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Dynamics of Living Law, Legal Pluralism, and the Challenges of Codifying Customary Law in Indonesia's National Legal System

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ABSTRACT

Background: The recognition of living law and legal pluralism in Indonesia's national legal system has become increasingly urgent, illustrated by a viral TikTok case in which derogatory content toward the Dayak people triggered a customary tribunal convened by indigenous youth organizations across fourteen districts in West and Central Kalimantan.
Objective: this study examines the nature of living law as a cultural phenomenon, how two normative systems negotiate within the same social space, and what is at stake when the state codifies customary law.
Method: this study employs a qualitative legal anthropology approach through a descriptive-analytical case study design, drawing on library research and document analysis of legislation and literature, analyzed through phenomenological, theoretical, and critical-reflective interpretive stages.
Results: the study finds that the recognition of living law in the National Penal Code (Law No. 1/2023, Article 2) marks a significant legal advancement, though top-down codification risks turning customary law into a static, inflexible artifact.
Implications: theoretically, this study integrates living law, legal pluralism, politics of recognition, and restorative justice into a unified anthropological framework for digital-space jurisdictional conflict; practically, it recommends that the state adopt a protective rather than colonizing role, allowing living law to develop organically through communal deliberation and participatory governance.

INTRODUCTION

The phenomenon that serves as the analytical starting point for this study originated from a short form video uploaded to the TikTok social media platform, in which an individual named RK made verbal statements about the Dayak people using diction and intonation deemed to be derogatory in nature. The content spread massively across digital platforms and reached hundreds of thousands of viewers in a short period of time, triggering an organized

collective response from the indigenous community that felt aggrieved. This pattern mirrors a broader tendency documented in Indonesia's digital public sphere, where content perceived as demeaning toward a particular ethnic or communal identity tends to circulate rapidly and provoke organized collective backlash well before formal legal channels are able to respond (Margono et al., 2024). In response, indigenous youth organizations from fourteen regencies and cities across West and Central Kalimantan convened a customary tribunal as a mechanism for resolving communal normative violations.

In that tribunal, four customary violation charges were simultaneously brought against the perpetrator, namely *capa molot* (bitter mouth), *keterajunan*, insult to the customary longhouse, and defamation of the Dayak ethnic group, an accumulation of charges that reflects the gravity of the violation attributed to the verbal act within the local customary normative framework. This phenomenon reflects what Rato, (2021) has identified as the new challenge of protecting the human rights of indigenous legal communities in the digital era, in which cyberspace has become a new arena for the intersection of indigenous identity, communal dignity, and a legal system that is not yet fully equipped to handle its complexities.

On the surface, the incident can be categorized as a case of violating norms of civility in digital space, typically resolved through a public apology and payment of a fine as a form of symbolic compensation. However, upon deeper examination, this case is in fact a contemporary manifestation of a far more fundamental and longstanding debate, namely the question of how a pluralistic society such as Indonesia constructs definitions of law, gives meaning to justice, and determines the authority of legitimacy in its enforcement.

This issue is not merely a product of contemporary social dynamics; rather, it has been one of the epistemological and juridical tensions that have accompanied Indonesia's national journey from the pre-colonial era through the post-independence period, and has yet to receive a definitive resolution in the national legal or socio-political discourse. Bayo et al., (2023) demonstrate that the issue of recognizing indigenous communities in Indonesian legislation still leaves a number of fundamental legal uncertainties, which can be viewed as one of the most pressing legal agendas in need of more comprehensive resolution. Significantly, the enactment of Law Number 1 of 2023 on the National Penal Code, specifically Article 2 on living law, represents the state's most direct attempt to formally integrate customary norms into the national criminal justice framework, making this an issue of immediate legal and political urgency. Butt, (2023) argues that although the new Penal Code is publicly framed as an effort to indigenize and democratize Indonesian criminal law, its actual mechanisms for recognizing customary norms remain tightly bounded by centralized state authority over their interpretation and enforcement.

Globally, the tension between state law and indigenous normative systems is not unique to Indonesia. Scholars of legal anthropology and indigenous rights have documented similar dynamics across jurisdictions,

from the recognition of tikanga Maori in New Zealand courts, to the constitutional entrenchment of usos y costumbres in Mexico, to the ongoing debates over Aboriginal customary law in Australia (Setiawan et al., 2024). What makes the Indonesian case distinctive is its sheer normative diversity, its post-colonial legal architecture, and the recent codification impulse embodied in the National Penal Code. Within the domestic legal order itself, Heliany et al., (2023) argue that the National Penal Code's accommodation of customary criminal law signals a deliberate strengthening of legal pluralism as a normative orientation, even as questions remain over how consistently this orientation will be implemented in practice.

The intersection of this codification project with digital-space violations, as illustrated by the RK-Dayak case, creates a novel analytical context that existing scholarship has not fully addressed. Several prior studies have examined adjacent themes. Febrianty et al., (2023) identify the conceptual limitations of living law recognition in Indonesian criminal law reform, particularly in defining the boundary between accommodable customary values and those conflicting with universal human rights. Rochaeti et al., (2023) demonstrate that Dayak customary conflict resolution practices produce more effective and sustainable outcomes than formal judicial approaches.

This paper attempts to examine that complexity through the lens of legal anthropology, a subdiscipline that views law not as dead text in statute books, but as a living practice that grows from and alongside society. Disantara, (2021) reminds us that Indonesia's distinctive form of legal pluralism is a cultural strategy that must be understood contextually amid the continuing flow of legal modernization, and it is here that legal anthropology finds its most urgent relevance. Using the case of the Dayak community and the debate surrounding the recognition of customary law in Indonesia's national legal system as a starting point, this study will explore three major questions: what is the nature of *living law* as a cultural phenomenon, how do two normative systems negotiate within the same social space, and what is at stake when the state decides to codify what has long lived freely and organically.

This study has a gap that distinguishes it from previous research. Most existing studies discuss legal pluralism and customary law from normative legal or legal sociology perspectives, but rarely integrate the digital space as a new arena for normative jurisdictional conflict. This study fills that gap by positioning a viral social media incident as the analytical entry point, while bringing together the theoretical frameworks of living law, legal pluralism, politics of recognition, and restorative justice into a single, comprehensive anthropological analytical framework. Accordingly, the contribution of this study is not merely descriptive, but also critically reflective regarding the direction of customary law codification policy in Indonesia following the enactment of the National Penal Code.

RESEARCH METHOD

This study employs a qualitative approach with a legal anthropology perspective through a descriptive-analytical case study design. The case used as the analytical entry point is the viral incident on TikTok involving RK and the collective response of the Dayak indigenous community from fourteen regencies and cities in West and Central Kalimantan. The following components define the methodological framework of this study.

This study is a qualitative doctrinal and interpretive study. It does not generate primary empirical data through fieldwork but instead relies on the systematic analysis of secondary sources within a legal anthropological framework. A descriptive-analytical case study approach is employed, focusing on a single bounded case, the RK-Dayak tribunal incident, to generate theoretically grounded insights applicable to broader questions of legal pluralism and indigenous law codification in Indonesia.

The design follows an interpretive paradigm in which meaning, context, and social practice take precedence over statistical generalization. The study draws on legal anthropological traditions as conceptualized by Pospisil, (1971), which treat law as a multi-layered normative phenomenon embedded in social and cultural life. The primary instruments are documentary analysis protocols, including systematic review of legislation (Law Number 1 of 2023; Law Number 48 of 2009), academic journal articles, books, and published case documentation related to the Dayak customary tribunal. Data were collected through library research encompassing academic databases, legal repositories, and digital archives.

Sources were selected based on relevance to the themes of living law, legal pluralism, restorative justice, and indigenous rights in Indonesia. Data Processing Method: Collected materials were organized thematically and subjected to content analysis aligned with the three-stage analytical model described below. Data were analyzed using critical interpretive methods in three stages: (1) phenomenological description of the case as a social and normative event; (2) theoretical analysis based on legal anthropological conceptual frameworks, including living law (Ehrlich & Ziegert, 2017), legal pluralism (Griffiths, 1986), politics of recognition (Taylor, 1994), and restorative justice; and (3) critical-reflective analysis of the tensions and implications arising from the effort to integrate customary law into the national legal system.

Data credibility was ensured through source triangulation, cross-referencing academic literature, primary legislation, and documented case reports. The use of multiple theoretical frameworks further strengthens the interpretive validity of the study's findings. Data were analyzed using critical interpretive methods in three stages: phenomenological description of the case, theoretical analysis based on legal anthropological conceptual frameworks, including living law, legal pluralism, restorative justice, and politics of recognition, and critical-reflective analysis of the tensions and implications arising from the effort to integrate customary law into the national legal system.

This study positions indigenous communities not as passive objects, but as active subjects who defend their identity and normative systems, an epistemological stance aligned with the anthropological tradition of not merely documenting reality, but also questioning the power relations that shape how law is understood and applied. Data credibility was ensured through source triangulation, cross-referencing academic literature, primary legislation, and documented case reports related to the Dayak customary tribunal incident.

The analytical process follows the interpretive tradition in legal anthropology as advanced by Pospisil, (1971), which treats law as a multi-layered normative phenomenon embedded in social and cultural contexts, requiring analysis that goes beyond textual exegesis toward an understanding of how norms are lived and enforced in practice.

RESULTS AND DISCUSSION

Living Law: Law as a Cultural Organism

More than a century ago, Austrian legal sociologist Eugen Ehrlich put forward a proposition that was simple yet radical. The law that truly matters is not what is printed in the official gazette, but what actually governs human behavior in everyday life. He called this *living law*. This law requires no legislature to create it, no judge to enforce it, and does not depend on prison to impose its sanctions. It lives in customs, in unwritten agreements, in collective shame, and in community solidarity (Ehrlich & Ziegert, 2017). In the context of contemporary Indonesian criminal law, the legal anthropological approach to the concept of living law has received increasing academic attention. Manurung et al.,(2025) argue that the formulation of living law in national criminal law reform inherently requires a legal anthropological perspective to understand how customary norms operate in living social reality, not merely as normative text.

Indonesia can be viewed as one of the most fertile grounds for living law in this sense. With more than 1,300 customary traditions spread from Sabang to Merauke, the country is a living archive of the diversity of human normative systems. Each indigenous community, from the matrilineal Minangkabau to the patrilineal Batak, from Bali with its Hindu-based adat to the animistic Dayak tribes, has built its own legal repertoire over centuries, long before the Dutch arrived with their law books, long before the founding fathers drafted the Constitution.

Capa molot in the tradition of the Dayak Kanyatan is a highly illustrative example. This sanction is not merely a prohibition against speaking rudely that can be equated with the defamation provisions of the Penal Code. It originates from a far deeper cosmological belief, that words possess active power capable of disturbing the balance of the universe. When someone utters negative words that divide the community, they do not merely violate a social norm but simultaneously disturb the cosmic order that forms the foundation of communal life.

Customary sanctions are therefore not simply punishment in the modern legal sense, but rather a ritual of restoration and a ceremony to return harmony that has been fractured. Within this framework, Laia, (2024) research on Dayak Ngaju customary law reinforces the finding that customary dispute resolution mechanisms in Dayak communities inherently contain a restorative dimension, in which customary sanctions function not only as retribution but as instruments for restoring fractured social and cosmological relations.

It is this cosmological dimension that is often overlooked when we discuss customary law solely in formal legal contexts. Customary law is not merely an alternative system of rules, but an expression of the way a society understands the universe, human relationships with one another, and human relationships with forces greater than oneself. It is not only about what is permitted and what is prohibited, but also about who we are, where we come from, and how we must live in order to remain in harmony with all things.

Legal Pluralism: When Two Normative Systems Meet

One of the most central concepts in contemporary legal anthropology is legal pluralism, a condition in which more than one legal system operates simultaneously within the same social space. Indonesia is one of the most complex manifestations of this, at least in the Southeast Asian region. Since Dutch colonialism introduced the dichotomy between European law and customary law (*adat recht*), the question of how these two systems can coexist has been one of the most challenging puzzles in legal and social science in this country.

Legal anthropologist John Griffiths distinguishes between weak legal pluralism and strong legal pluralism (Griffiths, 1986). In the weak framework, the state acknowledges the existence of other legal systems but retains its position as the apex of the normative hierarchy, with other systems recognized only to the extent that the state permits. In the strong framework, various legal systems operate in relative autonomy and equality, each possessing its own domain of legitimacy.

Indonesia, through the recognition of living law in Article 2 of the National Penal Code (Law Number 1 of 2023), appears to be moving toward something more complex than either, a pluralism that is recognized but regulated, valued but framed. Febrianty et al., (2023) note that the recognition of living law in Indonesian criminal law reform faces fundamental conceptual limitations, particularly in defining the boundary between customary values that merit accommodation and those that may conflict with universal human rights principles, requiring a more careful approach in its operationalization.

This recognition is conditioned by four criteria established from the top down, encompassing compatibility with Pancasila, the constitution, human rights, and general legal principles. Such conditionality reflects a subtle form of power negotiation laden with implications. On one hand, the state acknowledges the validity of customary law; on the other, the state simultaneously defines the boundaries of that space. In other words, the

existence of customary law is acknowledged, yet it is also filtered within a framework that has been determined by the state.

What is notable in the public debate surrounding this case is the tendency to avoid a hierarchical framing, the question of "which is superior, customary law or positive law?", and replace it with an integrative framing. Both are viewed as instruments that complement each other within a larger orchestra of justice. Positive law addresses violations that fall within its categorization, while customary law addresses those that do not, or those that are better resolved communally. If the customary process has produced an agreement that has been validated, the matter is closed to formal judicial proceedings.

Yet beneath the elegance of this integrative framing lies a tension that is not easily resolved. What if a violation has counterparts in both systems simultaneously, for example, defamation that exists in the Penal Code and is also a customary violation? In that case, which system takes priority? The answer, according to the legal framework being constructed, is that positive law operates first; customary law only applies to matters not regulated in the Penal Code. This quietly maintains positive law in a superior position, not explicitly hierarchical, but structurally dominant.

Indigenous Identity and The Challenges of Digital Spaces

The RK case raises an anthropological question of growing interest in the era of social media, namely, who is subject to customary law and where do the boundaries of the indigenous community end? Traditionally, customary law applies to members of the relevant community within a particular geographical territory. A person born and raised in the Dayak Ngaju community understands and internalizes the norms that apply in that community, including the consequences of violating them. This dynamic also appears in Dede, (2024) research on the implementation of Dayak Ngaju customary law in dispute resolution in Central Kalimantan, which shows that Dayak customary law is living and adaptive to changing social contexts, including in addressing disputes that transcend the geographical boundaries of the traditional community.

However, the internet does not recognize territorial boundaries. Content uploaded in Central Kalimantan can be viewed and experienced as an insult by Dayak communities around the world within minutes. The space where the violation occurred is no longer a village, no longer a forest, no longer customary land in the physical sense, but rather a data space without soil or foundation. When a violator is not physically present in the customary territory that was violated, the jurisdiction of customary law becomes a difficult question to answer.

Under such conditions, the Electronic Information and Transactions Law (ITE Law) becomes the more jurisdictionally appropriate instrument, precisely because it governs digital space that has no geographical boundaries. Yet the Dayak community's insistence on demanding customary sanctions signals something deeper than merely a matter of jurisdiction, it is a declaration that their identity and dignity do not end at the edge of

Kalimantan's forests. They are practicing what Fredrik Barth called ethnic boundary maintenance, asserting that even though physical boundaries have become fluid, identity boundaries remain real and must be defended (Barth, 1998).

Beyond that, the collective response from dozens of indigenous youth organizations united in a single demand constitutes a powerful act of cultural politics. In Charles Taylor's terms, this is called the politics of recognition, a struggle to gain acknowledgment of collective existence and dignity (Taylor, 1994). They were not only demanding compensation from one individual; they were speaking to a broader public, declaring that being Dayak is not something that can be insulted without consequence, that their value system is not a powerless relic of the past, but a living force that remains relevant and authoritative.

Customary Leaders: Between Cultural Mediators and State Agents

In every indigenous community, there is a figure who serves as the pivot of the entire normative process, the customary leader. Known by different names in each tradition, such as *damang* in parts of the Dayak region, *temenggung* elsewhere, *penghulu* in Minangkabau, or *kepala suku* (tribal chief) in various Papuan communities, this figure carries a function far more complex than that of a mere communal judge.

Within Victor Turner's anthropological framework, the customary leader can be understood as a ritual specialist, an individual with cultural authority to guide the community through moments of crisis and conflict. When conflict erupts, the customary leader does not merely preside over a hearing to determine who is at fault and what the punishment should be, but also leads a social dialogue whose purpose is to restore the community to its former state of integration (Turner, 2018). This process is ritualistic, symbolic, and rich in cultural meaning, far removed from the procedural logic of modern law.

In the context of integrating customary law into the national system, customary leaders have been assigned a new and ambiguous role. The customary leader is not only a community leader but also potentially an extension of the state in socializing legislation. Their traditional authority is used as a channel for the state's administrative interests. This raises a critical question about co-optation, whether state recognition will in fact transform the character of customary leaders from organic community leaders into officials infected by bureaucratic logic.

This concern is not purely speculative. Various historical records show a number of cases in which formal recognition of customary leaders actually shifted the basis of their legitimacy, from an authority rooted in community trust to an authority dependent on state certification and recognition. When the source of legitimacy shifts, the character of leadership tends to change as well, and with it, the very nature of the customary law they uphold.

The Dangers of Codification: When Customary Law Is Formalized

One of the implications that deserves serious attention from the recognition of living law in national law is the plan for its codification into Regional Regulations. The logic is straightforward, in order for customary law to have legal certainty, it must be written, structured, and formally referable. Yet it is precisely here that the greatest paradox emerges: the codification process itself risks fundamentally altering the character of customary law.

Ramadhani, (2024) reinforces this concern by highlighting that the implementation of customary law recognition in the new Penal Code faces structural challenges that cannot easily be resolved through technical regulation alone. Customary law is fundamentally a living system precisely because of its flexible, contextual nature, and because it is always reinterpreted in each concrete case by those who are culturally authorized to do so.

There is no single text that definitively defines what *capa molot* is or how much its fine should be. That meaning is born from deliberation, from reading the situation, from relational considerations involving the history, context, and position of all parties involved. When all of this is confined within the text of a formal Regional Regulation, customary law becomes rigid. Living law loses its ability to respond to the uniqueness of each situation.

Eric Hobsbawm, in the concept of the invented tradition developed together with Terence Ranger, shows that many traditions claiming to be ancient are in fact relatively recent constructions, created or reconstructed for particular purposes in modern contexts (Hobsbawm, E., & Ranger, 1983). The history of Dutch colonialism in Indonesia also holds similar examples, in which efforts to document and standardize adat by colonial officials often produced versions of adat that had been distorted by Western assumptions. Ironically, it was often these distorted versions that were subsequently accepted and represented as authentic adat.

There is an apt metaphor for this: a butterfly pinned to a collection board. It can still be identified, studied, and admired, but it is no longer alive. Codified living law risks becoming just that, formally recognized, neatly archived, yet stripped of the vitality that was the very source of its strength and relevance.

Restorative Justice and the Value of Restoration in Customary Law

Beneath all of this complexity lies a value that serves as the common thread between customary law and the spirit carried by national criminal law reform, an orientation toward restoration rather than mere retribution. In modern legal terminology, this is called restorative justice, an approach that focuses on restoring relationships between the offender, the victim, and the broader community, rather than simply calculating a proportional punishment.

What is remarkable is that this concept, often presented in international legal discourse as a modern innovation, appears to have long been at the core of customary legal systems in various Indonesian communities. The values of *gotong-royong* (mutual cooperation) and mutual forgiveness that form the

foundation of customary dispute resolution can be viewed as the most organic form of restorative justice, born not from academic theory, but from the lived experience of communal life in communities of mutual dependence.

The most frequently cited example is the customary system in Bali, which combines bottom-up mechanisms from the community with formal recognition from above. Conflict resolution there does not wait for instructions from the government, but moves from within society itself, from a shared awareness that communal harmony is more valuable than individual satisfaction over a legal victory. In Aceh, in West Sumatra, in East Nusa Tenggara, in Kalimantan, similar patterns exist with their own cultural variations.

Rochaeti et al., (2023), in their study on restorative justice in the customary jurisdiction of Dayak tribal communities in West Kalimantan, indicate that Dayak customary conflict resolution practices tend to produce more effective and sustainable resolutions compared to formal judicial approaches, precisely because they are rooted in a shared recognition of social harmony as a value held in high regard by the community.

This dimension represents a wealth of considerable value. Yet this wealth is at risk of being threatened if it is treated merely as a legislative resource, as raw material extracted to fill gaps in the formal legal system, only to be marginalized once that task is complete. Customary law is, at its core, more than a resource; it resembles an ecosystem. And ecosystems require living conditions, not merely museum conditions.

Customary Law and Human Rights: Navigating Tensions

The empirical record of the RK-Dayak case reveals both the effectiveness and the tensions inherent in customary dispute resolution. The tribunal, convened with representatives from fourteen regencies, resulted in an agreement that included a public apology, symbolic fines, and a formal ritual of reconciliation. The case was effectively closed within the customary framework before any formal criminal proceeding was initiated. This outcome aligns with Rochaeti et al., (2023) finding that Dayak customary processes tend toward sustainable resolution, and reinforces Laia, (2024)observation that the restorative dimension of Dayak Ngaju customary law extends to cases involving reputational and spiritual harm.

However, this case also exposes potential tensions between customary sanctions and internationally recognized human rights standards. The collective mobilization of fourteen regencies' youth organizations to compel compliance with customary norms raises questions about due process, the right to a fair hearing, and the potential for coercive social pressure to substitute for consent. Febrianty et al., (2023) flag precisely this concern, noting that the boundary between accommodable customary values and those conflicting with universal human rights is one of the key unresolved challenges in Indonesia's living law framework. These tensions do not invalidate the customary process, but they underscore the need for minimum procedural safeguards within customary dispute resolution mechanisms, particularly

when proceedings involve individuals from outside the originating community. The state's role, therefore, is not simply to recognize or codify customary law, but to ensure that its exercise respects the dignity and rights of all parties involved.

CONCLUSION

The Dayak community's demand for customary sanctions reflects more than compensation-seeking; it is an assertion of living identity and dignity by active, empowered indigenous subjects rather than passive objects awaiting state recognition. The recognition of living law in the National Penal Code (Law No. 1/2023, Article 2) is a significant step, consistent with Article 18B of the Constitution and the Law on Judicial Power. Yet the greatest challenge is not technical but epistemological and ethical: how to recognize customary law without reducing it, preserve it without museumifying it, and integrate it without colonizing it.

The state's most meaningful role is protective rather than architectural, allowing living law to grow organically through communal deliberation. This study recommends participatory formulation of implementing regulations, legal-anthropological training for judges, and regulatory attention to digital space as new jurisdictional terrain, alongside future comparative research on customary law responses to digital-space violations.

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