

Constitutional Integration of Customary Law in Criminal Case Handling Mechanisms Based on the National Criminal Code (Law Number 1 of 2023)

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ABSTRACT

The reform of criminal law through Law Number 1 of 2023 concerning the Criminal Code marks a paradigm shift from a retributive approach to corrective, restorative, and rehabilitative justice. One important aspect of this reform is the constitutional recognition of living law, including customary criminal law. This recognition affirms that customary law has a legitimate position as a basis for criminal punishment, with criminal provisions that can be in the form of fulfilling local customary obligations. This study uses a normative juridical method with a statutory and conceptual approach to analyze how the integration of customary criminal law into criminal case handling mechanisms can be implemented constitutionally within the framework of the National Criminal Code. The results show that customary criminal cases are still handled within the general criminal justice system, without the establishment of a separate customary court. However, customary leaders play a crucial role as experts in explaining violated customary norms, while the resolution of cases is directed towards restorative justice that aligns with the principles of the 1945 Constitution and Pancasila. These findings confirm that the constitutional integration of customary law into the national criminal justice system is a crucial step in realizing substantive justice, legal pluralism, and harmonization between national law and local values prevalent in society.

1. Introduction

As a country governed by the rule of law as affirmed in the Constitution, in casu the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), Indonesia places the law as the main foundation in all aspects of state administration. However, in terms of its implementation, the law

is not static but dynamic in nature.¹ This shows that the applicability of a legal norm is always open to change and adjustment in line with developments in social values, community needs, and paradigms that evolve in the life of the nation and state. This dynamic is also reflected in the field of criminal law, which is continuously undergoing reform in order to respond to ever-changing social challenges and realities.

The renewal of criminal law in Indonesia has brought a new paradigm in the handling of criminal cases. This new paradigm has become the national vision for criminal law, which is no longer considered a law of retaliation (*lex talionis*) that prioritizes retributive justice, but is focused on rehabilitative justice.² This means that criminal law is no longer oriented towards acts or criminal offenses as in the classical school of thought, but is more oriented towards the neo-classical school of thought, which pays attention to objective (acts/physical) and subjective (people/inner/inner attitude) aspects. In addition to the vision of reforming national criminal law, one of the missions of national criminal law reform is to shift criminal law from a colonial context to a codification of criminal law that embodies Indonesian values.³

The paradigm shift in criminal law reform also focuses on the regulation of living law in society. The existence of customary law communities is constitutionally recognized through Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which affirms that the state respects and recognizes customary law communities as long as they continue to exist and are in line with the principles of the Unitary State of the Republic of Indonesia. The existence of living law through the approach of Law Number 48 of 2009 concerning Judicial Authority (Judicial Authority Law) has been legitimately accommodated, whereby Article 5 Paragraph (1) states that “judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that exist in society.” Therefore, the basis for the regulation of living law in national criminal law stems from the constitutional mandate, in this case Article 18B of the 1945 Constitution of the Republic of Indonesia. The main thing that the legislators want to accommodate is the expansion of the principle of legality by regulating non-state law or living law.⁴

Living law, based on the explanation of Article 2 of Law Number 1 of 2023 concerning the Criminal Code (KUHP), is unwritten customary law that is still valid and developed in society as long as it does not conflict with Pancasila, the 1945 Constitution of the Republic of Indonesia and Human Rights as well as general legal principles, which in principle determine that a person who commits a certain act should be punished. Eddy and Topo argue that the understanding of the principle of legality in relation to living law encompasses both written and unwritten law. Furthermore, they explain that the application of living law can only be enforced for acts that are not regulated in the Criminal Code and is limited to minor criminal offenses. Living law can not only be used as a basis for imposing punishment, but can also be used as a reason to release a person from criminal responsibility, while still considering the principle of balance as regulated in the Criminal Code.⁵

The application of customary criminal law reflects the state's efforts to recognize and respect living law, while also demonstrating its efforts to harmonize the national legal system with customary legal practices in various regions.⁶ This is explicitly accommodated in Article 597 of the Criminal

¹ Jimly Asshiddiqie dan M. Ali Safa'at, *Teori Hans Kelsen Tentang Hukum*, Jakarta: Sekretaris Jenderal & Kepaniteraan Mahkamah Konstitusi RI, 2006, Page 96-97

² Eddy O. S. Hiariej, *Prinsip-Prinsip Hukum Pidana, Edisi Penyesuaian KUHP Nasional*, Depok: Rajawali Pers, 2024, Page 55

³ Albert Aries, *Hukum Pidana Indonesia Menurut KUHP Lama & KUHP Baru*, Depok: Rajawali Pers, 2024, Page 12

⁴ Aisha Nurul Fadilla, et.al, *Analisis Pengaturan Living Law dalam RUU KUHP yang Dituangkan pada Peraturan Daerah Ditinjau Berdasarkan Konstitusi*, Jurnal Jurist-Distion, Vol 7, No. 2, 2024, Page 224 <https://doi.org/10.20473/jd.v7i2.56121>

⁵ Eddy O. S. Hiariej & Topo Santoso, *Anotasi KUHP Nasional*, Depok: Rajawali Pers, 2025, Page 6-7

⁶ *Ibid*, Page 614

Code, which stipulates that anyone who commits an act that is considered prohibited by the laws of society shall be punished by fulfilling local customary obligations.

Regulations concerning the handling of perpetrators of customary crimes are a crucial aspect. Although the explanation of Article 2 of the Criminal Code states that provisions concerning living law will be further regulated through Regional Regulations, the mechanism for handling customary criminal cases still focuses on the Draft Criminal Procedure Code (RUU KUHAP). The RUU KUHAP is intended to serve as the basis for the implementation of the criminal justice system in order to realize the vision of the national Criminal Code as substantive criminal law. To that end, efforts are needed to synchronize and harmonize substantive criminal law and formal criminal law in order to create consistency in the overall application of criminal law.⁷

The drafting of the new Criminal Procedure Code brings hope for the implementation of substantive criminal law (Criminal Code) in line with the vision of national criminal law reform, as well as enabling more optimal synchronization and harmonization between substantive criminal law and formal criminal law provisions. The emergence of new provisions such as customary criminal law is an interesting issue to examine, particularly in the context of the implementation of handling violations of customary criminal law. Therefore, the author is encouraged to analyze how this law can be operationalized and integrated into the mechanism for handling customary crimes, as regulated in the framework of the National Criminal Code.

2. Research Methods

The research method used in this study is normative juridical, using the following approaches: first, the statute approach, which is an approach conducted by examining legislation related to the legal issues being discussed. The second approach is the conceptual approach, which is based on legal opinions or legal doctrines from legal experts.⁸

3. Result and Discussion

3.1. Customary Criminal Law Within the Framework of National Criminal Law

The existence and recognition of customary criminal law regulations have long been known in Indonesia, as evidenced by the existence of Law No. 1 Drt 1951 on Temporary Measures to Organize the Unity of Power and Civil Court Proceedings. From this provision, the regulation was then included in the 1945 Constitution of the Republic of Indonesia as amended.⁹

In fact, the existence of customary criminal law itself has existed and developed for a long time, even before the colonial period. This customary criminal law grew and developed within a community based on traditional norms and cultural values respected by certain communities.¹⁰ The existence of customary criminal law within its scope of application only applies within the community where customary law lives and thrives. Hilman Hadikusuma defines customary criminal law, as quoted by Fianusman Laia et al., as originating from the Dutch term “adat delicten recht,” meaning customary law violations.¹¹

As part of Indonesia's national identity, customary criminal law plays a very important role in protecting and preserving cultural values in communities that still practice customary law. The

⁷ Dewan Perwakilan Rakyat Republik Indonesia, *Naskah Akademik Rancangan Undang-Undang Tentang Hukum Acara Pidana*, Februari 2025, Page 58

⁸ Muhaimin, *Metode Penelitian Hukum*, Mataram: Mataram University Press, 2020, Page 56-58

⁹ Lilik Mulyadi, *Eksistensi Hukum Pidana Adat di Indonesia: Pengkajian Asas, Norma, Teori, Praktik Dan Prosedurnya*, Jurnal Hukum dan Peradilan, Vol 2 No 2, 2013, Page 229 <https://doi.org/10.25216/jhp.2.2.2013.225-246>

¹⁰ Tri Astuti Handayani dan Andrianto Prabowo, *Analisis Hukum Pidana Adat Dalam Hukum Pidana Nasional*, Jurnal Hukum Ius Publicum, Vol. 5 No.1, 2024, Page 92 <https://doi.org/10.55551/jip.v5i1.95>

¹¹ Fianusman Laia, et.al, *Eksistensi Hukum Adat Dalam Penyelesaian Tindakan Pidana Perzinaan*, Jurnal Panah Keadilan, Vol. 3 No. 1, 2024, Page 25-26 <https://doi.org/10.57094/jpk.v3i1.1444>

existence of customary law communities is constitutionally recognized through Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which affirms that the state respects and recognizes customary law communities as long as they continue to exist and are in line with the principles of the Unitary State of the Republic of Indonesia. This affirms the state's obligation not only to recognize but also to respond to the ongoing development of customary law.¹²

The existence of customary law communities and their customary criminal justice systems has become an important concern for the state. Therefore, efforts are needed to accommodate and formulate provisions of customary criminal law within the framework of national criminal law in an integrated manner. In fact, the existence of customary criminal law as part of living law has gained legitimacy through Article 5 of the Judicial Authority Law, which requires judges, including constitutional judges, to explore, understand, and follow the legal values and sense of justice that have developed within society. However, it does not stop there; the legitimacy of customary criminal law has been explicitly integrated into the national criminal law system.

Through the criminal law reform process, the legislators, namely the legislative and executive bodies, have enacted the Criminal Code, which is planned to come into effect nationally in early 2026. One of the notable aspects of the implementation of the Criminal Code is the inclusion of provisions related to living law. The recognition of living law as part of criminal offenses in the national criminal law system is an interesting aspect, as it marks a new approach in the formulation and application of criminal law that is more contextual and responsive to the legal values that have grown within society.¹³

The study of the renewal of customary criminal law within the framework of national criminal law cannot be separated from the reasons for criminal law reform, namely political, sociological, and practical reasons. Beni Kharisma revealed that criminal law reform substantially reflects attention to the aspirations for justice that are developing within society. One important aspect of this reform is the recognition of the existence of laws that are alive in society, which is manifested through the adoption of the sanction system in customary criminal law into the framework of national criminal law.¹⁴

The application of customary criminal law as stipulated in Article 2 of the Criminal Code requires that living law be understood as provisions that are not yet regulated in the Criminal Code, but are still in harmony with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights principles, and recognized general principles of law. Thus, based on the explanation of Article 2, customary criminal law provisions will be further implemented through specific regulations in the form of Regional Regulations that stipulate customary criminal acts.

The construction of criminal acts based on the laws that exist in society is specifically contained in Chapter XXXIV of the Criminal Code, where Article 597 stipulates that:

(1) Every person who commits an act that is prohibited by the laws of society shall be punished with a criminal penalty.

¹² Rahmat Hi. Abdulah, *Urgensi Hukum Adat Dalam Pembaharuan Hukum Pidana Nasional*, Jurnal Fiat Justisia, Vol 9, No. 2, 2015, Page 176 <https://doi.org/10.25041/fiatjustisia.v9no2.595>

¹³ Nindy Putri Nur Efendi dan Eva Achjani Zulfa, *Sinergi atau Konflik: Pasal 2 KUHP 2023 dalam Penegakan Hukum di Indonesia*, Jurnal Nagari Law Review, Vol 8, No 2, 2024, Page 372 <https://doi.org/10.25077/nalrev.v.8.i.2.p.371-382.2024>

¹⁴ Beni Kharisma Arrasuli, *Eksistensi Hukum Pidana Adat dalam Rancangan KUHP: Problematika Asas Legalitas dan Over-Kriminalisasi*, Jurnal Unes Law Review, Vol 6, No. 1, 2023, Page 728 <https://doi.org/10.31933/unesrev.v6i1.879>

(2) The criminal offense referred to in paragraph (1) is the fulfillment of customary obligations as referred to in Article 66 paragraph (1) letter f.

This means that all criminal acts that violate the laws of society are subject to punishment in accordance with local customs. Furthermore, the imposition of additional penalties related to the fulfillment of local customs is further regulated in Article 96 of the Criminal Code, which stipulates that:

(1) Additional penalties in the form of fulfilling local customary obligations shall be prioritized if the criminal act committed meets the provisions referred to in Article 2 paragraph (2).

(2) Fulfillment of local customary obligations as referred to in paragraph (1) shall be considered equivalent to a Category II fine.

(3) In the event that the customary obligations referred to in paragraph (1) are not fulfilled, the fulfillment of customary obligations shall be replaced by compensation equivalent to a category II fine.

(4) In the event that the compensation referred to in paragraph (3) is not fulfilled, the compensation shall be replaced with probation or community service.

The existence of Article 96 of the Criminal Code emphasizes that the implementation of local customary obligations does not always have to be carried out directly. Under certain circumstances, these obligations may be replaced by compensation payments equivalent to a Category II fine, amounting to IDR 10,000,000.00 (ten million rupiah), or may be converted into probation or community service. This provision is intended to accommodate situations where a person may be unable to fulfill local customary obligations.¹⁵

3.2. Mechanism for Handling Customary Criminal Cases

With the enactment of the Criminal Code on January 2, 2023, which is planned to come into effect on January 2, 2026, formal legal provisions are needed as an instrument of implementation to operationalize the material provisions in the Criminal Code when it comes into effect. Thus, formal legal provisions serve as the main foundation in the implementation of the criminal justice system to handle various cases regulated in the Criminal Code.

The inclusion of criminal provisions related to customary law in the Criminal Code provides special legitimacy in the process of handling such cases. In relation to the mechanism for handling criminal offenses related to the laws that apply in society, it is imperative to have integrated formal legal provisions to ensure that law enforcement in such cases can be carried out effectively.

If we look at the Criminal Procedure Code Bill currently being discussed by the legislature and the government, it appears that the handling of criminal cases related to customary law or the laws that exist in society still follows the general integrated criminal justice system.¹⁶ In other words, the case is not handled through a special customary criminal court, but rather through the stages of investigation, prosecution, and trial in court, as is the case with ordinary criminal offenses.

In the examination of criminal cases related to customary law or living law, customary leaders may be involved as experts in practice. Tobi Haryadi and Zakaria explain that an expert is an individual who has special knowledge or skills in a particular field and is asked to provide opinions or information in court to help uncover the true legal facts of the case under discussion.¹⁷ In practice,

¹⁵ Eddy O. S. Hiariej & Topo Santoso, *Op Cit*, Page 137

¹⁶ Institute for Criminal Justice Reform, RUU KUHAP <https://icjr.or.id/wp-content/uploads/2025/03/RUU-KUHAP-20-Maret-2025.pdf> diakses pada 27 September 2025 Pukul 17.45 WIB

¹⁷ Tobi Haryadi dan Zakaria, *Eksistensi Saksi Ahli Dalam Sistem Peradilan Pidana Di Indonesia*, Jurnal Disiplin, Vol 30, No 2, 2024, Page 58 <https://ojs.stihpada.ac.id/index.php/disiplin/article/view/1178>

traditional leaders are expected to explain the nature of the violations of customary law committed by the defendant. This information will assist the judge in analyzing and considering the existence and substance of the customary norms that are considered to have been violated, so that it can be used as a basis for consideration in the verdict. The presence of traditional leaders as experts in the case examination process enables judges and other law enforcement officials to learn about local customs.¹⁸

The handling of cases involving perpetrators of legal violations living in the community is carried out through a criminal justice process. This means that the process begins with a report to the police (Indonesian National Police investigators), who then follow up by conducting an investigation. After that, the case is handed over to the prosecutor's office for prosecution, and then examined in a public court hearing.

The duty of investigators in handling cases generally requires them to first receive reports from the community if someone is suspected of committing a criminal offense. This is also the case with the handling of living law violations, which can occur due to reports from indigenous communities who are aware of, or have been victims of, an incident that is suspected to be a customary criminal offense.¹⁹

Once the case file has been compiled, the investigator will submit it to the Public Prosecutor's Office for further processing. In exercising the state's authority in the field of prosecution, the Public Prosecutor's Office has the authority to determine whether a case is suitable to be brought to court. This authority plays an important role in maintaining a balance between the application of the law in accordance with applicable rules (*rechtmatigheid*) and an approach oriented towards objectives and the principle of expediency (*doelmatigheid*) in the criminal justice process.²⁰

Once the prosecutor has completed the indictment, the case file is then transferred to the court for immediate processing in a trial. According to Andi Hamzah, the process of examining criminal cases in court is a series of stages and procedures carried out by the court to review and decide on criminal cases, which includes the receipt of files, preliminary examinations, examination of the main case, and the reading of the verdict.²¹ This examination is also applied in the handling of cases involving violations of living law. If, during the examination, the judge is convinced by a legal event, evidence, and the testimony of a traditional leader who is presented as an expert that a customary crime has indeed occurred, then the judge may impose a criminal sanction in the form of fulfilling local customary obligations. If the fulfillment of local customary obligations cannot be carried out, the perpetrator may be subject to a category II fine or may be transferred to criminal supervision or community service. This provision is intended to accommodate situations where a person may not be able to fulfill local customary obligations.

In addition to the examination of a criminal act through the criminal justice system mechanism, this is also an implementation of the spirit of the paradigm of the formation of the Criminal Code, which no longer focuses on retribution but on corrective justice, restorative justice, and rehabilitative justice,²² therefore, during the investigation, examination, and prosecution stages, law

¹⁸ Milenia Ramadhani, *Tantangan Implementasi Pengakuan Hukum Adat Dalam Kitab Undang-Undang Hukum Pidana Baru di Indonesia*, Jurnal Syntax Idea, Vol 6, No. 8, 2024, Page 3714 <https://doi.org/10.46799/syntax-idea.v6i8.4356>

¹⁹ Cynthia Cornelia Leasa, et.al, *Penyelidikan Dan Penyidikan Dalam Perkara Pidana*, Jurnal Tatohi, Vol 4, No. 6, 2024, Page 481 <https://doi.org/10.47268/tatohi.v4i6.2454>

²⁰ Bonifasius Petrus Sando Mokorimban, *Fungsi, Tugas, Dan Wewenang Kejaksaan Dalam Sistem Peradilan Pidana Menurut Undang-Undang Republik Indonesia Nomor 11 Tahun 2021*, Jurnal Lex Privatum, Vol 13, No. 4, 2024, Page 2 <https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/56576>

²¹ Andi Hamzah, *Hukum Acara Pidana*, Jakarta: Sinar Grafik, 2016, Page. 245.

²² Rikiansyah, et.al, *Kajian Filsafat Hukum terhadap Perubahan Paradigma Hukum Pidana di Indonesia: Dari Pembalasan ke Pemulihan*, Indonesian Journal of Law and Justice, Vol 1, No. 4, 2024, Page 2 <https://doi.org/10.47134/ijlj.v1i4.2719>

enforcement officials are required to implement a resolution effort or mechanism using a restorative justice approach. The existence of living law, in its implementation, still uses an integrated judicial system approach and does not allow for resolution through a special customary court. Therefore, the mechanism for handling customary criminal cases still uses the general criminal justice system.

Although the handling of customary criminal cases uses the general criminal justice system, the integration of customary criminal law into the national criminal law system is not only related to normative and cultural aspects, but also requires constitutional oversight by state institutions so that its implementation remains in line with the principles of the rule of law, justice, and the protection of human rights as stipulated in the Constitution, in casu the 1945 Constitution of the Republic of Indonesia. In this context, the House of Representatives (DPR) and the Constitutional Court (MK) have a central role as constitutional supervisors of the existence and implementation of customary criminal law in Indonesia.

4. Conclusion

As a country based on the 1945 Constitution, Indonesia places law as the main pillar in the administration of national and state life. Social dynamics and the development of values of justice demand a more humane and contextual reform of criminal law. Through the Criminal Code, the state has not only shifted its paradigm from retributive justice to corrective, restorative, and rehabilitative justice, but also provided constitutional recognition of living law, including customary criminal law.

The integration of customary criminal law into the national legal system reflects efforts to harmonize local values and constitutional principles, as affirmed in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In the context of implementation, the mechanism for handling customary criminal cases is still carried out through the general criminal justice system, but it still provides space for customary leaders as experts in explaining the customary norms that have been violated and the application of customary sanctions as stipulated in Articles 96 and 597 of the Criminal Code. Furthermore, the DPR and the Constitutional Court play an important role in overseeing the implementation of the customary criminal regime. The DPR functions through its right of interpellation and legislative function to maintain the harmonization of norms, while the MK carries out constitutional review (judicial review) to ensure that the application of customary law remains in line with the principles of the rule of law and human rights. Thus, the constitutional integration of customary law into the National Criminal Code is a strategic step towards a pluralistic, just, and Indonesian-rooted criminal justice system.

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