

Recognition or Restriction: Dialectics of Customary Criminal Law in the Paradigm of Indigenous Communities

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Abstract

The recognition of customary law in the New Criminal Code is like a double-edged sword: on one hand, it acknowledges customary law, but on the other, it imposes limitations cloaked in formalism. This study aims to identify customary criminal offenses that are still practiced in indigenous communities and to analyze the perspectives of indigenous communities regarding customary law as the basis for criminal punishment, unlike previous studies that were still conceptual in nature and lacked empirical support. Thus, this study presents an empirical perspective from indigenous communities regarding the recognition of customary criminal law in the New Criminal Code. The approach in this study is socio-legal, employing qualitative and interpretive analysis. The research was conducted using a purposive sampling method in Sembalun Village and Bangket Parak Village through in-depth interviews with traditional leaders



and a literature review. This study concludes that the formalization of customary criminal law through local regulations has the potential to weaken its dynamic nature, given that, empirically, customary criminal law in Sembalun Village and Bangket Parak Village continues to evolve in response to the needs, values, and norms of the local community. Traditional leaders have responded positively to the recognition in the New Criminal Code, noting that customary law still holds greater binding power than state law. Therefore, the regulation of customary criminal law should be sufficiently affirmed in the general provisions of the Criminal Code as a guideline for judges in uncovering the living law within the community, without the need for further formalization through local regulations, to maintain a balance between state law and legal pluralism within Indonesian society.

Keywords

Pluralism, Customs, Crime, Formalization.

Introduction

Ubi Societas Ibi Ius, where there is society, there is the law. Cicero's words from over 2,000 years ago remain relevant for all time.¹ Law only emerges and develops within a society and through interactions between humans. The law that lives, grows, and develops in each society reflects that society. Society is characterized by its own culture and customs, so the law within a society is the embodiment of its *gesstesstructuur*.² This opinion is in line with Von Savigny's theory, which asserts that law develops based on the

¹ Ridwan Arifin, "Legal Development and Globalization: Some Contemporary Issues in Indonesia and Global Context," *Journal of Law and Legal Reform* 1, no. 3 (2020): i-iv, <https://doi.org/10.15294/jllr.v1i3.38544>.

² I Gusti Ketut Sutha, *Bunga Rampai Beberapa Aspekta Hukum Adat*, Pertama (Yogyakarta : Liberty, 1987).

volksgeist of society. Since each society has different customs, the laws that exist and evolve are not always the same.³

The passing of Law No. 1 of 2023 on the Criminal Code (KUHP) is a major accomplishment that marks a new phase in the development of the Indonesian criminal justice system.⁴ After more than 70 years of enforcing the Criminal Code (KUHP), which originated from the Dutch colonial legacy known as the Wetboek van Strafrecht (WvS), Indonesia has finally succeeded in drafting and possessing its own national criminal law code. This codification is expected to reflect and adapt to the social, cultural, and philosophical values that are alive and evolving within Indonesian society.⁵

Philosophically and ideologically, the WVS Criminal Code is based on the principle of formal legality, which focuses on legal certainty and normative justice. However, this approach tends to overlook substantive justice and the social values that develop in society. This orientation reflects the influence of liberal, individualistic, and capitalistic thought, which forms the main foundation of the Western legal system.⁶ The application of the KUHP WVS in practice often leads to discrepancies between legal certainty and the sense of justice that lives within Indonesian society, which is based on values of religiosity, collectivism, and the spirit of mutual cooperation.⁷

³ Hijriani dkk., "Perkembangan Teori Penegakan Hukum dalam Perwujudan Fungsi Norma di Masyarakat," *Sultra Research of Law* 5, no. 2 (2022): 58–65, <https://doi.org/10.54297/surel.v5i2.62>.

⁴ Noveria Devy Irmawanti dan Barda Nawawi Arief, "Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana," *Jurnal Pembangunan Hukum Indonesia* 3, no. 2 (2021): 217–27, <https://doi.org/10.14710/jphi.v3i2.217-227>.

⁵ Dwiana Adinda dkk., "Politik Hukum Dalam Pembaharuan Hukum Pidana di Indonesia," *Wathan: Jurnal Ilmu Sosial dan Humaniora* 1, no. 1 (2024): 12–25, <https://doi.org/10.71153/wathan.v1i1.16>.

⁶ Nandang Sambas, "Eksistensi Hukum Pidana Adat Dalam Pembentukan Hukum Pidana Nasional," *Syiar Hukum* XI, no. 3 (2009): 233–43, <https://doi.org/10.29313/sh.v11i3.546>.

⁷ Faisal Faisal dan Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (2021): 291, <https://doi.org/10.24843/JMHU.2021.v10.i02.p08>.

The attempt to strike a balance between the concepts of formal and material legality is one of the reform proposals in the New Criminal Code. Within this framework, the law that lives and develops within society (living law) is recognized and given status as one of the sources of criminal law.⁸ This article's explanation highlights that living law is regarded as unwritten customary law, the validity of which is further governed by government regulations that act as guidelines for the creation of regional regulations.⁹

The issue that is frequently debated and never fully resolved regarding the application of customary criminal law is legal certainty and justice. This is heavily influenced by the perspective of legal positivism, which holds that the law must be written, a notion that has become deeply ingrained in the field of criminal law in Indonesia. This statement is supported by several research findings, such as Basrawi's, whose research indicates that there is still a prevailing view that legal certainty can only be provided by written positive law.¹⁰

Kamil's research results¹¹ explain that the dominance of positivism often hinders the achievement of substantive justice in pluralistic situations, including the recognition and implementation of customary law that may conflict with written norms. Even the research findings of Komeni and Widjajanti¹² considers that Legal certainty, as the basis of the

⁸ Yoghi Arief Susanto dkk., "Review of Customary Criminal Law: A Recognition or Reduction in the New Criminal Code," *ADLIYA: Jurnal Hukum dan Kemanusiaan* 19, no. 1 (2025): 81–102, <https://doi.org/10.15575/adliya.v19i1.44458>.

⁹ Yoghi Arief Susanto dan Mujiono Hafidh Prasetyo, "Customary Criminal Law in the New Criminal Code: Between Positive and Negative Functions," *International Journal Of Multidisciplinary Research And Analysis* 8, no. 6 (2025): 3113–20, <https://doi.org/10.47191/ijmra/v8-i06-05>.

¹⁰ Basrawi Basrawi, "Kepastian Hukum Dalam Penyelesaian Kasus Pidana Melalui Hukum Adat Ditinjau Dari Sistem Hukum Nasional," *Al-'Adl* 13, no. 1 (2020): 70, <https://doi.org/10.31332/aladl.v13i1.1723>.

¹¹ Renita Kamil, "Legal Positivism Influence on Law Enforcement and Judicial Practice in Indonesia," *JUSTISI* 11, no. 2 (2025): 542–69, <https://doi.org/10.33506/js.v11i2.4049>.

¹² Wirdi Hisroh Komeni dan Ermania Widjajanti, "Ketidaktepatan Penerapan Hukum Pidana Adat dalam Pasal 2 KUHP Baru: Prespektif Teori Kepastian Hukum," *Innovative: Journal Of Social Science Research* 4, no. 3 (2024): 1051–59, <https://doi.org/10.31004/innovative.v4i3.10586>.

principle of legality in criminal law, can be disrupted by unwritten and ever-changing customary law.

This positivistic perspective certainly needs to be changed, with the hope that the rigid and inflexible principle of formal legality can become more dynamic through the recognition of customary criminal law in the New Criminal Code. In an effort to move closer to justice, customary criminal law is the original law of Indonesia and holds an integral and inseparable position. However, in practice, the application of this law has often been sidelined by the positive law inherited from the Dutch, which is considered more modern and progressive.¹³

It should be understood that Indonesia, with its level of legal pluralism, does not rely solely on written regulations as the foundation of its legal framework¹⁴. Integrating customary law into the national legal framework is necessary, which, in this case, has already been constitutionally regulated in the 1945 Constitution.¹⁵

Ironically, Indonesia, a multicultural and multi-ethnic nation with a highly complex society, renowned for its diverse traditions, also applies legal positivism, which is based not only on reductionism but also on universalism. The diversity of Indonesian society is thus reduced to a society with a single character, and all are subject to the same law. This pattern of thinking leads to legislation being enforced across all regions of Indonesia through the same application mechanisms, without regard for the differing socio-cultural conditions of those communities. Positive law is viewed as the sole instrument for achieving order in society. This

¹³ Ferry Fathurokhman, *Hukum Pidana Adat Baduy Dan Pembaruan Hukum Pidana*, Pertama (Jakarta: Kencana, 2022).

¹⁴ R. D. Sutanti dkk., "Customary law as an instrument of restorative justice: an alternative approach to criminal conflict resolution in plural legal systems," *Clio. Revista de Historia, Ciencias Humanas y Pensamiento Crítico*. 5, no. 10 (2025): 1348–81, Scopus, <https://doi.org/10.5281/zenodo.15453907>.

¹⁵ Lilik Mulyadi, "Eksistensi Hukum Pidana Adat Di Indonesia: Pengkajian Asas, Norma, Teori, Praktik Dan Prosedurnya," *LITIGASI* 17, no. 2 (2016): 3284, <https://doi.org/10.23969/litigasi.v17i2.138>.

situation clearly contradicts reality, as there are, in fact, many non-legal aspects that influence the establishment of order.¹⁶

In Indonesia, some regions uphold and implement customary laws in their communities. One such example is the Sembalun community, one of the oldest villages on the island of Lombok, known for consistently upholding traditional values. Additionally, the Bangket Parak community, despite being located around the Mandalika Special Economic Zone, continues to practice customary law in their social life. The persistence of customary law in these two areas demonstrates that traditions remain alive and continue to evolve dynamically in the face of social change and development.

Another issue that arises is the obligation to regulate customary criminal law through Regional Regulations. It would be very unfortunate if this were to happen, as it deviates from the fundamental idea behind the implementation of customary criminal law, as highlighted in previous research, including by Yoserwan¹⁷, Rozah¹⁸, and Junaidi.¹⁹ Regional regulations should ideally only serve to acknowledge the existence of living law that develops within society. These regulations do not need to provide detailed arrangements regarding the substance of customary law, especially in relation to the types of customary offenses and their associated sanctions. Overly specific regulations would contradict the dynamic and adaptive nature of customary law.

¹⁶ Harniwati Harniwati, "Hukum Adat di Era Modernisasi," *Journal of Global Legal Review* 2, no. 1 (2024): 41–52, <https://doi.org/10.59963/jglegar.v2i1.328>.

¹⁷ Yoserwan Yoserwan, "Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan Kuhp Baru," *UNES Law Review* 5, no. 4 (2023): 1999–2013, <https://doi.org/10.31933/unesrev.v5i4.577>.

¹⁸ Umi Rozah dan Aldi Yudistira, "Penal Policy Analysis of The Formulation of Customary Law in The 2023 KUHP," *Indonesian Journal of Criminal Law Studies* 10, no. 1 (2025): 83–114, <https://doi.org/10.15294/ijcls.v10i1.19939>.

¹⁹ Muhammad Junaidi dan Yoghi Arief Susanto, "Reformulation of Customary Criminal Law in the National Criminal Code Based on the Formation of Legislation," *Jurnal Pembangunan Hukum Indonesia* 7, no. 1 (2025): 43–60, <https://doi.org/10.14710/jphi.v7i1.43-60>.

Compared with previous studies, which have focused primarily on normative and conceptual analyses of customary criminal law, the empirical perspectives of indigenous communities have yet to be fully explored. It is therefore important to conduct a study of indigenous communities' views on the applicability of customary criminal law as a basis for sentencing under Indonesia's New Criminal Code.

To narrow the focus of this study, it will be divided into two research objectives: to identify customary criminal offences that are still practised within indigenous communities, and to analyse the perspectives of indigenous communities regarding customary law as the basis for criminal punishment. All research findings will be conceptually analyzed using the theory of legal pluralism, which views law as a pluralistic and dynamic system within society. This analysis is further enriched by the living law theory, which asserts that law originates from society and evolves alongside the values and social practices that live and change dynamically.

Method

This study uses a type of analysis, explicitly qualitative socio-legal analysis, using an interpretative approach that emphasizes the existing conditions in society as issues that can be generalized²⁰. This approach is relevant because it enables an analysis of indigenous communities' perspectives on the application of customary criminal law as the basis for sentencing in the New Criminal Code (KUHP Baru) and the identification of the types of customary criminal acts that are still practiced. The research locations were purposively chosen in Sembalun Village, Sembalun District, East Lombok Regency, and Bangket Parak Village, Pujut District, Central Lombok Regency, based on the consideration that both communities still uphold customary law despite being in different social contexts and levels of modernization.

²⁰ Dyah Ochtorina Susanti dan A'an Efendi, *Penelitian hukum (legal research)* (Jakarta: Sinar Grafika, 2014).

The research data consists of primary and secondary data. Primary data was obtained through in-depth interviews with traditional leaders who possess authority and an understanding of local customary law, specifically one person in the village of Sembalun who meets the criteria of being the highest traditional leader in that village, as well as one person in the village of Bangket Parak who meets the same criteria. Meanwhile, secondary data was collected through a literature review of laws and regulations, customary documents, and data analysis as described in the following steps: (1) Data collection was conducted through interviews and a literature review; (2) Data reduction, which in this case involved sorting data based on its relevance to the research material; (4) Data presentation is the process of organizing and analyzing data to conclude; (5) Conclusions are drawn from the discussion to address the research questions.

Result and Discussion

A. Types of Customary Crimes in the Sembalun Village and Bangket Parak Village Communities

Von Savigny stated that law is a manifestation of the spirit of a nation. His well-known view, “*Das Recht wird nicht gemacht, es ist und wird mit dem Volke*”,²¹ According to him, law is not created artificially but rather emerges and changes in tandem with community dynamics. Within this framework, customary criminal law or customary offenses reflect the social realities that are alive and deeply embedded in society. This law is formed based on the value systems and local cultures upheld by the community.²²

Customary criminal law is a social institution that is crucial to preserving social balance. It serves as an instrument to stabilize society against various forms of disturbances or turmoil arising from violations of

²¹ Susanto dkk., “Review of Customary Criminal Law: A Recognition or Reduction in the New Criminal Code.”

²² A. Masyhar dkk., “Reclaiming the Unwritten: Living Law’s Prospects under Indonesia’s 2023 Penal Reform,” *Jambe Law Journal* 8, no. 1 (2025): 255–85, Scopus, <https://doi.org/10.22437/home.v8i1.502>.

legal provisions, moral norms, religious values, or social etiquette.²³ In the traditional Indonesian view, which is cosmic in nature, the most fundamental principle is the realization of balance or harmony between the worldly and spiritual dimensions of life, individual and collective interests, and society and its environment. Any behaviour that upsets this equilibrium is seen as illegal, so customary authorities have a moral and social obligation to restore the disrupted order.²⁴

Traditional societies view humans as an integral part of the universe (the macrocosm) and inseparable from God Almighty, the creator. Humans are also believed to have a strong connection with their natural and social environments, thus creating a state of harmony and balance.²⁵ Therefore, every violation of customary provisions categorized as a customary offense is a form of disruption to the balance of the cosmos. Restitution for such violations aims to restore the original harmony within the social order.

Customary criminal law is essentially different from Western law because it does not preexist. Customary criminal law is not based on written regulations but on laws that live and develop within the community. Therefore, judges are not permitted to impose sanctions for an act if that act does not conflict with the values recognized by society. The assessment of such acts is grounded in a collective sense of justice, where legal censure arises from a sense of justice that lives, grows, and is maintained within a specific temporal context.²⁶

²³ A. Imam Al Muttaqin dkk., "Legal Pluralism in Kalimantan: A Study of the Dual Application of Criminal Law and Customary Law in Dayak Society," *East Asian Journal of Multidisciplinary Research* 4, no. 7 (2025): 3289–304, <https://doi.org/10.55927/eajmr.v4i7.257>.

²⁴ Pujiyono, "Hukum Pidana Adat Sub-Culture Kehidupan Hukum di Indonesia," *Masalah-Masalah Hukum* 40, no. 2 (2011): 148–57, <https://doi.org/10.14710/mmh.40.2.2011.158-163>.

²⁵ Maulana Halim Putra dkk., "The Position of Customary Criminal Law in Law No. 1 of 2023 on the Criminal Code," *International Journal of Law and Society* 2, no. 3 (2025): 170–79, <https://doi.org/10.62951/ijls.v2i3.686>.

²⁶ Tody Sasmitha Jiwa Utama, "'Hukum Yang Hidup' Dalam Rancangan Kitab Undang-Undang Hukum Pidana (KUHP): Antara Akomodasi Dan Negasi," *Masalah-Masalah Hukum* 49, no. 1 (2020): 14, <https://doi.org/10.14710/mmh.49.1.2020.14-25>.

1. Customary Offenses in Sembalun Village

The initial explanation clarifies that the Sembalun Village community is known for upholding traditional customs. This can be confirmed based on research findings and interviews with Martawi, the Head of the Special Customary Council of Paer Sembalun, who recounted that, before the introduction of national law in Sembalun Village, prior to the 1970s, customary law related to criminal law enforcement was practiced by the community. For example, if a theft occurred, the customary consequence for the perpetrator was to hang the stolen item around their neck and parade them around the village, followed by the community voluntarily throwing pebbles at them. In matters related to agriculture, if a landowner neglected to maintain a broken fence and an animal entered through the damaged fence and destroyed someone else's field, the landowner with the broken fence was required to compensate for the loss of crops. If someone committed adultery at that time, they would be paraded around the village and bathed by the local customary leader.²⁷

At that time, even in cases of customary violations or crimes, the police had no authority because the system was controlled by three powers, namely: The Penghulu was a customary institution authorized to manage social-religious life and foster the community's moral and ethical conduct. This role was based on the values of Lombok Buaq, which emphasized honesty, sincerity, wholeheartedness, righteousness, and justice, as well as the teachings of sangkabira, which prioritized the spirit of mutual cooperation, togetherness, and helping one another. The Penghulu institution was led by a traditional Penghulu who, in carrying out his duties, was assisted by six kyai, with areas of responsibility spread across

²⁷ Interview with Martawi, Chairman of the Paer Sembalun Special Kemangkuan Customary Council, August 4, 2025

several villages in the region. The main responsibilities of this institution include leadership in religious activities and the performance of customary rituals.

Pemekel and Pemangku are customary institutions responsible for maintaining social order and managing natural resources. Pemekel is responsible for organizing social life in the community, including matters of marriage, divorce, organizing celebrations, and resolving disputes. The institution was led by a Mekel or Jero Kepala, supported by customary officials who handled administration, communication, security, and territorial management. Pemangku also plays a role in the management and preservation of the natural environment, including forests, springs, agriculture, plantations, and cultural areas. The Pemangku Gumi, as the chief leader, was assisted by Mangku, who held special authority according to the area and resources under their management.

However, at present, the customary laws related to theft and adultery are no longer enforced by the people of Sembalun Village. As a result, any violations related to crimes are immediately handed over to the police. According to Martawi, however, the existence of customary law in the community plays a significant role, making the environment safer and more orderly. Currently, with the development of Sembalun Village as a tourist destination, the customary laws in use are related to and support tourism programs. Moreover, as the majority of Sembalun's residents are Muslim, there are regulations in place, both in hotels and restaurants, that prohibit the sale of alcoholic beverages, do not allow guests to stay unless they are a legally married couple, require modest dress and covering of the body, and maintain public order.²⁸

²⁸ Interview with Martawi, Chairman of the Paer Sembalun Special Kemangkuan Customary Council, August 4, 2025.

If these provisions are violated, sanctions are adjusted according to the offense committed in the area. The sanctions include minor penalties in the form of two warnings and moderate penalties in the form of a fine of Rp. 5,000,000.00 (five million rupiah), and severe penalties, which involve being prohibited from re-entering the Sembalun Village area. Of course, in enforcing these customary rules and sanctions, there is an institution called the Lang-lang. This institution is responsible for enforcing the awig-awig established in the Sembalun Village. Sembalun Village is already planning to reactivate the Village Court to resolve issues arising in the village and those related to customary law.²⁹

Therefore, in the future, for the enforcement of village awig-awig when there are violations, the lang-lang will summon the offender to be brought before the Village Court, discuss the punishment to be imposed through deliberation, and the community itself can observe the proceedings. According to Martawi, the existence of customary law in resolving cases of crime or violations of societal norms is far more effective, not only because it serves as a deterrent to the offender and provides educational value to the community, but also because it maintains balance and harmony in society. Moreover, the customary law in Sembalun Village is based on Islamic Sharia provisions.³⁰

2. Customary Offenses in Bangket Parak Village

In the community of Bangket Parak Village, village regulations (awig-awig) are established to empower, preserve, protect, and develop customary law. These regulations cover matters ranging from marriage to customary offenses, along with the sanctions or

²⁹ Interview with Martawi, Chairman of the Paer Sembalun Special Kemangkuan Customary Council, August 4, 2025.

³⁰ Interview with Martawi, Chairman of the Paer Sembalun Special Kemangkuan Customary Council, August 4, 2025.

customary obligations that must be carried out, up to traditional ceremonies and purification rituals.³¹

The awig-awig in the village are, of course, based on the philosophical values of Sasak Customary Law, namely Adat Gamme (religious customs), Adat Luir Gamme (traditional customs), and Adat Tafsil (placing Religion and Custom in balance). Its implementation is grounded on Titi (the balance between God and humans), Tate (order/rules), tertib (no overlap or disorder), Tapsile (politeness), and Jatmike (prioritizing actions that are carried out).³²

The existence of customary law in Bangket Parak Village, established through the awig-awig, is very important because it serves as a guideline/reference for resolving customary disputes in accordance with the norms and legal principles in Bangket Parak Village.³³ It is also worth noting that this area of Lombok is home to the Sasak ethnic group. Still, each region has unique characteristics in its customary law, resulting in differences in the norms contained within its respective awig-awig.

The customary law system of Bangket Parak Village recognizes various forms of sanctions, the main purpose of which is to restore social and moral balance within the community. One such sanction is a social sanction, or sanksi ilang, which involves ostracism, expulsion, or the removal of the perpetrator's social status from the customary community. This sanction is applied to certain customary violations for which monetary fines are not possible, particularly actions deemed to offend moral values, spirituality, and social order deeply.

³¹ Interview with Lalu Purnama Agung, Head of the Traditional Leaders of Central Lombok Regency, August 5, 2025.

³² Interview with Lalu Purnama Agung, Head of the Traditional Leaders of Central Lombok Regency, August 5, 2025.

³³ Interview with Lalu Purnama Agung, Head of the Traditional Leaders of Central Lombok Regency, August 5, 2025.

Social sanctions or sanksi ilang are generally imposed for serious customary violations, such as forbidden relationships (musaharah), the practice of witchcraft or sorcery (kalalu and ekawarna), marriages that violate customary rules (biru), and serious crimes such as rape accompanied by murder (sudu kanadah). In addition, actions that were previously subject to the highest level of sanction (the death penalty) can also end up with this social sanction. The essence of these sanctions is to remove the perpetrator from the social order to restore communal harmony.

In addition to social sanctions, customary law recognizes material fines, which are classified into three levels: pati (primary), madya (intermediate), and pratama (minor). Pati sanctions represent the highest level of punishment and are imposed for acts deemed to threaten life, honor, and social order. Acts in this category include sexual harassment of women, slander, incitement, poisoning, forced abduction of women, and making false accusations without evidence.

Madya sanctions are imposed for violations considered to be of an intermediate level, such as marrying a woman in a way not sanctioned by custom, disorderly conduct, disrespecting others, and breaching customary marriage procedures. Pratama sanctions, on the other hand, are minor sanctions generally imposed during the Sorong Serah Aji Krame customary procession, relating to breaches of conduct, dress code, or ceremonial procedure, all of which aim to maintain the sanctity and order of the ritual.

Regarding the Amounts of Fines or Sanctions, these customary sanctions include: first, the Principal Fine (Pati), set at a value of 49,000 kepeng, equivalent to a rate of 100 or Rp. 4,900,000 (four million nine hundred thousand rupiah). Second, Madya Fines or Sanctions are set at half the value of the principal fine (Pati), as mentioned in the first point. Third, Pratama Sanctions are

determined based on the prevailing pemegat value at each stratum, level, or stage of Aji Krame, considering proportionality and the degree of violation.

Customary law also regulates other deeds that result in sanctions or fines, such as arson (*hamuk tunjel*), unfounded accusations of sorcery (*sanksi cor*), vandalism of fences or walls, and various forms of theft classified according to the object involved, including *maling ame*, *maling ratne*, *maling raras*, *maling kabunan*, *maling timpuh*, and *maling arep*. The fine amount is generally adjusted according to the value of the loss and the outcome of customary community deliberations.

In the case of livestock theft, customary law differentiates sanctions based on the type and value of animals stolen. Theft of poultry entails double restitution along with a specific fine, whereas theft of larger livestock such as cows, buffaloes, or horses carries a heavier penalty. Similar principles are applied to the theft of electronics, motor vehicles, jewelry, and agricultural or marine products, with sanctions determined through customary deliberation and consensus.

In the field of morality, customary law stipulates the sanctions for adultery and other moral violations in detail. The number of sanctions varies based on the perpetrator's status, whether single, noble, or customary leader, and the severity of the violation. In addition to material fines, some moral transgressions are also subject to social sanctions, such as mandatory marriage or expulsion from the village, highlighting that moral violations are considered serious threats to the honor and social balance of the society.

One distinctive mechanism for resolving customary criminal acts, especially theft, is the Garap tradition, a ritual oath involving the drinking of water from the grave soil of Wali Nyatuk. This tradition is binding and compulsory for all eligible residents and

eliminates the possibility of resolution through state law if the customary path has been followed. Garap reflects the character of customary law, which is rooted in spiritual belief, the restoration of magical balance, and collective obedience of the community. Thus, the law functions not only as a normative instrument but also as a living social and religious mechanism within customary communities.

In the event of a case or violation not explicitly regulated by these customary laws, the resolution shall be carried out through a consensus mechanism between the perpetrator and the victim, with assistance or mediation by community leaders with social and moral authority in the local area. Any customary problems or disputes arising in the community are first heard at the hamlet level, as the initial forum for case resolution. If deliberation at the hamlet level cannot produce a decision agreed upon by all parties, the case will be delegated to the village level for further hearing and a final decision in accordance with applicable customary law provisions.³⁴

After identifying the types of customary crimes found in the two villages, we found that some customary crimes still exist, are believed in, and are practiced by the indigenous people of Bangket Parak Village, while others are no longer practiced at all, as in Sembalun Village. New customary crimes are emerging in response to societal developments in a region. This demonstrates that these customary crimes are elastic, dynamic, changing, and evolving in accordance with the dynamics of community life.

This development aligns with Van Vollenhoven's opinion that customary criminal law remains in effect as long as the customary law community exists and maintains it. Its validity depends on the place, time, and circumstances. An act that was previously not

³⁴ Interview with Lalu Purnama Agung, Head of the Traditional Leaders of Central Lombok Regency, August 5, 2025.

prohibited can be designated as a crime (criminalization) if it is deemed to disrupt the balance of law, public safety, and social order. Conversely, if an act is no longer considered a violation of customary norms, it is no longer subject to sanctions (decriminalization).³⁵

Although there are customary crimes that are not stated in the village awig-awig, this does not reduce the pre-existence of customary law. These awig-awig are compiled with the aim of being material for preserving, protecting, and developing customary law and becoming a guideline in community life so that it is not forgotten. Thus, customary criminal law does not adhere to the principle of legality as regulated in Article 1, paragraph (1) of positive criminal law in determining a criminal act.

If an act is not regulated and is not included in the awig-awig, this does not mean that the criminal act is negated and the perpetrator escapes sanctions. Instead, it will be resolved through a consensus-based deliberation mechanism between the perpetrator and victim, with assistance or mediation by community leaders who possess social and moral authority in the local environment. This is done to maintain harmony and balance in the community, achieve a sense of substantive justice, and resolve conflicts between the perpetrator and the victim.³⁶

Based on empirical evidence, customary law is responsive and dynamic in nature, as noted by Djojodigono; that is, it is capable of enduring, evolving, and adapting to the changing needs of the community over time. Customary law continues to undergo

³⁵ Rena Yulia dkk., "Restoring the Conflicts among Societies: How does Baduy Society Settle the Criminal Cases through Restorative Justice?," *Academic Journal of Interdisciplinary Studies* 12, no. 3 (2023): 193, <https://doi.org/10.36941/ajis-2023-0071>.

³⁶ Nur Rochaeti dkk., "A Restorative Justice System in Indonesia: A Close View from the Indigenous Peoples' Practices," *Sriwijaya Law Review*, 27 Januari 2023, 87-104, <https://doi.org/10.28946/slrev.Vol7.Iss1.1919.pp87-104>.

changes that are oriented towards the communal interests of indigenous communities. Furthermore, customary law is malleable or flexible in its application, taking into account the specific nature of each case, as it is based on general principles.³⁷

Customary law, therefore, possesses two interrelated characteristics: it preserves ancestral traditions whilst remaining capable of adapting to societal developments. Furthermore, customary law is open in nature, meaning it can incorporate influences from other legal systems provided they are deemed appropriate by the community. This is reflected in the process of interaction and harmonization between customary law, Islamic law, and Western law within the Indonesian legal system, facilitated by the role of the judiciary.³⁸

The relationship between customary law and state institutions, particularly those related to the criminal justice system, operates smoothly and is complementary in nature; for example, if a case of theft has been resolved through the customary process of 'garap', it cannot be referred to the authorities, and the perpetrator must not be prosecuted. Consequently, the perpetrator of the customary offence does not face double punishment.

Philosophically, this is in line with the values of Pancasila, which emphasize balance, harmony, and sustainability of life. Pancasila as a whole affirms that the happiness of the Indonesian nation can only be realized through harmonious and balanced relationships, whether between individuals and society, humans and

³⁷ Achmad Asfi Burhanudin, "Eksistensi Hukum Adat di Era Modernisasi," *SALIMIYA: Jurnal Studi Ilmu Keagamaan Islam* 2, no. 4 (2021): 96–113, <https://doi.org/10.2906/salimiya.v2i4.466>.

³⁸ Sulastriono Sulastriono dan Sartika Intaning Pradhani, "Pemikiran Hukum Adat Djojodigono dan Relevansinya Kini," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30, no. 3 (2018): 448, <https://doi.org/10.22146/jmh.36956>.

nature, humans and God, or between material progress and spiritual well-being.³⁹

B. Customary Offenses That Have Equivalents in the Criminal Code

Customary criminal law is a reflection of the social values that live and develop within a society. According to J.H. van Kan, law serves as a *weergawe* (mirror) of a nation's value system. In the Indonesian context, the existence of customary criminal law affirms that social groups possess internal control systems rooted in morality, culture, and collective consciousness.⁴⁰ Thus, customary criminal law is not only a legal phenomenon but also an expression of social identity that springs from community experience and belief.

However, customary criminal law was subordinated during the colonial period due to the enforcement of the Dutch-inherited Criminal Code (KUHP)⁴¹. The rigid application of the principle of legality led to the marginalization of customary law in judicial practice, even though customary norms continued to exist and be observed in society. This situation has created a value gap and disharmony between positive law and social reality. The clash between colonial legalism and living law later triggered academic criticism and calls for the reconstruction of the national criminal law.⁴²

Based on research into customary offenses that are still active, recognized, and practiced by communities today, several customary

³⁹ Nur Rochaeti dan Rahmi Dwi Sutanti, "Kontribusi Peradilan Adat Dan Keadilan Restoratif Dalam Pembaruan Hukum Pidana Di Indonesia," *Masalah-Masalah Hukum* 47, no. 3 (2018): 198, <https://doi.org/10.14710/mmh.47.3.2018.198-214>.

⁴⁰ I Made Widnyana, *Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana* (Jakarta: PT Fikahati Aneska, 2013).

⁴¹ Beni Kharisma Arrasul, "Eksistensi Hukum Pidana Adat dalam Rancangan KUHP: Problematika Asas Legalitas dan Over-Kriminalisasi," *UNES Law Review* 6, no. 1 (2023), <https://doi.org/10.31933/unesrev.v6i1>.

⁴² Yoserwan, *Implications of Adat Criminal Law incorporation into the New Indonesian Criminal Code: Strengthening or weakening?*, 10, no. 1 (2024), <https://doi.org/10.1080/23311886.2023.2289599>.

offenses have been found to correspond with the provisions in the new Criminal Code. This comparison is presented in the following table:

Table 1. Traditional Offenses That Have Equivalents in the Criminal Code (KUHP)

National Criminal Code	Customary Offense
CHAPTER XXIV Criminal Acts of Theft (Article 476, Article 477, Article 478, Article 479)	Regarding livestock theft, theft of electronic goods, motor vehicles, and jewelry, and theft of agricultural and marine products
CHAPTER XV Crimes of Morality (Article 411)	Adultery offense
CHAPTER XXII Criminal Acts Against the Body (Article 473)	Crime of rape
CHAPTER XXI Crimes Against Life and the Fetus Section One Murder (Article 458)	The crime of "amisadah" refers to the act of poisoning another person, where the penalty is murder if the poisoned person dies.
CHAPTER XVII Criminal Acts of Defamation (Article 434)	<i>Anggenidah</i> means to slander.
CHAPTER XVII Criminal Acts of Defamation (Article 436)	<i>Enduge</i> is the behavior of someone who belittles or does not appreciate others' work.
Criminal Offenses Against the Body (Article 473), and Criminal Offenses Against Life and the Fetus, Part One: Murder (Article 458)	<i>Sudu Kanadah</i> is a sanction imposed on individuals who rape a woman and then kill her.
CHAPTER VIII Criminal Acts Endangering Public Safety for People, Health, and Property	<i>Hamuk Tunjel</i> occurs when someone sets fire to another person's house.

Paragraph 2 Causing Fire, Explosion, and Flood Article 308	
CHAPTER XXVII Criminal Act of Fraud (Article 493)	If a goldsmith is dishonest with his master, he will be subject to a sanction known as Maling Timpuh (MT).
CHAPTER XXIX Criminal Acts of Damage and Destruction of Goods and Buildings Section One Damage and Destruction of Goods Article 521	If someone takes another person's belongings, they will be subject to a fine/penalty known as Maling Arep.

Source: compiled by the author from research findings

The Criminal Code contains equivalents for several crimes. This begs the question of whether the Criminal Code or customary criminal law should be applied. Article 5, paragraph (3), letter b of Emergency Law Number 1 of 1951 on Temporary Measures to Organize the Unity of the Powers and Procedures of Civil Courts serves as the normative foundation for the institutionalization of customary criminal law.

According to this article's requirements, the criminal penalties in the Criminal Code will be followed if a customary crime has an equivalent in the Criminal Code. On the other hand, criminal punishments in accordance with customary regulations may be employed as the primary punishment if the customary crime has no counterpart in the Criminal Code.

In the context of the new Criminal Code, Article 2, paragraph (2), stipulates limitations and conditions for the applicability of customary criminal law, often referred to as the margin of appreciation. Therefore, what is considered a customary crime must be filtered according to these criteria. This context is the same as Article 5 paragraph (3) sub b of Law

No. 1/1951, so that the implication is that the criminal threat imposed is that regulated in the new Criminal Code.

When Article 5(3)(b) Law No. 1/1951 is considered in conjunction with Article 1(1) of the Criminal Code, a shift is evident in the principles hitherto upheld by our criminal law.⁴³ For an act to be punishable, that act doesn't need to be expressly punishable under the Criminal Code or other legislation; however, if an unwritten provision imposes a penalty for that act, there is no justification for a judge not to impose a penalty for the commission of that act.⁴⁴

These guidelines serve as a framework for judges in determining which customary laws may still be used as a source of law for establishing the basis of sentencing. Consequently, these guidelines are influenced by national criteria, namely the 1945 Constitution and Pancasila, and international criteria, namely the general principles of law recognized by the community of nations as set out in Article 15(2) of the ICCPR.⁴⁵

Therefore, it is necessary to identify customary criminal law that is enforceable, which naturally takes time to develop. According to Rozah's book, which cites Fitzgerald's viewpoint, a custom must meet certain criteria for society to recognize it as law.⁴⁶ First, it is necessary to identify customary criminal law that is enforceable, which naturally takes time to develop. According to Rozah's book, which cites Fitzgerald's viewpoint, a custom must meet certain criteria for society to recognize it as law.

If these conditions are satisfied, it may become a legal standard that, if broken, will have repercussions.⁴⁷ First, material necessity, in cases where

⁴³ Lilik Mulyadi, *Hukum Pidana Adat Kajian Asas, Teori, Norma, Praktik dan Prosedur*, Cet. ke-1 (Bandung: Alumni, 2015).

⁴⁴ I Made Widnyana, *Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana*.

⁴⁵ Barda Nawawi Arief, *Perkembangan Asas Asas Hukum Pidana Indonesia Perspektif Perbandingan Hukum Pidana* (Semarang: Badan Penerbit Universitas Diponegoro Semarang, 2016).

⁴⁶ Umi Rozah, *Fisafat pembedanaan dalam sistem pembedanaan KUHP 2023 (Aplikasi dalam Kebijakan Hukum Pidana)* (Semarang: Yoga Pratama, 2024).

⁴⁷ Nyoman Serikat Putra Jaya, "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Masalah-Masalah Hukum* 45, no. 2 (2016): 123, <https://doi.org/10.14710/mmh.45.2.2016.123-130>.

the behavior has persisted for an extended period of time. The second is the intellectual requirement, wherein the legal standard creates a widespread perception that it is legally required to be followed. Third, when a standard is broken or disregarded, customary consequences are implied.

According to a different viewpoint from Nyoman Serikat Putra Jaya, customary criminal law, which forms the basis of national criminal law, must be founded on the following.⁴⁸ First, Indonesian society still upholds and develops customary criminal law. Second, attempts to establish a fair and successful society are not impeded by the implementation of customary criminal law. Third, Pancasila's lofty ideals are consistent with customary criminal law.

According to Muladi, the application of the doctrine of materially unlawful acts demonstrates that the law existing in society functions as the basis for punishment, grounds for the elimination of punishment, and considerations in sentencing. Therefore, judges must critically assess the validity of such laws, whether they represent cultural values that deserve respect or conflict with prevailing laws. In this assessment, Pancasila plays an important role as the foundation for understanding the law in society.

Building on the opinion of Nyoman Serikat Putra Jaya, and based on Articles 96 and 97 of the National Criminal Code, the author cites Muladi's opinion regarding customary sanctions as an additional punishment, which may also serve as a primary punishment. Their effectiveness is based on several factors: first, they must be appropriate and share the same objectives; second, they must be accepted as punishment by the community; third, their usefulness must be taken into account; fourth, they must be regarded as a necessity within the framework of the criminal justice system; and fifth, there must be adequate infrastructure.⁴⁹

⁴⁸ Nyoman Serikat Putra Jaya, *Relevansi Hukum Pidana Adat dalam Pembaharuan Hukum Pidana Nasional* (Bandung: Citra Aditya Bakti, 2005).

⁴⁹ Muladi dan Diah Sulistyani, *Catatan Empat Dekade Perjuangan Turut Mengawal Terwujudnya KUHP Nasional (Bagian I, 1980-2020)* (Semarang: Universitas Semarang Press, 2020).

Ultimately, if customary sanctions are to be imposed on perpetrators of criminal acts, there must be rational grounds and sufficient, well-reasoned considerations.⁵⁰

Customary criminal law plays a significant role in conflict resolution and restoring social balance. Therefore, the actualization of customary criminal law is crucial for developing a national criminal law system based on justice. Customary law has a restorative character, emphasizing the restoration of relationships and orienting itself toward social balance.⁵¹ These values align with the needs of contemporary Indonesian society, which desires laws that are not merely legalistic but also contextual, humanistic, and rooted in the nation's culture.

Therefore, the enactment of customary criminal law is not merely a matter of historical romanticism but rather a strategic step toward a more responsive and legitimate legal system in the eyes of the community. Therefore, the development and preservation of Indonesian customary law are crucial for national identity and dignity and reflect local wisdom in creating justice in harmony with nature and society.

C. The Perspective of Traditional Leaders on Customary Law in the New Criminal Code as the Basis for Criminalization

The enforcement of the new Criminal Code (KUHP) in Indonesia has generated a variety of perspectives within society, including among customary law communities such as Sembalun Village and Bangket Parak Village, which continue to uphold and implement customary law as outlined in the villages' awig-awig (traditional regulations). Based on interviews with local customary leaders Martawi and Lalu Purnama Agung, customary law is understood not merely as a set of social rules but

⁵⁰ Barda Nawawi Arief, *RUU KUHP BARU: Sebuah Restrukturisasi/Rekontruksi Sistem Hukum Pidana Indonesia*, Cet. 10 (Semarang: Pustaka Magister, 2022).

⁵¹ Sutanti dkk., "Derecho consuetudinario como instrumento de justicia restaurativa: un enfoque alternativo para la resolución de conflictos penales en sistemas jurídicos plurales."

as a collective identity, cultural heritage, and value system containing historical and philosophical meanings that are believed and internalized by the community.

According to Lalu Purnama Agung, the process of national law development and formation should ideally heed, acknowledge, and preserve customary law as an integral part of each region's character and uniqueness. The existence of customary law is seen as vital to prevent it from being eroded by the tides of modernization and cultural acculturation, and it can even function as a primary bulwark in filtering external cultural influences that are not in harmony with local values. This view is considered relevant, given that customary law in Sembalun Village and Bangket Parak Village is substantially influenced by Islamic teachings, thereby possessing strong social and moral legitimacy within the community.

Regarding the provisions in the new Criminal Code that recognize customary law as a basis for criminal prosecution, both Martawi and Lalu Purnama Agung welcomed this policy positively. This recognition is regarded as a form of respect and state legitimacy for the existence of living customary law within society. With such recognition, village awig-awig is believed to play a more effective role in governing community behavior and maintaining social harmony. According to Martawi and Lalu Purnama Agung, in practice, customary law is often more effective than state law in preventing and resolving violations, as people tend to be more fearful of customary sanctions that carry the social stigma of being “uncivilized” or “without custom.”

State law, which constitutes positive law, is enforced on the basis of statutory provisions; this is heavily influenced by rationalist thought, which has long emphasized the use of logic in the style of Levi-Strauss. Consequently, the law that is enforced is rational, mechanistic, and linear

in nature, and is based solely on statutory provisions established through formal mechanisms; the value that is prioritized is that of legal certainty.⁵²

Such rationalism means that aspects of belief, including myths and customary law, have no place within the law. The law is seen as something pure or free from social, cultural, economic, and even mythical aspects of society. John Austin stated that law is merely a command from a sovereign authority, created in accordance with formal, rational procedures and backed by sanctions. Law as text is also one of the legacies of Civil Law established by Emperor Justinian, marked by the formation of the *Corpus Juris Civilis*.⁵³

Emperor Justinian emphatically declared that the law was this code of statutes and that law enforcement officials were not to draw upon any source of law other than the statutes. In other words, law enforcement officials were to be made the mouthpieces of the statutes.

The perspectives of the community leaders of Sembalun and Bangket Parak Villages essentially express appreciation for the opening up of opportunities for the application of customary law in criminal law enforcement. This application is considered to not only function to maintain social order but also to sustain the traits, character, and identity of customary communities in the village. The formulation of village *awig-awig* aims to preserve, protect, and develop customary law that has long been practiced so that it is not lost from one generation to the next. This demonstrates that, empirically, customary law is not always unwritten; rather, in certain contexts, it undergoes a process of local codification without losing its fundamental values. Thus, these *awig-awig*, each ratified in the form of village regulations, reflect the existence and application of customary law.

⁵² Dan Priel, "Legal Positivism and Naturalistic Explanation of Action," *Law and Philosophy* 43, no. 1 (2024): 31–59, <https://doi.org/10.1007/s10982-023-09479-9>.

⁵³ Brian H. Bix, "John Austin and Constructing Theories of Law," dalam *The Legacy of John Austin's Jurisprudence*, vol. 103, ed. oleh Michael Freeman dan Patricia Mindus, Law and Philosophy Library (Springer Netherlands, 2013), https://doi.org/10.1007/978-94-007-4830-9_1.

Interestingly, one provision in the village awig-awig stipulates that if there is a customary violation or customary offense that is not explicitly regulated, its resolution shall be undertaken through a deliberative consensus mechanism with the accompaniment of traditional leaders. This provision shows that even if an act has not been written down, the perpetrator is still held accountable based on customary values and consensus. Consequently, the flexibility of customary law is maintained without neglecting the principle of accountability, while simultaneously demonstrating the pre-existing and adaptive nature of customary law in the face of social change.

Conceptually, customary violations stem from unwritten and dynamic laws; therefore, the scope of actions classified as violations may change as customary legal values evolve and times change. An act that was once considered a customary violation may lose its relevance at another time, and, conversely, actions not previously seen as violations may be criminalized by the customary community if they are viewed as disturbing social balance and harmony.⁵⁴

According to community leaders, the primary objective in addressing customary criminal acts is not retribution but rather conflict resolution, the restoration of social balance, and the maintenance of harmony and solidarity within the community. This approach is in line with the provisions of Article 51, letter c, of the New Criminal Code.⁵⁵

More broadly, customary criminal law plays a strategic role in maintaining the social order and cultural identity of Indigenous communities. Although it faces challenges in integrating with the state's formal legal system, its emphasis on restorative justice and community-

⁵⁴ A. Syaafi, "Social prohibitions as a form of communal value to maintain the interests of collective life of dayak tribe in central Kalimantan," *International Journal of Scientific and Technology Research* 8, no. 11 (2019): 44–47, Scopus, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85075069490&partnerID=40&md5=df0a292e91432ae154d409d6e2b25a33>.

⁵⁵ Barda Nawawi Arief, *Tujuan dan Pedoman Pemidanaan (Perspektif Pembaharuan & Perbandingan Hukum Pidana)*, 8 ed. (Semarang: Pustaka Magister, 2022).

based resolution offers an important perspective for developing the national criminal law. According to researchers, customary criminal law also serves as an effective mechanism of social control, preventing deviations and maintaining the existence of social groups. Through a sociological approach oriented toward restoring the original state, customary criminal law helps preserve order, uphold social values and norms, and strengthen legal pluralism.

Thus, the perspectives of indigenous community leaders in Sembalun and Bangket Parak villages regarding the recognition of customary law in the New Criminal Code represent a strategic step that not only respects customary law as the cultural heritage and collective identity of indigenous communities but also strengthens the role of customary law in maintaining social order and community harmony. Through restorative approaches and consensus-based dispute-resolution mechanisms, customary criminal law can offer adaptive, contextual solutions to social dynamics while simultaneously reinforcing legal pluralism in Indonesia. Therefore, the integration of customary law into the national criminal justice system creates space for the protection of local values while supporting the realization of more comprehensive and sustainable justice in society.⁵⁶

D. Problems in the Recognition of Indonesian Customary Criminal Law

The positive perspective put forward by this figure becomes particularly interesting to examine, given that, empirically, the existence and function of customary law in society often carry a stronger binding force and deterrent effect than state law. Customary law serves not only as an instrument for regulating social order but also as a representation of local identity, a manifestation of cultural values, and a bulwark against the

⁵⁶ Lusiana Margareth Tijow dkk., "The Urgency of Bajo Traditional Law as a Form of Law Enforcement Against the Performers of the Samenleven Delic," *Jurnal Ilmiah Al-Syir'ah* 19, no. 2 (2021): 256, <https://doi.org/10.30984/jis.v19i2.1422>.

currents of globalization. Sembalun and Bangket Parak Villages, which differ in geographic location, display distinctive characteristics in their regulation and handling of customary violations. These differences reflect the diversity of customary law practices that have developed according to the social and cultural conditions of each village in the district.

Notably, in the awig-awig (customary regulations) of Bangket Parak Village, there is a mechanism for resolving actions not explicitly regulated in written provisions, yet are empirically viewed as violations of custom. In such situations, resolution is achieved through deliberation with customary leaders, ensuring the perpetrator remains accountable for their actions. This mechanism is consistent with the flexible and dynamic nature of customary law. Thus, awig-awig can be understood as both a portrait and a means of documenting customary legal values so that they are not eroded by changes over time, as well as an effort to preserve customary law without limiting the possibility of new forms of customary violations emerging within society.

A critical evaluation is needed regarding the provisions of Article 2, paragraph (3) of the new Criminal Code (KUHP), which requires customary criminal law to be stipulated in the form of a Regional Regulation.⁵⁷ Empirically, in Sembalun Village and Bangket Parak Village, customary law is regulated through village awig-awig, which are derived from local values and culture and established by village regulations. This establishment aims to preserve customary law without eliminating its unique characteristics, allowing it to continue to develop dynamically in accordance with community values.⁵⁸

⁵⁷ Jansen Edinata Simanjuntak dkk., "Customary Law and Multiple Legal Systems in Criminal Justice: Indonesia's Penal Reform Experience," *Architecture Image Studies* 6, no. 3 (2025): 1864–80, <https://doi.org/10.62754/ais.v6i3.528>.

⁵⁸ Deri Ardiansyah dkk., "Formulasi RPP Pelaksanaan Pidana Adat sebagai Upaya Harmonisasi Penerapan Hukum Adat guna Mewujudkan Kepastian Hukum," *WICARANA* 3, no. 1 (2024): 11–22, <https://doi.org/10.57123/wicarana.v3i1.64>.

When customary law is codified into Regional Regulations, which serve as administrative law tools in the exercise of regional autonomy, the situation is different. In the framework of regional government administration, it is incorrect to include infractions of customary law into regional regulations as part of state law. Regulating customary criminal conduct under state law risks formalizing customary law, thereby limiting its flexibility and unique qualities rather than giving it meaningful recognition.

Based on this, it can be understood that the formalization of customary criminal law through Regional Regulations is solely intended to provide legal certainty. Still, it also carries the risk of eroding the normative pluralism that has long been rooted in customary institutions. The codification of customary criminal law, particularly when it specifies the types of customary offenses and their sanctions, can limit the development of customary law, which is contextual and dynamic. In such circumstances, customary criminal law is at risk of shifting from the principle of material legality to that of formal legality, thus losing its distinctiveness as a living law in society.⁵⁹

The legal-formal approach holds that law is a complete normative system capable of comprehensively regulating all social issues. Within this framework, the law is positioned solely as a set of rules that determine which actions are permitted and which are prohibited, with the law's truth monopolized by the state. This perspective gives rise to a construct in society in which modern law is synonymous with state law, which derives from a written constitution and is consciously established by humans through legislative mechanisms.

Before the implementation of the modern legal system in Indonesia, society had already recognized customary law as a legal system that grew

⁵⁹ G. E. Rusdi Antara dkk., "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, Scopus, <https://doi.org/10.33096/substantivejustice.v4i2.149>.

and developed within its social life. Therefore, in dispute resolution, the concept of justice was not only based on the provisions of written law but also on the living, recognized values of justice within the community.⁶⁰

The reform of Indonesian criminal law has revived customary criminal law, which the positivistic view of positive law has long submerged.⁶¹ This effort is not intended to provide space for the recognition and applicability of customary criminal law, which should, of course, be part of realizing a just and prosperous society.⁶²

To date, customary criminal law is often perceived as a conventional and outdated legal system, causing judicial practice to lean more toward the application of modern law, which emphasizes procedural aspects and normative certainty over customary law. As a result, the judicial process tends to deliver only formal justice, unable to restore social balance. This has triggered various forms of public dissatisfaction with the enforcement of criminal laws in Indonesia.

Law enforcement, which places too much emphasis on formalism and the textuality of statutory regulations, tends to fulfill only the aspect of legal certainty, while substantive justice risks being neglected. Therefore, the imperfections of positive legal norms must be overcome through progressive legal interpretation, making justice the principal consideration for judges in deciding cases.

A concrete example is the case of Yakobus Ture Boro, acting as the traditional leader (Mosalaki) of KEKU, Imelda Goti, and Fenansius Dae, who were sentenced to imprisonment for allegedly committing defamation through traditional chants or shouts directed at an individual

⁶⁰ Rahmat Hi. Abdullah, "Urgensi Hukum Adat Dalam Pembaharuan Hukum Pidana Nasional," *FIAT JUSTISIA:jurnal Ilmu Hukum* 9, no. 2 (2016), <https://doi.org/10.25041/flatjustisia.v9no2.595>.

⁶¹ Barda Nawawi Arief, *Beberapa Aspek Pengembangan Ilmu Hukum Pidana (Menyongsong Generasi Baru Hukum Pidana Indonesia)*. (Pidato Pengukuban Guru Besar) (Semarang: Badan Penerbit Undip, 2007).

⁶² Ade Adhari dkk., "Customary Delict of Penglipuran Bali in the Perspective of the Principle of Legality: A Dilemma and Arrangements for the Future," *Journal of Indonesian Legal Studies* 6, no. 2 (2021): 411–36, <https://doi.org/10.15294/jils.v6i2.50555>.

(Yohanes Dhosa Nay), pursuant to judgment number 53/Pid-B/2024/pn. BJW on Thursday, 30 January 2025; however, on appeal, all three defendants were acquitted by the judges of the Kupang High Court in judgment number 22/PID/2025/PT KPG because traditional chants cannot automatically be classified as defamation. The social and cultural (traditional) context must be taken into account when assessing such acts.

This situation underscores that customary law, so long as it remains alive and relevant, is a legitimate part of the national justice system and does not require formalization in local regulations to be applied; therefore, it is for judges to explore and understand the living and evolving aspects of society to deliver justice, which may formally involve customary leaders, indigenous communities or traditional elders to ascertain these matters. Undoubtedly, this will present both an opportunity and a challenge for judges to learn to understand the legal framework within which they operate; naturally, within the Indonesian context, this will vary from region to region in accordance with the values and norms held and practiced. Thus, judges are not merely ‘legal technicians’ who apply the law.

If judges, as God’s representatives on earth, ignore the living law in society and sideline customary criminal law, the meaning of law will be limited to the literal text of statutory regulations. This narrow approach distances the law from its main objectives: upholding justice and societal welfare. In the customary law system, judges have the authority and indeed the duty to issue rulings that reflect the sense of justice prevailing in society at that time, should a matter not be covered by statutory law (positive law); judges are obliged to give concrete expression to this through their rulings. What is decided by the judge through their ruling must be in line with the living law within the community, so that the arrangement is not based on something imposed, but on something that is indeed reasonable and must be accepted and followed.

E. Context of Legal Pluralism in the Recognition of Customary Criminal Law in the New Indonesian Penal Code (KUHP)

Legal pluralism emerged as a reaction to the centralized legal approach, which overlooked the diversity and social complexity of society. This approach emphasizes the importance of recognizing various sources of law, thereby balancing state law with other systems, such as customary and religious law. Legal pluralism demonstrates that society is diverse, with groups that have different traditions and rules governing them. This implies that people possess different ways of understanding the law.⁶³ By acknowledging multiple legal systems, the judiciary can gain greater public trust by respecting local and traditional values in the process.

In this context, legal pluralism provides an approach to various legal rules in society. It involves interactions between state and non-state laws, such as customary and religious law.⁶⁴ John Griffiths divides legal pluralism into two forms: weak pluralism and strong pluralism. Weak pluralism refers to the recognition of non-state law, but its position remains subordinate to state law. Meanwhile, strong pluralism refers to a condition in which non-state law is on equal footing with state law and can be applied independently, without being fully dependent on national law.⁶⁵

The diversity of customary law between Sembalun Village and Bangket Parak Village must certainly be preserved to strengthen legal pluralism in Indonesia. The provisions relating to the customary law of these two villages are set out in the form of awig-awig as an effort to

⁶³ Ning Adiasih dan Mulya Sarmono, "Overview Pluralism Law: Application Ammatoa Customary Crime Kajang, Bulukumba, South Sulawesi After the New Criminal Code Law," *Revista de Gestão Social e Ambiental* 18, no. 6 (2024): e05864, <https://doi.org/10.24857/rgsa.v18n6-059>.

⁶⁴ S. Zubaidah dkk., "Integrating Tradition into Legal Reform: Reconstructing the Role of Reconciliatory Customary Judges in Diversion Processes within the Interplay of Islamic, Customary, and National Law," *Jurnal Ilmiah Mizani* 12, no. 2 (2025): 56–70, Scopus, <https://doi.org/10.29300/mzn.v12i2.8439>.

⁶⁵ Xinyue Li, "Legal Pluralism," dalam *International Law*, oleh Xinyue Li (Oxford University Press, 2024), <https://doi.org/10.1093/obo/9780199796953-0258>.

preserve and protect them, and to serve as a guide for community behavior within the social order, whether between individuals, between individuals and their environment, or between individuals and their God, thereby fostering harmony and balance.

This is the reality of the situation; consequently, as explained in the Report of the Sixth National Law Seminar of 1994, written law and unwritten law should be complementary. This is based on the fact that the formation of unwritten law is more flexible than that of written law, as it can bridge the gap between the legality of a law and its effectiveness, and customary law is an important source of law in national life.⁶⁶ Therefore, in light of this reality and with reference to the provisions of Article 50(1) of Law No. 48 of 2009, which states that court decisions must include the grounds for the decision, whether based on written law or unwritten law, the diversity of law found in Indonesia must be preserved and recognized, rather than being subordinated to the provisions of state law.

According to Brian Z. Tamanaha, legal pluralism is often confronted with uncertainty, which is regarded as a weakness of the theory. Nevertheless, this criticism is not entirely accurate, as the root of such potential conflict lies in the power imbalance among the various regulatory systems.⁶⁷ This aligns with Werner Menski's view, in which he introduced three main norms in society: state law, religious law, and customary norms. These three norms should be maintained and protected to ensure their continued implementation. Therefore, customary law needs to be protected to ensure its values are continuously applied and to strengthen and complement state and religious law.⁶⁸

⁶⁶ Barda Nawawi Arief, *Kumpulan Hasil Seminar Hukum Nasional Ke Is/d VIII dan Konvensi Hukum Nasional 2008 tentang UUD 1945 Sebagai landasan Konstitusional Grand Design Sistem dan Politik Hukum Nasional*, Terbitan Ketiga (Semarang: Pustaka Magister, 2011).

⁶⁷ Brian Z. Tamanaha, "Law and Society," *St. John's Legal Studies Research Paper* 09, no. 0167 (2009): 1–24, <http://ssrn.com/abstract>.

⁶⁸ Werner Menski, "Flying Kites in a Global Sky: New Models of Jurisprudence," *Socio-Legal Review* 7, no. 1 (2011): 1, <https://doi.org/10.55496/JZEO6754>.

This view is undoubtedly heavily influenced by the school of rationalism discussed in the previous discussion; furthermore, the principle of legality in criminal law is deeply rooted in the enforcement of the law in Indonesia, which, in practice, leaves no room for customary law. It is worth noting, in relation to legal certainty under Article 28 of the 1945 Constitution, that this provision implies that the 1945 Constitution does not merely use the phrase 'legal certainty' but rather 'fair legal certainty', and never equates legal certainty with the certainty of the law as defined by the principle of legality in the old Criminal Code.

Fair legal certainty is in line with Article 2(2) of Law No. 48 of 2009, which states: the state judiciary shall apply and uphold the law and justice in accordance with Pancasila. Thus, this provision embodies the principle of balance and provides a more substantive meaning, rather than merely formal certainty based on the letter of the law. Quoting her opinion, Marjanne Termorshuizen explains that the view that a *lex scripta* can be *certa*, that is to say certain, in the sense of unambiguous, cannot be maintained. There is no such thing as a legal provision that is unambiguous in all circumstances.⁶⁹

The reality in the villages of Sembalun and Bangket Parak is that, although customary law is codified in the form of *awig-awig*, this does not in fact hinder the development of their customary law; moreover, if a breach of custom occurs that is not covered by these provisions, it will be resolved through consultation with the village's customary leaders. It is important to understand that legal certainty is maintained without disregarding the values of justice within the community. Flexible and dynamic customary law does not necessarily imply a lack of legal certainty.

The prohibition of unwritten law in the old Criminal Code⁷⁰, which was based on the principle of legality, is irrelevant to the spirit of the 1945

⁶⁹ Arief, *Perkembangan Asas Asas Hukum Pidana Indonesia Perspektif Perbandingan Hukum Pidana*.

⁷⁰ Arief, *Beberapa Aspek Pengembangan Ilmu Hukum Pidana (Menyongsong Generasi Baru Hukum Pidana Indonesia)*. (Pidato Pengukuhan Guru Besar).

Constitution; the emergence of the principle of legality (during the French Revolution) stemmed from the (unwritten) law of the king or ruler. This cannot be equated with unwritten law in Indonesia, which is essentially the law of the people, particularly Article 5(1) of Law No. 48 of 2009, whereby judges are obliged to explore, follow and understand the legal values and sense of justice that exist within society, and referring to the provisions of Article 53(1) and (2) of the new Criminal Code, which guide judges in handling criminal cases to uphold the law and justice, and if there is a conflict between legal certainty and justice, the judge shall prioritize justice.

Therefore, the complementary nature of the seminar's findings is, in fact, legally grounded in the Constitution and existing national legislation; sociologically, the *awig-awig* in both villages provide the means to maintain public order. It is therefore entirely inappropriate to pit legal certainty against the development of customary law.

Based on these viewpoints, Indonesia tends toward weak legal pluralism. This is due to the recognition of customary criminal law, as found in Article 2, paragraph (3), where the applicable provisions of customary criminal law are to be regulated in a Government Regulation, which will then serve as the basis or guideline for accommodating customary criminal law at the regional level in the form of Local Regulations.

Ismansyah states that within the framework of legal pluralism, the state should not monopolize law enforcement. On the contrary, the state needs to recognize and integrate the laws that develop in society, such as customary and religious laws, without obligating them to be codified in written form. Article 2 of the New Penal Code limits the applicability of customary law to cases not yet regulated in the Penal Code, even though almost all criminal acts are already covered in the Penal Code. As a result, customary law is only symbolically recognized in legislation, experiencing

what is termed a 'normative death.' Customary law is still respected culturally, but it loses its substantive function.⁷¹

Customary criminal law pays strong attention to the sociological aspects of society. It must be remembered that the law is not just a set of rules that exist in a vacuum but is present within a dynamic societal context. The manifestation of law depends on factual conditions and is influenced by social processes in a community. Therefore, with the new Penal Code, future law enforcement should not only look at the texts of statutory regulations within the Penal Code or laws outside it, but must also consider sociological aspects by referring to the living law within society, namely, customary criminal law.

The provision of Article 2, which acknowledges the living law within society, directly impacts criminal law enforcement. This is based on the core idea of balancing community interests, formal and material criteria, justice, and legal certainty. An act can be punished if it is against the law and/or against the law in society. Thus, judges assess criminal responsibility based on both formal and material aspects, making this provision a counterbalance to the formal legality principle that has operated until now.⁷²

Law enforcement often produces injustice when applied without regard to the social context. This occurred with the old Penal Code, which emphasized formal legality without material legality and adopted individualistic and liberal perspectives that were less suited to Indonesia's social conditions, leading law enforcement officials to judge cases solely based on the letter of the law without understanding the sociological context. In legal positivism, legal truth is equated with the authority's

⁷¹ Hanifah Dwi Jayanti, *Polemik Hukum Adat Minangkabau yang Terancam Hilang dalam Bayang Regulasi KUHP Nasional*, 21 Oktober 2025, <https://www.hukumonline.com/berita/a/polemik-hukum-adat-minangkabau-yang-terancam-hilang-dalam-bayang-regulasi-kuhp-nasional-lt68f9dae303a05/?page=3>.

⁷² Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana, Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana-Prenada Media, 2008).

decree, regardless of social reality, history, or political interests; thus, law, justice, and truth are measured solely by the ruler's decisions.⁷³

According to E. Ehrlich's living law concept, customary law should not be separated from state law. The state's positive law can still guarantee social effectiveness and accommodate the living law principle.⁷⁴ Living law is part of Indonesia's pluralistic legal system, integrating written law and customary practices. A sociological understanding of society is crucial to ensure that the law does not operate mechanistically and become alienating. Law is always tied to social, economic, and political contexts; thus, its existence is intended to serve humanity, not vice versa.

Upholding the law purely through regulations is a minimalist legal approach; a just legal system is a national law whose implementation can consider and engage with the prevailing moral norms of local communities, which are still believed to be true by those societies.⁷⁵

Therefore, the recognition of customary law in the Penal Code must be balanced with an implementation that respects diversity and local wisdom so that legal pluralism is maintained and the national judicial system can be trusted by indigenous communities.⁷⁶ The hopes of the indigenous communities of Desa Sembalun and Desa Bangket Parak are optimistic, yet they should remain critical by underscoring the need for real space for the continuity and strengthening of customary law as a foundation for maintaining social order and harmony.

⁷³ Jonaedi Efendi, "Application of Procedural Justice vis a vis Substantive Justice in Law Enforcement," *Arena Hukum* 17, no. 2 (2024): 270–89, <https://doi.org/10.21776/ub.arenahukum2024.01702.3>.

⁷⁴ O. V. Shcherbaniuk dan A. Z. Manyk, "The Concept of 'Living Law' by E. Ehrlich from the Point of View of the Specificity of Social Relations in the Globalized World," *Analytical and Comparative Jurisprudence*, no. 4 (September 2023): 652–56, <https://doi.org/10.24144/2788-6018.2023.04.102>.

⁷⁵ Vincentius Setyawan dan Bariah Safrut, *Rethinking Law and Justice: The Core Principles of Critical Legal Studies against Legal Formalism*, 10 Oktober 2025, <https://doi.org/10.5281/ZENODO.17332128>.

⁷⁶ Masyhar dkk., "Reclaiming the Unwritten: Living Law's Prospects under Indonesia's 2023 Penal Reform."

Conclusion

This study confirms that the formalization of customary criminal law in the form of local regulations risks undermining its dynamic nature, as can be seen empirically from the evolution of customary criminal offences in the villages of Sembalun and Bangket Parak, which have undergone changes oriented towards the communal interests of the indigenous communities. Moreover, customary criminal law operates in tandem to preserve ancestral traditions whilst being able to adapt to societal developments; consequently, the customary criminal law in these two villages differs in accordance with social developments, values, norms, and the needs of the community.

The indigenous communities in both villages have codified customary criminal law in the form of awig-awig, with the aim of protecting and preserving it, whilst not restricting or hindering the development of customary criminal law within the community. The views of the traditional leaders in the villages of Sembalun and Bangket Parak reflect a positive response to the recognition of customary criminal law in the new Criminal Code, and the reality is that the community fears customary law and its sanctions more than state law.

In light of this view, the provisions of Article 2 should be limited to paragraph (1) as a balance between formal and substantive provisions, and paragraph (2) as a guideline for judges in exploring, understanding and applying the living law within society to achieve justice; thus, there is no need for such provisions to be regulated in local regulations as explained in paragraph (3). Essentially, if such customary criminal law remains in force and relevant, it constitutes a legitimate source of law and reflects the character of Indonesian criminal law within a diverse society.

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