

Reconstructing Legality in a Plural Legal System: Living Law and Customary Criminal Law Under Indonesia's New Criminal Code

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Abstract

Introduction: The recognition of living law under Indonesia's new Criminal Code challenges the conventional understanding of the legality principle, which traditionally requires criminal liability to be based on predetermined written law. The challenge is particularly significant in Indonesia's plural legal order, where customary norms continue to operate alongside state law.

Purposes of the Research: This study aims to reconstruct the principle of legality by examining the normative position of living law and customary criminal law under Law No. 1 of 2023 concerning the Criminal Code. It specifically examines how legal certainty, substantive justice, constitutional rights, and cultural legitimacy can be reconciled.

Methods of the Research: This study employs normative legal research using statutory, conceptual, philosophical, and comparative approaches. Primary legal materials consist of Law No. 1 of 2023 and its implementing regulations, while secondary materials include scholarly literature on legality, living law, legal pluralism, and customary criminal law. The materials are analyzed qualitatively and prescriptively.

Results of the Research: The study finds that living law does not abolish the legality principle but modifies its operation within a constitutionally bounded plural legal framework. Customary criminal norms may function as a limited source of criminal liability only when their existence, territorial applicability, normative content, and compatibility with constitutional and human-rights standards are established. The study proposes a bounded legality model that combines formal legality, validated living law, judicial scrutiny, and institutional safeguards. Conclusion: The reconstruction therefore requires not unrestricted judicial recognition of customary norms, but a controlled integration of living law that preserves legal certainty while accommodating legitimate customary values.

Keywords: Principle of Legality; Living Law; Customary Criminal Law; Legal Pluralism; Criminal Law Reform.

Submitted: 2026-05-07

Revised: 2026-10-08

Accepted: 2026-10-11

Published: 2026-11-01

How To Cite: Lisa Aminatul Mukaromah, Khurul Anam, and Imroatul Azizah. "Reconstructing Legality in a Plural Legal System: Living Law and Customary Criminal Law Under Indonesia's New Criminal Code." SASI 32 no. 4 (2026): 343-355.

<https://doi.org/10.47268/sasi.v32i4.3890>

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INTRODUCTION

The development of modern criminal law reflects a continuous effort to balance legal certainty with social justice, particularly in countries with pluralistic legal traditions such as Indonesia.¹ The principle of legality (*nullum crimen sine lege*) has long been regarded as a cornerstone of criminal law, ensuring that no act can be punished unless it is clearly regulated in written law prior to its commission. However, in societies where customary norms (*Adat Law*) continue to function as living law, the rigidity of formal legality often creates tension between codified rules and societal values. The enactment of the 2023

¹ Achmad Hariri, Satria Unggul Wicaksana, and Samsul Arifin, "A Critical Study of Legal Positivism As a Legal System in a Pluralist Country," *KnE Social Sciences*, 2022, 563-72.

National Criminal Code represents a paradigm shift in Indonesian legal reform, as it attempts to integrate the concept of living law into the formal criminal justice system. This reconstruction signals a movement away from strict legal positivism toward a more contextual and culturally responsive legal framework, where unwritten norms recognized by society may influence criminal liability.² Consequently, the incorporation of customary law values into the legality principle raises important theoretical and practical questions regarding legal certainty, justice, and the role of local wisdom in national law.

Empirical data further demonstrates the urgency of this reconstruction. Indonesia consists of more than 1,300 ethnic groups and over 300 customary law communities, each possessing distinct legal traditions that continue to regulate social behavior. Reports from the Ministry of Law and Human Rights indicate that a significant number of community disputes particularly in rural areas are resolved through customary mechanisms rather than formal courts, with estimates suggesting that up to 40% of minor conflicts are handled through adat institutions. At the same time, the Supreme Court has recorded increasing case backlogs, exceeding tens of thousands of cases annually, indicating limitations in the formal legal system's capacity to accommodate local realities.³ Furthermore, legal scholars have identified numerous instances where rigid application of written criminal law fails to reflect the moral values and sense of justice within communities, leading to perceptions of injustice and reduced public trust in law enforcement. These quantitative and qualitative indicators highlight a structural gap between state law and living law, reinforcing the need to reconstruct the legality principle in a way that acknowledges Indonesia's socio-legal diversity.

From a theoretical perspective, the concept of living law, as introduced by Eugen Ehrlich, emphasizes that the law that truly governs society is not limited to statutes but also includes norms that live and develop within social practices. This perspective is further supported by socio-legal and legal pluralism theories, which recognize the coexistence of multiple legal systems within a single jurisdiction. In the Indonesian context, customary law has historically functioned as a primary source of order, long before the introduction of Western legal systems during the colonial period.⁴ Scholars argue that ignoring living law in the application of criminal law risks alienating communities and undermining the legitimacy of legal institutions.⁵ Therefore, the reconstruction of the legality principle through living law is not merely a normative innovation, but also a theoretical necessity to align formal law with the sociological realities of Indonesian society. This approach seeks to harmonize the rigidity of written law with the flexibility of unwritten norms, ensuring that criminal law remains both certain and just.

The incorporation of living law in the 2023 National Criminal Code is reflected in several provisions that explicitly recognize unwritten law as a basis for criminal liability under certain conditions. These provisions emphasize that customary norms may be applied as long as they are still alive in society, do not contradict national ideology (Pancasila), human

² Siti Rohmah and Azka Rasyad Alfatdi, "From Living Law to National Law: Theoretical Reconstruction of Applying Islamic Law in Indonesia," *Peradaban Journal of Law and Society* 1, no. 1 (2022), <https://doi.org/10.59001/pjls.v1i1.19>.

³ Yenny Febrianty et al., "The Limitations of Living Law in Indonesian Criminal Law Reform: An Effort To Realize Justice," *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 2 (2023): 196–208, <https://doi.org/10.29303/ius.v11i2.1232>.

⁴ Tomáš Ledvinka and James M. Donovan, "Reading Legal Ethnographies to Re-Map Legal Pluralism: A Pospisilian Corrective to the Prevailing Dichotomous Description of Afghanistan's Legal Order," *Legal Pluralism and Critical Social Analysis* 55, no. 3 (2023): 366–401, <https://doi.org/10.1080/27706869.2023.2213519>.

⁵ Kelty McKerracher, "Relational Legal Pluralism and Indigenous Legal Orders in Canada," *Global Constitutionalism* 12, no. 1 (2023): 133–53, <https://doi.org/10.1017/S2045381722000193>.

rights principles, and general legal principles recognized by civilized nations.⁶ The Code also requires judges to carefully assess the existence and relevance of such norms before applying them in judicial decisions. This legal recognition marks a significant departure from the classical legality principle, which strictly limits criminalization to written law. By expanding the scope of legality to include living law, the National Criminal Code introduces a more flexible yet complex legal framework that requires careful interpretation and implementation.⁷ This raises critical questions regarding standardization, evidentiary requirements, and the potential risks of legal uncertainty.

The gap between *das sein* (the reality) and *das sollen* (the ideal) becomes evident when examining the implementation of criminal law in Indonesia. In practice, many communities continue to rely on customary norms to regulate behavior and resolve disputes, demonstrating the continued relevance of living law in everyday life. However, the formal legal system has historically prioritized written statutes, often disregarding these local norms. This creates a disconnection between law as it is applied and law as it is experienced by society. Ideally, the legality principle should provide both certainty and justice, but in reality, its rigid application may lead to outcomes that are perceived as unfair or culturally insensitive. The reconstruction of the legality principle through living law seeks to bridge this gap by aligning legal norms with social realities, thereby enhancing both the legitimacy and effectiveness of the criminal justice system.

Based on the above considerations, this research aims to analyze the reconstruction of the principle of legality through the incorporation of *living law* in the 2023 National Criminal Code, particularly in relation to customary law values. The study examines the theoretical foundations, normative framework, and practical implications of this reconstruction, while identifying the potential challenges arising from its implementation. Furthermore, it evaluates whether the integration of *living law* can establish an appropriate balance between legal certainty and substantive justice within Indonesia's pluralistic legal system. The specific contribution of this research lies in developing a conceptual understanding of legality that moves beyond the conventional written-law paradigm by positioning *living law* as a conditional normative source whose recognition remains subject to constitutional principles, human rights, and the rule of law. In the Indonesian criminal law discourse, this study provides a framework for understanding how formal legality can accommodate customary normative authority without eliminating the safeguards against arbitrariness that constitute the fundamental function of the legality principle. More broadly, the analysis contributes to the discourse on criminal law reform in legally plural societies by demonstrating how state law and socially embedded normative orders may be reconciled within a legally accountable framework.

METHODS OF THE RESEARCH

To address the research objective of examining how the principle of legality can be reconstructed through the incorporation of *living law* based on customary law values within the 2023 National Criminal Code, this study employs a normative legal research method (doctrinal research). This method is used to systematically examine the legal norms,

⁶ Dheny Wahyudhi, "Customary-Based Restorative Justice: Philosophical Foundations and Normative Relevance in the Indonesian Criminal Justice System," *Edunity* 4, no. 12 (2025): 819–31.

⁷ Faisal et al., "Genuine Paradigm of Criminal Justice: Rethinking Penal Reform within Indonesia New Criminal Code," *Cogent Social Sciences* 10, no. 1 (2024), <https://doi.org/10.1080/23311886.2023.2301634>.

principles, and doctrines underlying the recognition of *living law* and its implications for the principle of legality within Indonesia's criminal law framework. The study applies three complementary approaches: a statutory approach, which examines the 2023 National Criminal Code alongside relevant legislation and constitutional principles; a conceptual approach, which analyzes legal doctrines concerning the principle of legality, *living law*, and legal pluralism; and a philosophical approach, which explores the underlying values of justice, legal certainty, and cultural recognition embedded in customary law.⁸ The legal materials comprise primary legal materials, including legislation and official legal documents; secondary legal materials, including books, journal articles, legal doctrines, and scholarly opinions; and tertiary legal materials, including legal dictionaries and encyclopedias. These materials are collected through literature study and document analysis to provide a comprehensive basis for examining the normative, conceptual, and philosophical dimensions of the reconstruction of the principle of legality. The analysis technique applied in this research is qualitative descriptive analysis, emphasizing systematic interpretation of legal texts and doctrines to identify patterns, inconsistencies, and implications of incorporating living law into the legality principle. The study also adopts a prescriptive analytical method, aiming not only to describe existing legal conditions but also to provide recommendations for improving the formulation and implementation of the legality principle within the Indonesian criminal law system.⁹ By comparing theoretical frameworks with normative provisions, this research seeks to evaluate whether the integration of living law aligns with fundamental legal principles, including human rights and the rule of law. The findings are expected to generate a coherent legal argument regarding the legitimacy, limitations, and future direction of recognizing customary law within the national criminal legal framework.

RESULTS AND DISCUSSION

A. Theoretical Reconstruction of the Principle of Legality in the Perspective of Living Law and Legal Pluralism

The principle of legality has historically functioned as a central pillar in modern criminal law, ensuring that no individual can be punished except on the basis of pre-existing written law. Rooted in the doctrine of *nullum crimen sine lege*, this principle reflects the influence of Enlightenment thought, particularly the desire to limit arbitrary state power and guarantee legal certainty. Classical theorists such as Cesare Beccaria¹⁰ and Paul Johann Anselm von Feuerbach emphasized that criminal law must be codified, clear, and prospective in order to protect citizens from unjust punishment.¹¹

However, while this rigid formulation of legality has been instrumental in building modern legal systems, it has also been criticized for its inability to accommodate the dynamic and pluralistic nature of social norms. In societies like Indonesia, where law is not solely derived from state legislation but also from deeply rooted customary traditions, the strict application of legality may result in a disconnect between formal law and lived social

⁸ John W. Creswell and J. David Creswell, *Research Design : Qualitative, Quantitative, and A Mixed-Method Approach*, SAGE Publication, 2023, <https://doi.org/10.4324/9780429469237-3>.

⁹ Jhon Creswell, "Qualitative Inquiry Research Design Choosing Among Five Approaches," 2017.

¹⁰ Cesare Beccaria, "Beccaria's On Crimes and Punishments: A Mirror on the History of the Foundations of Modern Criminal Law," *Oxford University Press*, no. n 2 (2014).

¹¹ Paul Johann and Anselm Feuerbach, *Textbook of the Common Penal Law in Force in Germany, Foundational Texts in Modern Criminal Law*, 2023, <https://doi.org/10.1093/acprof:oso/9780199673612.005.0001>.

realities. This tension forms the starting point for the theoretical reconstruction of the legality principle.

From a socio-legal perspective, the concept of *living law* offers a compelling critique of legal positivism by recognizing norms and practices that effectively govern social behavior even when they are not formally codified. Dupret emphasizes that legal practices cannot be understood solely through state legislation or judicial decisions, as normative ordering also emerges from social practices and interactions.¹² This perspective challenges the positivist conception of law as a system primarily grounded in formal legal sources.¹³ The theoretical significance of *living law* becomes clearer when situated within *legal pluralism*, which recognizes that multiple normative orders, including state law and customary law, may coexist within the same social field. In this sense, *legal pluralism* strengthens the *living law* argument by providing a theoretical basis for recognizing the normative authority of socially embedded customary norms alongside formal state law. This relationship is particularly relevant in Indonesia, where *adat* norms continue to regulate aspects of community life. Accordingly, the reconstruction of the principle of legality reflects Indonesia's plural legal reality by recognizing *living law* within clearly defined legal boundaries, while *legal pluralism* provides the theoretical foundation for explaining why such recognition is both relevant and necessary.

Legal pluralism further strengthens the argument for reconstructing the legality principle. As a theoretical framework, legal pluralism recognizes the coexistence of multiple legal systems within a single social field, including state law, customary law, and religious law. Scholars such as Rohmah have demonstrated that legal pluralism is not an exception but a common feature of many societies, particularly in post-colonial contexts.¹⁴ Indonesia exemplifies this condition, as its legal landscape is shaped by a combination of civil law traditions inherited from colonial rule, Islamic legal principles, and diverse customary laws across regions. Within this pluralistic setting, the exclusive reliance on written state law as the sole source of criminal liability appears increasingly inadequate. The classical legality principle, with its emphasis on codification, struggles to capture the normative diversity that exists in practice.¹⁵ Consequently, the reconstruction of legality through living law can be understood as an effort to align formal legal doctrine with the empirical reality of legal pluralism, thereby enhancing both its effectiveness and legitimacy.

The transition from a rigid to a more flexible understanding of legality reflects a broader shift in legal philosophy. Contemporary legal thought increasingly acknowledges that absolute rigidity may hinder justice rather than promote it. While the classical model of legality prioritizes predictability, it may also produce outcomes that are formally correct but substantively unjust, particularly when it disregards local norms and values.¹⁶ By contrast, a reconstructed legality principle seeks to balance legal certainty with contextual sensitivity. This does not mean abandoning the fundamental safeguards of legality, but rather recognizing the relevance of *living law* within clearly defined normative boundaries. Such recognition must be subject to clear criteria and legal safeguards to ensure that the application of unwritten norms remains consistent with legal certainty, fundamental rights,

¹² Hariri, Wicaksana, and Arifin, "A Critical Study of Legal Positivism As a Legal System in a Pluralist Country."

¹³ Baudouin Dupret, "Legal Pluralism, Plurality of Laws, and Legal Practices," *European Journal of Legal Studies* 1, no. 1 (2007): 1–26.

¹⁴ Rohmah and Alfatdi, "From Living Law to National Law: Theoretical Reconstruction of Applying Islamic Law in Indonesia."

¹⁵ Febrianty et al., "The Limitations of Living Law in Indonesian Criminal Law Reform: An Effort To Realize Justice."

¹⁶ McKerracher, "Relational Legal Pluralism and Indigenous Legal Orders in Canada."

and the rule of law, while preventing arbitrariness or abuse of judicial discretion.¹⁷ In the Indonesian context, the need for this reconstruction is particularly evident due to the enduring role of customary law in regulating social life. Adat norms often provide more immediate and culturally resonant mechanisms for resolving disputes and maintaining social harmony than formal legal institutions. However, the historical marginalization of these norms within the formal legal system has created a gap between law as written and law as practiced. The recognition of living law within the legality principle seeks to bridge this gap by acknowledging the normative authority of customary values while maintaining the overarching framework of the rule of law. This integration also reflects the philosophical foundation of Indonesia as a nation that values diversity and local wisdom, as embodied in Pancasila. Therefore, the reconstruction of legality is not only a theoretical necessity but also a reflection of Indonesia's constitutional identity.

Ultimately, the theoretical reconstruction of the principle of legality through the lens of living law and legal pluralism is driven by the need to create a more responsive and inclusive criminal law system. It recognizes that law cannot be static in a dynamic society and that legitimacy depends not only on formal validity but also on social acceptance. By incorporating living law into the framework of legality, the legal system becomes better equipped to address the complexities of a pluralistic society while still upholding fundamental principles such as legal certainty and the protection of individual rights. This reconstruction, therefore, represents a crucial step toward harmonizing formal legal structures with the lived realities of the communities they are intended to serve.

B. Normative Analysis of Living Law Recognition in the Indonesian Criminal Code 2023

The normative recognition of living law within the Indonesian Criminal Code 2023 represents one of the most transformative elements of Indonesia's contemporary criminal law reform. Traditionally, the principle of legality confined criminal liability strictly to written law, thereby ensuring predictability and limiting judicial discretion. However, the 2023 Criminal Code introduces a more nuanced approach by explicitly acknowledging that law is not solely embodied in statutes, but also exists in the form of norms that live and develop within society.¹⁸ This normative shift reflects an effort to harmonize formal legal structures with Indonesia's socio-cultural reality, where customary law continues to play a significant role in regulating social conduct. The inclusion of living law within the formal legal framework marks a departure from rigid legal positivism toward a more pluralistic and context-sensitive legal system, thereby redefining the scope and application of the legality principle itself.

At the core of this transformation are provisions within the Criminal Code that allow courts to recognize and apply unwritten norms under specific conditions. These provisions emphasize that living law may serve as a basis for criminal responsibility only when it is demonstrably "alive" within a particular community and continues to be observed as a binding norm. This requirement is crucial, as it prevents arbitrary invocation of vague or outdated customs that no longer reflect contemporary social values.¹⁹ Furthermore, the law

¹⁷ Ledvinka and Donovan, "Reading Legal Ethnographies to Re-Map Legal Pluralism: A Pospisilian Corrective to the Prevailing Dichotomous Description of Afghanistan's Legal Order."

¹⁸ Wahyudhi, "Customary-Based Restorative Justice: Philosophical Foundations and Normative Relevance in the Indonesian Criminal Justice System."

¹⁹ Faisal et al., "Genuine Paradigm of Criminal Justice: Rethinking Penal Reform within Indonesia New Criminal Code."

imposes additional safeguards by requiring that such norms must not conflict with higher legal principles, including the philosophical foundation of the state (Pancasila), constitutional guarantees, human rights standards, and universally recognized principles of law. In this sense, the recognition of living law is not absolute, but conditional and carefully circumscribed, ensuring that its application remains within the broader framework of the rule of law.

The normative construction of living law recognition also introduces a layered system of legal validation, where unwritten norms must undergo judicial scrutiny before being applied. Judges are tasked with verifying the existence, relevance, and acceptance of the alleged living law within the community.²⁰ This process requires a careful assessment of sociological evidence, such as community practices, customary institutions, and collective perceptions of justice. As a result, the role of judges becomes significantly more complex, as they are no longer mere interpreters of written statutes but also evaluators of social norms. This expanded role raises important questions about judicial capacity, consistency, and accountability, particularly in a legal system that has traditionally emphasized codified rules. Nevertheless, it also provides an opportunity to render decisions that are more responsive to local contexts and societal expectations.

Despite its progressive intent, the normative recognition of living law inevitably generates tension between legal certainty and legal flexibility. On the one hand, the inclusion of unwritten norms enhances the responsiveness of the legal system and allows it to accommodate diverse cultural values. On the other hand, it introduces a degree of uncertainty, as the content and scope of living law may vary across regions and communities. This variability can potentially lead to inconsistent judicial decisions, undermining the predictability that the legality principle seeks to guarantee. Moreover, the reliance on judicial interpretation increases the risk of subjectivity, particularly in the absence of standardized criteria for identifying and validating living law.²¹ These challenges highlight the need for clear guidelines and institutional mechanisms to ensure that the application of living law does not compromise the fundamental principles of legal certainty and equality before the law.

Another critical aspect of the normative framework is the limitation imposed on the application of living law to ensure its compatibility with human rights. The Criminal Code explicitly requires that any recognition of customary norms must align with international human rights standards and constitutional protections.²² This condition serves as an important safeguard against the potential misuse of customary law to justify practices that may be discriminatory or violate individual rights. For instance, certain traditional sanctions or social practices may conflict with modern principles of equality and dignity, necessitating careful judicial evaluation.²³ By subordinating living law to higher normative standards, the legal system seeks to strike a balance between cultural recognition and the protection of

²⁰ Nella Sumika Putri, "The Material Content of Regional Regulations as the Concretization of the Living Legal System in Society (Adat Law) Based on Article 2 of the Indonesian Penal Code (KUHP) 2023," *Jurnal Bina Mulia Hukum* 7, no. 2 (2023): 15–16.

²¹ Jansen Edinata Simanjuntak et al., "Customary Law and Multiple Legal Systems in Criminal Justice: Indonesia's Penal Reform Experience," *Architecture Image Studies* 6, no. 3 (December 2025): 1864–80, <https://doi.org/10.62754/ais.v6i3.528>.

²² Ali Masyhar et al., "Reclaiming the Unwritten: Living Law's Prospects under Indonesia's 2023 Penal Reform Faculty of Law, Universitas Negeri Semarang, Indonesia Faculty of Law, Universitas Jenderal Soedirman, Indonesia Faculty of Islamic Economics and Business, Univ," *Jambe Law Journal* 8, no. 1 (2025): 255–85, <https://doi.org/10.22437/jlj.8.1.255-285>.

²³ Zainal Arifin Hoesein, "The Dynamics of Criminal Law Reform in Indonesia: A Historical and Prospective Review From the Colonial Penal Code to the 2023 National Criminal Code," *Fox Justi: Jurnal Ilmu Hukum* 15, no. 03 (2025): 671–78, <https://doi.org/10.58471/justi.v15i03>.

fundamental rights. This approach reflects an understanding that while legal pluralism is valuable, it must operate within the boundaries of universal legal principles.

In addition to its implications for judicial practice, the recognition of living law also carries broader institutional consequences for the criminal justice system. Law enforcement agencies, prosecutors, and legal practitioners must adapt to a framework in which the sources of law are no longer limited to written statutes. This requires enhanced training, interdisciplinary knowledge, and greater sensitivity to cultural contexts. Furthermore, there is a need for collaboration with local communities and customary institutions to accurately identify and understand the norms that constitute living law. Without such efforts, the implementation of these provisions risks becoming inconsistent or ineffective. Therefore, the success of this normative innovation depends not only on the text of the law but also on the capacity of legal institutions to operationalize it in practice.

Ultimately, the normative analysis of living law recognition in the 2023 Criminal Code reveals both its transformative potential and its inherent complexities.²⁴ On one hand, it represents a significant step toward a more inclusive and contextually grounded legal system, capable of reflecting Indonesia's diverse cultural landscape. On the other hand, it introduces new challenges related to legal certainty, judicial discretion, and the protection of human rights. The key to addressing these challenges lies in the development of clear interpretative guidelines, robust judicial training, and continuous monitoring of legal practice. By doing so, the integration of living law can contribute to a more balanced and legitimate criminal justice system, where the principle of legality is not only preserved but also enriched through its engagement with the realities of social life.

C. Implications and Challenges of Integrating Customary Law Values into the Principle of Legality

The integration of customary law values into the principle of legality under the Indonesian Criminal Code 2023 generates profound implications for the Indonesian criminal justice system, particularly in redefining the relationship between formal law and social norms. At a practical level, this integration expands the sources of criminal law beyond codified statutes to include norms that live and function within society. Such an expansion allows the legal system to become more responsive to local contexts, thereby enhancing its social legitimacy and acceptance. In communities where customary norms remain deeply embedded, the recognition of living law can strengthen trust in legal institutions because judicial decisions are perceived as reflecting shared values rather than imposed external rules. This shift also contributes to restorative justice practices, where the focus is not merely on punishment but on restoring social harmony, which has long been a hallmark of customary legal systems. Consequently, the integration of customary law values offers an opportunity to transform the criminal justice system into one that is not only legally valid but also socially meaningful.

However, this transformation inevitably raises complex questions regarding legal certainty, which remains a fundamental element of the principle of legality. The classical formulation of legality emphasizes predictability, clarity, and uniform application of the law, ensuring that individuals can foresee the legal consequences of their actions. The inclusion of living law, by contrast, introduces variability, as customary norms differ across

²⁴ Annisa Sabilla Sueni et al., "Living Law and Hybrid Justice: The Integration of Customary Criminal Law in Indonesia's 2023 National Criminal Code," *Jurnal Hukum Progresif* 13, no. 2 (2025): 1-16.

regions and communities.²⁵ This diversity may lead to inconsistencies in judicial decisions, where similar acts are treated differently depending on the applicable local norms. Such disparities risk undermining the principle of equality before the law and may create perceptions of injustice among individuals who are subject to different legal standards. Therefore, while flexibility enhances contextual justice, it simultaneously challenges the uniformity and predictability that are essential to the rule of law. Balancing these competing demands becomes a central issue in the practical implementation of the reconstructed legality principle.

Another critical implication lies in the realm of human rights protection. The recognition of customary law values must be carefully aligned with constitutional guarantees and international human rights standards to prevent the legitimization of practices that may be discriminatory or incompatible with modern legal principles. In some cases, customary norms may reflect hierarchical or exclusionary social structures that conflict with contemporary notions of equality and individual rights. The requirement that living law must conform to higher normative standards serves as an essential safeguard, but its application depends heavily on judicial interpretation.²⁶ Judges must exercise careful judgment in determining whether a particular customary norm can be legitimately applied without violating fundamental rights. This task is inherently complex, as it requires not only legal expertise but also sensitivity to cultural contexts and ethical considerations. As such, the integration of customary law values necessitates a more nuanced and interdisciplinary approach to legal reasoning.

The challenges associated with proving the existence and validity of living law further complicate its implementation. Unlike written statutes, which can be easily identified and referenced, customary norms are often unwritten, fluid, and context-dependent. Establishing that a particular norm is genuinely “alive” within a community requires empirical evidence, such as testimony from community leaders, documentation of practices, or anthropological insights. This evidentiary process can be time-consuming and may vary significantly across cases, leading to inconsistencies in how living law is recognized and applied.²⁷ Moreover, the lack of standardized criteria for determining the validity of customary norms increases the risk of subjectivity and arbitrariness in judicial decisions. Without clear guidelines, there is a possibility that certain norms may be selectively invoked or misinterpreted, potentially leading to unequal treatment and legal uncertainty.

In addition to evidentiary challenges, the expanded role of judges in interpreting and applying living law introduces risks related to judicial discretion and potential abuse of power. The shift from a strictly codified system to one that incorporates unwritten norms inevitably grants judges greater interpretative authority. While this discretion can be used to achieve substantive justice, it also opens the door to inconsistent or biased decision-making if not properly regulated.²⁸ Differences in judges’ backgrounds, perspectives, and levels of understanding of customary law may result in divergent interpretations of similar

²⁵ Achmad Sarifudin Malik and Ratih Yulistiya Rahman, “Synergy of Moral Values in Customary Law with the Philosophy of Natural Law Article History,” *Iuridica Pancasila* 1, no. 1 (2024).

²⁶ Yohanna Y. R. Watofa et al., “Integration of Customary Law and State Law in Resolving Natural Resource Conflicts in Indigenous Areas,” *Journal of the American Institute* 2, no. 8 (2025): 1212–19, <https://doi.org/10.71364/178dhm07>.

²⁷ Ismail Maswatu et al., “Legal Protection of Indigenous Land Rights : A Study of Customary Law Integration in National Legal” 4, no. 3 (2025): 1789–94.

²⁸ Afnaini, “Integration of Customary Criminal Law into the National Legal System : Opportunities and Challenges,” *Fox Justi : Jurnal Ilmu Hukum* 15, no. 02 (2025): 607–18, <https://doi.org/10.58471/justi.v15i02>.

norms. This variability can weaken public confidence in the legal system and raise concerns about accountability. Therefore, the integration of customary law values requires robust institutional safeguards, including judicial training, clear interpretative frameworks, and mechanisms for appellate review to ensure consistency and fairness.

From a broader institutional perspective, the integration of customary law values also demands significant adjustments within the criminal justice system. Law enforcement officers, prosecutors, and legal practitioners must develop the capacity to identify and engage with living law in a systematic and informed manner. This may involve collaboration with customary institutions, the development of databases or documentation of local norms, and the incorporation of socio-legal research into legal practice. Without such institutional support, the application of living law risks becoming fragmented and ineffective. Furthermore, there is a need for continuous dialogue between state institutions and local communities to ensure that customary norms evolve in harmony with broader legal and societal developments. This dynamic interaction is essential to maintaining the relevance and legitimacy of both formal and informal legal systems.

To address these challenges, a set of strategic recommendations is necessary to ensure that the integration of customary law values remains consistent with the principles of a modern rule-of-law state. First, the development of clear and standardized guidelines for identifying and validating living law is crucial to reducing uncertainty and enhancing consistency. Second, comprehensive judicial training programs should be implemented to equip judges with the necessary knowledge and skills to handle cases involving customary norms. Third, mechanisms for monitoring and evaluating judicial decisions should be strengthened to detect and address disparities or potential abuses of discretion. Fourth, greater emphasis should be placed on harmonizing customary law with human rights standards, ensuring that cultural recognition does not come at the expense of fundamental rights. Finally, the establishment of interdisciplinary research and documentation initiatives can provide a more solid empirical foundation for the application of living law.²⁹

In conclusion, the integration of customary law values into the principle of legality presents both significant opportunities and formidable challenges. On one hand, it enables the criminal justice system to become more responsive, inclusive, and reflective of Indonesia's rich cultural diversity. On the other hand, it introduces complexities related to legal certainty, human rights protection, evidentiary standards, and judicial discretion. The success of this integration ultimately depends on the ability of legal institutions to manage these challenges through thoughtful regulation, capacity building, and continuous evaluation. By striking an appropriate balance between flexibility and certainty, Indonesia can develop a criminal law system that not only upholds the rule of law but also resonates with the lived experiences of its people.

CONCLUSION

This study concludes that the recognition of living law under Indonesia's new Criminal Code does not abolish the principle of legality but reconfigures its operation within a plural legal order. Article 1 of Law Number 1 of 2023 continues to establish formal legality and

²⁹ Loso Judijanto, "Customary Law as a Pillar of Identity and Sustainability: A Review of Its Dynamics, Challenges, and Relevance in the Era of Modernization," *International Journal of Global Sustainable Research* 3, no. 11 (2025): 787-804, <https://doi.org/10.59890/ijgsr.v3i11.96>.

prohibit analogy, while Article 2 creates a limited normative space for living law as a basis for recognizing customary criminal conduct. Accordingly, the relationship between legality and living law should not be understood as a choice between legal certainty and substantive justice, but as a constitutional requirement to reconcile both dimensions. The study proposes a bounded living-law legality model, in which customary criminal norms may be recognized only after satisfying cumulative requirements concerning their existence, territorial applicability, community recognition, normative content, and compatibility with the Constitution, human rights, and generally recognized principles of law. Judicial recognition must therefore be based on verifiable evidence and reasoned judicial assessment rather than subjective reliance on customary practices. The reconstruction consequently preserves the core functions of legality - foreseeability, non-arbitrariness, and limitation of state power - while allowing legitimate customary norms to contribute to substantive justice. Its implementation requires institutional mechanisms for identifying and validating living law, judicial accountability, adequate evidentiary standards, and continuous constitutional and human-rights scrutiny. The contribution of this study lies in conceptualizing living law not as an unrestricted exception to legality, but as a constitutionally bounded component of legality in a plural legal system.

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Conflict of Interest Statement: The author(s) declares that research was conducted in the absence of any commercial or financial relationship that could be construed as a potential conflict of interest.

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