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Reclaiming the Unwritten: Living Law's Prospects under Indonesia's 2023 Penal Reform

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Abstract

The enactment of the Indonesian Criminal Code (KUHP) marks a significant reform in the country's criminal law system. One of the most notable changes is the formal recognition of living law as a source of criminal law. This recognition provides space for the incorporation of local values and indigenous customary wisdom into the national legal system. However, this provision has sparked controversy, particularly due to its potential conflict with the principle of legality and the protection of human rights. In principle, modern criminal law requires that only acts explicitly regulated by legislation can be subject to punishment. Therefore, the application of unwritten norms as a basis for criminal liability poses serious challenges to legal certainty. This study aims to analyze the prospects of applying living law under the new KUHP by examining its formalization, limitations, and implications for the principle of legality and human rights. This research

employs a normative juridical and comparative approach, analyzing statutory regulations, legal doctrines, and practices from several other countries. The findings indicate that the implementation of living law can only be carried out in a limited and conditional manner—through formalization via local regulations, judicial oversight, and assurance that customary norms do not contradict the Constitution. If formulated and applied correctly, the recognition of living law can improve access to social justice, strengthen the legitimacy of law, and contribute to building a peaceful and inclusive society within a sustainable legal development framework.

Keywords: Criminal Code; Society; Living Law; Indigenous; Legal Identity

A. Introduction

The phenomenon of crime is inherently intertwined with human life. Humanity and crime coexist as two sides of the same coin, reflecting an inevitable relationship. Crime has been there as early as the existence of man on this planet. It is even true that crime always stalks behind the comfort of society, affecting social, political, and moral dynamics throughout human history. It is believed that crime is the oldest social problem.[1] Crime is characterized by its ever-changing or evolving nature as it continually adapts to the changes and developments in human life.[2] Experts who have conducted studies on crime suggest that crime can be defined into juridically and sociologically definitions. Juridically, crime means a human act that is contrary to the law, can be punished as regulated in the criminal law. Meanwhile, in a sociological sense, the definition of crime is a human act that violates the values that exist in society. [3]

It is inferred from the above explanation that crime is an act that is contrary to the values of human life. According to Sudarto, a prominent Indonesia law scholar, evil acts or punishable acts are

1 Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, 1st ed. (Yogyakarta: Genta, 2010), 11.

2 Ali Masyhar, *Pergulatan Kebijakan Hukum Pidana Dalam Ranah Tatanan Sosial*, 1st ed. (Semarang: Universitas Negeri Semarang Press, 2008), 125.

3 Yesmil Anwar and Adang, *Pembaruan Hukum Pidana Reformasi Hukum Pidana* (Jakarta: PT Gramedia Widiasarana Indonesia, 2008).

the objects of criminal law in the realm of *das sein*/empirical, while the object of criminal law in the realm of *das sollen* is a positive norm of criminal law.[4] To emphasize, criminal law not only consists of positive criminal legal norms but also specifically addresses evil or punishable acts. Criminal law is intended to address and resolve such harmful or criminal actions.

As to the nature of criminal law, Mezger states that it is a set of legal rules that bind to an act that meets certain conditions, a result in the form of a crime. In principle, an evil act can be categorized as a criminal act if it is listed in the law.[5] One of the principles that is embraced in criminal law and is often the basis is the Principle of Legality. The principle of legality is regulated in Article 1 paragraph (1) of the Indonesian Criminal Code (KUHP). Both the old Criminal Code and the new Criminal Code place this principle of legality in Article 1 paragraph (1), which shows how important the principle of legality in criminal law is to ensure legal certainty.

As a consequence of the legality principle, any evil acts that are not explicitly defined in the rules of law cannot be subject to criminal penalties. In fact, the actions specified in legislation represent only a small percentage of the total behaviors recognized within society. However, Law Number 1 of 2023 on the Criminal Code (hereinafter new Criminal Code) provides a breath of fresh air by accommodating the law that lives in the community.

Implicitly, this provision is affirmed in Article 2 Paragraph (1) which confirms that: "Provisions as referred to in Article 1 paragraph (1) shall not diminish the enforceability of the laws that live in the community which determine whether a person should be sentenced even though such act is not regulated in this Law." This article annuls the monopolistic nature of the principle of legality which was previously resembled a "tunnel vision," focusing solely on one perspective while ignoring others. The new provision challenged the old one that considered only the written law. It opened up a space to introduce and apply the living law in the system of Indonesian criminal law.

4 Sudarto, *Hukum Pidana I* (Semarang: Yayasan Sudarto, 2013), 38 .
5 Sudarto, *Hukum Pidana I…*,13.

However, the idea of recognizing the living law has recently resulted in pros and cons. It has sparked several polemics regarding the determination of living law provisions in the Criminal Code. The source of criminal law in the new Criminal Code does not only rely on formal written rules, but also on unwritten law - particularly customary (*Adat*) criminal law, referred to in this article as the living law. Although Article 2 appears to provide rooms for the application of the living law, its enforcement is actually very limited. In Article 2 paragraph (2), it is emphasized that the living law shall be applicable in written form, meaning that it requires a formalization of the unwritten law.

Cases such as Nenek Minah in Banyumas, who was accused of stealing three cocoa pods;[6] Nenek Manisih in Batang, who took leftover produce from a kapok plantation;[7] Tabriji in Serang, who was alleged to have stolen two ducks; Basar and Kholil in Kediri, who were caught taking a watermelon;[8] and Sarjo in Cirebon, who stole two bars of soap and a packet of peanuts worth IDR 13,000 from a convenience store, represent examples of minor criminal acts that could have been resolved through penal mediation based on local values.

Basically, Indonesian society has historically adhered to local wisdom that functioned as a set of social norms and can be elevated as living law. The conflict resolution through customary mechanisms has predated the arrival of colonial legal systems and continues to exist today in various customary law communities. Several cases within the scope of absolute authority are not solely based on written legal sources derived from legislation. In such instances, judges play a crucial role in interpreting and uncovering the essence of the law from

6 The Jakarta Post, "issues: Minister, NGOs slam trial of grandma," https://www.thejakartapost.com/news/2009/11/26/issuesminister-ngos-slam-trial-grandma039.html, accessed June 1, 2025.

7 Kompas.com, "Pencuri Buah Randu Dituntut Satu Bulan Penjara,"https://regional.kompas.com/read/2010/01/27/0344314/index.html?newnavbar=1, accessed June 1, 2025.

8 Kompas.com, "Semangka Darwati Antar Kholil Masuk Penjara," https://nasional.kompas.com/read/2009/11/30/23470786/semangka.darwati.antar.kholil.masuk.penjara, accessed June 1, 2025.

various sources, including local customs and cultural values embedded in society. This condition also leads to the emergence of rulings made through the discretionary judgment of the judges.[9]

The recognition of customary law as a source of criminal law is not only reflected in social practices but also affirmed in several court decisions. For instance, in a case decided by the Palu District Court in 2010, the presiding judge considered the definition of adultery based on customary law, referring to Supreme Court jurisprudence No. 93 K/Kr/1975, which states that the customary delict of adultery does not depend on the formal elements of Article 284 of the Indonesian Criminal Code. Likewise, in Decision No. 427/Pid/2008/PT.MKS of the Makassar High Court in 2009, the court imposed a sentence based on a customary delict – extramarital intercourse between consenting adults – that is not regulated under the Indonesian Criminal Code. Similarly, in Supreme Court Decision No. 984 K/Pid/1996, it was stated that if the offender had already received a customary sanction from community leaders, the prosecution by the state should be declared inadmissible (*niet ontvankelijk verklaard*). Supreme Court Decision No. 1644 K/Pid/1988 also held that a person who had undergone a customary reaction (sanction) could not be tried again by the state court for the same offense.

These decisions demonstrate that the Supreme Court recognizes the existence of customary criminal law and its accompanying social reactions as a legitimate means of resolving legal disputes within society. The constitutional foundation for such recognition is reinforced in Article 18B paragraph (2) of the 1945 Constitution, which states that the state acknowledges and respects traditional communities and their customary rights as long as they remain alive and are in accordance with societal development and the principles of the Unitary State of the Republic of Indonesia. Furthermore, Articles

9 Yusna Zaidah, M. Fahmi Al-Amruzi, and A. Sukris Sarmadi, "Unveiling the Role of Local Cultural Considerations in Judicial Discretion: An Analysis of Inheritance Decisions in the Religious Courts of South Kalimantan," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 23, no. 1 (June 24, 2023): 47–58.

5(1) and 50(1) of Law No. 48 of 2009 concerning Judicial Power obligate judges to explore and adhere to the values of law and justice that live within society. This provision forms the legal basis for judges to use unwritten sources of law as the foundation for their decisions, including in the context of restorative approaches to criminal cases.

In Supreme Court Decision No. 1600 K/Pid/2009, the Court emphasized that one of the objectives of criminal law is to restore the social balance disrupted by a criminal act, and that reconciliation between the complainant and the accused holds substantial value – often greater than continuing with formal criminal prosecution. Today, the new KUHP explicitly acknowledges the validity of customary law within the national criminal justice system. However, the formalization of such norms must be undertaken with caution and careful formulation to avoid diminishing the essence of justice inherent in customary communities or stifling the organic development of customary law that has long thrived among Indonesia's diverse societies.

In fact, the Indonesian people already have a lot of local wisdom that can be raised as the living law. This practice had been carried out even centuries before the entry of Dutch colonialism and imposed its legal concept to be followed. The concept of community criminal case settlement is more directed to mediation with the aim of not just winning or losing, but towards the concept of a win-win solution. The provisions in the new Criminal Code currently look at and refer to the law that lives in society. Nevertheless, a key issue lies in how the living law arrangement which was originally unwritten law has been recognized and even formalized within the Criminal Code, along with the implications that follow.

Therefore, this study aims to analyze the position of living law within the framework of national criminal law, identify the ideal model for formalizing customary law so that it can serve as a legitimate basis for criminal liability without disregarding the principle of legality, and evaluate how the integration of local values can align with the guarantees of human rights and legal certainty. The main issue examined in this paper is to what extent the living law can be

accommodated within the national criminal justice system without violating the principle of legality and human rights, as well as the normative and institutional mechanisms needed to ensure its implementation in a fair and constitutional manner. This study is particularly relevant given the limited number of prior studies that have specifically addressed the application of living law in the context of the newly enacted Criminal Code.

As far as the application of living law is concerned, research on similar topics has been published. One of which was carried out by Musmuliady et al., who emphasizes efforts to limit living law to customary law intended to maintain the existence of the principle of material legality, as well as causes legal ambiguity.[10] Another research has also been conducted by Edwing Gregorio et.al focusing on the expansion of the principle of legality in the Criminal Code not only has implications for the existence of living law but also has an impact on the enforcement of criminal law. The expansion provides a space for the softening of the application of the principle of legality in criminal law enforcement, considering that criminalization is not only regulated in the law but also in regional regulations.[11] While those two aforementioned articles discussed the existence of living law, this study delves further into the potential for legal regulation embedded within community practices following the enactment of the new Criminal Code, namely Law Number 1 of 2023.

B. Method

The research employs a normative juridical method, utilizing both a conceptual and comparative approaches.[12] The normative juridi-

10 Musmuliady, Jubair, and Aminuddin Kasim, "Menghidupkan Living law: Konstruksi dan Implikasi Living law dalam Pengesahan Rancangan Kitab Undang-Undang Hukum Pidana (RKUHP)," *Rechtsidee* 10, no. 2 (December 28, 2022).

11 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 (April 19, 2024): 263–90.

12 Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum

cal method is used to examine applicable legal norms as outlined in statutory regulations, jurisprudence, legal doctrines, and relevant general principles of law. The conceptual approach is employed to elaborate on theories of criminal law, the concept of the principle of legality, and the doctrine of living law as developed in both national and international legal literatures.

The study also employs methods of legal interpretation, namely historical, systematic, and teleological interpretation. Historical interpretation is used to trace the development of the principle of legality and the recognition of customary law within the Indonesian legal system. Systematic interpretation is applied to place Article 2 of the KUHP within the broader context of the national legal framework. Teleological interpretation is employed to assess whether the recognition of living law aligns with the aims of criminal law reform that are grounded in substantive justice values.

As an additional approach, a comparative method is used to examine how other countries with legal pluralism – such as South Africa, Canada, and Malaysia – recognize and integrate customary law into their legal systems. This comparison aims to identify best practices that can serve as references for designing a suitable mechanism for recognizing living law within Indonesia's national criminal legal framework.

The legal materials are analyzed qualitatively by constructing an analytical narrative demonstrating the relationship between legal norms, theories, and practices. Through this approach, the research aims to produce a comprehensive, critical, and contextual legal synthesis regarding the prospects of the implementation of the living law under the national Criminal Code.

C. Living Law in Indonesia after the Indonesian New Criminal Code

The term the living law was first proposed by Eugen Ehrlich as the

Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (April 1, 2020): 20–33.

opposite of state law (law is made by the state/positive law). [13] For Eugen Ehrlich, the development of law is centered on society itself, not on the formation of laws by the state, judges' decisions, or on the development of legal science. Eugen Ehrlich wants to convey that society is the main source of law. The law cannot be separated from its society. On this basis, Eugen Ehrlich stated that the living law is the law that dominates life itself, even though it has not been included in the legal proposition. This perspective demonstrates that the living law consists of provisions that emerged alongside the birth of society, as laws are created by society and exist to fulfil their needs and interests. Therefore, state law is dependent on and inseparable from societal factors. As a result, state law shall consider laws that live within the community.

However, with the birth of the modern state, the living law tends to be eliminated and replaced with positive law (state law). The living law is not even regarded as a law. However, in the Indonesian legal system, the living law is still recognized with certain limits, such as the recognition of indigenous peoples and their traditional rights, the recognition of customary rights and so on.[14]

From a sociological and anthropological perspective, Indonesian society is inherently pluralistic, characterized by a rich diversity of cultures, religions, and customs. In this context, the discourse on customary law—including its criminal dimensions—is closely related to Indonesia's positive law, which is shaped by this cultural diversity. This condition reflects a form of legal pluralism, where unwritten customary laws coexist alongside the state law and continue to be recognized and developed within indigenous communities.[15] As a

13 Eugen Ehrlich, *Fundamental Principles of The Sociology of Law, Walter L. Moll Trans* (New York: Routledge [Taylor & Francis], 2017).

14 Syofyan Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," *DiH: Jurnal Ilmu Hukum*, September 3, 2018.

15 Dian Ekawaty Ismail, Avelia Rahmah Y Mantali, and Mohamad Rivaldi Moha, "The Concept of Revitalizing Traditional Institutions in the Criminal Law System to Realize Restorative Justice," *Jambura Law Review* 5, no. 2 (June 3, 2023), 220–34.

form of living law, customary law has been deeply rooted and widely practiced by diverse communities across the Nusantara, long before the Indonesian independence.[16] Multiple legal systems have existed within Indonesian society, such as customary law and Islamic law.

Therefore, legal pluralism has long been a reality in which each legal community maintains its own legal norms, styles, and characteristics.[17] The Dutch colonial presence in Indonesia significantly influenced the development of the country's legal system.[18] As is widely known, the Netherlands follows a civil law tradition, in which written law is regarded as the primary source of legal authority.[19]

Legal thought in Indonesia is still largely dominated by the legalistic-positivist tradition of the Civil Law system, which tends to define law narrowly as written legislation.[20] In this context, statutory law is regarded as the primary source of law.[21] Indonesia's legal system is structured hierarchically, with regulations issued at almost every level of government, resulting in an extensive and layered body of legislation.[22] Virtually every aspect of state administration and public

16 Ali Akhbar Abaib Mas Rabbani Lubis and Muhammad Abdul Khaliq Suhri, "Relasi Hukum Islam Dan Adat Dalam Tradisi Pamogih Pada Perkawinan Masyarakat Muslim Bondowoso," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 3, no. 2 (December 27, 2020): 45–63.

17 Brian Z. Tamanaha, "Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences," *Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (July 7, 2021): 1-38.

18 Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences*, ed. marquis Canada and Inc Bridgeport National Bindery, *Legal Pluralism Explained: History, Theory, Consequences*, 1st ed. (New York: Oxford University Press, 2021),56-72.

19 Praise Juinta W. S. Siregar, "Perbandingan Sistem Hukum Civil Law Dan Common Law Dalam Penerapan Yurisprudensi Ditinjau Dari Politik Hukum," *Jurnal Program Magister Hukum Fakultas Hukum Universitas Indonesia* 2, no. 2 (June 2, 2022): 1030-1031.

20 Ratih Lestarini, "The Sociological Perspective on The Study of The Living Law: Is It a Part of Legal Discipline or Social Discipline?," *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 3 (December 25, 2023), 448–64.

21 Shidarta, *Formal Legal Sources in Indonesian Law*, 3rd ed. (Jakarta: UPT Penerbitan Universitas Tarumanegara, 2021), 31.

22 Tutut Ferdiana Mahita Paksi, "Analysis of the Formation of Laws and Regulations in the Indonesian Legislation Hierarchy," *Ekspose: Jurnal Penelitian Hukum Dan Pendidikan* 21, no. 2 (December 16, 2022): 1451–1459.

behavior is governed by these formal legal rules.[23]

The dependence on legislation reflects the logical consequence of being a *Rechtsstaat* (a state based on law), where actions must conform to the principle of legality. However, this heavily dependence on statutory law overlooks the existence of another form of law that lives and evolves within society, particularly the living law or customary law, which is manifested in the legal behavior of communities and possesses strong normative force. Unlike state law, living law arises organically from social practices and remains effective even without formal codification. In other sides, positive law has its own limitations; it may be ambiguous, incomplete, contradictory, or even ineffective in addressing certain situations, highlighting the limitations of a purely positivist legal approach. Given these conditions, the position and relevance of the living law become a matter of concern.

Indonesia actually has its own legal system, namely the Pancasila legal state. For this reason, besides the written laws, the living law as one of its sources of law in Indonesia as clearly observable from the following provisions:[24]

1. Article 18B paragraph (2) of the 1945 Constitution which contains recognition of indigenous peoples and their rights.
2. Article 5 of the Judicial Power Law requires a judge to explore the sense of law that grows and develops in society.
3. In the Agrarian Law
4. In the Marriage Law
5. In inheritance law, legal pluralism is allowed, where there are Islamic, customary, and western inheritance laws. The above examples indicate that the living law is still recognized in the Indonesian legal system.

The law that lives in the community so far has not been maximized, although in some rules it has recognized the existence of the law that lives in society as in the Law on Judicial Power, but in practice it is still far from being roasted, many cases whose settlement does not prioritize the values of justice in society. Judges' decisions

23 Paksi, "Analysis of the Formation of Laws and Regulations...," 31.
24 Hadi, "Hukum Positif dan the Living Law…." 264.

that consider the law that lives in society are a form of legal discovery that has been accepted in the legal system in Indonesia, although it is rarely practiced.[25]

It is widely acknowledged among legal scholars that criminal law is closely linked to the principle of formal legality, expressed in the Latin maxim *nullum delictum, nulla poena sine praevia lege poenali*.[26] This principle serves as a foundational doctrine for students of criminal law. The maxim signifies that no action can be punished unless it is based on a law that was already in effect at the time the act was committed.[27] According to this principle, an act qualifies as a criminal offense if it aligns with the legal definitions established by statute. However, in the Indonesian context, there are instances where actions that technically meet the legal criteria are not necessarily regarded as criminal by the prevailing values and norms within the local community. A notable example is the case of Mbah Manisih, who was deemed to have committed theft after collecting leftover kapok from a plantation—an act that technically fulfilled the legal elements of theft under the Criminal Code.[28] However, within the local community's customary norms, such behavior is commonly practiced and referred to as *ngasak*, and it is not regarded as a criminal offense.[29] Conversely, actions that reflect community values and are perceived as morally wrong cannot be classified as criminal if they are not explicitly prohibited by law.

Therefore, one of the orientations of criminal law reform

25 Siti Chadijah, "Pengaturan Delik Adat Dalam Rancangan KUHP Sebagai Bagian Dari Ius Constiuendum," *Pamulang Law Review* 2, no. 2 (June 6, 2020): 101.

26 Ade Adhari et al., "Customary Delict of Penglipuran Bali in the Perspective of the Principle of Legality: A Dilemma and Arrangements for the Future," *Journal of Indonesian Legal Studies* 6, no. 2 (November 30, 2021): 411.

27 Adhari et al, "Customary Delict of Penglipuran Bali...," 428.

28 Antara News, "Pengambil Sisa Kapuk Dihukum 24 Hari Penjara," 2010, https://m.antaranews.com/amp/berita/172196/pengambil-sisa-kapuk-dihukum-24-hari-penjara, accessed June 29, 2025.

29 ST Junaeda et al., "A'pare-Pare: Tradisi Ngasak Padi di Polombangkeng Selatan, Kabupaten Takalar Sulawesi Selatan," *Journal of Education and Culture* 4, no. 2 (June 8, 2024): 16.

through the ratification of Law No. 1 of 2023 is to formulate legal provisions that live in society. The living law actually has two meanings, namely a broad meaning and a narrow meaning.[30] The broad meaning of law that lives in society is related to every provision of legal rules, both written and unwritten, that apply in society (*ius constitutum*).[31] The provisions of this legal rule are not only made by the state, but also include those made by non-states such as the community. In addition, living law also includes customary laws that are considered binding because they are carried out continuously and are considered important to always be applied by certain communities.[32]

Thus, the law that lives in society at large includes all legal provisions that apply in society, including customary law. Narrowly, laws that live in society are usually understood as laws that apply in a particular community and are unwritten law.[33] This narrow law is usually referred to as customary law or other similar terms. Referring to the conception of living law in the broad and narrow sense above, it is necessary to look at and see how the Criminal Code that has been passed regulates the provisions regarding the law that lives in society.

Referring to Article 2 paragraph (1) of the Criminal Code and its explanation, it can be concluded that the Criminal Code only affirms that the law that lives in society is customary law. We can see this in the explanation of Article 2 paragraph (1) of the Criminal Code which emphasizes that the law that lives in the community is identified as customary law. If it is based on the division of law that lives in society in a broad and narrow sense, it can be seen that the meaning of law that lives in society that is desired by the Criminal Code is the

30 Budi Suhariyanto, "Problema Penyerapan Adat Oleh Pengadilan Dan Pengaruhnya Bagi Pembaruan Hukum Pidana Nasional," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30, no. 3 (November 14, 2018), 421.

31 Ahmad Rosidi et al., "Transaksi Online Dimasa Pandemi Covid-19, Perspektif Hukum Positif (Ius Contitutum)," *Journal Ilmiah Rinjani: Media Informasi Ilmiah Universitas Gunung Rinjani* 10, no. 1 (January 30, 2022), 61–72.

32 Paul Schiff Berman, *The Oxford Handbook of Global Legal Pluralism* (New York: Oxford University Press, 2020).

33 Sartika Intaning Pradhani, "Sejarah Hukum Maritim Kerajaan Sriwijaya dan Majapahit dalam Hukum Indonesia Kini," *Lembaran Sejarah* 13, no. 2 (February 27, 2018), 186.

meaning in a narrow sense.[34] This means that recognized living law is a law that lives in a society that applies in a certain community and is unwritten law which is usually referred to as customary law or other similar terms.

There are two reasons why living law in the new Criminal Code is interpreted in a narrow sense, namely: first, referring to various facts and legal phenomena in society, the weak role of customary law in the legal system in Indonesia is one of the reasons to provide guarantees and existence for the enforcement of customary law in society.[35] Moreover, customary law can be said to be Indonesia's "distinctive" law that has grown and developed from the local community. The importance of the role of customary law is actually in line with the idea of criminal law reform that tries to facilitate customary law within the framework of national criminal law.[36] Second, an effort to provide a narrow definition of living law in society in the RKUHP which emphasizes that living law is customary law is actually an effort to maintain the existence of the principle of legality in criminal law.

As explained earlier, in criminal law, the principle of legality occupies an important position and can even be considered as the "heart" of criminal law.[37] The principle of legality in general indicates that criminal law regulations are written, interpreted in a limited way, in a strict manner to ensure certainty and legal protection for the community related to the potential for criminalization.[38] Al-

34 Rosdiana Rosdiana and Ulum Janah, "Penerapan Restorative Justice Dalam Tindak Pidana Perzinaan Pada Masyarakat Kutai Adat Lawas," *Jurnal Bina Mulia Hukum* 5, no. 1 (September 23, 2020), 53–73.

35 Yunani Abiyoso et al., "Adat Institutions In Aceh Government: A Constitutional Perspective Constitutional Perspective," *Journal of Islamic Law Studies* 4 4, no. 1 (2020), 1–15.

36 Fradhana Putra Disantara, "Konsep Pluralisme Hukum Khas Indonesia Sebagai Strategi Menghadapi Era Modernisasi Hukum," *Al-Adalah: Jurnal Hukum Dan Politik Islam* 6, no. 1 (June 14, 2021), 1–36.

37 Achmad Bustomi, "The Legality Principle Application in Indonesian Criminal Law System," *Nurani Hukum* 4, no. 2 (December 15, 2021), 29–37.

38 Eddy O.S. Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana*. (Jakarta: Erlangga, 2009).

though the principle of legality must still be maintained in the Criminal Code, the principle of legality in the Criminal Code has only been constructed as a formal legality principle that emphasizes the written, limited, and strict nature. The principle of legality in the new Criminal Code is constructed materially so that it also adopts legal values that live, grow, and develop in society.[39] By stimulating customary law as in Article 2 of the Criminal Code which will later be followed up in Regional Regulations, it has reduced the essence of customary law which is unwritten to written. Efforts to limit living law are customary law intended to maintain the existence of the principle of material legality.

D. Living Law: Impact on Legality and Human Rights

The recognition of living law in the new Indonesian Criminal Code through Article 2 paragraph (1) carries significant normative implications for one of the fundamental principles of criminal law, namely the principle of legality. In this context, acknowledging unwritten norms as a basis for criminal liability has the potential to erode the strength of the *nullum delictum, nulla poena sine lege praevia* principle, which has long served as a safeguard for legal certainty, a limitation on state power, and a protection against arbitrary actions. The use of unwritten law—often inconsistent, undocumented, and heavily reliant on specific customary communities—may lead to legal uncertainty. This poses a particular risk for citizens outside those communities, who may find themselves subject to legal standards they could not have foreseen or understood, thereby violating the principles of foreseeability and accessibility required in a just criminal justice system.

Furthermore, the recognition of living law without a strict mechanism for its selection, formalization, and oversight also risks contravening human rights principles. Many customary norms remain discriminatory, especially toward women, children, vulnerable

39 Vincentius Patria Setyawan and Hyronimus Rhiti, "Relasi Asas Legalitas Hukum Pidana Dan Pemikiran Hukum Alam," *Jurnal IInovasI Penelitian* 2, no. 12 (2022), 3814.

groups, or religious and belief minorities. For example, there are customary laws that restrict women's inheritance rights, justify symbolic violence against individuals accused of adultery, or limit freedom of expression and religion based on local norms. If such norms are used as a basis for criminal liability, there is a risk of criminalizing behaviors that are otherwise protected under the Constitution and international human rights instruments.

In addition, the absence of strong judicial oversight mechanisms regarding the application of customary law increases the likelihood of *forum shopping*, where law enforcement or judges selectively apply customary norms to serve temporary interests, leading to inconsistent and unfair rulings. Without sufficient codification and accountability, living law could become a tool to justify discriminatory practices and violations of the principle of equality before the law.

Therefore, to ensure that the recognition of living law does not become a threat to the principle of legality and human rights protection, strict formalization requirements are necessary, including:

1. Limiting its scope only to living customary law communities that are constitutionally recognized;
2. Clear parameters ensuring that customary norms do not conflict with Pancasila, the 1945 Constitution, human rights, and general principles of international law;
3. Judicial oversight and control over the application of customary law in criminal proceedings.

Through such measures, living law can function as a source of context-based justice without sacrificing the fundamental principles of a modern rule-of-law state and the protection of human rights.

E. Comparative Perspectives on the Recognition of Living Law

Indonesia is not the only country facing challenges in integrating customary law into its national legal system. Countries with plural legal traditions—such as South Africa, Canada, and Malaysia—also recognize the existence of living law within indigenous or customary com-

munities. However, each employs different approaches, limitations, and mechanisms to balance the recognition of customary law with the principles of modern rule of law and human rights protection. Customary law as a form of living law continues to evolve, remain adaptive, and stay relevant in upholding justice and social order beyond the framework of formal legal systems.[40]

South Africa offers a prominent example of a hybrid legal system, where customary law is constitutionally recognized within the national legal framework. Sections 211 and 212 of the 1996 South African Constitution explicitly acknowledge customary legal systems, provided they do not conflict with constitutional provisions, especially human rights principles. South African courts are authorized to consider and apply customary law, but only insofar as such norms are not discriminatory.[41] This illustrates the importance of a selective and corrective approach to customary law—embracing local values while testing them against constitutional standards.

Canada also recognizes the existence of Indigenous Legal Traditions as part of its reconciliation efforts with the First Nations, Métis, and Inuit peoples. Through the Truth and Reconciliation Commission and judicial reforms, Canada provides space for restorative justice practices rooted in indigenous traditions, particularly for minor criminal offenses. However, the application of customary law in Canada is limited to specific jurisdictions and does not override federal law.[42] This reflects a model of conditional and limited recognition, where customary law may be applied as long as it aligns with human rights and democratic legal norms.

Meanwhile, Malaysia adopts a dual legal system, similar to In-

40 Didik Sukriono et al., "Local Wisdom as Legal Dispute Settlement: How Indonesia's Communities Acknowledge Alternative Dispute Resolution?," *Legality: Jurnal Ilmiah Hukum* 33, no. 1 (April 15, 2025), 261–85.

41 Daniel Huizenga, *Customary Law and Indigenous Rights in South Africa: From Transformative Constitutionalism to Living Law in Struggles for Rural Land Rights*, a Dissertation of Socio-Legal Studies (Ontario: York University Toronto, July 2019).

42 Kenji Tokawa, "Indigenous Legal Traditions and Canadian Bhinneka Tunggal Ika : Indonesian Lessons for Legal Pluralism in Canada," *The Journal of Legal Pluralism and Unofficial Law* 48, no. 1 (January 2, 2016), 17–40.

donesia, which accommodates both customary law (*Adat*) and Sharia law alongside general law. Some states, such as Negeri Sembilan, formally institutionalize *Adat Perpatih* in matters of inheritance and family law. In Malaysia, customary law is codified through state enactments, thereby ensuring legal certainty. At the same time, courts retain the authority to reject customary norms that conflict with principles of justice or constitutional rights.[43]

From these three countries, several important lessons can be drawn: recognition of living law must not be absolute; it requires strict formalization mechanisms, constitutional compatibility, and judicial oversight to avoid becoming a source of new injustices. South Africa demonstrates the importance of human rights as a filter in customary law application. Canada emphasizes a reconciliatory and restorative model, while Malaysia focuses on integrating customary law into a formal legal structure at the state level.

For Indonesia, these international practices suggest that the integration of living law into the Criminal Code must be accompanied by constitutional safeguards, mechanisms for verifying and legalizing customary norms through local regulations, and an active role for the judiciary in assessing their consistency with justice, human rights, and the foundational values of Pancasila.

F. Formalization of the Living Law into Indonesian Regional Regulations.

The enactment of Law Number 1 of 2023 concerning the Indonesian Criminal Code is a masterpiece of the Indonesian nation in the field of criminal law as an effort of decolonization from the colonial legal regime. The existence of Law Number 1 of 2023 would mean that the parent of Indonesian criminal law has shifted from the colonial parent to the Indonesian parent of criminal law. There are at least six reasons for the need to amend the colonial Criminal Code from WvS, namely Law 1/1946 jo. Law 73/1958 to the new Criminal Code.

43 Andrew Harding, "Malaysia: Religious Pluralism and the Constitution in a Contested Polity," *Middle East Law and Governance* 4, no. 2–3 (2012): 356–85.

According to Prof. Sudarto[44] there are four reasons why the amendment has to be made. *First*, from a political reason, Indonesia's status as an independent and sovereign country is no longer bound by any foreign legal instruments, including the Dutch-origin Criminal Code *WvS*. Therefore, adopting a national Criminal Code is not only necessary to depart from the colonial legacy but also a logical step toward asserting legal independence and fostering national identity. *Second*, sociologically, Indonesian society has a very different structure and culture from that of Dutch society. This certainly affects the culture of law. The *WvS* Criminal Code is unlikely to fully reflect the cultural values of the Indonesian nation, as it was not formulated in the context of the Indonesian values and norms. *Third*, philosophically, Indonesia and the Netherlands are grounded in fundamentally different values and systems. Indonesia is illuminated by the philosophical values of Pancasila, which emphasizes communal-religious principles. Meanwhile, the Criminal Code (*Wvs*) stems from liberal and secular values. *Fourth*, from a practical perspective, the original and official text of the *WvS* is written in Dutch. The language is not widely understood by many Indonesian law enforcement officers. This linguistic problem might bring obstacles to understanding the norms and result in misinterpretation, due to inaccurate translation from the original text.

Considering the historical background, Prof. Muladi[45] argues that the *WvS* Criminal Code, having been created in the 19th century, is substantially outdated from the social realities it will regulate. This underscores the necessity to have a Criminal Code that reflects the development of society, especially in response to the development of the international community that has been recognized by civilized nations. In addition to Sudarto's and Muladi's suggestions, I[46] would further argue that the law of a country is nothing but like

44 Sudarto, *Hukum Dan Hukum Pidana*, 5th ed. (Bandung: PT. Alumni, 2007).

45 Muladi, "Proyeksi Hukum Pidana Materiil Indonesia Di Masa Datang," in *Pidato Pengukuhan Jabatan Guru Besar* (Semarang, 1990), 3.

46 Ali Masyhar, *Hukum Pidana: Kajian Berdasar UU No. 1 Tahun 2023* (Semarang: Universitas Negeri Semarang Press, 2024).

a construction that is linked to a legal system. In the legal structure, all legal rules must be aligned between the highest legal gradation to the lowest gradation. An ideal legal system is unattainable if the subordinate legal structures are in conflict with or inconsistent with the higher-level legal framework. As a subordinate legal structure, the Criminal Code (WvS) should be in line and consistent with Indonesia's supreme philosophical values, embodied in Pancasila as its *grundnorm*.

Based on the earlier reasons above, the new Criminal Code sets out five central missions, which include:[47]

1. Democratization

   The new Criminal Code has a mission to regulate various freedoms of democracy, freedom of expression, both oral and written, freedom of speech and freedom of expression, not to prohibit it.
2. Decolonization

   The Criminal Code intends to renew and eliminate colonial characteristics.
3. Consolidation

   The growth of laws or legislation outside the Criminal Code needs to be consolidated in one umbrella regulation, namely the national Criminal Code.
4. Harmonization

   Aligning laws that grow and develop outside the Criminal Code, with the umbrella regulation, the Criminal Code.
5. Adaptation/Modernization

   The new Criminal Code is intended to answer and accommodate the development of such a rapidly evolving era.

The reasons and objectives mentioned above cannot be achieved through partial changes; a comprehensive and codified revision of the Criminal Code is necessary. With the enactment of Law Number 1 of 2023, significant reforms have been introduced, including a shift from recognizing only formal legality to incorporating laws that re-

47 Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana: Edisi Penyesuaian KUHP Nasional* (Depok: Rajawali Press, 2024), p. 55-58

flect societal values. In Indonesia, criminal law is derived from both written and unwritten sources, and it is crucial that any act aligns with the formulations outlined in this law to ensure legal certainty.

Although Article 2 seems to provide space for the living law to apply, its enforcement is very limited. Article 2 stated that:[48]

(1) The provisions as intended in Article 1 paragraph (1) do not reduce the applicability of the law that lives in society that determines that a person should be punished even if the act is not regulated in this Law.

(2) The law that lives in society as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the people of the nations.

(3) Provisions regarding procedures and criteria for determining laws that live in society are regulated by Government Regulations.

The explanation is as follows:

- "The law that lives in society is the customary law that determines that a person who commits a certain act should be punished. The laws that live in society in this article are related to unwritten laws that are still valid and developing in the life of people in Indonesia. To strengthen the enforcement of the law that lives in the community, the Regional Regulation regulates the customary crime.
- "Applicable where the law lives" applies to every person who commits a customary crime in the area. This paragraph contains guidelines in establishing customary criminal law whose applicability is recognized by this Law.
- The Government Regulation in this provision is a guideline for the regions in establishing laws that live in the community in the Regional Regulation.

Thus, a living law in order to be valid must meet the following requirements:

1. Applies only where the law is located;
2. Not regulated in the Criminal Code;
3. In accordance with the values contained in:
    a. Pancasila;
    b. Constitution of the Republic of Indonesia in 1945;

48 Article 2 of Law Number 1 of 2023 Concerning the Criminal Code (2023).

c. Human rights;

d. Common legal principles recognized by the people of the nations.

4. Regulated in the Regional Regulation.

It is possible to add sections as needed. A section may consist of several

One of the reasons underlying the passage of Law Number 1 of 2023 on the Criminal Code is because it prioritizes the spirit of Indonesian nationality by referring to the legal ideals of Pancasila.[49] The legal ideals of Pancasila are expected to be a guide in the formulation and application of criminal law norms. One of the substances in the new Criminal Code that has an orientation to implement the legal ideals of Pancasila is the existence of legal arrangements that live in society.[50] Article 2 paragraph (3) of Law Number 1 of 2023 concerning the Indonesian Criminal Code (KUHP) stipulates that the procedures and criteria for determining living law in society shall be regulated through a Government Regulation. The elucidation of this article also states that Regional Regulations (*Peraturan Daerah*) will serve as a legal instrument to reinforce the applicability of living law within specific communities. Consequently, unwritten norms must undergo a formalization process before they can be applied as a basis for criminal liability.

This formalization mechanism carries significant legal consequences. First, it transforms the status of customary law from unwritten law into *ius constitutum*—positive law that is binding and enforceable by the state. This raises a fundamental question about the hierarchy of legal norms: what is the legal standing of customary law once formalized through a Regional Regulation, in comparison to national legislation or the Criminal Code itself? Without a clear normative hierarchy, there is considerable potential for overlap and

49 Shidarta Shidarta, "Bernard Arief Sidharta: Dari Pengembanan Hukum Teoretis Ke Pembentukan Ilmu Hukum Nasional Indonesia," *Undang: Jurnal Hukum* 3, no. 2 (December 1, 2020), 441–76.

50 Faisal Faisal and Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (July 30, 2021), 291.

conflict between local and national norms, which may ultimately undermine legal certainty.

Second, in practice, the level of readiness and capacity among regions to enact such regulations varies widely. Some regions have strong and well-documented customary institutions, while others lack a clear customary legal structure or have undergone cultural assimilation that has diluted traditional norms. This disparity risks creating inconsistencies in the application of criminal law across different regions, contradicting the principle of criminal law unification at the national level.

Third, the formalization process, if carried out without participatory consultation with the customary communities themselves, may result in regional legal products that lack authenticity and could potentially trigger internal conflict. Many customary norms are inherently contextual, flexible, and consensus-based; thus, codifying them into rigid written rules may distort their underlying philosophical values.

From a law enforcement perspective, the formalization of customary law as a basis for criminal punishment also presents challenges for legal practitioners—particularly police officers, prosecutors, and judges—who must understand the local socio-cultural context in order to determine whether an act should indeed be criminalized under living law, or whether it should be addressed through non-penal mechanisms. Without adequate training and guidance, this process risks becoming a tool for the criminalization of conduct that should not fall within the realm of formal criminal law.

Therefore, to ensure that the formalization of living law through Regional Regulations does not result in legal uncertainty or unequal access to justice, several safeguards are necessary:

1. Clear and standardized guidelines from the central government regarding the criteria and process for formalizing customary law;
2. Active involvement of customary communities in the drafting of local norms;
3. Oversight by the Supreme Court or other legal supervisory bodies regarding the substance and implementation of Regional

Regulations containing customary law provisions;

4. Periodic evaluation of the enforcement of living law-based regulations to ensure compliance with constitutional principles and human rights norms.

In addition to being listed in the formulation of Article 2 of Law No. 1 of 2023, the provisions of the living law are also included in Article 597 paragraph (1) of Law No. 1 of 2023:

> "Every person who commits an act that according to the law that lives in society is declared a prohibited act, is threatened with a criminal offense."

From the perspective of its original meaning, the living law does not require state intervention or formal codification in order to be effective or enforceable. As a renowned legal scholar Carl Friedrich von Savigny declared, *"Das Recht wird nicht gemacht, es ist und wird mit dem Volke,"* meaning that law is not made but rather exists and grows alongside with the society.[51] Despite the enactment of the new Criminal Code 2023, the concept of living law within it remains inconsistently articulated. To achieve justice based on Pancasila, a reinterpretation involving interdisciplinary experts is needed, expanding living law to include both customary and traditional laws, and restoring recognition of customary courts in the national criminal justice system.[52]

The author argues that while the state should avoid strict codification of the living law, it may still offer broad and general guidance on certain punishable acts in a flexible manner. It is also essential that the reformulation of the living law reflects a broader understanding, extending beyond the confines of customary law, and its regulation is implemented through Regional Regulations.[53] Inspired by Paul Bo-

51 Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (New York: Oxford University Press, 2001).

52 Aris Hardinanto et al., "Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila," *Journal of Law and Legal Reform* 5, no. 3 (October 31, 2024), 1029–66.

53 Umi Rozah and Aldi Yudistira, "Penal Policy Analysis of The Formulation of Customary Law in The 2023 KUHP," *Indonesian Journal of Criminal Law Studies* 10, no. 1 (2025), 83–114.

hannan's concept, the flexible articulation of the living law represents a process through which societal norms are re-embedded within a formal legal framework, the process known as re-institutionalization of norms,[54] aimed at preserving and fostering the continued evolution of the living law within society. If this interpretation is accepted, the role of the state in formulating the living law can be understood as both legitimate and constructive.

G. Conclusion

The recognition of living law in Law Number 1 of 2023 on the Criminal Code (KUHP) represents a progressive step toward creating a more inclusive legal system rooted in local values. However, this advancement also raises significant concerns about legal certainty, the protection of human rights, and the principle of legality—particularly given Article 2, which allows the basis for criminal prosecution to include unwritten norms or living law. To prevent legal disparities and potential misuse, the formalization of living law through Regional Regulations must be conducted with clear national guidelines, rigorous oversight, and in alignment with the values of Pancasila, the 1945 Constitution, and human rights standards.

Comparative insights suggest that the integration of customary norms necessitates judicial review, standardized evaluation mechanisms, and active participation of the community. The government should urgently issue regulations that outline the procedures and criteria for recognizing living law, while regional governments need clear frameworks for drafting such regulations. Judicial bodies must be empowered to assess the constitutionality of formalized norms, while law enforcement officials should be equipped with special training to enable them to apply these norms fairly within their cultural contexts. With these safeguards in place, the recognition of living law can reinforce legal pluralism while upholding justice, democracy, and constitutional integrity in Indonesia.

54 Paul J. Bohannan, *Antropologi Dan Hukum*, ed. T.O Ihromi (Jakarta: Yayasan Obor Indonesia, 1993).

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