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Integrating Customary Criminal Law into National Criminal Justice Systems: Indonesia and South Africa in a Southern Criminology Perspective

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Abstract

The urgency of integrating customary criminal law into the national legal system is increasing, especially in countries with legal pluralism such as Indonesia and South Africa. Both countries face challenges in accommodating customary criminal law that is alive and evolving in society, which is often subordinated by the colonial-based national legal system and modernization. This study uses a southern criminology approach based on the thinking of Antonio Gramsci to analyze the hegemony of national law over local law and fight for space for knowledge and legal traditions from the Global South in the criminal justice system. The type of research used is normative comparative legal research with the collection of secondary legal materials in the form of legislation, court decisions, academic literature, and international instruments related to the existence and treatment of customary criminal law. This research utilizes literature study techniques and qualitative analysis of legal documents, as well as a variety of juridical, sociological, and historical approaches combined with Gramscian hegemony analysis. The results of the study show that constitutional recognition in both countries has not resulted in ideal integration; customary criminal law tends to remain marginalized by national regulations and the modern legal system. However, with an integration model that places customary criminal law as part of the restorative justice process and recognition of legal pluralism, the prospects for harmonization are increasingly open towards a more just and inclusive national criminal justice system. This study emphasizes the need to strengthen the position of customary criminal law, political will, and legal education based on southern criminology.

Keywords: Customary Criminal Law; Integration; National System; Southern Criminology

I. Introduction

The urgency of integrating customary criminal law into the national systems of Indonesia and South Africa stems from the fact that both countries have a legal history marked by dualism between customary law that exists within society and a national legal system rooted in colonial

tradition. In Indonesia, customary criminal law represents values of justice,[1] social balance, and national cultural identity that have been constitutionally recognized, but are still often subordinated by the Dutch-inherited Criminal Code and state policies that tend to prioritize the uniformity of national law. A similar situation occurs in South Africa, where the conventional criminal justice system carries the influence of colonialism and apartheid, which largely ignored local legal practices, resulting in injustice for indigenous communities that have their own mechanisms for resolving criminal acts.[2] The absence of space for integrating customary criminal law hinders efforts to achieve substantive justice and respect for legal pluralism,[3] and even limits policy innovation that can respond to the contextual social needs of communities.

Through the adoption of Gramsci's southern criminology approach, legal reform must begin with the recognition of the hegemony of the national system and the subordination of customary law, which makes integration an urgent necessity for building a criminal justice system that is responsive, fair, and in line with the aspirations of local communities in both countries.[4] As part of the national criminal law reform agenda, this integration not only serves as a symbol of the independence of the law of an independent nation,[5] but also a prerequisite for achieving social justice and recognition of the indigenous values that form the foundation of national identity and social harmony. The urgency of integrating customary criminal law into the national systems of Indonesia and South Africa lies at the heart of the discourse on criminal justice reform that is fair and responsive to legal pluralism and the social dynamics of society. In the context of both countries, this involves the complexity of dualism between customary law as a local value that lives and develops within the traditions of society and national law,[6] which often reproduces colonial legacies and formal modern systems.

Furthermore, it can be argued that constitutional recognition of customary criminal law in Indonesia and the existence of customary law mechanisms in South Africa have not been fully followed by effective implementation in the national system.[7] At the same time, customary law is able to fill the void in values, accommodate the need for collective conflict resolution, and bring about harmony and restitution, which are often absent in national criminal systems based on formal sanctions. Disharmony, the subordination of customary law, and state institutional resistance to the integration of local mechanisms have implications for injustice and the failure of the national legal adaptation system to respond to the social realities of multicultural communities. By adopting Gramsci's southern criminology thinking, it is hoped that this integration will be seen as a fundamental breakthrough in deconstructing the hegemony of the national legal system and recognizing the importance of knowledge and legal practices from the Global South in building a fair, contextual, and inclusive criminal justice system in Indonesia and

1 I. Heliany, W. Widowati, & M. Sihotang, "The pluralism of Indonesian criminal law: implications and orientations in the post-new criminal code," Sasi, vol. 29, no. 3, p. 514, 2023. https://doi.org/10.47268/sasi.v29i3.1494
2 A. Marzuki, "The criminal law system in Indonesia from the perspective of Pancasila," Journal of Social Research, vol. 2, no. 9, p. 3154-3161, 2023. https://doi.org/10.55324/josr.v2i9.1345
3 F. Disantara, "Konsep pluralisme hukum khas indonesia sebagai strategi menghadapi era modernisasi hukum", Al-Adalah: Jurnal Hukum Dan Politik Islam, vol. 6, no. 1, p. 1-36, 2021. https://doi.org/10.35673/ajmpi.v6i1.1129
4 P. Ciocchini and J. Greener, "Regimes of extreme permission in southeast asia: theorizing state-corporate crime in the global south," The British Journal of Criminology, vol. 63, no. 5, pp. 1309-1326, 2022. https://doi.org/10.1093/bjc/azac091
5 C. Himonga and F. Diallo, "Decolonization and teaching law in Africa with special reference to living customary law," Potchefstroom Electronic Law Journal, vol. 20, p. 1-19, 2017. https://doi.org/10.17159/1727-3781/2017/v20i0a3267
6 A. Apripari, V. Swarianata, J. Puluhulawa, I. Puluhulawa, & D. Matte, "Investigating the existence of Gorontalo customary law in the national criminal code," Dialogia Iuridica, vol. 14, no. 2, pp. 119-143, 2023. https://doi.org/10.28932/di.v14i2.6250
7 C. Albertyn, "Religion, custom and gender: marital law reform in South Africa," International Journal of Law in Context, vol. 9, no. 3, pp. 386-410, 2013. https://doi.org/10.1017/s1744552313000128

South Africa.[8] The urgency of integrating customary criminal law into the national systems in Indonesia and South Africa stems from the urgent need for a more inclusive, socially just, and responsive legal system that accommodates the pluralism and dynamics of local communities in both countries, which share a legacy of legal dualism between national and customary law systems. In Indonesia, customary criminal law is constitutionally recognized as part of living norms, but its position is often subordinated by formal national rules left over from colonialism, resulting in a reduction in the power of indigenous peoples to enforce their own justice and a substantive imbalance between local values of justice and the certainty of state law.[9] Meanwhile, in South Africa, the national legal system and conventional judicial practices, colored by colonialism, decolonization, and apartheid, have neglected customary criminal justice mechanisms that have historically been better able to accommodate balance, social harmony, and the diverse needs of communities.[10] Without meaningful integration, both Indonesia and South Africa have the potential to fail to realize the basic rights of indigenous peoples, limit relevant policy transformation, and hinder the ideals of social justice as mandated in the national criminal law reform agenda. Using Gramsci's southern criminology approach, future reforms must deconstruct the hegemony of the national system while reviving the position of local legal knowledge and practices to create a fair, contextual, and robust criminal justice system as a symbol of independence and social harmony in the modern era for both nations.

The problem of legal dualism arises when national legal systems which are generally rooted in Western formal models and colonial legacies coexist, but tend to dominate and erode the existence and role of customary law that has lived and developed in local communities in Indonesia,[11] and South Africa. The imbalance between customary law and national law is clearly reflected in the structure of legislation, law enforcement processes, and the orientation of legal education, which often views customary law as a symbol of inferior tradition that does not meet the state's standards of legal certainty and formal justice, and is therefore often excluded from criminal decisions, legislation, and formal judicial processes.[12] The modernization of the national legal system, despite bringing efficiency and structuring, has contributed to the marginalization of the Indonesian legal knowledge system and conflict resolution mechanisms based on collectivism, social harmony, and restoration, which are more in line with the reality of a multicultural society with a wealth of local legal traditions. That is why laws that are considered good are not sufficient,[13] when faced with the challenges of social justice reflected in the absence of customary criminal law mechanisms as an alternative resolution space and recognition of the interests of indigenous communities, which ultimately results in the failure to substantively resolve criminal conflicts and enforce local rights fairly. Therefore, Antonio Gramsci's southern criminology becomes an important line of thought by dissecting how the subordination of local law occurs as a result of the hegemony of the modern legal knowledge system that does not

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8 K. Carrington, B. Dixon, D. Fonseca, D. Goyes, J. Liu, & D. Zysman, "Criminologies of the global south: critical reflections," Critical Criminology, vol. 27, no. 1, pp. 163-189, 2019. https://doi.org/10.1007/s10612-019-09450-y

9 E. Dimou, "Decolonizing southern criminology: what can the "decolonial option" tell us about challenging the modern/colonial foundations of criminology?", Critical Criminology, vol. 29, no. 3, p. 431-450, 2021. https://doi.org/10.1007/s10612-021-09579-9

10 J. Harris, "Transnational capital and the technology of domination and desire," Race & Class, vol. 57, no. 1, pp. 3-19, 2015. https://doi.org/10.1177/0306396815581780

11 T. Tolkah, "Customary law existency in the modernization of criminal law in Indonesia," Varia Justicia, vol. 17, no. 1, pp. 72-89, 2021. https://doi.org/10.31603/variajusticia.v17i1.5024

12 M. Lee and K. Laidler, "Doing criminology from the periphery: crime and punishment in Asia," Theoretical Criminology, vol. 17, no. 2, pp. 141-157, 2013. https://doi.org/10.1177/1362480613476790

13 L. Ferguson, M. Anderson, M. Liang, & E. Filmer-Wilson, "Why a good law is not always good enough: a global review of restrictions to supportive laws for sexual and reproductive health and rights," BMJ Global Health, vol. 9, no. 2, p. e014100, 2024. https://doi.org/10.1136/bmjgh-2023-014100

recognize the truth, efficacy, and values of customary law practices. Through Gramscian analysis of hegemony and subordination, it can be argued that the dominance of national law over customary law is not solely the result of the development of legal science, but is a social construction shaped by the colonial regime, the modernization of educational institutions,[14] and legislative policies which in turn demand deconstruction towards the recognition and integration of customary criminal law for the sake of sustainable social justice in the national system. It is at this culmination that the integration of customary criminal law into the national criminal law system becomes interesting to dissect using the analytical tools of Gramsci's southern criminology.

Building on prior scholarship, this study is situated within three main strands of existing research. First, studies on the pluralism of Indonesian criminal law after the enactment of the New Criminal Code highlight the tension between codification and the recognition of living law, particularly customary criminal law, within the national system.[15] Second, normative analyses emphasize that the Indonesian criminal law system must be grounded in the philosophical orientation of Pancasila as the ethical and ideological foundation of national law, including in responding to legal pluralism.[16] Third, critical scholarship warns that the formal incorporation of customary criminal law into state legislation may, if not carefully designed, result in the further subordination of *adat* justice through procedural dominance and state-centric standards.[17] However, the novelty of this paper lies in its theoretical and comparative contribution. Rather than merely mapping constitutional recognition or doctrinal debates, this study employs Gramsci's southern criminology to explain how the hegemony of the national criminal law system is reproduced through legal ideology, institutional arrangements, and knowledge hierarchies, and why integration must be understood as a process of dehegemonization rather than simple administrative accommodation. The significance of this research is twofold. Theoretically, it contributes to the development of critical legal pluralism by operationalizing Gramscian analysis within criminal justice reform discourse. Practically, it offers a policy-oriented framework for Indonesia and South Africa by proposing integration models that safeguard indigenous justice mechanisms, balance state intervention with public interest considerations, and institutionalize restorative and harmony-based approaches as part of a socially legitimate and inclusive criminal justice system.

II. Research Problems

Based on the need to develop a more inclusive, fair, and context-sensitive criminal justice system in pluralistic countries, this study highlights how customary criminal law can find an equal position in the national legal architecture of Indonesia and South Africa. Using a comparative normative approach enriched by Gramsci's southern criminology lens, the study focuses on examining the basis for recognition, the map of obstacles and opportunities for integration, and the dynamics of power relations between national and local laws. From this

[14] M. Bigoni, "Accounting for hegemony: fascist ideology and the shifting roles of accounting at the University of Ferrara and the Alla Scala Opera House (1922–1943)," Accounting History, vol. 26, no. 4, pp. 640–664, 2021. https://doi.org/10.1177/10323732211009517

[15] I. Heliany, W. Widowati, and M. Sihotang, "The pluralism of Indonesian criminal law: implications and orientations in the post-new criminal code," *Sasi*, vol. 29, no. 3, p. 514, 2023. https://doi.org/10.47268/sasi.v29i3.1494

[16] A. Marzuki, "The criminal law system in Indonesia from the perspective of Pancasila," *Journal of Social Research*, vol. 2, no. 9, p. 3154–3161, 2023. https://doi.org/10.55324/josr.v2i9.1345

[17] Yoserwan, "Implications of Adat Criminal Law incorporation into the New Indonesian Criminal Code: Strengthening or weakening?," *Cogent Social Sciences*, vol. 10, no. 1, p. 9, 2024. https://doi.org/10.1080/23311886.2023.2289599

framework, the following three major questions are formulated to guide the analysis and policy recommendations.

1. How do customary criminal laws currently exist, are recognized, and are practiced in Indonesia and South Africa, and to what extent are customary mechanisms and sanctions recognized and integrated into the national criminal justice process?
2. What are the main obstacles to the integration of customary criminal law, what policy and institutional opportunities can be exploited, and what good practices can be replicated through a restorative justice approach and the recognition of legal pluralism?
3. How does the hegemony of national law shape the subordination of local law according to Gramsci's framework, and what strategies are most effective for strengthening customary criminal law within the national system through the strengthening of actors, regulations, and accountable governance?

III. Research Methods

The research method used in this study is normative legal research, as defined by Peter Mahmud Marzuki as a scientific process based on specific methods, systems, and thinking to discover legal rules, legal principles, and legal doctrines in order to answer legal issues that are faced.[18] The types of legal materials used include primary legal materials in the form of legislation, official reports, and court decisions, as well as secondary legal materials such as books, scientific journals, and expert opinions relevant to the issue of integrating customary criminal law into the national legal system, particularly in Indonesia and South Africa.[19] The research approach chosen is a comparative approach, which allows for an in-depth analysis of the application of legal thinking based on southern criminology. The technique for obtaining legal materials is through library research, namely by collecting and reviewing relevant literature and legal documents. All legal materials obtained were analyzed using deductive syllogism techniques, namely drawing legal conclusions from general premises contained in legal norms and doctrines, then applying them to the specific issues under study, as recommended by Peter Mahmud Marzuki. With this methodology, the research is expected to provide prescriptive and applied legal arguments and become a solution to the need for the integration of customary criminal law into the national legal system,[20] particularly in Indonesia and South Africa.

IV. Result and Discussion

1. Analysis of the Existence, Recognition, and Practice of Integration of Customary Criminal Law in the National Legal Systems of Both Countries.

First An analysis of the existence, recognition, and practice of integrating customary criminal law into the national legal systems of Indonesia and South Africa reveals complex dynamics and challenges in accommodating customary law as part of the national legal system. In Indonesia, the existence of customary criminal law is normatively recognized by the constitution, particularly in Article 18B of the 1945 Constitution and a number of sectoral regulations that provide a legal basis for the recognition and respect for the existence of

[18] Peter Mahmud Marzuki & M. S. Sh, Pengantar Ilmu Hukum (Prenada Media 2024) 45–46.
[19] Ratno Lukito, 'Compare But Not to Compare": Kajian Perbandingan Hukum di Indonesia' (2022) 12 https://www.ujh.unja.ac.id/.../727 diakses pada tanggal 20 Juni 2025.
[20] Sholahuddin Al Fatih, Perkembangan Metode Penelitian Hukum di Indonesia (Malang: UMMPress,2024) 33–34..

customary law communities. This recognition is reflected in various legal products at the regional level, such as the *Qanun* in Aceh,[21] or the *Awig-awig* in Bali,[22] as well as in several customary jurisdictions in the regions,[23] where criminal cases are still resolved according to deliberation mechanisms and customary sanctions before or without involving the formal state judiciary even several Supreme Court decisions affirm respect for the decisions of customary leaders.[24]

As a further illustration, the dual legal system in Aceh, which places *Qanun* alongside national law, presents challenges in maintaining the authority of customary and formal law. Criticism regarding the constitutionality and practical implementation of *Qanun* highlights the ongoing tension between these two systems.[25] The role of *Qanun* in conflict resolution, stating that the enactment of *Qanun* after the Aceh Tsunami signified a commitment to integrating Sharia law, but there are still challenges in effectively applying these laws within a broader legal framework.[26] This illustrates the role of *Qanun* in mediating disputes and its consequences for local government. From a sociological perspective, *Awig-awig* and *Qanun* in Aceh function as manifestations of local legal traditions, which aim to create a balance between community practices and national law, indicating that greater recognition in the formal judicial process is needed for these customs.[27] This emphasizes the need for broader integration of customary law into the national legal discourse, both domestically,[28] and within the social environment of the community. Meanwhile, in the context of *awig-awig*, it functions as Balinese customary law rooted in local traditions (*e.g., Pawongan*),[29] aiming to regulate social interactions and preserve cultural identity, from the domestic sphere, the environment, customary forests,[30] to the social sphere. In this context, the application of *awig-awig* illustrates the practical implications of customary law in balancing traditional practices with national regulations, which demonstrates the integration of local wisdom into the formal legal system, although the lack of formal recognition of customary courts also contributes to marginalization in the conflict resolution process, which weakens

[21] L. Nurmala and Y. Koni, "Differences and similarities in the division of inheritance law according to Islamic law and Javanese customary law in Indonesia in a comparative study of law, so that," International Journal of Educational Review, Law and Social Sciences (IJERLAS), vol. 2, no. 1, p. 129-142, 2022. https://doi.org/10.54443/ijerlas.v2i1.134

[22] W. Yulianingsih, Y. Indawati, & A. Kartika, "Awig-awig as traditional law written in traditional law perspective in Indonesia," Nusantara Science and Technology Proceedings, 2021. https://doi.org/10.11594/nstp.2021.0929

[23] M. Alputila, M. Tajuddin, & N. Badilla, "Identification of customary delict of south papua and its customary sanctions as a form of preservation of customary law," Devotion: Journal of Research and Community Service, vol. 4, no. 12, pp. 2271-2285, 2023. https://doi.org/10.59188/devotion.v4i12.627

[24] T. Nafi, L. Nurtjahyo, I. Kasuma, T. Parikesit, & G. Putra, "Peran hukum adat dalam penyelesaian kasus-kasus kekerasan terhadap perempuan di kupang, atambua, dan waingapu", Jurnal Hukum & Pembangunan, vol. 46, no. 2, p. 233, 2016. https://doi.org/10.21143/jhp.vol46.no2.77

[25] F. Afandi and L. Bagaskoro, "Islam and state's legal pluralism", Epistemé: Jurnal Pengembangan Ilmu Keislaman, vol. 19, no. 01, p. 1-26, 2024. https://doi.org/10.21274/epis.2024.19.01.1-26

[26] M. Sholeh, N. Yunus, & I. Susilowati, "Resolusi konflik pencegahan disintegrasi bangsa melalui legalitas hukum syariat di aceh", SALAM: Jurnal Sosial Dan Budaya Syar-I, vol. 3, no. 2, p. 217-230, 2016. https://doi.org/10.15408/sjsbs.v3i3.7862

[27] A. Lutfiana, "Keistimewaan qanun di aceh dalam perspektif sociological yurisprudence menurut eugen ehrlich", Jurnal Hukum Dan Pembangunan Ekonomi, vol. 8, no. 2, p. 199, 2021. https://doi.org/10.20961/hpe.v8i2.49770

[28] T. Fuadi and I. Irdalisa, "Integrating religious and sexual education in Aceh: a comprehensive approach to prevent extramarital sex and promote youth well-being," AL-ISHLAH: Journal of Education, vol. 16, no. 2, p. 809-820, 2024. https://doi.org/10.35445/alishlah.v16i2.4893

[29] A. Made, "Konsep pawongan sebagai dasar pemenuhan hak dan kewajiban dalam awig-awig sekaa teruna canthi graha di Banjar Tengah Desa Adat Sesetan", Vyavahara Duta, vol. 17, no. 1, p. 78-88, 2022. https://doi.org/10.25078/vyavaharaduta.v17i1.968

[30] I. Lestawi and D. Bunga, "The role of customary law in forest preservation in Bali," Journal of Landscape Ecology, vol. 13, no. 1, pp. 25-41, 2020. https://doi.org/10.2478/jlecol-2020-0002

community justice.[31] Titisari's study also highlights the fundamental role of awig-awig in maintaining social order in Balinese society, including customary criminal law and its sanctions.[32]

However, this integration has not been optimal because the national legal system continues to treat customary law as lex specialis, limiting its scope and often subjecting it to national standards of legality and human rights, resulting in its scope remaining partial and contextual.[33] Meanwhile, in South Africa, recognition of customary criminal law is manifested through formal dualism between the common law system (a colonial legacy)[34] and the tradition of local customary law (*Ubuntu*),[35] which is accommodated to a limited extent, particularly in civil matters and community affairs. However, in criminal cases, customary law only applies if it does not conflict with the basic principles of the constitution and human rights. Efforts at cohesion and concrete integration are carried out through the mechanism of official customary courts, which function in parallel with and are sometimes subordinate to state courts. However, tensions often arise when customary values or procedures are considered to be in conflict with modern and universal standards.[36] In both countries, these integration practices reflect the tug-of-war between respect for identity, collective rights, and local justice versus the need for harmonization within the framework of national and international law; thus, customary criminal law institutions remain vulnerable and dependent on political commitment, judicial sensitivity, and community adaptation to ongoing socio-cultural changes.

As a more concrete illustration of the intense tug-of-war between respect for cultural identity, the collective rights of indigenous peoples, and local justice on the one hand, and demands for harmonization within the framework of national and international law on the other, the following case study can be presented. For example, in Indonesia, cases of customary law violations in the Baduy and Balinese communities are often resolved through deliberation and the imposition of customary sanctions,[37] such as exile or community service. In such cases, the decisions of customary leaders are recognized and respected by the community but are not always fully recognized by the state courts if they conflict with national human rights principles.[38] thus, creating a discourse between the fulfilment of community justice and the state's obligation to maintain certainty and protection of human rights. In Bali, *Awig-awig* is the main source of law in handling minor crimes such as theft or customary insults, but its application remains under the supervision of state law to ensure that there are no deviations from universal principles, including the protection of children or women. Meanwhile, in South Africa, customary courts

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31 F. Luawo and H. Amalia, "The implementation of inheritance based on the tribe of Kaili Ledo and Islamic inheritance laws," Jurnal Dinamika Hukum, vol. 19, no. 2, p. 318, 2019. https://doi.org/10.20884/1.jdh.2019.19.2.2525

32 A. Titisari, L. Swandewi, C. Warren, & A. Reid, "Stories of women's marriage and fertility experiences: qualitative research on urban and rural cases in Bali, Indonesia," Gates Open Research, vol. 7, p. 124, 2023. https://doi.org/10.12688/gatesopenres.14781.1

33 I. Setiawan, A. Wahyu, A. Rahman, & A. Sutrisno, "Juridical study of customary law in the Indonesian national legal system," Asian Journal of Social and Humanities, vol. 2, no. 8, p. 1824-1831, 2024. https://doi.org/10.59888/ajosh.v2i8.317

34 G. Marmone, "What is the shape of institutions? Materializing the cycles of life in an East African age class society," Journal of the Royal Anthropological Institute, vol. 30, no. 2, pp. 457-477, 2023. https://doi.org/10.1111/1467-9655.14066

35 C. Himonga, M. Taylor, & A. Pope, "Reflections on judicial views of ubuntu," Potchefstroom Electronic Law Journal, vol. 16, no. 5, pp. 369-430, 2017. https://doi.org/10.17159/1727-3781/2013/v16i5a2437

36 B. Dixon, "Using theory from the global south: from social cohesion and collective efficacy to ubuntu," Theoretical Criminology, vol. 28, no. 3, pp. 267-286, 2024. https://doi.org/10.1177/13624806231221744

37 H. Fuqoha, G. Putri, A. Alfarizi, S. Gunawan, & D. Dikrurahman, "The role of community traditional institutions in dispute resolution in multicultural communities," Journal of World Science, vol. 3, no. 11, pp. 1403-1408, 2024. https://doi.org/10.58344/jws.v3i11.1224

38 B. Bräuchler, "The revival dilemma: reflections on human rights, self-determination and legal pluralism in eastern Indonesia," The Journal of Legal Pluralism and Unofficial Law, vol. 42, no. 62, p. 1-42, 2010. https://doi.org/10.1080/07329113.2010.10756648

often handle moral violations or minor crimes based on local traditions; but in serious cases such as violence or sexual abuse, the state requires the transfer of cases to national courts to ensure a fair and non-discriminatory legal process, even though this sometimes causes dissatisfaction among local communities who feel that their values, collective rights, and local wisdom mechanisms are not sufficiently respected. The vulnerable situation of customary criminal law institutions in both countries is strongly influenced by the political commitment of the government for example, regulatory changes or the strengthening of customary institutions in Indonesia after reform, as well as judicial sensitivity that determines whether judges will accept customary decisions or settlements as a basis for legal considerations in certain criminal cases. Community adaptation to sociocultural changes shows both resistance and enthusiasm: on the one hand, the younger generation is beginning to question the relevance and fairness of customary sanctions that are considered no longer contextual; on the other hand, there is a movement to advocate for customary law to strengthen its institutional position, such as the efforts of the Dayak Customary Institution in Kalimantan,[39] and the Council of Traditional Leaders in South Africa in pushing for stronger recognition at the national and international levels. The case of Pakraman Village in Bali, which decided on violations of customary norms through social sanctions while coordinating with the local police, and the customary court case in Limpopo, South Africa, which was eventually transferred to the state court for the sake of certainty of the victim's rights, are concrete examples of this tug of war of integration that always requires caution, legal flexibility, and strengthening the state's commitment through inclusive and responsive legal regulations and education to socio-cultural dynamics.[40] In the context of legal education, such studies must be directed towards understanding and applying customary law to foster an educated society that respects legal pluralism. This also reflects a commitment to reforming legal education and integrating customary legal norms. [41]

2. Identifying Barriers, Opportunities, and Good Practices for Integration (Restorative Justice, Recognition of Legal Pluralism).

Identifying obstacles to the integration of customary criminal law into the national systems of Indonesia and South Africa is closely related to differences in paradigms, institutional interests, and regulatory limitations. One of the main obstacles is the lack of harmony between customary law norms and national law, where customary criminal law is often considered a secondary source of law that applies only in limited or incidental circumstances, and is therefore only accommodated in certain cases or regions. It is not uncommon for customary criminal law to be applied on the condition that it must be in accordance with or not contradict national principles and standards, such as the protection of human rights and legal certainty, even though in practice, this adjustment often weakens the authority of customary law in the eyes of local communities. Resistance can also come from law enforcement and judicial officials who tend to be more

[39] E. Pujirahayu and C. Wulandari, "The existence of Dayak customary council in settlement of criminal cases based on local awareness (decision study of Dayak customary council section no. 01/smad-pa/i/2011)," Proceedings of the 2nd International Conference on Law, Economic, Governance, ICOLEG 2021, June 29-30, 2021, Semarang, Indonesia, 2021. https://doi.org/10.4108/eai.29-6-2021.2312611. See also D. Pone, A. Saptomo, B. Baharudin, A. Harahap, & R. Rustam, "Analysis of the role based on the customary criminal justice system of dayak bangkalaan in the national criminal justice system", Syntax Literate; Jurnal Ilmiah Indonesia, vol. 9, no. 3, p. 1616-1623, 2024. https://doi.org/10.36418/syntax-literate.v9i3.14826.

[40] S. Manullang, "Understanding the sociology of customary law in the reformation era: complexity and diversity of society in Indonesia," Linguistics and Culture Review, vol. 5, no. S3, p. 16-26, 2021. https://doi.org/10.21744/lingcure.v5ns3.1352

[41] H. Fuqoha, G. Putri, A. Alfarizi, S. Gunawan, & D. Dikrurahman, "The role of community traditional institutions in dispute resolution in multicultural communities," Journal of World Science, vol. 3, no. 11, pp. 1403-1408, 2024. https://doi.org/10.58344/jws.v3i11.1224

comfortable with a positive law approach than opening space for customary-based peaceful settlement mechanisms. Other obstacles include limited resources, varying quality of customary institutions, and a lack of education and socialization of legal pluralism in communities and bureaucracies.

On the other hand, opportunities for integration are increasingly opening up due to the recognition of the principle of legal pluralism in the constitutions and legislation of both countries. In Indonesia, Article 18B of the 1945 Constitution and a number of regional legal products provide a legal basis for customary dispute resolution mechanisms,[42] while in South Africa, the existence of official customary courts institutionalizes customary criminal dispute resolution forums at the local level. Another opportunity lies in the increasing adoption of the principle of restorative justice by law enforcement and judicial institutions, which provides space for perpetrators, victims, and communities to utilize customary deliberation mechanisms, mutual agreements, and non-punitive social sanctions as alternative solutions for resolving minor criminal cases or violations of collective norms. Initiatives for dialogue, integrated training between state officials and customary institutions, and institutional consolidation through the formulation of well-documented customary regulations are key factors that strengthen the chances of successful integration in the future.

Good practices of integration can be found in a number of regions in Indonesia, such as Bali, Kalimantan,[43] West Sumatra,[44] Palembang (*tepung tawar*),[45] and NTB, which place the resolution of customary violations through deliberation and consensus and sanctions based on local values recognized and respected and even used as a basis for judges to make more fair and contextual decisions. Restorative justice has also begun to be internalized in the programs of the attorney general's office and the police, in which certain cases are encouraged to be resolved through customary peace without having to enter the formal judicial system, as long as the protection of the basic rights of victims, transparency, and minimal supervision by state officials are still prioritized. In South Africa, customary courts are given the authority to resolve minor criminal cases by prioritizing restitution and the restoration of social harmony. In fact, there are a number of cases that have resulted in customary mediation solutions being recognized by the state court, provided that the procedures meet the principles of justice and accountability.[46] This good practice serves as inspiration that the integration of customary and national criminal law will be effective if supported by an inclusive legal framework, institutional synergy, and continuous education on legal pluralism with the principles of restorative justice,[47] and

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42 I. Setiawan, A. Wahyu, A. Rahman, & A. Sutrisno, "Juridical study of customary law in the Indonesian national legal system," Asian Journal of Social and Humanities, vol. 2, no. 8, pp. 1824-1831, 2024. https://doi.org/10.59888/ajosh.v2i8.317

43 F. Fetrus, B. Wibowo, & F. Hasibuan, "The application of Dayak customary law in West Kalimantan towards fulfilling a sense of justice for victims (case study of indecent acts)," Asian Journal of Social and Humanities, vol. 3, no. 1, pp. 45-55, 2024. https://doi.org/10.59888/ajosh.v3i1.424

44 G. Nasir and A. Saptomo, "Customary land tenure values in Nagari Kayu Tanam, West Sumatra," Cosmopolitan Civil Societies: An Interdisciplinary Journal, vol. 14, no. 3, pp. 30-45, 2022. https://doi.org/10.5130/ccs.v14.i3.8099

45 J. Junaidi, "Implementation of penal mediation "tepung tawar" as criminal case settlement in Palembang, South Sumatra," Teumulong: Journal of Community Service, vol. 2, no. 2, pp. 79-84, 2024. https://doi.org/10.62568/jocs.v2i2.19

46 A. Dube, "The UDHR at 75: Analyzing the Prevalence of the Use of the UDHR and Other Human Rights Treaties in the Work of the Constitutional Court of South Africa," Laws, vol. 13, no. 4, p. 50, 2024. https://doi.org/10.3390/laws13040050

47 R. Darmawan, M. Diputra, A. Rahman, & A. Sutrisno, "Analysis of the effectiveness of the application of restorative justice in criminal cases in Indonesia," Journal of World Science, vol. 3, no. 5, p. 567-572, 2024. https://doi.org/10.58344/jws.v3i5.612

recognition of legal pluralism as the common foundation for building a more responsive and socially just criminal justice system.

3. Gramscian Analysis of Hegemony and the Ideal Policy Model for Integrating Customary Criminal Law into the National System Gramscian Analysis of Hegemony and the Ideal Policy Model for Integrating Customary Criminal Law into the National System.

First Examining the main ideas of Antonio Gramsci, which form the foundation of southern criminology, highlights the role of hegemony that is, the ideological and cultural domination exercised by dominant groups or classes over subordinate ones through mechanisms of consensus, rather than solely through physical coercion or violence.[48] Gramsci distinguishes two main motors in the superstructure of society: political society (state institutions, legal apparatus, and instruments of coercion) and civil society (social, educational, religious, and cultural institutions), which places true and solid power through moral and intellectual leadership, so that subordinate groups voluntarily accept and internalize the goals and values of the dominant group.[49] Hegemony occurs when the state combines instruments of coercion (legal force, prisons, police) and consensus (education, media, culture) to reinforce established ideologies, such as the superiority of national law over local or customary law.

In the context of southern criminology, Gramsci calls for criminological analysis to not only depart from the Global North perspective, which tends to ignore the legacy of colonialism, literacy bias, and legal knowledge practices from the Global South, but also through an alignment with cognitive justice, justice in the production and distribution of knowledge, including in the structuring of the concept of criminal justice. Gramsci rejects classical economic determinism and universalistic Northern perspectives. Instead, he formulates strategies for social and legal change through the development of collective consciousness, social class alliances, and the strengthening of the role of organic intellectuals (traditional leaders, local educators) who help build a counter-discourse to the hegemonic domination off.[50] Thus, Gramsci's version of southern criminology provides space for the empowerment of indigenous community mechanisms, respect for indigenous criminal law, and the dismantling of national legal subordination practices that are often cloaked in the pretext of modernization and globalization.

Gramsci's important proposition in southern criminology is that power and knowledge must be criticized as the result of social construction (not universal facts), law enforcement must open space for epistemological pluralism and respect for local identities, and criminal justice must be rooted in the historical context, value systems, and aspirations of the Global South. Thus, southern criminology also encourages: (1) the deconstruction of Eurocentric narratives of law and criminology; (2) the strengthening of organic intellectuals for the revitalization of local law; (3) dialogical synergy between modern law and customary law; and (4) the development of models of criminal justice that are responsive to the pluralism and socio-cultural complexity characteristic of Third World countries, such as Indonesia and South Africa. The main ideas of Antonio Gramsci that underlie southern criminology are rooted in the theory of hegemony, namely the domination of the ruling class or social group through a combination of coercion and

[48] I. Cader and D. Sundrijo, "Critical analysis of neo-gramscian hegemony," Eduvest - Journal of Universal Studies, vol. 3, no. 8, pp. 1435-1448, 2023. https://doi.org/10.59188/eduvest.v3i8.894

[49] Ó. Agustín and M. Jørgensen, "Gramsci, social theory and migration," European Journal of Social Theory, vol. 28, no. 3, pp. 453-472, 2024. https://doi.org/10.1177/13684310241283826

[50] R. Febriani and I. Hamdi, "Soft power & hegemony: Gramsci, Nye, and Cox's perspectives," Jurnal Filsafat, vol. 34, no. 1, p. 86, 2024. https://doi.org/10.22146/jf.87478

consensus so that the values and ideology of the dominant group are voluntarily internalized by subordinate groups. Gramsci asserts that power is not only exercised through state apparatus (police, law, prisons), but also through civil society (educational institutions, religion, culture, media) where consensus and social consciousness are formed through education, norms, and cultural control, resulting in "moral and intellectual leadership." Within the perspective *of* southern criminology, as developed by Gramsci, knowledge, law, and justice systems that develop in countries of the Global South are often subordinated to narratives and institutions of the Global North that claim to be universal, when in fact they very often operate in a hegemonic and biased manner towards local experiences, values, and justice mechanisms (for example, in the context of national law on water privatization).[51]

Gramsci advocates cognitive justice, justice in the production and distribution of knowledge, including legal knowledge by providing a space for discourse for local laws, indigenous communities, and organic intellectuals to develop discourses and practices of justice rooted in the social and cultural realities of Southern societies. According to Gramsci, southern criminology is not merely a reversal of the Eurocentric paradigm, but promotes epistemological pluralism; it deconstructs the narrative of modernization and challenges the practice of legal homogenization that ignores pluralism and contextual justice.[52] Thus, Gramsci's model of southern criminology encourages the revitalization of local mechanisms, recognition of legal pluralism, synergistic dialogue between national and customary law, and the development of criminal justice that is inclusive, participatory, and aligned with the history and aspirations of local communities.

At this culmination, Antonio Gramsci's concept of hegemony in analysing the relationship between national law and local law underpins the understanding of how the dominance of formal state law is constructed not solely through coercive power or legislation, but through a process of collective consent and internalization of dominant values, which then places customary law in a subordinate position within society. In the context of modern legal systems in Indonesia and South Africa, the practice of hegemony is evident in the acceptance by society and state apparatus of the superiority of the national legal system (colonial or modern heritage) which is reproduced through legal education, legislation, and court decisions that rarely provide fair space for mechanisms or sanctions based on customary criminal law.[53] The subordination of local law occurs when regulations and judicial practices force customary law to conform to national standards of legality or even ignore it altogether, often under the pretext of harmonization, human rights protection, or modernization reforms, which in fact reinforce the dependence of customary law on external legitimacy from the state and judicial actors.[54]

Gramsci highlights that the consensus and passive consent of subordinate groups (indigenous peoples) are the result of a hegemonic process, in which indigenous peoples do not simply submit because of legal coercion, but because they have internalized the view that the

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51 C. Fletcher, A. Heelsum, & C. Roggeband, "Water privatization, hegemony and civil society: what motivates individuals to protest about water privatization?", Journal of Civil Society, vol. 14, no. 3, p. 241-256, 2018. https://doi.org/10.1080/17448689.2018.1496308

52 S. Zhou, "The overstated challenge: analyzing the challenge of southern criminology to the hegemony of northern criminology and its implications for criminological theory in the 21st century," Contemporary Challenges: The Global Crime, Justice and Security Journal, vol. 5, 2024. https://doi.org/10.2218/ccj.v5.9359

53 S. Muntaha and A. Saptomo, "Comparison of sanctions for the crime of adultery in Toraja customary law and national law in Indonesia," Journal of Law, Politics and Social Sciences, vol. 3, no. 1, pp. 341-349, 2024. https://doi.org/10.55606/jhpis.v3i1.3385

54 S. Galleguillos, "How southern is southern criminology in Latin America?", Theoretical Criminology, vol. 28, no. 3, pp. 287-308, 2023. https://doi.org/10.1177/13624806231213953

national legal system is the only rational choice for social justice and progress.[55] In practice, this subordination has fostered resistance and strategies of resistance among indigenous communities,[56] ranging from legal advocacy and the revitalization of indigenous institutions to efforts to seek formal recognition in the constitution or regional legislation.[57] The strategy to strengthen customary criminal law within the national system must depart from counter-hegemonic efforts, namely building the internal legitimacy of indigenous peoples, strengthening the governance of customary institutions such as through training, advocacy facilitation, and synergy with state apparatus and designing a collaborative model between customary and national legal systems that complement each other rather than marginalize each other.

Concrete steps include optimizing the role of customary criminal law in resolving criminal cases based on the principles of restorative justice, involving customary leaders in mediation and conflict resolution, and drafting regional or national regulations that recognize customary mechanisms as official legal instruments within the framework of legal pluralism. This strengthening must also be accompanied by judicial assistance and advocacy that fights for the rights of indigenous peoples in the legislative and litigation processes so that they are not merely regulated objects, but active subjects in the development of a more just, responsive, and contextual national legal system. Ultimately, the strategy of strengthening customary criminal law based on Gramsci's thinking not only challenges the hegemonic dominance of national law, but also builds a new space for consensus that combines the moral, intellectual, and social strengths of indigenous peoples with the interests of the state towards a pluralistic, restorative criminal law ecosystem that is biased towards substantive justice.

To ensure that these strengthening strategies do not remain merely normative or fragmented initiatives, they must be situated within a coherent institutional design that clearly defines the position, authority, and limits of customary criminal law within the national criminal justice system. Without an integrative model, efforts such as restorative-based resolution, the involvement of customary leaders, and advocacy for indigenous peoples' rights risk being absorbed by the dominant logic of state law or reduced to symbolic recognition without substantive impact. Therefore, a conceptual transition is required from strategies of empowerment at the community level to a structured model of integration at the systemic level, one that translates Gramscian dehegemonization into concrete legal arrangements capable of harmonizing local autonomy with state responsibility.

The ideal model for integrating customary criminal law into the national system essentially places customary law not as subordinate or merely complementary, but as an integral part of the criminal justice system framework that is formally and substantively recognized through the principle of legal pluralism.[58] In this model, customary criminal case settlement mechanisms are given sufficient autonomy in handling violations that are closely related to local norms, collective identity, and community harmony, without neglecting the protection of basic human rights and state supervision to prevent human rights violations or discriminatory practices. The existence of

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55 T. Thipe, "Defining boundaries: gender and property rights in South Africa's Traditional Courts Bill," Laws, vol. 2, no. 4, pp. 483-511, 2013. https://doi.org/10.3390/laws2040483

56 W. Oedoyo, R. Marbun, & A. Zahra, "Epistemological errors of criminal law politics in the criminal code: the loss of authority of the chief of adat," Advances in Social Science, Education and Humanities Research, pp. 591-601, 2023. https://doi.org/10.2991/978-2-38476-164-7_54

57 R. Catello, "Critical historical criminology in the antipodean: unthinking history and criminology in the global south," International Journal for Crime, Justice and Social Democracy, vol. 12, no. 1, pp. 30-41, 2023. https://doi.org/10.5204/ijcjsd.2742

58 E. Silambi, P. Moenta, F. Patittingi, & N. Azisa, "Ideal concept of traditional justice in solving criminal cases," Academic Journal of Interdisciplinary Studies, vol. 11, no. 1, p. 293, 2022. https://doi.org/10.36941/ajis-2022-0026

customary courts or forums, which are regulated and recognized by national law, can be an effective entry point, in which case minor cases, restorative deliberations,[59] and non-criminal sanctions are resolved locally and the results of the decisions can be recognized by the state judiciary, either as a basis for a verdict, mitigating considerations, or termination of the case if substantive peace and justice are achieved.

Ideally, this integration should also include coordination mechanisms whether through state institutions, law enforcement agencies, or independent oversight bodies to ensure that customary law forums or institutions operate transparently, accountably, and in accordance with the principles of due process of law.[60] Legal education must mainstream pluralism, and the training of officials and judges needs to be directed towards strengthening their understanding of living law and restorative values,[61] so as to create synergy between state institutions and customary institutions, rather than a subordinate,[62] or antagonistic relationship. In addition, in the legislative sphere, laws and regulations can establish case criteria, types of sanctions, mediation mechanisms, and the rights of victims and perpetrators who are processed through customary forums, while limiting or excluding the handling of serious cases for the sake of protecting human rights and the public interest. In this context, the challenge of integrating customary law into the formal legal system reflects broader social tensions between tradition and modernity, which require a reconsideration of legal authority,[63] although opportunities for integration remain open.

Policy recommendations to support this harmonization include several strategic steps. First, revise and harmonize regulations so that customary criminal law is recognized as a legitimate source of law in the national system, for example by clarifying the position of customary forums in criminal justice legislation. Second, expanding the space for indigenous communities to participate in determining legal policies and drafting regulations, as well as strengthening cross-institutional advocacy to oversee the protection of indigenous peoples' rights. Third, establishing a participatory monitoring and evaluation system to ensure that the integration of customary criminal law continues to be carried out in accordance with the principles of justice, is not abused, and is in line with the protection of universal human rights. Fourth, initiate continuous education and training for officials, judges, and the community on the values of legal pluralism, restorative justice, and the importance of consensus-based resolution mechanisms. Fifth, develop a dialogue forum between the state and indigenous communities as a medium for consultation, mutual learning, and a space for negotiating contextual solutions to any differences in interpretation or tensions in practice in the field. With these steps and model design, the integration of customary criminal law can proceed in harmony with national law, while maintaining collective rights, local wisdom, and the ideals of substantial social justice in pluralistic countries such as Indonesia and South Africa.

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59 F. Nelson, "Due process model dan restorative justice di indonesia: suatu telaah konseptual", Jurnal Hukum Pidana Dan Kriminologi, vol. 1, no. 1, p. 92-112, 2020. https://doi.org/10.51370/jhpk.v1i1.5

60 Novozhylov, V. (2019). Due process in code enforcement as a criminal procedural task: on the issue of essence and practical use. Journal of the National Academy of Legal Sciences of Ukraine, 26(4), 105-129. https://doi.org/10.31359/1993-0909-2019-26-4-89

61 I. Ifrani, F. Abby, A. Barkatullah, Y. Nurhayati, & M. Said, "Forest management based on local culture of Dayak Kotabaru in the perspective of customary law for a sustainable future and prosperity of the local community," Resources, vol. 8, no. 2, p. 78, 2019. https://doi.org/10.3390/resources8020078

62 H. Hajairin, M. Mustofa, & T. Chandra, "Criminal justice reform: from due process model to reintegrative model as an alternative to criminal case resolution," Asian Journal of Social and Humanities, vol. 1, no. 10, p. 601-609, 2023. https://doi.org/10.59888/ajosh.v1i10.82

63 Albertyn, "The role of legal education in shaping the legal culture of the future: strategies and prospects for development," Futurity Education, pp. 259-274, 2023. https://doi.org/10.57125/fed.2023.09.25.15

V. Conclusion

First, this study finds that the integration of customary criminal law in Indonesia and South Africa remains fragmented and inconsistent at the policy and institutional levels. Although both countries formally recognize customary law, its application in criminal justice is still conditional and subordinate to national legal frameworks. Customary mechanisms operate effectively at the community level, but their outcomes are not systematically recognized or incorporated into state criminal justice processes. This condition indicates a policy gap between constitutional recognition and practical implementation, resulting in legal uncertainty and the continued marginalization of indigenous justice mechanisms.

Second, the main policy barriers to integration include regulatory disharmony, institutional reluctance, and a dominant legal paradigm that prioritizes formal legality over restorative and community-based justice. At the same time, opportunities for reform are evident through the increasing adoption of restorative justice and the constitutional acceptance of legal pluralism in both countries. Several good practices demonstrate that customary mechanisms can resolve minor criminal cases in a manner that restores social harmony, reduces case overload, and protects victims' rights, provided they are supported by clear procedures, minimum standards, and state oversight.

Third, from a southern criminology perspective grounded in Gramsci's theory of hegemony, effective integration requires deliberate policy intervention to rebalance the relationship between national law and customary law. This includes strengthening the institutional capacity of customary forums, ensuring meaningful participation of indigenous communities in lawmaking, and establishing clear regulatory pathways for recognizing customary settlements within the national criminal justice system. A policy model based on strong legal pluralism and restorative justice is therefore essential to transform customary criminal law from a marginal practice into a functional and legitimate component of a fair, inclusive, and context-responsive criminal justice system in both countries.

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