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The Application of Customary Criminal Law from Perspective of The Legality Principle and Legal Certainty

ABSTRACT

Customary criminal law is part of the living law within society and reflects the values, customs, and sense of justice of customary communities. The recognition of living law has a normative basis in Law Number 1 of 2023 concerning the Criminal Code (KUHP), particularly Article 2. However, this recognition raises issues regarding the relationship between legal pluralism and the principle of legality, which requires a clear legal basis for criminal punishment. This article aims to analyze the application of customary criminal law from the perspectives of the principle of legality and legal certainty. This study employs a normative juridical method using statutory and conceptual approaches through an examination of primary legal materials and scholarly literature. The findings indicate that customary criminal law may be accommodated provided that it complies with constitutional limitations, does not conflict with Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the community of nations, and is applied through transparent and reviewable procedures. Legal certainty must be maintained by carefully identifying customary communities and their customary norms, establishing that such norms genuinely remain in force within the community, and ensuring that the sanctions imposed are proportionate and respect the rights of all parties involved.

Keywords: customary criminal law, principle of legality, legal certainty, living law, National Criminal Code.

INTRODUCTION

Indonesia possesses a diverse array of indigenous communities, each with its own norms and mechanisms for addressing violations mechanisms that have evolved from local customs. In certain communities, a violation is understood not merely as an act that harms an individual, but as one that disrupts social balance. Consequently, customary resolution processes may emphasize the restoration of relationships, formal apologies, restitution, or other traditional obligations. Nevertheless, the application of sanctions that encroach upon the criminal legal

sphere must carefully respect the respective boundaries of authority between indigenous communities and the state (Pratama, 2026).

The primary challenge lies in reconciling the recognition of customary law with the principle of legality. The principle of legality protects individuals from arbitrary criminalization by requiring that the basis for any prohibition—and its associated sanctions—be known in advance. In contrast, customary law often evolves through social practice and recognition, which are not always codified in written regulations. Contemporary discourse surrounding Article 2 of the National Criminal Code also highlights the tension between the recognition of "living law," legal certainty, and the protection of human rights (Putranto dan Triadi, 2025).

Law Number 1 of 2023 concerning the Criminal Code provides space for "living law"—customary law as it exists within society—subject to specific conditions. Article 2 recognizes the validity of such law, provided it meets the criteria established by the Act and its implementing regulations. Meanwhile, Article 1 reaffirms the principle of legality as a foundational tenet. Consequently, the recognition of customary criminal law should not be interpreted as an unfettered authority to punish individuals based on vague or ill-defined norms (Wardhana et al, 2023).

Against this backdrop, this article examines two issues: how customary criminal law is applied within the framework of the principle of legality, and how legal certainty can be maintained when customary norms are invoked. This discussion aims to provide law students with an introductory perspective on the interplay between legal pluralism, the protection of indigenous communities, and the safeguards afforded to individuals who come into contact with the legal system.

RESEARCH METHODS

This research employs a normative juridical method, which relies on legislation and library-based materials. The approaches utilized include a statutory approach—to examine the 1945 Constitution of the Republic of Indonesia and Law Number 1 of 2023 concerning the Criminal Code—as well as a conceptual approach to understand the principle of legality, *living law*, and legal certainty. Secondary legal materials include books on criminal law and the criminal justice system, as well as journal articles discussing customary criminal law. The analysis is conducted qualitatively by examining the relationship between legal norms and the issues surrounding their application.

RESULT AND DISCUSSION

The Status of Customary Criminal Law within the Indonesian Legal System

Customary criminal law can be understood as a set of norms that exist within and are observed by an indigenous or customary community; these norms prohibit certain acts and prescribe customary consequences for their violation. A key characteristic of this system is its close connection to community values, the restoration of balance, and the involvement of the affected parties. Resolutions do not necessarily take the form of imprisonment; they may instead involve restitution for losses, formal apologies, customary fines, or other measures accepted within the community (Nababan dan Anggusti, 2026).

The recognition of customary law communities (masyarakat hukum adat) is constitutionally grounded—most notably in Article 18B, paragraph (2) of the 1945 Constitution—which acknowledges and respects these communities and their traditional rights, provided they remain in existence, align with the evolution of society, and are consistent with the principles of the Unitary State of the Republic of Indonesia. This constitutional recognition does not imply that every custom automatically serves as a basis for criminal prosecution. The

existence of the community, the validity and scope of the norms, and their compatibility with constitutional rights must all be evaluated (Kirana, 2026).

Law Number 1 of 2023 concerning the Criminal Code (KUHP) addresses "living law" (hukum yang hidup dalam masyarakat) in Article 2. This provision allows for the application of such living law within the specific communities where it exists, provided that the matter is not already regulated under the Criminal Code and that the law aligns with the values of Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by the international community. Article 2 further stipulates that the specific procedures and criteria for this application shall be established through government regulations. Consequently, the recognition of customary law is integrated into the national legal framework, rather than existing as a system exempt from legal oversight (Fajar et al., 2024).

Studies on "living law" emphasize that formalization—through regulations and evidentiary mechanisms—can help ensure that the norms being applied are truly "alive" and recognized by the community. However, overly rigid formalization risks altering the dynamic nature of customary law. Therefore, implementation policies must strike a balance between documenting norms, acknowledging local practices, and providing space for indigenous communities to explain the meaning of these norms (Doing, 2025).

The Principle of Legality and the Challenges of Applying Customary Criminal Law

The principle of legality is commonly articulated through the maxim *nullum crimen, nulla poena sine lege*—meaning that no act can be criminalized and no punishment can be imposed without a legal basis that predates the act itself. In national law, Article 1, paragraph (1) of Law Number 1 of 2023 stipulates that no act may be subject to criminal sanctions and/or measures unless authorized by criminal provisions within legislation that existed prior to the commission of the act. This principle demands legal certainty, accessibility of information, and a prohibition against retroactive application (Sihotang, 2023).

The recognition of "living law"—law that exists within a society—as provided for in Article 2, expands the scope of criminal law to include norms that develop outside of written regulations. This is often referred to as the recognition of the "material aspect" of legality. Nevertheless, this provision does not constitute an unconditional exception. Any customary norm used as a legal basis must be clearly identifiable, proven to be still in practice, applicable to the relevant community and territory, and must not conflict with human rights or constitutional principles (Komeni, 2024).

The first risk is the lack of clarity in the formulation of norms. If a prohibition is stated only in general terms—without evidence regarding its content, scope, and the consequences prescribed by custom—it becomes difficult for an individual to anticipate the legal repercussions of their actions. The second risk is selective application, where the same norm is enforced differently depending on the person or group involved. The third risk is the possibility that customary sanctions may be discriminatory or disproportionate. Recent literature identifies issues concerning the boundaries of "living law," the equitable enforcement of norms, and potential conflicts with the protection of human rights as critical concerns in the application of Article 2 of the Criminal Code (Nur, 2026).

To mitigate these risks, law enforcement officials should not merely accept a unilateral assertion that a particular customary norm exists. Establishing the existence of such a norm may involve considering testimony from customary leaders, consistent practice, community recognition, relevant local documentation, and the broader social context. The accused must be given the opportunity to understand the norm being applied and to present a rebuttal. Furthermore, the court must provide clear reasoning regarding the existence of the norm, the basis for its application, and the alignment of any sanctions with national law.

Legal Certainty and Legal Capacity in the Application of Customary Norms

Legal certainty implies that the law is understandable, predictable, and applied consistently. In the context of customary criminal law, certainty relates not only to whether a norm is written down, but also to whether the content of the norm can be substantiated and is known to the members of the community in question. Such certainty is essential for protecting indigenous or customary communities while simultaneously preventing arbitrary criminalization (Sudibyo dan Rahman, 2021).

The term "legal capacity" in this context refers to the ability and authority of a subject or institution to act and make decisions that carry legal consequences. In the application of customary criminal law, a distinction must be made between the capacity of a customary community to maintain and enforce its internal norms and the state's authority to impose criminal penalties. The recognition of a customary community does not, in itself, grant any individual leader or group the authority to impose punishments that restrict a person's liberty (Putra, 2024).

The legal capacity of an indigenous community must be assessed based on the existence of the community, its recognized institutional structure, the practices that remain in effect, and the scope of its authority under the law. Simultaneously, the capacity of an individual alleged to have committed an offense must also be considered—including their age, any legally relevant conditions, and their right to a fair process. Customary dispute resolution must not be used as a shortcut to circumvent the procedural safeguards provided within the formal judicial system (Pasaribu dan Simamora, 2022).

The concept of a criminal justice system implies that law enforcement is a series of processes involving investigators, prosecutors, the courts, and correctional institutions; this system must maintain a balance between justice, legal certainty, and utility. This systemic perspective is essential to ensure that customary dispute resolution does not operate as an entirely unmonitored process. When a case enters the national judicial system, the evidentiary process

and the resulting verdict must continue to uphold the rights of all parties involved (Soetijono et al., 2025).

Legal certainty also requires transparency regarding the nature of sanctions. Sanctions aimed at restoring social relations may align with restorative justice, provided they are accepted voluntarily or imposed through a legitimate, proportionate process that does not degrade human dignity. Conversely, sanctions involving violence, humiliation, ostracization that violates fundamental rights, or discrimination cannot be justified solely on the grounds of tradition. Customary norms must be understood within the framework of the constitution and human rights (Hasan, 2025).

A Balanced Model of Implementation

First, identify the norms and the community. The authority handling the case must verify that the indigenous community and the claimed norms are indeed still active, and must clarify the territorial scope and the individuals bound by these norms. Second, conduct an assessment of compatibility. The norms must not conflict with Pancasila, the 1945 Constitution, human rights, or the provisions of national law. Third, ensure a fair process, including notification regarding the alleged violation of norms, an opportunity to defend oneself, and documentation of the rationale for the decision (Hasan, 2025).

Fourth, ensure the proportionality of sanctions. Restorative objectives should be prioritized—provided they align with the nature of the offense and the interests of the victim—without compromising the protection of vulnerable parties. Fifth, establish coordination between customary institutions and law enforcement agencies to prevent unjustified double sanctions or conflicting rulings. Sixth, document these practices through a participatory approach with the indigenous community, ensuring that the documentation does not merely become a tool for state-imposed standardization (Hasan, 2025).

Article 66 of the National Criminal Code also includes the fulfillment of local customary obligations as a form of additional penalty. This indicates that

customary obligations can be relevant within the national penal system, though their application must remain within the framework of prevailing legal rulings and regulations (criminal justice, 2023). Consequently customary resolution mechanisms and state judicial processes should be designed to be interconnected, while maintaining a clear distinction between their respective functions.

Under this model, respect for legal pluralism need not be viewed as being in absolute conflict with the principle of legality. Recognizing customary norms can enrich the understanding of justice as it exists within a society, while evidentiary requirements, constitutional boundaries, and fair procedural standards serve to protect individuals against arbitrary action.

CONCLUSION

The application of customary criminal law within the Indonesian legal system is accommodated through the recognition of "living law"—laws that exist and are practiced within a society—most notably under Article 2 of Law Number 1 of 2023 concerning the Criminal Code. This recognition constitutes an acceptance of legal pluralism, yet it does not negate the principle of legality. Any customary norm applied must be genuinely "living," verifiable, clearly defined in its scope, and consistent with Pancasila, the 1945 Constitution, and human rights.

Legal certainty can be maintained through the identification of specific communities and their norms, transparent evidentiary processes, the provision of opportunities for the accused to mount a defense, judicial oversight, and the imposition of proportionate sanctions. The legal capacity of customary institutions must be distinguished from the state’s authority to impose criminal penalties. Consequently, the application of customary criminal law should be directed toward achieving a balance between respecting local values, protecting individual rights, and upholding the principles of a state governed by the rule of law.

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