



CUSTOMARY ADJUDICATION OF DOMESTIC VIOLENCE UNDER ARTICLE 2 OF INDONESIA'S NEW PENAL CODE: EVIDENCE FROM KAYAN HULU



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Abstract

Article 2 of Law No. 1 of 2023 on the Indonesian Criminal Code restores living law as a source of criminal liability, while leaving the criteria, procedures, and scope of recognition to an implementing government regulation that has not yet been enacted. This study examines customary settlement of domestic violence cases in Kayan Hulu Sub-district, Malinau Regency, North Kalimantan, and its constraints within the national legal framework. Using normative legal research with statutory, conceptual, and comparative approaches, it draws on the 1945 Constitution, Law No. 1 of 2023, Law No. 23 of 2004, Law No. 12 of 2022, and Law No. 7 of 2012, supplemented by interviews with customary officials conducted from August 2025 to January 2026. The findings show that the customary forum, led by the Ngau together with the Head of Custom and Lit Adat Ngau, resolves cases through six deliberative stages culminating in tunggu and restorative rituals. It handles minor psychological violence and household neglect but excludes serious physical and sexual violence. Five constraints were identified: authority deficits, jurisdictional dualism, weak deterrence, absence of written procedure, and inadequate victim protection. Turkish law, while excluding custom as a source of criminal liability, retains state-supervised restorative mechanisms through mediation and protective measures. The comparison identifies two key safeguards: offence-category-based jurisdictional thresholds and victim-consent review outside the deliberative forum. The article proposes a four-layer normative architecture for the implementing regulation of Article 2 centred on victim protection.

Abstrak

Pasal 2 Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana memulihkan hukum yang hidup dalam masyarakat sebagai sumber pertanggungjawaban pidana, tetapi menyerahkan kriteria, prosedur, dan ruang lingkup pengakuannya kepada peraturan pemerintah pelaksana yang belum diundangkan. Penelitian ini mengkaji penyelesaian perkara kekerasan dalam rumah tangga melalui hukum adat di Kecamatan Kayan Hulu, Kabupaten Malinau, Kalimantan Utara, serta kendalanya dalam kerangka hukum nasional. Penelitian normatif ini menggunakan pendekatan perundang-undangan, konseptual, dan komparatif, berdasarkan UUD NRI Tahun 1945, UU No. 1 Tahun 2023, UU No. 23 Tahun 2004, UU No. 12 Tahun 2022, dan UU No.



7 Tahun 2012, dilengkapi wawancara dengan fungsionaris adat pada Agustus 2025– Januari 2026. Hasil penelitian menunjukkan bahwa peradilan adat yang dipimpin Ngau bersama Kepala Adat dan Lit Adat Ngau menyelesaikan perkara melalui enam tahap musyawarah yang berpuncak pada tunggu dan ritual pemulihan. Forum ini menangani kekerasan psikis ringan dan penelantaran rumah tangga, tetapi tidak berwenang atas kekerasan fisik berat dan kekerasan seksual. Lima kendala ditemukan: defisit kewenangan, dualisme yurisdiksi, lemahnya daya cegah, ketiadaan hukum acara tertulis, dan tidak memadainya perlindungan korban. Perbandingan dengan hukum Turki, yang tidak mengakui kebiasaan sebagai sumber pertanggungjawaban pidana namun mempertahankan restorasi melalui mediasi yang diawasi negara dan tindakan perlindungan, menunjukkan dua pengaman penting: ambang kewenangan berbasis kategori delik dan pemeriksaan persetujuan korban di luar forum musyawarah. Artikel ini menawarkan arsitektur normatif empat lapis bagi peraturan pemerintah pelaksana Pasal 2 yang berorientasi pada perlindungan korban.

INTRODUCTION

Domestic violence remains the most persistently under-adjudicated category of interpersonal harm in Indonesia. The annual records compiled by the National Commission on Violence Against Women have for more than a decade placed the domestic sphere at the head of reported complaints, yet the number of cases that reach a judicial determination is a small fraction of those reported, and smaller still of those actually endured. The distance between incidence and adjudication is not merely a question of enforcement capacity; it is a question of geography, of culture and of institutional proximity. In Kayan Hulu Sub-district, an upstream territory of Malinau Regency in North Kalimantan that lies along the land border with the Malaysian state of Sarawak, the nearest district court and the nearest prosecution office are several hours distant by river and, during periods of low water, are for practical purposes unreachable. For the Kayan Dayak communities that inhabit the sub-district, the institution that in fact resolves marital conflict, assault between spouses and the neglect of household obligations is not the state court but the customary judicature presided over by the *Ngau*. That judicature is not a ceremonial survival. It convenes, it hears the parties, it weighs evidence, it determines fault, it imposes *tunggu*, and its determinations are complied with. The entry into force of Law No. 1 of 2023 on the Criminal Code on 2 January 2026 has altered the legal significance of that practice, because Article 2 of the Law restores the law living in the community as a source of criminal liability for the first time since the enactment of Law No. 1 of 1946.

The scholarship that has accumulated around the living law clause is substantial but unevenly distributed. A first cluster addresses the doctrinal question whether

Article 2 can be reconciled with the principle of legality codified in Article 1 of the same Law, and whether an unwritten norm can furnish the basis of a criminal charge without collapsing the certainty that the legality principle exists to protect (Adhari, 2021; Kurniawan & Rachman, 2022; Pratiwi & Wijaya, 2022). A second cluster is regional and largely descriptive, mapping customary offences and customary forums in Aceh, Bali, Papua, Minangkabau and, considerably less often, in Kalimantan (Hidayat & Mustofa, 2021; Latupeirissa & Hehanussa, 2023; Nurjaya, 2020). A third cluster, written for the most part outside Indonesia, situates the state recognition of adat within the general theory of legal pluralism and the politics of indigeneity (Bedner & van Huis, 2008; Benda-Beckmann & Benda-Beckmann, 2011; Hoekema, 2020; Merry, 1988). What these three clusters share is a preoccupation with land, identity and institutional recognition. Violence inside the household, which is at once the offence category in which customary settlement is most frequently used and the category in which it is most fiercely contested, is almost wholly absent from them. Where gender-based violence does appear, it is treated either as proof that adat systematically shelters the offender (Irianto, 2019) or as an illustration of an indigenous restorative ethic (Hakim & Sudirman, 2023), but rarely as a problem of competing statutory commands.

Evaluated against the focus of the present study, the existing literature has three limitations that together define the space this article occupies. First, although several studies correctly observe that the recognition in Article 2 is conditional and that a government regulation is required to complete it (Ali & Rustamaji, 2023; Muhtada & Diniyanto, 2023), none has moved from that observation to a specification of what the regulation must contain, with the consequence that a delegated instrument of considerable constitutional weight is being discussed as a formality. Second, the literature treats customary criminal law as a homogeneous category and therefore obscures the fact that customary competence varies sharply with the gravity of the act; no study has tested a single, identifiable customary jurisdiction against the offence-by-offence structure of Law No. 23 of 2004 and Law No. 12 of 2022. Third, the collision between Article 41 of Law No. 7 of 2012, which directs that social conflict be resolved by giving precedence to customary institutions, and Article 23 of Law No. 12 of 2022, which prohibits the out-of-court settlement of sexual violence, has not been analysed even though it determines the outer boundary of any customary settlement inside the household (Fitria & Wahyuni, 2023; Tanuwidjaja & Susanti, 2023). This study is positioned precisely at the intersection of those three gaps.

Two questions accordingly guide the inquiry. The first asks how the mechanism for resolving domestic violence under the customary law of Kayan Hulu is actually constituted, in terms of its institutional hierarchy, its procedural sequence and the

sanctions it commands. The second asks what obstacles constrain the application of that mechanism once the national statutory framework is brought to bear, and what the implementing regulation of Article 2 must contain if those obstacles are to be removed. The argument advanced in response is that Article 2 is, in its present state, an incomplete norm: it confers recognition without supplying the criteria by which recognition is to be tested, the procedure by which a customary determination is to enter the criminal process, or the limits beyond which customary settlement must yield. The practice observed in Kayan Hulu is capable of absorbing a defined and deliberately narrow band of domestic violence, and does so with a legitimacy that the state forum cannot replicate in that territory. Outside that band, however, recognition without regulation will not produce legal pluralism but a zone of *de facto* impunity, in which the withdrawal of a complaint procured through customary pressure operates as an unreviewable substitute for adjudication.

METHODS

This study is doctrinal legal research supported by a targeted empirical component. The label matters, because the analysis rests in part on interview material gathered in the field, and describing the design as purely normative would understate both what was done and the basis on which the findings rest. Its object is the coherence between the customary practice observed in Kayan Hulu and the body of written norms that purports to govern it, and its purpose is prescriptive rather than explanatory: it seeks to establish what ought to be regulated, not to measure the frequency with which particular outcomes occur. Three approaches are combined. The statutory approach is used to examine the whole of the legislation bearing on the recognition of customary criminal law and on the criminalisation of domestic violence, and to trace the hierarchical and temporal relationships between those instruments. The conceptual approach is used to reconstruct the doctrines of living law, legal pluralism, customary delict and restorative justice, and to test whether the practice observed can be accommodated within them. A comparative reading of sub-national instruments is used to establish the extent to which regional regulation has already supplied, or has failed to supply, the institutional infrastructure that the delegated regulation will presuppose.

The primary legal materials examined are the 1945 Constitution of the Republic of Indonesia, in particular Articles 18B(2), 28I(3) and 32(1); Law No. 1 of 2023 on the Criminal Code, in particular Articles 1 and 2; Law No. 23 of 2004 on the Elimination of Domestic Violence, in particular Articles 5 to 9 and 44 to 53; Law No. 12 of 2022 on Sexual Violence Offences, in particular Article 23; Law No. 7 of 2012 on the Handling of Social Conflict, in particular Article 41; Law No. 6 of 2014 on Villages; Law No. 23 of 2014 on Regional Government; Regulation of the Minister of Home

Affairs No. 52 of 2014; Regional Regulation of Malinau Regency No. 10 of 2012 on the Recognition and Protection of the Rights of Customary Communities; Regent Regulation of Malinau No. 201 of 2014; and Regional Regulation of North Kalimantan Province No. 1 of 2019 on the Empowerment of Customary Communities. Secondary legal materials consist of peer-reviewed articles published in nationally accredited and internationally indexed journals, together with the standard textbook literature on customary law. Materials were gathered by documentary study using the snowball technique and were inventoried through a card system applied critically and systematically.

Because the object of study is a functioning institution rather than a text alone, the doctrinal analysis is supported by interview material collected in Kayan Hulu Sub-district between August 2025 and January 2026 from customary functionaries, namely the holder of the office of Ngau, two village-level Kepala Adat and three members of the Lit Adat Ngau, together with community members who had previously brought or answered a customary complaint. That material is used strictly to establish the content and sequence of the customary norm, in the manner in which a doctrinal study of unwritten law must establish the norm it analyses, and not as a sample from which generalisations about incidence are drawn. Interviewees were informed of the purpose of the study, and identifying particulars have been withheld because the underlying cases concern violence inside the household. Analysis proceeded through legal reasoning, using grammatical and systematic interpretation, supplemented where the instruments conflict by the principles of *lex superior*, *lex specialis* and *lex posterior*. The findings are presented in three movements corresponding to the manifestation of the practice, the factors that sustain and constrain it, and its transformative implications for the design of the delegated regulation.

Two features of the fieldwork should be recorded explicitly. First, as to ethics: participation was voluntary and informed, no identifying particulars have been retained, interviews were conducted away from the household of any party to a matter under discussion, and a referral protocol was agreed in advance with the regional service unit for women and children in the event that a disclosure of ongoing harm was encountered. The research protocol was reviewed and approved by the research ethics body of the authors' institution prior to the commencement of fieldwork. Second, and more consequential for the argument developed below: those interviewed were customary functionaries and parties who had brought or answered a complaint, and no separate confidential interviews were conducted with women who had been the injured party in a matter resolved by the customary forum. This is a material limitation rather than an incidental one, because the central normative claim of this article concerns the quality of a victim's consent within the deliberation,

and evidence bearing directly on that question cannot be supplied by those who preside over it. The finding on victim safeguards advanced in the Result and Discussion sections is therefore an inference drawn from the structure of the procedure and from the international literature on comparable settings, and is presented as such rather than as a claim verified from the accounts of victims themselves.

RESULT AND DISCUSSION

RESULT

The first finding concerns the form in which the practice manifests itself. The customary order of the Kayan Dayak in Kayan Hulu is not an informal habit of mediation but a stratified judicature with a defined hierarchy of office. At its apex stands the *Ngau*, who is at once the highest customary authority and the presiding judge of the customary forum. The *Ngau* is assisted by a *Wakil Ngau*, by a *Panglima Adat* charged with the enforcement of determinations, and by the *Lit Adat Ngau*, a collegiate body whose membership is deliberately fixed at an even number so that no determination can be produced by a bare majority and every outcome must rest on consensus. Below the sub-district level the *Kepala Adat* holds responsibility within the village, and the *Ketua Adat* within the hamlet; both work alongside the *Kepala Dusun* and the heads of neighbourhood units, so that the customary and the administrative structures of the village overlap at every point. This institutional density explains a feature of the practice that distinguishes it from ordinary mediation: the forum does not merely facilitate agreement between the parties, it determines fault and imposes an obligation.

The procedural sequence through which a domestic violence complaint passes is correspondingly formal. It begins with an oral report, ordinarily made by the victim or by a member of her natal family to the *Ketua Adat*, and proceeds through a verification stage in which the *Kepala Adat*, accompanied by the hamlet head, hears both spouses and any witnesses and, where the complaint is of physical abuse, observes the injury directly. If the matter is not resolved at that level, a deliberation is convened by summons addressed not only to the spouses but to both extended families, whose presence transforms the dispute from a private grievance into a matter of collective concern. The deliberation itself is presided over by the *Ngau*, who identifies the applicable customary norm, invites each party to speak without interruption, and directs the *Lit Adat Ngau* towards consensus. The determination fixes fault, imposes *tunggu* in money or in kind, requires a public apology and extracts an undertaking of non-repetition. Execution is public: the handing over of *tunggu*, the reconciliation meal and the announcement of the outcome to the

community are all constitutive elements of the remedy rather than incidents of it, because the harm that the customary order recognises is a disturbance of cosmic and social balance and not only an injury to the person. Table 1 sets out the sequence and aligns each stage with its functional counterpart in state criminal procedure.

Table 1. Procedural Sequence of Customary Adjudication of Domestic Violence in Kayan Hulu and Its Functional Equivalent in State Criminal Procedure

Stage	Customary term and competent office	Substance of the act	Functional equivalent in state procedure
1	<i>Pelaporan</i> — victim or natal family to the <i>Ketua Adat</i>	Oral complaint; no written form; the complainant is ordinarily accompanied by a senior member of her own family	Report or complaint initiating the process
2	<i>Penelusuran</i> — <i>Kepala Adat</i> with the <i>Kepala Dusun</i> and the head of the neighbourhood unit	Both spouses and any witnesses are heard; where physical abuse is alleged the injury is observed directly; the gravity of the act is provisionally classified	Preliminary inquiry (<i>penyelidikan</i>)
3	<i>Undangan musyawarah</i> — <i>Kepala Adat</i> or <i>Ngau</i>	Summons addressed to the spouses and to both extended families; the time and place of the deliberation are fixed and announced	Summons of the parties (<i>pemanggilan</i>)
4	<i>Musyawarah adat</i> — <i>Ngau</i> presiding, with <i>Wakil Ngau</i> , <i>Panglima Adat</i> and <i>Lit Adat Ngau</i>	The applicable customary norm is identified; each party speaks without interruption; the collegiate body deliberates towards consensus, no outcome being available on a bare majority	Examination at trial (<i>pemeriksaan di persidangan</i>)

Stage	Customary term and competent office	Substance of the act	Functional equivalent in state procedure
5	<i>Keputusan adat</i> — <i>Ngau</i> together with the <i>Lit Adat Ngau</i>	Fault is determined; <i>tunggu</i> is fixed in money or in kind; a public apology is ordered and an undertaking of non-repetition is extracted	Judgment (<i>putusan</i>)
6	<i>Pemulihan</i> — customary institution and the community at large	Public handing over of <i>tunggu</i> ; reconciliation meal and ritual; announcement of the outcome; continuing social supervision of the household	Execution (<i>eksekusi</i>) and post-adjudicative supervision

Source: Processed by the authors from interviews with customary functionaries of Kayan Hulu (August 2025 – January 2026) and from Regional Regulation of Malinau Regency No. 10 of 2012

Two features of this sequence deserve emphasis because they bear directly on the question of recognition. The first is that the customary forum operates without any distinction between public and private wrong. The literature on adat has long observed that the classification of law into criminal and civil branches is foreign to customary systems, which conceive of every disturbance as an imbalance requiring restoration (Nurjaya, 2020; Salinding, 2021). In Kayan Hulu this is not an abstraction: the same forum, on the same day, may determine a boundary dispute, a case of adultery and an assault between spouses, applying to each the same logic of *tunggu*. The second is that the forum has no concept of the unwithdrawable complaint. Because the object of the proceeding is reconciliation, the withdrawal of a grievance by the injured party terminates the matter, and the forum possesses no means of continuing against the will of the complainant. Both features are functional within the customary order and both become sources of difficulty the moment that order is asked to interlock with a statutory scheme built on precisely the opposite premises.

A further feature of the practice bears directly on the certainty objection that is ordinarily raised against the recognition of unwritten law. The customary norms of the Kayan Dayak of Kayan Hulu have been reduced to writing. Functionaries explained that the compilation was undertaken for three reasons: to deepen the community's understanding of its own norms, to strengthen the participation of the community in development within and beyond the sub-district, and to secure a harmonious and orderly common life. The compiled record states the categories of

customary wrong and, for each, a tariff of *tunggu* expressed in monetary units and in traditional valuables. What the record conspicuously does not state is procedure. It is silent on who may bring a complaint, on whether a complaint may be brought by a person other than the injured party, on the manner in which evidence is to be weighed, on the standard by which fault is to be established, and on whether and by whom a determination may be revisited. The customary order has therefore already achieved the substantive ascertainability that Article 2 presupposes, while remaining without the procedural ascertainability that the criminal law requires, and this asymmetry indicates with some precision where the delegated regulation must do its work.

The institutional infrastructure that a delegated regulation would presuppose is, in Malinau Regency, already partially in place. Regional Regulation No. 10 of 2012 recognises and protects the rights of customary communities, and Regent Regulation No. 201 of 2014 established a managing body for customary community affairs, furnishing the customary institution with an administrative counterpart within the regency government. At provincial level, Regional Regulation No. 1 of 2019 on the empowerment of customary communities supplies a further layer of recognition and, significantly, a budgetary basis: the office-holders of the customary institution in Kayan Hulu receive an honorarium from the regional government, and the institution receives material support for the conduct of its proceedings. This matters for the design of the implementing regulation because it demonstrates that the machinery of verification, registration and supervision that such an instrument would require does not have to be built from nothing. What the sub-national instruments cannot do, however, is supply the competence that is missing, since Article 15 of Law No. 12 of 2011 confines the creation of criminal norms to statute and to regional regulations only within the narrow limits there specified.

In the absence of a delegated regulation, a channel of a different kind has emerged in practice. Prosecutorial policy on the cessation of prosecution on restorative grounds permits a public prosecutor to terminate a case where the offence is not grave, where the accused has not previously offended, and where the accused and the victim have been reconciled. In territories such as Kayan Hulu, a customary determination is capable of supplying the evidence of reconciliation on which such a termination rests, and functionaries reported that determinations have on occasion been produced to investigators for that purpose. This is a workable accommodation and it demonstrates that the two orders can be made to interlock. It is not, however, a substitute for the delegated regulation, for three reasons. It operates at the discretion of an individual officer rather than by right; it contains no verification of the freedom of the victim's consent, which is precisely the safeguard that the

customary deliberation lacks; and it produces no public record against which consistency between cases might be assessed. A discretionary accommodation, however benign, is not a legal regime (Hakim & Sudirman, 2023; Muhtada & Diniyanto, 2023).

The second finding concerns the factors that determine which cases the customary forum can and cannot absorb. Interview material and the observed pattern of determinations converge on a threshold that the functionaries themselves articulate with some precision. Verbal abuse, humiliation, excessive control and the ordinary run of marital quarrel are treated as squarely within customary competence and are resolved by reprimand, apology and a modest *tunggu*. Temporary failure to provide maintenance and disputes over economic roles within the household are likewise absorbed, and are resolved by the imposition of a customary duty of maintenance and by a renegotiation of family responsibilities. Light physical abuse is handled, though with visible unease and with a higher *tunggu*. Serious physical abuse, abuse resulting in incapacity or death, and any conduct of a sexual character are referred outward: the functionaries state without qualification that such matters belong to the police, and the customary role is confined to the reconciliation of the two families after the state process has run. Table 2 maps this threshold against the four statutory categories of domestic violence and assesses each against the conditions of Article 2(1) of Law No. 1 of 2023.

Table 2. Competence of the Kayan Hulu Customary Forum over the Statutory Categories of Domestic Violence

Statutory category	Statutory characterisation	Practice observed in Kayan Hulu	Assessment against Article 2 of Law No. 1 of 2023
Light physical violence (Art. 44(4), Law No. 23 of 2004)	Complaint offence; withdrawable; maximum four months' imprisonment or a fine	Handled with visible unease; higher <i>tunggu</i> ; apology and undertaking of non-repetition	Admissible, provided the victim's consent is free and informed and the act is not a repetition
Serious physical violence (Art. 44(1) – (3), Law No. 23 of 2004)	Ordinary offence; up to fifteen years where death results	Referred to the police; customary role confined to reconciliation of the two families	Not admissible; customary settlement cannot extinguish liability for a serious offence

Statutory category	Statutory characterisation	Practice observed in Kayan Hulu	Assessment against Article 2 of Law No. 1 of 2023
Light psychological violence (Art. 45(2), Law No. 23 of 2004)	Complaint offence; withdrawable; maximum four months' imprisonment or a fine	Core competence; reprimand, apology and modest <i>tunggu</i>	Admissible; the strongest fit with the living-law clause
Serious psychological violence (Art. 45(1), Law No. 23 of 2004)	Ordinary offence; up to three years' imprisonment	Rarely handled; the forum has no capacity to assess psychological injury	Not admissible without an independent expert assessment of harm
Sexual violence within the household (Arts. 46 – 48, Law No. 23 of 2004; Law No. 12 of 2022)	Ordinary offence; settlement outside the criminal process prohibited by Art. 23 of Law No. 12 of 2022	Not handled; referred outward without exception	Absolutely excluded; the statutory prohibition admits of no customary exception
Household neglect and economic abuse (Art. 49, Law No. 23 of 2004)	Complaint offence; withdrawable; maximum three years' imprisonment	Handled; customary duty of maintenance imposed and family roles renegotiated	Admissible, subject to a supervision mechanism verifying continued performance

Source: Author's analysis of Law No. 23 of 2004, Law No. 12 of 2022 and Law No. 1 of 2023, read against the field data

The factors that sustain adherence to the customary forum are neither irrational nor reducible to ignorance of the state system. Six emerged consistently. Proximity is the first: a determination can be obtained within days, in the village, at no cost, whereas the state forum requires travel, expense and an absence from subsistence activity that few households can sustain. Legitimacy is the second: the *Ngau* and the *Kepala Adat* are known, their authority is inherited and their determinations carry a religio-magical weight that a distant judgment does not. Comprehensibility is the third: the proceeding is conducted in the vernacular, without documents, and its logic is shared by everyone present. Continuity of relationship is the fourth: the parties will remain neighbours and kin, and a remedy that restores the relationship is preferred to one that severs it. Shame is the fifth, and operates as the principal enforcement mechanism, since public announcement of a determination imposes a cost that no fine could equal. The sixth is the community's own conviction that customary law is

constitutive of identity and that recourse to the state forum is a repudiation of it. These findings are consistent with what has been reported of other Dayak communities in Kalimantan (Anwar & Nurhayati, 2022; Hidayat & Mustofa, 2021) and with the broader literature on access to justice in remote regions (Arliman S., 2019).

Against those sustaining factors stand five constraints, and it is these that constitute the substance of the second research question. The first is a deficit of competence. The customary forum possesses no jurisdiction recognised by the state over criminal matters; Regional Regulation of Malinau Regency No. 10 of 2012 and Regional Regulation of North Kalimantan Province No. 1 of 2019 recognise and empower the customary institution but cannot, consistently with Article 15 of Law No. 12 of 2011, confer criminal jurisdiction upon it. The determination of the *Ngau* is therefore, in the eyes of the state, a private settlement and nothing more. The second constraint is jurisdictional dualism. A matter concluded before the customary forum may be reported afresh to the police, and the customary determination does not bar the subsequent proceeding; conversely a matter reported to the police may be withdrawn under customary pressure. The result is that neither system supplies finality, and the parties are exposed to a sequence of proceedings whose order depends on accident.

The third constraint concerns the deterrent capacity of the customary sanction. *Tunggu* is calibrated to restoration rather than to prevention, and in the particular context of violence between spouses it is frequently paid from the joint resources of the household, so that the economic burden falls in part upon the victim. Functionaries and community members alike reported instances of repetition after a determination had been made and complied with. The fourth constraint is the absence of written procedure. Although the customary norms of the community have been compiled in a written record, that record states substantive obligations and tariffs; it does not state who may complain, how evidence is to be weighed, what standard of proof applies, or whether a determination may be revisited. Inconsistency between one *Kepala Adat* and another is the predictable consequence, and it is a form of legal uncertainty that recognition under Article 2 would entrench rather than cure (Sulistiyawan & Kusriyah, 2022).

The fifth constraint is the most serious and the least discussed. The customary proceeding contains no safeguard for the free formation of the victim's will. The deliberation is conducted in the presence of both extended families, in a setting in which the preservation of the marriage is the acknowledged objective and in which the withdrawal of a grievance is socially rewarded. A victim who wishes to insist upon a state remedy must do so against the assembled weight of her own kin. Because Articles 44(4), 45(2) and 51 to 53 of Law No. 23 of 2004 constitute light physical abuse,

light psychological abuse and household neglect as complaint offences that may be withdrawn, the customary forum is structurally capable of producing exactly the outcome that the statute makes possible, namely a withdrawal, without any of the conditions that would make that withdrawal an exercise of autonomy. This is the point at which the recognition of the living law ceases to be a question of cultural respect and becomes a question of the protection of a person (Marzuki & Fitriani, 2021; Tanuwidjaja & Susanti, 2023).

The third finding concerns the transformative implication of these observations for the national legal order. Article 2(1) of Law No. 1 of 2023 provides that the provisions of the Law do not diminish the applicability of the law living in the community which determines that a person may be punished even though the act is not regulated by the Law; Article 2(2) provides that the law living in the community applies within the territory in which it lives and so far as it is consistent with the values contained in Pancasila, the 1945 Constitution, human rights and the general principles of law recognised by the community of nations, and that further provision is to be made by government regulation; and Article 2(3) confines the sanction to the fulfilment of the customary obligation. Read together, these three paragraphs do not enact a customary criminal jurisdiction. They enact a conditional and delegated recognition whose operative content is to be supplied elsewhere. Until that content is supplied, Article 2 is an incomplete norm, and the practice in Kayan Hulu continues to operate outside the criminal justice system rather than within it.

The incompleteness is compounded by collision. Article 1 of Law No. 1 of 2023 restates the principle of legality; Article 2 admits an unwritten source. Article 41 of Law No. 7 of 2012 directs that conflict resolution give precedence to customary institutions and declares the resulting agreement binding, but it speaks of social conflict between groups and cannot without distortion be read as conferring jurisdiction over an offence between spouses. Article 23 of Law No. 12 of 2022 prohibits the settlement of sexual violence outside the criminal process, and does so in absolute terms that admit of no customary exception. Law No. 23 of 2004 makes the lighter forms of domestic violence withdrawable and thereby creates the very aperture through which customary settlement enters. The criminal procedure legislation, meanwhile, provides no mechanism by which a customary determination may be recorded, verified or given effect within a case file. Table 3 sets out these collisions and the principle by which each may provisionally be resolved pending the enactment of the delegated regulation.

Table 3. Normative Collisions Affecting the Application of the Living Law to Domestic Violence and Their Provisional Resolution

Instrument and provision	Normative command	Point of collision	Provisional resolution
Art. 2(1) – (3), Law No. 1 of 2023	The living law applies where it lives, subject to Pancasila, the Constitution and human rights; further provision by government regulation; sanction confined to the customary obligation	Recognition is conditional and not self-executing; no implementing regulation has been enacted	Incomplete norm; pending the regulation, adat operates only as a ground for discretion
Art. 1, Law No. 1 of 2023	No act is punishable except by virtue of a pre-existing written statutory provision	An unwritten norm is admitted as a source of liability	Art. 2 is a qualified exception, narrowed by the sanction ceiling in Art. 2(3)
Arts. 44(4), 45(2), 49 and 51 – 53, Law No. 23 of 2004	The lighter forms of domestic violence are complaint offences and the complaint may be withdrawn	Withdrawal converts a public wrong into a private one; customary pressure is used to procure it	Compatible only where consent is free; a safeguard against coerced withdrawal is required
Art. 23, Law No. 12 of 2022	Sexual violence may not be settled outside the criminal process	Customary forums have historically settled sexual offences by fine	The prohibition prevails as both <i>lex specialis</i> and <i>lex posterior</i>
Art. 41, Law No. 7 of 2012	Conflict resolution shall give precedence to customary and social institutions and the result is binding	The provision addresses social conflict between groups, not offences between spouses	Restrictive interpretation; the provision confers no criminal jurisdiction
Perda Malinau No. 10 of 2012; Perda North Kalimantan No. 1 of 2019	Recognition, protection and empowerment of customary institutions	Sub-national instruments are read as a source of adjudicative authority	Art. 15 of Law No. 12 of 2011 confines Perda to institutional and procedural support
Criminal procedure legislation in force	The stages of the criminal process and the contents of the case file are exhaustively prescribed	No mechanism exists for recording, verifying or giving effect to a customary determination	A procedural gateway must be created at the level of the delegated regulation

Source: Author's construction from the instruments cited

The transformative significance of the analysis lies in what follows from that matrix. If the collisions are left to be resolved case by case, by individual investigators and prosecutors exercising discretion in a territory where supervision is thin, the predictable outcome is not pluralism but arbitrariness: identical facts will be treated differently according to the disposition of the officer, and the victim's ability to insist on a state remedy will depend on her capacity to resist her own community. If, on the other hand, the delegated regulation is drafted so as to fix a competence ceiling in advance, to prescribe the point at which and the form in which a customary determination enters the criminal process, and to make the victim's free and informed consent a condition of validity rather than an assumption, then the very features that make the customary forum effective in Kayan Hulu can be preserved without surrendering the protective function of the criminal law. The architecture proposed in this article, and presented in Figure 1 below, is an attempt to specify that instrument.

DISCUSSION

The results may be summarised in four propositions. The customary judicature of Kayan Hulu is a stratified institution with a determinate hierarchy of office and a six-stage procedural sequence that ends not in punishment but in the restoration of a disturbed balance through *tunggu*, apology and public reconciliation. Its competence over domestic violence is neither unlimited nor undifferentiated: it absorbs light psychological abuse and household neglect readily, light physical abuse with reservation, and refers serious physical violence and all sexual violence outward without hesitation. Its authority rests on proximity, legitimacy, comprehensibility, the continuity of relationship, the sanction of shame and a conviction that customary law is constitutive of communal identity. And it is constrained by five deficits — of recognised competence, of finality, of deterrence, of written procedure and of victim safeguard — of which the last is the gravest, because the structure of the deliberation is capable of producing a withdrawal of complaint that satisfies the form of Law No. 23 of 2004 while defeating its purpose.

The causes of that configuration are traceable to the divergent premises on which the two normative orders rest. The customary order conceives of a wrong as an imbalance affecting a collectivity, and therefore locates the remedy in restoration and the standing to forgive in the injured group rather than in the injured individual. The statutory order conceives of domestic violence as an injury to a person whose autonomy the law exists to vindicate, and therefore locates the remedy in the punishment of the offender and the protection of the victim. Neither premise is

unreasonable and neither is wholly displaced by the other; but the aperture that Law No. 23 of 2004 leaves open, in making the lighter offences withdrawable, allows the collective premise to operate upon a statutory mechanism designed for the individual one. Added to this is a second cause of a different order: the state's own institutional absence. Where the nearest court is a day's journey away, the choice presented to a victim is not between two forums but between one forum and none, and a normative analysis that ignores that fact will produce recommendations no one can follow (Anwar & Nurhayati, 2022; Rahman & Zein, 2023).

The effects that follow are cumulative and, in the absence of intervention, self-reinforcing. Because the customary determination has no recognised legal effect, it produces no finality, and the parties remain exposed to a second proceeding whose commencement depends on accident rather than principle; the predictable adaptation is that determinations are kept undocumented, which in turn deepens the evidentiary invisibility of domestic violence in the sub-district. Because the sanction is calibrated to restoration and is frequently satisfied from household resources, repetition carries a low expected cost and the protective function of the criminal law is not performed. Because there is no written procedure, outcomes vary between villages and the variation cannot be reviewed. And because consent is presumed rather than verified, the recognition contemplated by Article 2 would, if enacted without further specification, convert a practice that currently operates alongside the criminal law into one that operates instead of it, with consequences borne disproportionately by women (Fitria & Wahyuni, 2023; Irianto, 2019).

Set against the existing literature, these findings both confirm and depart from what has previously been reported. They confirm the general observation that adat forums in Indonesia deliver a form of restorative justice that state courts do not, and that their legitimacy is grounded in social proximity rather than in coercive power (Hakim & Sudirman, 2023; Latupeirissa & Hehanussa, 2023; Nurjaya, 2020). They confirm the theoretical claim that legal pluralism describes not the peaceful coexistence of orders but their competition for the same subjects (Benda-Beckmann & Benda-Beckmann, 2011; Hoekema, 2020; Merry, 1988). They depart, however, in three respects. First, where much of the domestic literature treats customary criminal competence as a single question to be answered yes or no, the present findings show that the community itself operates a differentiated threshold and that the regulation should codify that threshold rather than invent one. Second, where studies of the living law clause have concentrated on its compatibility with the principle of legality (Adhari, 2021; Kurniawan & Rachman, 2022; Pratiwi & Wijaya, 2022), the more urgent problem revealed here is procedural rather than doctrinal. Third, where the recognition debate is usually framed as one between cultural autonomy and state

authority (Bedner & van Huis, 2008; Hardjaloka, 2022; Muhtada & Diniyanto, 2023), the present analysis shows that the decisive axis runs between communal authority and individual autonomy inside the community.

The Consent Problem in Comparative Perspective

The claim that a deliberative customary settlement may generate a withdrawal of complaint that satisfies the form of Law No. 23 of 2004 while defeating its purpose is not peculiar to Kayan Hulu, and the argument is considerably strengthened by placing it alongside a body of international scholarship that has reached the same conclusion about restorative processes in gendered violence generally. That literature identifies three mechanisms by which consent within a restorative forum becomes unreliable. The first is the structural power asymmetry between the parties, which the informality of the process does not neutralise and may amplify, since the procedural protections that constrain an offender in a courtroom are precisely what an informal setting dispenses with (Stubbs, 2007). The second is the presence of family and community members whose interest lies in the preservation of the relationship rather than in the vindication of the injured party, which converts a decision that ought to be the victim's alone into a collective one (Daly & Stubbs, 2006). The third is the reframing of the harm as a disturbance of relations rather than as a wrong done to a person, which subtly relocates the standing to forgive from the victim to the group (Hudson, 2002).

Each of these three mechanisms is present in the procedure described in the Result section. The deliberation is conducted before assembled kin of both households; the remedy is expressed as the restoration of a disturbed balance; and the tunggu is frequently satisfied from household resources that the victim herself may partly have generated, so that the sanction is borne in part by the person it was imposed to vindicate. The convergence is close enough that the international findings should be treated as directly relevant rather than as distant analogy, and their absence from the Indonesian debate on the living law clause is itself notable.

Two qualifications prevent that literature from being applied to Kayan Hulu without adjustment, and both cut in directions the analysis should acknowledge. The first is that much of the critique was developed in jurisdictions where a functioning and accessible state alternative existed, so that the question was whether a victim should be diverted from it. In Kayan Hulu the nearest court is a day's journey away, and the realistic comparison is not between a restorative forum and a criminal trial but between a restorative forum and no forum at all. A critique premised on the availability of an alternative loses part of its force where the alternative is unavailable, which is why the recommendations advanced below are directed at conditioning the customary process rather than at displacing it. The second qualification is that

scholarship on indigenous justice has cautioned against assuming that state courts serve indigenous women better than community fora, since the former may carry their own histories of dismissal and of cultural incomprehension, and since indigenous women themselves have often sought the reform of community processes rather than exit from them (Nancarrow, 2006; Coker, 2006). Work on how international norms are received and reshaped in local settings makes the same point in more general terms: a protective standard imported without local adaptation frequently fails to travel, and the more durable reforms are those that operate through existing institutions rather than around them (Merry, 2006; Goel, 2005).

The practical implication is specific, and it sharpens the recommendation made below. If the unreliability of consent is structural rather than incidental, then a regulation that merely requires the victim's free and informed consent as a condition of validity has not solved the problem, because the structure that renders consent unreliable will also render its verification unreliable if verification is performed within the same forum and by the same participants. What follows is that verification must be external to the deliberation: conducted separately, in confidence, by a person who is not a party to the customary proceeding and who is answerable elsewhere. The regional service unit for women and children is the obvious candidate, and its involvement should be a condition of validity rather than a matter of referral after the event. This is a stronger requirement than the draft regulatory models currently contemplate, and the comparative literature is the reason for insisting upon it.

The Turkish Comparison: Custom Outside the Criminal Law, Reconciliation Inside the State

Turkey supplies an instructive counter-case, and one drawn from a legal order that shares with Indonesia both a plural social reality and a codified criminal law of continental derivation. Custom (*örfve âdet*) is admitted there as a subsidiary source of the civil law where the statute and the judge's own rule-making are exhausted, under Article 1 of the Turkish Civil Code, but it is admitted nowhere in the criminal law, whose sources Article 2 of the Turkish Penal Code confines to statute; no counterpart to the living law clause of Article 2 of Law No. 1 of 2023 exists. Turkish law goes further and treats custom in this specific field as an aggravating rather than an excusing circumstance, since killing with a customary motive (*töre saikiyle öldürme*) is listed in Article 82 of the Penal Code among the qualified forms of intentional homicide punishable by aggravated life imprisonment — a provision enacted in 2004 in order to withdraw the mitigation that courts had previously extended to killings resolved upon by a family council, and understood in the Turkish doctrine as directed at precisely that collective decision-making structure (Göztepe, 2005; Sev'er & Yurdakul, 2001).

The practice nevertheless persisted well beyond the statutory reform, and the reason is the institutional one identified in Kayan Hulu rather than a defect of drafting. Family and lineage councils (*aile meclisi, aşiret*) have continued to adjudicate matters of honour and marital conflict in parts of eastern and south-eastern Anatolia, and the pressure such a council exerts upon a complainant operates on the same three mechanisms the comparative literature isolates: the assembled kin have an interest in the preservation of the household, the harm is articulated as a stain upon the collectivity rather than as an injury to a person, and the standing to forgive migrates accordingly from the woman to the group (Kardam, 2005; Sev'er & Yurdakul, 2001). The state institutions themselves have not been immune to that framing, since police and prosecutorial practice has been documented as anticipating reconciliation and as treating non-lethal violence inside the household as a private matter capable of internal management (Ertürk, 2007). The parallel with the fifth deficit identified above — the absence of any safeguard for the free formation of the victim's will — is exact.

What Turkey did in response is the decisive comparative point, because it did not recognise the community forum and it did not abolish restoration either. It relocated restoration inside the state and closed it for the offences most exposed to coerced consent. Mediation (*uzlaştırma*) under Article 253 of the Code of Criminal Procedure is available only for an enumerated list of offences; it is conducted not by the disputants' elders but by a mediator appointed by the mediation bureau attached to the public prosecutor, and the agreement takes effect only upon the prosecutor's or the court's approval, so that the informal settlement acquires legal effect through a state officer who is external to the parties. It is barred outright for offences against sexual inviolability and for persistent stalking, even where prosecution otherwise depends upon complaint, on the reasoning that a victim's consent cannot be accepted as a sufficient warrant for bargaining in those categories. Protection is kept structurally separate: measures under Law No. 6284 of 2012 on the Protection of the Family and the Prevention of Violence against Women are issued swiftly and without a requirement of proof that violence has occurred, and their continuation does not depend upon the victim's willingness to maintain a criminal complaint.

Two lessons and one caution follow for the implementing regulation contemplated by Article 2(2). The first lesson is that a competence ceiling is more defensible when it is expressed, as in Article 253, as a closed list of offence categories withdrawn from any consensual disposal, which is the technique proposed above for sexual violence and serious physical violence. The second is that restoration and protection should not be routed through the same actors: the Turkish separation of the mediator, who is appointed and supervised by the state, from the protective order,

which is available irrespective of the complaint, is a working model of the external verification argued for here, and it confirms that requiring the regional service unit for women and children to verify consent outside the customary deliberation is neither exotic nor unworkable. The caution is twofold. Turkey's architecture presupposes an accessible court, which Kayan Hulu does not have, so the Turkish exclusion of custom cannot simply be transplanted where the alternative to the customary forum is no forum at all; and the withdrawal from the Istanbul Convention in 2021 shows how quickly the protective layer of such an architecture may be weakened by political decision, which is a further reason for constituting victim safeguards as conditions of validity in the regulation itself rather than leaving them to policy.

Three recommendations follow. Conceptually, the implementing regulation of Article 2 should abandon the ambition of a general definition of living law and adopt instead a two-limbed structure: an existence test, cumulative and verifiable, and a competence ceiling expressed by reference to identified statutory offence categories rather than by an open standard of gravity. Methodologically, the regulation should require each regency to enact, after verification, a published compilation of customary offences and tariffs, on the model already attempted in Malinau, and should provide that no customary norm outside the compilation may ground a determination; this converts the unwritten into the ascertainable without converting it into statute, and answers the certainty objection at its strongest point (Ali & Rustamaji, 2023; Wahyudi & Sari, 2024). In policy terms, the regulation must create a procedural gateway by which a customary determination is recorded in the case file, verified against the compilation and the competence ceiling, and confirmed by determination of the district court, and it must make the victim's free and informed consent, her access to a companion and her referral to the regional service unit conditions of validity rather than matters of good practice, with that consent verified separately from the deliberation and by a person who is not a participant in it, for the reasons set out immediately above (Sulistiyawan & Kusriyah, 2022; Tanuwidjaja & Susanti, 2023). Figure 1 presents these elements as an integrated architecture.

The three tables presented above set out, respectively, the procedural sequence of the customary forum, the boundary of its competence over the statutory categories of domestic violence, and the collisions between the instruments that govern it. Figure 1 draws those findings together into a single normative architecture for the government regulation contemplated by Article 2(2) of Law No. 1 of 2023. The figure is organised in four layers. The first states the constitutional and statutory basis of the delegation and makes explicit that the regulation derives its authority from Article 2(2) and is bounded by Article 2(3). The second states the substance that the regulation must contain, comprising an existence test, a mechanism for the

compilation and validation of customary offences, a competence ceiling expressed *ratione materiae*, a procedural gateway, a set of mandatory victim safeguards, and a statement of legal effect together with its limits.

The third layer identifies the institutional actors and traces the path of a case through them, from the complaint made to the *Ketua Adat*, through the customary forum, to the verification of the competence ceiling by the police, the cessation of prosecution on restorative grounds, and the confirmation and registration of the determination by the district court; the regional government, the regional service unit for the protection of women and children and the Supreme Court appear as supporting actors whose functions the regulation must also specify. The fourth layer states the outcomes against which the instrument is to be evaluated: legal certainty, victim protection, coherence between Article 2 and the two statutes that govern violence inside the household, and access to justice in a border region where the state forum is remote. A feedback loop connects the register of confirmed determinations back to the periodic revision of the compilation, so that the instrument remains responsive to a body of law that is, by definition, in movement.

Read against the Discussion, the four layers are not a restatement of the tables but a response to the specific defects those tables expose. The competence ceiling in the second layer codifies the threshold the community already operates rather than imposing a new one, since "the community itself operates a differentiated threshold and that the regulation should codify that threshold rather than invent one"; light psychological violence and household neglect fall within it, light physical violence is accepted with reservation, and serious physical violence and every form of sexual violence are referred outward. The compilation and validation mechanism in the same layer answers the certainty objection at its strongest point, converting "the unwritten into the ascertainable without converting it into statute" (Ali & Rustamaji, 2023; Wahyudi & Sari, 2024), while the procedural gateway in the third layer addresses the deficit of finality by routing the determination through verification by the police and confirmation by the district court (Sulistiyawan & Kusriyah, 2022; Tanuwidjaja & Susanti, 2023).

The victim-safeguard element carries the weight of the consent problem, and its position in the figure is deliberate. Because the unreliability of consent is structural rather than incidental — arising from the power asymmetry that informality amplifies (Stubbs, 2007), from the presence of kin whose interest lies in the preservation of the relationship (Daly & Stubbs, 2006), and from the reframing of the harm as a disturbance of relations that relocates the standing to forgive from the victim to the group (Hudson, 2002) — verification conducted inside the deliberation would reproduce the very defect it is meant to cure, since "the structure that renders consent unreliable will also render its verification unreliable if verification is

performed within the same forum and by the same participants." The figure therefore situates the regional service unit for the protection of women and children outside the customary forum, as a condition of validity rather than a matter of *post hoc* referral. The access-to-justice outcome in the fourth layer records the countervailing qualification that in a border region the realistic comparison is "not between a restorative forum and a criminal trial but between a restorative forum and no forum at all", which is why the architecture conditions the customary process instead of displacing it (Nancarrow, 2006; Coker, 2006; Merry, 2006).

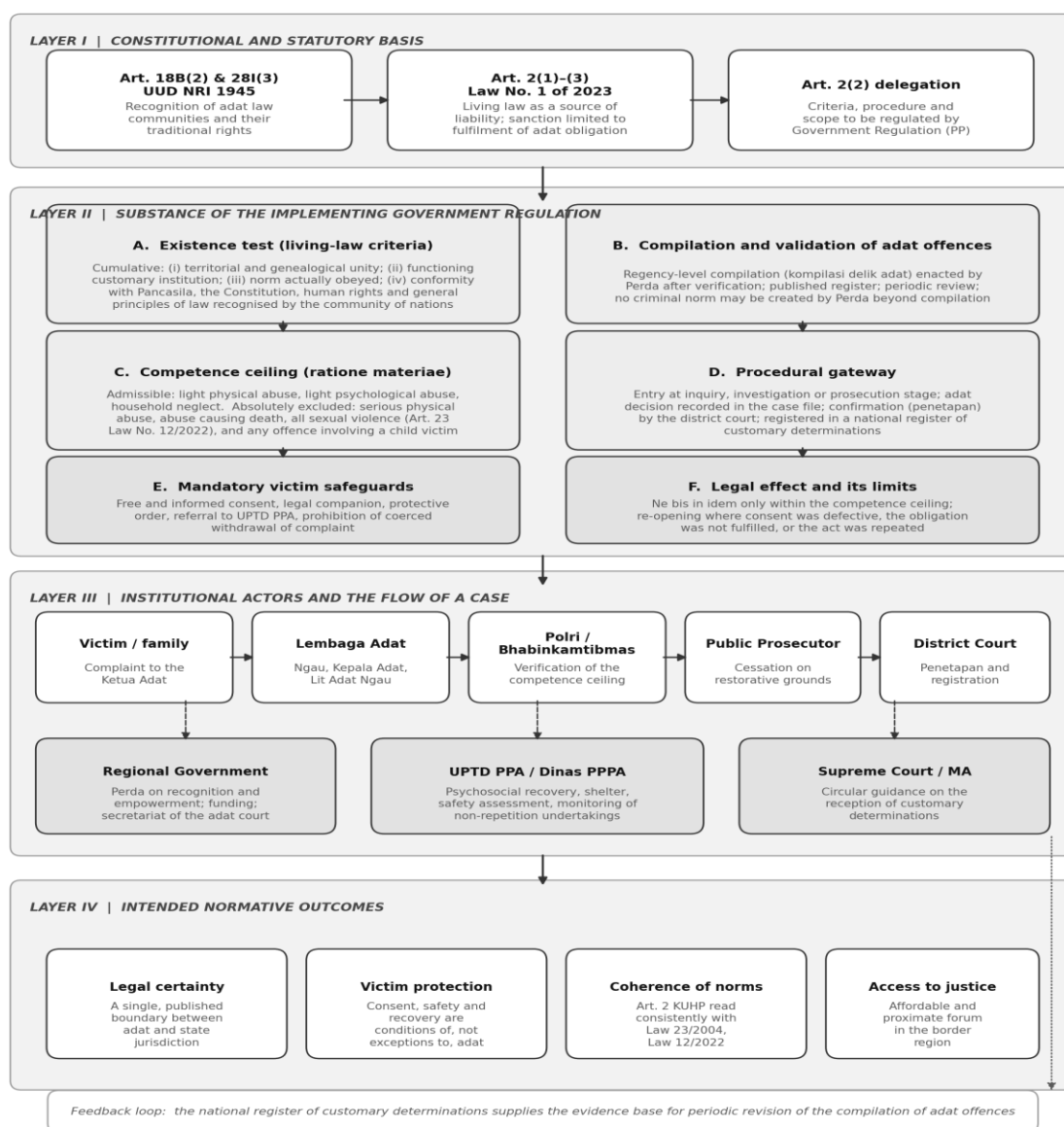


Figure 1. Normative Architecture for the Government Regulation Implementing Article 2 of Law No. 1 of 2023 on the Criminal Code

Source: Constructed by the authors

Read against the Turkish comparison, the figure can be understood as an attempt to obtain the protective effects of the Turkish arrangement without importing its exclusion of custom, which the geography of Kayan Hulu would make unworkable. Three correspondences are deliberate. The competence ceiling in the second layer performs the function that Article 253 of the Turkish Code of Criminal Procedure performs through its closed list of mediable offences, withdrawing sexual violence and serious physical violence from consensual disposal altogether rather than leaving the question to the gravity assessment of the forum. The procedural gateway in the third layer performs the function of the Turkish mediation bureau and of the prosecutorial or judicial approval that follows it, in that the settlement acquires legal effect only through an officer of the state who stands outside the parties, here the police verification of the ceiling and the confirming determination of the district court. And the mandatory referral of the victim to the regional service unit performs the function of the protective measure under Law No. 6284 of 2012, whose availability does not depend upon the maintenance of a complaint. The difference is that the Indonesian design routes the customary determination into the criminal process instead of excluding it, and for that reason the safeguards must be constituted as conditions of validity rather than as parallel remedies.

Three qualifications should be entered about what the figure asserts. It is a normative design and not a report of an existing institutional arrangement: none of the four layers describes a practice currently in force, and the diagram should be read as a specification against which the regulation eventually enacted may be tested rather than as an account of how cases are presently disposed of in Kayan Hulu. Its statement of legal effect is deliberately bounded, in that a confirmed customary determination is given finality only within the competence ceiling and only where the safeguards have been satisfied, so that nothing in the architecture confers a general customary criminal jurisdiction of the kind Article 2(3) of Law No. 1 of 2023 forbids. And the feedback loop from the register of confirmed determinations to the periodic revision of the compilation is the element most dependent on administrative capacity, since a register that is not maintained converts the compilation from a guarantee of certainty into an obstacle to the recognition of norms that have changed. The outcomes stated in the fourth layer — legal certainty, victim protection, coherence between Article 2 and the two statutes governing violence inside the household, and access to justice in a border region — are therefore offered as evaluative criteria for the instrument, and the socio-legal measurement of whether they are met remains work for the further study identified in the conclusion.

CONCLUSION

The mechanism by which domestic violence is resolved under the customary law of Kayan Hulu is a stratified judicial process rather than an informal accommodation. It is presided over by the *Ngau*, supported by the *Wakil Ngau*, the *Panglima Adat* and the deliberately even-numbered *Lit Adat Ngau*, and administered at village and hamlet level by the *Kepala Adat* and the *Ketua Adat*. It proceeds through six stages — complaint, verification, summons, deliberation, determination and restoration — and it concludes not in punishment but in *tunggu*, public apology, an undertaking of non-repetition and a reconciliation observed by the community. Its competence is differentiated: light psychological violence and household neglect fall squarely within it, light physical violence is accepted with reservation, and serious physical violence and every form of sexual violence are referred outward as a matter of settled practice. The obstacles to its operation are five in number: the absence of a criminal competence recognised by the state, the dualism that denies finality to its determinations, the limited deterrent capacity of a sanction calibrated to restoration, the absence of any written procedure governing complaint, proof and review, and the absence of any safeguard for the free formation of the victim's will.

The contribution of the study is fourfold. Conceptually, it shows that the debate over the living law clause has been framed too narrowly as a contest between the principle of legality and cultural recognition, when the decisive question is procedural: by what route, subject to what ceiling and under what safeguards may a customary determination enter the criminal process. Methodologically, it demonstrates the value of testing a single, identifiable customary jurisdiction against the offence-by-offence structure of the relevant statutes, rather than treating customary criminal law as a homogeneous category, and it shows that the threshold the regulation requires already exists in the community's own practice and needs to be codified rather than invented. In policy terms, it offers a four-layered architecture for the government regulation contemplated by Article 2(2), built upon a cumulative existence test, a regency-level compilation of customary offences, a competence ceiling expressed by reference to identified statutory categories, a procedural gateway culminating in confirmation by the district court, and a set of victim safeguards constituted as conditions of validity. Comparatively, it shows that the safeguards proposed here are not an invention of the authors but have a working analogue in Turkish law, which excludes custom from the sources of criminal liability and treats a customary motive as an aggravating circumstance, yet retains restoration in a state-supervised form by confining mediation to an enumerated list of offences, entrusting it to a mediator appointed by the prosecution service and subject to judicial approval, and detaching protective measures from the maintenance of a complaint; the lesson drawn is that a closed list of excluded offences and a verifier external to the

deliberation are the two elements on which the protective value of any recognition regime depends.

Four limitations qualify these conclusions and indicate the direction of further work. The study is doctrinal, and although it is informed by interview material gathered from customary functionaries and community members, it does not measure the incidence of domestic violence in Kayan Hulu, the frequency of customary settlement or the rate of repetition after determination; a socio-legal study designed to generate those measurements would materially strengthen the case for the competence ceiling proposed here. The study is confined to a single customary jurisdiction, and the threshold observed among the Kayan Dayak cannot be assumed to hold among other Dayak communities, still less across the archipelago; comparative work across several jurisdictions is required before a national instrument is drafted. The Turkish comparison is likewise limited in kind: it rests on statutory text and secondary scholarship rather than on fieldwork in Türkiye, and it is offered to illuminate the design choices available to the Indonesian regulator rather than as a full comparative study of how those provisions operate in practice. Finally, the study necessarily analyses an implementing regulation that does not yet exist, and its proposals should be read as a normative design to be tested against the instrument eventually enacted rather than as an interpretation of one already in force.

DECLARATIONS

AUTHOR CONTRIBUTION STATEMENT

Sri Ayu Astuti conceived the study, gathered and analysed the primary legal materials and the field data in Kayan Hulu Sub-district, constructed the collision matrix and the proposed regulatory architecture, prepared the first draft of the manuscript, and acted as the corresponding author. Berthi Ramadhani P supervised the doctrinal design of the research, contributed to the analysis of the constitutional recognition of customary law communities and the relationship between Article 2 of Law No. 1 of 2023 and the legislation on domestic violence and sexual violence, and revised the Results and Discussion sections. Burak Taş contributed to the comparative legal approach by examining the relevant legal framework and practices in Turkey, providing comparative perspectives on the recognition and application of customary or living law within the Turkish legal system, and contributing to the comparative analysis and discussion of the study's findings. All three authors read, critically revised, and approved the final manuscript and accept responsibility for its content.

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DATA AVAILABILITY STATEMENT

All legal materials analysed in this study are publicly available. The national legislation cited may be consulted through the database of the Ministry of Law of the Republic of Indonesia at <https://peraturan.go.id>, and the regional regulations of Malinau Regency and North Kalimantan Province through the respective regional legal documentation networks. The interview material that supports the description of the customary procedure is not publicly archived, because the underlying matters concern violence inside the household and the participants were assured of confidentiality; summary notes without identifying particulars are available from the corresponding author on reasonable request.

DECLARATION OF INTERESTS STATEMENT

The authors declare that they have no known competing financial interests or personal relationships that could have influenced the work reported in this paper.

ADDITIONAL INFORMATION

This article is derived from the master's thesis of the first author, submitted to the Master of Law Programme, Faculty of Law, Universitas Borneo Tarakan, under the supervision of the second author. The thesis material has been substantially reworked for the purposes of this article, and the analysis of the implementing regulation of Article 2 of Law No. 1 of 2023 presented in the results and discussion is original to it. An earlier version of the competence mapping presented in Table 2 was discussed with customary functionaries of Kayan Hulu, whose comments the authors gratefully acknowledge.

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