

Customary Council Decisions as Grounds for the Elimination of Prosecution: Notes on the Criminal Procedure Code

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Abstract

This article examines whether decisions issued by customary councils should constitute a legal ground for the elimination of prosecution under Indonesia's Law No. 20 of 2025 on the Criminal Procedure Code. Following the enactment of Law No. 1 of 2023 on the National Criminal Code, customary criminal law has been formally recognized as part of Indonesian living law. However, the Criminal Procedure Code does not provide procedural provisions governing the relationship between customary justice mechanisms and the state criminal justice system. Using normative legal research with statutory and case approaches, this study analyzes Supreme Court jurisprudence recognizing customary decisions as a valid basis for eliminating prosecution. The findings indicate that the lack of procedural recognition creates legal uncertainty and undermines the principle of legal pluralism. Therefore,



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this article proposes the inclusion of a specific provision in the Criminal Procedure Code that recognizes customary council decisions as a ground for eliminating prosecution when the offender has complied with the imposed customary sanction.

Keywords

Elimination of Prosecution, Customary Criminal Law, Living Law, Customary Justice, Criminal Procedure Reform.

Introduction

The enactment of Law Number 1 of 2023 concerning the Criminal Code or National Criminal Code (hereinafter referred to as the NCC) marks a significant milestone in the history of Indonesian law, as it officially ends the prolonged dominance of Dutch colonial criminal law.¹ One of the most crucial legal innovations introduced by the NCC is its formal recognition of customary criminal law as a legitimate source of law alongside statute legislation.² Article 2 of the NCC affirms that “living law in society” may serve as a basis for criminal prosecution, even in the lack of statutory provisions, provided that certain criteria are met.³ This provision is not merely symbolic; it carries profound normative consequences, effectively elevating local normative customs to the status of legal parity with state-made criminal norms.⁴ Further strengthening this recognition, Article 597 of the NCC provides explicit regulation on

¹ Malau Parningotan, “Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023,” *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 1 (June 13, 2023): 837–44, <https://doi.org/10.37680/ALMANHAJ.V5I1.2815>.

² Ahmad Rivai et al., “Implementation of Pancasila Values in the Formation of Law No. 1 of 2023 (New Criminal Code),” *Formosa Journal of Science and Technology* 4, no. 1 (January 2024): 27–38, <https://doi.org/10.55927/FJST.V4I1.13001>.

³ Daffa Ladro et al., “Living Law Dalam KUHP: Suatu Gagasan Menginventarisasi Kompilasi Hukum Adat,” *Jurist-Diction* 7, no. 3 (July 2024): 439–56, <https://doi.org/10.20473/JD.V7I3.56266>.

⁴ Musmuliady, Jubair, and Aminuddin Kasim, “Turn on the Living Law: The Construction and Implications of Living Law in Ratification of Draft Criminal Code (RKUHP),” *Rechtsidee* 10, no. 2 (December 2022): 10.21070/jihr.v11i0.798, <https://doi.org/10.21070/jihr.v11i0.798>.

customary offenses. This provision asserts that violations of certain customary norms may be classified as criminal offenses, so long as the custom is valid within a particular community, is not contrary to the foundational values of the Pancasila and the Constitution, and is not already regulated under the NCC.⁵ In this respect, customary law is no longer treated merely as sociological or anthropological data but has been transformed into enforceable criminal law under the auspices of the state.⁶ However, this acknowledgment raises a host of practical and normative issues, especially given the lack of a complementary procedural framework to ensure that the enforcement of customary norms is conducted in a lawful and just manner.⁷

The urgency of this issue becomes apparent when examined in light of the ongoing drafting of the Criminal Procedure Code Draft (hereinafter referred to as the CPCD), which, unfortunately, does not include specific provisions related to procedural aspects of customary criminal law.⁸ This omission represents a severe normative vacuum. On one hand, the NCC acknowledges the binding nature of living customary criminal law as a source of criminal liability. On the other hand, the lack of procedural rules means there is no legally established method for investigating, adjudicating, and enforcing such customary

⁵ Nella Sumika Putri, "The Material Content Of Regional Regulation As The Concretization Of The Living Legal System In Society (Adat Law) Based On Article 2 Of The Indonesian Penal Code (KUHP) 2023," *Jurnal Bina Mulia Hukum* 7, no. 2 (2023), <https://doi.org/https://doi.org/10.23920/jbmh.v7i2.1101>.

⁶ Tody Sasmitha Jiwa Utama, "Between Adat Law and Living Law: An Illusion of Customary Law Incorporation Into Indonesia Penal System," *The Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (May 2021): 269–89, <https://doi.org/10.1080/07329113.2021.1945222>.

⁷ Gede Eka Rusdi Antara, I Nyoman Budiana, and Ida Ayu Sadnyini, "Formulation of Customary Criminal Law in Future Criminal Code and Legal Enforcement in Indonesia," *Substantive Justice International Journal of Law* 4, no. 2 (2021): 164–81.

⁸ Aisha Nurul Fadilla et al., "Analisis Pengaturan Living Law Dalam RUU KUHP Yang Dituangkan Pada Peraturan Daerah Ditinjau Berdasarkan Konstitusi," *Jurist-Diction* 7, no. 2 (April 2024): 223–44, <https://doi.org/10.20473/JD.V7I2.56121>.

criminal law offenses.⁹ As a result, the recognition of customary criminal law becomes superficial, undermined by the lack of procedural guarantees that ensure due process for both offenders and victims in customary law disputes. Modern criminal law systems rest not only on the principle of substantive legality but also on the procedural safeguards that uphold fairness and justice.¹⁰ What is even more concerning is the CPCD's failure to acknowledge that dispute resolution through customary institutions could constitute a legitimate basis for the elimination of criminal prosecution by the state.¹¹ In practice, the Supreme Court of Indonesia has, in several cases, affirmed that criminal cases resolved by customary councils should not be retried in the state judicial system.¹² A seminal example is the Supreme Court case law in Number 1644 K/Pid/1986.¹³ This aligns with the substantive principle of *ne bis in idem*, which prevents individuals from being punished twice for the same offense.¹⁴

The lack of such regulation in the CPCD has continued with the enactment of Law Number 20 of 2025 concerning the Criminal Procedure Code (CPC). As a *lex generalis*, the CPC implicitly, despite

⁹ Apripari Apripari et al., "Investigating the Existence of Gorontalo Customary Law in the National Criminal Code," *Dialogia Iuridica* 14, no. 2 (May 2023): 119–43, <https://doi.org/10.28932/DI.V14I2.6250>.

¹⁰ Hartoyo, Noenik Soekorini, and Nur Handayati, "Application of the Principle of Legality in the Criminal Justice System: Ensuring Justice and Protection of Human Rights," *ENDLESS: INTERNATIONAL JOURNAL OF FUTURE STUDIES* 6, no. 2 (June 2023): 254–66, <https://doi.org/10.54783/ENDLESSJOURNAL.V6I2.174>.

¹¹ Hudha Bagus Setyadi and Ali Masyhar, "Legal Politics in the Draft Criminal Procedure Code (KUHP) in Indonesia," *Journal of Literature Review* 1, no. 1 (June 2025): 257–62, <https://doi.org/10.63822/320MHD19>.

¹² Rizal Maulana and Lia Fauziyyah Ahmad, "Peradilan Adat Sebagai Kerangka Restorative Justice Dalam Penyelesaian Perkara Pidana Di Indonesia," *Mizan: Journal of Islamic Law* 6, no. 2 (October 2022): 227–44, <https://doi.org/10.32507/MIZAN.V6I2.1623>.

¹³ Kuntadi, "The Existence of Decisions of Customary Institutions in the Settlement of Criminal Cases in Indonesia," *KnE Social Sciences*, February 2023, 323–334, <https://doi.org/10.18502/KSS.V8I3.12838>.

¹⁴ Juliette Lelieur, "'Transnationalising' Ne Bis in Idem: How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal Certainty," *Utrecht Law Review* 9, no. 4 (2013): 198–210, <https://doi.org/10.18352/ULR.250>.

the complete absence of any provision mandating the regulation of customary criminal law through a Government Regulation, leaves it to subordinate legislation to govern customary criminal law, particularly its procedural aspects. This is evidenced by the regulation of criminal procedural law concerning customary criminal law in Government Regulation Number 55 of 2025 concerning Procedures and Criteria for the Determination of Living Law in Society. The implications of this legal void will become more pronounced as the NCC is fully enacted on January 2, 2026.¹⁵ Under the forthcoming legal framework, district courts will have sole jurisdiction to adjudicate cases involving violations of customary criminal norms.¹⁶ This effectively strips customary communities/councils of their long-held authority to resolve criminal matters within their sociocultural framework. Cases traditionally handled through customary mediation, community sanctions, or ritual reconciliation will now be subject to adjudication by state courts. This shift does not merely reflect the consolidation of state legal authority; it represents a subtle form of legal recolonization, disguised as legal progressivism but effectively disempowering local legal autonomy.

Another critical consequence of the lack of procedural regulation for customary criminal law in the CPC is the resulting legal uncertainty regarding the criteria for determining whether a particular act violates an accepted customary norm and how such violations should be processed through adjudication.¹⁷ Without standardized procedural guidelines, law enforcement officers, such as police and prosecutors, are granted excessive interpretive discretion in determining whether a customary

¹⁵ Zico Junius Fernando, Sri Wulandari, and Panca Sarjana Putra, "Potential Overcriminalization in Religious Offenses : A Critical Analysis of The Formulation of The New National Criminal Code (Law 1 Number 2023)," *Jurnal HAM* 14, no. 3 (2023): 205–16, <https://doi.org/http://dx.doi.org/10.30641/ham.2023.14.3>.

¹⁶ Antara, Budiana, and Sadnyini, "Formulation of Customary Criminal Law in Future Criminal Code and Legal Enforcement in Indonesia."

¹⁷ Robi Assadul Bahri, "Konsep Penegakan Hukum Pidana Adat Di Indonesia Berdasarkan Asas Kepastian Hukum," *Law, Development and Justice Review* 7, no. 1 (April 30, 2024): 61–74, <https://doi.org/10.14710/LDJR.7.2024.61-74>.

offense has occurred. This creates a legal space prone to arbitrary enforcement and potential abuse of power, particularly against indigenous communities whose legal norms and cultural contexts are poorly understood by state agents. In this regard, the risk arises that the state may instrumentalize customary criminal law as a punitive mechanism rather than as a framework for community-based justice. Furthermore, Article 2 paragraph (2) of the NCC mandates that any recognized “living law” must comply with the Pancasila, the 1945 Constitution, human rights principles, and general legal norms.¹⁸ This requirement sets the stage for a potential conflict between local values embedded in customary criminal law and universal legal standards promoted by the national legal system. Many customary norms, although deeply rooted in local moral systems, may not entirely align with international human rights doctrines or formal legal positivism.¹⁹ In such cases, state courts, particularly those without sufficient cultural competence, will struggle to assess the legal validity of specific customary norms. Consequently, judicial decisions may either overlook the social reality of indigenous communities or reject the legitimacy of customary law on the grounds of perceived incompatibility with universal values.

A sharper critique can be directed at the consequences of transferring the authority to resolve customary criminal matters from community institutions to district courts. This represents not merely a shift in jurisdiction but a strategic extension of state control over the social life of indigenous peoples. In such an arrangement, the state does not genuinely recognize the sovereignty of customary law; rather, it assimilates it into the formal penal system as an auxiliary tool. The state

¹⁸ Aris Hardinanto et al., “Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila,” *Journal of Law and Legal Reform* 5, no. 3 (October 2024): 1029–66, <https://doi.org/10.15294/JLLR.V5I3.13923>.

¹⁹ Jahan Shaik et al., “Law, Culture, And Social Norms: Understanding Customary Practices in Conflict with Constitutional Rights,” *Journal of Information Systems Engineering and Management* 10, no. 3 (May 2025): 1791–1802, <https://doi.org/10.52783/JISEM.V10I3.8663>.

appears to exploit the symbolic recognition of customary law to broaden the reach of its punitive regime, without offering institutional legitimacy to the adjudicative mechanisms long practiced by indigenous communities.²⁰ Such delegitimization of customary courts contravenes the constitutional mandate of Article 18B paragraph (2) of the 1945 Constitution²¹, which affirms the recognition and respect for traditional law communities and their customary rights as long as they remain viable in the context of societal development.²²

The urgency of this article lies in its aim to complement prior studies by several scholars, which, although addressing the rights of indigenous peoples and the independence of customary councils in adjudicating cases, have not specifically examined criminal procedure law following the enactment of the CPC, as reflected in the works of Mayastuti²³ and Purwanda²⁴. Despite the NCC's recognition of customary criminal law, the CPC does not govern the procedural consequences of customary dispute-resolution mechanisms, the CPC does not govern the procedural consequences of customary dispute-resolution mechanisms. This creates uncertainty regarding whether cases resolved through customary councils should still be prosecuted in state courts. Consequently, the lack of procedural regulation for customary

²⁰ Anti Mayastuti, Luthfiyah Trini H, and Diana Lukitasari, "Institutionalizing Customary Court in Indonesian Justice System As an Effort to Realize Access to Justice Right for Indigenous People," *Indonesian Journal of Criminal Law Studies* 7, no. 2 (2022): 227–244. <https://doi.org/10.15294/ijcls.v7i2.35087>

²¹ Sunardi Purwanda, Nurul Asyikeen Binti Abdul Jabar, Rudini Hasyim Rado, and Nurul Miqat, "The Fate of Indigenous Peoples' Rights Recognition After the Enactment of the National Criminal Code," *Indonesian Journal of Criminal Law Studies* 9, no. 2 (2024): 357–388, <https://doi.org/10.15294/ijcls.v9i2.36636>.

²² Harniwati Harniwati, "Hukum Adat Di Era Modernisasi," *Journal of Global Legal Review* 2, no. 1 (April 2024): 41–52, <https://doi.org/10.59963/JGLEGAR.V2I1.328>.

²³ Anti Mayastuti, Luthfiyah Trini H, and Diana Lukitasari, "Institutionalizing Customary Court in Indonesian Justice System As an Effort to Realize Access to Justice Right for Indigenous People," *Indonesian Journal of Criminal Law Studies* 7, no. 2 (2022): 227–244.

²⁴ Sunardi Purwanda, Nurul Asyikeen Binti Abdul Jabar, Rudini Hasyim Rado, and Nurul Miqat, "The Fate of Indigenous Peoples' Rights Recognition After the Enactment of the National Criminal Code," *Indonesian Journal of Criminal Law Studies* 9, no. 2 (2024): 357–388, <https://doi.org/10.15294/ijcls.v9i2.36636>.

criminal law in the CPC is not merely a technical shortcoming. It reflects a deeper failure of the Indonesian legal system to construct a truly pluralistic and inclusive criminal justice framework. Based on the foregoing explanation, the research problems that arise are as follows:

1. How are customary criminal law and decisions of customary councils recognized within Indonesia's criminal code and criminal procedure code?
2. How has the Supreme Court interpreted customary sanctions as grounds for the elimination of prosecution?
3. How should the NCC and CPC regulate decisions of customary councils as grounds for the elimination of prosecution?

Method

In normative legal research, selecting the appropriate methodology is crucial.²⁵ Among the commonly used approaches are the statutes and case analyses. This article adopts both as its main methods to explore the recognition of customary criminal law in the NCC and the lack of customary criminal procedure law in the CPC, these legal materials were analyzed using doctrinal analysis and systematic interpretation. The statute approach involves examining laws and regulations relevant to the issue. In this context, the article analyzes the Criminal Code-*Wetboek van Strafrecht* (hereinafter referred to as the CC-WvS), the NCC, the CPC, and other related regulations. The NCC introduces major changes, notably Article 2 and Article 597, which recognize “living law” as a legitimate source of criminal norms. However, this recognition lacks procedural support, as the CPC does not regulate customary criminal law in practice. The statute approach highlights this legal gap: the state

²⁵ Emelia Kontesa and Zico Junius Fernando, “Reclaiming Our Roots: Agrarian Law’s Battle Against Land Grabbing,” *Lex Scientia Law Review* 8, no. 2 (November 2024): 1–10, <https://doi.org/10.15294/LSLR.V8I2.10681>.

accepts substantive customary norms but provides no framework for adjudicating them fairly, risking due process violations and legal uncertainty.

The case approach complements this by analyzing relevant court decisions, particularly those from the Supreme Court. For example, Decision No. 1644 K/Pid/1986 emphasizes that once a customary offense has been resolved within a customary council, such as through the customary sanctions, the state should not prosecute it again. This suggests that customary justice has been acknowledged in practice as a legitimate form of dispute resolution, aligning with the principle of *ne bis in idem*. However, without procedural codification, such recognition remains inconsistent and vulnerable to disregard by police or prosecutors. Combining both approaches allows the article to critically assess the tension between formal legal reform and the reality of indigenous legal practices. While the NCC appears to embrace legal pluralism, the lack of procedural recognition in the CPC undermines this progress. The statute and case approaches together expose how symbolic recognition, without procedural legitimacy, risks turning customary criminal law into a tool of state control rather than a vehicle of justice for indigenous communities.

Result and Discussion

A. Grounds for the Elimination of Prosecution in Indonesia's Contemporary Criminal Code and Criminal Procedure Code

In the Indonesian criminal justice system, criminal prosecution serves as a manifestation of the state's authority to uphold justice.²⁶ However, this authority is not absolute. The legal system recognizes a range of principles that can justify the elimination of prosecution, an idea

²⁶ Nadia Ayu Wulandari et al., "An Analysis of the Prosecutor's Authority to Terminate Prosecution Based on Restorative Justice with the Prosecutor's Authority as a Public Prosecutor," *Path of Science* 10, no. 6 (June 2024): 4001–10, <https://doi.org/10.22178/POS.105-6>.

known in international criminal law as the “elimination of prosecution”.²⁷ The Rome Statute of the International Criminal Court states that there are several grounds for the Prosecutor not to proceed, such as an insufficient legal or factual basis.²⁸ Furthermore, a charge withdrawal may also be obtained by the Prosecutor with the permission of the Trial Chamber.²⁹ Under the Indonesian criminal law, this mechanism is also acknowledged and regulated. Law Number 8 of 1981 on the Criminal Procedure Code (hereinafter referred to as the CPC 1981), it stipulates that the public prosecutor may discontinue a case under the public interest defense.³⁰ However, Law Number 16 of 2004 on the Public Prosecutor also regulates the termination of cases for the public interest defense, although this authority is held solely by the Indonesian Attorney General, reflecting the Opportunity Principle, rather than by prosecutors at lower levels. This legislation was later amended through Law Number 11 of 2021. While additional provisions were introduced regarding the authority of the Indonesian Attorney General in Article 35, 35A and 35B, the authority to exercise the Opportunity Principle remains solely with the Indonesian Attorney General. Additionally, there was only a slight amendment in the definition of “public interest” and how the Attorney General should proceed with the Opportunity principle, which remains unclear, particularly concerning which state authorities that the Attorney General should consult to before exercising the Opportunity Principle. Furthermore, the case discontinuation authority by the public prosecutor is more based on the reasons is inadmissible, rather than the importance

²⁷ Bintang Sekar Ayu and Kayus Kayowuan Lewoleba, “Reframing Prosecutorial Legitimacy: Embracing Restorative Justice in Criminal Case Discontinuation,” *DiH: Jurnal Ilmu Hukum*, May 2024, 91–103, <https://doi.org/10.30996/DIH.V20I2.10803>.

²⁸ Article 53 paragraph 2 subsection (a) of the Rome Statute of the International Criminal Court 1998.

²⁹ Article 61 paragraph (9) of the Rome Statute of the International Criminal Court 1998.

³⁰ Article 14 subsection (h) of the CPC 1981.

of the public interest defense.³¹ Despite the complexity, this concept is not merely about halting a legal process; it embodies fundamental principles of criminal law such as legal certainty, justice, humanity, and the efficiency of the criminal justice system.³² As such, it becomes essential to examine how grounds for eliminating prosecution are regulated under the two prevailing legal regimes in Indonesia: the CC-WvS and the NCC, which is set to take full effect in 2026.³³

A significant provision is found in Article 75, which governs complaint based offenses (*delik aduan*). In such cases, prosecution can only be initiated if the victim files a formal complaint. If the complaint is later withdrawn, the legal process must cease. This approach provides victims with a participatory role in determining whether the state should intervene in particular offenses, particularly those involving personal dignity or sensitive social relationships such as adultery or defamation. Eliminating prosecution in these instances serves the dual purpose of protecting the privacy and dignity of the victim while also avoiding unnecessary criminalization of private matters that may be better resolved outside formal penal processes. The CC-WvS acknowledges the principle of *ne bis in idem* based on Article 76, which states that no individual should be prosecuted twice for the same act. While this principle is not articulated verbatim in the statute, it has been consistently upheld in Supreme Court jurisprudence and forms part of the general principles of international criminal law. In Indonesia, it has gained legal traction

³¹ Nurkholim, N. (2021). Termination of Criminal Investigations by The Prosecutor Under Criminal Law. LEGAL BRIEF, 11(1), 139–147. Retrieved from <https://legal.isha.or.id/index.php/legal/article/view/90>.

³² Ainul Azizah, I Gede Widhianan Suarda, and Mardiyono Mardiyono, “Prinsip Keadilan Restoratif Dalam Penghentian Penuntutan Perkara Pidana Berdasarkan Peraturan Jaksa Agung Nomor 15 Tahun 2020,” *JURNAL HUKUM, POLITIK DAN ILMU SOSIAL* 2, no. 2 (May 2023): 154–66, <https://doi.org/10.55606/JHPIS.V2I2.1643>.

³³ Hasbullah and Dian Ayu Pratiwi, “Quo Vadis Criminal Procedural Law in Indonesia After the Enactment of Law Number 1 of 2023 Concerning the Criminal Law Code,” *International Journal of Social Service and Research* 5, no. 4 (May 2025): 376–88, <https://doi.org/10.46799/IJSSR.V5I4.1219>.

through judicial interpretation and doctrinal consensus. As a safeguard against arbitrary and repetitive prosecution, *ne bis in idem* limits the state's prosecutorial authority and protects defendants from legal harassment, ensuring the finality and fairness of judicial outcomes.

Article 77 of the CC-WvS introduces another ground, the death of the offender. Criminal liability, according to both doctrine and legal practice, is inherently personal and non-transferable.³⁴ Therefore, if a suspect or defendant dies either before or during the legal process, the prosecution is legally extinguished. This provision reflects a humane and rational perspective within criminal law, emphasizing that the goals of justice should not override the fundamental impossibility of punishing a deceased person. It also reinforces the idea that legal processes must remain proportionate and sensitive to the realities of human life. Under the CC-WvS, although not systematically codified, several grounds for eliminating prosecution are recognized either explicitly or through the interpretation of jurisprudence and legal doctrine.³⁵ One of the most classical and longstanding grounds is the statute of limitations (*daluwarsa*), codified under Article 78 of the CC-WvS.³⁶ This provision stipulates that criminal prosecution becomes void if a certain period has elapsed since the commission of the offense. For instance, crimes punishable by death or life imprisonment become time-barred after 18 years.³⁷ This principle underscores the importance of legal certainty: the state cannot indefinitely postpone prosecution, as such a delay may result

³⁴ Komala Sari, "Criminal Responsibility for Perpetrators of Maltreatment Causing Death," *Focus Hukum UPMI* 2, no. 01 (May 2025), <https://doi.org/10.55751/JFHU.V2I01.108>.

³⁵ Tolib Effendi, Dominikus Rato, and Bayu Dwi Anggono, "Termination of Prosecution Based on Restorative Justice as an Expansion of the Meaning of Case Waiver," *Rechtidee* 19, no. 2 (December 2024): 265–84, <https://doi.org/10.21107/ri.v19i2.27609>.

³⁶ Novri R. Wenas, "Gugurnya Kewenangan Menuntut Pidana Karena Daluwarsa Berdasarkan Pasal 78 Kitab Undang-Undang Hukum Pidana," *LEX ET SOCIETATIS* 8, no. 4 (October 2020), <https://doi.org/10.35796/LES.V8I4.30929>.

³⁷ Joko Susanto, Ali Masyhar, and Anis Widyawati, "A Juridical Perspective On Press Ethics in Reporting the Identity of Child Victims of Immorality: Between Public Interest and Children's Rights," *Journal of Law and Legal Reform* 7, no. 1 (2026): 415–56, <https://doi.org/https://doi.org/10.15294/jllr.v7i1.30638>.

in injustice for both the accused and the victim. It aligns with the rationale that the immediacy of prosecution is essential to a fair and effective legal system. From a constitutional perspective, prosecution may also be eliminated through mechanisms such as amnesty and abolition, as provided in Article 14 of the 1945 Constitution.³⁸ These are presidential prerogatives exercised with the consideration of the House of Representatives. Amnesty applies to collective cases for public interest, while abolition is specific to individual cases and renders prosecution legally irrelevant.³⁹ Though derived from public law and state governance, the effects of these powers directly intersect with criminal law, as they strip prosecutors of their authority to proceed with criminal charges. These measures illustrate how constitutional instruments can function as vehicles for eliminating prosecution in the interest of broader social and political reconciliation.

In contrast to the CC-WvS's fragmentary and unsystematic nature, the NCC offers a more structured and reform-oriented legal framework.⁴⁰ Furthermore, the NCC has a significant development, given the Old Criminal Code only provides four grounds of elimination of prosecution namely *ne bis in idem*, death of the accused, statute of limitations and *afdoening buiten process* (settlement outside of proceedings)⁴¹. Under Article 132 paragraph (1) the NCC, grounds for elimination of prosecution are based on maximum amount of criminal fine, withdrawal of complaint for criminal complaint, and amnesty and

³⁸ Rizky Malinto Ramadani, Indra Perwira, and Bilal Dewansyah, "Problem Pemberian Amnesti Oleh Presiden Dalam Perspektif Kepentingan Negara," *Jurnal Ilmiah Universitas Batanghari Jambi* 21, no. 3 (October 2021): 984–982, <https://doi.org/10.33087/JIUBJ.V21I3.1688>.

³⁹ Yusi Amdani, "Ruler of Interests, Political Interests, or Law Enforcement: Case Study of Amnesty Plan for Din Minimi Group in East Aceh," *Al-Ahkam* 18, no. 2 (October 2018): 245–62, <https://doi.org/10.21580/AHKAM.2018.18.2.2420>.

⁴⁰ Roby Satya Nugraha et al., "The Transformation of Indonesia's Criminal Law System: Comprehensive Comparison between the Old and New Penal Codes," *Reformasi Hukum* 29, no. 1 (April 2025): 1–21, <https://doi.org/10.46257/JRH.V29I1.1169>.

⁴¹ Topo Santoso, 2026, Pokok-Pokok Hukum Pidana: Sesuai KUHP Nasional & UU Penyesuaian Pidana, *Rajawali Press*, p. 326.

abolition. Meanwhile, Article 132 paragraph (2) also provides for the grounds for the elimination of prosecution where the offender is a corporation. A notable example is the regulation of statutes of limitation under Article 25, which classifies offenses with clearer time limitations, three years for minor offenses and up to twenty years for serious crimes. This standardization enhances the clarity and usability of the law, allowing both law enforcement and the public to understand the boundaries of prosecution more precisely. It also reflects a shift toward greater procedural transparency and legal accessibility. Beyond temporal limits, the NCC embraces a more restorative approach to justice, integrating mechanisms that allow for prosecution to be eliminated under circumstances grounded in community-based reconciliation. Article 53 states that judges must consider the living values of justice within society when imposing criminal sentences. This opens the door for the resolution of criminal cases through non-penal means, such as restorative justice agreements between offenders and victims. Where there is reconciliation, apology, and restitution, prosecution may be deemed unnecessary, thereby shifting the penal system away from retribution and toward restoration. This marks a significant transformation in Indonesia's criminal law philosophy, aligning it more closely with restorative justice paradigms seen in progressive legal systems around the world. Although the implementation of restorative justice has been under scrutiny for the policy's harmonization, such controversy emerged because the CPCD amendment is treated as a non-litigation case settlement, which overlooks the priority of criminal victims' rights.⁴²

A significant development in the New Criminal Code (NCC) is the formal recognition of customary criminal law under Articles 2 and 597, reflecting a commitment to legal pluralism. Normatively, sanctions imposed through legitimate customary procedures should, in principle,

⁴² Faisal Irfani, "RUU KUHP: Konsep Keadilan Restoratif Versi DPR Dan Pemerintah Dikritik Hanya Akan Untungkan Pelaku Dan Penegak Hukum," BBC News Indonesia, July 23, 2025, <https://www.bbc.com/indonesia/articles/cp90d1rxd13o>.

preclude subsequent state prosecution. However, this principle has not been operationalized within the positive legal framework. Article 132 of the NCC, which exhaustively regulates the extinction of the right to prosecute for both natural persons and corporations, does not recognize resolutions by customary forums as a ground for terminating prosecution. This omission indicates that the recognition of the normative force of customary criminal law, particularly the existence and procedural validity of “customary criminal procedure”, remains underdeveloped, resulting in ambiguity regarding the legal effect and binding force of decisions rendered by customary councils. Furthermore, Article 71 paragraphs (1) to (4) of the Criminal Procedure Code (CPC) regulate the extinction of prosecutorial authority only in general terms and fail to provide a coherent procedural framework for integrating customary criminal law into the formal criminal justice process. This condition may give rise to uncoordinated dualism in case resolution between state judicial mechanisms and customary institutions. Accordingly, a more integrative legal policy framework is required to ensure harmonization between substantive recognition and procedural regulation within Indonesia’s criminal justice system.

The only regulatory instrument addressing “criminal procedure law” in relation to customary criminal law is Government Regulation Number 55 of 2025 on Procedures and Criteria for the Determination of Living Law in Society (hereinafter, the GR), as mandated by Article 2 paragraph (3) of the NCC. *De jure*, the GR is not intended to function as a regulatory framework governing criminal procedure law outside the CPC, including with respect to the provisions contained in Articles 16 to 22. Nevertheless, in practice, the drafting of the GR exhibits a distinctly patchwork character, as it appears to be driven primarily by the objective of implementing Article 2 paragraph (3) of the NCC while simultaneously compensating for the omission of procedural norms concerning customary criminal law within the CPC. In principle, the

GR should be confined to formulating criteria and mechanisms for the recognition and determination of living law, rather than extending into the regulation of procedural adjudication. Consequently, the construction of “criminal procedure law” within the GR remains conceptually underdeveloped and structurally misplaced, effectively encroaching upon a domain that, by its nature and function, properly falls within the scope of statutory regulation under the CPC. This conceptual misalignment is further reflected in Chapter III of the GR, entitled “Procedures for the Handling and Resolution of Customary Criminal Offenses,” which, in substance, resembles an autonomous system of customary criminal procedure rather than merely providing technical guidance for the implementation of the NCC or the CPC. From the perspective of customary criminal law doctrine and jurisprudence, the provisions of Articles 16 to 22 reveal a problematic conceptual shift. In judicial practice, the Supreme Court has consistently treated customary sanctions as a relevant ground for the elimination of prosecution, provided that the settlement is genuinely carried out by a competent and socially recognized customary institution. Against this backdrop, Article 16 introduces the involvement of the Civil Service Police Unit (*Satuan Polisi Pamong Praja*) alongside customary institutions in the deliberative process, an arrangement that is fundamentally incompatible with the autonomous character of customary law. Customary law, as reflected in established case law, is understood as living law that develops organically within society, rather than as a mechanism administratively institutionalized by state authorities. The intervention of state enforcement bodies in customary adjudication therefore risks undermining the social legitimacy of customary decisions and transforming their character from community based justice into a form of quasi-state adjudication, a model neither recognized in classical customary law doctrine nor supported by established case law.

Further inconsistency arises from Articles 20 to 22 of the GR, which require a district court order to validate the outcomes of customary deliberations and introduce a “fallback” mechanism whereby non-compliance with customary decisions triggers recourse to the state criminal justice system. Customary adjudication is, by its nature, final and oriented toward restoring social and cosmic (spiritual equilibrium), and therefore does not require validation from state institutions. The requirement of a court order effectively subordinates customary decisions to the authority of the state judiciary, rather than recognizing them as expressions of an autonomous legal order. Moreover, the fallback mechanism under Article 22, whereby a case resolved through customary processes may be reprocessed under formal criminal procedure, raises serious concerns regarding *ne bis in idem* in its “material sense”. Accordingly, the normative construction of Articles 16 to 22 not only departs from the fundamental characteristics of customary law as a living law but also fails to align with case-law developments that emphasize the recognition and finality of customary dispute resolution as an integral component of legal pluralism.

B. Indonesian Supreme Court Case Law on Customary Council Decisions as Grounds for Elimination of Prosecution in District Courts

Indonesian criminal procedure code has never explicitly formulated rules regarding customary criminal law procedure, even though the CPC 1981 was enacted in 1981, long after the enactment of Emergency Law No. 1 of 1951.⁴³ There is no specific reason in the official preliminary report of the CPC 1981 legislative discussions as to why customary criminal procedure was not included. The only mention of customary

⁴³ Achmad Royani, Enik Isnaini, and Jatmiko Winarno, “Evaluation of the Applicability of Indonesian Criminal Procedure Code,” *Jurnal Independent* 10, no. 2 (March 2022): 128–32, <https://doi.org/10.30736/JI.V10I2.178>.

law in the legislative records of CPC 1981 relates to the family of the defendant or convict.⁴⁴ However, even in that discussion, there was no elaboration on how customary criminal law views the family of a convict; rather, the focus was on the legal criteria for determining who could be considered family under Indonesian customary law. The reason for discussing the qualifications of those who could be considered "family" was the lack of a codified definition of "family" in Indonesia. At the same time, customary interpretations varied widely across communities.⁴⁵ The CPC 1981 drafting committee was indeed aware that Indonesia's customary law is a "living reality" that cannot be denied.⁴⁶ However, the exact reason for the exclusion of customary criminal procedure from the CPC 1981 remains unknown. Although not specifically regulated under the CPC 1981, decisions rendered by customary councils, which do not fall within the formal typology of state judicial rulings, nonetheless constitute the final resolution in cases governed by customary criminal law. Before analyzing the Supreme Court case law, the author will first outline several decisions of customary councils regarding the adjudication of customary criminal law cases at the local level.⁴⁷ In the context of this article, the relevant decision of the Dayak Customary Council is as follows:

⁴⁴ Preliminary Minutes of the Joint Meeting of Commission III and Commission I on the Criminal Procedure Code Draft, 14 February 1980, pp. 20–21.

⁴⁵ *Ibid.*, pp. 25–26.

⁴⁶ Preliminary Minutes of the Joint Meeting of Commission III and Commission I on the Criminal Procedure Code Draft, 15 February 1980, p. 10.

⁴⁷ The first author would like to express his sincere gratitude to Dr. Cahya Wulandari from Faculty of Law, Universitas Negeri Semarang, for generously providing four copies of decisions issued by the Dayak Customary Council (three of which are used as examples in this article), drawn from her doctoral dissertation entitled *Formulasi Mediasi Penal Berbasis Falsafah Belom Bahadat dalam Pembaruan Hukum Pidana Nasional: Studi Kasus di Adat Dayak Ngaju* (Formulation of Penal Mediation Based on the Philosophy of Belom Bahadat in the Reform of National Criminal Law: A Case Study of the Dayak Ngaju Customary Law) at Universitas Diponegoro. The first author also expresses his appreciation for her supervision in preparing the early draft of this article for presentation at the 3rd International Conference on Law, Conservation, and Sustainable Development (ICCONSIST), held at the Faculty of Law, Universitas Negeri Semarang on 24–25 June 2025.

1. The Decision of the Dayak Customary Council No. 01/SMAD-PA/2011

This case originated from the expert testimony of Tamrin Amal Tomagola during judicial proceedings concerning the dissemination of a video depicting sexual intercourse involving Nazril Irham, alias Ariel Peterpan, with Luna Maya and Cut Tari, which had circulated on the internet. In his statement, Tamrin Amal Tomagola asserted that among the Dayak people, sexual relations outside of marriage are considered customary and socially acceptable. This statement was deemed offensive and injurious to the dignity of the Dayak community. As a result, Tamrin Amal Tomagola was held accountable under Dayak customary law for violating the provisions of Article 13 of *Singer Sala Basa* in conjunction with Article 50 of *Singer Tandahan Rendah*, and Article 68 of *Singer Tekap Bau Mate*, as established by the resolutions of the Dayak Customary Assembly (*Kerapatan Adat*) held at Tumbang Anoi in 1894.⁴⁸ In its decision, the Dayak customary council⁴⁹ adjudicated the violation of Dayak customary law as follows:

- a. The offender of customary law shall deliver a formal apology before the Dayak Customary Council Assembly for all violations committed, in addition to any prior apologies already made;
- b. The offender shall fulfil the obligations prescribed under Dayak customary law (*Singer*) according to Articles 13, 50, 52, and 68, which shall be executed by the handing over of five bundles of *garantung* (traditional gongs);
- c. The offender shall bear the full cost of the *Menetes Hinting Bunu* ritual under Article 27 of the *Singer Tetes Hinting Bunu*, including the customary reconciliation ceremony, amounting to IDR 77,777,700.00;

⁴⁸ Indictment Sidang Majelis Adat Dayak: SKD-01/Palng/01/2011, p. 2

⁴⁹ Sidang Majelis Adat Dayak Decision No. 01/SMAD-PA/2011, p. 2

- d. The offender is ordered to retract the testimony given before the panel of judges at the Bandung District Court (West Java) in the case concerning the pornographic video involving Nazril Irham (Ariel), and to destroy any research materials deemed insulting or degrading to the Dayak community.

2. Reconciliation Customary Council Decision of Dedy Yusuf Case

The case originated from an incident of collective assault, wherein the victim, Dedy Yusuf, was struck on the head with a wooden object on 25 October 2018, resulting in an injury requiring ten stitches. In response, the victim filed a complaint with the Council of Customary Reconciliation (*Kerapatan Mantir Perdamaian Adat*) of Menteng Sub-district, Jekan District, Palangka Raya Municipality. The conduct in question constituted a violation of Dayak customary criminal law (*Singer Adat*), as codified in the Tumbang Anoi Assembly of 1984, specifically Article 23 of the *Singer Biat Himang* (customary sanction imposed for blood-causing injury) and Article 96 of the *Singer Kasukup Belum Bahadat* (comprehensive customary sanction for violations of norms of decency, civility, and ethical conduct). The total customary reparation imposed amounted to 267 *Kati Ramu*, equivalent to IDR 40,000,000. The adjudication and resolution of this case within the customary justice system were grounded upon the following considerations:

- a. To implement reconciliation in accordance with the spirit of adat law, namely the pursuit of peace and restorative justice;
- b. To base the reconciliation process upon the provisions of *singer adat* (customary sanctions) as articulated in the codified rules of customary law adopted during the 1894 Tumbang Anoi Assembly;

- c. To preserve societal harmony and communal order following the principles of peaceful coexistence within the framework of the Unitary State of the Republic of Indonesia.⁵⁰

In its ruling, the customary adjudicative body not only imposed a customary fine upon the offender but also recorded the complainant's formal undertaking not to escalate the matter through the state's formal legal system. Following the reconciliation, a customary peace ritual, rooted in the Dayak traditions of Central Kalimantan, shall be conducted to prevent any recurrence of hostility or acts of reprisal. Any breach of this decision shall render the violator liable to legal action in accordance with either the Central Kalimantan Dayak customary law or Indonesia's formal positive legal system.

3. Decision of the *Kerapatan Mantir Perdamaian* (Customary Reconciliation Council) concerning the Customary Dispute of Linawatie I. Dulin, Menteng Subdistrict, Jekan District, Palangka Raya City

This sexual harassment case originated during the visit of President Joko Widodo to a public event involving the distribution of t-shirts to the community. The complainant, Linawatie I. Dulin, was present at the event together with the accused, Pangihutan Sitompul. During the event, while the complainant was standing in front of him, the accused touched her breast. The complainant immediately screamed and alerted the police, and the accused was subsequently taken into custody by the Palangka Raya Police Department. In its ruling, the *Kerapatan Mantir Perdamaian*

⁵⁰ Customary Reconciliation Ruling on the Customary Case of a Fight Involving Group Assault Resulting in Bruises on the Arm and Head Injuries Requiring 10 Stitches, with the Victim Named Dedy Yusuf, p. 2

(Customary Reconciliation Council or CRC) rendered the following decisions:

- a. Imposition of a *Singer Adat* (customary sanction) upon Pangihutan Sitompul in the form of *Singer Sala Basa* with *Sawan Oloh* and *Singer Tekap Baut Mate*, amounting to 60 *Kati Ramu Adat* or the equivalent of IDR 6,000,000;
- b. CRC procedural costs of IDR 1,500,000;
- c. The *Lap Tunggal Kedamangan* is to be deducted from the *Singer Adat*;
- d. The customary reconciliation ceremony shall be carried out through the *Tampung Tawar* ritual;
- e. With the conclusion of the customary reconciliation process and the fulfilment of the associated payments, the matter is deemed resolved. There shall be no further claims brought by either the complainant or the accused through any other legal means, and all parties commit to renouncing any feelings of vengeance.⁵¹

Based on the three aforementioned decisions, the following conclusions may be drawn regarding the "customary criminal procedure":

- a. Reconciliation settlement in a customary case constitutes the principal spirit of customary law, whereby disputes are primarily resolved through the local customary legal system;
- b. Penal decisions in customary cases predominantly take the form of customary fines, with the offender being required to bear the cost of traditional rituals or ceremonies;
- c. A customary decision concludes the customary case and serves as a binding mechanism, preventing its escalation to the formal state legal system.

⁵¹ Customary Reconciliation Decree Regarding the Customary Case of Complainant Linawatie I. Dulin against Respondent Pangihutan Sitompul, p. 3

Although “customary criminal procedure” is not as rigid as the criminal procedure codified in the CPC, the procedural practices remain alive and are respected by the local community. Decisions rendered by local customary councils possess binding legal force, remain effective, and are honored by the people residing within that jurisdiction. The absence of customary criminal procedure in the CPC 1981 has not prevented the Supreme Court from adjudicating customary criminal cases, whether or not they have equivalents in the NCC. The Supreme Court’s authority to adjudicate such matters is based on the principle that judges are obligated to explore, follow, and understand the legal values and sense of justice that live within society. Based on this foundation, the Supreme Court effectively exercises its own “procedural law and authority” in customary criminal cases, even though this is not explicitly stipulated in the CPC or the Judiciary Law regarding procedures for trying and deciding such cases. The reasoning is that legal values and the sense of justice within society are, in part, derived from customary criminal law, a living legal source in society and one of the foundations of criminal law.

Decisions by customary councils as grounds for the elimination of prosecution in district courts can be found in several Supreme Court cases law. In terms of context, these decisions concern violations of still-living customary norms within specific communities, and such case law is strictly limited to matters of customary criminal law. The relevant cases are as follows:

1. Supreme Court Decision No. 1644 K/Pid/1988

This case involved a housewife named Sitti Rochani, who had four children: Yuri, Yulianto, Herlina, and Hasrun. Sitti’s eldest son, Yuri, was a schoolmate of Tauwi, the defendant in this case. The incident began when Yuri and Tauwi went fishing late into the night

on September 5, 1985. Given the late hour, they returned to Yuri's house and decided to stay overnight. After midnight, Tauwi went out to urinate and, while walking toward the bathroom, noticed Sitti lying asleep in the adjacent room. At the time, Tauwi was 18 years old. Upon seeing her, he entered the room and proceeded to have sexual intercourse with Sitti.

Sitti, realizing someone was on top of her, screamed and asked who was assaulting her. Hearing the scream, Tauwi fled and returned to pretend to sleep in Yuri's room. Sitti immediately checked everyone in the house and discovered that Tauwi, her foster son who was also staying over, was among the sleepers. The matter was brought before the village head. Tauwi confessed to the act, and the village head decided that Tauwi had violated the community's customary moral norms. He imposed a customary sanction called *Prohala*, requiring the payment of one buffalo and a piece of *kaci* cloth. Tauwi complied and fulfilled this customary sanction. Sometime later, the case was brought before the Kendari District Court with the primary charge under Article 53 in conjunction with Article 285 of the CC-WvS, subsidiary to Article 281 paragraph (1) CC-WvS, and further subsidiary to Article 5 paragraph (3) of Emergency Law No. 1 of 1951. The public prosecutor demanded six months' imprisonment for Tauwi. In his defence, Tauwi argued that he had already been sanctioned under customary law through *Prohala*, and that any further sentence by the district court would constitute double punishment for the same offense (double jeopardy).

The Kendari District Court rejected Tauwi's plea, reasoning that the matter was within the jurisdiction of the district court under the Judiciary Law, which grants exclusive authority to state courts in criminal matters. Tauwi was found legally and convincingly guilty of rape and sentenced to four months imprisonment. Tauwi appealed

the decision. The High Court reclassified Tauwi's offense as a customary criminal offense under the category of *Siri'*, specifically *Siri' Diposiri* (disgracing oneself or one's family) and *Siri' Dipomate* (a severe violation of morality, dignity, and personal honor). As a result, the High Court ruled that Tauwi was guilty under Article 5 paragraph (3) of Emergency Law No. 1 of 1951 and adjusted the lower court's ruling accordingly. Tauwi then filed a cassation appeal with the Supreme Court, reiterating the arguments made in his plea and appeal. The Supreme Court, in its considerations, outlined Tauwi's reasons for cassation: first, that the lower courts had erred in law by imposing double punishment on someone who had already been sanctioned under *adat* law; and second, that the courts failed to respect living customary law still observed in Tauwi's region. The Supreme Court upheld these arguments, annulling both the Kendari District Court Decision No. 17/Pid/B/1987/PN.Kdi and the High Court Decision No. 32/Pid.B/1987/PT.SULTRA, stating:

“Considering the aforementioned objections, the Supreme Court finds:

Regarding objections 1 and 2: These objections are justifiable because the High Court and District Court misapplied the law. The payment of one buffalo and a piece of *kaci* cloth constitutes a customary sanction already imposed and executed by the offender, and the sanction was proportionate to the offense committed. Therefore, under Article 5 paragraph (3) poin (b) of Emergency Law No. 1/1951, the defendant cannot be sentenced again by the Court.”

The Supreme Court adjudicated the case independently and declared that the charges filed by the public prosecutor of the Kendari District Attorney's Office were inadmissible. From this case law, a legal doctrine emerges. If a local customary authority has already decided a customary criminal matter, and the perpetrator has

complied with the imposed sanction. The perpetrator cannot be prosecuted again in the district court. This affirms the application of the *ne bis in idem* principle.

2. Supreme Court Decision No. 948 K/Pid/1996

This case involved an affair between Amutayo Ngude, a church elder, and Enta Ntoo in 1992. Amutayo Ngude was married to Siray Kayontu, while Enta Ntoo was married to Rolex Taluntje. Enta Ntoo was a coworker of Rolex and frequently encountered Amutayo through work. On September 18, 1992, they arranged to meet at night in a plantation owned by Rolex Taluntje in Selewana. There, they engaged in sexual intercourse and were caught by villagers, who reported the incident to the local customary council. Rolex handed over the matter to the local council. The *Hadat* Sulewana council issued a customary decision, imposing a sanction solely on Enta Ntoo, as Amutayo had fled and avoided the *adat* proceedings. The sanction required Enta to pay three cows one to her husband and two to the village via the *hadat* council. Enta fulfilled and executed the sanction. Rolex chose not to file a police report against Enta for the sake of their children. However, the case proceeded to the district court based on a complaint filed by Amutayo's wife, Siray Kayontu, on October 20, 1992.

In her defence, Enta claimed she had already received a customary sanction and that further sentencing would constitute double punishment. The Poso District Court found both Amutayo and Enta guilty under Article 284 of the CC-WvS (adultery). They appealed the decision. The Palu High Court overturned the ruling and issued its own judgment, sentencing Amutayo to three months imprisonment and declaring the charges against Enta inadmissible due to her prior customary sanction. The prosecutor filed a cassation

on April 23, 1996, but failed to submit the memorandum of appeal. The Supreme Court, in its ruling, stated:

“The Palu High Court has declared the charges against Defendant II inadmissible because she had already paid a 'customary fine,' which remains highly respected in the local community. Because the prosecution of Defendant II was declared inadmissible, and because the basis for the charges against both defendants stemmed from a single act reported by Siray Kayontu, the charges against Defendant I must also be declared inadmissible.”

Based on this, the Supreme Court held that in cases involving customary criminal law in which the offender has already been sanctioned by a respected, still-living customary institution, state prosecution by the district court is inadmissible. These two cases of law emphasize the resolution of customary criminal law at the level of local customary councils, without any state intervention, provided the case indeed pertains to customary criminal law. In those decisions, there is also no indication of involvement by the Civil Service Police Unit (*Satuan Polisi Pamong Praja*) as a party participating alongside the local customary councils in resolving such cases.

C. An Ideal Formulation for Customary Council Decisions as Grounds for Elimination of Prosecution on the Criminal Code and Criminal Procedure Code

Book I of the NCC, under Article 2, accommodates “living law” (customary criminal law) as a source of law outside of statutory legislation.⁵² Article 597 of Book II of the NCC regulates criminal acts

⁵² Simon Albertian Redy, “The Position of Living Law as a Legal Institution in Law No. 1 of 2023 on the Criminal Code,” *Journal of Law, Politic and Humanities* 5, no. 4 (March 30, 2025): 2571–80, <https://doi.org/10.38035/JLPH.V5I4.1374>

in accordance with living law within society. According to the elucidation of Article 2, provisions concerning customary criminal law shall be regulated by a Government Regulation, which serves as the basis for Regional Regulations that incorporate such provisions. Additionally, the NCC repeals Article 5, paragraph (3), subsections b and c, of Emergency Law No. 1 of 1951, thereby regulating customary criminal law regardless of whether it parallels the provisions in the Criminal Code. This means that the source of customary criminal law is now restricted by the government solely to those recognized and regulated by Government Regulations as references for Regional Regulations. Here, it is clearly evident that there is a positivization of non-state unwritten law into state-promulgated written law. However, the issue does not stop there; it also concerns the jurisdiction of local customary councils as the legitimate authorities over customary criminal law. A customary council functions as the adjudicator of violations against customary law, so when a case has been decided by a customary council, complete with a customary sanction imposed on the offender, the case is considered resolved upon the fulfilment of the sanction. It, therefore, should not be subject to prosecution in a state district court. This principle has been consistently upheld in the Supreme Court of Indonesia's case law.

Article 132, paragraph (1) of the NCC does not include decisions of customary councils imposing customary sanctions as a ground for the elimination of prosecution. The grounds for the elimination of prosecution in the NCC are reiterated in the Academic Draft (*Naskah Akademik*) of the Draft Criminal Procedure. These grounds include: prosecution is discontinued by operation of law; there is a final and binding court decision on the same matter against the accused; expiration of the statute of limitations; the death of the accused; withdrawal of complaint in complaint-based offenses; the accused pays the maximum fine for offenses punishable only by a fine of up to category II; the accused pays the maximum fine of category IV for

offenses punishable by imprisonment of up to one (1) year or a fine of up to category III; resolution through restorative justice mechanisms; or the granting of amnesty or abolition. These reasons for the elimination of prosecution are set out in Article 71, paragraph (2) of the CPC.

As a *lex generalis*, the NCC, which recognizes living law (customary criminal law) as a source of law, should also recognize the existence of customary council decisions as a valid ground for declining prosecution, as is already acknowledged in several Supreme Court cases in Indonesia. Although the NCC repeals Article 5, paragraphs (3) subsections (b) and (c), of Emergency Law No. 1 of 1951, it does not mean that the resolution of customary criminal law cases by indigenous communities is invalidated. A decision by a local customary council that imposes a customary sanction for a customary offense should still be respected as long as the customary criminal law exists and is recognized in that region. Supreme Court Decisions Number 1644 K/Pid/1988 and Number 948/K/Pid/1996 both recognize customary council decisions in customary criminal matters. This demonstrates that, although customary courts were formally abolished by Emergency Law No. 1 of 1951, the customary council continues to exist independently outside the state judiciary. This recognition has a positive consequence: that a person who has been found guilty by a customary council should not be prosecuted again in a district court for the same offense (double jeopardy). In other words, the district court should not reclaim jurisdiction over matters that local customary councils have lawfully and legitimately resolved. In such circumstances, when a case involving customary criminal law arises in the jurisdiction of a state district court and has already been settled by a decision of the local customary council, the district court must decline to adjudicate the case.

Ideally, both the NCC and the CPC should include a formulation that recognizes the elimination of prosecution when the offender has already been subject to a customary council decision imposing a

customary sanction. Therefore, it is necessary to reformulate the grounds for the elimination of prosecution both in the NCC and the CPC. Since the NCC has already been enacted and partially revised by Law Number 1 of 2026 on the Adjustment of Criminal Sanctions, making reformulation impossible at this stage, the CPC, particularly Article 71 paragraph (2), should be immediately amended to include a procedural element related to customary criminal law, specifically regarding prosecution. This should be done by adding a provision regarding customary council decisions between subsection (f) and (h), as described above, namely:

Prosecution authority shall be eliminated as referred to in paragraph (1) if:

- a) There is a final and binding court decision against the accused for the same matter;
- b) The statute of limitations has expired;
- c) The accused has died;
- d) There has been a withdrawal of complaints in complaint-based offenses;
- e) The accused has paid the maximum fine for an offense punishable only by a fine of up to category II;
- f) The accused has paid the maximum fine of category IV for an offense punishable by imprisonment of up to one (1) year or a fine of up to category III;
- g) The accused has complied with and executed a customary sanction based on a decision of the local customary council;
- h) Resolution has been achieved through a Restorative Justice Mechanism; or
- i) Amnesty or abolition has been granted.

It is untenable to construe the elimination of prosecution in customary cases, where a customary council has adjudicated the matter

and rendered a decision, as constituting double jeopardy (*ne bis in idem*) within the meaning of Article 132 paragraph (1) subsection (a) of the NCC and Article 71 paragraph (2) subsection (a) of the CPC. Such a qualification is grounded in a fundamental misunderstanding of the legal nature of customary law adjudication. The doctrine of *ne bis in idem* presupposes the existence of a prior judgment rendered within the framework of the state criminal justice system. In contrast, decisions of customary councils are, both conceptually and normatively, situated outside that system. They do not meet the qualification of a “court judgment” in the sense of positive law. They therefore cannot, within any coherent doctrinal construction, be equated or assimilated to the regime of *ne bis in idem*. Any interpretation that seeks to extend the scope of Article 132 paragraph (1) subsection (a) of the NCC and Article 71 paragraph (2) subsection (a) of the CPC to encompass customary decisions, based on a court order validating customary dispute resolution under Article 20 of the GR, amounts, in essence, to an impermissible analogical expansion in criminal law, in direct violation of the principle of legality.

It is equally untenable to classify the resolution of customary criminal cases as a form of “out-of-court settlement” grounded in restorative justice, as referred to in Article 132, paragraph (1), subsection (g) of the NCC and Article 71, paragraph (2), subsection (g) of the CPC. Restorative justice within modern criminal law systems is premised on consensual mechanisms that are facilitated and ultimately recognized within the framework of state law, emphasizing reconciliation between the offender and the victim. By contrast, customary adjudication is not merely a consensual dispute-resolution mechanism, but a manifestation of the normative authority of customary law communities, derived from the living law and operating within their own institutional structures and value systems, aimed at restoring cosmic (spiritual) equilibrium. To equate customary adjudication with restorative justice is not only

conceptually flawed but also reduces it to a mere procedural variant of dispute resolution within the state legal framework. Such a reductionist approach obscures the doctrinal foundations of customary law and diminishes its status as an autonomous legal order. It follows that the resolution of cases by customary councils, as a ground for the elimination of prosecution, must be understood as an autonomous legal basis, existing outside, and not as part of, the state criminal procedural regime. Any doctrinal framework that seeks either to assimilate customary decisions into the *ne bis in idem* regime or to reclassify them as restorative justice mechanisms fails to apprehend the pluralistic structure of Indonesian law and risks subordinating the living law to the hegemony of formal state law.

Further concerns arise from the GR's regulatory design, particularly Articles 15 to 22, which purport to establish “criminal procedure rules” relating to customary criminal law. As a matter of legal hierarchy and systemic coherence, criminal procedure, being a core component of public law, ought to be regulated at the statutory level as the *lex generalis*, rather than through a government regulation of lower hierarchical status. Article 22 of the GR is especially problematic insofar as it provides that, where a customary decision has been rendered. Still, if the offender fails to comply with it, the matter shall be redirected to the state criminal justice system under the CPC. Such a “fallback” mechanism undermines the finality and authority of customary adjudication and distorts its autonomous character. Where non-compliance occurs, social sanctions imposed by the local customary community constitute a more appropriate and internally consistent response, provided that the conduct in question constitutes a purely customary offense with no equivalent in the NCC. Moreover, the construction adopted in the GR creates the misleading impression that violations of customary criminal law are equivalent to breaches of regional regulations, thereby reducing customary law to quasi-formal state mechanisms. This is conceptually

flawed, as customary criminal law derives from living law recognized by the constitution and cannot be equated with formal legislative products.

The involvement of the Civil Service Police Unit (*Satuan Polisi Pamong Praja*), whose mandate is limited to enforcing regional regulations, further reflects this mischaracterization. Accordingly, any integration of customary criminal law into the national criminal justice system must be effected through explicit and comprehensive provisions in the CPC, to ensure doctrinal coherence, legal certainty, and respect for the autonomous character of customary law.

Conclusion

The current grounds for the elimination of prosecution in Indonesian criminal law do not adequately accommodate customary adjudication. Customary council decisions cannot be subsumed under *ne bis in idem* or restorative justice, as both are conceptually confined to mechanisms operating within the state legal system. This reveals a clear and consequential normative gap. It is therefore necessary for the CPC to explicitly recognize decisions of legitimate customary councils as an autonomous ground for the elimination of prosecution. Such recognition must reflect the independent nature of customary criminal law as part of the living law, rather than assimilating it into existing state-centered legal categories that are doctrinally incompatible. Reformulating Article 71 paragraph (2) of the CPC is, accordingly, not merely a legislative option but a doctrinal imperative to ensure systemic coherence, respect for legal pluralism, and the development of a more inclusive and socially responsive criminal justice system.

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