

## A Normative Review of the Integration of Customary Criminal Sanctions into the National Sentencing System for Land Rights Violations

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### ABSTRACT

The coexistence of customary criminal sanctions and the national sentencing system in Indonesia reflects the country's plural legal structure, particularly in cases involving land rights violations. While indigenous communities continue to enforce customary sanctions that are socially binding and restorative in nature, Indonesian positive law remains normatively ambiguous regarding their legal status within state-imposed criminal punishment. The enactment of Law No. 1 of 2023 on the National Criminal Code recognizes living law but fails to provide explicit guidance on how customary sanctions should be integrated into sentencing decisions. Using normative legal research with statute, conceptual, and case approaches, this article examines the juridical position of customary criminal sanctions and their implications for legal certainty and proportionality in sentencing. The analysis demonstrates that unregulated coexistence between customary sanctions and state punishment risks inconsistent judicial practices and potential violations of the principle of non bis in idem. This article argues that customary criminal sanctions may only be integrated into the national sentencing system through explicit normative positioning, either as mitigating factors or as regulated corrective measures, in order to uphold legality, legal certainty, and substantive justice in land rights cases.

**Password:** *customary criminal sanctions, sentencing system, land rights violations, legal pluralism, criminal law reform.*

### INTRODUCTION

Land rights violations in Indonesia constitute a persistent legal and social problem that is often resolved not only through the formal criminal justice system but also through customary criminal sanctions applied within indigenous communities. In many regions, customary sanctions are socially binding, perceived as legitimate, and effectively restore communal order following land-related offenses.<sup>1</sup> This empirical reality demonstrates that state criminal law does not operate in isolation but coexists with living customary norms that continue to regulate land relations and dispute resolution.

However, the coexistence of customary criminal sanctions and the national sentencing system raises a fundamental juridical problem. Indonesia's criminal law system is constructed upon the principles of formal legality, codification, and state monopoly over punishment. Customary sanctions, by contrast, derive their authority from communal consensus rather than statutory enactment. When both mechanisms are applied

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<sup>1</sup> Adi Kusyandi, Sahda Salsabila, and M. Murtiningsih, "Kedudukan Hukum Pidana Adat dalam Hukum Pidana Indonesia," *Yustitia* (2023).

to the same land rights violation, uncertainty arises regarding their legal status, interaction, and cumulative effect within the national criminal justice framework.<sup>2</sup>

This problem becomes increasingly acute following the enactment of Law No. 1 of 2023 on the National Criminal Code. The new Criminal Code explicitly recognizes “living law” (hukum yang hidup dalam masyarakat) as a relevant normative source, thereby reopening the space for customary norms within the criminal law system.<sup>3</sup> Nevertheless, the Code does not clearly regulate whether customary criminal sanctions may substitute, complement, or mitigate state-imposed criminal penalties. This omission produces normative ambiguity rather than legal clarity.

The ambiguity is further compounded in land-related offenses, where customary law has historically played a central role. Law No. 5 of 1960 on Basic Agrarian Principles (UUPA) recognizes customary land rights (hak ulayat) and implicitly affirms the relevance of indigenous legal institutions in land governance.<sup>4</sup> Yet, when violations of land rights escalate into criminal matters prosecuted by the state, the relationship between customary resolution and state punishment remains unclear. This uncertainty creates a risk of overlapping sanctions imposed by customary authorities and state courts.

The core legal issue addressed in this article is the existence of normative ambiguity in Indonesian positive law concerning the integration of customary criminal sanctions into the national sentencing system for land rights violations. This ambiguity manifests in three interrelated aspects: the unclear legal status of customary criminal sanctions within the national penal framework, the absence of guidance for judges in considering customary sanctions during sentencing, and the unresolved relationship between customary settlement and state criminal liability.<sup>5</sup>

Such ambiguity has tangible juridical consequences. Divergent judicial practices have emerged, with some judges considering customary sanctions as mitigating factors, while others disregard them entirely. In certain cases, defendants who have already undergone customary sanctions remain subject to full criminal punishment by the state, raising concerns regarding legal certainty and the principle of non bis in idem.<sup>6</sup> Without a clear normative framework, the integration of customary sanctions risks undermining both legal predictability and substantive justice.

From an academic perspective, existing scholarship has largely focused on the recognition of customary law in general or on restorative justice paradigms, without systematically addressing the sentencing implications of customary criminal sanctions in land rights cases. Comparative and doctrinal studies acknowledge legal pluralism but often stop short of proposing concrete normative models for integrating customary sanctions into a codified sentencing system.<sup>7</sup> This research gap necessitates a focused normative analysis grounded in positive law.

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<sup>2</sup> Renita Kamil, “Legal Positivism Influence on Law Enforcement and Judicial Practice in Indonesia,” *JUSTISI* (2025).

<sup>3</sup> Law No. 1 of 2023 on the Criminal Code, arts. 2–3.

<sup>4</sup> Law No. 5 of 1960 on Basic Agrarian Principles, arts. 3 and 5.

<sup>5</sup> Gede Eka Rusdi Antara, I. N. Budiana, and Ida Ayu Sadnyini, “Formulation of Customary Criminal Law in Future Criminal Code and Legal Enforcement in Indonesia,” *Substantive Justice International Journal of Law* (2021).

<sup>6</sup> Arif Junaidi and Rizki Nurdiansyah, “Analisis Perbandingan Sistem Hukum Pidana di Indonesia: Pidana Barat (KUHP) dan Pidana Adat,” *Mahkamah: Jurnal Riset Ilmu Hukum* (2025).

<sup>7</sup> Agus Widjajanto, I. G. P. Astawa, and Muhammad Rulyandi, “Decolonising Restorative Justice in Indonesia,” *Legality: Jurnal Ilmiah Hukum* (2025).

Accordingly, this article aims to examine the normative position of customary criminal sanctions within Indonesian criminal law, to assess the juridical implications of normative ambiguity for sentencing practices in land rights violations, and to propose a constitutionally grounded model for integrating customary sanctions into the national sentencing system in a manner that ensures legal certainty and substantive justice.<sup>8</sup>

## METHOD

This study employs normative legal research with a prescriptive orientation. Normative research is appropriate for examining the coherence and adequacy of legal norms governing the interaction between customary criminal sanctions and the national sentencing system. The analysis focuses on identifying normative ambiguity and proposing systematic legal formulations rather than describing empirical dispute-resolution practices.<sup>9</sup>

The statute approach is used to analyze relevant constitutional and statutory provisions, including Article 18B paragraph (2) of the 1945 Constitution, Law No. 1 of 2023 on the Criminal Code, Law No. 5 of 1960 on Basic Agrarian Principles, and Law No. 30 of 2014 on Government Administration. This approach enables an assessment of whether existing legislation provides a coherent normative basis for integrating customary sanctions into state sentencing decisions.<sup>10</sup>

The conceptual approach is applied to examine key legal concepts such as living law, legal pluralism, sentencing theory, and restorative justice. These concepts are used to evaluate whether customary criminal sanctions can be accommodated within the objectives of punishment recognized in modern Indonesian criminal law, including proportionality, justice, and social harmony.<sup>11</sup>

The case approach complements statutory and conceptual analysis by examining judicial decisions in which courts have considered customary settlements or sanctions in land-related criminal cases. This approach reveals how normative ambiguity translates into inconsistent sentencing practices and illustrates the practical implications of doctrinal uncertainty.<sup>12</sup> Legal materials consist of primary sources (statutory regulations and court decisions), secondary sources (peer-reviewed journals and doctrinal works on criminal law and customary law), and tertiary sources (legal dictionaries and encyclopedias). The analysis employs systematic and teleological interpretation to formulate prescriptive recommendations for integrating customary criminal sanctions into the national sentencing system in a constitutionally consistent manner.<sup>13</sup>

## HASIL DAN PEMBAHASAN

The Indonesian constitutional framework explicitly acknowledges the existence

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<sup>8</sup> Budi Prakosa Adi, "Creating Synergy between Restorative Customary Law Values and the Retributive National Legal System," *SHS Web of Conferences* (2025).

<sup>9</sup> Philipus M. Hadjon, *Introduction to Indonesian Administrative Law* (Yogyakarta: Gadjah Mada University Press, 2020).

<sup>10</sup> 1945 Constitution of the Republic of Indonesia, art. 18B(2); Law No. 1 of 2023 on the Criminal Code; Law No. 5 of 1960 on Basic Agrarian Principles; Law No. 30 of 2014 on Government Administration

<sup>11</sup> I. M. W. Darma, "New Paradigm of Indonesian Criminal Law Policy to Formulate Sanctions for Cases of Customary Crimes," *Jurnal Hukum dan Peradilan* (2021).

<sup>12</sup> Samuel Siahaan et al., "Analisis Penyelesaian Sengketa terhadap Upaya Pengambilalihan Hak atas Tanah Adat," *Jurnal Riset Rumpun Ilmu Sosial, Politik dan Humaniora* (2025).

<sup>13</sup> Budi Prakosa Adi, "Creating Synergy between Restorative Customary Law Values and the Retributive National Legal System," (2025).

of customary law communities and their traditional rights, provided that such rights remain alive and consistent with national legal principles. Article 18B paragraph (2) of the 1945 Constitution establishes constitutional recognition of indigenous legal orders, thereby affirming that customary norms are not extralegal phenomena but part of Indonesia's plural legal reality.<sup>14</sup> This recognition forms the normative foundation for considering customary criminal sanctions within the broader criminal law system.

The enactment of Law No. 1 of 2023 on the National Criminal Code further reinforces this constitutional position by introducing the concept of "living law" as a relevant normative reference in criminal law. The Code implicitly accepts that certain conduct may be governed by norms that originate outside statutory criminal provisions.<sup>15</sup> However, this recognition is framed cautiously and does not automatically elevate customary sanctions to the status of state-imposed criminal penalties. As a result, the precise juridical position of customary criminal sanctions remains normatively indeterminate.

This indeterminacy manifests in the absence of clear classification. Indonesian criminal law traditionally distinguishes between principal punishments, additional punishments, and measures (tindakan). Customary criminal sanctions do not fit neatly into any of these categories. They are not imposed by the state, yet they function as punitive and corrective mechanisms within indigenous communities.<sup>16</sup> The lack of classification creates ambiguity as to whether customary sanctions should be treated as punishment, restorative mechanisms, or merely social consequences without legal relevance in sentencing.

The tension between formal legality and legal pluralism becomes evident at this point. The principle of legality requires that criminal punishment be based on prior statutory authorization, while legal pluralism acknowledges the normative authority of non-state legal orders.<sup>17</sup> When customary sanctions are applied to land rights violations that later enter the state criminal justice system, judges face a normative dilemma: ignoring customary sanctions undermines constitutional recognition of indigenous law, while recognizing them without statutory guidance risks violating formal legality.

This dilemma is particularly pronounced in land-related cases due to the historical and normative role of customary law in land governance. The Basic Agrarian Law recognizes customary land rights and implicitly affirms indigenous authority over land regulation.<sup>18</sup> Nevertheless, when land disputes escalate into criminal cases, customary sanctions imposed for land violations lack a clear procedural bridge to state sentencing decisions. This gap illustrates normative ambiguity rather than normative absence, as multiple legal norms coexist without clear hierarchy or coordination.

Normatively, this ambiguity weakens the coherence of the criminal law system. Customary sanctions are neither fully excluded nor systematically integrated, resulting in ad hoc judicial approaches. Prescriptively, Indonesian criminal law requires explicit normative positioning of customary criminal sanctions, either by recognizing them as legally relevant mitigating factors or by defining them as complementary measures within

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<sup>14</sup> 1945 Constitution of the Republic of Indonesia, art. 18B(2).

<sup>15</sup> Law No. 1 of 2023 on the Criminal Code, art. 2.

<sup>16</sup> Adi Kusyandi, Sahda Salsabila, and M. Murtiningsih, "Kedudukan Hukum Pidana Adat dalam Hukum Pidana Indonesia," *Yustitia* (2023).

<sup>17</sup> Renita Kamil, "Legal Positivism Influence on Law Enforcement and Judicial Practice in Indonesia," *JUSTISI* (2025).

<sup>18</sup> Law No. 5 of 1960 on Basic Agrarian Principles, art. 3.

the sentencing framework. Without such clarification, constitutional recognition of customary law remains symbolic rather than operational.<sup>19</sup>

### **Legal Implications of Normative Ambiguity in Sentencing for Land Rights Violations**

Normative ambiguity regarding the status of customary criminal sanctions produces significant legal consequences in sentencing practices for land rights violations. In the absence of explicit statutory guidance, judges are left with broad discretion to determine whether and how customary sanctions should influence sentencing outcomes.<sup>20</sup> This discretionary space results in divergent judicial approaches, undermining consistency and predictability in criminal adjudication.

One major implication concerns the risk of double sanctioning. In several land-related cases, individuals who have already undergone customary sanctions are subsequently subjected to full criminal punishment by state courts. Without a clear normative rule addressing the legal effect of customary sanctions, such practices raise serious concerns regarding the principle of *non bis in idem*.<sup>21</sup> Although customary sanctions are not formally classified as state punishment, their punitive nature and social consequences cannot be ignored in assessing cumulative penal impact.

The ambiguity also affects the protection of defendants' rights. When judges disregard customary sanctions entirely, defendants may experience disproportionate punishment that fails to account for prior restorative or punitive measures imposed by indigenous authorities.<sup>22</sup> Conversely, when judges inconsistently reduce sentences based on customary sanctions without normative criteria, sentencing outcomes become unpredictable and vulnerable to accusations of arbitrariness. Both scenarios undermine legal certainty and equality before the law.

Judicial practice reflects this inconsistency. Some courts treat customary settlement as a mitigating factor, while others view it as irrelevant to criminal liability. This divergence is not rooted in differing factual circumstances but in the absence of a unified normative framework guiding judicial reasoning.<sup>23</sup> As a result, similar land rights violations may yield significantly different sentencing outcomes depending on judicial interpretation rather than legal principle.

From a systemic perspective, normative ambiguity weakens the integrative function of the criminal justice system. The lack of coordination between customary mechanisms and state sentencing creates parallel systems that operate without mutual recognition or limitation. This fragmentation contradicts the objective of the National Criminal Code to establish a coherent and proportional sentencing system grounded in

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<sup>19</sup> Gede Eka Rusdi Antara, I. N. Budiana, and Ida Ayu Sadnyini, "Formulation of Customary Criminal Law in Future Criminal Code and Legal Enforcement in Indonesia," *Substantive Justice International Journal of Law* (2021).

<sup>20</sup> Fransiska Khatrine, "Criminal Law Reform of the Existence of Article 378 of the Criminal Code in Land Cases," *Jurnal Indonesia Sosial Sains* (2024).

<sup>21</sup> Arif Junaidi and Rizki Nurdiansyah, "Analisis Perbandingan Sistem Hukum Pidana di Indonesia: Pidana Barat (KUHP) dan Pidana Adat," *Mahkamah: Jurnal Riset Ilmu Hukum* (2025).

<sup>22</sup> Ferry Herlius, "Kaidah Hukum Adat dalam Penuntutan Demi Keadilan Berbasis Kearifan Lokal," *Perspektif* (2022).

<sup>23</sup> Samuel Siahaan et al., "Analisis Penyelesaian Sengketa terhadap Upaya Pengambilalihan Hak atas Tanah Adat," *Jurnal Riset Rumpun Ilmu Sosial, Politik dan Humaniora* (2025).

justice and legal certainty.<sup>24</sup>

To clarify these implications, the following table summarizes the legal effects of normative ambiguity in sentencing practices for land rights violations.

**Table 1. Legal Consequences of Normative Ambiguity in Integrating Customary Criminal Sanctions into National Sentencing for Land Rights Violations**

Aspect	Normative Ambiguity	Legal Consequence
Judicial Discretion	Unbounded and unguided	Inconsistent sentencing
Double Sanctioning	No clear prohibition	Risk of non bis in idem
Defendant Protection	Uneven consideration	Disproportional punishment
Legal Certainty	Weak normative coordination	Unpredictable outcomes
Systemic Coherence	Fragmented authority	Erosion of sentencing integrity

Prescriptively, addressing these implications requires statutory clarification that delineates the legal relevance of customary sanctions in sentencing decisions. Customary sanctions should not operate in parallel with state punishment without coordination. Instead, criminal procedural and substantive law must establish clear criteria for judicial consideration of customary sanctions to ensure proportionality, consistency, and constitutional compliance.<sup>25</sup>

### **Reconstructing a Normative Model for Integrating Customary Sanctions into the National Sentencing System**

The integration of customary criminal sanctions into the national sentencing system requires a coherent normative reconstruction that reconciles constitutional recognition of indigenous law with the principles of legality and proportionality in criminal punishment. The absence of explicit statutory guidance in the National Criminal Code has resulted in fragmented judicial practices, indicating the need for a structured model that situates customary sanctions within the architecture of state sentencing rather than outside it.<sup>26</sup> Such reconstruction must begin from the objectives of punishment recognized in Indonesian criminal law.

Law No. 1 of 2023 on the Criminal Code reflects a shift toward a more balanced sentencing philosophy that incorporates retributive, preventive, and restorative elements. Within this framework, customary sanctions may be normatively justified insofar as they contribute to social harmony, victim restoration, and proportional accountability.<sup>27</sup> However, customary sanctions cannot be equated with principal punishments imposed by the state, as this would undermine the legality principle by allowing non-statutory

<sup>24</sup> H. Flora, Mac Thi Hoai Thuong, and Ratna Deliana Erawati, "The Orientation and Implications of New Criminal Code," *Jurnal IUS Kajian Hukum dan Keadilan* (2023).

<sup>25</sup> Budi Prakosa Adi, "Creating Synergy between Restorative Customary Law Values and the Retributive National Legal System," *SHS Web of Conferences* (2025).

<sup>26</sup> H. Flora, Mac Thi Hoai Thuong, and Ratna Deliana Erawati, "The Orientation and Implications of New Criminal Code," *Jurnal IUS Kajian Hukum dan Keadilan* (2023).

<sup>27</sup> Law No. 1 of 2023 on the Criminal Code, arts. 51–54.

penalties to function as autonomous criminal sanctions.

A viable normative model is to position customary criminal sanctions as legally relevant mitigating factors in sentencing decisions. Under this model, the imposition of customary sanctions prior to state adjudication would not extinguish criminal liability but would be expressly considered by judges in determining sentence severity.<sup>28</sup> This approach preserves state authority over punishment while acknowledging the substantive justice achieved through customary mechanisms. Importantly, such consideration must be regulated by statutory criteria to prevent arbitrary or inconsistent application.

An alternative but complementary model is to integrate customary sanctions as part of additional punishments or corrective measures (tindakan). In this formulation, customary sanctions could be incorporated into sentencing outcomes where they align with rehabilitative or restorative objectives recognized by the Criminal Code.<sup>29</sup> This model allows customary practices to function within the formal sentencing structure without displacing statutory penalties, thereby maintaining coherence within the criminal law system.

For either model to operate legitimately, clear normative criteria must be established. These criteria should include: constitutional compatibility with Article 18B paragraph (2) of the 1945 Constitution; consistency with the objectives of punishment under the National Criminal Code; voluntariness and procedural fairness in the imposition of customary sanctions; and proportionality between the customary sanction and the criminal offense.<sup>30</sup> Without such criteria, judicial consideration of customary sanctions risks perpetuating the very ambiguity it seeks to resolve.

Normatively, statutory reform is indispensable. The National Criminal Code should be supplemented by implementing regulations or sentencing guidelines that explicitly regulate the legal relevance of customary criminal sanctions in land rights cases. Such regulation would transform constitutional recognition of indigenous law from a declaratory principle into an operational norm within the sentencing system.<sup>31</sup> This reform would also enhance legal certainty and prevent double sanctioning.

Ultimately, integrating customary sanctions into the national sentencing system is not merely a matter of accommodation but of systemic coherence. By embedding customary sanctions within a regulated sentencing framework, Indonesian criminal law can uphold legal pluralism without sacrificing legality, proportionality, or the rule of law.<sup>32</sup>

## CONCLUSION

The integration of customary criminal sanctions into Indonesia's national sentencing system for land rights violations presents a fundamental normative challenge rooted in legal pluralism and formal legality. This study demonstrates that existing positive law, including the National Criminal Code and agrarian legislation,

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<sup>28</sup> Aby Maulana, Pathorang Halim, and Tubagus Heru Dharma Wijaya, "Victim Pardon Model in National Criminal Law Reform," *Al-Qisth Law Review* (2023).

<sup>29</sup> Villar Wibawa Wicaksana and Mas Putra Zenno Januarsyah, "Social Work Punishment Policy in the National Criminal Code," *Jurnal USM Law Review* (2025).

<sup>30</sup> 1945 Constitution of the Republic of Indonesia, art. 18B(2).

<sup>31</sup> Budi Prakosa Adi, "Creating Synergy between Restorative Customary Law Values and the Retributive National Legal System," *SHS Web of Conferences* (2025).

<sup>32</sup> Agus Widjajanto, I. G. P. Astawa, and Muhammad Rulyandi, "Decolonising Restorative Justice in Indonesia," *Legality: Jurnal Ilmiah Hukum* (2025).

provides constitutional recognition of customary law without offering a clear operational framework for its integration into sentencing decisions. As a result, normative ambiguity persists, undermining legal certainty and consistency in judicial practice.

This article concludes that customary criminal sanctions cannot function as autonomous criminal punishments within the national legal system without violating the legality principle. However, excluding them entirely from sentencing considerations would negate constitutional recognition of indigenous law and substantive justice achieved through customary mechanisms. Therefore, integration is only justifiable when customary sanctions are normatively positioned within the sentencing framework, either as mitigating factors or as regulated corrective measures.

Prescriptively, Indonesian criminal law requires explicit statutory clarification to govern the legal relevance of customary sanctions in land rights cases. Such clarification must ensure proportionality, prevent double sanctioning, and provide clear guidance for judges. Without this reform, the coexistence of customary sanctions and state punishment will continue to generate legal uncertainty and undermine the legitimacy of criminal adjudication in plural legal contexts.

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