

# Implementing Living Law under Indonesia's New Criminal Code: Legal-Political Implications for the National Criminal Justice System

Sarip Hidayat<sup>a\*</sup>, Suwari Akhmaddhian<sup>a</sup>, Erga Yuhandra<sup>a</sup>, Lam Thanh Danh<sup>b</sup>

<sup>a</sup> Faculty of Law, Universitas Kuningan, Kuningan, Indonesia.

<sup>b</sup> Faculty of Law, Ton Duc Thang University, Ho Chi Minh, Vietnam

 : sarip.hidayat@uniku.ac.id

Corresponding Author\*



## Abstract

**Introduction:** The recognition of living law in Article 2 of Law Number 1 of 2023 on the Criminal Code represents a significant transformation in Indonesia's criminal law, particularly in reconciling statutory legality with customary norms that remain operative within local communities. However, the incorporation of unwritten norms into criminal adjudication raises concerns regarding legal certainty, equality before the law, and consistency in judicial application.

**Purposes of the Research:** This study examines the legal-political framework governing the recognition and implementation of living law under Indonesia's new Criminal Code and analyzes its implications for the relationship between customary and state criminal law.

**Methods of the Research:** This study employs a socio-legal approach combining normative legal analysis with empirical examination of the application of customary norms. Statutory, conceptual, and case approaches are used to examine the legal basis, limitations, and judicial application of living law.

**Results Main Findings of the Research:** The study finds that the recognition of living law constitutes a controlled form of legal pluralism rather than an unrestricted delegation of criminal lawmaking to customary communities. Its validity is subject to constitutional values, Pancasila, human rights, and generally recognized principles of law. The principal challenge lies in determining whether a customary norm genuinely constitutes living law and in ensuring consistent standards for its identification, verification, and judicial application. The study therefore argues for an institutional mechanism that integrates customary-law recognition with formal state procedures while preserving substantive justice and legal certainty.

**Keywords:** Legal Politics; Living Law; Customary Law; Criminal Law Reform; Legal Pluralism.

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## INTRODUCTION

Legal reform criminal national through birth Constitution Number 1 of 2023 concerning the Criminal Code is milestone important in journey system law Indonesian criminal law. The previous Criminal Code applies, namely Wetboek van Strafrecht (WvS) legacy Dutch colonialism, has used during more from one century and is considered no Again reflect values social, cultural, and view life the Indonesian nation based on Pancasila and the 1945

Constitution. With the implementation of the new Criminal Code, Indonesia is trying to present system law more criminal sovereign, humanistic, and appropriate with character Indonesian nation.<sup>1</sup>

Confession to law customs in system Indonesian law has base strong constitutional as listed in the 1945 Constitution of the Republic of Indonesia. Contains in Article 18B paragraph (2) it is stated that "The state recognizes and respects it units public law customs along with rights traditional throughout Still alive and well with development society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in Constitution." Provision This show that the state is firm give confession constitutional to existence public law customs and systems the law, including legal norms customs that regulate life social society. However, recognition the nature conditional It means law customs only recognized as far as Still alive, no contradictory with development modern society, as well as in harmony with principles of the Unitary State of the Republic of Indonesia.<sup>2</sup> With Thus, the 1945 Constitution does not only confess existence law customs as inheritance culture, but also provide base legitimacy for its integration to in system law national. Legitimacy law customs are also emphasized in Article 28I paragraph (3) of the 1945 Constitution, which states that "Identity culture and rights public traditional respected in harmony with development of time and civilization." this article strengthen position law customs as part from right basic collective public custom, which is mandatory respected and protected by the state. With thus, respect to law customs No only nature cultural, but also a order constitutionally binding, so that the state is obliged ensure that the values law customs still live and play a role in formation law national.<sup>3</sup>

Temporary that, confession to law customs are also included in Constitution Number 48 of 2009 concerning Judicial Power. The most important article in matter This is Article 5 paragraph (1), which reads "Judges and constitutional judges must dig, follow, and understand

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<sup>1</sup> Parningotan Malau, "Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 1 (2023): 837-44, <https://doi.org/10.37680/almanhaj.v5i1.2815>.

<sup>2</sup> Muhammad Fadli et al., "State Recognition and Protection of Customary Law in Promoting Legal Compliance Based on Local Cultural Values in Indonesia," *National Law Magazine* 54, no. 2 (2024): 283-314, <https://mhn.bphn.go.id>.

<sup>3</sup> Aliyth Prakarsa, Dadang Herli Saputra, and Abitsa Zora Sya'bana, "Keberlakuan Peradilan Adat Dalam Masyarakat Hukum Adat Bali: Posisi Dan Tantangan Dalam Sistem Hukum Nasional," *Proceeding of Seminar Nasional "Membentuk Model Ideal Peradilan Pidana Adat Dalam Sistem Hukum Nasional"* 27 (2025): 175-83, <https://doi.org/10.30595/pssh.v27i.1839>.

values law and a living sense of justice in public." Provision This give obligation normative to the judge to No only adhere to the law written (written law), but also dig law No written (unwritten law) that lives in the middle society, including law custom. This means that the judge in cut off case No may only referring to the regulations legislation only, but must consider values social, moral and cultural life as manifestation from The recognition of *living law* in the new Indonesian Criminal Code is a matter of legal politics because it reflects the state's policy choice regarding the sources and development of national law. The incorporation of *living law* demonstrates an effort to accommodate legal values and norms that exist within society, particularly customary law, into the formal legal system. This process involves various actors, including legislators, the government, legal scholars, customary law communities, and civil society organizations. The dynamics of its formation arise from differing perspectives on legal certainty, justice, human rights protection, and the role of customary norms in a modern criminal justice system. Consequently, the recognition of *living law* represents not only a legal issue but also a political process of balancing state law and societal legal values. Next Article 10 paragraph (1) of the Judicial Power Law states that " Court forbidden reject for examine, try and decide something case filed with pretext that law No or not enough clear, but rather must for examine and try him." Provision This confirm that if happen emptiness law written, the judge remains must cut off case with dig laws that live in society Indonesian context is often sourced from law custom.<sup>4</sup> In addition, Article 50 paragraph (1) of the same law mention that decision court must load" reasons and basis the decision, also includes chapter certain from regulation relevant legislation or source law No written that is used base For to judge. This show that source law No written like law customs recognized formally as base valid law in the judicial process.<sup>5</sup>

Very fundamental aspect of the new Criminal Code is confession to living law in public (living law) as source law criminal. Article 2 paragraph (1) of the new Criminal Code in a way explicit state that "Provision as intended in Article 1 paragraph (1) no reduce its validity living

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<sup>4</sup> Erma Ariefieni, "Urgensi Penegakan Hukum Dalam Putusan Hakim Pada Perkara Pidana Berbasis Hukum Progresif" (Universitas Sultan Agung Semarang, 2024).

<sup>5</sup> Tri Astuti Handayani and Andrianto Prabowo, "Analisis Hukum Pidana Adat Dalam Hukum Pidana Nasional," *Jurnal Hukum Ius Publicum* 5, no. 1 (2024): 89-105, <https://doi.org/10.55551/jip.v5i1.95>.

law in society decides that somebody worthy convicted although actions the No arranged in Constitution." Provision This mark change paradigm from system law positivistic - formalistic criminal law going to a pluralistic and contextual system, where law No only sourced from text legislation, but also of values living and recognized social society. The main objective arrangement law criminal customs in the new Criminal Code is For give runway law and protection for its validity, because rules the can introduce potential limitations weaken existence law custom. Therefore that, is necessary runway laws that do not only acknowledge, but also respect and protect law criminal customs in order to be able to Keep going live and thrive in accordance with existing norms, while still stick to the philosophy nation and state.<sup>6</sup>

In a way empirical the existence of living law is indeed has long been reality in Indonesian society.<sup>7</sup> Every area own values law customs that regulate life social, start from settlement disputes, etiquette, to sanctions to violation of norms. For example, society customs in Aceh, Bali, Papua, and Maluku have mechanism settlement more violations prioritize deliberation, balance social, and recovery connection between individuals, rather than punishment solely. However, in reality, the system law national during This more dominated by law written law that is rooted from system law Europe Continental.<sup>8</sup> As a result, many practice law customs or law No written ignored, no own strength binding, and even considered contradictory with principle legality (*nullum crimen sine lege*). In practice judiciary, judges often have difficulty for accommodate local living norms Because No existence base law clear positive. Condition the reflect gap between reality social (*living law*) and structure formal law (state law). With thus, the recognition against living law in the new Criminal Code is response to need for bridge reality social public with system law rigid and legalistic nationalism.

In a way normative the implementation of living law is expected can realize justice appropriate substantive with values Indonesian culture and morals. New Criminal Code No only expected become tool enforcement law as source material, but also as means for build

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<sup>6</sup> Immanuel Joyson B Manurung and Andi Hakim Lubis, "Formulasi The Living Law Sebagai Pembaharuan Hukum Pidana Nasional Melalui Pendekatan Antropologi Hukum," *Media Hukum Indonesia (MHI)* 2, no. 5 (2025): 217-24.

<sup>7</sup> Jufianty Trisna Putri, "Eksistensi Living Law Sebagai Perwujudan Masyarakat Adat Dalam Pembaruan Sistem Hukum Pidana Nasional," *Eksekusi : Jurnal Ilmu Hukum Dan Administrasi Negara* 2, no. 2 (2024): 93-100, <https://doi.org/10.55606/eksekusi.v2i2.1080>.

<sup>8</sup> Novi Eka Saputri and Eny Kusdarini, "Kontribusi Sistem Hukum Eropa Kontinental Terhadap Pembangunan Sistem Hukum Nasional Di Indonesia," *Masalah-Masalah Hukum* 50, no. 4 (2021): 363-72, <https://doi.org/10.14710/mmh.50.4.2021.363-372>.

awareness law rooted in values local and strengthening integration social. Ideally, recognition to living law in public must done with clear boundaries and mechanisms, so as not to cause uncertainty law. Customary norms or law No written that is used base criminalization must fulfil criteria certain, such as No contradictory with Pancasila, the 1945 Constitution, human rights, and the principles law general. With Thus, the application of living law does not may become tool justification for violation right basic man or discrimination to group certain. In addition, in framework system law criminal national, living law is expected capable strengthen legitimacy law Indonesian criminal law in the eyes of society. When the law reflect values that are lived and believed by the people, then compliance law will grow No Because coercion, but rather Because moral and social awareness. That's it ideal ideals of implementation of living law in the new Criminal Code A system living, dynamic and just law social. The problem formulation in this study focuses on how the concept of *living law*, or the law that lives within society, is accommodated in the new Indonesian Criminal Code and its implications for the Indonesian criminal law system. The recognition of *living law* presents challenges in terms of legal certainty, uniformity of application, and potential conflicts between customary law and national law. Therefore, this study aims to analyze the regulation of *living law* in the new Criminal Code and its impact on the principles and implementation of criminal law in Indonesia.

## METHODS OF THE RESEARCH

This study employs a socio-legal research approach.<sup>9</sup> The socio-legal approach is adopted because the issues examined in this research are not limited to positive legal norms contained in statutory regulations but also concern the social realities and legal practices that exist within society. This approach enables the research to examine the interaction between formal legal rules and the norms, values, and practices that develop within customary law communities.<sup>10</sup> The research is descriptive-analytical in nature and utilizes both primary and secondary data. Primary data are obtained through field research, particularly interviews with members of

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<sup>9</sup> Aristo Pangaribuan, "Metode Wawancara Dalam Penelitian Hukum Doktrinal Dan Sosio-Legal," *Online* 6, no. 2 (2023): 351-83, <https://doi.org/10.22437/ujh.6.2.351-383>.

<sup>10</sup> Fachrizal Afandi, "Penelitian Hukum Interdisipliner Reza Banakar: Urgensi Dan Desain Penelitian Sosio-Legal," *Undang: Jurnal Hukum* 5, no. 1 (2022): 231-55, <https://doi.org/10.22437/ujh.5.1.231-255>.

customary law communities and other relevant informants. Secondary data are obtained through a literature review of relevant legislation, books, scholarly journal articles, research reports, and other academic sources related to *living law*, customary law, and the Indonesian criminal justice system. Data collection is conducted through two main methods: library research and field research. Library research is carried out by examining relevant legal materials and scholarly literature, while field research is conducted through interviews to obtain empirical information regarding the existence and application of *living law* within society.

## RESULTS AND DISCUSSION

### A. Legal Politics and the Recognition of Living Law in the New Criminal Code

The recognition of living law in the new Indonesian Criminal Code represents one of the significant developments in Indonesia's national criminal law.<sup>11</sup> The recognition of *living law* in the new Indonesian Criminal Code is not merely a philosophical or normative matter but also a product of legal politics. It reflects the state's policy choice to develop a national criminal law system that accommodates legal norms and values existing within Indonesian society while maintaining the principle of legality. The formation of the new Criminal Code involved various actors, including the legislature, government, judges, law enforcement institutions, legal scholars, customary law communities, and civil society organizations. Their different interests and perspectives contributed to the formulation and scope of *living law* within the new Criminal Code. The recognition of living law also reflects a policy compromise between legal certainty, uniformity, and the principle of legality on the one hand, and the need to accommodate Indonesia's diverse social and cultural values on the other. Therefore, not every customary practice automatically constitutes a source of criminal law. Its recognition and application remain subject to legal limitations, constitutional principles, human rights, and the objectives of the national criminal justice system. In this context, *living law* represents a selective form of legal accommodation aimed at creating a criminal law system that is responsive to societal values while maintaining legal certainty and constitutional consistency.

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<sup>11</sup> Faisal Faisal and Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (2021): 291, <https://doi.org/10.24843/jmhu.2021.v10.i02.p08>.

After more from One century use Wetboek van Strafrecht (WvS) legacy Dutch colonial Indonesia finally have a national Criminal Code which is aware enter values social, moral, and customary public to in system law criminal.<sup>12</sup> In the context of this, living law interpreted as legal norms that are not written, but living, recognized, and obeyed by society in life every day. Concept This rooted in reality that in the middle plural Indonesian society, law No only present in form regulation legislation, but also in form customs, traditions, and social norms that regulate behavior individual in his community.<sup>13</sup> Therefore that, the birth of the new Criminal Code No just replacement text law colonial, but also a effort reconstruction identity law national based values Indonesian and culture local. According to Bushar Muhammad stated that law customs is "the law that lives and develops in the midst of society, no written in form law, but obeyed and maintained Because belief public to Power tie it up" View This confirm that vitality law customs lies in the recognition society, not only formal.<sup>14</sup>

Confession to living law in the new Criminal Code poured out in a way firm in Article 2 paragraph (1) which states that "Provision as intended in Article 1 paragraph (1) no reduce its validity living law in society decides that somebody worthy convicted although actions the No arranged in Constitution." Formulation This mark change fundamental from system law previous criminal offenses nature positivistic going to system pluralistic and contextual law. If previously principle *nullum crimen sine lege* understood in a way stiff, meaning No There is actions that can convicted except arranged in Constitution now the new Criminal Code open room for the existence of legal norms that exist in society for become base criminalization. With thus, living law recognized as source law legitimate criminal law parallel with law written, although its implementation still must through clear mechanisms and limitations as arranged in Constitution.

Draft living law Alone Actually No matter new in theory law. Ideas This first put forward by Eugen Ehrlich, a sociologist law of Austrian origin, who stated that "the living law is the law

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<sup>12</sup> Nafi Mubarak, "Sejarah Perkembangan Hukum Pidana Di Indonesia: Menyongsong Kehadiran KUHP 2023 Dengan Memahami Dari Aspek Kesejarahan," *Al-Qanun: Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 27, no. 1 (2024).

<sup>13</sup> Rahmah, Mustar, and Surya Sukti, "Living Law Dalam Hukum Keluarga Di Indonesia," *Jurnal Riset Multidisiplin Edukasi* 2, no. 5 (2025): 195-207, <https://doi.org/10.71282/jurmie.v2i5.289>.

<sup>14</sup> Maulana Ira, "Hukum Adat Di Aceh : Menakar Eksistensi Dan Kedudukannya Dalam Sistem Hukum Nasional," no. September (2025).

which dominates life itself, even though it has not been posited in legal propositions. "According to Ehrlich, the real law live and function in society often not written in formal state regulations, but rather in the form of customs and practices social justice that reflects a sense of justice society.<sup>15</sup> In the Indonesian context, the idea This is very relevant, considering Indonesian nation since formerly own system law customs that regulate behavior public Far before presence law colonial. Customary law This functioning as means guard balance social and complete conflict through mechanism deliberation as well as recovery connection between individuals, not just through giving sanctions. With thus, the recognition to living law in the new Criminal Code in fact is form recognition to law customs as laws that live and develop in the midst of Indonesian society.<sup>16</sup> Draft law life in society is a group rules (laws) that emerge moment public formed. contains the values that exist in society, always united with society, and function For interest society.<sup>17</sup>

In a way historical, recognition to law customs or living law has own base constitutional in the 1945 Constitution, in particular in Article 18B paragraph (2) which states that "The state recognizes and respects it units public law customs along with rights traditional throughout Still alive and well with development society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in Constitution. "Apart from that, Article 28 I paragraph (3) also confirms this that "Identity culture and rights public traditional respected in harmony with development of time and civilization." Second chapter This show that the state recognizes existence law customs as part from system law national, provided that law the Still alive and not contradictory with values constitutional. With thus, the recognition living law in the new Criminal Code is continuation logical from mandate the constitution that has been give place for existence public law customs and systems the law.

Besides the basics constitutional, recognition to living law is also in line with principle in Constitution Number 48 of 2009 concerning Judicial Power, especially Article 5 paragraph (1)

<sup>15</sup> E Ehrlich, *Fundamental Principles of the Sociology of Law* (Ed. Revisi). (Cambridge: MA: Harvard University Press., 2024).

<sup>16</sup> Andi Wulan Rahmadani et al., "Budaya Hukum Yang Hidup Dalam Masyarakat Indonesia Ditinjau Berdasarkan KUHP Nasional Nomor 1 Tahun 2023," *Jurnal Cendekia Ilmiah* 4, no. 2 (2025): 305–14.

<sup>17</sup> Wempy Setyabudi Hernowo, Zaid Zaid, and M. AUFAR SAPUTRA PRATAMA ERWAN, "Peran Sociological Jurisprudence Dalam Menciptakan Keefektivitasan Hukum Melalui Living Law," *Legalitas: Jurnal Hukum* 13, no. 1 (2021): 44, <https://doi.org/10.33087/legalitas.v13i1.243>.

which requires judges to “dig, follow, and understand values law and a living sense of justice in public.” Provision This show that system Indonesian law does not close self to the existence of social norms outside regulation written. The judge even required For consider values the in cut off matters, especially when law positive Not yet arrange in a way clear something actions. Therefore that, in a way juridical, recognition to living law in the new Criminal Code own runway strong, good law in a way constitutional and in system justice national. However thus, the recognition living law in the new Criminal Code No nature absolute and not without limits. Article 2 paragraph (2) of the Criminal Code confirms that living law in public can made into base criminalization only If No contradictory with Pancasila, the 1945 Constitution, Human Rights, and the principles law generally recognized nations civilized. With Thus, the former Constitution still give limitation normative For ensure that customary norms are recognized No violate fundamental principles of law national and international.<sup>18</sup>

This is important For avoid abuse of customary norms that can cause discrimination, human rights violations, or uncertainty law. In other words, recognition living law in the new Criminal Code is form accommodation selective to plurality law, not reception without condition to all over practice existing customs. From the perspective view philosophical, confessional living law reflect Spirit For grounding law to be more near with reality social society.<sup>19</sup> During this, law often considered Far from people's lives because too formal and legalistic. As a result, many problem social No can completed in a way effective Because approach formal law is often not in line with mark lived justice society.<sup>20</sup>

Through confession to living law, new Criminal Code make an effort present system law more criminal responsive and contextual, where the law No only functioning as tool control social state, but also as reflection values social and cultural nation. With thus, living law become bridge between state law and law social so that achievement objective law consisting of from certainty law and justice substantive.

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<sup>18</sup> Dhandy Parindo et al., “Application of Basic Human Rights Concepts and Reform of the Three Main Pillars of Criminal Law in the New Criminal Code Law No. 01 of 2023 Dhandy,” *Jurnal Hukum Indonesia* 3, no. 3 (2023): 129–42, <https://doi.org/10.58344/jhi.v3i3.796>.

<sup>19</sup> Rahmah, Mustar, and Surya Sukti, “Living Law Dalam Hukum Keluarga Di Indonesia.”

<sup>20</sup> Arpandi Karjono, Parningotan Malau, and Ciptono Ciptono, “Penerapan Keadilan Restoratif Justice Dalam Hukum Pidana Berbasis Kearifan Lokal,” *Jurnal Usm Law Review* 7, no. 2 (2024): 1035–50, <https://doi.org/10.26623/julr.v7i2.9571>.

In a way sociological, application living law in the new Criminal Code is also confession to pluralism the law that becomes characteristics typical Indonesian.<sup>21</sup> In reality social, Indonesian society lives in diversity system different values, customs and cultures between region. The customary law that applies in Aceh is of course different with in Bali, Papua, or Minangkabau. Recognition to living law allows diversity the accommodated in framework law national without delete identity local society.<sup>22</sup> With so, the new Criminal Code No only instrument law criminal, but also a tool integration social that recognizes diversity law as part from riches nation. In terms of this, living law No interpreted as threat to unity law national, but as amplifier legitimacy social to law applicable criminal law.<sup>23</sup> Although Thus, the implementation living law also gives rise to challenges. One of them is How determine and identify the true norms living in society. Not all habit can categorized as law customs or living law, because must fulfil element confession social, continuity, and recognized moral sanctions together. In addition, the role of the judge becomes very crucial in interpret and apply living law in case concrete. The judge is required own understanding deep to context social and cultural society in which the norm is applies, so that it does not cause misinterpretation.<sup>24</sup> In this case this, is needed guidelines clear judicial and academic for differentiate between social norms normal with legal norms customs that have Power tie.

In a way overall, recognition to living law in the new Criminal Code is step proceed in development law national with an Indonesian personality.<sup>25</sup> Draft This expand room for values social and cultural local for play a role in formation and implementation law criminal, without ignore universal principles of modern law. With runway constitutional and limitations clear normative, living law expected can strengthen system law criminal more national fair, contextual, and rooted in life society.<sup>26</sup>

<sup>21</sup> Dadang Herli Saputra et al., "Menakar Kembali Plularisme Hukum Dalam Pernormatifan Hukum Pidana Adat Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana" 27 (2025), <https://doi.org/10.30595/pssh.v27i.1843>.

<sup>22</sup> Ariel Lois, Febrian Halomoan, and Taufiqurrohman Syahuri, "Konfigurasi Politik Hukum Adat Di Indonesia: Studi Sejarah, Regulasi Dan Implementasi," *Jurnal BATAVIA* 1, no. 6 (2024): 292-300, <https://doi.org/10.64578/batavia.v1i6.97>.

<sup>23</sup> Lois, Halomoan, and Syahuri.

<sup>24</sup> Agam Ibnu Asa et al., "Legal Philosophy as a Judge 's Worldview in Handling Down Criminal Verdicts 1 Aliran Filsafat Hukum Sebagai Cara Pandang ( Worldview ) Hakim Dalam Menjatuhkan Putusan Pidana," *Jurnal Pembangunan Hukum Indonesia* 7, no. 2 (2025): 20-48.

<sup>25</sup> Muhammad Rusli Arafat et al., "Tantangan Dan Peluang Integrasi Hukum Adat Dalam Sistem Hukum Pidana Indonesia Pasca Undang-Undang Nomor 1 Tahun 2023 Tentang" 27 (2023), <https://doi.org/10.30595/pssh.v27i.1850>.

<sup>26</sup> Eltasya Nadianti and Bambang Ali Kusumo, "Politik Hukum Pidana Dalam Pembaharuan Hukum Pidana Nasional: Analisis Terhadap KUHIP Baru Indonesia," *Indonesian Journal of Law and Justice* 2, no. 4 (2025): 10, <https://doi.org/10.47134/ijlj.v2i4.4135>.

New Criminal Code in a way explicit confess law customs as one of the source law criminal law in Indonesia, provided that fulfil conditions certain. Consequently, the law customs own more position strong in system law national, but also raises challenge with certainty law, uniformity enforcement legal and potential violation right basic man If enforcer law the No do harmonization law criminal.<sup>27</sup>

Based on results interview with figure Kuta Customary Law community in the Regency Ciamis society customs the have regulations based on Ciamis Regency Regional Regulation Number 15 of 2016 concerning Recognition and Protection of the Kuta Village Customary Law Community, which in principle in settlement case that is through Deliberation and custom, if There is someone who violates rule customs can charged sanctions prevailing customs in public said, so that confession law customs in law criminal national No More from just innovation law, recognition living law is manifestation from ideals nation For present living, growing and just law social for all Indonesian people.

## **B. Implications Application of Living Law to Indonesian Criminal Law System**

Implementation living law in the new Criminal Code mark change significant paradigm in system law Indonesian criminal law. Previously, the system law Indonesian criminal law adheres to view strict positivistic where the source law only recognized in form Constitution written.<sup>28</sup> View This is inheritance from system law Dutch colonialism which prioritizes certainty formal law and reject the validity of customary norms or law No written as base criminalization. However, with enactment of the new Criminal Code through Constitution Number 1 of 2023, orientation law Indonesian criminal law shifts going to approach pluralistic and contextual, which recognizes existence living law or living law in public as part from system law national recognition This reflected in a way explicit in Article 2 of the Criminal Code which states that "the provisions as intended in Article 1 paragraph (1) no reduce its validity living law in society decides that somebody worthy convicted although actions the No

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<sup>27</sup> Sarip Hidayat et al., "Pergeseran Asas Legalitas Formal Ke Material Dalam KUHP Baru Dan Konsekuensinya Terhadap Hukum Adat Material Legality In The New Criminal Code And Its Impact On Customary Law Dengan Menafsirkan Pasal Ini . Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Ki," *Jurnal Hukum Mimbar Justitia ( JHMJ )* 11, no. 1 (2025): 151–66.

<sup>28</sup> Abid Abid Roby Satya Nugraha, Edi Rohaedi, Nandang Kusnadi, "Transformasi Sistem Hukum Pidana Di Indonesia : Perbandingan Komprehensif Antara KUHP Lama Dan KUHP Baru," *JRH: Reformasi Hukum* 29, no. 1 (2025): 1–21.

arranged in law". Provisions This become base normative for confession law customs, values social and moral norms of society as source law legal criminal law in Indonesia.

Implications First from implementation living law is change fundamental to structure and character law criminal national.<sup>29</sup> If previously law criminal nature stiff and uniform, now He become more flexible and adaptive to values local. This is means that system law Indonesian criminal law begins accommodate diversity of norms and values that exist in the midst of society. In the context of pluralistic Indonesia, where every area own system customs and culture own confession to living law give room for its validity appropriate justice with context social aspects of each community. For example, in public customs in Papua, Aceh, Bali, or Minangkabau.<sup>30</sup>

Settlement case criminal often done through mechanism customs that emphasize recovery connection social (restorative justice), not punishment retributive.<sup>31</sup> With existence confession living law, practices settlement based customs the now get legitimacy law, so that can integrated with system justice formal criminal law. This shows that living law own role strategic in build system law inclusive, humanistic and just criminal law social. In addition, the implementation of living law bring implications to fundamental principles of law criminal, especially principle legality (nullum crimen sine lege).<sup>32</sup> In paradigm classic, basic legality interpreted in a way strict that No There is actions that can convicted except arranged in a way written in law. However, the new Criminal Code provide a progressive interpretation to principle This with add dimensions social through confession living law. That is, legal norms No Again understood in a way exclusive as results state legislation , but can also sourced from practice social changes recognized by society. This show shift from law of a legal nature formalistic going to substantive law, where justice No only seen from text legislation, but also

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<sup>29</sup> Edwing Gregorio, Dewi Adi Kusumastuti, and I Gusti Komang Wijaya Kesuma, "Implikasi Pelunakan Pengaturan Asas Legalitas Dalam KUHPN Terhadap Konsep 'Hukum Yang Hidup Dalam Masyarakat,'" *Jurist-Diction* 7, no. 2 (2024): 263–90, <https://doi.org/10.20473/jd.v7i2.56124>.

<sup>30</sup> Lukas Patrick Hutajulu, "Strategi Integrasi Hukum Adat Dalam Sistem Hukum Nasional," *HARISA: Jurnal Hukum, Syariah, Dan Sosial* 02, no. 1 (2025): 124–39.

<sup>31</sup> Irvan Maulana and Mario Agusta, "Konsep Dan Implementasi Restorative Justice Di Indonesia," *Datin Law Jurnal* 2, no. 2 (2021): 49.

<sup>32</sup> Yuber Lago, Yuni Priskila Ginting, and Fajar Sugianto, "Dilema Keadilan Hukum Antara Hukum Tidak Tertulis Yang Hidup (Ongeschreven Recht) Dan Asas Legalitas Dalam Hukum Pidana Indonesia Ditinjau Dari Aspek Filo-Sofis," *DiH: Jurnal Ilmu Hukum* 19, no. Alkostar 2011 (2023): 71–84, <https://doi.org/10.30996/dih.v19i1.7310>.

of values social and moral values that live in society.<sup>33</sup> With Thus, the implementation living law expand room interpretation for judges to dig values local as base in determine accountability criminal and impose decisions that reflect justice substantive.

However Thus, the implementation living law also gives rise to challenge Serious to certainty law and uniformity enforcement law criminal.<sup>34</sup> Due to its non -criminal nature written and highly dependent on context social, there are possibility differences in interpretation between One area with other areas regarding What do you mean with laws that live in society. For example, a actions that are considered violate law customs in one community, not yet Of course considered wrong in other areas. Conditions This potential cause fragmentation law and inconsistency in application of criminal norms. In addition, the burden proof about existence living law become problem important. Judges, Public Prosecutors and law enforcers law other must capable prove that customary norms the truly Still live, obey, and have binding power in society the law itself. For that, is necessary clear standards and mechanisms in identify and verify existence living law, for example through study anthropological research empirical, or view institution recognized customs so that can codify applicable legal norms in society law customs That self and role government is very necessary in manufacturing regulation government or regulation area those in the area Still is at society custom. Without mechanism mentioned, the implementation living law potential cause uncertainty laws and violations principle equality in front of law (equality before the law).

Apart from the aspect normative, implementation living law also has an impact on the system justice criminal and practice enforcement law in Indonesia. With existence confession to law customs, apparatus enforcer law especially judges are required for own sensitivity social and understanding more culture wide.<sup>35</sup> This is in line with mandate of Article 5 paragraph (1) of the Law Number 48 of 2009 concerning Judicial Power, which obliges judges to dig and

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<sup>33</sup> Sartono et al., "Rekonstruksi Filsafat Hukum Di Tengah Krisis Normatif: Kajian Kualitatif Deskriptif Atas Wacana Keadilan Dan Moralitas Dalam Hukum," *International Journal of Social, Policy and Law (Ijospl)* 6, no. 2 (2025): 61–65.

<sup>34</sup> Arafat et al., "Tantangan Dan Peluang Integrasi Hukum Adat Dalam Sistem Hukum Pidana Indonesia Pasca Undang-Undang Nomor 1 Tahun 2023 Tentang."

<sup>35</sup> Fadli et al., "Pengakuan Dan Perlindungan Negara Terhadap Hukum Adat Dalam Mendorong Kepatuhan Hukum Berbasis Nilai-Nilai Budaya Lokal Di Indonesia (State Recognition and Protection of Customary Law In Promoting Legal Compliance Based on Local Cultural Values In Indones."

understand values law and a sense of justice that lives in society. In context implementation living law, the judge does not only become implementer law, but also as interpreter social interpreter who is capable assessing customary norms in a way critical. Sensitivity This it is important that the implementation law customs No contradictory with principles right basic man or Pancasila values. In addition, the institution enforcer law like police and prosecutors need adopt a more approach restorative and participatory in handle cases in areas that are still strong with system customs. With so, integration between state law and law public can walk in a way harmonious.

Implementation living law also has implications to development law national and political law criminal law in Indonesia. With enter law customs to in system law formal criminal law, the state shows effort Serious for do nationalization law and release dependence to paradigm colonial. This is a step important in build law national with Indonesian personality (national legal identity).<sup>36</sup> However, in order for the implementation living law truly functioning as expected, the government need compile regulation implementers and guidelines judicial authorities mechanism implementation laws that live in society. Guidelines the must covers criteria law customs that can made into base criminalization, procedures proof in court, as well as principle suitability with Pancasila values and rights basic human.<sup>37</sup> Without guidance mentioned, the implementation living law risky cause subjectivity enforcement law, arbitrariness officers, and violations to principle due process of law. In addition, the implementation of living law potential strengthening the justice model restorative justice in system law Indonesian criminal law. Many laws recovery-oriented customs balance social, not retaliation. In case this, living law can functioning as moral and normative basis for push settlement case in a way peace and deliberation, as reflected in various practice customs like peace gampong in Aceh, perarem in Bali, and deliberation villages in West Sumatra.<sup>38</sup> Integration of values the to in system law modern criminal law will strengthen substantive and

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<sup>36</sup> Muhammad Sabiq Balya, "Pembangunan Sistem Hukum Nasional Berbasis Pada Nilai-Nilai Pancasila," *Grondwet* 4, no. 1 (2025): 37–49, <https://doi.org/10.61863/gr.v4i1.48>.

<sup>37</sup> Deri Ardiansyah, Rayhan Dwi Kurnia, and Rika Rahayu, "Formulasi RPP Pelaksanaan Pidana Adat Sebagai Upaya Harmonisasi Penerapan Hukum Adat Guna Mewujudkan Kepastian Hukum," *Wicarana* 3, no. 1 (2024): 11–22, <https://doi.org/10.57123/wicarana.v3i1.64>.

<sup>38</sup> Aulia Rahmat, "Reformulasi Kebijakan Negara Dalam Perlindungan Kearifan Lokal Studi Dinamika Dan Keberlanjutan Nagari Di Sumatera Barat," 2023, 30–31.

enriching justice system justice national. Therefore that, the implementation living law No only relevant from side legality, but also plays a role important in cultural reform legal culture reform in Indonesia from being oriented towards sanctions going to law that is oriented towards restoration and balance social.

With Thus, the implementation living law in the new Criminal Code bring implications wide to system law Indonesian criminal law, both from aspect philosophy, substance, and structure its enforcement. He expand room justice through confession towards social norms and customs that exist in society, as well as enrich character law national with values local. However, on the other hand, its implementation demand caution so as not to cause uncertainty law or abuse of customary norms. Therefore that, synergy between maker policy, apparatus enforcer law, academics, and society customs become key in ensure living law functioning as instrument harmonization between state law and law social. In the end, success implementation living law will depending on the extent of the system law Indonesian criminal law is capable balance between certainty law, justice substantive, and values humanity living in the midst community. Implementation law customs in Indonesia in power judiciary in principle Already implemented as example settlement case laws that live in society However No arranged in the Criminal Code or Constitution in case number 2 Pid. C /2017/PN. Smp. which in the conclusion his words case about public Sumenep which is the majority religious Islam and local regulations forbid sale drink alcoholic. Next there is also a solution case laws that live in society However arranged in Constitution like in Case Number 7/ Pid. Sus-Anak/2021/ PN Prp. dated September 13, 2021, the conclusion state case molestation by a child to child victims in the process completed based on law customs (Nias Tribe) and achieved peace Where child as perpetrator action criminal penalties imposed sanctions customs that are loaded in deed peace.

## CONCLUSION

The recognition of *living law* under Article 2 of Law Number 1 of 2023 represents a significant transformation in Indonesia's criminal law because it accommodates customary norms within a legal system traditionally dominated by statutory legality. The analysis demonstrates, however, that such recognition should be understood as regulated legal pluralism rather than

unrestricted recognition of customary criminal norms. The validity of *living law* remains constrained by Pancasila, the 1945 Constitution, human rights, and generally recognized principles of law. The principal legal challenge is therefore not whether *living law* should be recognized, but how its existence and normative validity should be established before it produces criminal-law consequences. Without reliable criteria for identification, verification, and application, reliance on customary norms may generate inconsistent judicial interpretation, undermine legal certainty, and create risks of unequal treatment. The study further finds that judicial application constitutes a critical institutional point for harmonizing customary and state criminal law. Accordingly, the implementation of *living law* requires coordination among courts, law-enforcement institutions, local governments, and customary-law communities, supported by transparent procedures for establishing applicable customary norms. Importantly, the regulatory framework has developed since the enactment of the Criminal Code. Government Regulations Number 55 of 2025 now provides procedures and criteria for determining living law in society, requiring the article's original argument about the need for implementing guidelines to be reconsidered in light of this development. The contribution of this study therefore lies in conceptualizing *living law* not merely as an expression of customary-law recognition, but as an institutionally mediated form of legal pluralism that must reconcile substantive justice with legality, equality, and legal certainty.

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