

LIVING LAW ON THE MARGINS: A CRITICAL REVIEW OF ARTICLE 2 OF THE 2023 INDONESIAN PENAL CODE

Antoni Putra

Faculty of Law Universitas Andalas, Indonesia

antoni.putra@law.unand.ac.id

Lucky Raspati

Faculty of Law Universitas Andalas, Indonesia

lucky.raspati@law.unand.ac.id

Taufik Rachman

Faculty of Law Universitas Airlangga, Indonesia

taufik@fb.unair.ac.id

Iwan Kurniawan

Faculty of Law Universitas Andalas, Indonesia

iwankurniawan@law.unand.ac.id

Abstract

The recognition of living law in society, as stipulated in Article 2 of Law Number 1 of 2023 on the Indonesian Penal Code (KUHP), appears to be a progressive step toward respecting legal pluralism in Indonesia. However, this recognition is conditional and places customary law in a subordinate position to state law. This article critically examines how Article 2 of the KUHP systematically narrows the space for customary law and disregards the sociological reality of living legal traditions. This study employs a normative juridical research method, focusing on the analysis of statutory provisions, legal doctrines, and relevant academic literature. Customary law, which has long been effective in resolving social conflicts, is marginalized due to its perceived incompatibility with formalistic and universal legal principles. This article proposes a deliberative approach as an alternative through equal and dialogical engagement between state and customary legal systems, emphasizing affirmative recognition that respects the autonomy of local legal

communities. In doing so, recognizing customary law should not be a limiting instrument but a means to strengthen contextual justice within Indonesia's diverse society.

Keywords: customary law, Indonesian Penal Code 2023, legal pluralism, legal subordination, deliberative approach.

Introduction

The enhancement of Indonesia's national criminal law reform has reached a significant milestone with enacting Law No. 1 of 2023, commonly called the Criminal Code (*Kitab Undang-Undang Hukum Pidana, KUHP*). One of the key innovations introduced in this legislative framework is the recognition of living law within society, which in the Indonesian context is primarily associated with customary law (*hukum adat*). This provision, outlined in Article 2 of the KUHP, represents a step towards accommodating legal pluralism and bridging the relationship between state law and locally evolving norms that have been historically rooted in communities.¹

However, a more nuanced examination reveals an inherent irony within this recognition. Article 2 of the KUHP stipulates that living law can only be enforceable if it has not been addressed within the KUHP and as long as it does not contradict the Pancasila (the foundational philosophical theory of Indonesia), the 1945 Constitution, human rights (HAM), and generally acknowledged principles of law among nations. This stipulation raises critical questions regarding the extent to which the state genuinely acknowledges customary law as an integral component of the national legal system. The conditional recognition reflects a potential limitation that could subordinate customary law beneath the overarching structure of state law, undermining its autonomy and relevance.²

In practice, customary law has played a pivotal role as a dynamic legal system that effectively addresses various social disputes at the

¹ I Ketut Oka Setiawan, Ariq Muzaffar Wahyu, Alip Rahman, and Anom Sutrisno, 2024. "Juridical study of customary law in the Indonesian national legal system", *Asian Journal of Social and Humanities*(8), 2:1824-1831, <https://doi.org/10.59888/ajosh.v2i8.317>

² Takwim Azami, 2022. "Dinamika perkembangan dan tantangan implementasi hukum adat di Indonesia", *Qistie*(1), 15:42, <https://doi.org/10.31942/jqi.v15i1.6487>

community level. It encapsulates local wisdom and attains significant social legitimacy within Indigenous communities, facilitating conflict resolution through culturally resonant mechanisms. Nonetheless, the imposition of Article 2 KUHP, which delineates a constricted and conditional space for the application of customary law, engenders concerns that such laws might face systematic marginalization, risking the erosion of their independence as functioning legal systems.³

Within this normative and practical context, existing scholarly works have sought to address the recognition of customary law under the new KUHP from various perspectives. The existing scholarship has addressed various aspects of the recognition of customary law within Indonesia's new Penal Code (KUHP). Ramadhani identifies at least six major challenges in the implementation of living law that must be anticipated by relevant stakeholders.⁴ Helianny et al. examine the implications of Article 2 of the new KUHP for the practice and future orientation of criminal law pluralism in Indonesia.⁵ From the perspective of the principle of legality, Yanto and Hikmah provide a doctrinal analysis of Article 2 of Law Number 1 of 2023.⁶ Empirical insights are offered by Suartina, who documents the marginalization of customary law experienced by indigenous communities through field research conducted in three Kasepuhan communities.⁷ In addition,

³ Yaris Adhial Fajrin and Ach Faisol Triwijaya, 2020. "The concept of penal mediation for defamation delict in the indonesia ite law as a manifestation of restorative justice", *Yustisia Jurnal Hukum*(3), 9:363. <https://doi.org/10.20961/yustisia.v9i3.36167>

⁴ Milenia Ramadhani, 2024. "Tantangan Implementasi Pengakuan Hukum Adat dalam Kitab Undang-Undang Hukum Pidana Baru di Indonesia", *Syntax Idea*(8), 6:2708-3716. <https://doi.org/10.46799/syntax-idea.v6i8.4356>

⁵Samuel Dharma Putra Nainggolan, Jamalum Sinambela, Edison Donauli Simbolon, and Kholilur Rahman, 2023. "Harmonisasi Hukum Pidana Adat Batak Toba Dengan Sistem Hukum Pidana Nasional", *Ilmu Hukum Prima (Ihp)*(1), 6:46-59. <https://doi.org/10.34012/jihp.v6i1.3431>

⁶Andri Yanto and Faidatul Hikmah, 2023. "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas", *Recht Studiosum Law Review*(2), 2:81-91. <https://doi.org/10.32734/rslr.v2i2.14162>

⁷Fanny Fauzie, 2019. "Kemerdekaan Menyampaikan Pendapat Dimuka Umum Sebagai Makar Menurut KUHP", *Al Hurriyah Jurnal Hukum Islam*(2), 4:205. <https://doi.org/10.30983/alhurriyah.v4i2.2084>

Kusworo and Fauzi propose the compilation and inventory of customary law as an institutional follow-up to the living law provision.⁸

Despite these contributions, existing studies tend to emphasize either implementation challenges or the implications of legal pluralism without sufficiently interrogating the normative logic underpinning Article 2 of the KUHP itself. The novelty of this article lies in its critical examination of the normative construction of Article 2, exposing the inherent paradox of conditional recognition of customary law embedded within the provision. Departing from prior approaches, this study advances a deliberative and affirmative framework that reconceptualizes the relationship between state law and customary law through equal and dialogical engagement. By foregrounding the agency of indigenous communities within legislative and norm-formulation processes, this article contributes a more context-sensitive and normatively coherent approach to strengthening criminal law pluralism in Indonesia.

This paper aims to critically analyze the normative construction of Article 2 of the KUHP about the existence of customary law. The focus will be on how this regulation affects the status of customary law within the Indonesian criminal justice system and how the state's approach to legal pluralism is mirrored in these regulatory frameworks. Furthermore, the paper proposes alternative approaches that are more deliberative and affirmatively responsive to the pluralistic legal landscape of Indonesia, suggesting that a deeper integration of customary law could promote a more just legal framework accommodating local realities.⁹

Amidst discussions surrounding legal reform, it is crucial to address the dynamics of customary law as it intersects with evolving governance structures and public policies in Indonesia. The customary legal framework reflects centuries of local governance practices and needs adaptive mechanisms that resonate with contemporary social dynamics. In this regard, the recognition of customary law within the scope of

⁸Freny Zulvyanita and Widhi Handoko, 2022. "Upaya Penyelesaian Pembagian Waris Tanah Menurut Hukum Adat Di Hadapan Notaris", *Notarius*(2), 16:686-700. <https://doi.org/10.14710/nts.v16i2.42380>

⁹ Ria Kumala, Bimo S. Thathit, Ahmad Yudianto, and Sudjari Solichin, 2020. "Clinical forensic aspect of burn injury in domestic violence: a case report". <https://doi.org/10.2991/aebmr.k.200513.037>

national legislation should be aimed at fostering a symbiotic relationship that respects and uplifts traditional legal norms while aligning them with the nation's commitment to ensuring human rights and social justice.

While this dialogue on legal reform takes place, it is equally important to highlight the growing challenges facing customary law amidst the rise of state authority over community norms. Customary law traditionally embodies essential aspects of social identity and cultural heritage, which have provided community members with a sense of resilience and social cohesion. Consequently, recognizing and integrating it within the national legal framework must be approached with sensitivity to ensure that the values it represents are not overshadowed by formal legal stipulations that may disregard their significance.

The ongoing discourse should encourage a reconsideration of the implications of existing power asymmetries that accompany legal reforms. Particularly, engaging customary law as a living legal tradition necessitates creating mechanisms that empower Indigenous communities, allowing them not only to shape their legal destinies but also to actively participate in the legislative process. Such strategies can help minimize the risks of alienating customary frameworks as mere peripherals in the overarching legal system.¹⁰

Concerning Indonesia's commitment to pluralism, the integration of customary law presents an opportunity to cultivate a more inclusive legal environment. This environment should ideally reflect the richly diverse traditions and legal practices embedded within various Indonesian communities. The state must navigate this pluralism carefully to prevent the potential homogenization of laws that could erode the unique characteristics of different cultural and legal systems that have thrived for generations.¹¹

These considerations reveal that the future of Indonesia's legal landscape hinges upon a critical reassessment of how customary law is recognized, valued, and implemented alongside state law. By fostering

¹⁰ Jonas Sello Thinane, 2024. "Lgbtqi rights crucified in indonesia? new penal code anti missio dei?", *Pharos Journal of Theology*(105(3)). <https://doi.org/10.46222/pharosjot.105.318>

¹¹ I Gede Budhi Mahayana and I Nyoman Bagiastra, 2023. "The legal authority of clemency in mitigating sentences for convicts in planned murder cases", *Journal of World Science*(10), 2:1734-1741. <https://doi.org/10.58344/jws.v2i10.456>

a legal framework that honors pluralism, Indonesian society can strengthen its legal fabric, creating pathways for just governance that resonate with all its members and ensuring that no customary or state law goes unrecognized.

Methods

This study employs normative juridical legal research to critically examine the conditional recognition of living law (customary law) under Article 2 of Indonesia's Criminal Code (Law No. 1 of 2023). The research applies a statutory approach to analyze the normative structure of Article 2, alongside a conceptual approach to assess key doctrines of legal pluralism, living law, and the principle of legality. In addition, a comparative approach is used to contextualize Indonesia's regulatory model within broader pluralistic criminal law frameworks. The research problem is addressed through doctrinal legal analysis emphasizing normative coherence and power asymmetries between state law and customary legal systems. Data are collected through library-based research, consisting of primary legal materials, secondary legal materials, and relevant scholarly commentaries. All materials are analyzed using qualitative normative analysis to evaluate how the current regulatory framework constrains the autonomy of customary law and to assess the relevance of deliberative and affirmative approaches in strengthening substantive justice within Indonesia's plural legal landscape.

The Theory of Customary Law: A Pillar of Local Justice in the Indonesian Legal System

Customary law is a legal system that emerges and evolves from the local values within society. It originates from state legislation and social practices passed down through generations, validated by collective agreement, and implemented through local institutions. In legal theory, customary law can be understood as part of what is often termed "living law", a law present in social reality rather than solely in normative texts.¹² This concept indicates that the legality of customary law is grounded in

¹² Darlian Pone, Ade Saptomo, Baharudin Baharudin, Aminuddin Harahap, and Rustam Rustam, 2024. "Analysis of the role based on the customary criminal justice system of dayak bangkalan in the national criminal justice system", *Syntax Literate Jurnal Ilmiah Indonesia*(3), 9:1616-1623. <https://doi.org/10.36418/syntax-literate.v9i3.14826>

the lived experiences of the community, and it is fundamentally intertwined with the sociocultural context in which it operates.

The systematic introduction of the concept of customary law was first propounded by Cornelis van Vollenhoven, a Dutch legal expert, who asserted that the communities in Indonesia (formerly the Dutch East Indies) possess their legal systems, which he referred to as "adat law." Van Vollenhoven contested the notion that local societies lacked their law, emphasizing that customary law is complex, structured, and reflective of local values of justice.¹³ This foundational theory laid the groundwork for recognizing the critical role of customary law in Indonesia and highlighted its normative legitimacy through communal consensus rather than formal legislative mechanisms.

In its development, customary law embodies several key characteristics that delineate it within the broader legal landscape:

1. **Unwritten but Binding:** Customary law is often not codified; however, it is deeply ingrained in the social fabric and adhered to by the community due to its roots in collective social and moral values. This unwritten nature emphasizes the importance of local customs over formal legal documentation.
2. **Flexible and Contextual:** Customary law is adaptable, evolving in accordance with society's needs and dynamics. It reflects changing social landscapes and is responsive to cultural shifts within communities. Consequently, it can address local needs more effectively than rigid statutory legal frameworks.
3. **Communal and Restorative:** Unlike state law, which often adopts an individualistic and punitive approach, customary law prioritizes social harmony, relationship restoration, and consensus through deliberative dialogue. This community-centered focus aligns closely with restorative justice paradigms, which advocate for healing and reconciliation rather than retribution.
4. **Originates from and is Executed by the Community:** The legitimacy of customary law arises from the community's belief in local values and the authority of customary institutions. This

¹³ Galuh Faradhilah Yuni Astuti, 2015. "Relevansi hukum pidana adat dalam pembaharuan hukum pidana di indonesia", *Pandecta Research Law Journal*(2), 10:195. <https://doi.org/10.15294/pandecta.v10i2.4953>

grassroots foundation validates its application and empowers local authorities to mediate disputes effectively.

5. Embodiment of Legal Pluralism: Theoretically, customary law embraces the notion of legal pluralism, suggesting that multiple legal systems can coexist within a single society. In this framework, state law does not dominate uniformly but exists alongside other legal practices, including religious laws and, notably, customary laws. This plural legal landscape harmonizes normative frameworks to enhance social justice and community welfare.

Despite these attributes, the function of customary law often faces challenges, as it tends to be subordinated by the positivist state law. Article 18B Paragraph (2) of the 1945 Constitution of Indonesia provides a constitutional foundation for recognizing customary communities and their rights. However, implementation within various legislative frameworks, such as the Penal Code of 2023, raises concerns over discriminatory applications stipulating the conditions under which customary law is acknowledged.¹⁴ Specifically, these frameworks require that customary law not conflict with state law or state-defined human rights, leading to a precarious balance in the interaction between local customs and formal regulations.

The presence of such legal hierarchies reflects an epistemic dominance of the state over local law-representing practices, signaling a need for a critical examination of how state mechanisms interact with and potentially undermine the legitimacy of customary legal systems.¹⁵ Transitioning from mere tolerance of customary law to affirmative recognition implies engaging in an active and equitable acknowledgment within the national legal framework. This shift necessitates accommodating customary practices and protecting,

¹⁴ Helnawaty, 2017. "Hukum pidana adat dalam pembaharuan hukum pidana nasional", *Binamulia Hukum*(2), 6:149-160. <https://doi.org/10.37893/jbh.v6i2.79>

¹⁵ Yoserwan, A. Irzal Rias, Tenofrimer Tenofrimer, Diana Arma, and Lucky Raspati, 2023. "The role of adat institution in the settlement of criminal cases through restorative justice in west sumatera", *Nagari Law Review*(2), 6:146. <https://doi.org/10.25077/nalrev.v.6.i.2.p.146-157.2023>

developing, and providing mechanisms for them to function substantively in conflict resolution and promoting social justice.¹⁶

When analyzing the significance of restorative justice within this context, it becomes evident that customary law systems often embody principles of restorative practices. For instance, restorative justice seeks to address the needs of victims, involve offenders in accountability, and engage community stakeholders in the healing process.¹⁷ This model aligns with customary law's communal and relational ideology, reinforcing the idea that justice can be achieved through dialogue and reintegration rather than isolation and punishment.

Furthermore, the revitalization of customary law practices, particularly in the Indonesian context, illustrates their relevance in contemporary legal reforms. Research indicates that the contribution of customary criminal law is significant for resolving disputes outside formal judicial settings, thereby promoting alternative dispute resolution (ADR) mechanisms that adhere to local traditions while aligning with national legal principles.¹⁸ Such practices are not only consistent with the values enshrined in Indonesia's Pancasila but also resonate with broader theories of legal balance, whereby the integration of Indigenous perspectives into the national legal discourse enriches the fabric of justice.

In conclusion, customary law is integral to Indonesia's legal landscape, acting as a pillar of local justice that embodies community values, flexibility, and restorative outcomes. However, to realize its full potential, a concerted effort must be made to recognize, protect, and enhance the role of customary law within the national legal system. Only through such transformation can Indonesia achieve a legal system that truly reflects the plurality of its society while fostering a commitment to justice that is both equitable and inclusive.

¹⁶ Meyrina Helnawaty, Susana Andi, 2017. "Restorative justice dalam peradilan anak berdasarkan undang-undang no.11 tahun 2012", *Jurnal Penelitian Hukum De Jure*(1), 17:92. <https://doi.org/10.30641/dejure.2017.v17.92-107>

¹⁷ Sugeng Muntaha and Ade Saptomo, 2024. "Comparison of sanctions for the crime of adultery in toraja customary law and national law in indonesia", *Jurnal Hukum Politik Dan Ilmu Sosial*(1), 3:341-349. <https://doi.org/10.55606/jhpis.v3i1.3385>

¹⁸ Gordon Walker and Harriet Bulkeley, 2006. "Geographies of environmental justice", *Geoforum*(5), 37:655-659. <https://doi.org/10.1016/j.geoforum.2005.12.002>

Conceptual Issues in the Recognition of Customary Law under the Penal Code

The introduction of the Indonesian Criminal Code (KUHP) under Article 2, Paragraph (1) marks a significant moment in Indonesia's legal framework governing customary law, or *hukum adat*. The stipulation in this article emphasizes that provisions shall not detract from the recognition of customary law that prevails in society, highlighting the importance of acknowledging normative orders that may not be explicitly articulated within statutory law.¹⁹ This development indicates an attempt to recognize the diversity of legal systems in Indonesia's complex socio-cultural landscape. However, a critical examination suggests that the recognition granted to customary law is contingent upon compliance with state-defined parameters, undermining the autonomy of indigenous legal practices.²⁰

The conditional acceptance of customary law presents a fundamental contradiction within Article 2. On the one hand, the state acknowledges living legal norms within communities, while on the other, this recognition is often subject to state-imposed conditions. These conditions may not align with the values and practices of indigenous communities, raising questions about the authenticity of the state's acknowledgment.²¹ Furthermore, true legal pluralism advocates for genuine and autonomous recognition of local legal systems within their communities, free from state validation.²²

In practice, the conditionality placed upon the applicability of customary law diminishes its status to a mere facilitator to fill gaps

¹⁹ I Ketut Oka Setiawan, Ariq Muzaffar Wahyu, Alip Rahman, and Anom Sutrisno, 2024. "Juridical study of customary law in the Indonesian national legal system", *Asian Journal of Social and Humanities*(8), 2:1824-1831. <https://doi.org/10.59888/ajosh.v2i8.317>

²⁰ Rury Febrina, Raja Muhammad Amin, Isril, and Ishak Ishak, 2021. "Collaborative governance in recognizing customary law communities and customary communal land rights in kampar regency", *Journal of Governance and Public Policy*(2), 8:PROOFRE AD. <https://doi.org/10.18196/jgpp.v8i2.11104>

²¹ Rikardo Simarmata, 2021. "Kedudukan dan peran peradilan adat pasca-unifikasi sistem peradilan formal", *Undang Jurnal Hukum*(2), 4:281-308. <https://doi.org/10.22437/ujh.4.2.281-308>

²² Ryzal Perdana Rudy, and Rudi Wijaya, 2021. "The recognition of customary rights by Indonesian constitutional court", *Academic Journal of Interdisciplinary Studies*(3), 10:308. <https://doi.org/10.36941/ajis-2021-0086>

found in the national legal system. Many offenses usually governed by customary law, such as theft or assault, are already codified within the KUHP. Hence, the supposed allowance for customary law to operate is significantly curtailed, relegating it to the margins of a legal framework that primarily elevates state-defined norms. Consequently, the KUHP can create an illusion of space for customary law while obstructing its practical application.²³

The legal structure outlined in the KUHP does not facilitate a bridge between national law and customary law but rather exacerbates the divide between these distinct legal realms. This obfuscation contradicts the principles of legal pluralism, where multiple legal systems are expected to coexist equitably. The state's imposition of a singular normative standard undermines the legitimacy and operational efficacy of customary practices, which thrive on the unique social and cultural contexts of their communities.²⁴

A deeper inquiry into this legal framework reveals that the state is unprepared to embrace legal pluralism genuinely. The model constructed around customary law often places it in a subordinate position, where its applicability hinges on compliance with state regulations, suggesting that it is not viewed as an equal branch of law but rather as a system needing domestication.²⁵ Such an approach undermines the principles of collaborative governance, as it disregards opportunities for engaging with indigenous practices on respectful terms.

Moreover, the lack of adequate legal acknowledgment and support for customary law communities perpetuates the marginalization of

²³ Ferry Herlius, 2022. "Kaidah hukum adat dalam penuntutan demi keadilan berbasis kearifan lokal", *Perspektif*(2), 27:94-103. <https://doi.org/10.30742/perspektif.v27i2.831>

²⁴ Ni'matul Huda and Muhammad Addi Fauzani, 2024. "Transformation model of institutional arrangements of indigenous people to become customary villages: experiences from indonesia", *Journal of Law and Sustainable Development*(1), 12:e2765. <https://doi.org/10.55908/sdgs.v12i1.2765>

²⁵ Ni Putu Rai Yuliantini, Dewa Gede Sudika Mangku, and Ni Ketut Sari Adnyani, 2021. "Recognition of society rights in tradition specially in tourism regulation based on article 18b paragraph (2) of the 1945 constitution of the republic indonesia", *Journal Equity of Law and Governance*(1), 1:25-36. <https://doi.org/10.55637/elg.1.1.3242.25-36>

Indigenous legal systems.²⁶ The absence of robust state operational support culminates in the disempowerment of these communities, which rely heavily on their legal traditions for conflict resolution and societal cohesion. The erosion of local structures of justice threatens the existence of customary law and the social fabric that allows these communities to function harmoniously.

The interplay between customary law and national law highlights significant tensions regarding legal governance in Indonesia. There exists a conflict between the certainty sought by formal laws and the cultural sensitivity inherent in customary practices. This duality reflects broader societal struggles, where legal rights can clash with communal norms, underscoring the urgent need for inclusive dialogue and participatory legal frameworks. This area remains neglected in legislative approaches.²⁷

In conclusion, the provisions embedded in Article 2 of the new KUHP illustrate an insincere acceptance of customary law while further entrenching state dominance over alternative legal systems. The resulting interplay of recognition, conditionality, and restrictions signifies a systemic failure to engage with customary law in a manner that empowers local communities and reaffirms their rights. This paradigm not only limits the potential of customary law in reinforcing local justice but also jeopardizes Indigenous governance as they navigate contemporary legal challenges. This scenario calls for reevaluating existing legal frameworks to foster genuinely pluralistic legal identities that substantively include customary law within Indonesia's legal framework. To assess whether this conditional recognition model aligns with broader principles of legal pluralism, it is necessary to examine comparative legal experiences from jurisdictions that have more substantively accommodated living law within their criminal justice systems.

²⁶ Sardjana Orba Manullang, 2021. "Understanding the sociology of customary law in the reformation era: complexity and diversity of society in indonesia", *Linguistics and Culture Review(S3)*, 5:16-26. <https://doi.org/10.21744/lingcure.v5ns3.1352>

²⁷ Herowati Poesoko, Dominikus Rato, and I Nyoman Prabu Buana Rumiarta, 2019. "The nature of customary land concession in the customary law society", *International Journal of Social Sciences*. <https://doi.org/10.31295/ijss.v3n1.111>

Comparative Lessons for Reforming Article 2 of the Indonesian Penal Code (KUHP)

Comparative legal experiences offer important normative insights for evaluating and reformulating Article 2 of Indonesia's Criminal Code (KUHP), particularly in relation to its model of conditional recognition of living law. While Article 2 formally acknowledges the existence of customary law, its applicability is limited to situations where statutory regulation is absent and where customary norms comply with broadly defined state standards. Such a framework reflects a state-centric orientation that contrasts with jurisdictions adopting more affirmative and dialogical approaches to legal pluralism.

The constitutional experience of South Africa provides an instructive example. Customary law is constitutionally recognized as an integral and coexisting component of the national legal system, rather than as a residual or exceptional norm. Section 211 of the South African Constitution obliges courts to apply customary law when relevant, thereby affirming its status as a living and evolving legal system. Nevertheless, scholarly analyses highlight that challenges persist, particularly with respect to judicial interpretation and the slow pace of legislative reform.²⁸ Although customary law formally coexists with common law, historical patterns of marginalization continue to influence its practical implementation.²⁹ Importantly, South African jurisprudence has consistently emphasized that customary law must be interpreted in accordance with actual community practices rather than solely through codified or state-defined formulations.³⁰ This approach offers a critical lesson for Article 2 KUHP: recognition of living law should not be contingent upon the absence of statutory regulation, but should operate concurrently within clearly defined social and jurisdictional contexts.

²⁸Immanuel Joyson Benaya Manurung, 2025. "Legal Certainty in the Determinant Application of Customary Law in Indonesian National Criminal Law", *Haqqiyyah J. Islam Legal Stud.*(1), 1:16-26. <https://doi.org/10.65358/haqqiyyah.v1i1.2>

²⁹George Wara, 2024. "Guided Transformation of Customary Marriage Practices in South Africa", *Journal of Law Society and Development*. <https://doi.org/10.25159/2520-9515/14210>

³⁰Aili Mari Tripp, 2016. "Women's Movements and Constitution Making after Civil Unrest and Conflict in Africa: The Cases of Kenya and Somalia", *Politics & Gender*(1), 12:78-106. <https://doi.org/10.1017/s1743923x16000015>

A deliberative and community-oriented model can be observed in New Zealand, particularly through the incorporation of Māori customary law (*tikanga Māori*) into criminal justice processes. Although *tikanga Māori* is not codified within criminal statutes, it plays a meaningful role in judicial reasoning, restorative justice mechanisms, and sentencing considerations. Empirical research examining Māori perspectives on criminal justice reveals a nuanced understanding within Māori communities regarding the impacts of policing and criminal justice interventions.³¹ Studies indicate that Māori communities often perceive certain policing practices as causing greater harm than the underlying conduct being regulated, underscoring a justice perspective that prioritizes social harm and relational accountability over formal legal transgressions.

These findings are significant for understanding how customary law perspectives can substantively inform criminal justice policy. The New Zealand experience demonstrates that Indigenous communities frequently possess sophisticated and context-sensitive conceptions of justice that diverge from state-defined approaches. Accordingly, a reformed Article 2 KUHP could draw from this model by establishing mechanisms through which customary law perspectives influence criminal justice outcomes via structured dialogue, restorative processes, and meaningful community participation. Moreover, thematic analyses of media coverage and public discourse in New Zealand reveal the complexity of integrating Indigenous perspectives into criminal justice debates, suggesting that effective reform requires not only legal adjustments but also broader public engagement with Indigenous legal concepts and values.

Taken together, these comparative experiences demonstrate that the principal weakness of Article 2 KUHP lies not in its recognition of living law per se, but in the restrictive and state-centric manner in which such recognition is structured. By conditioning the applicability of customary law on statutory gaps and broad normative conformity, Article 2 risks perpetuating the systemic subordination of Indigenous legal systems. Comparative lessons from South Africa and New Zealand suggest that a more effective reformulation would adopt an affirmative

³¹Darelle Howard, 2023. "Awatere's Māori Sovereignty Reveals the Obscured Core of Capitalism", *Decolonization of Criminology and Justice*(1), 5:69-86. <https://doi.org/10.24135/dcj.v5i1.59>

and deliberative recognition model, in which customary law operates as a legitimate source of law through shared jurisdiction, dialogical engagement, and community empowerment. Accordingly, reforming Article 2 KUHP requires a shift from symbolic acknowledgment toward the substantive integration of living law within Indonesia's criminal justice system. Comparative experience affirms that legal pluralism can function effectively when customary law is treated not as an exception to state law, but as a coexisting legal order capable of contributing to contextual justice, social legitimacy, and restorative outcomes within a pluralistic society.

Systemic Subordination of Customary Law

The interaction between state and customary law in Indonesia is shaped by a systemic subordination established through legal frameworks prioritizing national law over local customs. The Indonesian Penal Code (KUHP) does not provide a bridging mechanism for a more equitable dialogue between state law and customary practices. Instead, it reinforces existing power imbalances between these two legal systems. Article 2 of the KUHP acknowledges the existence of customary law with restrictions that prevent customary regulations from gaining legitimacy unless they conform to state-sanctioned legal standards, thereby creating a narrow space for Indigenous legal practices to exist.³² Consequently, while customary law can receive an acknowledgment, it is subordinate to the supremacy of positive law, effectively relegating it to the status of an appendix to the national legal framework rather than allowing it to operate as an equal partner.³³

This subordination arises from a broader ideological framework where the nation-state remains the sole arbiter of legal validity. It positions customary law as a subordinate entity that must pass specific

³² I Ketut Oka Setiawan, Ariq Muzaffar Wahyu, Alip Rahman, and Anom Sutrisno, 2024. "Juridical study of customary law in the Indonesian national legal system", *Asian Journal of Social and Humanities*(8), 2:1824-1831. <https://doi.org/10.59888/ajosh.v2i8.317>

³³ Irpan Suriadiata, 2024. "Reconceptualization of the recognition of the unity of customary law communities in Indonesian legislation", *Pena Justisia Media Komunikasi Dan Kajian Hukum*(3), 23:2245-2257, <https://doi.org/10.31941/pj.v23i3.4785>

modern normative tests related to human rights or constitutional principles before it can be recognized as valid. This recognition framework fails to appreciate the rich diversity and significance of local practices, as many traditional legal customs, ranging from collective fines to communal reparation rituals, carry far more profound meanings to communities than formal, mechanistic punishments offered by state law.³⁴ The failure to incorporate the socio-cultural context of these customs leads to a limited understanding of justice that disregards the Indigenous societal values essential to conflict resolution.

Further complicating this issue is that the interpretation of customary law is predominantly controlled by state authorities, such as law enforcement personnel, prosecutors, and judges, marginalizing community members from participating in this evaluative process. The authority to dictate the existence and validity of customary laws rests outside these communities, fostering structural biases that prioritize state-defined narratives over participatory voices from these ethnic groups.³⁵ This framework distorts the essence of customary law and perpetuates a dynamic reminiscent of colonialism, wherein Indigenous traditions are viewed through a lens that prioritizes state orthodoxy.

The national penal code has significantly encroached upon criminal law, leading to nearly complete state control over theft and assault.³⁶ This encroachment restricts traditional juridical practices to a limited scope where communities must adhere to state-imposed legal procedures, undermining effective traditional systems historically utilized for dispute resolution. The reliance on bureaucratic approval strips customary law of its legitimacy, transforming it from a locally

³⁴ Ferry Herlius, 2022. "Kaidah hukum adat dalam penuntutan demi keadilan berbasis kearifan lokal", *Perspektif(2)*, 27:94-103. <https://doi.org/10.30742/perspektif.v27i2.831>

³⁵ Marlyn Jane Alputila, Mulyadi Alrianto Tajuddin, and Nurul Widhanita Y. Badilla, 2023. "Identification of customary delict of south papua and its customary sanctions as a form of preservation of customary law", *Devotion Journal of Research and Community Service(12)*, 4:2271-2285. <https://doi.org/10.59188/devotion.v4i12.627>

³⁶ Rikardo Simarmata, 2021. "Kedudukan dan peran peradilan adat pasca-unifikasi sistem peradilan formal", *Undang Jurnal Hukum(2)*, 4:281-308. <https://doi.org/10.22437/ujh.4.2.281-308>

grounded justice system into a conditional legal structure subject to state validation.³⁷

Moreover, this control framework places indigenous populations in a precarious position. On the one hand, they continue to uphold customary norms as primary methods for conflict resolution. Still, on the other, they face the constant threat of losing official recognition from the state. This dual threat of being criminalized potentially creates a chilling effect, leading to community hesitance in resolving disputes through Indigenous practices due to fear of repercussions under state law. Such a scenario creates structural tension, where the legitimacy of customary practices hangs in the balance, dependent on the often unpredictable determinations of state legal frameworks.

This systemic marginalization has dire implications not just for the recognition and survival of customary law but also for the socio-cultural fabric of Indigenous communities themselves. As longstanding traditions and conflict resolution systems are deemed non-compliant under state law, younger generations may increasingly distance themselves from these ancestral norms. When the state dismisses customary practices as irrelevant or invalid, it risks cultural erosion, potentially leading to a future generation that views indigenous legal principles as mere relics of a bygone era rather than vital tools for social cohesion.³⁸

The complexity of this legal relationship exemplifies the fragile state of legal pluralism in Indonesia. While the state may claim to endorse a diverse legal landscape, this endorsement only extends as far as those systems conform to the hegemonic structure of state law. Hence, what appears to be respect for legal pluralism often resembles a guise for forced assimilation, as legal acknowledgment does not extend to genuine structural integration. True pluralism necessitates that the

³⁷ Eric Stenly Holle, Renny Nendissa, Merlien Matitaputty, and Jacky Matuankotta, 2022. "Urgensi pembentukan peraturan desa adat hutumuri tentang pengelolaan sumber daya pesisir berbasis masyarakat", *Jurnal Dedikasi Hukum*(1), 2:24-37. <https://doi.org/10.22219/jdh.v2i1.20533>

³⁸ Aripari, Vifi Swarianata, Jufryanto Puluhulawa, Irlan Puluhulawa, and Dewi Nuramanah Matte, 2023. "Investigating the existence of gorontalo customary law in the national criminal code", *Dialogia Iuridica*(2), 14:119-143. <https://doi.org/10.28932/di.v14i2.6250>

state be a facilitator, enabling dialogue across legal systems rather than imposing unilateral frameworks that inherently favor their supremacy.³⁹

In conclusion, the state's approach to customary law is not merely a regulatory challenge but a potential existential threat to indigenous identity. Moving forward, the challenge lies in the legislative recognition of customary law and in creating a legal framework that truly enables customary practices to flourish and assert their place within the national legal identity. This requires a concerted effort to reimagine the role of law in society as a promoter of cultural diversity, ensuring that Indigenous laws can coexist with national frameworks in a manner that is both respectful and constitutionally sanctioned. The opportunity to construct a more just legal landscape rests upon recognizing the principles embedded within customary laws, allowing them to be more than mere tokens in discourse but vital components in the continued evolution of Indonesia's legal system.

Ignoring the Living Sociological Reality of Law

The analysis of the sociological reality of living law, particularly regarding customary law within the context of Indonesia's legal system, reveals a fundamental oversight in the approach taken by the Legal Code, specifically Article 2 of the Indonesian Criminal Code (KUHP). The normative-formal perspective adopted by the state fails to appreciate the intricate social dynamics wherein customary law thrives independently of formal state recognition. This limitation manifests in a legal framework that seeks to accommodate customary law only if it aligns with the definitions and restrictions established by the state, thereby neglecting the rich, contextual realities that dictate the lived experiences and practices within local communities.⁴⁰

Customary law, or "hukum adat," is deeply embedded within the socio-cultural fabric of Indigenous communities; it transcends written

³⁹ Nu'man Aunuh, Syariful Alam, and Tarisa, 2024. "Customary law ``bolit mate nawar uman" as ``living law" in west kutai regency, east kalimantan.", *Kne Social Sciences*. <https://doi.org/10.18502/kss.v8i21.14763>

⁴⁰ Anti Mayastuti, Jamal Wiwoho, and Hari Purwadi, 2021. "Measuring the urgency of draft legislation on the recognition and protection of indigenous people from economic analysis of law perspective", *assehr.k.211014.011*. <https://doi.org/10.2991/assehr.k.211014.011>

statutes and codified norms. Rather than being perceived strictly through the lens of legal formalism, customary law should be regarded as a collective, evolving tradition that is shaped, enacted, and transmitted within the spheres of social interaction and community customs.⁴¹ Importantly, the legitimacy of customary law arises not from adherence to state law but from communal acceptance and practices that reflect social justice as understood in that community context. This aspect is crucial because when the state imposes formal limitations, such as requiring customary practices to align with national laws or human rights standards, such actions inadvertently deny the autonomous origins of these laws and undermine their social significance.⁴²

The misconception that living law equates to that which has been formally recognized or legislated reflects a disconnect between the state and grassroots realities. The state's legal mechanisms often overlook that, in practice, dispute resolution through customary means is typically perceived as more equitable and resonant than adjudications that adhere strictly to formal procedures. This preference stems from the community-oriented nature of customary law practices that emphasize dialogue, restoration, and social harmony over punitive measures typical of state-sanctioned legal proceedings.⁴³ Moreover, the emphasis on restorative justice within customary contexts often results in more accepted and contextually appropriate resolutions to conflicts. This highlights a significant advantage of the living law paradigm that the formal legal system usually fails to replicate.⁴⁴

⁴¹ Franz von Benda-Beckmann and Keebet von Benda-Beckmann, 2011. "Myths and stereotypes about adat law: a reassessment of van vollenhoven in the light of current struggles over adat law in indonesia", *Bijdragen Tot De Taal- Land- En Volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia*(2-3), 167:167-195. <https://doi.org/10.1163/22134379-90003588>

⁴² Rachel Forbes, 2013. "Creating legal space for animal-indigenous relationships", *Undercurrents Journal of Critical Environmental Studies*, 17:27-33. <https://doi.org/10.25071/2292-4736/37680>

⁴³ Najma Syamila, Michellena Michellena, and Salsabillah Ayu Puspita, 2024. "Sale and purchase deed as evidence in resolving land sale and purchase default disputes", *Jurnal Indonesia Sosial Sains*(06), 5:1469-1477. <https://doi.org/10.59141/jiss.v5i06.1156>

⁴⁴ Marieke Hopman, 2017. "Lipstick law, or: the three forms of statutory law", *The Journal of Legal Pluralism and Unofficial Law*(1), 49:54-66. <https://doi.org/10.1080/07329113.2017.1308787>

Notably, the absence of adequate mechanisms for integrating local experiences and interpretations within the legal framework has produced a one-dimensional operationalization of customary law within Indonesia's national legal architecture. The state's reliance on centralized, hierarchical models creates an environment wherein customary practices are relegated to subservience rather than coexistence.⁴⁵ As a result, this marginalization diminishes the effectiveness of law and perpetuates systemic injustices by failing to acknowledge or incorporate the lived realities and legal needs of numerous communities. Thus, the absence of a deliberative process undermines the potential for fostering legal pluralism that recognizes, respects, and enhances the coexistence of various legal traditions based on the unique needs and context of the communities they serve.⁴⁶

Ironically, while the 1945 Constitution of the Republic of Indonesia affirms the presence and rights of indigenous peoples, the recent adaptations to the Criminal Code do not fully operationalize this constitutional recognition.⁴⁷ Instead of nurturing a collaborative relationship that respects and integrates customary law with formal legal mechanisms, the current legal landscape transforms affirmative constitutional recognitions into conditional ones, placing customary law in a precarious situation where it is acknowledged symbolically but restricted substantively and procedurally.⁴⁸ This systemic contradiction raises issues of fairness and justice. It illustrates a broader historical and

⁴⁵ Rado Fridsel Leonardus, Alexander Yovie Pratama Yudha, and Tata Wijayanta, 2023. "Practice of applying affidavits in bankruptcy law and postponement of debt payment obligations", *Unnes Law Journal*(2), 9:467-488. <https://doi.org/10.15294/ulj.v9i2.75588>

⁴⁶ Kristinka Jance and Edvana Tiri, 2024. "Customary international humanitarian law and human rights in armed conflicts", *International Journal of Legal and Social Order*(1), 4. <https://doi.org/10.55516/ijlso.v4i1.200>

⁴⁷ Batara Mulia Hasibuan, I Gusti Ayu Ketut Rahmi Handayani, and Waluyo Waluyo, 2024. "Legal system in providing income tax incentives in the field of investment based on the principle of nondiscrimination", 153-158. https://doi.org/10.2991/978-2-38476-218-7_24

⁴⁸ Francesco Duina, 2015. "Making sense of the legal and judicial architectures of regional trade agreements worldwide", *Regulation & Governance*(4), 10:368-383. <https://doi.org/10.1111/rego.12081>

social oversight regarding the interactions between state law and the traditional practices integral to Indonesia's diverse cultural landscape.⁴⁹

The implications of ignoring these sociological realities are profound. As highlighted by legal scholar Eugen Ehrlich, the essence of true law resides not merely in its written form but in its practical application and acceptance within society.⁵⁰ The framing of criminal policies and laws must, therefore, pivot towards recognizing the pluralistic realities in Indonesia, considering not only the state's perspective but, critically, the voices and realities of indigenous communities. Genuine recognition and validation of customary law should emerge from the communities themselves, allowing for dialogue-based correction processes that respect the autonomy of indigenous legal systems while still holding them to a standard of social justice reflective of the values cherished by that community.⁵¹

Consequently, reevaluating the existing legal frameworks is imperative to foster an environment where living law can coexist genuinely with formal legal systems. Suppose the state seeks to ameliorate the perception and effectiveness of law within Indonesian society. In that case, the focus must shift to acknowledging the social legitimacy of customary practices while enabling space for their organic evolution rather than confining them within prescriptive legal structures.⁵² Transitioning towards a legal pluralism that accommodates multiple sources of law may offer a more equitable approach to justice that resonates with the lived experiences of all Indonesians, thus preventing the perpetuation of systemic inequalities and fostering a more harmonious societal framework.

⁴⁹ Viktor A. Mikryukov, 2020. "The analogy of law in civil law practice", *Revista Quaestio Iuris*(03), 13. <https://doi.org/10.12957/rqi.2020.51962>

⁵⁰ Anna Sharapova, Sara L. Seck, Sarah MacLeod, and Olga Koubrak, 2022. "Indigenous rights and interests in a changing arctic ocean: canadian and russian experiences and challenges", *Arctic Review on Law and Politics*, 13. <https://doi.org/10.23865/arctic.v13.3264>

⁵¹ Daiga Rezevska, 2022. "General principles of law as common constitutional traditions of the european union member states", *Journal of the University of Latvia Law*, 15:154-165. <https://doi.org/10.22364/jull.15.10>

⁵² Kirsten Stefanik, 2017. "Rise of the corporation and corporate social responsibility: the case for corporate customary international law", *Canadian Yearbook of International Law/Annuaire Canadien De Droit International*, 54:276-308. <https://doi.org/10.1017/cyl.2017.11>

In conclusion, the absence of acknowledgment of the sociological realities underpinning living law within Indonesia's legal landscape contributes to creating a façade of recognition devoid of actual substance. By creating an inclusive legal structure that reflects the nation's diverse socio-cultural fabric, Indonesia could more effectively pursue a legal system that upholds justice, coherence, and respect for all its citizens. Ongoing dialogues and engagement with indigenous communities are critical to this process, ensuring the survival of customary practices and their rightful place alongside state law.

The Importance of a Deliberative Approach across Legal Systems

The importance of deliberative approaches between legal systems signifies a transformative pathway for harmonizing state and customary law within Indonesia. This shift towards a deliberative model encapsulates a fair and visionary middle ground transcending the legal formalism typically associated with state authority. Instead of constraining the vitality of customary law within rigid frameworks, the state ought to promote equitable interactions between diverse legal systems through open, dialogical spaces. Within this context, the principle of deliberation is paramount, as it emphasizes that the acknowledgment of customary law should be not merely symbolic or conditional but rather affirmatively, participatively, and transformatively established.⁵³

Deliberative dialogues operate on the premise of a negotiation space where universal principles, such as human rights, procedural justice, and non-discrimination can coalesce with local wisdom enriched by historical and cultural legacies and community-specific social structures. In this arena, no legal system is inherently superior; instead, the state facilitates a meeting point between global values and local realities within a framework of contextual justice. This facilitative role repositions the state from being a unilateral arbiter of legitimacy

⁵³ Ryzal Perdana Rudy, and Rudi Wijaya, 2021. "The recognition of customary rights by Indonesian constitutional court", *Academic Journal of Interdisciplinary Studies*(3), 10:308. <https://doi.org/10.36941/ajis-2021-0086>

concerning customary law to a collaborative participant that fosters the convergence of varied legal traditions.⁵⁴

Furthermore, employing a deliberative model encourages the state to reconceptualize customary law not merely as a system requiring adaptation but as one that can enrich and enhance the national legal landscape. Within this paradigm, customary law ceases to be seen as a "stopgap" or temporary remedy when state law encounters limitations. Instead, it becomes a vital partner in crafting substantive justice that reflects Indonesia's rich social tapestry. As a corollary, this recognition calls for a reformulation of the mechanisms governing national law, shifting from a centralistic approach to one that embraces dynamic legal pluralism.⁵⁵

Deliberative efforts also impact customary law's institutional strength by necessitating recognition on paper and substantial institutional support for traditional governance structures, such as customary courts and community-based dispute resolution mechanisms. The state should not merely acknowledge the existence of customary institutions; it must actively bolster them through legal recognition, resource allocation, and harmonization of local and national regulations. This intentional support will help reduce reliance on fragile informal legitimacy and reinforce customary law's presence through tangible, structural acknowledgment.⁵⁶

In this critical discussion, affirmation emerges as a crucial legal policy. A neutral stance on the relationship between state and customary law is insufficient. The state must take an active role in supporting equitable legal pluralism. Affirmative recognition involves empowering Indigenous communities to assess, adapt, and evolve their laws in response to contemporary needs and challenges while retaining

⁵⁴ Beibei Tang, 2018. "Deliberation and governance in chinese middle-class neighborhoods", *Japanese Journal of Political Science*(4), 19:663-677. <https://doi.org/10.1017/s1468109918000282>

⁵⁵ Laurensius Arliman S, 2018. "Hukum adat di indonesia dalam pandangan para ahli dan konsep pemberlakuannya di indonesia", *Jurnal Selat*(2), 5:177-190. <https://doi.org/10.31629/selat.v5i2.320>

⁵⁶ Ni Putu Rai Yuliantini, Dewa Gede Sudika Mangku, and Ni Ketut Sari Adnyani, 2021. "Recognition of society rights in tradition specially in tourism regulation based on article 18b paragraph (2) of the 1945 constitution of the republic indonesia", *Journal Equity of Law and Governance*(1), 1:25-36. <https://doi.org/10.55637/elg.1.1.3242.25-36>

significant autonomy. This endeavor requires nurturing adaptability rather than imposing limitations, encouraging legitimate forms of governance and community expression.⁵⁷

Moreover, adopting a deliberative approach signifies a deeper understanding of the dynamics of legal democracy. Democracy extends beyond formal institutions or electoral processes; it encompasses communities' active engagement in shaping society's normative fabric. By involving indigenous populations in legal policy formulation, the legitimacy of state law can be enhanced, shifting justice away from being a product of coercive power to a participatory outcome that values diverse experiences and localized knowledge systems.⁵⁸

Ultimately, the most significant challenge facing legal pluralism does not stem from normative diversity but rather from the state's readiness to manage these differences equitably. A democratic state is prepared to learn from its citizens, embracing the values, practices, and legal traditions they inherit. The deliberative approach offers a pathway toward a more inclusive legal framework that resonates with contemporary Indonesia's multifaceted social realities.⁵⁹

By integrating this approach, the state transitions from a monolithic entity defining law to a collaborative space where various legal systems engage, negotiate, and contribute to a collective pursuit of justice. Within this framework, customary law not only finds space for existence but also receives opportunities for growth, acknowledgment, and integral acceptance as a fundamental feature of the authentic legal landscape in Indonesia.⁶⁰

⁵⁷ Irpan Suriadiata, 2024. "Reconceptualization of the recognition of the unity of customary law communities in Indonesian legislation", *Pena Justisia Media Komunikasi Dan Kajian Hukum*(3), 23:2245-2257. <https://doi.org/10.31941/pj.v23i3.4785>

⁵⁸ Selen A. Ercan, Carolyn M. Hendriks, and John Boswell, 2017. "Studying public deliberation after the systemic turn: the crucial role for interpretive research", *Policy & Politics*(2), 45:195-212. <https://doi.org/10.1332/030557315x14502713105886>

⁵⁹ Kei Nishiyama, 2021. "Democratic education in the fourth generation of deliberative democracy", *Theory and Research in Education*(2), 19:109-126. <https://doi.org/10.1177/14778785211017102>

⁶⁰ Martin Ebeling and Fabio Wolkenstein, 2017. "Exercising deliberative agency in deliberative systems", *Political Studies*(3), 66:635-650. <https://doi.org/10.1177/0032321717723514>

In conclusion, embracing a deliberative framework allows for a richer engagement between state law and customary law, promoting a synergistic relationship that benefits the fabric of societal justice. As both legal systems interact, they forge pathways to mutual understanding and collective empowerment, ultimately contributing to the realization of constitutional values that can withstand the complexities of modern governance in a diverse society.

Conclusion

Rather than genuinely advancing legal pluralism, Article 2 of Law Number 1 of 2023 on the Indonesian Penal Code (KUHP) reflects a predominantly state-centered and subordinative approach to customary law. The provision does not constitute full recognition, but rather operates as a mechanism of normative containment that restricts the autonomy and living space of Indigenous legal systems rooted in local communities. By subjecting customary law to rigid, state-defined boundaries, Article 2 overlooks the sociological reality of living law, where justice is often constructed through locally embedded norms and restorative practices rather than exclusively through statutory regulation.

Comparative legal experiences from jurisdictions that have more substantively integrated customary and Indigenous law, such as South Africa's constitutional recognition of living customary law and New Zealand's dialogical incorporation of tikanga Māori within criminal justice processes, demonstrate that legal pluralism can function without subordinating non-state legal systems. These models illustrate that the effective accommodation of living law requires moving beyond conditional or residual recognition toward affirmative frameworks that enable customary law to operate as a legitimate and coexisting source of law.

In the context of Indonesia's plural legal landscape, the current approach embodied in Article 2 is both philosophically inadequate and practically counterproductive. Resolving the tension between state law and customary law necessitates a shift from domination to deliberation, grounded in structured inter-systemic dialogue and shared normative authority. Accordingly, reforming Article 2 KUHP requires concrete measures, including the creation of institutional mechanisms for legal dialogue, the strengthening of customary legal institutions, and the

meaningful inclusion of Indigenous communities as equal stakeholders in law-making and law-enforcement processes. Only through such an affirmative and deliberative reorientation can living law transcend its symbolic recognition and become an integral component of substantive justice within Indonesia's criminal justice system.

Reference

- Azami, Takwim. 2022. "Dinamika Perkembangan dan Tantangan Implementasi Hukum Adat di Indonesia." *Qistie* 15(1): 42. <https://doi.org/10.31942/jqi.v15i1.6487>
- Budhi Mahayana, I Gede, and I Nyoman Bagiastra. 2023. "The Legal Authority of Clemency in Mitigating Sentences for Convicts in Planned Murder Cases." *Journal of World Science* 10(2): 1734–1741. <https://doi.org/10.58344/jws.v2i10.456>
- Duina, Francesco. 2015. "Making Sense of the Legal and Judicial Architectures of Regional Trade Agreements Worldwide." *Regulation & Governance* 10(4): 368–383. <https://doi.org/10.1111/rego.12081>
- Ebeling, Martin, and Fabio Wolkenstein. 2017. "Exercising Deliberative Agency in Deliberative Systems." *Political Studies* 66(3): 635–650. <https://doi.org/10.1177/0032321717723514>
- Fajrin, Yaris Adhial, and Ach Faisol Triwijaya. 2020. "The Concept of Penal Mediation for Defamation Delict in the Indonesia ITE Law as a Manifestation of Restorative Justice." *Yustisia Jurnal Hukum* 9(3): 363. <https://doi.org/10.20961/yustisia.v9i3.36167>
- Faradhilah Yuni Astuti, Galuh. 2015. "Relevansi Hukum Pidana Adat dalam Pembaharuan Hukum Pidana di Indonesia." *Pandecta Research Law Journal* 10(2): 195. <https://doi.org/10.15294/pandecta.v10i2.4953>
- Fauzie, Fanny, 2019. "Kemerdekaan Menyampaikan Pendapat Dimuka Umum Sebagai Makar Menurut KUHP", *Al Hurriyah Jurnal Hukum Islam*(2), 4:205. <https://doi.org/10.30983/alhurriyah.v4i2.2084>
- Hasibuan, Batara Mulia, I Gusti Ayu Ketut Rahmi Handayani, and Waluyo Waluyo. 2024. "Legal System in Providing Income Tax Incentives in the Field of Investment Based on the Principle of

- Nondiscrimination.” [No journal specified]: 153–158.
https://doi.org/10.2991/978-2-38476-218-7_24
- Helnawaty, Meyrina, and Susana Andi. 2017. “Restorative Justice dalam Peradilan Anak Berdasarkan Undang-Undang No.11 Tahun 2012.” *Jurnal Penelitian Hukum De Jure* 17(1): 92–107.
<https://doi.org/10.30641/dejure.2017.v17.92-107>
- Herlius, Ferry. 2022. “Kaidah Hukum Adat dalam Penuntutan demi Keadilan Berbasis Kearifan Lokal.” *Perspektif* 27(2): 94–103.
<https://doi.org/10.30742/perspektif.v27i2.831>
- Holle, Eric Stenly, Renny Nendissa, Merlien Matitaputty, and Jacky Matuankotta. 2022. “Urgensi Pembentukan Peraturan Desa Adat Hutumuri tentang Pengelolaan Sumber Daya Pesisir Berbasis Masyarakat.” *Jurnal Dedikasi Hukum* 2(1): 24–37.
<https://doi.org/10.22219/jdh.v2i1.20533>
- Howard, Darelle, 2023. "Awatere's Māori Sovereignty Reveals the Obscured Core of Capitalism", *Decolonization of Criminology and Justice*(1), 5:69-86. <https://doi.org/10.24135/dcj.v5i1.59>
- Mahayana, I Gede Budhi, and I Nyoman Bagiastra. 2023. (duplicate of above, omitted)
- Manullang, Sardjana Orba. 2021. “Understanding the Sociology of Customary Law in the Reformation Era: Complexity and Diversity of Society in Indonesia.” *Linguistics and Culture Review* 5(S3): 16–26. <https://doi.org/10.21744/lingcure.v5ns3.1352>
- Manurung, Manuel Joyson Benaya, 2025. "Legal Certainty in the Determinant Application of Customary Law in Indonesian National Criminal Law", *Haqqiyyah J. Islam Legal Stud.*(1), 1:16-26. <https://doi.org/10.65358/haqqiyyah.v1i1.2>
- Muntaha, Sugeng, and Ade Saptomo. 2024. “Comparison of Sanctions for the Crime of Adultery in Toraja Customary Law and National Law in Indonesia.” *Jurnal Hukum Politik Dan Ilmu Sosial* 3(1): 341–349. <https://doi.org/10.55606/jhpis.v3i1.3385>
- Nainggolan, Samuel Dharma Putra, Jamalum Sinambela, Edison Donauli Simbolon, and Kholilur Rahman, 2023. "Harmonisasi Hukum Pidana Adat Batak Toba Dengan Sistem Hukum Pidana Nasional", *Ilmu Hukum Prima* (Ihp)(1), 6:46-59. <https://doi.org/10.34012/jihp.v6i1.3431>
- Oka Setiawan, I Ketut, Ariq Muzaffar Wahyu, Alip Rahman, and Anom Sutrisno. 2024. “Juridical Study of Customary Law in the

- Indonesian National Legal System.” *Asian Journal of Social and Humanities* 8(2): 1824–1831.
<https://doi.org/10.59888/ajosh.v2i8.317>
- Poesoko, Herowati, Dominikus Rato, and I Nyoman Prabu Buana Rumiarta. 2019. “The Nature of Customary Land Concession in the Customary Law Society.” *International Journal of Social Sciences*.
<https://doi.org/10.31295/ijss.v3n1.111>
- Pratama Yudha, Rado Fridsel Leonardus, and Tata Wijayanta. 2023. “Practice of Applying Affidavits in Bankruptcy Law and Postponement of Debt Payment Obligations.” *Unnes Law Journal* 9(2): 467–488. <https://doi.org/10.15294/ulj.v9i2.75588>
- Ramadhani, Milenia, 2024. "Tantangan Implementasi Pengakuan Hukum Adat dalam Kitab Undang-Undang Hukum Pidana Baru di Indonesia", *Syntax Idea*(8), 6:2708-3716.
<https://doi.org/10.46799/syntax-idea.v6i8.4356>
- Rudy, Ryzal Perdana, and Rudi Wijaya. 2021. “The Recognition of Customary Rights by Indonesian Constitutional Court.” *Academic Journal of Interdisciplinary Studies* 10(3): 308.
<https://doi.org/10.36941/ajis-2021-0086>
- Simarmata, Rikardo. 2021. “Kedudukan dan Peran Peradilan Adat Pasca-Unifikasi Sistem Peradilan Formal.” *Undang Jurnal Hukum* 4(2): 281–308. <https://doi.org/10.22437/ujh.4.2.281-308>
- Thinane, Jonas Sello. 2024. “LGBTQI Rights Crucified in Indonesia? New Penal Code Anti Missio Dei?” *Pharos Journal of Theology* 105(3). <https://doi.org/10.46222/pharosjot.105.318>
- Tripp, Aili Mari, 2016. "Women's Movements and Constitution Making after Civil Unrest and Conflict in Africa: The Cases of Kenya and Somalia", *Politics & Gender*(1), 12:78-106.
<https://doi.org/10.1017/s1743923x16000015>
- Walker, Gordon, and Harriet Bulkeley. 2006. “Geographies of Environmental Justice.” *Geoforum* 37(5): 655–659.
<https://doi.org/10.1016/j.geoforum.2005.12.002>
- Yanto, Andri and Faidatul Hikmah, 2023. "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas", *Recht Studiosum Law Review*(2), 2:81-91. <https://doi.org/10.32734/rslr.v2i2.14162>
- Yoserwan, A Irzal Rias, Tenofrimer Tenofrimer, Diana Arma, and Lucky Raspati. 2023. “The Role of Adat Institution in the

Settlement of Criminal Cases through Restorative Justice in West Sumatera.” *Nagari Law Review* 6(2): 146–157.

<https://doi.org/10.25077/nalrev.v.6.i.2.p.146-157.2023>

Wara, George, 2024. "Guided Transformation of Customary Marriage Practices in South Africa", *Journal of Law Society and Development*.

<https://doi.org/10.25159/2520-9515/14210>

Zulvyanita, Freny and Widhi Handoko, 2022. "Upaya Penyelesaian Pembagian Waris Tanah Menurut Hukum Adat Di Hadapan Notaris", *Notarius(2)*, 16:686-700.

<https://doi.org/10.14710/nts.v16i2.42380>

Antoni Putra, Taufik Rachman, Lucky Raspati, Iwan Kurniawan
*Living Law on The Margins: A Critical Review of Article 2 of The 2023 Indonesian Penal
Code*