

The Urgency of Integrating Customary Sanctions in the National Criminal System as a Form of Restorative Justice in Biak Numfor Based on Law Number 1 of 2023 concerning the Criminal Code

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Abstrack

This research aims to analyze the legal arrangements regarding the recognition of the law that lives in society in the 2023 Criminal Code (KUHP) and examine the urgency of integrating customary sanctions in the national penal system, especially in Biak Numfor Regency, as a manifestation of restorative justice. The research method used is normative-empirical legal research, with a legislative, conceptual, and sociological approach, through literature study and analysis of customary case settlement practices in Biak Numfor. The results of the study show that normatively, Article 2 of the 2023 Criminal Code provides a clear legal basis for the recognition of living law as a source of national criminal law. Philosophically, the recognition is in line with the values of Pancasila, the theory of Volksgeist Savigny, and the principle of restorative justice that emphasizes the restoration of social relations. Meanwhile, sociologically, customary settlement practices in Biak Numfor have proven effective in creating peace, strengthening legal legitimacy, and reducing the burden of formal justice. This study emphasizes that the integration of customary sanctions into the national penal system is a strategic step towards a legal system that is humanistic, socially just, and rooted in the local values of Indonesian society.

Keywords: customary law, living law, restorative justice

Abstrak

Penelitian ini bertujuan untuk menganalisis pengaturan hukum mengenai pengakuan hukum yang hidup dalam masyarakat dalam Kitab Undang-Undang Hukum Pidana (KUHP) Tahun 2023 serta menelaah urgensi integrasi sanksi adat dalam sistem pidana nasional, khususnya di Kabupaten Biak Numfor, sebagai perwujudan keadilan restoratif. Metode penelitian yang digunakan adalah penelitian hukum normatif-empiris, dengan pendekatan perundang-undangan, konseptual, dan sosiologis, melalui studi literatur dan analisis terhadap praktik penyelesaian perkara adat di Biak Numfor. Hasil penelitian menunjukkan bahwa secara normatif, Pasal 2 KUHP 2023 memberikan dasar hukum yang jelas bagi pengakuan living law sebagai sumber hukum pidana nasional. Secara filosofis, pengakuan tersebut selaras dengan nilai-nilai Pancasila, teori Volksgeist Savigny, dan prinsip keadilan restoratif yang menekankan pemulihan relasi sosial. Sementara secara sosiologis, praktik penyelesaian adat di Biak Numfor terbukti efektif dalam menciptakan perdamaian, memperkuat legitimasi hukum, dan mengurangi beban peradilan formal. Penelitian ini menegaskan bahwa integrasi sanksi adat ke dalam sistem pidana nasional merupakan langkah strategis menuju sistem hukum yang humanis, berkeadilan sosial, dan berakar pada nilai-nilai lokal masyarakat Indonesia.

Kata Kunci: , hukum adat, living law, keadilan restoratif

A. Introduction

The reform of Indonesia's criminal law system has reached an important momentum with the promulgation of Law Number 1 of 2023 concerning the Criminal Code (KUHP) (hereinafter "the 2023 Criminal Code") which will be enforced effective from January 2, 2026.¹ The 2023 Criminal Code introduces a number of new paradigms, including the recognition of "laws that live in society" (*living law*) as stated in Article 2 paragraph (1).² Of course, in the latest regulation, this marks a shift

¹ JDIH of the Coordinating Ministry for Infrastructure and Regional Development, "Law 1/2023: Criminal Code (KUHP)," 2023, https://jdih.kemerkoinfra.go.id/uu-12023-kitab-undang-undang-hukum-pidana-kuhp?utm_source=chatgpt.com.

² Dissecting Living et al., "Criminal Perspectives and Types of Sanctions," 2024, 349–73.

in the paradigm of national criminal law from a legalistic-positivistic system to a more contextual and inclusive system of the socio-cultural values of the Indonesian people.³

Since the colonial period, the penal system in Indonesia has been heavily influenced by the continental European legal tradition that emphasizes *legal certainty* and the principle of legality (*nullum crimen, nulla poena sine lege*).⁴ Of course, through the approach that has been implemented, it has provided formal clarity, but often ignores the social reality that lives in the midst of a pluralistic Indonesian society and is full of customary values and local moral norms. It is in this context that the 2023 Criminal Code seeks to present a criminal law that is not only oriented towards the enforcement of written norms, but also respects the values of customary law as a source of legitimacy for social justice.⁵

For indigenous peoples in Papua, customary law is the main instrument in maintaining social balance. Every sanction and violation (both violent offenses, theft and social) in this case is resolved through a customary mechanism that emphasizes the restoration of relations between members of the community, unlike in positive law, namely by depriving them of life, retribution and imprisonment. The settlement model carried out by indigenous peoples in this case certainly holds the principle of restorative justice (*restorative justice*) yang dalam hal ini telah diakui secara global sebagai pendekatan pemidanaan yang lebih humanis dan berorientasi pada rekonsiliasi.

The idea of restorative justice did not emerge out of nowhere; conceptually it was rooted in the old idea that conflict and crime were violations of social relations. Early figures who formed this framework of thought included Nils Christie (1977) with the idea of "conflicts as property" which emphasized the right of participation of parties to the dispute, as well as early writings that distinguished between retributive and restorative approaches. Modern pioneers who popularized the term and practice of restorative justice include Howard Zehr (book *Changing Lenses*, 1990) who became the main reference on the concept of shifting the lens of view: from "crime as a violation against the state" to "a violation against human beings and relationships."⁶ From the late 1970s to the 1990s, victim-perpetrator mediation initiatives, restitution programs, and community reconciliation practices emerged (*victim-offender mediation, family group conferencing, circle processes*).

There are many customary *law practices* in various communities including indigenous communities in Indonesia. In this case, sanctions and violations emphasize settlements that restore social harmony such as with, restitution, ceremonies, and payment of a number of glassware). When the state ignores or marginalizes customary mechanisms, there is often social distance between the community and formal law enforcement agencies. Recognizing the role of customary can increase the legitimacy of the justice system and community compliance with case resolution. Nevertheless, integration must ensure that customary practices do not violate fundamental human rights. Various studies in this regard emphasize the need for harmonized standards so that integration does not cause norm inconsistencies.⁷

In the context of indigenous peoples in Indonesia (especially in Biak Numfor), the customary law system has long served as a mechanism for resolving conflicts and distinctive social violations. Empirical studies show that in many cases indigenous peoples in Papua opt for customary sanctions mechanisms that emphasize the restoration of relationships between perpetrators, victims and communities, rather than mere formal criminal retribution.⁸ But unfortunately, until now, the

³ ZAINAL ARIFIN et al., "A Does Media Play an Important Roles in Regional Election? A Pers Law Perspective," *Pena Justisia: Media Komunikasi dan Kajian Hukum* 24, no. 1 (1 Maret 2025): 253–71, <https://doi.org/10.31941/pj.v24i1.5777>.

⁴ Zainal Arifin dan Emi Puasa Handayani, "Cybercrime: Menyelisik Penegakan Hukum dan Penanggulangannya," 2023.

⁵ Parningotan Malau, "Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023," *None*, 2023, <https://doi.org/https://doi.org/10.37680/almanhaj.v5i1.2815>.

⁶ Lasmin Alfies Sihombing, "Restorative Justice, Crime, Punishment, and Criminal Justice: A Historical Analysis, Opportunities and Challenges," *UNES Law Review* 6, no. 3 (2024): 8902–11.

⁷ Klara Dawi et al., "Pengakuan Hukum yang Hidup dan Asas Legalitas dalam KUHP Nasional: Kajian Perbandingan antara Indonesia dan Belanda," *Arus Jurnal Sosial dan Humaniora* 5, no. 2 (Agustus 2025): 2945–51, <https://doi.org/10.57250/ajsh.v5i2.1567>.

⁸ Budiyanto Budiyanto, "The Application of Restorative Justice in the Settlement of Customary Deliques," *Papua Law Journal* 1, no. 1 (October 25, 2018): 81–100, <https://doi.org/10.31957/plj.v2i2.582>.

customary law mechanism in Papua is still often on the fringes of the national legal system. Many criminal cases that have been settled customarily are still formally processed by law enforcement officials, as if customary settlements do not have legal force. On the basis of this fact, this situation creates a gap between formal justice and social justice, which ultimately weakens the legitimacy of the criminal justice system in the eyes of indigenous peoples.

Through the 2023 Criminal Code (hereinafter referred to as the Criminal Code), with its explicit recognition of living law, offers an important opportunity to bridge the gap. As in Article 2 paragraph (1) and Article 2 paragraph (2). So in this case, it is a normative basis that recognizes the existence of customary law and opens up opportunities for the integration of customary sanctions in the national criminal system in Article 2 of the 2023 Criminal Code. In addition, the state paved the way for the integration of the customary law system into the national criminal framework. However, on the other hand, this opportunity also presents a great challenge in terms of the implementation and consistency of the application of restorative justice principles.

Although the recognition of the law that lives in society has been normatively regulated, its application in the criminal justice system does not yet have clear operational guidelines. But in practice, law enforcement officials still adhere to a positive legal paradigm, so customary settlements are often not considered in formal legal processes.

Based on the description above, the formulation of this research problem can be described as follows

1. What are the legal arrangements regarding the recognition of the law that lives in society in the 2023 Criminal Code?
2. What is the urgency of integrating customary sanctions into the national penal system in Papua as a form of restorative justice?

The purpose of the research in this case is

1. In order to find out the legal arrangements regarding the recognition of the law that lives in society in the 2023 Criminal Code
2. In order to understand the urgency of integrating customary sanctions in the national penal system in Papua as a form of restorative justice

Literature Review

Penelitian sebelumnya tentu telah dilakukan oleh peneliti terdahulu, namun dalam hal ini terdapat beberapa perbedaan yang belum pernah dilakukan penelitian sebelumnya diantaranya.

1. Journal by Nazla Husnayain Legal Politics Towards the Integration of Restorative Justice in Law Enforcement Practice in Indonesia. The research aims to evaluate the role of legal politics in the adoption of restorative justice and conformity with national criminal law. The research discusses, among other things, the politics of Indonesian law that are currently moving towards a more humanist and restorative paradigm of justice. This is reflected in legal policies that emphasize the settlement of cases through peace and social recovery. Although normatively there have been many supportive policies, the implementation of restorative justice still faces several obstacles, including a paradigm shift from *retributive justice* towards *restorative justice*. There are several regulations that have regulated related to restorative justice, including the National Police Chief's Regulation No. 8 of 2021, the Attorney General's Regulation No. 15 of 2020, as well as articles in the Criminal Code No. 1 of 2023, but there is no model of integration and implementation in practice and application.
2. Muhammad Rusli Arafat's Research, Challenges and Opportunities for Customary Law Integration in the Indonesian Criminal Law System After Law Number 1 of 2023 concerning the Criminal Code, The research aims to analyze the challenges that arise in efforts to integrate customary law into the national criminal law system after the enactment of Law No. 1 of 2023 concerning the Criminal Code and to find a conceptual model of how customary law can be accommodated without causing disharmony with the principles of legality, human rights principles, and legal certainty. The discussion in the resulting research is that there is no clear derivative rule in the implementation of Article 2 of the 2023 Criminal Code. Although the article has become a bridge between customary law and positive law, there are shortcomings that need to be completed. In addition, through the recognition of customary law, it will cause discrimination against vulnerable groups if customary sanctions are still biased. In addition, there

is a difference between customary law and positive law where it is written and unwritten, so it will pose a risk of legal uncertainty and subjective interpretation in law enforcement.

B. Research Methods

This research is a type of legal pluralism research which examines customary law and the codified positive law.⁹ This research uses a legal approach *socio-legal research*. The location of the research in this case is focused on Papua, especially in the Biak Numfor area, where there are 12 bars (areas) of customary law. The legal materials used in this case are by using *secondary data*, including primary legal materials, including Law Number 1 of 2023 concerning the Criminal Code, Law Number 48 of 2009 concerning Judicial Power, Law Number 39 of 1999 concerning Human Rights, Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua and jurisprudence. Secondary legal materials include books related to customary law and related legal materials, including legal encyclopedias, and indexes of relevant legal journals.

C. Discussion

Legal Regulations on the Recognition of Laws Living in the Community in the 2023 Criminal Code

After the passage of Law No. 1 of 2023 concerning the Criminal Code, of course this is a big breakthrough where in Article 2 Paragraphs (1) and (2) it has recognized the law that lives in society as one of the sources of legitimate criminal law. Of course, this Article philosophically and normatively marks a paradigm shift from a legalistic-positivistic legal system to a pluralistic and sociological legal system which means a shift from law as a "product of the state" to law as a "reflection of social values of society".

But in this case, it is necessary to look again at its application and implementation Which of course refers to several theories including *the stufenbau theory* initiated by Hans Kelsen and *the volkesit theory* initiated by Friedrich Carl von Savigny. According to Hans Kelsen in his work *Reine Rechtslehre* (Theory of Pure Law), explains that the legal system is built in the form of a tiered *hierarchy of Stufenbau des Recht*, where each norm derives its validity from a higher norm.¹⁰

In this context, Article 2 of the 2023 Criminal Code occupies a position as a legal norm, but in substance, it affirms the existence of social norms (customs) as part of the national legal system. In other words, the 2023 Criminal Code not only regulates norms sourced from *state law*, but also recognizes the validity of non-state law (customary)¹¹ as a norm in the lower layers of the national legal system. Hans Kelsen said that each norm gets its validity not only from its formal form, but from its conformity with the higher legal order. So in this case:

1. Customary law recognized by Article 2 of the Criminal Code obtains validity from the Law
2. The 1945 Constitution itself obtained validity from the grundnorm in the form of Pancasila as the basic norm of the state.

So that the recognition of the law that lives in society is hierarchically valid and constitutional because it is rooted in the highest source of the Indonesian legal system. In addition, in *stufenbau theory* legal norms have a dynamic character, where lower norms can adapt to social conditions as long as they do not conflict with higher norms. Article 2 paragraph (2) of the 2023 Criminal Code emphasizes this by providing a restriction that living law applies "as long as it is in accordance with the values of Pancasila, the general principles of the law of nations, and human rights." Thus, in this case, the latest Criminal Code has reflected *the stufenbau theory*, namely the highest norm (Pancasila), the intermediate norm (1945 Constitution & the Criminal Code) and the social norm (*Living law*). So based on this,

⁹ Emi Puasa Handayani dan Zainal Arifin, "IMPLEMENTASI PENYELESAIAN SENGKETA TANAH MELALUI MEDIATOR NON SERTIFIKAT DI KOTA KEDIRI," *ADHAPER: Jurnal Hukum Acara Perdata* 8, no. 1 (2022): 59–74.

¹⁰ Litya Surisdani Anggraeniko and Hesti Ayu Wahyuni, "The Development of Pure Law and Its Implementation in Indonesia," *J-LEE-Journal of Law, English, and Economics* 6, no. 1 (2024): 11–24.

¹¹ Ilham A Gani et al., *Introduction to Criminal Law (Theoretical, Principles, and Implementation of the New Criminal Code Law No. 1 of 2023)* (Widina Publisher, 2025).

there has been a change where previously the Indonesian legal system was monistic (Tunggal)¹² now becomes pluralistic-hierarchical, where customary law is placed as a legitimate sub-system in the national legal structure.

In contrast to the concept of *volkgeist* put forward by von Savigny, where he argued that law is not artificially created by the state, but grows and develops from the collective consciousness of the "*volkgeist*"¹³ society, Savigny argues, each nation has a unique social spirit, and law is an expression of the values, customs, and traditions that live in the midst of that society. A good state law, according to him, is a law that is in harmony with the soul of the people, not one that is imposed from outside.¹⁴

In the context of law in Indonesia, this *Volkgeist* is in line with the values of customary law that are lived and obeyed by people in various regions, including in Papua. By recognizing the law that lives in society, the 2023 Criminal Code has actually adopted the basic principle of Savigny's theory, namely that national law must reflect the soul and personality of the nation.

The Philosophical Foundation for the Recognition of Customary Law in the 2023 Criminal Code

The ratification of Law Number 1 of 2023 concerning the Criminal Code (KUHP) marks a fundamental transformation in the Indonesian criminal law system.¹⁵ This new Criminal Code not only replaced the colonial legacy (*Wetboek van Strafrecht voor Nederlandsch-Indië*), but also introduced a new paradigm that recognized the criminal law as part of a pluralistic social system. One of them is the recognition of Article 2 which provides recognition of the existence of living law in society (*living law*),

Based on the explanation of Article 2, this provision provides a normative basis for the recognition of customary law as a legitimate source of criminal law, as long as it does not contradict the basic principles of the state and human rights. According to Faradila, the arrangement that has been established is a form of reconciliation between the formal legal system and social reality, where the state recognizes that the law does not only come from the law, but also from the legal values that are alive and obeyed by the "*living law*" society.¹⁶ This is in line with the spirit of pluralistic constitutionalism mandated by Article 18B paragraph (2) of the 1945 Constitution which affirms that the state recognizes and respects the laws that live in society as long as it is in line with the development of society and the principle of the unitary state of the republic of Indonesia.

In addition, the recognition of the law as living in society has a strong philosophical basis in progressive legal theory and legal pluralism. According to Satjipto Rahardjo, law should be understood as a means to improve human welfare, not just a collection of written norms. The laws that live in society reflect the value of substantive justice that is often not accommodated by the text of the law.¹⁷ In addition, according to Sally Falk Moore through the *semi-autonomous social field* theory explains that each community has its own social mechanism to regulate behavior, which can coexist with state laws. In the Indonesian context, indigenous peoples in Papua, Bali, or Maluku, have long had an effective social sanctions system and conflict resolution mechanism without involving state apparatus.¹⁸

Apart from these several theories, of course, this legal recognition must also be sourced from the philosophy of Pancasila as a grundnorm in the national legal system. Pancasila demands that the law be a means to realize social justice that lives in the conscience of the people, not just a tool of

¹² Hasanuddin Hasim, "The Relationship of International Law and National Law from the Perspective of the Theory of Monism and the Theory of Dualism," *Mazhabuna: Journal of Comparative Schools*, 2019.

¹³ Philippe Nonet dan Philippe Selznick, *Hukum responsif* (Nusamedia, 2019).

¹⁴ M Zulfa Aulia, "Friedrich Carl von Savigny tentang hukum: Hukum sebagai manifestasi jiwa bangsa," *Undang: Jurnal Hukum* 3, no. 1 (2020): 201–36.

¹⁵ Zainal Arifin dan Emi Puasa Handayani, "Melawan Radikalisme Dengan Menyamakan Aras Membumikan Pancasila Di Masa Pandemi Lewat Media" 2, no. 1 (2021): 30–45.

¹⁶ Aulia Faradila, "Implications of the National Criminal Code on the Transformation of the Role of Prosecutors in Customary Law-Based Criminal Law Enforcement" 27 (2025), <https://doi.org/10.30595/pssh.v27i.1844>.

¹⁷ Satjipto Rahardjo, *Progressive Law Enforcement* (Kompas Book Publisher, 2010).

¹⁸ Khoirur Turmudzi, "The Application of Sally Falk Moore's Concept of Legal Pluralism in Conflict Resolution at the Local Government Level," *Journal of Law Caraka Justitia* 5, no. 1 (2025): 29–42.

coercion by the state. So that the existence of customary law and customary sanctions is a direct manifestation of the value of social justice Pancasila, because it comes from moral consensus and the value of togetherness in the community.¹⁹

As Notonagoro argues, Pancasila is not only the basis of the state, but also the source of national legal ethics, so that any legal reform must reflect the social values that live in society.²⁰

So that with the passage of the latest Criminal Code, it is not only a modern criminal codification, but also an instrument of recognition of the legal reality that lives in society, especially in areas that still uphold the customary law system.

The Urgency of Integrating Customary Sanctions in the National Penal System in Papua as a Form of Restorative Justice

The Normative and Philosophical Foundations of the Integration of Customary Sanctions in the National Criminal System

Based on some existing literature and looking at the national legal framework, it shows that the recognition of customary sanctions as part of the national penal system has gained strong legitimacy from the normative and philosophical sides. This is in line with Law No. 1 of 2023 concerning the Criminal Code, where Article 2 paragraphs (1) and (2) are the main basis for the recognition of customary law. As in the 1945 Constitution in Article 18B paragraph (2) of the 1945 Constitution. In this case, the provisions that have been passed affirm that a person can be convicted of an act that is not regulated in the law, as long as the act is recognized as a violation according to the law that lives in society, and does not contradict the values of Pancasila and the principles of human rights. So that the integration of customary sanctions into the national penal system has a strong rational basis in a positive legal manner.²¹

In addition, there is a shift in the legal system in Indonesia, which shows that the Indonesian legal system is starting to abandon the positivistic paradigm and move towards an integrative legal model,²² where customary law, religious law, and state law complement each other. In addition, the integration of customary sanctions into the national penal system is not a violation of the principle of legality (*nullum crimen sine lege*), but an expansion of this principle by adding the moral and social dimensions of the local community. As is known, where the recognition of the law in the treasures of national law is in line with the philosophy of Pancasila, namely the second and fifth precepts Where the application of customary sanctions emphasizes the restoration of social relations, deliberation, and community balance reflecting these human values and social justice. Furthermore, this customary mechanism contains the substance of restorative justice, namely prioritizing recovery for the suffering of victims and reconciliation between perpetrators, victims, and communities.²³

The essence is that criminal law certainly requires reforms that are in line with the values of the Indonesian nation. Where previously criminal law in Indonesia was *decolonized*, now it is a *sociocultural* nation that is in line with the values of Pancasila.

Sociological and Practical Urgency of Customary Sanctions Integration in Biak Numfor

Through several studies that have been carried out, especially in the Biak Numfor area, one of which was conducted by Brian Krar, it is known that indigenous peoples in Biak Numfor Regency have a customary law system and customary institutions that are still alive and functioning effectively

¹⁹ Zainal Arifin dan Emi Puasa Handayani, "The influence of mass media reporting on the rescue and formulation of environmental laws in Kediri," *Legal Standing: Jurnal Ilmu Hukum* 6, no. 1 (2022): 105–14.

²⁰ Miska Amien, "Causa Materialis Pancasila According to Notonagoro," *Journal of Philosophy* 16, no. 1 (2006): 18–26.

²¹ Zainal Arifin, Zico Junius Fernando, dan Emi Puasa Handayani, "Implikasi Hukum Perubahan Kedua Undang-Undang Informasi dan Transaksi Elektronik: Menyeimbangkan Kebebasan Berpendapat dan Partisipasi Publik dalam Demokrasi Digital," *Litigasi* 26, no. 1 (2025): 165–200, <https://doi.org/10.23969/litigasi.v26i1.21555>.

²² Tanius Sebastian, "Ronald Dworkin's Anti-Positivism: Reasoning Law as Morality," *Law: Law Journal* 6, no. 1 (2023): 269–308.

²³ Zainal Arifin dan Emi Puasa Handayani, "Resolution of Inheritance Disputes Through Non-Litigation in Kediri," *UNISKA LAW REVIEW* 4, no. 2 (2024): 251–61.

in maintaining social harmony.²⁴ Such customary law not only plays a role in resolving minor disputes such as persecution, petty theft, or inter-clan fights, but also plays an important role in preventing wider social conflicts.

As is known, in terms of dispute resolution, the Biak Numfor Community still exists and respects customary decisions, especially those set by Mananwir (traditional heads) or village customary councils. Forms of customary settlement such as pig fines, peace money and the handover of glassware. This aims to restore the previously chaotic situation due to imbalances due to disputes. This is a form of manifestation of a form of dignity restoration and building harmony between the parties who have been in conflict.

In the Biak customary law system, sanctions are not intended to retaliate, but to restore relations. The process not only ended the conflict, but also restored trust between the family and the village. The results of field observations show that the people of Biak respect customary decisions more than formal court decisions, because customary settlements involve figures who have moral and social legitimacy.²⁵ Thus, from a sociological perspective, the integration of customary sanctions in the national penal system has a high urgency, because without formal recognition from the state, the social legitimacy of formal law will continue to weaken. This is in line with Rianto Adi's opinion where the law that lives in society has a stronger influence than the written law. The people of Biak believe that true justice does not always exist in the courtroom, but in the customary reconciliation room under the auspices of the traditional elders.²⁶

Implementation and Implications of Customary Sanctions Integration as a Form of Restorative Justice.

The implementation of the integration of customary sanctions into the national penal system must start from a clear normative framework: the 2023 Criminal Code has opened the door through the recognition of the law that lives in society (living law), but the normative recognition has not automatically resulted in safe, consistent, and fair practices without implementing regulations and operational guidelines. Therefore, the first step that must be taken is the preparation of specific implementing legal instruments. This is solely to realize legal certainty and restrictions so that recognition does not give birth to juridical ambiguity. Without this kind of instrument, the recognition of the Criminal Code risks becoming a source of multiple interpretations and inconsistencies in application in the field.²⁷

In addition to operationally, the most feasible implementation model is a structured hybrid model of 1) identification and documentation of customary laws that actually live in the community, 2) participatory verification, 3) formal determination of customary law status, 4) recording of customary settlement results. The hybrid model in question combines local legitimacy with state control so that customary outcomes do not stand completely outside the state's accountability mechanism. This kind of practice is in line with Supreme Court proposals and academic studies that emphasize the need for verification mechanisms and technical guidelines.²⁸

The technical stages that need to be formulated in detail include: formal criteria for recognition of customary norms, evidentiary procedures in court to declare a norm as living law, types of cases that are worthy of referral to customary mechanisms, and limitations on customary sanctions that can be accommodated.²⁹ These provisions must refer to the principle that the

²⁴ Brian Krar, M Si Eviany, and others, "The Role of the Karkara Byak Kankain Institution in Resolving Inter-Group Conflicts in Biak Numfor Regency, Papua Province" (Institute of Domestic Government, 2025).

²⁵ Zainal Arifin dan Emi Puasa Handayani, "Quo Vadis Kebijakan Penyusunan Kabinet Koalisi Jokowi Tinjauan Filosofis, Historis, Teoritis dan Yuridis," n.d.

²⁶ Rianto Adi, *Sociology of Law: Sociological Legal Studies* (Indonesian Torch Library Foundation, 2012).

²⁷ Unitary State and the Republic of Indonesia, "Article 602 of Law Number 1 of 2023 concerning the Criminal Code," no. 16100 (2023).

²⁸ Adji Prakoso, "Mahkamah Agung RI Usulkan Berbagai Ketentuan Penting Dalam Penyusunan Rancangan Peraturan Pemerintah Tentang Living Law," Mari News, 2025, <https://marinews.mahkamahagung.go.id/berita/mahkamah-agung-ri-usulkan-berbagai-ketentuan-penting>

²⁹ Emi Puasa Handayani et al., "Urgensi pengaturan pidana pencemaran nama baik dalam perspektif hak asasi manusia," in *Prosiding Seminar Hukum Aktual Fakultas Hukum Universitas Islam Indonesia*, vol. 2, 2024, 115–28.

application of customary sanctions applies "as long as it is in accordance with the values of Pancasila, general principles of law, and human rights" as explained in the 2023 Criminal Code.³⁰

The integration of customary sanctions as a form of restorative justice has the potential to be a strong contextual solution for Papua (including Biak Numfor), but only if it is supported by a clear implementing legal instrument of participatory verification mechanisms; active human rights protection; documentation and transparency; actor's capacity; and independently evaluated phase-pilots. Without these elements, integration would only be a normative claim with no substantive effect. On the other hand, if designed and implemented carefully, integration can enrich the national penal system to be more restorative, legitimitative, and rooted in the nation's local values.

D. Conclusion

Normatively, the recognition of the law that lives in society as stipulated in Article 2 of the 2023 Criminal Code affirms the paradigm shift in Indonesia's criminal law from a positivistic legal system to a pluralistic and contextual legal system. This recognition is the juridical basis for the applicability of customary law as one of the legitimate sources of criminal law, as long as it does not conflict with the values of Pancasila, human rights, and general principles of international law.

Philosophically, the integration of customary sanctions reflects the values of Pancasila, the theory of Volksgeist Savigny, and the principle of Restorative Justice which is oriented towards the restoration of social relations, not retribution. Customary sanctions in Papua, including Biak Numfor, are a concrete form of justice that lives in a society that prioritizes harmony, deliberation, and social balance.

E. References

- Adi, Rianto. *Sosiologi hukum: kajian hukum secara sosiologis*. Yayasan Pustaka Obor Indonesia, 2012.
- Amien, Miska. "Causa Materialis Pancasila Menurut Notonagoro." *Jurnal Filsafat* 16, no. 1 (2006): 18–26.
- Anggraeniko, Litya Surisdani, dan Hesti Ayu Wahyuni. "Perkembangan Hukum Murni Serta Implementasinya di Indonesia." *J-LEE-Journal of Law, English, and Economics* 6, no. 1 (2024): 11–24.
- Arifin, Zainal, Zico Junius Fernando, dan Emi Puasa Handayani. "Implikasi Hukum Perubahan Kedua Undang-Undang Informasi dan Transaksi Elektronik: Menyeimbangkan Kebebasan Berpendapat dan Partisipasi Publik dalam Demokrasi Digital." *Litigasi* 26, no. 1 (2025): 165–200. <https://doi.org/10.23969/litigasi.v26i1.21555>.
- Arifin, Zainal, dan Emi Puasa Handayani. "Melawan Radikalisme Dengan Menyamakan Aras Membumikan Pancasila Di Masa Pandemi Lewat Media" 2, no. 1 (2021): 30–45.
- . "Quo Vadis Kebijakan Penyusunan Kabinet Koalisi Jokowi Tinjauan Filosofis, Historis, Teoritis dan Yuridis," n.d.
- . "Resolution of Inheritance Disputes Through Non-Litigation in Kediri." *UNISKA LAW REVIEW* 4, no. 2 (2024): 251–61.
- . "The influence of mass media reporting on the rescue and formulation of environmental laws in Kediri." *Legal Standing: Jurnal Ilmu Hukum* 6, no. 1 (2022): 105–14.
- ARIFIN, ZAINAL, Muhammad Ayman al-Akiti, Emi Puasa Handayani, dan Sholahuddin Al-Fatih. "A Does Media Play an Important Roles in Regional Election? A Pers Law Perspective." *Pena Justisia: Media Komunikasi dan Kajian Hukum* 24, no. 1 (1 Maret 2025): 253–71. <https://doi.org/10.31941/pj.v24i1.5777>.
- Aulia, M Zulfa. "Friedrich Carl von Savigny tentang hukum: Hukum sebagai manifestasi jiwa bangsa." *Undang: Jurnal Hukum* 3, no. 1 (2020): 201–36.
- Budiyanto, Budiyanto. "Penerapan Keadilan Restoratif (Restorative Justice) Dalam Penyelesaian Delik Adat." *Papua Law Journal* 1, no. 1 (Oktober 2018): 81–100. <https://doi.org/10.31957/plj.v2i2.582>.
- Dawi, Klara, Sy Muhammad Ridho Rizki Maulufi Alkadrie, Angelia Pratiwi Mastiurlani Christina

³⁰ Kesatuan dan Indonesia, "Pasal 602 Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana."

- Sitorus, dan Sri Ayu Septinawati. "Pengakuan Hukum yang Hidup dan Asas Legalitas dalam KUHP Nasional: Kajian Perbandingan antara Indonesia dan Belanda." *Arus Jurnal Sosial dan Humaniora* 5, no. 2 (Agustus 2025): 2945–51. <https://doi.org/10.57250/ajsh.v5i2.1567>.
- Faradila, Aulia. "Implikasi KUHP Nasional terhadap Transformasi Peran Jaksa dalam Penegakan Hukum Pidana Berbasis Hukum Adat" 27 (2025). <https://doi.org/10.30595/pssh.v27i.1844>.
- Gani, Ilham A, M M SH, Muhammad Aksa Ansar, M H SH, dan others. *Pengantar Hukum Pidana (Teoritis, Prinsip, dan Implementasi KUHP Baru UU No. 1 Tahun 2023)*. Penerbit Widina, 2025.
- Handayani, Emi Puasa, dan Zainal Arifin. "IMPLEMENTASI PENYELESAIAN SENGKETA TANAH MELALUI MEDIATOR NON SERTIFIKAT DI KOTA KEDIRI." *ADHAPER: Jurnal Hukum Acara Perdata* 8, no. 1 (2022): 59–74.
- Handayani, Emi Puasa, Zainal Arifin, Rinni Puspitasari, Noval Ghani Baihaki, dan Diana Kharisma. "Urgensi pengaturan pidana pencemaran nama baik dalam perspektif hak asasi manusia." In *Prosiding Seminar Hukum Aktual Fakultas Hukum Universitas Islam Indonesia*, 2:115–28, 2024.
- Hasim, Hasanuddin. "Hubungan Hukum Internasional dan Hukum Nasional Perspektif Teori Monisme dan Teori Dualisme." *Mazhabibuna: Jurnal Perbandingan Mazhab*, 2019.
- Infrastruktur dan Pembangunan Kewilayahan, JDIH Kemenko Bidang. "UU 1/2023: Kitab Undang-Undang Hukum Pidana (KUHP)," 2023.
- Kesatuan, Negara, dan Republik Indonesia. "Pasal 602 Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana," no. 16100 (2023).
- Krar, Brian, M Si Eviany, dan others. "Peranan Lembaga Kankain Karkara Byak dalam Penyelesaian Konflik antar Kelompok di Kabupaten Biak Numfor Provinsi Papua." institut pemerintahan dalam negeri, 2025.
- Living, Membedah, L A W Dalam, Kuhp Dari, dan Orin Gusta Andini. "Perspektif Pidana Dan Jenis Sanksi," 2024, 349–73.
- Malau, Parningotan. "Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023." *None*, 2023. <https://doi.org/https://doi.org/10.37680/almanhaj.v5i1.2815>.
- Nonet, Philipe, dan Philipe Selznick. *Hukum responsif*. Nusamedia, 2019.
- Prakoso, Adji. "Mahkamah Agung RI Usulkan Berbagai Ketentuan Penting dalam Penyusunan Rancangan Peraturan Pemerintah tentang Living Law." *Mari News*, 2025.
- Rahardjo, Satjipto. *Penegakan hukum progresif*. Penerbit Buku Kompas, 2010.
- Sebastian, Tanius. "Anti-Positivism Ronald Dworkin: Menalar Hukum sebagai Moralitas." *Undang: Jurnal Hukum* 6, no. 1 (2023): 269–308.
- Sihombing, Lasmin Alfies. "Restorative Justice, Kejahatan, Hukuman, dan Peradilan Pidana: Sebuah Analisis Kesejarahan, Peluang dan Tantangan." *UNES Law Review* 6, no. 3 (2024): 8902–11.
- Turmudzi, Khoiru. "Penerapan Konsep Pluralisme Hukum Sally Falk Moore dalam Penyelesaian Konflik di Tingkat Pemerintahan Daerah." *Jurnal Hukum Caraka Justitia* 5, no. 1 (2025): 29–42.
- Zainal Arifin dan Emi Puasa Handayani. "Cybercrime: Menyelisik Penegakan Hukum dan Penanggulangannya," 2023.