

Banjar Customary Law as a Living Law: An Ehrlichian Analysis of Consensus-Based Dispute Resolution and Social Restoration

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ABSTRACT

This article examines the status of Banjar customary law as a living law and its potential integration into regional regulations in South Kalimantan using Eugen Ehrlich's theory of the living law. This normative legal study employs a conceptual approach, a statutory approach, and document analysis of both national and regional regulations. The findings demonstrate that Banjar customary law fulfills the characteristics of a living law, possessing strong social legitimacy and functioning as a mechanism for dispute resolution grounded in deliberation and social restoration. Nonetheless, its integration into the formal legal system faces challenges, including the absence of a regional recognition regulation (Perda Rekognisi), the lack of limited codification, and normative disharmony between customary law and state law. This study proposes an integration model based on recognition-oriented regional regulations, limited codification, and synergy with the national restorative justice framework. The findings contribute conceptually to strengthening legal pluralism in Indonesia and formulating regionally responsive policies rooted in local values.



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INTRODUCTION

Indonesia constitutionally defines itself as a state based on the rule of law (Rechtsstaat), a model that emphasizes the supremacy of law, the protection of human rights, checks and balances, and legal certainty for all citizens. The Rechtsstaat principle requires that state governance be organized through rational, structured, and written legal norms. However, the character of the Indonesian legal state cannot be reduced solely to written law. Both constitutional arrangements and social history illustrate that the national legal system has developed within a culturally and normatively plural society (Asshiddiqie, 2017). Thus, Indonesia's legal state represents a blend of legal formalism and recognition of social norms long embedded within the community.

This recognition of plural legal orders is explicitly articulated in Article 18B(2) of the 1945 Constitution, which affirms that "the state recognizes and respects indigenous peoples and their traditional rights as long as they remain alive..." This provision legitimizes customary communities and their normative orders not merely as cultural remnants but as integral components of the national legal structure. Constitutional Court Decision No. 35/2012 further underscores that constitutional recognition requires concrete policy instruments at the regional level to prevent customary rights from remaining merely declaratory.

In South Kalimantan, the Banjar people constitute one of the long-established customary communities. Normative values such as *bubuhan* (kinship solidarity), deliberative decision-making, respect for customary and religious leaders, and mechanisms of relational restoration through reconciliation are defining features of Banjar social institutions (Mahyuni, 2021). Banjar customary dispute resolution serves not only as a conflict-settlement mechanism but also as a vehicle for preserving social justice values oriented toward harmony. This restorative orientation aligns with contemporary restorative justice principles increasingly adopted in Indonesian law enforcement policies.

Ehrlich's sociological jurisprudence provides a theoretical lens for understanding the endurance of Banjar customary law. In *Fundamental Principles of the Sociology of Law* (1936), Ehrlich argued that the center of gravity of legal development lies not in legislation, legal doctrine, or judicial decisions, but in society itself. As he famously stated, "the living law is the law which dominates life itself even though it has not been posited in legal propositions." Banjar customary law thus constitutes a living law because its authority is derived from social legitimacy and collective norms rather than state-issued rules.

Legal pluralism further illuminates the coexistence of multiple normative systems. Griffiths (1986) distinguishes between *weak legal pluralism*, where non-state law is valid only when recognized by the state, and *strong legal pluralism*, in which various normative orders operate independently. Indonesia exemplifies strong pluralism because customary, religious, and local norms continue to regulate society effectively despite not always being codified. Within this framework, Banjar customary law remains relevant because it embodies widely accepted communal values, including deliberation and *bubuhan*-based solidarity.

Although Article 18B(2) provides constitutional recognition, such recognition is largely declaratory without derivative regional regulations (Asshiddiqie, 2017). Constitutional Court Decision No. 35/2012 reinforces that customary rights require legal operationalization through regional policies. Without a *Perda Rekognisi*, customary law exists in a precarious state—socially acknowledged but legally unprotected.

Empirical studies indicate that most regional regulations in South Kalimantan address cultural preservation rather than functional recognition of customary institutions in dispute resolution (Aziz, 2022). Consequently, Banjar customary law occupies a “semi-formal” position: operative in society yet lacking formal legitimacy. This results in a normative gap between the strong sociological authority of customary law and its weak formal status.

Given these dynamics, this article seeks to address two central issues: (1) how Ehrlich’s living law theory explains the continued vitality and authority of Banjar customary law; and (2) what integration model would harmonize Banjar customary law with the national legal framework without undermining its social character. The study aims to offer conceptual foundations and policy recommendations for regional governments in strengthening customary law as part of Indonesia’s legal pluralism.

RESEARCH METHOD

This research employs normative (doctrinal) legal methodology using three analytical approaches:

1. Statutory Approach: Examining the 1945 Constitution, the Village Law, the Regional Government Law, and relevant regional regulations.
2. Conceptual Approach: Reviewing theories of the living law, legal pluralism, and customary law recognition.
3. Historical and Document Approach: Analyzing the historical development of Banjar customary law and existing documentary sources.

RESULT

Banjar Customary Law as a Living Law in the Normative Perspective

Banjar customary law exhibits the defining characteristics of Ehrlich’s living law. Dispute resolution through deliberation, with the involvement of *Pembakal*, customary leaders, and religious figures, demonstrates the ongoing vitality of Banjar customary norms. These norms not only guide behavior but also sustain social harmony. Echoing Ehrlich’s assertion that living law governs social life regardless of codification, Banjar customary practices continue to regulate communal relations effectively.

Indonesian scholars similarly view customary law as an autonomous normative order operating independently of the state (Soetandyo, 2019). Hence, Banjar customary law persists because it embodies ethical, moral, and cultural norms internalized within daily life.

Relevance of the Living Law Theory and Legal Pluralism

The relevance of Ehrlich’s theory lies not in the mere existence of customary norms but in their continued observance. Banjar communities still rely on customary procedures for resolving interpersonal and social disputes—an embodiment of strong legal pluralism (Griffiths, 1986). Moreover, Banjar practices reflect restorative principles, emphasizing reconciliation over punishment. As noted by Mahyuni (2021), *bubuhan* and deliberation position dispute resolution as a means of restoring balance. This reinforces the idea that Banjar customary law is both socially effective and theoretically aligned with contemporary restorative frameworks.

Constitutional Recognition and Normative Challenges

Despite constitutional affirmation, Banjar customary law lacks sufficient operational regulation at the regional level. Most regional regulations address cultural expressions rather than jurisdictional authority or dispute-resolution mechanisms (Aziz, 2022), resulting in “symbolic recognition.” The absence of specific *Perda Rekognisi* creates a gap between sociological and formal validity.

Although Constitutional Court Decision No. 35/2012 encourages detailed regional regulation of customary governance and rights, implementation remains limited. Regional governments often prioritize development policies over strengthening local legal structures. As Asshiddiqie (2017) stresses, constitutional recognition must be followed by derivative regulations to ensure enforceability.

Vertical and Horizontal Normative Disharmony

Integration efforts are hindered by both vertical and horizontal disharmony. Vertically, constitutional recognition has not been sufficiently translated into regional regulations. Horizontally, customary institutions lack clearly defined authority due to the absence of *Perda Rekognisi*. Rahman (2020) identifies weak legal structures for customary institutions in South Kalimantan as a primary cause of regulatory ambiguity.

The absence of clear legal frameworks leads to jurisdictional overlap between customary leaders and state law enforcement, sometimes resulting in parallel dispute-resolution processes. Without legal grounding, customary law risks being treated as non-legal practice despite strong social legitimacy (Griffiths, 1986).

Integration Model Based on Recognition and Restorative Justice

An effective integration model can be achieved through *Perda Rekognisi*, which formally acknowledges customary institutions and their authorities. Limited codification may outline general principles without undermining customary law's inherent flexibility—an approach consistent with Soetandyo (2019), who cautions against rigid codification.

A complementary mechanism is alignment with the national restorative justice framework, particularly Perpol No. 10/2022. Because Banjar customary resolution prioritizes relational restoration, state recognition of customary settlement processes could enhance restorative justice implementation. Collaborative mechanisms between law enforcement and customary leaders would reflect Indonesia's Pancasila-based legal pluralism.

Banjar customary law is deeply rooted in social structures characterized by kinship (*bubuhan*), deliberation, and communal balance. Dispute resolution emphasizes restoring relationships through reconciliation, compensation, or customary obligations (Rahman, 2020). These practices illustrate the essence of a living law—socially authoritative and widely practiced despite lacking formal codification.

CONCLUSION

Banjar customary law fulfills Ehrlich's criteria of a living law, deriving its authority from social legitimacy, deliberative norms, and restorative values. Integration into the national legal system remains limited because existing regional regulations do not provide functional recognition for customary institutions. A normative gap persists between constitutional recognition and regional regulatory implementation. Ideal integration requires *Perda Rekognisi*, limited codification, clear coordination mechanisms between state and customary institutions, and alignment with the national restorative justice framework. The Provincial Government of South Kalimantan should formulate a comprehensive *Perda Rekognisi* for Banjar customary law, Customary institutions should prepare documented principles as the basis for limited codification. Law enforcement agencies must develop SOPs for integrating customary settlement and restorative justice mechanisms. Academics should strengthen research and documentation of Banjar customary law to support evidence-based policymaking and Strengthening customary law should maintain its nature as a living law—flexible, socially grounded, yet formally acknowledged.

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