



# The Existence of Customary Criminal Sanctions from the Perspective of Living Law and the Reform of the National Criminal Code

Hepy Krisman Laia

Universitas Pembangunan Panca Budi  
E-mail: [hepykrismanlaia@dosen.pancabudi.ac.id](mailto:hepykrismanlaia@dosen.pancabudi.ac.id)

Article Info	Abstract
<p><b>Article History</b> Received: 2025-11-25 Revised: 2025-12-29 Published: 2025-01-10</p> <p><b>Keywords:</b> <i>customary criminal sanctions, living law, national criminal code updates</i></p>	<p>This study examines the existence of customary criminal sanctions from a living law perspective and their relevance to the reform of the National Criminal Code. In Indonesia's pluralistic society, customary law is part of the living norms and is practically adhered to, including in the mechanism for imposing sanctions for violations. The existence of customary criminal sanctions not only has sociological legitimacy but also receives constitutional recognition as long as it does not conflict with the principles of the rule of law and human rights. The reform of the Criminal Code through Law Number 1 of 2023 opens up space for recognition of living law in society, thus demonstrating a paradigm shift from a positivistic approach to a more contextual and responsive approach to legal pluralism. This study uses normative legal methods with statutory and conceptual approaches, and is analyzed qualitatively through deductive reasoning. The results of the study indicate that the integration of customary criminal sanctions into the national criminal justice system must be designed proportionally, taking into account the principles of legality, legal certainty, and protection of human rights. An ideal normative design requires clear boundaries regarding the types of cases, a coordination mechanism between customary institutions and law enforcement officials, and a restorative justice approach as a bridge of harmonization. Thus, recognition of customary criminal sanctions is not only a form of respect for tradition, but also part of an effort to build national criminal law that is rooted in community values and remains in line with constitutional principles.</p>

## I. INTRODUCTION

Discussions regarding the existence of customary criminal sanctions in the Indonesian legal system always point us to the fundamental reality that national law does not exist in a vacuum, but rather rests on social realities that have long existed and developed within society. Since before the formation of the modern state, indigenous communities across the archipelago have had a system of norms, dispute resolution mechanisms, and patterns of sanctions for violations deemed to disrupt social balance. These sanctions are not merely interpreted as a form of retribution, but as a means of restoring harmony and maintaining the sustainability of communal relations. In this context, customary criminal law is truly a concrete manifestation of living law within society.

The term "living law" itself is often associated with the idea that law is not merely

written in statutes, but rather exists within social practices and the collective consciousness of society. In Indonesia, this concept gains strong relevance due to the pluralistic and multi-layered nature of society. Soerjono Soekanto asserted that effective law is law that aligns with the values and social structure of the society in which it is enforced (Soerjono Soekanto, 1982). This view demonstrates that state law cannot be separated from existing sociological realities. In the context of customary criminal law, sanctions imposed by customary institutions are often more widely obeyed and accepted by local communities than formal state sanctions, as they are considered fairer and more proportional by local standards.

The existence of customary law as part of the national legal system has actually received constitutional recognition. Article 18B paragraph 2 of the 1945 Constitution of the Republic of Indonesia states that the state recognizes and

respects the unity of customary law communities and their traditional rights as long as they remain alive and in accordance with societal developments and the principles of the Unitary State of the Republic of Indonesia. This recognition demonstrates that customary law is not merely a cultural heritage, but rather a normative entity that enjoys legitimacy within the framework of the Indonesian rule of law. However, this recognition is often declarative in nature and has not been fully integrated systematically into the construction of national criminal law.

The history of the formation of Indonesian criminal law demonstrates the dominance of the colonial legacy through the *Wetboek van Strafrecht* (Code of Criminal Law), which later became the Criminal Code. This system is fundamentally rooted in the European continental legal tradition, which emphasizes the principle of strict legality. This principle states that no act can be punished except based on the provisions of pre-existing laws. In practice, the principle of legality is often understood formally, thus placing written law as the sole source of legitimacy for criminal punishment. Consequently, customary criminal sanctions not stipulated in law are often viewed as outside the state's criminal law system.

Yet, in social reality, various indigenous communities continue to implement criminal sanctions based on local norms. Sanctions can include customary fines, obligations to reimburse losses, social exclusion, and even specific rituals intended to restore cosmic balance. Ter Haar describes customary law as law that grows and develops alongside society, possessing binding power because it is recognized and explicitly adhered to (Ter Haar, 1981). Therefore, the existence of customary criminal sanctions cannot be simply ignored in the name of formal codification.

The reform of the National Criminal Code through Law Number 1 of 2023 concerning the Criminal Code represents a crucial opportunity to review the position of customary criminal law within the national legal system. One characteristic of this reform is the recognition of existing laws within society as a source of law that can be considered in sentencing, provided certain conditions are met. This concept demonstrates a paradigm shift from rigid legal positivism to a more contextual and responsive approach to legal pluralism. Barda Nawawi Arief stated that the reform of national criminal law must be oriented towards the values that exist within Indonesian

society and not simply imitate foreign models (Barda Nawawi Arief, 2011). This statement emphasizes the importance of integrating state law and customary law within a harmonious system.

However, the recognition of living law in the revised Criminal Code is not without its challenges. First, there are questions regarding the limits and criteria under which customary law can be used as a basis for criminal punishment. Not all customary practices are acceptable within the framework of a modern rule of law, especially if they conflict with human rights or the principles of universal justice. Second, there is the potential for conflict between the principle of legality and the application of norms not formally written in legislation. Mahfud MD once emphasized that legal pluralism in Indonesia is inevitable, but must remain within the framework of the constitution and the principles of the rule of law (Mahfud MD, 2009). Therefore, the integration of customary criminal law into the national system requires careful normative design to avoid legal uncertainty.

From a theoretical perspective, the existence of customary criminal sanctions can also be understood through a restorative justice approach. Unlike the retributive paradigm, which emphasizes retribution, customary systems generally emphasize the restoration of relationships and social balance. Romli Atmasasmita explains that the modern criminal justice system needs to accommodate the restorative values that develop within society, including those derived from customary law (Romli Atmasasmita, 2010). In this context, customary criminal sanctions can be seen as an early form of restorative practices that have long existed in the Indonesian archipelago. This demonstrates that the reform of the Criminal Code, which opens up space for a restorative approach, is deeply rooted in local traditions.

However, the main issue remains how to formulate a proportional relationship between customary criminal sanctions and the national criminal justice system. Do customary sanctions stand on an equal footing with state sanctions, or are they merely considered mitigating factors? Can the implementation of customary sanctions eliminate criminal prosecution by the state, or does it still require formal judicial proceedings? These questions demonstrate that the existence of customary criminal sanctions is not simply a matter of recognition, but also concerns systemic

design and practical implications for law enforcement.

Within the framework of a state governed by the rule of law, the principles of legal certainty, justice, and expediency must be balanced. Satjipto Rahardjo argues that law cannot be separated from humanitarian values and a societal sense of justice (Satjipto Rahardjo, 2006). Therefore, recognizing customary criminal sanctions must be positioned as an effort to align state law with the sense of justice inherent in society. However, at the same time, the state remains obligated to guarantee the protection of human rights and prevent discriminatory or disproportionate practices.

Against this backdrop, discussions on the existence of customary criminal sanctions from the perspective of living law and the reform of the National Criminal Code are highly relevant and urgent. This topic touches not only on the dogmatic aspects of criminal law but also concerns issues of legal pluralism, legislative politics, and the direction of national legal development. The integration of customary law into the national criminal system must be seen as part of efforts to decolonize law and affirm Indonesia's legal identity, rooted in local values while remaining in line with constitutional principles and human rights.

Based on this description, there are two research questions that are the focus of this study. First, how customary criminal sanctions exist from a living law perspective in the Indonesian legal system before and after the National Criminal Code reform. Second, what is the ideal normative design for integrating customary criminal sanctions into the national criminal justice system to align with the principles of legality, legal certainty, and human rights protection.

## II. RESEARCH METHODS

This research uses a normative legal research method with a statutory and conceptual approach. The statutory approach is carried out by examining the provisions of the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 2023 concerning the Criminal Code, and other regulations relevant to the recognition of customary law and the principle of legality. The conceptual approach is used to analyze the concepts of living law, legal pluralism, and criminal theory in the context of integrating customary criminal sanctions into the national

legal system. The legal materials used include primary legal materials in the form of laws and regulations, secondary legal materials in the form of books and journals by Indonesian legal experts, and tertiary legal materials as supporting materials. The analysis is conducted qualitatively using deductive reasoning techniques to draw systematic and argumentative conclusions.

## III. RESULTS AND DISCUSSION

### A. The Existence of Customary Criminal Sanctions from the Perspective of Living Law in the Indonesian Legal System

The existence of customary criminal sanctions in the Indonesian legal system cannot be separated from the fact that Indonesian society has been a pluralistic society with diverse value systems and social regulatory mechanisms since its inception. Before the establishment of the modern state, customary communities recognized norms of prohibition, obligation, and sanctions for certain violations. These norms were not written down in a formal codification, but lived within the collective consciousness of the community and were enforced through customary institutions. From a living law perspective, the existence of customary criminal sanctions demonstrates that law is not always identical to statutes but rather grows out of dynamic social interactions.

The concept of living law in the Indonesian context holds strong relevance due to its diverse and multi-layered social character. Soerjono Soekanto explains that effective law is law that aligns with the values and social structure of the society in which it applies, so that the existence of customary norms that are adhered to and practiced in practice constitutes part of a living legal system (Soerjono Soekanto, 1982). Within this framework, customary criminal sanctions are not merely traditions, but possess strong sociological legitimacy because they are recognized and accepted by the community.

In his study of customary law, Ter Haar asserts that customary law is the totality of regulations arising from the decisions of authoritative customary officials and adhered to by the community as binding (Ter Haar, 1981). This view demonstrates that customary criminal sanctions have their own institutional structure and enforcement mechanisms. These sanctions are not baseless, but rather arise from collective values maintained for the sake of social balance.

Therefore, when viewed from a living law perspective, customary criminal sanctions are a manifestation of law that truly operates in community life.

In many indigenous communities, violations of norms are not merely viewed as acts against individuals, but as disturbances to social and spiritual balance. Therefore, the primary goal of sanctions is not retribution, but rather the restoration of harmony. This concept differs from the retributive paradigm in modern criminal law, which emphasizes retribution for wrongdoing. Barda Nawawi Arief stated that Indonesia's national criminal law system should be built on the values inherent in society, including the values of balance and restoration recognized in customary law (Barda Nawawi Arief, 2011). This statement demonstrates that customary criminal law contains philosophical values relevant to national legal reform.

The recognition of customary law as part of the national legal system is constitutionally based in Article 18B paragraph 2 of the 1945 Constitution of the Republic of Indonesia. This provision affirms that the state recognizes and respects the unity of customary law communities and their traditional rights as long as they remain alive and in accordance with societal developments and the principles of a unitary state. Normatively, this recognition positions customary law as a legitimate entity within the framework of a state based on the rule of law. However, this recognition does not automatically address the position of customary criminal sanctions in relation to the national criminal justice system.

In the history of the development of Indonesian criminal law, the principle of legality has been a central principle limiting the state's authority to impose penalties. This principle asserts that no act can be punished without pre-existing regulations. Romli Atmasasmita explains that the principle of legality is an instrument for protecting human rights, preventing the state from acting arbitrarily in punishing individuals (Romli Atmasasmita, 2010). However, if the principle of legality is understood narrowly and formally, customary norms not written into law have the potential to be marginalized.

This is where the tension between legal positivism and sociological approaches arises. Positivism places statutes as the sole legitimate source of law, while sociological approaches acknowledge the existence of norms that exist within society. Satjipto Rahardjo criticized legal

approaches that overemphasize texts and ignore social realities, as law's true purpose is to serve humanity and a sense of social justice (Satjipto Rahardjo, 2006). In this context, customary criminal sanctions can be viewed as a form of local justice that should not be ignored in the development of national law.

The practice of customary criminal sanctions across regions exhibits wide variation, both in form and substance. In some communities, sanctions take the form of customary fines paid in kind or cash to the victim or community. In others, sanctions may include the obligation to perform certain rituals as a symbol of restoring balance. There are also social sanctions, such as temporary ostracism, aimed at providing a deterrent effect while maintaining harmony. All of these mechanisms demonstrate that customary law has preventive, repressive, and restorative functions.

From a penal theory perspective, customary criminal sanctions tend to align with a restorative approach. The concept of restorative justice emphasizes restoring relationships between perpetrators, victims, and the community. Romli Atmasasmita emphasized that the restorative approach is an important alternative to the modern criminal justice system, which has historically placed too much emphasis on punishment (Romli Atmasasmita, 2010). In this context, the practice of customary criminal sanctions can be viewed as a form of restorative justice that has long developed in Indonesian society.

However, not all customary practices are automatically accepted within the national legal system. Mahfud MD emphasized that legal pluralism must remain within the constitutional framework and the principles of the rule of law, so that customary practices that conflict with human rights cannot be justified (Mahfud MD, 2009). This statement is important to emphasize that recognition of customary criminal sanctions is not unlimited. The state remains responsible for ensuring that all forms of punishment respect human dignity and the principles of universal justice.

In the context of the Criminal Code reform through Law Number 1 of 2023, recognition of living law in society is a crucial issue. Provisions regarding living law allow judges to consider customary norms in deciding cases, as long as these norms are still alive and in accordance with the values of Pancasila, human rights, and general legal principles. Barda Nawawi Arief stated that criminal law reform must reflect the character of

the nation and be inseparable from the cultural roots of society (Barda Nawawi Arief, 2011). Therefore, the recognition of living law in the new Criminal Code is a step towards integrating local values into the national system.

The existence of customary criminal sanctions from a living law perspective demonstrates that national law cannot be constructed monolithically. Indonesia, as a pluralistic nation, requires an approach that recognizes the diversity of social norms and practices. Soerjono Soekanto emphasized that law will be effective if it aligns with the legal awareness of society (Soerjono Soekanto, 1982). Therefore, the integration of customary criminal sanctions is not merely symbolic recognition, but rather a sociological necessity to ensure national law has social legitimacy.

Philosophically, the recognition of customary criminal sanctions is also in line with the values of Pancasila, particularly the principles of social justice and just and civilized humanity. Customary law, which focuses on balance and the restoration of social relations, reflects the values of mutual cooperation and togetherness that are characteristic of Indonesian society. Satjipto Rahardjo emphasized that Indonesian law must be rooted in substantive humanitarian values and justice, not merely procedural ones (Satjipto Rahardjo, 2006). Thus, customary criminal sanctions have a philosophical dimension that can enrich the national legal system.

Legally, the main challenge lies in defining boundaries and integrating mechanisms. The state needs to ensure that customary norms used as the basis for criminal penalties are certain and verifiable. Furthermore, a monitoring mechanism is needed to ensure that the application of customary sanctions does not lead to discrimination or abuse of authority. Mahfud MD emphasized the importance of harmonizing state law and customary law to prevent dualism that undermines legal certainty (Mahfud MD, 2009). Therefore, the existence of customary criminal sanctions must be placed within a clear systemic framework.

Thus, from a living law perspective, customary criminal sanctions have sociological, philosophical, and constitutional legitimacy. They are part of the living legal reality within Indonesian society. The reform of the Criminal Code, which opens up space for the recognition of living law, demonstrates a paradigm shift toward a more inclusive and contextual legal system. However, this integration still requires clear

normative boundaries to align with the principles of legality, legal certainty, and human rights protection.

This analysis demonstrates that the existence of customary criminal sanctions is not merely a historical or cultural issue, but rather a fundamental issue in the development of national criminal law. Recognition of living law serves as a bridge between state law and community law, ensuring that national law maintains its social roots. Within the framework of Indonesia's rule of law, customary criminal sanctions can be viewed as part of legal pluralism that must be managed wisely and proportionally to achieve substantive justice for all citizens.

## **B. Integration of Customary Criminal Sanctions in the National Criminal Code Reform and Ideal Normative Design**

The reform of national criminal law through Law Number 1 of 2023 concerning the Criminal Code marks a significant phase in the history of Indonesian legislation. After decades of using colonial legacy, the country finally has a codified criminal law drafted with consideration of the nation's character, the values of Pancasila, and the social dynamics of Indonesian society. In this context, the recognition of living law is a significant characteristic of this reform. This demonstrates the legislators' recognition that the national criminal law system cannot be separated from the reality of existing legal pluralism.

Normatively, the National Criminal Code provides space for the existence of living laws in society as long as they meet certain requirements, such as not contradicting Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized nations. This recognition represents a progressive step compared to previous approaches that tended to be formalistic and closed to norms outside the law. Barda Nawawi Arief has long emphasized that the renewal of national criminal law must accommodate the socio-cultural values of Indonesian society as part of national legal politics (Barda Nawawi Arief, 2011). Thus, the integration of customary criminal sanctions in the new Criminal Code is not a sudden event, but rather the result of a long debate in academic discourse and legislation.

However, the recognition of living law within the national criminal justice system raises a number of conceptual and practical issues. First, how do customary criminal sanctions relate to the

principle of legality? The principle of legality is the primary foundation of modern criminal law, guaranteeing legal certainty and protecting individuals from state arbitrariness. Romli Atmasasmita explains that the principle of legality serves to limit state power and guarantee citizens' rights in the criminal justice process (Romli Atmasasmita, 2010). Therefore, any expansion of sources of criminal law must remain within this protective framework.

In this context, recognition of living law should not be interpreted as opening up unlimited space for customary norms to be used as a basis for criminal punishment. Clear criteria are needed regarding what is meant by living law. Soerjono Soekanto stated that a norm can be called living law if it is truly obeyed and has social coercive power in society (Soerjono Soekanto, 1982). Therefore, the existence of customary norms must be empirically proven, not merely a symbolic claim.

Second, there is the question of the relationship between customary criminal sanctions and state criminal sanctions. Can the implementation of customary sanctions disqualify criminal prosecution by the state, or is it merely considered a mitigating factor? In judicial practice, judges tend to consider customary resolutions as a reason to impose lighter sentences or even halt certain processes through restorative justice mechanisms. This approach demonstrates an effort to harmonize state law and customary law. Satjipto Rahardjo argues that the law must be able to adapt to the needs of society and not be trapped in rigid formalities (Satjipto Rahardjo, 2006). Therefore, recognition of customary resolutions can be seen as a form of flexibility in the legal system in achieving substantive justice.

Third, it is necessary to ensure that the integration of customary criminal sanctions does not conflict with human rights principles. Mahfud MD emphasized that legal pluralism in Indonesia must remain subject to the constitution and must not violate the basic principles of human rights protection (Mahfud MD, 2009). This means that if any customary practice involves discrimination, violence, or treatment that degrades human dignity, the state is obligated to correct it. Recognition of customary law does not justify any practice that invokes tradition.

Formulating an ideal normative design requires a systemic and multi-layered approach. First, the state needs to inventory and document existing and relevant customary norms. This

inventory is crucial to avoid legal uncertainty and ensure that recognized norms truly possess social legitimacy. Ter Haar asserts that customary law emerges from concrete practices and decisions of authoritative customary institutions (Ter Haar, 1981). Therefore, identifying customary institutions and mechanisms is a crucial part of this integration.

Second, it is necessary to establish clear normative boundaries regarding the types of cases that can be resolved through customary mechanisms. Not all crimes can be transferred to customary resolution, especially those related to broad public interest or serious violations of human rights. In this regard, the principles of proportionality and the public interest must be primary considerations. Barda Nawawi Arief emphasizes the importance of balancing community protection with individual protection in the criminal justice system (Barda Nawawi Arief, 2011). Therefore, the integration of customary sanctions must take into account the gravity and impact of the act.

Third, a monitoring and coordination mechanism is needed between customary institutions and state law enforcement officials. Integration must not create a confusing dualism or open up room for abuse of authority. Soerjono Soekanto reminds us that legal effectiveness is greatly influenced by the enforcement structure and coordination between institutions (Soerjono Soekanto, 1982). Therefore, an ideal normative design must include clear procedures regarding the relationship between customary resolution and formal justice processes.

Fourth, a restorative justice approach can serve as a bridge for integration. Restorative justice provides space for recovery-oriented solutions without eliminating the state's legal protection function. Romli Atmasasmita stated that restorative justice is a relevant paradigm in the modern criminal justice system because it positions victims, perpetrators, and the community as active subjects in the resolution process (Romli Atmasasmita, 2010). In this context, customary criminal sanctions can be accommodated as part of a state-recognized restorative mechanism.

From a legal policy perspective, the integration of customary criminal sanctions into the National Criminal Code reflects efforts to decolonize the law. To date, the Indonesian criminal law system has been heavily influenced by continental European traditions that do not fully reflect Indonesia's social character. Mahfud

MD defines legal politics as the official direction of state policy in formulating and implementing laws (Mahfud MD, 2009). Therefore, the recognition of living law in the new Criminal Code is part of a legal policy that seeks to restore national legal identity to its cultural roots.

However, the success of this integration depends heavily on implementation. Without clear guidelines, recognition of living law can lead to uncertainty and disparity in decisions. Satjipto Rahardjo reminds us that good law is not just what is beautifully written in law, but also what can be fairly implemented in practice (Satjipto Rahardjo, 2006). Therefore, implementing regulations, judicial guidelines, and training for law enforcement officers are needed to properly understand the concept of living law.

Overall, the integration of customary criminal sanctions into the revised National Criminal Code is a progressive step that reflects recognition of Indonesia's legal pluralism. However, such integration must be carefully designed to maintain its alignment with the principles of legality, legal certainty, and human rights protection. The ideal normative design is one that bridges local values and universal principles, ensuring that national criminal law is not only formally valid but also substantively just.

Thus, the National Criminal Code reform opens up opportunities to strengthen the role of customary criminal sanctions in the Indonesian legal system. Their existence is no longer marginalized but recognized as part of the national legal framework rooted in societal values. The challenge lies in managing this pluralism proportionally and responsibly, so that national law truly reflects the nation's identity while guaranteeing certainty and justice for all citizens.

#### **IV. CONCLUSIONS AND RECOMMENDATIONS**

It can be concluded that the existence of customary criminal sanctions from a living law perspective has sociological, philosophical, and constitutional legitimacy within the Indonesian legal system, and is strengthened through the renewal of the National Criminal Code, which recognizes living law within society. However, this recognition is not absolute; it must be placed within the framework of the principles of legality, legal certainty, and the protection of human rights. Ideal integration requires clear normative boundaries, a coordination mechanism between customary institutions and law enforcement

officials, and a restorative justice approach as a bridge of harmonization, so that legal pluralism can be managed proportionally and remain in line with the principles of the Indonesian rule of law.

#### **REFERENCE LISTAN**

- Ali, Achmad. 2009. *Uncovering Legal Theory and Judicial Theory*. Jakarta: Kencana Prenada Media Group.
- Arief, Barda Nawawi. 2011. *Criminal Law Reform in a Comparative Study Perspective*. Bandung: Citra Aditya Bakti.
- Arief, Barda Nawawi. 2018. *Anthology of Criminal Law Policy*. Jakarta: Kencana.
- Atmasasmita, Romli. 2010. *Contemporary Criminal Justice System*. Jakarta: Kencana Prenada Media Group.
- Atmasasmita, Romli. 2012. *Integrative Legal Theory: A Reconstruction of Development Law Theory and Progressive Law Theory*. Yogyakarta: Genta Publishing.
- Haar, B. Ter. 1981. *Principles and Structure of Customary Law*. Jakarta: Pradnya Paramita.
- Huda, Chairul. 2006. *From No Crime Without Fault to No Criminal Responsibility Without Fault*. Jakarta: Kencana.
- Kansil, CST 1989. *Introduction to Indonesian Law and Legal System*. Jakarta: Balai Pustaka.
- Mahfud MD, Moh. 2009. *Legal Politics in Indonesia*. Jakarta: Rajawali Pers.
- Manan, Bagir. 2004. *Constitutional Theory and Politics*. Yogyakarta: FH UII Press.
- Rahardjo, Satjipto. 2006. *Law in the World of Order*. Jakarta: UKI Press.
- Republic of Indonesia. 1945. *The 1945 Constitution of the Republic of Indonesia*.
- Republic of Indonesia. 2023. *Law Number 1 of 2023 concerning the Criminal Code*.
- Sidharta, Bernard Arief. 2000. *Reflections on the Structure of Legal Science*. Bandung: Mandar Maju.
- Soekanto, Soerjono. 1982. *Legal Awareness and Legal Compliance*. Jakarta: Rajawali.
- Wignjosoebroto, Soetandyo. 2002. *Law: Paradigms, Methods, and Problem Dynamics*. Jakarta: Elsam and Huma.