

The legitimacy of customary criminal law institutions in the imposition of just punishment toward the implementation of Law No. 1 of 2023 on the Indonesian Criminal Code

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Abstract

The concept of living law within society has become an important subject of study, particularly in anticipation of the implementation of Law No. 1 of 2023 on the Indonesian Criminal Code (KUHP). The new Indonesian Criminal Code, also referred to as the National Criminal Code, is scheduled to take effect in early 2026. Its enforcement presents dilemmas and new dynamics for both law enforcement authorities and the general public. Moreover, several criminal provisions have sparked debate among the public, particularly with regard to legal principles contained in the Code, including the application of living law in society, commonly referred to as *adat law* (*adatrecht*). This study adopts a normative legal approach with a descriptive research design and a statutory approach. The sources of data used are secondary materials, consisting of three categories: primary legal materials in the form of legislation; secondary materials such as books, journals, and scholarly writings; and tertiary materials such as legal dictionaries, online resources, and encyclopedias. Data collection was carried out through library research, and the data were analyzed qualitatively. Article 2 of the Criminal Code is not intended to revive the traditional customary court system, but rather to provide legitimacy to legal institutions that remain living within society. The existence of living law in society does not contradict the principle of legality, which is based on the philosophical foundation of *nulla poena sine lege* meaning that punishment can only be imposed on the basis of written criminal law. However, living law also aligns with the philosophical principle of *nulla poena sine jure*, which means that no punishment can exist without law, including laws that live within society. The application of living law is subject to important limitations: it must not conflict with the Criminal Code, the 1945 Constitution, human rights principles, or universally recognized international norms. Customary law, however, has proven to be more effective in resolving community disputes, as communal and spiritual values remain deeply rooted in social life, making it a swift mechanism for restoring harmony within society.

Keywords

Legitimacy, Customary Criminal Law, Living Law, Justice, Indonesian Criminal Code 2023

Published:

October 1, 2025

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Selection and Peer-review under the responsibility of the ASEAN Conference of Law Schools 2025 Committee

Introduction

Indonesia is a country characterized by diverse cultures, ethnic groups, and legal systems that continue to evolve over time. One system that has endured to the present day is *adat criminal law* (customary criminal law). This legal tradition, practiced by indigenous communities, is rooted in cultural values and social norms. Customary criminal law has long been embedded within Indonesia's social system, particularly in regions where local wisdom remains strong.

Within the framework of a state governed by law, the existence of customary criminal law often sparks debate, especially concerning its position and role in the national legal system, which is primarily based on codified rules such as the Indonesian Criminal Code (KUHP) [1]. The enactment of Law No. 1 of 2023, replacing the century-old Dutch colonial Criminal Code, represents a historic milestone in reforming Indonesia's criminal law system. This revision has long been anticipated, as the colonial code was seen as inconsistent with the values embraced by the Republic of Indonesia. After several failed attempts at reform, the government eventually succeeded in enacting Law No. 1 of 2023, which will take effect in January 2026.

One of the significant innovations in the new Criminal Code is the recognition of *living law* (*hukum yang hidup di masyarakat*), including customary law, as stipulated in Article 2 paragraph (1). This provision acknowledges that individuals may be subject to punishment based on laws prevailing in society, provided that certain requirements are met. This recognition formally integrates customary law into the national criminal law system. Nevertheless, this development also raises conceptual and practical questions, such as how to determine the parameters of customary law that may be applied, how the principle of legality should be upheld, and to what extent customary criminal law can coexist with universal principles of justice and human rights.

The central issues to be examined in this article are the extent to which customary criminal law remains relevant within the national criminal law system after the enactment of the new Criminal Code, and how its institutions can maintain legitimacy in the imposition of punishments that reflect substantive justice. Specifically, this article addresses two research problems: (1) the existence of customary criminal law in the context of national criminal law following the enactment of the new Criminal Code; and (2) the legitimacy of customary legal institutions in delivering punishments that are fair and just.

Method

This study employs normative legal research using a statutory approach. According to Ronny Hanitijo Soemitro, the forms of normative legal research include: the inventory of positive law, the study of legal principles, research on *law in concreto*, synchronization of law, research on legal systems, and comparative law [2]. Normative legal research is also referred to as doctrinal legal research. In doctrinal research, law is conceptualized

as what is written in statutory regulations (*law in books*) [3]. The study of legal systematics can therefore be conducted on specific legislation or written law [4].

The data in this research consist of secondary data, obtained through library research relevant to the subject matter. Secondary data are defined as “data derived from literature studies related to publications, namely legal documents contained in official sources” [5]. Such data include primary legal materials, secondary legal materials, and tertiary legal materials.

Data analysis can generally be divided into two categories: quantitative and qualitative. Qualitative analysis, which is employed in this study, does not use numerical measurements but rather provides descriptions of findings through words. It emphasizes the quality of data rather than its quantity. In normative legal research, qualitative analysis is prioritized as the primary method of interpretation and evaluation [6].

Results and Discussion

The Existence of Customary Criminal Law within the Context of National Criminal Law after the Enactment of the New Criminal Code

C. Van Vollenhoven described customary law as a body of regulatory norms governing the behavior of indigenous peoples and foreign Orientals, encompassing two aspects: law and social norms with sanctions. According to him, customary law constitutes unwritten regulations (*unstatutory regulations*) or uncodified rules [7]. As a system that is not written or formally arranged, the application of customary law in the public sphere depends largely on prevailing social values, which are acknowledged and maintained by the community. Consequently, customary law may also be understood as the living customs of society.

This notion has been proven in practice, as many communities still apply customary sanctions to maintain social order and harmony. Customary sanctions serve as a mechanism to uphold consistency in communal norms by penalizing violations. According to Lilik Mulyadi, the imposition of customary sanctions represents a restoration of balance between the community and the universe, functioning as a *ratio magis* that aims to return disrupted harmony to its original state [8].

Lilik further summarizes that customary criminal law concerns acts that disregard society’s sense of justice and propriety, thereby disturbing social balance [9]. For him, customary law is an indigenous legal system of Indonesia, containing noble and resilient values that form the identity of the nation. Any violation of these values causes socio-cultural disruption in society. Although it is not codified or systematically arranged, customary law remains binding in its application because it embodies communal values accepted by local customary law communities, reflecting an evenly distributed sense of justice [10].

This recognition of living law is consistent with the long-term development agenda (RPJP) under Law No. 17 of 2007, which affirms two orientations in legal reform: (1) developing both written and unwritten legal substances to form a unified national legal system aligned with Indonesia's development agenda and socio-cultural aspirations; and (2) involving communities in shaping legal awareness as an essential component of legal development. Thus, Indonesian legal reform is not only substantive but also participatory, ensuring community engagement as an inseparable element.

The Preamble of the 1945 Constitution further enshrines Pancasila as the foundational philosophy underpinning social and legal life. Pancasila reflects Indonesia's core values of divinity, humanity, unity, democracy, and social justice. These principles are reinforced in Article 29(1), which declares that Indonesia is founded on the belief in One Almighty God, as well as in Articles 28A–28J, which guarantee the protection of human rights.

Furthermore, Article 5 paragraph (3) of Emergency Law No. 1 of 1951 stipulates that: “acts which, under the living law, are considered criminal and have comparable provisions in the Criminal Code, shall be subject to the same punishment as their closest equivalent.” This provision directs judges to recognize and incorporate the living law into adjudication of criminal cases. Beyond formal legality, customary law therefore holds legitimacy within the framework of material legality. Nevertheless, recognition of customary law often clashes with formalistic interpretations of legality.

The inclusion of material legality in the new Criminal Code aims to ensure legal certainty in criminal adjudication and to address gaps in written law [11]. However, incorporating customary law into the framework of law enforcement raises debates regarding the emergence of a dualistic legal system. Customary adjudication is often regarded as more effective in restoring the values of justice disrupted by violations of social norms [12].

This situation creates two major implications: first, the legitimacy of customary adjudication signifies the recognition of customary offenses; and second, the role of customary adjudication as a complementary mechanism for resolving non-customary offenses through customary legal instruments. What must be carefully considered is ensuring that customary legal provisions, when integrated as criminal norms, do not create conflict or instability within the broader system of criminal law enforcement.

The Legitimacy of Customary Legal Institutions in the Imposition of Just Punishment

Legitimacy is a crucial element for any institution, as it is constrained by prevailing norms and social values, and responses to these constraints necessitate analyzing institutional behavior within its broader environment. Suchman explains that “legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.” In other words, legitimacy represents a collective assumption that a particular action is necessary, proper, or appropriate according to a socially constructed

system [13]. In the context of governance, Coicaud views legitimacy as the recognition of authority in ruling [14], while Johnson interprets it as a collectively constructed reality of social recognition [15].

According to Max Weber, legitimacy derives from three primary sources: (1) tradition, whereby people accept authority because it has existed over time; (2) charisma, where legitimacy comes from trust in a leader's personal qualities; and (3) legality, where authority is recognized through trust in rational legal rules. Based on this framework, government legitimacy depends largely on public perception, whether grounded in custom, charisma, or rational-legal authority [16].

In the context of Indigenous Peoples (Masyarakat Hukum Adat, MHA), legitimacy affects two fundamental aspects: first, their legal status and the rights they possess; and second, the legal consequences in terms of constitutional and/or traditional rights. This remains a contested issue in practice, as indigenous communities and the state often have divergent perspectives regarding MHA, which frequently leads to conflict [17].

The new Indonesian Criminal Code (Law No. 1 of 2023) upholds legality standards while simultaneously accommodating unwritten law (*living law*) recognized by society. Indonesia, as a *rechtsstaat* (rule of law), does not base its governance merely on power (*machtsstaat*), but recognizes both written and unwritten norms. Thus, even if an act is not regulated by statutory law, but violates living law in society, it may still be sanctioned [18]. However, the application of unwritten customary law is restricted to conditions consistent with Pancasila, the 1945 Constitution, human rights, and universally recognized legal principles.

The incorporation of living law into the new Criminal Code raises challenges in enforcement. Without proper local regulations (e.g., governor or regent/mayor decrees), the recognition of customary offenses could create legal uncertainty. Law enforcement officers must be guided not only by statutory provisions but also by a sensitivity to the sense of justice prevailing in diverse communities.

The 2023 Criminal Code reform is positioned as a step toward modernizing Indonesia's criminal justice system, ensuring due process while addressing broader social and humanitarian issues. From a criminal policy perspective, reform should encompass the three dimensions of law: substance, structure, and legal culture. This holistic approach aims to ensure effectiveness in law enforcement.

Customary law, when supported by strong local leadership, can serve as an effective means of resolving cases where statutory provisions are silent. According to Anto Soemarman, the authority of customary law stems from the recognition and maintenance of customary offenses by elders and community leaders. The influence of customary figures can therefore serve as a consideration for judges in adjudicating cases.

The integralistic approach to Indonesian criminal policy emphasizes harmonizing competing interests to create a modern national criminal law system. This view aligns with Muladi's principle of *balancing interests within the framework of Pancasila*, whereby criminal law reform must consider the interests of the individual, society, the state, and the broader international community [19].

Ultimately, the purpose of punishment is not solely retribution but the restoration of cosmic and social balance disrupted by crime—covering physical, psychological, and spiritual dimensions. Justice, as a fundamental legal value, must be harmonized with legal certainty and utility. As Van Apeldoorn highlights, law constantly faces a tension between the demand for certainty and the demand for justice. To resolve this, the principle of utility must be prioritized so that both certainty and justice serve human dignity and human rights.

In this framework, the final aim of criminal policy is the protection and welfare of society. As Barda Nawawi argues, “the ultimate goal of criminal policy is the protection of society to achieve social welfare.” Similarly, UNAFEI (1973) emphasized that protection of society represents the ultimate objective of criminal policy, which may be expressed in terms such as the happiness of citizens, wholesome living, social welfare, or equality.

Thus, the legitimacy of customary law institutions in the imposition of just punishment lies in their ability to reconcile legal pluralism with national criminal law reform, ensuring that justice, certainty, and utility are harmonized under the philosophical framework of Pancasila.

Conclusion

The existence of living law within communities has become an important subject of study in light of the enactment of Law No. 1 of 2023 on the Indonesian Criminal Code (KUHP). The principles embedded in the National Criminal Code relate directly to the application of community-based law, often referred to as *adat law*. Article 2 of the new Criminal Code is not intended to revive the traditional system of customary courts, but rather to provide legitimacy to the living legal institutions that continue to function within society. The recognition of such laws does not contradict the principle of legality, which is grounded in the philosophical maxim *nulla poena sine lege*, emphasizing that punishment must be based on criminal legislation. At the same time, living law reflects the broader principle of *nulla poena sine jure*—no punishment without law—which encompasses community-based laws that continue to exist and operate in daily life. The application of living law must nonetheless be subject to clear limitations. It must not contradict the Criminal Code, the 1945 Constitution, human rights, or universally recognized principles of law. In practice, *adat law* often proves more efficient in resolving community conflicts, as it is deeply rooted in strong communal and spiritual values, which enable rapid restoration of social harmony.

In order to ensure effective and just implementation, the government must establish clear implementing regulations, particularly regarding criteria, procedures, and boundaries for recognizing living law as customary criminal law within the framework of the National Criminal Code. This requires the issuance of government regulations or local regulations that can serve as binding guidelines. Such rules should define when an act may be classified as a customary criminal offense, how it may be applied within judicial proceedings, and what restrictions should be placed on its enforcement to ensure consistency with the values of Pancasila, the 1945 Constitution, and human rights. Furthermore, the legitimacy of customary legal institutions in imposing just punishment requires meaningful participation of Indigenous communities in the formulation of these rules. Safeguards must be put in place to ensure that the application of living law does not result in violations of human rights, particularly with respect to women, children, persons with disabilities, and other vulnerable groups. In this regard, the principles of justice, equality, and non-discrimination must be prioritized to guarantee that the recognition of living law enriches Indonesia's criminal justice system without compromising fundamental rights.

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