



Beyond the Principle of Legality: Integrating Indigenous Legal Values into the Modern Criminal Justice System

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Abstract

The principle of legality has traditionally safeguarded legal certainty, constrained state coercion, and protected individuals from arbitrary criminalization and punishment. However, its strictly formal conception may insufficiently accommodate legal pluralism and customary law's normative authority. This article examines the integration of customary legal values into modern criminal justice while preserving constitutional supremacy, human rights, fair-trial guarantees, and legal certainty. It employs normative legal research using conceptual and statutory approaches, supported by socio-legal considerations. Primary and secondary legal materials are analyzed qualitatively through systematic, teleological, historical, and constitutional interpretation. The study distinguishes customary law as a source of criminalization from its role as a normative resource for resolving criminal cases. Criminal liability based on customary law requires accessibility, precision, foreseeability, territorial determinacy, and constitutional compatibility. Conversely, customary values may inform mediation, sentencing, victim restoration, reconciliation, and offender reintegration, subject to effective safeguards. Accordingly, this article proposes an inclusive legality model recognizing customary law conditionally, based on social legitimacy, normative clarity, participatory procedures, proportionality, protection of vulnerable groups, and state supervision. This multilayered framework integrates customary law through value-based, procedural, institutional, and supervisory dimensions. It concludes that legal pluralism can be accommodated within modern criminal justice without abandoning the protective foundations of legality.

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1. Introduction

The principle of legality constitutes one of the central foundations in the development of modern criminal law. It affirms that conduct may only be subject to criminal punishment where it has previously been defined as a criminal offence under applicable legislation. Within the continental legal tradition, the principle of legality serves as an instrument for limiting state power, ensuring legal certainty, and protecting individuals from arbitrary criminalization. Through the maxim *nullum crimen, nulla poena sine lege*, criminal law is situated within a normative framework that is written, foreseeable, and applied prospectively.¹

Despite its fundamental importance in safeguarding individual rights, a formalistic application of the principle of legality does not always adequately address the complexity of legal life in plural societies. Modern criminal law has generally developed within the paradigm of legal centralism, which regards the state as the primary, and often the exclusive, source of binding legal norms. This paradigm tends to equate law with written legislation while overlooking social norms that emerge, are observed, and are transmitted across generations within local communities.

In societies characterized by cultural diversity and multiple legal traditions, state law is not the only normative order governing social conduct. Alongside positive law, customary law, religious law, local practices, and community-based dispute-resolution mechanisms continue to operate in substantive and meaningful ways.² The coexistence of these normative orders demonstrates that national legal systems are inherently situated within a context of legal pluralism. Accordingly, an understanding of criminal law that relies exclusively on formal legality risks producing an incomplete account of the legal realities experienced by society.

Customary law occupies an important position in the social life of many communities, particularly in countries shaped by colonial histories and marked by the continued presence of traditional societies. It does not merely consist of prohibitions and sanctions, but also embodies values concerning balance, harmony, collective responsibility, the restoration of social relations, and respect for the community. In many Indigenous and customary communities, wrongdoing is understood not simply as an individual act against the state, but as a disruption of social, spiritual, and cosmological equilibrium.³

This approach bears a close conceptual relationship to restorative justice, which has increasingly developed as a critique of the dominance of retributive punishment. The growing attention accorded to restorative justice reflects a broader shift in contemporary

¹ Teodorico Cristóbal Támara, "El Principio De Legalidad Como Exigencia Mínima De Legitimación Del Poder Penal Del Estado," *Revista Oficial Del Poder Judicial. Órgano De Investigación De La Corte Suprema De Justicia De La República Del Perú* 12, no. 14 (2020): 247–64, <https://doi.org/10.35292/ropj.v12i14.267>.

² Rena Yulia et al., "Conflict Resolution Patterns in Indigenous Communities of Indonesia: A Comprehensive Study of the Customary Laws of Baduy, Kajang, and Anak Dalam in Jambi," *Indonesia Private Law Review* 6, no. 2 (2026): 159–76, <https://doi.org/10.25041/iplr.v6i2.4671>.

³ Hayatul Ismi et al., "Revitalizing Customary Law: Reforming Buffalo Farming Practices (Jalangan) in Menaming Village for Sustainable Governance," *Journal of Law and Legal Reform* 5, no. 4 (2024), <https://doi.org/10.15294/jllr.v5i4.7014>.

criminal law discourse.⁴ Punishment is no longer understood solely as a legitimate form of state retribution, but also as a process aimed at restoring victims, encouraging offender accountability, and repairing social harm. Nevertheless, restorative justice is still frequently presented as a modern innovation without adequate recognition of comparable practices that have long existed within customary communities.

This situation gives rise to an epistemological paradox. On the one hand, modern criminal justice systems have increasingly embraced penal mediation, reconciliation, reparation, and community-based dispute resolution. On the other hand, customary legal values that have historically developed similar approaches are often relegated to the status of informal norms operating outside the official legal system. As a result, customary law is rarely treated as an equal source of legal knowledge and is instead regarded merely as a supplementary mechanism or a practical instrument to be employed when the formal system encounters limitations.

The recognition of customary criminal law under Article 2 of Law No. 1 of 2023 on the Indonesian Criminal Code (KUHP) represents one of the most significant paradigmatic shifts in Indonesia's criminal law reform. This provision broadens the traditional conception of the principle of legality, which has historically rested on the maxim *nullum crimen, nulla poena sine lege scripta*, namely, that an act may only be punished if it has previously been defined as a criminal offence in written legislation. Through Article 2 of the KUHP, Indonesian criminal law is no longer constructed exclusively upon a formal conception of legality, but expressly creates normative space for the operation of living law as a source of criminal law.

In substance, Article 2 provides that the principle of legality under Article 1 paragraph (1) does not preclude the application of living law that recognizes certain conduct as punishable, even where such conduct is not expressly regulated as a criminal offence under the KUHP. This recognition, however, is not absolute. Living law applies only within the territorial and social context in which it remains operative, only to conduct not already regulated under the KUHP, and only insofar as it is consistent with Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general principles of law recognized by the community of nations. The detailed procedures and criteria for determining such living law are further delegated to a Government Regulation, which has subsequently been operationalized through Government Regulation No. 55 of 2025.

From a theoretical perspective, this framework reflects a reconstruction of the principle of legality from a purely formal conception toward a more substantive and pluralistic model of legality. The state thereby acknowledges that legally relevant norms in Indonesian society do not derive exclusively from state legislation. Within customary law communities, there may exist socially binding norms concerning prohibited conduct, responsibility, the restoration of social equilibrium, and customary obligations. Article 2 of the KUHP can therefore be understood as an attempt to bridge state criminal law and living law without abandoning the protective function of the legality principle as a guarantee of legal certainty.

⁴ Sutanti Rahmi Dwi et al., *Customary Law as an Instrument of Restorative Justice: An Alternative Approach to Criminal Conflict Resolution in Plural Legal Systems*, May 22, 2025, <https://doi.org/10.5281/ZENODO.15453907>.

This construction also has a constitutional foundation in Indonesia's recognition of customary law communities. Article 18B paragraph (2) of the 1945 Constitution recognizes and respects customary law communities and their traditional rights, subject to specified constitutional conditions, while Article 28I paragraph (3) provides that cultural identities and the rights of traditional communities shall be respected in accordance with the development of the times and civilization. Accordingly, the incorporation of living law into the KUHP is not merely a matter of criminal policy; it may also be understood within the broader framework of the constitutionalization of legal pluralism in Indonesia.

If Article 2 of the KUHP provides the normative basis of legitimacy, Government Regulation No. 55 of 2025 provides the operational mechanism. Article 1 of the Regulation expressly defines "Living Law in Society" as customary law that determines that a person who commits a particular act ought to be subject to punishment, while a "Customary Criminal Offence" refers to a criminal offence based on such living law.

This is a crucial feature of the regulatory design. Government Regulation No. 55 of 2025 does not allow every customary norm to operate automatically as criminal law. Instead, Article 2 positions the Regulation as a guideline for regional governments to identify and regulate customary criminal offences that are not already regulated under the KUHP through regional regulations (Peraturan Daerah). Article 3 further provides that where the elements of a customary criminal offence are identical to, or can be equated with, an offence already regulated under the KUHP, the KUHP shall prevail.

This arrangement establishes what may be described as the principle of subsidiarity of customary criminal law. Customary criminal law is not positioned as a competing normative regime alongside the KUHP in relation to the same prohibited conduct. Rather, it operates to fill normative spaces that remain outside the scope of the national Criminal Code. In this structure:

The KUHP functions as the principal framework of general criminal law; living law applies to conduct not regulated under the KUHP; and regional regulations serve as the formal and operational instruments through which customary criminal offences are recognized and implemented.

This model is significant because it seeks to prevent both *double criminalization* and normative conflict between national criminal law and customary criminal law. Not every customary norm, however, automatically becomes criminal law: Government Regulation No. 55 of 2025 establishes a relatively strict filtering mechanism. Article 4 requires living law to satisfy two fundamental conditions. First, it must be consistent with Pancasila, the 1945 Constitution, human rights, and general principles of law recognized by the community of nations. Second, the relevant customary norm must genuinely be recognized and practiced by the local customary law community whose existence has itself been legally recognized and established in accordance with applicable legislation.

Article 5 further narrows the scope of recognition by requiring a customary criminal offence to satisfy several criteria: the conduct must violate living law; it must be subject to a customary sanction in the form of fulfilment of a customary obligation; it must not already

be regulated under the KUHP; and it must apply to any person who commits the customary offence within the relevant customary law territory. Under Article 6, customary criminal offences satisfying these requirements must subsequently be regulated through a regional regulation.

Accordingly, the legal framework establishes at least four layers of normative filtering:

1. the customary norm must genuinely remain alive and socially operative;
2. the relevant customary law community must be identifiable and legally recognized;
3. the substance of the norm must be compatible with constitutional and human rights standards; and
4. the conduct concerned must not already be regulated under the KUHP.

This regulatory model demonstrates that the KUHP does not recognize living law on the basis of unconditional recognition, but rather through a model of conditional recognition. Customary criminal law is recognized only insofar as it satisfies substantive, institutional, territorial, and constitutional standards established by the state legal order. In this sense, the Indonesian model seeks to accommodate legal pluralism without abandoning the requirements of legal certainty, constitutional supremacy, and human rights protection.

The marginalization of customary law cannot be separated from the historical formation of modern criminal law. In many postcolonial states, national legal systems were constructed through the transplantation of colonial legal frameworks that emphasized codification, centralization, and hierarchical ordering of norms. Within this process, customary law was frequently characterized as traditional, unwritten, local, and insufficiently compatible with the rationality associated with modern law. Such a construction produced a structural subordination of Indigenous and customary normative systems.

Contemporary legal scholarship has increasingly challenged the assumption that legal modernization must necessarily proceed through normative uniformity. Although standardization may promote administrative consistency, it can also suppress the diverse ways in which communities understand and experience justice. In the field of criminal law, excessive uniformity risks distancing judicial processes from the social values of the communities subject to them. Law may consequently retain formal validity while losing substantive legitimacy.⁵

Such integration requires a broader understanding of legality than one confined exclusively to written legislation. The principle of legality may be developed into a more substantive conception that considers not only the formal existence of a rule, but also its legitimacy, accessibility, foreseeability, fairness, and compatibility with constitutional values. Within this framework, customary law may be recognized insofar as its norms are identifiable,

⁵ Naseer Sabbar Lafta et al., "Quantifying the Role of Customary Law in Environmental Conflict Resolution: A Mixed Legal-Statistical Framework," in *Optimization and Data Science in Industrial Engineering*, vol. 2855, ed. Zohreh Molamohamadi et al., Communications in Computer and Information Science (Springer Nature Switzerland, 2026), https://doi.org/10.1007/978-3-032-17023-1_11.

consistently applied, and compatible with fundamental human rights principles.⁶ Participation is necessary not only to identify the norms that continue to operate within the community, but also to assess whether those norms retain social legitimacy and can be applied fairly in societies undergoing continuous social transformation.⁷

At the practical level, customary law may be integrated into various stages of the criminal justice process. Its values may inform investigations, prosecutions, mediation, sentencing, the implementation of sanctions, and the social reintegration of offenders. Such integration, however, should not depend solely on the individual discretion of law-enforcement officials. Clear legal standards are required to determine the categories of cases eligible for customary resolution, the conditions governing its application, the consent of the parties, the mechanisms of supervision, and the legal consequences arising from customary-based settlements.

This can be observed in the 1945 Constitution of the Republic of Indonesia. Article 18B (2) provides that: “The State recognizes and respects traditional communities along with their traditional rights, insofar as they remain in existence and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia, as regulated by law.” Furthermore, Article 28I (3) stipulates that: “Cultural identities and the rights of traditional communities shall be respected in accordance with the development of the times and civilization.”

The need for such standards demonstrates that the incorporation of customary law does not entail the removal of the state from the administration of criminal justice. The state retains a fundamental responsibility to protect victims’ rights, guarantee fair-trial standards, prevent abuses of power, and ensure that customary processes do not become instruments of impunity. In cases involving serious violence, exploitation, discrimination, or unequal power relations, the state must ensure that customary settlements do not sacrifice victims’ interests in the name of an illusory form of communal harmony.

Previous scholarship has extensively examined customary law, legal pluralism, the principle of legality, and restorative justice. These four bodies of discourse, however, have often developed in relative isolation from one another. Research on the principle of legality has primarily focused on legal certainty and the limitation of state power, whereas studies of customary law have generally emphasized the recognition of Indigenous communities and the preservation of legal traditions. Meanwhile, the restorative justice literature has more frequently concentrated on the effectiveness of alternative dispute resolution without adequately connecting it to broader critiques of legal centralism in criminal law.

This fragmentation has created a significant research gap concerning how customary legal values may be systematically incorporated into the criminal justice system without

⁶ Muhammad Junaidi and 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>.

⁷ Tebello Matsela, “Beyond Bhe – Examining the Impact of Bhe v Magistrate Khayelitsha on the Customary Law of Succession and Gender Equality,” *African Journal of Legal Studies* 17, no. 4 (2025): 442–60, <https://doi.org/10.1163/17087384-12340125>.

weakening the principle of legality. Relatively few studies have developed a conceptual framework capable of reconciling formal legality, legal pluralism, restorative justice, human rights protection, and community legitimacy.⁸ Moreover, limited attention has been devoted to distinguishing the symbolic recognition of customary law from its substantive integration into criminal justice decision-making processes.

Against this background, this article argues that the modernization of the criminal justice system should not be understood as a process of abandoning customary law. Rather, modernization should be directed toward the establishment of a legal system capable of managing normative plurality in a democratic, transparent, and human rights-oriented manner.⁹ Customary legal values can contribute to strengthening the restorative dimension of criminal justice, social responsibility, community participation, and offender reintegration, all of which remain insufficiently accommodated within formal penal systems.

Accordingly, this article addresses the following research question: How can customary legal values be integrated into the modern criminal justice system through a reconstruction of the principle of legality without undermining legal certainty, human rights protection, fair-trial guarantees, and the state's responsibility for enforcing criminal law?

This article seeks to formulate a framework for integrating customary legal values into the modern criminal justice system through a reinterpretation of the principle of legality. The proposed framework conceptualizes legality not as an absolute barrier to the recognition of living law, but as an instrument for ensuring that customary values are applied in a foreseeable, proportionate, participatory, and human rights-compliant manner. The article therefore aims to contribute theoretically to the development of a pluralistic conception of criminal law while simultaneously providing a normative foundation for criminal justice reform that is more context-sensitive, inclusive, and just.

2. Method

This study employs normative legal research using conceptual and statutory approaches, supplemented by a limited socio-legal approach. The conceptual approach is used to examine the theoretical foundations of the principle of legality, legal pluralism, living law, restorative justice, and human rights protection within the criminal justice system. The statutory approach is applied to analyze legal norms governing the principle of legality, the recognition of Indigenous peoples and customary law, the authority of law-enforcement institutions, the protection of victims and accused persons, and the potential incorporation of local values into criminal proceedings. The socio-legal approach is employed in a limited manner to understand the relationship between state law and the normative realities of

⁸ Erni Dwita Silambi et al., "Ideal Concept of Traditional Justice in Solving Criminal Case," *Academic Journal of Interdisciplinary Studies* 11, no. 1 (2022): 293, <https://doi.org/10.36941/ajis-2022-0026>.

⁹ Ade Adhari et al., "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>.

society, particularly in assessing the social legitimacy, continuing validity, and dispute-resolution functions of customary mechanisms.¹⁰

The legal materials consist of primary, secondary, and tertiary sources. Primary legal materials include constitutions, legislation, judicial decisions, human rights instruments, and policy documents relating to customary law and the criminal justice system.¹¹ Secondary materials comprise peer-reviewed journal articles, academic books, research reports, and institutional publications addressing the principle of legality, legal pluralism, restorative justice, legal decolonization, and customary justice. All materials are analyzed qualitatively through grammatical, systematic, historical, teleological, and constitutional interpretation. The analytical process involves identifying relevant norms, mapping conceptual relationships and conflicts, conducting cross-jurisdictional comparison, evaluating the findings against the requirements of legal certainty and human rights protection, and formulating an integrative framework. The proposed framework is subsequently assessed according to the principles of normative accessibility, foreseeability, party consent, non-discrimination, proportionality, protection of vulnerable groups, state supervision, and the availability of review or objection mechanisms against the outcomes of customary-based settlements.

3. Discussion

3.1. Reconstructing the Principle of Legality from the Perspectives of Legal Pluralism and Substantive Justice

The reconstruction of legality proposed in this article should begin with a distinction that is frequently obscured in debates on customary criminal law: the use of customary law as a source of criminalization is normatively different from the use of customary legal values in the resolution of offences that have already been defined by state law. These two functions engage the principle of legality at different levels and therefore cannot be subjected to identical standards. Where customary law is invoked to determine that particular conduct constitutes a criminal offence, the coercive power of the state is brought into operation at its most intensive level. Criminalization exposes individuals to criminal liability and punishment and must therefore satisfy the strongest requirements of legality, including prior existence of the norm, accessibility, sufficient precision, foreseeability, territorial determinacy, and protection against retrospective or arbitrary application. The less ascertainable the customary norm, the stronger the risk that criminal liability will depend upon ex post reconstruction of community expectations rather than upon a norm that could reasonably have guided conduct in advance.¹²

¹⁰ Judy Marria Saimima et al., "Layered Hybrid Model in Criminal Resolution: Integrating Epkeret and State Law Under Legal Pluralism in Indonesia," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 26, no. 1 (2025): 1–15, <https://doi.org/10.30631/alrisalah.v26i1.2180>.

¹¹ Colleen C. Williams, "Discovering and Identifying Grey Literature in the Field of Law," *The Serials Librarian* 79, nos. 3–4 (2020): 245–51, <https://doi.org/10.1080/0361526X.2020.1847741>.

¹² Jansen Edinata Simanjuntak et al., "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>.

This difficulty does not, however, justify excluding customary law altogether from the criminal justice system. It instead requires a distinction between customary norms as offence-generating rules and customary values as justice-orienting norms. The former determine whether criminal liability may arise; the latter influence how an already established criminal wrong should be addressed.¹³ This distinction is central because the legality concerns applicable to the creation of criminal liability are considerably more demanding than those applicable to the use of customary values in mediation, diversion, sentencing, reparation, reconciliation, or offender reintegration. Once criminal liability has been established under a sufficiently foreseeable legal rule, customary values do not necessarily expand the sphere of prohibited conduct. Rather, they may inform the normative response to wrongdoing by introducing considerations of social restoration, collective responsibility, compensation, apology, reconciliation, and reintegration. As shown in the Introduction, these restorative functions are central elements of customary justice.

This distinction therefore permits a more precise reconstruction of the principle of legality. Legality should remain strict at the point of criminalization but more normatively open at the point of resolution. Such an asymmetrical approach avoids two opposing errors. The first is excessive legal formalism, which treats the principle of legality as requiring the exclusion of all non-state normative orders from criminal justice. The second is unrestricted legal pluralism, which assumes that the social existence of a customary norm is itself sufficient to justify criminal punishment. Neither position is normatively satisfactory. A defensible model should preserve the state's monopoly over coercive criminalization while simultaneously allowing socially legitimate customary values to influence the manner in which criminal responsibility is processed and resolved.

The significance of this distinction lies in the different constitutional interests implicated by each function. Criminalization primarily engages the individual's right to legal certainty and protection from arbitrary punishment. Consequently, a customary norm that functions as a basis for criminal liability must satisfy demanding standards of clarity, accessibility, and foreseeability. By contrast, the incorporation of customary values at the stage of case resolution principally concerns the quality, proportionality, and social legitimacy of the state's response to wrongdoing. Here, the principal concern is not whether the individual could foresee the existence of a criminal prohibition, but whether the mechanism of resolution respects consent, equality, victim protection, proportionality, human dignity, and procedural fairness. This explains why the same customary norm may be unsuitable as a direct source of criminalization yet remain normatively valuable as a source of restorative principles.

From this perspective, the principle of legality should not be conceptualized merely as a binary rule distinguishing written from unwritten law. Its more important function is to regulate the degree of normative authority that may legitimately be attributed to customary law within different stages of criminal justice. The closer a customary norm comes to creating or aggravating criminal liability, the stronger the demands of formal legality must

¹³ Muhamad Yofhan Wibianto et al., "Real Justice, Real Impact with the Prosecutors in Action," *Journal of Human Rights, Culture and Legal System* 5, no. 3 (2025): 1015–41, <https://doi.org/10.53955/jhcls.v5i3.804>.

become. Conversely, where customary law operates to mitigate, restore, reconcile, or facilitate reintegration without creating new criminal liability, greater normative accommodation may be justified, provided that constitutional and human-rights safeguards remain effective.

This functional differentiation also clarifies the meaning of inclusive legality proposed in this article. Inclusive legality does not imply that every living norm is transformed into criminal law. Nor does it dilute the protection traditionally associated with *nullum crimen, nulla poena sine lege*. Rather, it differentiates the permissible legal effects of customary law according to the function being performed. Customary law may be subject to a particularly stringent recognition threshold where it is invoked as a basis for criminalization, while customary values may be incorporated more flexibly into mechanisms of restoration and resolution. In both cases, however, recognition remains conditional upon consistency with constitutional principles, human rights, fair-trial guarantees, and protection against discrimination.

The Indonesian legal framework provides a useful illustration of this differentiated model. Article 2 of Law No. 1 of 2023 on the Indonesian Criminal Code recognizes the operation of living law while simultaneously subjecting it to territorial, constitutional, and human-rights limitations. Government Regulation No. 55 of 2025 further restricts customary criminal offences to conduct not already regulated by the Criminal Code and subjects their recognition to statutory criteria and regional regulation. This framework demonstrates that the recognition of customary criminal law is not equivalent to unrestricted acceptance of unwritten norms. Rather, it reflects a model of conditional and controlled recognition, in which living law may enter the criminal justice system only through a series of substantive, institutional, and constitutional filters.

The analytical implication is therefore important: customary law should not be asked to perform the same function, nor should it be subjected to the same legal test, at every stage of criminal justice. As a source of criminalization, it requires exceptional justification because it authorizes the coercive power of punishment. As a source of values for resolving established criminal wrongdoing, however, it may legitimately enrich the criminal process by introducing restorative, participatory, and community-oriented considerations that formal criminal law may inadequately accommodate. This differentiated approach provides a more coherent reconciliation between legal certainty and legal pluralism than either the complete exclusion or the unrestricted recognition of customary law.

Table 1. Identification of Customary Legal Values¹⁴

No	Where Customary Law Is Normatively Meaningful	Where Customary Law Is Not Normatively Meaningful
1	It may be granted limited recognition within the framework of state law.	It should not be recognized as a basis for criminalization or punishment.
2	It may be integrated into the stages of investigation, prosecution, judicial examination, sentence enforcement, and social reintegration.	It should be excluded where it conflicts with the constitution, human rights, or human dignity.

¹⁴ “Customary Law Impact in the Development of Indonesia’s Criminal Code,” *Journal of Critical Reviews* 7, no. 03 (2020), <https://doi.org/10.31838/jcr.07.03.43>.

3	It may be used to strengthen victim restoration, offender accountability, reconciliation, and social harmony.	It may be reconstructed where its underlying values remain relevant, but its procedures or implementation are problematic.
4	It should be applied only on the basis of the parties' free and informed consent and with adequate safeguards for vulnerable groups.	The case should be referred back to the formal justice system where consent, equality, and victim protection cannot be guaranteed.
5	Its application should remain subject to state supervision and be accompanied by accessible complaint and review mechanisms.	Its use should be prevented where it serves as a means of impunity, elite domination, or the justification of discrimination.

Source: Secondary data, processed by the authors, 2026.

Customary law may be regarded as normatively meaningful where it possesses social legitimacy, its norms can be adequately identified, its procedures are participatory, its substance is consistent with constitutional and human rights standards, and its application produces a fair form of restoration for victims, offenders, and the wider community.¹⁵ Under such conditions, customary law should not be confined to symbolic recognition, but may be substantively integrated into the criminal justice system through mechanisms of inclusive legality, restorative justice, and state supervision.

Conversely, customary law should be classified as normatively deficient where it no longer enjoys social legitimacy, contains discriminatory norms, operates through closed or coercive procedures, imposes disproportionate sanctions, or disregards the rights of victims and vulnerable groups. Customary law falling within this category should not serve as a basis for criminalization or punishment. Where its underlying values remain relevant, the norm concerned should be reconstructed through a participatory process and brought into conformity with the constitution, human rights, legal certainty, and fair-trial principles.

Accordingly, the idea of “moving beyond the conventional approach to the principle of legality” is not intended to abolish legality, but rather to develop a more inclusive conception of it. Such a model enables normatively meaningful customary values to contribute to the modern criminal justice system while preventing deficient customary norms from acquiring legal legitimacy solely on the basis of tradition or cultural identity.

The incorporation of customary legal values into case resolution, sentencing, victim restoration, and offender reintegration rests on a more defensible normative foundation. Values such as deliberation, collective responsibility, the restoration of equilibrium, compensation, apology, and reconciliation may enrich both the objectives and mechanisms of criminal justice.¹⁶ At this level, customary law does not function to expand the scope of

¹⁵ Jef De Mot and Francesco Parisi, “Customary Law,” in *The Encyclopedia of Political Thought*, 1st ed., ed. Michael T. Gibbons (Wiley, 2014), <https://doi.org/10.1002/9781118474396.wbept0232>.

¹⁶ I. Gusti Agung Mas Rwa Jayantiari et al., “The Rights of Customary Law Communities to Resources: The Relationship of Coexistence of State Law and Customary Law,” *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 1 (2025): 187–98, <https://doi.org/10.29303/ius.v13i1.1329>.

criminalization, but instead provides a mode of dispute resolution that is more responsive to the needs of victims, offenders, and communities.

This form of integration bears a close relationship to the development of restorative justice. Restorative justice shifts the orientation of criminal justice away from questions concerning which legal rule has been violated and what punishment should be imposed, toward questions of who has been harmed, what harm has occurred, who bears responsibility, and how that harm may be repaired. This orientation is consistent with many customary legal traditions that understand wrongdoing as a disruption of social relationships and communal equilibrium rather than merely as an abstract violation of state law.

Nevertheless, the relationship between customary law and restorative justice must be approached with caution. Not every customary mechanism is restorative, and not every restorative practice originates in customary law.¹⁷ Certain customary mechanisms may emphasize punishment, exclusion, or collective obligations that impose disproportionate burdens on particular parties.¹⁸ The integration of customary law must therefore avoid romanticizing local traditions as inherently just, democratic, or protective of victims.

Recognition of customary law must be subject to normative assessment based on constitutional and human rights standards. Customary norms or practices that discriminate against women, children, persons with disabilities, minority groups, or socially subordinated community members cannot be justified solely by reference to respect for tradition. The constitution must remain the highest normative framework for determining the permissible scope of customary law within the criminal justice system. Legal pluralism should therefore not be understood as an endorsement of unrestricted normative relativism.

Within this framework, the principle of legality may operate as a filtering mechanism rather than as an absolute barrier to customary law. Legality requires every application of a customary norm to have a basis of recognition in state law, a clearly defined scope, accessible procedures, and foreseeable legal consequences. Through this approach, customary law is not applied merely on the basis of claims to informal authority, but within a legal framework designed to protect all parties involved.

Reconstructing the principle of legality also requires a broader understanding of the sources of criminal law. Legal sources should not be confined exclusively to statutory texts, but may include norms whose existence is recognized by the constitution or legislation. Such recognition does not mean that all customary norms automatically become part of positive criminal law. The state must establish criteria concerning the existence of the relevant community, the continuity of the norm, its degree of social acceptance, its substantive values, and its compatibility with human rights.

¹⁷ Efa Rodiah Nur et al., "Rembug Pekon as a Restorative Justice Model: Integrating Local Wisdom and Islamic Law in Criminal Case Resolution in Lampung, Indonesia," *De Jure: Jurnal Hukum Dan Syar'iah* 18, no. 1 (2026): 240–67, <https://doi.org/10.18860/j-fsh.v18i1.36356>.

¹⁸ Airin Liemanto et al., "Recognition of the Right to Participation of Tribal Peoples in the Repatriation of Lombok Treasures," *Legality: Jurnal Ilmiah Hukum* 32, no. 2 (2024): 195–220, <https://doi.org/10.22219/ljih.v32i2.33052>.

It is also important to distinguish between symbolic recognition and operational recognition. Symbolic recognition occurs when a constitution or statute formally acknowledges Indigenous peoples or customary communities but fails to provide mechanisms through which customary norms may influence judicial processes.¹⁹ By contrast, operational recognition creates a clearly defined role for customary legal values in investigation, prosecution, mediation, sentencing, and social reintegration. This article argues that substantive integration can only be achieved where such recognition is accompanied by concrete procedures, clearly allocated institutional authority, and effective supervisory mechanisms.

Accordingly, the reconstruction of the principle of legality must preserve a careful balance between legal certainty and context-sensitive justice. Legality cannot be abandoned, as it remains the principal safeguard against arbitrary criminalization. At the same time, it should not be invoked to exclude all forms of living law from the criminal justice process. What is required is a model of inclusive legality: one that maintains foreseeability while allowing customary legal values to contribute to the realization of substantive justice.

Inclusive legality should contain at least four essential elements. First, there must be a basis for recognition in the constitution or legislation. Second, the customary norms concerned must be sufficiently identifiable and ascertainable. Third, their application must remain subject to human rights scrutiny and fair-trial guarantees. Fourth, their use must be open to supervision and correction by state institutions. These four elements place customary law in a dialogical relationship with state law, rather than subjecting it either to absolute subordination or to unrestricted autonomy.²⁰

Ultimately, reconstructing the principle of legality creates the possibility of developing a more pluralistic criminal justice system. Such a system does not reject state law, but neither does it treat state law as the sole source of justice. The state retains primary responsibility for protecting rights and enforcing criminal law, while communities are afforded space to contribute through values and mechanisms that possess genuine social legitimacy. This relationship enables criminal law to move beyond rigid legal formalism toward a system that is more context-sensitive, restorative, and responsive to social diversity.

3.2. A Model for Integrating Customary Legal Values into the Modern Criminal Justice System

The integration of customary legal values into the modern criminal justice system requires a clearly defined institutional design rather than merely broad normative recognition. Without an operational model, customary law risks being reduced to a symbolic expression of legal pluralism with little practical influence on law-enforcement processes. Conversely, integration undertaken without clear standards may create room for inconsistency,

¹⁹ Marina Rona et al., "Restorative Justice in the Settlement of Traffic Accident Causing Death Toll According to the Perspective of Customary Judiciary in Sanggau District, West Kalimantan," *Yustisia Jurnal Hukum* 9, no. 1 (2020): 139, <https://doi.org/10.20961/yustisia.v9i1.39351>.

²⁰ Julisa Aprilia Kaluku et al., "Juvenile Criminal Responsibility in Muslim-Majority States: Between Sharia, State Law, and Restorative Justice," *De Jure: Jurnal Hukum Dan Syar'iah* 18, no. 1 (2026): 191–210, <https://doi.org/10.18860/j-fsh.v18i1.32848>.

discrimination, abuse of authority, and legal uncertainty. The integration model must therefore be structured, gradual, and subject to effective oversight.

The first stage involves identifying customary legal values that are relevant to the criminal justice system. Integration should not be directed toward incorporating all customary rules into state criminal law, but rather toward recognizing values capable of enhancing the quality of justice. These may include the restoration of social equilibrium, offender accountability, respect for victims, deliberation, reconciliation, reparation, social solidarity, and reintegration into the community. A value-based approach is more adaptive than the textual adoption of customary rules because it allows customary principles to inform criminal justice without freezing the internal dynamics of the communities from which they originate.

The identification of such values must be conducted through a participatory process. The state should not unilaterally determine the content of customary law through administrative categorization or interpretation by law-enforcement officials. Customary communities must be involved in explaining the relevant norms, objectives, procedures, institutional actors, and consequences of customary dispute resolution. Community representation, however, should not be confined to customary elites or traditional leaders.²¹ Women, younger generations, victims, internal minority groups, and vulnerable community members must also be given meaningful opportunities to express their views regarding the legitimacy and effects of the customary practices concerned.

The second stage concerns the classification of cases that may appropriately be resolved through, or influenced by, customary mechanisms. Not every criminal offence is suitable for community-based resolution. Cases involving limited harm, interpersonal disputes, conflicts rooted in community relations, or offences in which meaningful restoration remains possible may be considered for customary processes.²² By contrast, serious crimes, sexual violence, human trafficking, torture, corruption, offences against vulnerable groups, and crimes involving extreme power imbalances require stronger and more direct state intervention.

Such classification is essential to prevent customary resolution from becoming a mechanism of impunity. In some contexts, pressure to preserve communal harmony may compel victims to accept outcomes that do not reflect their interests or needs. This risk is particularly acute where the offender occupies a stronger social, economic, political, or customary position. Victims' interests must therefore not be subordinated to abstract claims of social peace. Harmony achieved through coercion, intimidation, or the silencing of victims cannot properly be regarded as restorative justice.

²¹ Bisrat Teklesilassie Yazew and Getachew Kassa, "Punishing Criminals Indigenously: Perspectives from Customary Law and Social Relationship Practices of Afar Pastorals Along the Lower Awash Valley," *Cogent Social Sciences* 9, no. 2 (2023): 2273337, <https://doi.org/10.1080/23311886.2023.2273337>.

²² Anang Riyan Ramadianto et al., "Victim Impact Statement as a Model of Victim-Centered Justice in Child Sexual Abuse Cases," *Jurnal Hukum IUS QUIA IUSTUM* 32, no. 2 (2025): 337–60, <https://doi.org/10.20885/iustum.vol32.iss2.art4>.

The third stage is to ensure the free, informed, and voluntary consent of all parties. Customary law-based resolution must depend on the willingness of both the victim and the offender to participate without intimidation, coercion, or undue pressure. A victim's consent cannot be presumed merely because the community or family has approved the process. Victims must be adequately informed of their rights, the applicable procedures, the legal consequences of participation, their right to refuse, and their continued access to the formal justice system.

Consent must also remain revocable where the customary process becomes unfair or subjects the victim to renewed pressure or harm. In such circumstances, the case must be capable of being returned to the formal criminal justice system. This safeguard is essential to demonstrate that customary mechanisms complement, rather than wholly replace, the state's responsibility for the administration of criminal justice. The existence of a genuine choice between customary and formal mechanisms constitutes a fundamental element of procedural protection.

The fourth stage concerns integration into the various phases of the criminal justice process. At the investigative stage, law-enforcement officials may determine whether a case contains a customary dimension and satisfies the requirements for alternative resolution. Such a determination, however, should not depend entirely on the discretion of individual investigators. Clear guidelines must be established regarding eligible categories of cases, the condition and interests of the victim, the risk of reoffending, existing power relations, and the capacity of the customary mechanism to provide meaningful restoration.

At the prosecution stage, prosecutors may consider the outcome of a customary settlement as a basis for conditional discontinuance of proceedings, diversion, or the formulation of a more proportionate sentencing recommendation. Such consideration should depend on whether the offender has fulfilled the agreed responsibilities, the victim has received meaningful reparation, the process was free from coercion, and the broader public interest has not been compromised. A customary settlement should not automatically extinguish criminal responsibility, particularly where the offence has wider social consequences or threatens significant public interests.²³

During judicial proceedings, judges may take customary legal values and the outcomes of customary settlements into account when assessing culpability, mitigating circumstances, the appropriate type of sentence, or other suitable measures. In certain cases, the fulfilment of customary obligations may be relevant to the proportionality of punishment. Judges must nevertheless ensure that such obligations are not degrading, discriminatory, or capable of producing disproportionate double punishment.

Integration may also occur at the sentence-enforcement stage. Rather than treating imprisonment as the primary response, the criminal justice system may develop community-based sanctions informed by customary values, including reparation, community service, the restoration of social relationships, or other agreed obligations. Such

²³ Dian Ekawaty Ismail et al., "The Concept of Revitalizing Traditional Institutions in the Criminal Law System to Realize Restorative Justice," *Jambura Law Review* 5, no. 2 (2023): 220–34, <https://doi.org/10.33756/jlr.v5i2.11682>.

sanctions must remain grounded in state law and subject to effective supervision in order to prevent arbitrary treatment. Customary values may enrich the social dimension of punishment, but they must not displace minimum standards of humane treatment.

The fifth stage involves establishing effective oversight mechanisms. Oversight is necessary because community-based processes are not inherently free from power imbalances. The state must provide accessible procedures for complaint, review, or annulment where a customary settlement violates the rights of any party.²⁴ Oversight does not necessarily require the state to assume control over the entire process; rather, it should ensure the availability of external accountability where internal mechanisms fail to provide adequate protection.

Oversight may be exercised by courts, prosecutors, legal aid institutions, human rights commissions, or independent bodies with appropriate expertise in customary law. Such mechanisms should be designed proportionately so as not to eliminate community autonomy. State intervention should focus primarily on the protection of rights rather than on forcing all customary practices into the bureaucratic procedures of the formal legal system.

The sixth stage concerns the documentation and accessibility of customary norms. One of the principal challenges in integrating customary law is its frequently unwritten and context-dependent character. The absence of documentation may make it difficult to ensure consistency in application. At the same time, comprehensive codification may ossify customary law and transfer interpretive authority from the community to the state.

Documentation should therefore be undertaken flexibly by recording the relevant principles, procedures, territorial scope, competent institutions, and commonly recognized forms of resolution. Such documentation need not transform customary law into rigid statutory rules, but it must be sufficiently clear to enable the parties to understand the applicable norms and the consequences of the process. It may also assist courts and law-enforcement authorities in assessing the validity of claims concerning the existence and content of a particular customary norm.

The seventh stage is the strengthening of institutional capacity among both law-enforcement authorities and customary institutions. State officials require an informed understanding of legal pluralism, legal anthropology, restorative justice, cultural sensitivity, and the protection of vulnerable groups. Without such capacity, customary law may be interpreted superficially or applied selectively. Conversely, customary institutions must also develop an adequate understanding of human rights principles, victim protection, free and informed consent, and the prohibition of discrimination.

²⁴ Riska Ameliana Dewi et al., "The Authority of Judges in The Application of Restorative Justice for Children in Indonesia," *Jurnal Hukum Dan Peradilan* 14, no. 2 (2025): 401-24, <https://doi.org/10.25216/jhp.14.2.2025.401-424>.

Capacity-building should be directed toward establishing an equitable relationship between state institutions and customary communities. The state should not treat customary institutions merely as instruments for reducing formal caseloads. Equally, customary institutions should not assume judicial functions without accountability. The preferred model is an institutional partnership based on a clearly defined allocation of authority and responsibility, accompanied by transparent safeguards and effective mechanisms of review and correction.

Based on these stages, this article proposes a multilayered model of integration. The first layer is value-based integration, which incorporates the principles of restoration, deliberation, and social responsibility into criminal justice policy. The second layer is procedural integration, involving the use of customary mechanisms at specific stages of the criminal justice process. The third layer is institutional integration, which recognizes the role of customary institutions through formalized relationships with state authorities. The fourth layer is supervisory integration, under which the entire process is assessed against constitutional standards, human rights principles, and fair-trial guarantees.

Table 2. Qualification and Framework for the Integration of Customary Law into the Modern Criminal Justice System²⁵

No	Assessment Dimension	Normatively Meaningful Customary Law	Consequences Where Customary Law Is Meaningful	Normatively Deficient Customary Law	Measures Where Customary Law Is Deficient
1	Social legitimacy	Customary law remains living, observed, and genuinely accepted by the community that sustains it. Its validity is not based solely on historical claims, but is demonstrated through continuity of practice and social acceptance.	It may be considered a source of values in the formulation of criminal justice policy, case resolution, sentencing, victim restoration, and offender reintegration.	The customary norm is no longer recognized, is not consistently practised, or is maintained only by particular elites without broader community support.	It should not be used as a basis for resolving cases. The state should conduct social verification and prevent reliance on customary claims that lack community legitimacy.
2	Clarity and accessibility of norms	The content, objectives, procedures, competent authorities, and consequences of applying the customary norm	It may be flexibly documented and applied, provided that its operation is foreseeable and does not give rise to arbitrariness.	The customary norm is vague, inconsistent, unverifiable, or subject to unilateral interpretation	It should not serve as a basis for criminalization, punishment, or the restriction of rights. The norm must first

²⁵ Khanan Saputra et al., "Communal Justice for Environmental Sustainability in Indonesia's New Criminal Code: Challenges in Law Enforcement," *Journal of Law, Environmental and Justice* 4, no. 1 (2026): 161-207, <https://doi.org/10.62264/jlej.v4i1.221>.

		can be identified with sufficient clarity by the parties concerned.		by customary authorities.	be clarified through a participatory process before it can be considered within the legal system.
3	Compatibility with the constitution and human rights	The customary value respects human dignity, equality before the law, non-discrimination, victim protection, and fair-trial principles.	It may be integrated as part of an inclusive conception of legality, while remaining subject to constitutional oversight and human rights standards.	The customary norm or practice involves discrimination, violence, degrading punishment, or restrictions of rights based on gender, age, social status, religion, or position within the community.	It must be excluded and should not receive legal legitimacy. Where its underlying value remains relevant, the norm must be reconstructed to ensure conformity with constitutional and human rights standards.
4	Orientation toward justice	The customary process is directed toward victim restoration, offender accountability, the restoration of social equilibrium, reconciliation, and reintegration into the community.	It may enrich the orientation of the criminal justice system by shifting it from a predominantly retributive model toward a restorative and participatory approach.	The process is directed solely toward retaliation, exclusion, revenge, or protection of the community's reputation without regard to the victim's interests.	It should not be treated as a restorative justice mechanism. The state must prioritize victim protection and employ formal legal mechanisms that offer stronger guarantees of substantive justice.
5	Consent of the parties	The customary process is conducted on the basis of the free, informed, and voluntary consent of the parties,	It may be used as an alternative or complementary criminal justice mechanism, provided that consent is given	Consent is obtained through coercion, intimidation, social dependency,	The outcome should not bind the victim. The case must be returned to the formal justice system, and the

		particularly the victim. The parties retain the right to refuse or terminate the process.	without pressure from family members, the community, state officials, or customary leaders.	or unilateral decisions by the family or community that disregard the victim's wishes.	state must guarantee effective legal assistance and protection.
6	Protection of vulnerable groups	The customary mechanism provides equal participation for women, children, persons with disabilities, minority groups, and community members occupying socially	It may be recognized where adequate assistance, representation, and safeguards are available to ensure that vulnerable groups are not sacrificed in the name of communal harmony.	Vulnerable groups are excluded, denied a meaningful voice, or subjected to disproportion ate obligations because of their social position.	The norm must be rejected or reconstructed. The state must ensure that the integration of customary law does not reinforce existing inequality or subordination.
7	Institutional accountability of customary bodies	The customary institution possesses an identifiable structure of authority, transparent procedures, reasoned decision-making, and mechanisms of accountability to the community.	It may be granted a limited role in case resolution through coordinated relationships with investigators, prosecutors, courts, and victim-protection institutions.	Decisions are made through closed and opaque procedures, cannot be questioned, or depend heavily on the personal will of customary leaders.	The authority of the customary institution should not be directly recognized. Institutional reform, procedural transparency, and objection mechanisms are required before integration can occur.
8	Oversight and corrective mechanisms	Accessible procedures are available for complaints, objections, review, or correction by state institutions where the customary process violates the rights of the parties.	A customary settlement may be granted limited legal effect after verification by the competent authorities or courts.	The customary decision is treated as final and absolute, without access to state institutions or corrective mechanisms.	It should not be given legal effect capable of extinguishing criminal responsibility. The state must guarantee access to the formal justice system and correct

					decisions that violate rights.
9	Proportionality of customary sanctions or obligations	The customary obligation is reasonable, relevant to the harm caused, practically enforceable, and directed toward restoring the victim and repairing social relationships.	It may be considered a form of reparation, restorative measure, a mitigating factor, or part of a restorative settlement.	The customary sanction is excessive, degrading, imposed upon the offender's family, impoverishing, or results in disproportionate double punishment.	It should neither be enforced nor recognized by the state. The sanction must be replaced with a proportionate, humane, and restorative form of accountability.
10	Relevance to the type of case	The customary mechanism is applied to cases in which restoration is realistically achievable, particularly interpersonal conflicts, offences involving limited harm, or disputes closely connected to community relations.	It may be used during investigation, prosecution, judicial proceedings, sentencing, or social reintegration, subject to a clearly defined classification of eligible cases.	The customary mechanism is used to resolve serious crimes, sexual violence, human trafficking, torture, corruption, or offences involving extreme power imbalances.	Customary settlement should not replace state criminal proceedings. Customary values may only be considered to a limited extent where doing so does not diminish victim protection or offender accountability.
11	Relationship with the principle of legality	Customary law is used to enrich methods of case resolution and the objectives of punishment, rather than to create unforeseeable criminal offences.	It may be situated within an inclusive conception of legality that preserves legal certainty while recognizing living legal values within society.	The customary norm is used directly to punish conduct that was not previously and clearly defined, or could not reasonably have been foreseen as a criminal offence.	It should not serve as a basis for criminalization or punishment because this would contravene the principle of <i>nullum crimen, nulla poena sine lege</i> . Its recognition must first be grounded in a clear legal basis.
12	Contribution to the	Customary values enhance social	They may be substantively	The customary norm makes	It should not be maintained

criminal justice system	legitimacy, victim restoration, offender accountability, community participation, and the effectiveness of social reintegration.	integrated through criminal justice policy, operational guidelines for officials, judicial reasoning, community-based sanctions, and restorative justice mechanisms.	no meaningful contribution to restoration, prolongs conflict, creates new forms of injustice, protects the interests of offenders and community elites.	within the criminal justice process. The state should develop fairer alternative mechanisms and support the transformation of customary values to reflect the needs of contemporary society.
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Source: Secondary data, processed by the authors, 2026.

This multilayered model is more appropriate than either transferring full jurisdiction over criminal cases to customary institutions or standardizing customary mechanisms within formal state procedures. Full delegation may create gaps in legal protection, whereas excessive standardization may erode the contextual character of customary law. A multilayered approach allows for institutional flexibility while preserving the minimum standards that must govern all criminal dispute-resolution mechanisms.

Several indicators are necessary to assess the feasibility of implementing this model. First, the customary norm concerned must possess genuine social legitimacy. Second, the applicable procedures must be foreseeable and accessible to the parties. Third, the victim's participation must be based on free and informed consent. Fourth, the settlement must guarantee non-discrimination and adequate protection for vulnerable groups. Fifth, it must produce identifiable and measurable forms of restoration. Sixth, effective mechanisms of state supervision, review, and correction must remain available.²⁶

The integration model must also address potential jurisdictional conflicts. Such conflicts may arise where customary institutions and state authorities simultaneously claim competence over the same case. To resolve these tensions, the legal framework should establish principles of subsidiarity, institutional coordination, and the primacy of rights protection. In cases where harm can be effectively remedied at the community level, customary mechanisms may be granted limited priority. However, where an offence threatens significant public interests or fundamental rights, state jurisdiction must remain predominant.

Ultimately, integrating customary legal values is not intended to return the criminal justice system to the legal structures of the past. Rather, it represents an effort to construct a more inclusive form of legal modernity. A modern legal system need not be equated exclusively with centralization, comprehensive codification, or the dominance of retributive punishment.²⁷ Legal modernity may also be expressed through recognition of normative

²⁶ Junaidi and Susanto, "Reformulation of Customary Criminal Law," 43–60.

²⁷ Saimima et al., "Layered Hybrid Model in Criminal Resolution," 1–15.

plurality, meaningful community participation, victim restoration, and the protection of human rights.

Accordingly, customary legal values may be incorporated into the criminal justice system through a framework of inclusive legality and a multilayered institutional model. Such integration preserves legal certainty, fair-trial guarantees, and the state's continuing responsibility for the administration of criminal justice, while creating space for local values to enrich the purposes and processes of law enforcement. This model positions customary law not as a rival to state law, but as a legitimate normative resource capable of contributing to a criminal justice system that is more restorative, participatory, context-sensitive, and substantively just.

4. Conclusion

The analysis demonstrates that the integration of customary law into modern criminal justice should not be framed as a choice between rigid statutory legality and unrestricted legal pluralism. Rather, a more defensible approach requires a functional distinction between customary law as a basis for criminalization and customary legal values as a normative resource for the resolution of criminal cases. The former directly engages the coercive power of the state and must therefore remain subject to particularly stringent requirements of legality, including accessibility, foreseeability, territorial determinacy, normative clarity, and constitutional compatibility. By contrast, the latter may be accommodated more flexibly in mediation, sentencing, victim restoration, reconciliation, and offender reintegration because it does not necessarily expand the scope of criminal liability.²⁸ This distinction provides the foundation for the article's conception of inclusive legality: a model in which legality remains strict where customary norms generate or aggravate criminal responsibility, while permitting greater normative accommodation where customary values contribute to restorative and context-sensitive forms of justice. Such accommodation, however, remains conditional upon consistency with constitutional principles, human rights, fair-trial guarantees, victim protection, and effective state supervision. The proposed multilayered framework encompassing value-based, procedural, institutional, and supervisory integration therefore seeks to reconcile legal certainty with legal pluralism without either subordinating customary law entirely to state law or granting it unrestricted normative autonomy.

This study nevertheless has several limitations that define the scope of its conclusions. First, the proposed framework is predominantly normative and conceptual; it does not provide an empirical assessment of how customary justice institutions actually operate across different communities, particularly in relation to power asymmetries, victim participation, gender equality, and the effectiveness of customary sanctions. Second, although the analysis draws upon the Indonesian recognition of living law and broader literature on legal pluralism, the framework does not claim that customary legal systems are institutionally or culturally uniform. Customary norms may differ substantially in their sources of authority,

²⁸ Islamul Haq et al., "Legal Harmony: Integration of Customary, National, and Islamic Criminal Law in the Toraja Ma'rambu Langi," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 20, no. 2 (2025), <https://doi.org/10.19105/al-lhkam.v20i2.17680>.

territorial reach, institutional structure, procedures, and relationship with state institutions.²⁹ Third, the distinction between normatively meaningful and normatively deficient customary law remains dependent upon criteria that require further operational clarification, particularly in determining social legitimacy, consistency of practice, free and informed consent, proportionality, and the adequacy of safeguards for vulnerable groups. Accordingly, the framework proposed here should be understood as a normative architecture for evaluating possible forms of integration rather than as a universally applicable institutional blueprint. This limitation is particularly important because the article itself recognizes that customary law cannot be presumed to be inherently restorative, democratic, or rights-protective merely because it derives from tradition.

Future research should therefore move beyond the present conceptual framework and examine how differentiated forms of customary-law integration operate in particular legal and social settings. Comparative research is needed to test whether the distinction between the criminalization function and the resolution function of customary law can be sustained across jurisdictions with different constitutional approaches to legal pluralism. Empirical socio-legal studies should also investigate how customary norms are identified, who is authorized to interpret them, how community consent is established, and whether customary settlement mechanisms provide meaningful protection for victims and vulnerable groups in practice. In the Indonesian context, particular attention should be given to the implementation of Article 2 of the Criminal Code and Government Regulation No. 55 of 2025, including the extent to which regional regulation can translate living law into an ascertainable legal norm without transforming it into a rigid form of state-created law.³⁰ Further research should also develop more precise indicators for measuring social legitimacy, foreseeability, proportionality, participatory validity, and constitutional compatibility. Such inquiry would allow the concept of inclusive legality advanced in this article to be tested, refined, and potentially transformed from a normative proposition into a more operational theory of how state criminal law and customary normative orders can coexist within a constitutionally constrained system of legal pluralism.

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²⁹ Teuku Muttaqin Mansur et al., "Mediating Tradition: The Role of Law Enforcement in Customary Law Disputes," *Jurnal Ilmiah Peuradeun* 13, no. 2 (2025): 1183–208, <https://doi.org/10.26811/peuradeun.v13i2.1921>.

³⁰ Gede Eka Rusdi Antara et al., "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, <https://doi.org/10.33096/substantivejustice.v4i2.149>.

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