are very important. They make sure that customary law is not applied randomly but is consistent with the rule of law, human rights, and the protection of dignity. Customary criminal law and the Criminal Code have to work to protect

³⁶ B. Ter Haar Bzn., *Azas-azas hukum adat* (S. Poesponoto, Trans.) (Pradnya Paramita, 1976)

³⁷ I. M. Widnyana, *Hukum pidana adat dalam pembaharuan hukum pidana* (PT Fikahati Aneska bekerja sama dengan BANI Arbitration Center, 2013).

people's rights. Customary criminal law is still a part of the legal system in Indonesia. The state has to make sure that it is applied fairly and consistently with the law. This is what the Constitution and the laws of Indonesia say about customary criminal law.³⁸

Figure 1. Three Main Conclusions from the Formulation of Article 5 Paragraph (3) Sub-paragraph b of Emergency Law Number 1 of 1951



Source: Lilik Mulyadi, The Existence of Customary Criminal Law in Indonesia: A Study of Its Principles, Norms, Theories, Practices, and Procedures, 17 Jurnal Litigasi 3284, 3305 (2016).

The law in our country has a long history and Emergency Law Number 1 of 1951 is very important to this. This law got rid of courts and self-governing courts as separate institutions that make decisions. However it did not get rid of customary law as something that people follow in their daily lives.

In Emergency Law Number 1 of 1951 there is a part that says state courts can think about things that people consider to be wrong even if these things are not written down in the Criminal Code. This means that the government is trying to make all the courts the same while also letting customary values be a part of how criminal cases are handled in state courts. This is what Republik Indonesia and some other people like Mulyadi and Jaya have said.

When we look at this from the point of view of law Emergency Law Number 1 of 1951 does some very important things. First it says that some things that are considered wrong by law can be punished, even if they are not written down in the Criminal Code. Second it gives judges the power to decide if the punishment from

³⁸ Republik Indonesia, "Undang-Undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil. Lembaran Negara Tahun 1951 Nomor 9, Tambahan Lembaran Negara Nomor 8" (1951); L. Mulyadi, "Eksistensi hukum pidana adat di Indonesia: Pengkajian asas, norma, teori, praktik dan prosedurnya," Litigasi 17, no. 2 (2016): 3284-3313, <https://doi.org/10.23969/litigasi.v17i2.138>; N. S. P. Jaya, Relevansi hukum pidana adat dalam pembaharuan hukum pidana nasional (Citra Aditya Bakti, 2005).

law is fair compared to the punishment from the state. Third it helps make sure that someone is not punished twice for the thing if they have already been punished by customary law.

Emergency Law Number 1 of 1951 is a deal. It says that the laws we normally follow are important.. Emergency Law Number 1 of 1951 also talks about being fair and making sure people do not get punished twice for the same thing. These ideas are really important in our countrys system for dealing with criminals. Some people like Danil and Herlius and Mulyadi have talked about Emergency Law Number 1 of 1951 and criminal law. They think Emergency Law Number 1 of 1951 is important, for our countrys law. Emergency Law Number 1 of 1951 is what they are talking about when they discuss such a law.³⁹

The position of judges in recognizing criminal law is really important. When customary courts were no longer used, judges in state courts became the people who decide if a customary norm can be seen as a law that people actually follow and if a customary settlement can be used in a criminal case. Judges have to do this because of Article 5 paragraph (1) of Law Number 48 of 2009 on Judicial Power, which tells judges that they need to look into, follow, and understand the values of the law and what people think is fair in society. Article 10 paragraph (1) says that courts cannot say no to hearing a case just because the law is not clear or does not exist, and Article 50 paragraph (1) allows judges to use laws that are not written down when they are making decisions. So, judges do not just have to follow what the law says. They also have to think about what customary criminal law means in the context of the case so that it is fair to everyone in society. Judges have to think about criminal law and how it relates to social justice, as seen in the work of Republik Indonesia, Rahardjo, and Suhariyanto. Customary criminal law is what judges need to consider when they are making decisions about cases, and they have to think about how customary criminal law can be used to make sure that people get a fair trial.⁴⁰

The law has to be fair and reasonable when it comes to cases. We have to make sure that people's freedom is not taken away without a reason. In a country where the law is fair, any punishment must follow some basic rules. These rules are that the law must be clear, it must not discriminate against anyone, and it must be fair. The punishment must also respect people's rights. So, judges have to check if the customary law they are using is still followed by the people it affects. They have to see if people know about this law, if they agree with it, and if they actually follow it. Judges also have to make sure that any punishment given because of this law is in line with the Constitution and the values that our country is based on. They have to check if it is fair according to the principles of justice that everyone agrees on. If we

³⁹ Jaya, N. S. P. (2016). Hukum sanksi pidana adat dalam pembaharuan hukum pidana nasional. *Masalah-Masalah Hukum*, 45(2), 123–130. <https://doi.org/10.14710/mmh.45.2.2016.123-130>

⁴⁰ Republik Indonesia, "Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman. Lembaran Negara Republik Indonesia Tahun 2009 Nomor 157, Tambahan Lembaran Negara Nomor 5076" (2009).; S. Rahardjo, *Hukum progresif: Sebuah sintesa hukum Indonesia* (Genta Publishing, 2009).; B. Suhariyanto, "Problema penyerapan adat oleh pengadilan dan pengaruhnya bagi pembaruan hukum pidana nasional," *Mimbar Hukum* 30, no. 3 (2018): 421–436, <https://doi.org/10.22146/jmh.33227>.

do not do this, then using law in criminal cases can cause confusion, and people might get punished for things that are not clearly wrong.⁴¹

The new criminal law rules that came into effect with Law Number 1 of 2023 on the Criminal Code show a change in how we think about the law that people actually live by. Article 2 of the National Criminal Code says that the law that people follow in their lives can be used to decide if someone should be punished, as long as it does not go against Pancasila, the 1945 Constitution, human rights, and the basic principles of law that countries around the world agree on. This means that the law is changing from only following the rules to also thinking about what is fair and right. In terms of criminal law, our country is no longer just about written rules. It also considers the unwritten rules that people follow, but it has to stay within the limits of what the Constitution and human rights allow. The government is trying to make space for the legal systems that exist in Indonesia without making the law unclear. This is according to Republik Indonesia, Magala, Yanto, and Hikmah, who all wrote about this in 2023. The criminal law is trying to balance the need for rules with the need to respect the different ways that people live and understand the law in Indonesia.⁴²

The National Criminal Code has a problem in Article 2. This problem is about norms. We need to figure out how to know if a customary norm is really a law that people follow or if it is only something that one group says it is. The National Criminal Code also has to deal with offences in different regions. We have to be careful that each region does not make its own rules without any guidance.⁴³ However, if this occurs, then there would be no uniformity of the National Criminal Code, and thus it would be difficult to protect the citizens' rights. Therefore, it becomes necessary to set forth certain norms with regards to customary law. In other words, there should be certain requirements concerning the type of evidence necessary to prove that certain customary law is valid. There must also be information with regards to the types of sanctions that could be imposed under such law. It is also necessary to take into consideration the relationship between customary law and the decisions of the state. One should also consider the connection between customary law and the principle of 'not being punished twice

⁴¹ E. Danil, "Konstitusionalitas penerapan hukum adat dalam penyelesaian perkara pidana," *Jurnal Konstitusi* 9 (2016): 583–587.; S. C. Pawana, "Polemik atas konsep "hukum yang hidup" dalam pembaharuan KUHP di Indonesia," *Judicatum: Jurnal Dimensi Catra Hukum* 1, no. 1 (2023): 51–62, <https://doi.org/10.35326/judicatum.v1i1.4045>.; Prasetyo, S. N., Aunuh, N. Tongat and Y. A. Fajrin, "Hukum yang hidup dalam masyarakat dalam pembaharuan hukum pidana nasional," *Jurnal Konstitusi* 17, no. 1 (2020): 157–177, <https://doi.org/10.31078/jk1717>.; T. S. J. Utama, "Hukum yang hidup" dalam Rancangan Kitab Undang-Undang Hukum Pidana (KUHP): Antara akomodasi dan negasi," *Masalah-Masalah Hukum* 49, no. 1 (2020): 14–25, <https://doi.org/10.14710/mmh.49.1.2020.14-25>.

⁴² Republik Indonesia, "Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana. Lembaran Negara Republik Indonesia Tahun 2023 Nomor 1, Tambahan Lembaran Negara Nomor 6842" (2023).; A. S. Magala, "Akomodasi hukum yang hidup dalam KUHP baru Indonesia menurut perspektif hukum progresif," *Jurnal Spektrum Hukum* 20, no. 2 (2023): 115–127, <https://doi.org/10.56444/sh.v20i2.4345>.; A. Yanto and F. Hikmah, "Akomodasi hukum yang hidup dalam Kitab Undang-Undang Hukum Pidana Nasional menurut perspektif asas legalitas," *Recht Studiosum Law Review* 2, no. 2 (2023): 81–91, <https://doi.org/10.32734/rslr.v2i2.14162>.

⁴³ S. C. Pawana, "Polemik atas konsep "hukum yang hidup" dalam pembaharuan KUHP di Indonesia," *Judicatum: Jurnal Dimensi Catra Hukum* 1, no. 1 (2023): 51–62, <https://doi.org/10.35326/judicatum.v1i1.4045>;

for one and the same crime'. Thus, both the National Criminal Code and customary law must interact. There should be no contradiction between them in order to protect the citizens' rights *ne bis in idem*.⁴⁴

In the context of criminal court practice, the main challenge lies in the way the courts ought to react to a prior settlement in the cases that fall under state criminal procedure. In case of the fulfillment of customary punishment, and in case where the settlement has solved the matter in question in the community, the judge has to exercise care when passing state punishment on the accused. This is to ensure that such punishments are done fairly and do not constitute double jeopardy. Where the customary punishment is not fulfilled, it is not fair or victim-oriented, then the state criminal procedure can go on to prosecute the individual. This is done to serve justice and uphold the law. Consequently, a customary settlement is not a factor that bars state from punishing the offender. Rather, it is one of the factors that the judge considers in determining whether to prosecute, the severity of the punishment, or the extent of restoration required. The work of some researchers, including David, Herlius, and Simarmata, has addressed this question.⁴⁵

The Indonesian criminal law acknowledges customary criminal law as a source of law; however, to some extent only. Such acknowledgment is based on the Constitution, as well as some statutes including the Emergency Law Number 1 of 1951, the Law on the Authority of the Judiciary, and the National Criminal Code. However, the application of customary criminal law should not violate the rule of law principles. The principle of legality, legal certainty, equality, as well as the protection of human rights and victim's rights form such principles. As a result, customary criminal law cannot be considered as an instrument used to bypass formal legal rules. In addition, it works as a complementary source of law within the legal framework. The application of customary criminal law is based on the Constitution and basic principles of criminal law.

Based on what has been discussed above, one may conclude that customary criminal law is a source of law in Indonesia, but in certain terms. It is so because the Constitution, several other legislative acts and the National Criminal Code admit the existence and importance of customary criminal law in legal relations. Nonetheless, the recognition of customary criminal law should be interpreted bearing in mind the rule of law that presupposes principles of justice, legal certainty and respect for human rights. Consequently, customary criminal law cannot be regarded as the instrument of circumventing formal law. Rather, it is a complimentary source of law functioning in the context of the rule of law and Constitutional provisions on criminal justice. For the purpose of analyzing the place of customary criminal law in Indonesia, it is important to review how courts interpret and apply customary criminal law. Thus, the current study will address relevant legislative acts, court decisions and legal theories. This approach is quite legitimate because the topic includes statutory and judicial aspects of law. The analysis will concern

⁴⁴ F. Herlius, "Kaidah hukum adat dalam penuntutan demi keadilan berbasis kearifan lokal," *Perspektif: Kajian Masalah Hukum dan Pembangunan* 27, no. 2 (2022): 94–103, <https://doi.org/10.30742/perspektif.v27i2.831>.

⁴⁵ D., Haris, O. K. David and H. Handrawan, "Penguatan putusan hukum adat melalui penetapan pengadilan dalam penyelesaian perkara tindak pidana umum," *Halu Oleo Legal Research* 4, no. 1 (2022): 76–88, <https://doi.org/10.33772/holresch.v4i1.25163>;

Constitutional and statutory provisions that recognize customary criminal law in addition to the analysis of the general meaning of observance of the rule.

CONCLUSION

The recognition of unwritten or customary law within the Indonesian criminal justice system is not a violation of the legality principle, but rather a constitutionally regulated and legitimate extension of legal sources. This shift from formal legality to material legality is explicitly solidified through Article 2 of Law Number 1 of 2023 concerning the Criminal Code (KUHP) and the 1945 Constitution. Nevertheless, the recognition of this living law is highly conditional; its application is only valid if the norms remain active, are accepted by the local community, and align with the values of Pancasila, the constitution, and human rights standards to prevent discrimination and arbitrary punishment.

Conceptually, customary criminal law operates on a restorative justice approach focused on repairing relationships, healing victims, and restoring community balance, rather than merely imposing retributive sanctions. Unlike state law, which rigidly adheres to formal texts, customary law utilizes mechanisms such as public apologies, fines, and symbolic rituals to reunite the offender, the victim, and the community. The formalization of customary law does not aim to undermine the fundamental principles of modern criminal law, but rather to accommodate the diversity of Indonesia's social structures, making law enforcement more flexible and reflective of substantive justice.

In practice, judges hold a central role as the primary arbiters who are mandated to explore, understand, and internalize the values of justice living within society, in accordance with Law No. 48 of 2009. Judges are tasked with evaluating on a case-by-case basis whether the customary settlements and sanctions applied are fair, proportionate, and restitutive. This evaluation is crucial in determining whether a customary sanction can halt state prosecution to prevent double jeopardy (*ne bis in idem*), or if it merely serves as a mitigating factor in sentencing. Ultimately, the application of living law serves as a constitutional mechanism to bridge substantive justice and legal certainty without sacrificing the rule of law.

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