

Living Law in Indonesia's New Criminal Code: Constructing a Harmonization Framework for National and Customary Criminal Law

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Abstract

Introduction: The recognition of living law under Indonesia's Law Number 1 of 2023 on the Criminal Code creates a normative intersection between state criminal law and customary criminal law. However, the legal framework does not yet provide sufficient juridical mechanisms for determining, verifying, and applying customary criminal norms within the formal criminal justice system.

Purposes of the Research: This study aims to construct a juridical framework for harmonizing national and customary criminal law by examining the legal position of living law, identifying criteria for the recognition of customary criminal norms, and formulating mechanisms for their application within the national criminal justice system.

Methods of the Research: This study employs normative legal research using statutory, conceptual, and analytical approaches. Primary legal materials, particularly Law Number 1 of 2023, the 1945 Constitution, and Law Number 48 of 2009, are analyzed through systematic, teleological, and historical interpretation.

Results of the Research: The study develops a juridical construction consisting of four recognition parameters and three operational mechanisms. A customary norm must demonstrably exist and continue to be practiced, be recognized by the relevant community, be judicially verifiable, and comply with constitutional, human-rights, and fundamental criminal-law principles. The operational framework comprises: (1) compilation of customary offenses through participatory regional regulation; (2) coordination between formal and customary institutions; and (3) a hybrid model integrating formal adjudication with customary restorative mechanisms where legally permissible. The study concludes that harmonization should be based on structured coexistence rather than assimilation, thereby accommodating living law while preserving legality, legal certainty, and human-rights protection.

Keywords: Living Law; Customary Criminal Law; Legal Harmonization; Principle of Legality; Criminal Law Reform.

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INTRODUCTION

The transformation of the Indonesian criminal law system through the enactment of Law Number 1 of 2023 on the Criminal Law Code marks a new chapter in the long-awaited history of national law since the independence era. This codification of modern criminal law not only represents an effort to decolonize the law from the legacy of Wetboek van Strafrecht of the Dutch colonial legacy, but also presents a progressive paradigm in accommodating legal pluralism that lives in Indonesian society. The existence of the new National Criminal Code carries fundamental juridical implications for the existence of customary criminal law as a living law that has been entrenched in the lives of indigenous peoples throughout the

archipelago for centuries. Recognition of the law that lives in society as enshrined in several articles of the National Criminal Code reflects the awareness of law-makers of the importance of harmonization between the legal system of the state that is written and systematic with the customary law system that is not written but has a strong social legitimacy at the local community level.¹

The problem of harmonizing State Criminal Law with customary criminal law has become a prolonged academic discourse in the treasury of Indonesian Legal science, especially with regard to how to construct a juridical framework that is able to bridge two legal systems that have fundamentally different characteristics, philosophies, and enforcement mechanisms. The complexity of the relationship between state law and customary law often causes normative conflicts in law enforcement practices in regions that still firmly hold their customary law traditions, where the unclear position of customary law in the hierarchy of the national legal system causes inconsistencies in its application by law enforcement officials who tend to prioritize written law.² Neglect of customary law in the formal justice system has created a sense of injustice among Indigenous peoples who feel their local justice values are not accommodated in court decisions, thus causing social resistance to the implementation of state law at the indigenous community level.

Although several previous studies have explored the relationship between state law and customary law, the majority of these studies were carried out before the birth of the new National Criminal Code, so they have not been able to capture the latest juridical dynamics after the enactment of Law Number 1 of 2023. The study of legal pluralism in the Indonesian context has contributed significantly to understanding the coexistence of various legal systems, but its analysis is still limited to theoretical frameworks without in-depth elaboration of harmonized juridical technical constructions in the context of the codification of the new National Criminal Law.³ Previous research has also opened insights into the importance of considering sociological aspects in law enforcement, but has not specifically analyzed the mechanism of operationalization of living law in a formal criminal justice system that is structured and hierarchical. Empirical studies on the application of customary law in the settlement of criminal cases show that there is a significant gap between normative recognition of customary law and its practical implementation in the field, where judges often experience dilemmas in deciding cases involving customary law norms due to the absence of clear juridical parameters.⁴ Previous researches have tended to focus on the conflict aspect between the two legal systems without comprehensively exploring how an ideal juridical construction can be constructed to create synergy between state criminal law and customary criminal law within the framework of the current National Criminal Code. Studies on the customary law system in Indonesia have identified various unique characteristics of customary law such as its unwritten nature, flexibility, and orientation to restoring social balance, but have not analyzed in depth how these characteristics can be accommodated in a national criminal law system that adheres to the principle of strict legality. Research on national criminal law formulation policy has also examined the

¹ Margo Hadi Pura, "Integrasi Hukum Pidana Adat Dalam Sistem Peradilan Pidana Nasional: Harmonisasi Hukum Masyarakat Adat Cigugur Dalam Lingkup Masyarakat Modern," *Proceedings Series on Social ...* 27 (2025), <https://doi.org/10.30595/pssh.v27i.1851>.

² Anisa Harapania Sinaga et al., "Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan KUHP Baru," *JICN: Jurnal Intelek Dan Cendekiawan Nusantara* 2, no. 3, Juni – Juli 2025 (2025): 2332–47.

³ Undang-undang Republik Indonesia, "Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana" (2023).

⁴ Dheny Wahyudhi, Herlambang, and Elly Sudarti, "Integrasi Hukum Adat Dalam Kerangka KUHP Baru : Evaluasi Pluralisme Hukum Dan Tantangan Implementasi Restoratif Justice," *Indonesian Journal of Law and Justice Volume: 3*, no. 2 (2025): 1–9.

legislative process of the new criminal code, but has not provided a comprehensive analysis of the juridical implications of the articles recognizing living law and how they should be interpreted and applied in judicial practice.⁵

The fundamental limitation of previous studies lies in the lack of analysis of specific articles in the National Criminal Code that provide space for the implementation of laws that live in society, as well as how these articles can be operationalized in criminal justice practice without causing legal uncertainty. Studies on the application of restorative justice in the Indonesian criminal justice system have shown the great potential of approaches that prioritize social rapprochement over retaliation, but have not yet integrated the Indigenous legal perspective as an authentic manifestation of restorative justice that has been practiced by Indonesian society long before the concept of restorative justice was introduced in modern legal discourse.⁶ In addition, there is no in-depth study that analyzes the juridical implications of the dualism of the sanction system between formal criminal sanctions that are retributive and customary sanctions that emphasize more restorative aspects and social reintegration. Problems regarding the limits of recognition of customary criminal law, the criteria for the validity of a norm of customary law to be recognized in the formal justice system, as well as the mechanism of proving the existence of living law in court have not received adequate attention in the existing legal literature.⁷

This research gap becomes even more crucial given that the National Criminal Code has provided a normative foundation for living legal recognition, but without a clear juridical technical elaboration on how such recognition should be implemented in law enforcement practice. Comparative experience from other countries that also face the challenge of legal pluralism shows that harmonization of legal systems requires not only normative recognition, but also concrete operational mechanisms to ensure that customary law can function effectively within the framework of national legal systems without causing fragmentation or inconsistencies in law enforcement. Indonesia, which has more than 300 ethnic groups with diverse customary law systems, adds complexity in constructing a harmonizing framework that can accommodate such diversity while maintaining the unity of the national legal system.

Based on the identification of these gaps, this study aims to construct a harmonized juridical framework between state criminal law and customary criminal law in the context of the implementation of the National Criminal Code, with a particular focus on the analysis of the concept of living law as a bridge between the two legal systems. This study seeks to overcome the limitations of previous studies by conducting a comprehensive analysis of the articles in the National Criminal Code that provide space for the enforceability of living laws, exploring the juridical constructs that enable the effective implementation of such recognition, as well as formulating parameters and operational mechanisms to ensure that harmonization can be realized without compromising legal certainty and substantive justice. Specifically, this study will analyze how the concept of living law can be integrated

⁵ Immanuel Joyson B. Manurung and Andi Hakim Lubis, "Formulasi The Living Law Sebagai Pembaharuan Hukum Pidana Nasional Melalui Pendekatan Antropologi Hukum," *Media Hukum Indonesia (MHI)* 2, no. 5 (2025): 217–24.

⁶ Muhammad Rustamaji, Ismawati Septiningsih, and Dara Pustika Sukma, "Tantangan Integrasi Dan Harmonisasi Hukum Pidana Adat Dalam Pembaruan Sistem Peradilan Pidana Nasional (Studi Pluralisme Hukum Indonesia, Kanada Dan Selandia Baru)," *Proceedings Series on Social Sciences & Humanities* 27, no. 36 (2025): 164–74, <https://doi.org/10.30595/pssh.v27i.1838>.

⁷ Muhammad Rusli Arafat, Margo Hadi Pura, and Taun Taun, "Tantangan Dan Peluang Integrasi Hukum Adat Dalam Sistem Hukum Pidana Indonesia Pasca Undang-Undang Nomor 1 Tahun 2023 Tentang KUHP," *Proceedings Series on Social Sciences & Humanities* 27 (2025): 2808–103, <https://doi.org/10.30595/pssh.v27i.1850>.

into the national criminal justice system, what criteria must be met in order for a customary law norm to be recognized as a valid living law, and how the mechanism of proof and application in the criminal justice process.

The significance of this study lies in the urgency to provide a theoretical and practical basis for the implementation of the National Criminal Code that recognizes legal pluralism, so as to bridge the gap between normative idealism and the sociological reality of a pluralistic Indonesian society. The scientific novelty of this study is in the construction of a harmonization model that is not only descriptive-analytical of positive legal provisions, but also prescriptive in formulating an operational framework that can be used by legal practitioners, especially judges, prosecutors, and advocates, in applying the provisions of the living law in handling criminal cases. Thus, this study is expected to make a significant contribution to the development of Indonesian criminal law that is responsive to local values, while strengthening the social legitimacy of the national legal system through recognition and respect for the diversity of legal systems that live in society.

METHODS OF THE RESEARCH

This study uses normative legal research methods as a methodological basis considering that the focus of the urgency of 'living law' in the criminal code: building the harmonization of national and Customary Criminal Law Through a Juridical Construction Approach with customary criminal law in the implementation of the National Criminal Code. First, the statute approach is used to identify and examine the normative basis governing living law within the national criminal justice system, particularly the provisions of Articles 2, 66 (1) (f), and 601 (1) of Law Number 1 of 2023 on the National Criminal Code. This approach is directed at clarifying the scope, legal status, and normative limits of customary criminal law, including the relationship between written criminal law and customary norms recognized as living law. Through this approach, the study identifies areas where statutory provisions remain general or require further juridical clarification. Second, the conceptual approach is employed to clarify the legal concepts underlying the recognition and application of living customary law, including the concepts of legality, living law, customary criminal law, legal pluralism, and restorative justice. This approach is particularly important in determining the characteristics and criteria of a customary norm that may legitimately qualify as living law and be applied within the national criminal justice system. It therefore addresses the conceptual uncertainty underlying the recognition of customary criminal norms. Third, the analytical approach is used to systematically connect the statutory provisions and legal concepts in order to formulate a coherent juridical construction for harmonizing state and customary criminal law. The analysis focuses on three operational dimensions: (1) normative recognition, through which customary offenses are identified and compiled; (2) evidentiary and judicial parameters, through which the existence, continuity, community recognition, and compatibility of customary norms with fundamental legal principles are verified; and (3) institutional mechanisms, through which formal law-enforcement institutions and customary institutions can coordinate their respective roles. This approach enables the study to move beyond identifying normative ambiguity toward constructing an operational framework for the implementation of living law under the National Criminal Code. Accordingly, the three approaches serve distinct but interconnected functions: the statute approach clarifies what the law recognizes, the conceptual approach determines what constitutes legitimate living customary law, and the

analytical approach constructs how such norms can be verified, coordinated, and applied within the national criminal justice system. The combination of these approaches is therefore used not merely to interpret existing norms, but to formulate a juridical construction capable of harmonizing state criminal law and customary criminal law within the framework of Law No. 1 of 2023. Normative juridical method was chosen because this study analyzes written legal norms, legal principles, and doctrines related to the implementation of living law in the Indonesian criminal law system, and examines the vertical and horizontal synchronization between legislation governing the recognition of customary law.⁸ The approaches used in this study include statutory approach (statute approach), conceptual approach (conceptual approach), and analytical approach (analytical approach) to dissect the juridical construction of criminal law harmonization comprehensively.

The legislative approach is carried out by analyzing three main regulations that form the normative basis of the study, namely the Constitution of the Republic of Indonesia in 1945, especially Article 18b paragraph (2) concerning the recognition and respect for the unity of Indigenous Peoples⁹, Law Number 1 of 2023 on the Criminal Law Code, especially Article 2 and articles that recognize the enforceability of laws that live in society, as well as Law Number 48 of 2009 on judicial power that provides space for judges to explore legal values that live in society.¹⁰ Conceptual approach is used to analyze fundamental juridical concepts such as living law, legal pluralism, legal harmonization, and restorative justice as a theoretical basis in constructing harmonization model. Meanwhile, an analytical approach is implemented in order to systematically unravel the relationship between legal norms in different regulations and identify potential normative conflicts and their judicial solutions.¹¹

Legal materials tracing techniques used are literature studies by reviewing primary legal materials in the form of legislation, secondary legal materials that include scientific literature such as books, scientific journals, and the results of previous research, as well as tertiary legal materials in the form of legal dictionaries and encyclopedias. The analysis of legal materials is carried out qualitatively by the techniques of systematic interpretation, teleological interpretation, and historical interpretation in order to understand the substantive meaning of the legal norms under study. The analysis process is carried out through the stages of Norm identification, classification based on hierarchy and substance, systematization to find links between norms, and interpretation to construct a coherent and applicable harmonized juridical framework in criminal law enforcement practice.

RESULTS AND DISCUSSION

A. Normative Recognition of Customary Criminal Law in the Construction of the National Criminal Code

The existence of customary criminal law in the Indonesian Criminal Law Order has undergone a paradigmatic transformation through explicit recognition in Law Number 1 of 2023 concerning the Criminal Law Code. This normative recognition is concretely manifested in Article 2 of the National Criminal Code which states that the provisions referred to in Article 1 Paragraph (1) do not reduce the enactment of laws that live in society

⁸ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Prenada Media, 2021).

⁹ Undang-Undang Republik Indonesia, "Undang-Undang Dasar Negara Republik Indonesia 1945" 105, no. 3 (1945): 129-33.

¹⁰ Undang-Undang Republik Indonesia, "Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman" 19 (2009): 19.

¹¹ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Prenada Media, 2022).

that determine that a person should be punished even though the act is not regulated in legislation. The juridical formulation indicates the expansion of the principle of legality which was originally rigid and formalistic to be more flexible by accommodating unwritten sources of law that have long lived and developed in the legal consciousness of Indonesian indigenous peoples. Article 66 paragraph (1) letter f of the National Criminal Code further strengthens the position of the customary criminal law by recognizing the fulfillment of local customary obligations as one of the additional criminal forms that can be imposed by the judge in his decision.¹²

Formal recognition of customary criminal law in the National Criminal Code reflects the awareness of law-makers of the importance of bridging the gap between the written law that is universal with the values of local justice that lives in Indigenous communities. This juridical construction is a progressive effort to integrate two legal systems that have been running in parallel without a clear coordination mechanism, so it often causes normative conflicts in law enforcement practices at the local level. Article 601 paragraph (1) of the National Criminal Code provides the basis for the conviction of acts that are declared prohibited under the law of living in society, even though these acts are not explicitly regulated in written laws and regulations. This provision affirms that criminal acts are no longer solely limited by what is written in the codification of laws, but also includes prohibitions derived from the living law that have been rooted in the lives of indigenous peoples throughout the archipelago.¹³

First, Article 2 provides the foundation for the compilation of customary offenses. Article 2 recognizes the continued applicability of law living within society, including customary criminal law, subject to territorial applicability and consistency with Pancasila, the 1945 Constitution, human rights, and generally recognized legal principles. Importantly, the Elucidation of Article 2 explains that customary criminal offenses should be affirmed and compiled through Regional Regulations. Thus, Article 2 does not merely recognize customary law in abstract terms; it creates a pathway for identifying, documenting, and compiling customary offenses so that their existence and scope can be determined with greater legal certainty. This provides the normative basis for the proposed customary-law compilation mechanism, including identification of the offense, applicable customary consequences, and the relevant community in which the norm remains living.

Second, Article 66 (1) (f) provides the basis for connecting customary obligations with the formal criminal justice system. The provision recognizes the Fulfillment of local customary obligations as a form of additional punishment. This creates an institutional point of intersection between state criminal adjudication and customary mechanisms. The provision therefore supports the proposed coordination mechanism, whereby formal judicial institutions and customary institutions can perform complementary functions: the formal justice system maintains adjudicative authority and legal safeguards, while customary institutions may contribute to determining and facilitating the fulfillment of locally recognized customary obligations. Third, the provision that directly establishes criminal liability for conduct prohibited by living law is Article 597, rather than Article 601(1). Article

¹² Adi Kusyandi, Sahda Salsabila, and Murtiningsih, "Kedudukan Hukum Pidana Adat Dalam Hukum Pidana Indonesia," *Yustitia* 32, no. 3 (2021): 167–86.

¹³ Yoghi Arief Susanto, Riski Dysas Prabawani, and Naili Aulia Najah, "Review of Customary Criminal Law: A Recognition or Reduction in the New Criminal Code," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 19, no. 1 (2025): 77–96, <https://doi.org/10.15575/adliya.v19i1.44458>.

597 provides that a person who commits an act prohibited by the law living within the relevant community may be subject to punishment in the form of fulfillment of customary obligations as referred to in Article 66(1)(f). Accordingly, Article 597 provides the substantive bridge between recognition of living law under Article 2 and the customary sanction mechanism under Article 66(1)(f). It also demonstrates why judicial verification is necessary: before a customary norm can generate criminal consequences, its existence, applicability, and compatibility with the statutory requirements governing living law must be established.

Taken together, these provisions establish a sequential juridical structure: Article 2 establishes recognition and the pathway for compilation; Article 597 provides the substantive basis for applying a prohibition derived from living law; and Article 66(1)(f) provides the formal sentencing mechanism through the fulfillment of local customary obligations. On this basis, the study develops three interconnected operational mechanisms: (1) compilation of customary offenses; (2) coordination between formal and customary institutions; and (3) a hybrid model integrating formal criminal adjudication with appropriate restorative customary mechanisms.

The proposed hybrid model follows from the interaction of these provisions. Formal courts retain the authority to determine criminal liability and impose legally recognized sanctions, while customary institutions can contribute to the fulfillment of customary obligations and restorative processes, such as deliberation, reparation, reconciliation, and reintegration. The model therefore seeks neither to subordinate customary law to state law nor to create a parallel criminal justice system, but to establish a legally controlled form of coexistence between the two systems.

The operational mechanisms proposed in this study are derived from the complementary functions of Articles 2, 66(1)(f), and 597 of Law No. 1 of 2023 on the Criminal Code. These provisions provide the normative foundation for transforming the recognition of living customary law into an operational framework for its identification, application, and harmonization with the state criminal justice system. Article 2 provides the normative gateway for the recognition of living law by expressly acknowledging that the principle of legality does not exclude the application of living law that determines an act to be punishable, subject to territorial applicability and compatibility with Pancasila, the 1945 Constitution, human rights, and generally recognized legal principles. Its elucidation further indicates that customary criminal offenses should be compiled through Regional Regulations. Accordingly, Article 2 provides the basis for the first operational mechanism, namely the compilation of customary offenses, through which existing customary norms can be identified, documented, and formulated into an accessible normative reference while retaining their character as living law.

Article 66(1)(f) provides the institutional and sentencing basis for incorporating customary obligations into the formal criminal justice system by recognizing the *pemenuhan kewajiban adat setempat* as an additional punishment. This provision creates a point of connection between state-imposed criminal sanctions and customary responses to wrongdoing. Consequently, it provides the normative basis for a coordination mechanism between formal judicial institutions and customary institutions, particularly in determining the appropriate relationship between a court-imposed sentence and the fulfillment of locally recognized customary obligations.

Article 597, rather than Article 601, provides the substantive criminal-law basis for the application of living law by criminalizing conduct that is prohibited according to the law living within the relevant community. The provision therefore creates the basis for translating a recognized customary norm into an enforceable criminal consequence. When read together with Article 2, Article 597 requires the existence and applicability of the relevant living law to be established before it can serve as a basis for criminal liability. This supports the need for judicial verification of the existence, continuity, community recognition, and substantive compatibility of the customary norm.

Read together, these provisions establish a sequential juridical structure: Article 2 provides the basis for recognition and compilation of living customary law; Article 597 provides the substantive basis for applying a recognized customary prohibition as a criminal norm; and Article 66(1)(f) provides the sentencing mechanism through which customary obligations may be incorporated into the formal criminal justice system. On this basis, the study constructs three operational mechanisms: (1) compilation of customary offenses through Regional Regulations; (2) coordination between formal judicial institutions and customary institutions; and (3) a hybrid model that combines formal criminal adjudication with restorative customary obligations where legally appropriate. The hybrid model therefore does not place customary justice outside the state criminal justice system, but establishes a controlled point of interaction between state adjudication and customary restorative practices.

Paradigmatic transformation in the recognition of customary criminal law through the National Criminal Code requires a progressive interpretation framework in understanding the relationship between the written legal system and the unwritten legal system. The dynamics of legal pluralism in Indonesia shows that the existence of customary law is not an anomaly in the national legal system, but a representation of the sociological reality of society that has been entrenched for centuries. The normative recognition given by the national penal code should be understood as a formal legitimacy to legal practices that have long existed and functioned effectively in regulating the life of Indigenous Peoples. A rigid and formalistic interpretation framework of the provisions on living law can reduce the substance of such recognition to mere juridical rhetoric without significant implementative impact on law enforcement practice at the local level.¹⁴

The mechanism for operationalizing the recognition of customary criminal law in the formal justice system requires the development of an adequate legal infrastructure, including the development of special procedures for verifying the existence and substance of customary law norms in the proceedings. The judge as the spearhead of the implementation of the National Criminal Code has a crucial role in delving into and identifying the laws that live in society, as mandated by the Judicial Power Law. The main challenge faced is how to ensure that the norms of customary law that are applied are really living laws that are lived and obeyed by the community, not artificial constructions or selective revitalizations carried out for certain interests. A participatory mechanism involving Indigenous peoples in the process of identification and verification of customary law norms is needed to ensure their authenticity and social legitimacy.¹⁵

¹⁴ Muhammad Akbar Ramadhan and Muhammad Arief Syahfrudin, "Implementasi Dan Harmonisasi Norma Hukum Adat Dan Hukum Nasional Di Indonesia," *Jurnal Ilmu Hukum, Sosial, Dan Humaniora* 1, no. 5 (2023): 204–17.

¹⁵ Putri Risna Nurrohmah, Tiara Lista Aryanti, and Olivia Mediana Nainggolan, "Peranan Hukum Pidana Adat Dalam Pembangunan Hukum Nasional Di Era Globalisasi," *De Juncto Delicti : Journal Of Law* 1, no. 1 (2021): 61–74.

However, normative recognition of customary criminal law in the National Criminal Code raises critical questions about whether the provision is really a substantive recognition or it has the potential to reduce the autonomy and authentic characteristics of the customary criminal law itself. This concern arises because the regulation on the enforceability of laws that live in society still requires government regulations as guidelines for their implementation, which implies the possibility of excessive formalization that can erode the flexibility and contextual nature of customary criminal law. The process of subordination of customary law within the framework of hierarchical regulation has the potential to change the fundamental characteristics of customary law which is autonomous, uncoded, and based on community consensus. Therefore, the recognition of customary criminal law should be understood not as subordination in the national legal system, but as a framework for respectful legal coexistence without losing the identity and uniqueness of each system.¹⁶

B. Character of the philosophy of customary Criminal Law as Living Law

Customary criminal law has philosophical characteristics that are fundamentally different from national criminal law, especially in terms of goal orientation, settlement mechanisms, and the underlying philosophy of punishment. Customary criminal law in Indonesia is rooted in communal values that place the law as an instrument to maintain social and cosmic balance in people's lives, not merely as a tool to provide retributive sanctions to perpetrators of criminal acts. This paradigm of communalism reflects the holistic view of indigenous peoples who see evil not only as an offense against the individual or the state, but as an interference with the cosmic harmony involving the relationship between man and Man, Man and nature, as well as man with supernatural forces believed in in traditional belief systems. Unlike the National Criminal Law which emphasizes legal certainty and retributive sanctions based on legality principles, customary criminal law is more oriented to recovery, reconciliation, and return of harmony through deliberation mechanisms and certain customary rituals.¹⁷

Sanctions in customary criminal law are not only punitive in nature as sanctions in conventional criminal law, but have a restorative function that aims to restore the balance disturbed by unlawful acts. The mechanism of customary sanctions emphasizes on the restoration and return of social harmony through customary payments, compensation to victims or victims' families, as well as the implementation of certain rituals that are believed to cleanse the spiritual imbalance caused by criminal acts. This approach is in line with the principle of restorative justice which in the last decade has increasingly received attention in the global criminal law reform discourse as an alternative to the criminal justice system that is too focused on retaliation. The religious, communal, concrete, traditional, and dynamic characteristics of customary criminal law make it an authentic manifestation of restorative justice that has been practiced by Indonesian society long before the concept was introduced in modern legal literature.¹⁸

The restorative character of customary criminal law can be observed in several concrete practices that correspond to the core principles of modern restorative justice. Customary

¹⁶ Susanto, Prabawani, and Aulia Najah, "Review of Customary Criminal Law: A Recognition or Reduction in the New Criminal Code."

¹⁷ Siswadi et al., "Understanding Customary Criminal Law in Indonesia," *Arus Jurnal Sosial Dan Humaniora (AJSH)* 5, no. 2 (2025): 2960–67.

¹⁸ Damianus Rama Tene, Andi Mulyono, and Nurjanah Lahangatubun, "Implikasi Penerapan Hukum Pidana Adat Dalam Penyelesaian Tindak Pidana Pasca Pembaruan Hukum Pidana Nasional Indonesia," *Ekspose: Jurnal Penelitian Hukum Dan Pendidikan* 22, no. 2 (2023): 29–41, <https://doi.org/10.30863/ekspose.v22i2.4151>.

deliberation (*musyawarah adat*), for example, provides a participatory forum in which the victim, perpetrator, customary leaders, family members, and relevant members of the community may collectively discuss the consequences of the offense and determine an appropriate resolution. This directly reflects the restorative-justice principle of victim participation, because the victim is not merely an object of the criminal process but is given an opportunity to express the harm suffered, expectations for redress, and views concerning reconciliation. Similarly, customary reparations or compensation represent a concrete form of perpetrator responsibility. Rather than limiting accountability to the imposition of punishment by the state, customary mechanisms may require the offender to repair the consequences of the wrongdoing through compensation, restoration of property, fulfillment of customary obligations, or other forms of reparation accepted by the affected community. The emphasis therefore shifts from punishment alone toward making the perpetrator acknowledge the harm and actively contribute to its repair.

In certain communities, cleansing or reconciliation rituals may further serve a restorative function by symbolically restoring social and communal relationships disrupted by the offense. Although such rituals have cultural and spiritual meanings that cannot simply be equated with contemporary legal mechanisms, their restorative dimension lies in their function of facilitating reconciliation, reintegration, and restoration of social harmony. The offender is expected to acknowledge the wrongdoing and undertake a process through which the relationship with the victim and the wider community can be restored. These practices demonstrate that customary criminal law and modern restorative justice may differ in their normative sources, institutional structures, and cultural meanings, but they share important

The unwritten nature of customary criminal law allows flexibility in its application according to the social, cultural context and specific conditions of each case handled by the customary institution. Customary criminal law lives in the collective consciousness of the community and is passed down from generation to generation through oral traditions, customary practices, and the example of elders and customary leaders who become references in dispute resolution. The dynamic characteristics of customary criminal law allow adaptation to social change and the needs of society without having to go through a long and bureaucratic process of formal legislation. However, this uncoded nature also poses challenges in the context of harmonization with the national legal system that adheres to the principle of strict legality, where every act that can be punished must be clearly specified in the legislation. These challenges require a careful approach to ensure that harmonization does not eliminate the essence and uniqueness of the existing criminal law.¹⁹

The implementation of customary criminal law in the settlement of concrete criminal acts shows its effectiveness and relevance in answering the Justice needs of local communities that are often not met through formal judicial mechanisms. A case study of the application of customary criminal law in adultery cases in Ilih Village, Damer district, southwest Maluku regency shows that customary law has a wider scope than the provisions of Article 284 of the old criminal code which only criminalizes adultery committed by or with married people. Customary law in Tidore stipulates that individuals who commit adultery, regardless of marital status, must marry immediately and can be paraded in public as a form of social punishment as well as a lesson for the community not to repeat similar acts. This

¹⁹ Nurrohmah, Aryanti, and Nainggolan, "Peranan Hukum Pidana Adat Dalam Pembangunan Hukum Nasional Di Era Globalisasi."

approach not only sanctions the abuser, but also seeks to solve the problem in a comprehensive way by legalizing the relationship through marriage, thus preventing broader social consequences such as illegitimate children and prolonged stigmatization.²⁰

The application of Kerinci customary criminal law to persecution also shows the advantages of a restorative approach in creating substantive justice for victims and the community. Kerinci customary criminal law regulates sanctions that are adjusted to the level of persecution through three levels: mild, moderate, and severe persecution, where each level has a different settlement mechanism. Sanctions in the form of customary fines, compensation or pampas to victims, as well as other customary punishments aim to create justice through traditional norms and conditions that are understood and accepted by the Kerinci community. In minor criminal cases, the settlement is carried out through deliberation involving traditional judges, *Ninik Mamak*, and traditional leaders who have the legitimacy and trust of the community, so that the resulting decision is more easily accepted and implemented by the parties compared to formal court decisions that are often considered foreign and not in accordance with local values.²¹

The comparison between the settlement of criminal acts through customary criminal law with National Criminal Law shows that the integration of the two legal frameworks can provide a more comprehensive and effective approach in dealing with crime in culturally diverse societies. National Criminal Law provides legal certainty through clear codification and measurable sanction systems, while customary criminal law offers flexibility and contextual relevance that allows for fairer settlement according to local sociocultural conditions. The effectiveness of the application of Customary law in reducing the number of certain crimes in local communities indicates that Customary Law not only has strong social legitimacy, but also provides a significant preventive impact because Customary sanctions involve the entire community and create more effective social control. Therefore, harmonization between customary criminal law and National Criminal Law is an urgent need to achieve holistic justice that accommodates both legal certainty and substantive justice based on local values.²²

C. Expansion of the principle of legality and the existence of Living Law in Criminal Law Reform

The recognition of the law that lives in society as stipulated in Article 2 of the National Criminal Code marks a fundamental expansion of the principle of legality which has been the main pillar of the Indonesian criminal law system. The principle of legality in its classical conception, known as *adagium nullum delictum nulla poena sine praevia lege poenali*, affirms that no act can be punished unless it has been stipulated in advance in the law. However, the recognition of living law in the National Criminal Code presents a new dimension in the principle of legality by providing space for unwritten legal norms that live in society to be the basis for punishment, as long as these norms are really alive, recognized, and adhered to by the people concerned. This expansion is an important step in the reform of Indonesian

²⁰ Hasna Yuliet Frans, Armunanto Hutahaena, and Djernih Sitanggang, "Kajian Penerapan Hukum Pidana Adat Dibanding Dengan Hukum Pidana Nasional Dalam Perkara Perzinaan," *Jurnal Sosial Dan Sains* 5, no. 6 (2025): 1923–33, <https://doi.org/10.59188/jurnalsosains.v5i6.32076>.

²¹ A Saptomo et al., "Comparison of Sanctions for the Crime of Persecution According to the Kerinci Customary Criminal Law and the Indonesian Criminal Law," *Jaksa: Jurnal Kajian ...* 2, no. 2 (2024).

²² Frans, Hutahaena, and Sitanggang, "Kajian Penerapan Hukum Pidana Adat Dibanding Dengan Hukum Pidana Nasional Dalam Perkara Perzinaan."

criminal law which has tended to be formalistic and legalistic, so it often fails to provide substantive justice for people who still firmly hold the values of customary law.²³

The existence of living law in the renewal of National Criminal Law is not an anomaly or deviation from the principle of legality, but rather a progressive interpretation that recognizes that the source of law is not only limited to written laws established by the state. The concept of living law recognizes that in a pluralistic society such as Indonesia, there are various sources of law that live and develop organically in the community, which have legitimacy and effectiveness in regulating behavior and resolving disputes at the local community level. This recognition is in line with the theory of legal pluralism which sees that in one jurisdiction various legal systems can live together, each of which has its own domain and authority. The integration of living law into the National Criminal Law system requires clear mechanisms to ensure that its application does not create legal uncertainty or potentially violate the human rights guaranteed in the Constitution.²⁴ The implementation of the concept of living law in the formal criminal justice system requires the development of a juridical instrument in the form of a compilation of customary offenses drawn up by local governments through local regulations. This compilation serves as a partial codification of the norms of customary law living in a particular region, thus providing certainty for law enforcement officers in identifying and applying customary law in handling criminal cases. Local governments that have customary offenses in their territory have an obligation to develop local regulations that compile a compilation of these offenses complete with proof mechanisms, settlement procedures, and types of sanctions that can be imposed. This codification process must be carefully conducted with the involvement of Indigenous leaders, local stakeholders, and customary law experts to ensure that the resulting compilation truly reflects the values and legal practices that live in the community, not merely juridical constructions imposed from outside the community.²⁵

Customary criminal law contributes significantly to the development of restorative justice systems in Indonesia because the principles underlying customary law have long applied a restorative approach long before the concept of restorative justice was introduced in modern criminal law discourse. The noble values of indigenous peoples such as mutual cooperation, kinship, deliberation for consensus, and respect for fellow human beings are manifestations of the philosophy of restorative justice that emphasizes social rapprochement, reconciliation between perpetrators and victims, and reintegration of perpetrators into society. The system of sanctions in customary criminal law oriented towards restoring balance, compensation to victims, and customary rituals to cleanse the spiritual effects of crime reflects a holistic approach to conflict resolution that focuses not only on punishing the perpetrator, but also on healing the social wounds inflicted by the crime. The integration of customary law principles into the formal justice system can enrich the restorative justice approach with local values that have proven effective in maintaining social harmony.

The adoption of restorative principles of customary criminal law into the formal justice system can be done through various mechanisms such as diversion, penal mediation, and

²³ Itok Dwi Kurniawan, "The Existence of Living Law in Criminal Law Reform: Expansion of the Principle of Legality," *Justitia et Pax* 40, no. 2 (2024): 243–64, <https://doi.org/10.24002/jep.v40i2.7762>.

²⁴ Nur Sri Maryam DM, "Kontribusi Pidana Adat Terhadap Pengembangan Sistem Keadilan Restoratif Di Indonesia," *Desentralisasi : Jurnal Hukum, Kebijakan Publik, Dan Pemerintahan* 1, no. 4 (2024): 264–76, <https://doi.org/10.62383/desentralisasi.v1i4.501>.

²⁵ Tene, Mulyono, and Lahangatubun, "Implikasi Penerapan Hukum Pidana Adat Dalam Penyelesaian Tindak Pidana Pasca Pembaruan Hukum Pidana Nasional Indonesia."

the establishment of special institutions that combine elements of customary justice with formal justice. Hybrid models that integrate formal judges with customary leaders in handling certain cases can create synergies between legal certainty offered by the formal justice system and substantive justice that is the strength of the customary justice system. Increasing recognition of the legality of the decisions of customary institutions in certain cases, especially for minor crimes and crimes related to customs, can reduce the burden on the formal justice system while providing faster, cheaper, and in accordance with community values. Community involvement in the process of resolving criminal cases, as has been practiced in customary law, can create more effective social control and provide a more substantive deterrent effect because social sanctions from the community are often more influential than formal sanctions from the state.²⁶

The expansion of the principle of legality through the recognition of living law marks a paradigmatic evolution in the understanding of the legitimate sources of criminal law in the Indonesian legal system. The traditional conception of the principle of legality that emphasizes the exclusivity of written law as the only source of punishment is experiencing progressive reinterpretation by recognizing that legal legitimacy does not solely come from state authority through formal legislative processes. Recognition of living law reflects the understanding that in a pluralistic society, there are multiple sources of normativity, each of which has its own domain of legitimacy. This transformation is in line with the development of contemporary legal theory that criticizes state-centric views in legal studies and advocates recognition of various forms of legal orders that exist outside the legal structure of the state.²⁷ The operationalization of the concept of living law in judicial practice requires the development of a special methodology for identifying and verifying the existence and substance of customary law norms that are claimed to be living law. Judges cannot rely solely on the unilateral claims of the parties regarding the existence of a customary law norm, but must verify it through various sources including the testimony of Indigenous leaders, ethnographic documentation, and evidence of the practice of applying the norm in the community. This verification process is crucial to prevent abuse of customary law where certain parties claim the existence of fictitious customary norms to justify actions or avoid formal legal sanctions. The development of rigorous but still flexible standards of proof is needed to accommodate the unique characteristics of customary law that are not documented in writing.²⁸

The implementation of customary law as part of the restorative justice system in Indonesia faces various challenges that require a strategic and adaptive approach to address them. The main challenges include the diversity of customary law systems in various regions of Indonesia that makes it difficult to harmonize efforts on a national scale, the limited documentation and codification of customary law that can be used as a reference by law enforcement officers, as well as the potential conflict between customary law values and universal human rights principles guaranteed in the Constitution and international conventions that have been ratified by Indonesia. Efforts are needed to align customary law with human rights standards to ensure that the application of customary law does not violate fundamental rights such as the right to a fair trial, Prohibition of discrimination, and

²⁶ Tene, Mulyono, and Lahangatubun.

²⁷ Wahyudhi, Herlambang, and Sudarti, "Integrasi Hukum Adat Dalam Kerangka KUHP Baru : Evaluasi Pluralisme Hukum Dan Tantangan Implementasi Restoratif Justice."

²⁸ Kusyandi, Salsabila, and Murtiningsih, "Kedudukan Hukum Pidana Adat Dalam Hukum Pidana Indonesia."

protection of vulnerable groups. Local approaches in specific cases that take into account the local socio-cultural context need to be developed while maintaining the universal principles of justice and the protection of human rights.²⁹

D. Challenges and strategies for harmonizing State Criminal Law with customary Criminal Law

Harmonization between state criminal law and customary criminal law faces complex challenges stemming from the fundamental differences between the two legal systems in terms of philosophy, mechanism, and purpose of punishment. The first challenge is related to jurisdictional conflicts between formal and customary judicial institutions in handling criminal cases involving Indigenous Peoples. Uncertainty about the limits of authority of each institution can lead to forum shopping where the parties choose a forum that is considered more profitable, or vice versa cause conflicts of authority that lead to legal uncertainty. The second challenge is about the criteria and mechanisms of proving the existence of a norm of customary law as a legitimate living law, given the nature of customary law that is not written and varies between regions. Clear juridical parameters are needed to determine when a norm of customary law can be considered a law that lives in society and therefore has binding force.³⁰

The third challenge is related to the potential erosion of local wisdom and autonomy of customary criminal law due to excessive formalization in an effort to harmonize with the national legal system. The process of codification, determination of criteria, and limits in the application of customary law imposed through regulation can change the authentic characteristics of customary law which is flexible, contextual, and based on community consensus. Formalization that is not sensitive to local values can eliminate the essence of customary law as a manifestation of traditional wisdom that lives organically in society, and turn it into state law wrapped in Indigenous symbols but has lost its substance. The fourth challenge is related to the need to align the system of sanctions in customary criminal law that is restorative oriented with the system of sanctions in national criminal law that tends to be retributive, without eliminating the unique characteristics of each system.³¹

Harmonization strategies that can be pursued to address these challenges include the development of a regulatory framework that provides autonomy for customary criminal law within certain limits while ensuring the protection of human rights and fundamental principles of criminal law. The establishment of laws on Indigenous Peoples is becoming increasingly urgent to provide legal certainty regarding the recognition, rights, and authority of indigenous peoples, including in carrying out their customary legal systems. The development of a coordination mechanism between formal and customary judicial institutions is necessary to avoid jurisdictional conflicts and ensure efficient and fair settlement of cases. Increasing the capacity of law enforcement officers regarding legal pluralism and customary law through special education and training can assist them in identifying, understanding, and applying customary law in handling criminal cases while upholding legal certainty and Human Rights.³²

²⁹ Ramadhan and Syahfrudin, "Implementasi Dan Harmonisasi Norma Hukum Adat Dan Hukum Nasional Di Indonesia."

³⁰ Susanto, Prabawani, and Aulia Najah, "Review of Customary Criminal Law: A Recognition or Reduction in the New Criminal Code."

³¹ Tene, Mulyono, and Lahangatubun, "Implikasi Penerapan Hukum Pidana Adat Dalam Penyelesaian Tindak Pidana Pasca Pembaruan Hukum Pidana Nasional Indonesia."

³² Ramadhan and Syahfrudin, "Implementasi Dan Harmonisasi Norma Hukum Adat Dan Hukum Nasional Di Indonesia."

Tabel 1. Comparative characteristics of National Criminal Law and customary Criminal Law

Aspect	National Criminal Law	Customary Criminal Law
Sources of Law	Written and codified	Unwritten, tradition-based
Sanctions Orientation	Retributif dan deterrence	Restorative and reintegration
Basic Philosophy	Individualistic, legal certainty	Communalistic, cosmic balance
Settlement Mechanism	Adversarial, formal	Deliberation, informal
Purpose of Conviction	Punishment of the offender	Restoration of social harmony
Setting Properties	Uniform, generally applicable	Contextual, different per region

Source: Researcher Analysis Based on Literature Review, 2025.

The table above shows the basic differences between National Criminal Law and customary criminal law which are the basis for challenges in harmonization efforts. These differences are not insurmountable obstacles, but rather reflect the richness of Indonesia's pluralistic legal system. The ideal harmonization is not the uniformity or subordination of one system to another, but rather the creation of a framework of respectful coexistence in which each system can operate according to its domain and superiority. National criminal law can focus on cases that require high legal certainty and cross-regional dimension, while customary criminal law can handle local cases that are more effectively resolved through a restorative approach based on community values.

CONCLUSION

This study demonstrates that the recognition of *living law* under Law No. 1 of 2023 provides a normative basis for accommodating customary criminal law within Indonesia's national criminal justice system. The principal legal challenge, however, lies not in the recognition of customary norms itself, but in establishing juridical criteria and institutional mechanisms that ensure their application remains consistent with legality, constitutional protection, human rights, and legal certainty. The study develops four parameters for recognizing a customary norm as *living law*: (1) the norm must demonstrably exist and continue to be practiced within the relevant community; (2) it must be recognized and observed by that community; (3) its existence and substance must be capable of judicial verification; and (4) its application must be compatible with Pancasila, the Constitution, human rights, and fundamental principles of criminal law. Based on these parameters, the study proposes three interconnected mechanisms: first, participatory compilation of customary offenses through appropriate regional regulatory instruments; second, institutional coordination between formal law-enforcement bodies and customary institutions; and third, a controlled hybrid model through which customary restorative mechanisms may complement formal criminal proceedings where legally permissible. The principal contribution of this study is therefore a structured coexistence model, rather than the assimilation or separation of customary and state criminal law. This model seeks to transform the recognition of *living law* from a general normative principle into an operational juridical framework while preserving the legitimacy of customary norms and the safeguards of the national criminal justice system.

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