

The Application of Living and Recognized Customary Law as a Material Source of Law in Criminal Judicial Practice Based on Article 2 Paragraph (1) of the 2023 Criminal Code (KUHP)

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ABSTRACT

The recognition of living law as a material legal source in Article 2 paragraph (1) of the 2023 Criminal Code (KUHP) marks a significant paradigm shift in Indonesia's criminal law system. This study aims to analyze the application of living and recognized customary law in judicial practice. Using a normative legal research method with statutory, conceptual, comparative, and case approaches, the results show that the application of customary law can function positively (as a basis for punishment) and negatively (as a ground for abolition or mitigation of punishment) if it meets the cumulative criteria in Article 2 paragraph (2) and is verified through Government Regulation No. 55 of 2025. In practice, the mechanism begins from the investigation stage to execution. However, it still faces various challenges, including multiple interpretations, regional disparities, the paradox of formalization, and the potential for judicial tyranny. Therefore, strengthening through more technical regulations, capacity building for law enforcement officials, and active participation of indigenous communities is urgently needed to realize restorative justice with legal certainty.

INTRODUCTION

Indonesia's recent revision of its criminal legislation, enacted as Law Number 1 of 2023 regarding the Criminal Code (KUHP), signifies a momentous achievement in the country's legal evolution. This legislative update signifies a profound transformation, moving away from the strict principle of formal legality that originated during the colonial period to a more equitable material legality. This approach acknowledges "living law," or the law that exists within communities, as a valid foundation for substantive criminal law. Specifically, Article 2, paragraph (1) of the 2023 KUHP clarifies that the stipulations concerning the legality principle outlined in Article 1, paragraph (1) do not invalidate the application of living law within society. This article posits that an individual may be subjected to punishment even if their actions are not explicitly codified in the present Law. Consequently, this stipulation provides substantial opportunity for the incorporation of customary law (hukum adat) into Indonesia's national criminal justice framework, especially given the nation's highly diverse societal structure.

The acknowledgment of customary law is not merely a technical legal adjustment but a profound philosophical and sociological transformation. It reflects the state's commitment to decolonization of criminal law, respect for cultural diversity, and the realization of substantive justice that aligns with the values of Pancasila and the 1945 Constitution. For decades, the formalistic approach of the old Criminal Code often created tensions between legal certainty (*rechtzekerheid*) and the sense of justice (*gerechtigheid*) living in indigenous communities. Many acts considered reprehensible under customary norms could not be punished because they lacked explicit regulation in written law. The 2023 KUHP, supported by Government Regulation

No. 55 of 2025, attempts to bridge this gap by providing both normative recognition and operational mechanisms for the application of customary law in judicial practice.

However, the practical implementation of this recognition in criminal courts remains complex. It raises critical questions regarding the mechanism of application, the forms it takes (positive and negative functions), and the various challenges faced, such as multiple interpretations, regional capacity disparities, the paradox of formalization through Regional Regulations (Perda), and the potential for judicial tyranny. This article examines these issues by analyzing the application of living and recognized customary law in criminal justice practice based on Article 2 paragraph (1) of the 2023 KUHP and Government Regulation No. 55 of 2025.

RESEARCH METHOD

This research utilizes a normative legal framework, incorporating statutory, conceptual, comparative, and case-based methodologies. The foundational legal sources examined are the 1945 Constitution and the 2023 Criminal Code., Government Regulation No. 55 of 2025, and relevant court decisions. Secondary materials consist of books, journals, and legal doctrines on living law and restorative justice. Data analysis is carried out through grammatical, systematic, teleological, and historical interpretation methods, supported by case studies from various regions in Indonesia.

RESULT AND DISCUSSION

Mechanism of Application in the Criminal Justice System

The recognition of living law as a basis for punishment in Article 2 of the 2023 KUHP represents an important paradigm shift in the history of Indonesian criminal law. As a country with extraordinary cultural diversity, Indonesia has long known legal pluralism where customary law, as a manifestation of living law, grows organically, is voluntarily obeyed by indigenous communities, and functions to restore social balance through restorative approaches based on deliberation and kinship. This recognition not only expands formal legality into material legality but also serves as a form of respect for local values that have long existed outside state law codification.

In a broad perspective, the mechanism of applying customary law in the criminal justice system reflects the state's effort to harmonize national legal supremacy with the socio-cultural realities of society. Before the 2023 KUHP, the absorption of customary law by courts had occurred through Supreme Court jurisprudence, although without a strong normative basis. Judges often excavated living legal values in society in accordance with Article 5 paragraph (1) of Law No. 48 of 2009 on Judicial Power, especially in cases that do not have a perfect equivalent in the old Criminal Code. This shows that living law has long become an unwritten legal source that helps judges realize substantive justice amid the rigidity of legal positivism.

Article 2 paragraph (1) of the 2023 KUHP explicitly states that the provisions of the formal legality principle in Article 1 paragraph (1) do not reduce the applicability of living law in society which determines that a person deserves to be punished even though the act is not regulated in this law. This provision opens space for the application of customary law as a material source of criminal law, both as a basis for punishment and as a factor influencing sentencing. However, to prevent arbitrariness, Article 2 paragraph (2) establishes four cumulative criteria that must be met, while paragraph (3) mandates further regulation through Government Regulation.

The mechanism of applying customary law in the criminal justice system begins at the investigation stage. Investigators and prosecutors must consider whether the act violates living law in the local community. If there is an indication of a customary offense, inventory and

verification of customary norms are conducted according to the mechanism regulated in Government Regulation No. 55 of 2025. This process involves deliberation among indigenous law communities, consultation with traditional leaders, and documentation proving that the norm is still “living” and “recognized” collectively. The results of this verification become material for consideration in the indictment or termination of prosecution through a restorative approach.

At the prosecution and trial stages, the application mechanism becomes more concrete. Prosecutors can submit charges that include elements of violations against living law in society, while judges are obliged to explore, follow, and understand relevant customary law values. In their decisions, judges can impose principal criminal sanctions plus additional sanctions in the form of fulfillment of customary obligations pursuant to Article 100 of the 2023 KUHP. Government Regulation No. 55 of 2025 strengthens this mechanism by requiring Regional Regulations that contain customary offenses and types of applicable customary sanctions, thereby providing a stronger legal basis and reducing the risk of multiple interpretations.

In judicial practice, the mechanism of applying customary law has been evident in various Supreme Court jurisprudences prior to the 2023 KUHP. For example, in several decisions, judges canceled punishment because the perpetrator had already undergone customary sanctions from traditional leaders, reasoning that social balance had been restored. These decisions demonstrate that courts tend to accommodate customary law as a mitigating factor or even as grounds for abolishing punishment in certain cases without perfect equivalents in the old Criminal Code. With the enactment of the 2023 KUHP and Government Regulation No. 55 of 2025, this mechanism has become more structured, although it still requires procedural adjustments at the district and high court levels.

The mechanism of applying customary law in the criminal justice system highly depends on synergy between the normative provisions of Article 2 of the 2023 KUHP, the operationalization of Government Regulation No. 55 of 2025, and the readiness of the judicial apparatus. The verification process through deliberation and Regional Regulations serves as an important bridge between the flexibility of living law and the demands of legal certainty. However, practical challenges remain, such as regional capacity disparities, potential multiple interpretations by judges, and the risk of subordination of customary norms by state law. The success of this mechanism is not determined solely by regulation but also by the cultural understanding of law enforcement officials, active participation of indigenous communities, and effective oversight mechanisms. Only with consistent and participatory implementation can the application of customary law truly realize restorative justice aligned with Pancasila values and Indonesia’s diversity, while strengthening the legitimacy of the national criminal justice system in the eyes of indigenous communities.

Forms of Application and Challenges in Practice

The recognition of living law in Article 2 of the 2023 KUHP is one of the important milestones in Indonesia’s national criminal law renewal, which seeks to balance formal legality with material justice and legal pluralism that has long been a social reality. As an archipelagic country with thousands of indigenous law communities possessing dynamic unwritten norms, Indonesia faces the classic tension between legal positivism demanding certainty through written rules and the organic, contextual, and restorative nature of customary law. Customary law, as a manifestation of living law, not only functions as a norm regulating behavior but also as a mechanism for restoring social balance that prioritizes deliberation, kinship, and reintegration of perpetrators into the community. This recognition is expected to bring criminal law closer to the living sense of justice in society and serve as a form of decolonization from the retributive colonial Criminal Code heritage.

Normatively, the forms of application of customary law can be distinguished into two main functions: positive and negative. The positive function occurs when customary law is used as a basis for punishment. The negative function arises when settlement through customary mechanisms has been carried out, serving as grounds for abolition or mitigation of punishment. Both functions are operationalized through mechanisms regulated in Government Regulation No. 55 of 2025.

Table 1. Stages of Customary Law Application in the Criminal Justice System

NO	Stage	Main Mechanism	Legal Basis	Main Challenges
1	Investigation & Inquiry	Identification of customary offenses, initial deliberation with traditional leaders	Article 2(1) KUHP + PP 55/2025	Difficulty proving “still living”
2	Prosecution	Verification through Regional Regulation, consideration of restorative termination	PP 55/2025 Articles 5–7	Multiple interpretations by prosecutors
3	Trial	Judge excavates customary values, hears expert witnesses	Article 5 Law 48/2009 + Article 2 KUHP	Judicial subjectivity
4	Sentencing	Principal sanction + additional customary obligation (Article 100)	Article 100 KUHP + PP 55/2025	Coordination with Regional Regulations
5	Execution & Monitoring	Implementation of customary sanctions, evaluation of social balance restoration	PP 55/2025 + Supreme Court jurisprudence	Lack of monitoring mechanisms

Stages of Application and Challenges

The application of customary law is carried out in stages and involves many parties, from investigators to judges. Government Regulation No. 55 of 2025 plays an important role in providing an operational framework through deliberation and Regional Regulations, thus reducing the abstract nature of Article 2 of the 2023 KUHP.

In practice, there are concrete examples such as the siri' case in South Sulawesi and the kasepehang case in Bali. However, challenges in practice remain very complex, including the high risk of multiple interpretations, regional capacity disparities, potential judicial tyranny, and the paradox of formalization.

One important dimension in the application of customary law concerns gender equality. The position of daughters as heirs in Batak Toba customary law has undergone significant transformation in the modern era, moving toward greater alignment with Pancasila values and national law. This example illustrates how customary law must continue to adapt dynamically while maintaining its living character in order to remain relevant and constitutionally compliant.

CONCLUSION

The application of living and recognized customary law in criminal justice practice based on Article 2 paragraph (1) of the 2023 KUHP has shown significant progress with the support of Government Regulation No. 55 of 2025. However, various challenges still need to be addressed

so that this recognition does not become merely symbolic but truly realizes substantive justice that is culturally rooted.

SUGGESTIONS

1. The government should immediately issue more technical implementing regulations to reduce multiple interpretations and regional disparities.
2. The Supreme Court should issue a Circular Letter providing guidelines for the application of Article 2 of the 2023 KUHP.
3. Law enforcement officials need intensive and continuous training on customary law and restorative approaches. Indigenous communities should play an active role as the main subject in the inventory and verification process.
4. Further research is recommended to conduct empirical studies on the effectiveness of implementation in various regions.

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