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Faisal /
Derita Prapti Rahayu /
Dwi Haryadi /
Jeanne Darc Noviayanti Manik

Código: 2208901213 • Autor: istockphoto.com

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Seeking Certainty in Uncertainty: Integrating Living Law into Indonesia's Criminal Code to Harmonize Legal Pluralism and Indigenous Justice

Faisal[*]
Derita Prapti Rahayu[**]
Dwi Haryadi[***]
Jeanne Darc Noviayanti Manik[****]

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Abstract

This research examines the transformative implications of integrating *living law* into Indonesia's new criminal code within the nation's pluralistic legal framework, encompassing both statutory law and dynamic indigenous legal traditions. The study identifies significant challenges in harmonizing these systems, particularly due to the absence of a comprehensive regulatory framework governing indigenous justice. To address this issue, the establishment of *Adat Courts* is proposed as a strategic mechanism to preserve and enforce indigenous values without necessitating their formal codification. Employing a qualitative methodology grounded in legal philosophy and regulatory analysis, the research highlights the urgent need to resolve potential jurisdictional overlaps and normative contradictions that hinder the effective implementation of living law. The findings underscore that Adat Courts serve as a pragmatic and culturally sensitive solution, preserving Indonesia's legal diversity while maintaining the integrity of the national legal order. In conclusion, the integration of living law into Indonesia's criminal code signifies a critical juncture in the evolution of the country's legal system. To implement Adat Courts, we argue for the government to: (i) establish a regulatory framework recognizing Adat Courts, (ii) clarify jurisdiction, and (iii) set minimum procedural standards.

Keywords: Adat Courts, harmonization, substantial justice, legal pluralism, living law.

[*] Faculty of Law, Universitas Bangka Belitung. Email: faisal@ubb.ac.id, ORCID: https://orcid.org/0000-0003-1336-0120

[**] Faculty of Law, Universitas Bangka Belitung. Email: deritapraptir@ubb.ac.id, ORCID: https://orcid.org/0000-0003-1457-3312

[***] Faculty of Law, Universitas Bangka Belitung. Email: dwi.haryadi@ubb.ac.id, ORCID: https://orcid.org/0000-0002-7164-9048

[****] Faculty of Law, Universitas Bangka Belitung. Email: jeanne-darc@ubb.ac.id, ORCID: https://orcid.org/0000-0002-1184-1804

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Buscar certeza en la incertidumbre: integración de la ley viva en el Código Penal de Indonesia para armonizar el pluralismo jurídico y la justicia indígena

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Resumen

Esta investigación examina las implicaciones transformadoras de la integración del *living law* (derecho vivo) en el nuevo Código Penal de Indonesia, en el marco jurídico pluralista del país, que abarca tanto el derecho estatutario como las tradiciones jurídicas indígenas dinámicas. El estudio identifica desafíos significativos en la armonización de estos sistemas, en particular debido a la ausencia de un marco normativo integral que rija la justicia indígena. Para abordar esta cuestión, se propone establecer Tribunales Adat como un mecanismo estratégico para preservar y aplicar los valores indígenas sin necesidad de su codificación formal. Mediante una metodología cualitativa basada en la filosofía del derecho y en el análisis normativo, la investigación destaca la urgente necesidad de resolver posibles superposiciones jurisdiccionales y contradicciones normativas que obstaculizan la implementación efectiva del *living law*. Los hallazgos subrayan que los Tribunales Adat constituyen una solución pragmática y culturalmente sensible, que preserva la diversidad jurídica de Indonesia al tiempo que mantiene la integridad del orden jurídico nacional. En conclusión, la integración del *living law* en el Código Penal de Indonesia representa un punto crítico en la evolución del sistema jurídico del país. Para implementar los Tribunales Adat, sostenemos que el gobierno debe: (i) establecer un marco normativo que los reconozca, (ii) precisar su jurisdicción y (iii) fijar estándares procesales mínimos.

Palabras clave: Tribunales Adat, armonización, justicia sustantiva, pluralismo jurídico, derecho vivo.

Introduction

The transition of Indonesia's criminal law policy has entered a transformative phase with the promulgation of the Draft Criminal Code (*Rancangan Kitab Undang-Undang Hukum Pidana* - RKUHP) as Law 1 of 2023 on December 6, 2022.[1] The deliberation on the RKUHP has been a perennial agenda item in Indonesia's penal law reform since 1963, aiming to replace the Dutch Colonial Criminal Code, which had been in effect since January 1, 1918, and remained operative post-independence.[2] As a country that has adopted the Continental European legal system since its independence in 1945 to avoid legal loopholes, Indonesia's need to present a genuinely indigenous criminal law product became inevitable.[3] In the penal reform, the missions of decolonization, modernization, unification, and the intrinsic incorporation of national values have been implemented concurrently with the application of living law as a formal legal source in the criminal code.[4] The enactment of the RKUHP represents a significant departure from the colonial legacy, thereby marking a paradigm shift from a colonial legal legacy toward the construction of a national penal framework normatively aligned with Indonesia's legal pluralism and cultural identity.

The deliberative process of the RKUHP reflects a long-standing effort to replace a legal system inherited from the colonial era with a code that reflects the aspirations of the Indonesian people.[5] Since its adoption, the RKUHP has been a focal point of the ongoing discourse on legal reform and national identity, with stakeholders actively shaping the contours of the new criminal code.[6] In the quest for a genuine and comprehensive criminal law system, Indonesia has navigated through the challenges of reconciling its historical legal foundations with the contemporary needs of a dynamic society. The inclusion of living law as a formal source underscores

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1 Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?" *Griffith Law Review* 32, no. 2 (2023), 190–214, https://doi.org/10.1080/10383441.2023.2243772.

2 Faisal Faisal et al., "Progressive Consideration of Judges in Deciding Sentencing Under Indonesia New Criminal Code," *Jambe Law Journal* 6, no. 1 (2023), 85–102, https://doi.org/10.22437/jlj.6.1.85-102.

3 Muslihun Muslihun, "Legal Positivism, Positive Law, and the Positivisation of Islamic Law In Indonesia," *Ulumuna* 22, no. 1 (2018), 77–95, https://doi.org/10.20414/ujis.v22i1.305.

4 Fatmawati Fatmawati, Muhammad Shuhufi, and Anita Chaturvedi, "Defamation in the New Criminal Code: A Review of Substantive Justice," *Jurnal Ius* 11, no. 3 (2023), 465–80, https://doi.org/10.29303/ius.v11i3.1288.

5 Endri Endri and Irwandi Syahputra, "Community Service Order: Challenges and Expectations as a New Type of Sanction in the Criminal Code Draft (RKUHP)," in *Proceedings of the 1st International Conference on Social-Humanities in Maritime and Border Area (SHIMBA 2022), Tanjung Pinang, Riau, September 18-20, 2022*, 123–30 (2022), https://doi.org/10.4108/eai.18-9-2022.2326019.

6 Simon Butt and Tim Lindsey, "The Criminal Code," in *Crime and Punishment in Indonesia* (London: Routledge, 2020), 21–43, https://doi.org/10.4324/9780429455247-3.

the commitment to infusing traditional wisdom and local values into the legal framework, contributing to a more inclusive and culturally sensitive criminal justice system.[7] As Indonesia enters this new chapter in its legal landscape, the successful implementation of the RKUHP represents not only a milestone in penal reform but also a testament to the nation's resilience in forging a legal identity that respects its history while addressing the evolving demands of justice in the 21st century.

The protracted deliberations spanning over six decades have culminated in a final draft comprising 632 articles, meticulously organized into two comprehensive volumes: General Provisions and Criminal Offenses.[8] This transformative process extends beyond mere adjustments to technical norms within the criminalization framework, representing a transitional shift from the Dutch Colonial Criminal Code to an authentic paradigm firmly grounded in the socio-cultural realities of the Indonesian nation. Consequently, numerous provisions hitherto unfamiliar in the *Wetboek van Strafrecht* (Dutch Colonial Criminal Code/Previous Indonesian Criminal Code) are meticulously addressed in the New Criminal Code, slated to take effect in 2025.[9] However, the protracted political negotiations during the drafting of the Criminal Code have left in their wake a gamut of critiques and fundamental issues, chief among them being the regulation of living law, which is characterized by a discernible degree of ambiguity.[10]

Criminal law serves as a reflective mirror of a nation's moral fabric and plays a pivotal role as a guarantor of endeavors to establish a civilized societal order.[11] The significance of criminal law in preventing and addressing criminal acts is intrinsically linked to the notions of justice and societal security, which constitute fundamental needs according to Abraham Maslow's hierarchy of physiological

[7] Andri Yanto Faisal et al., "Genuine Paradigm of Criminal Justice: Rethinking Penal Reform within Indonesia New Criminal Code," *Cogent Social Sciences* (2024), 1–17, https://doi.org/10.1080/23311886.2023.2301634.

[8] Adi Mansar and Ikhsan Lubis, "Harmonization of Indonesian Criminal Law Through the New Criminal Code Towards Humane Law," *Journal of Law and Sustainable Development* 11, no. 12 (2023), 01–17, https://doi.org/10.55908/sdgs.v11i12.2381.

[9] Yulio Iqbal Cahyo Arsetyo, "Indonesia's New Criminal Code and Its Implication of International Treaties of Human Rights Commitment in Indonesia," *Jurnal Penelitian Serambi Hukum* 16, no. 2 (2023), 179–86, https://doi.org/10.59582/sh.v16i02.832.

[10] Tongat Tongat, "The Ambiguous Authority of Living Law Application in New Indonesian Penal Code: Between Justice and the Rule of Law," *International Journal of Criminal Justice Science* 12, no. 2 (2022), 188–209, https://ijcjs.com/menu-script/index.php/ijcjs/article/view/529.

[11] Cahya Wulandari et al., "Penal Mediation: Criminal Case Settlement Process Based on the Local Customary Wisdom of Dayak Ngaju," *Lex Scientia Law Review* 6, no. 1 (2022), 69–92, https://doi.org/10.15294/lesrev.v6i1.54896.

needs.[12] Consequently, the law must seamlessly correlate and achieve equilibrium with the social realities within which it is enforced. The linear alignment of legal norms with societal values necessitates a bridging mechanism that enables this harmonious convergence, and an ideal paradigm sourced from the societal milieu itself serves this purpose.[13] In its practical implementation, a meritorious legal framework must derive its substance from local societal values. However, for a nation characterized by a high degree of cultural pluralism, such as Indonesia, this undertaking proves to be a formidable challenge.[14]

The extensive reconfiguration of the criminal law landscape in Indonesia, exemplified by the RKUHP, signifies not only a legal metamorphosis but also an evolving societal trajectory towards a more culturally nuanced and responsive legal system.[15] The incorporation of hitherto unfamiliar elements, such as living law, underscores an earnest effort to harmonize the legal framework with Indonesia's diverse cultural tapestry. Nevertheless, the persisting criticisms and challenges underscore the delicate equilibrium required between respecting cultural diversity and upholding a coherent and effective legal system. As the New Criminal Code is poised to take effect in 2025, the ongoing discourse and adaptive measures will play a pivotal role in shaping the efficacy and legitimacy of the reformed criminal justice system in Indonesia.[16]

Substantively, Article 2(1) of Law 1 of 2023 concerning Criminal Law establishes the state's acknowledgment of living law as a recognized source of criminalization alongside national law.[17] This conceptual recognition undermines the position of the previously emphasized legality principle in Article 1(1) and allows the incorporation of living law into law enforcement practices. However, the inclusion of living law in this revision of Indonesia's criminal law reflects a dichotomous political choice. In addition to the fervor surrounding penal reform and the decolonization

12 Bob Bowen, *The Matrix of Human Needs: Reframing Maslow's Hierarchy of Needs* (Huntington Beach, CA: Scientific Research Publishing, Inc., 2020), 1–8, https://doi.org/10.31124/advance.12442661.v1.

13 Emilia Shelawati, Mutia Andini, and Masduki Asbari, "Pancasila as a Paradigm of Legal Development in Indonesia," *Journal of Information Systems and Management (JISMA)* 1, no. 2 (2022), 22–27, https://doi.org/10.59004/jisma.v1i1.9.

14 Bahtiyar Efendi and Widhi Handoko, "Implementation of Criminal Law in Handling Narcotics Cases in Indonesia," *Pena Justisia Media Komunikasi Dan Kajian Hukum* 21, no. 2 (2022), https://doi.org/10.31941/pj.v21i2.2678.

15 Elena Maculan and Alicia Gil Gil, "The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts," *Oxford Journal of Legal Studies* 40, no. 1 (2020), 132–57, https://doi.org/10.1093/ojls/gqz033.

16 Fatmawati, Shuhufi, and Chaturvedi, "Defamation in the New Criminal Code."

17 Henny Saida Flora, "The Living Law's Restorative Justice: Implementation of Restorative Justice as an Integrative Mechanism in Criminal Law," *Unram Law Review* 7, no. 1 (2023).

of criminal code values, the gradual acknowledgment of living law diminishes its content, substance, and even its inherent values. Furthermore, there exists ambiguity concerning the scope of the applicable living law, its binding efficacy, enforcement mechanisms, and regulatory sources.[18]

Living law is acknowledged, and individuals may be prosecuted for violations thereof. Simultaneously, there is currently no regulation in the Criminal Code or other legal instruments specifying the types of living law in question.[19] Despite Indonesia being a multicultural nation with diverse local wisdom on criminalization, this situation widens the space for legal uncertainty, while certainty itself is a fundamental pillar of modern criminal law.[20] The dichotomy of living law in Indonesia's new criminal code exists at the crossroads of potentialities, oscillating between the recognition of legal pluralism and the pursuit of social justice, or legal uncertainty and the transformation of living law into a form resembling "zombie law."[21]

Within this conceptual framework, the integration of living law into the New Criminal Code unfolds dual potentials warranting meticulous scrutiny.[22] On one front, the assimilation of living law presents expansive opportunities to attain substantive justice, addressing inherent lacunae within the somewhat rigid positivist dimension.[23] Especially in the Indonesian context, where the legal landscape has lagged behind that of other nations, living law emerges as a catalyst for revitalizing the criminal justice system. Furthermore, living law serves as a conduit for integrating localism and regional values into the formal legal realm. This infusion enriches judges' considerations during criminal sentencing, offering a more nuanced and culturally sensitive approach to justice administration.[24] It signifies a departure from conventional, often monolithic, legal considerations and embraces the diversity inherent in Indonesia's societal fabric.

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18 Tongat, "The Ambiguous Authority."

19 Robert W. Hefner, "The Politics of Indonesia's New Criminal Code," *Australian Journal of Law and Religion* 2 (2023), 104–6, https://doi.org/10.55803/h161a.

20 Muladi and Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana* (Bandung: Alumni, 2005), 30–45.

21 Catarina Sjölin, "The Need to Kill off Zombie Law: Indecent Assault, Where It Went Wrong and How to Put It Right," *Journal of Criminal Law* 81, no. 1 (2017), 50–65, https://doi.org/10.1177/0022018316685023.

22 Anthony C. Diala, "The Concept of Living Customary Law: A Critique", *The Journal of Legal Pluralism and Unofficial Law*, 49.2 (2017), 143–65, https://doi.org/10.1080/07329113.2017.1331301.

23 Sophian Yahya Selajar and Aroma Elmina Martha, "Indonesian Criminal Code, Living Law and Control in Law Enforcement in Indonesia," *SASI* 29, no. 4 (2023), 705–705, https://doi.org/10.47268/sasi.v29i4.1697.

24 Fatmawati, Shuhufi, and Chaturvedi, "Defamation in the New Criminal Code."

On the flip side of this transformative potential, the dynamic nature of living law introduces an element of dualism. This dualism, if left unaddressed and unregulated by relevant mechanisms, poses a significant risk, potentially leading to legal chaos, heightened uncertainty, and conflicts across various dimensions—be it in terms of legal substance, structural arrangements, or the broader legal culture. Effectively navigating this complex terrain necessitates robust legal breakthroughs that can be pragmatically applied. These breakthroughs must serve as a harmonious convergence point between the latent potentials and inherent weaknesses in the accommodation of living law in the new criminal code. By establishing such a balance, the overarching objectives of incorporating living law, with its potential for cultural enrichment and justice reform, can be more feasibly and effectively realized.

The focus of this research is a comprehensive exploration of the relevance of the issues emerging after the enforcement of living law within the new criminal code. It seeks to uncover potential solutions and identify ideal implementation mechanisms tailored to Indonesia's unique legal landscape and cultural diversity. Through this exploration, the research aims to contribute valuable insights to refine and optimize the integration of living law into the Indonesian criminal justice framework.

Research Method

This study employs a legal-normative methodology; however, it does not scrutinize the law in isolation from its social environment. Instead, it examines the law in relation to society. Drawing on Ricœur's hermeneutical thought regarding the grafting of hermeneutics and phenomenology, it is understood that legal norms contained within regulatory texts are not merely static in meaning but constitute language as events or discourses with a living and dynamic dimension.[25] Consequently, legal research cannot be conducted solely by interpreting texts, as these texts are embedded in contexts that allow for multiple interpretations. This implies that an understanding of the contextual meaning of the text and the language of regulation is also necessary.[26]

[25] Darren E. Dahl, "The Origin in Traces: Diversity and Universality in Paul Ricoeur's Hermeneutic Phenomenology of Religion," *International Journal for Philosophy of Religion* 86, no. 2 (2019), 99–110, https://doi.org/10.1007/s11153-019-09714-1.

[26] Philip Langbroek et al., "Methodology of Legal Research: Challenges and Opportunities," *Utrecht Law Review* 13, no. 3 (2017), 1, https://doi.org/10.18352/ulr.411.

Law is not viewed merely as a collection of norms but is also considered from the perspective of the social impact and significance of norm formation (law), emphasizing the social background's significance.[27] Therefore, this investigation will refer to the textual forms of the law and its manifestations as ideas, aspirations, values, morals, and justice as conceptualizations of ideological, philosophical, and moralistic legal perspectives. In the realm of legal hermeneutics and phenomenology, the study acknowledges that legal norms, as encapsulated in regulatory texts, transcend static linguistic meanings. Ricœur's philosophy underscores that these norms constitute a living discourse, subject to dynamic interpretation and imbued with the socio-cultural context. Consequently, legal inquiry cannot be confined to a narrow textual analysis; it necessitates an exploration of the contextual meanings and the linguistic nuances of regulatory frameworks.

To complement the Ricœurian hermeneutical analysis, this study incorporates the *Chaos Theory of Law* developed by Charles Sampford to further elucidate the urgency of legal certainty in the implementation of norms. This theoretical framework views social and legal realities as inherently fluid and dynamic, characterized by complexity and unpredictability. Accordingly, it underscores the necessity for robust normative guidelines that are not only clearly articulated but also contextually adaptable in their application. Within this paradigm, legal certainty is not a static construct but a stabilizing force essential for navigating the chaotic nature of law in practice. The data in this study are derived from a comprehensive literature review, including primary legal sources such as statutory regulations, legislative drafts (notably the RKUHP), and official government documents. Secondary sources include scholarly books, journal articles, legal commentaries, and reports relevant to legal reform and legal hermeneutics. These materials were selected purposively to ensure a diverse and critical perspective on the formulation and interpretation of the RKUHP, as well as to trace the theoretical underpinnings of legal pluralism and legal certainty in the Indonesian context.

Proposing a comprehensive legal study aligns with this approach, emphasizing the need to view law beyond mere compilation of norms. It underscores the importance of understanding the social ramifications of normative formations, thereby accentuating the significance of the societal context.[28] This study, therefore, embraces a

[27] Naomi Creutzfeldt, Marc Mason, and Kirsten McConnachie, eds., *Routledge Handbook of Sociolegal Theory and Methods* (London: Routledge, 2019), https://doi.org/10.4324/9780429952814.

[28] Vasilios Ioakimidis and Reima Ana Maglajlic, "Neither 'Neo-Luddism' nor 'Neo-Positivism': Rethinking Social Work's Positioning in the Context of Rapid Technological Change," *The British Journal of Social Work* 53, no. 2 (2023), 693–97, https://doi.org/10.1093/bjsw/bcad081.

holistic examination that considers legal texts not only as normative provisions but also as reflections of ideological, philosophical, and moral perspectives, embodying ideas, aspirations, values, morals, and justice.

Results and Discussion

Living Law Application in Indonesia's New Criminal Code

Indonesia inherits the principle of legality from the Continental European legal tradition.[29] At the time of the proclamation of Independence on August 17, 1945, Indonesia's national identity had not yet fully coalesced, marked by a multicultural, multi-ethnic population united by a shared experience of Dutch colonization from 1816 to 1942. Post-independence, the absence of a domestically crafted criminal legal instrument compelled the temporary adoption of the familiar Dutch legal system, which was subsequently ratified with several minor modifications.[30] This legal inheritance culminated in the adaptation of the Dutch criminal code, *Wetboek van Strafrecht voor Nederlands-Indie* (WvS-NI), into the Criminal Code (Kitab Undang-Undang Hukum Pidana - KUHP) in 1946 for the Java and Madura regions, and since 1978, for the entire territory of Indonesia. As a legal product rooted in the values and morality of Continental European society, WvS-NI exhibited sociocultural gaps relative to Indonesian society, leading to a misalignment between legal needs and the neglect of the plural and complex social reality.

The primary principle characterizing Continental European law is legal certainty, historically rooted in the development of legalism, positivism, and mercantilism that flourished in Europe during the Renaissance and Enlightenment. Article 1(1) of WvS-NI explicitly affirms the application of the principle of legality in Indonesia, stating: "No act shall be penalized unless the strength of the criminal laws in existing legislation existed when the act was performed."

Article 1(1) is grounded in the thoughts of Ludwig Andreas von Feuerbach, encapsulated in his famous maxim "*nullum delictum nulla poena sine praevia lege poenali*"

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[29] Boy Nurdin and Khayitjon Turdiev, "Paradigm of Justice in Law Enforcement in the Philosophical Dimensions of Legal Positivism and Legal Realism," *Lex Publica* 8, no. 2 (2021), 65–74, https://doi.org/10.58829/lp.8.2.2021.65-74.

[30] Mashuril Anwar, "Holistic Paradigm Contradiction of the Ultimate Principle of Remedium Against the Principle of Legality in Environmental Criminal Law Enforcement," *Administrative and Environmental Law Review* 1, no. 1 (2020), 43–52, https://doi.org/10.25041/aelr.v1i1.2083.

(no offense, no punishment without a prior penal law).[31] The inheritance of the legality principle in WvS-NI serves as the evaluative foundation for criminal acts, relying solely on written law as the source.[32] This condition results in the neglect of Indonesian values and incompatibility between legal norms and the social dimensions of the society in which they are applied. In reality, legal texts from one nation cannot be adopted and implemented seamlessly in another, particularly when the two nations' socio-cultural values diverge.[33]

Textual disparities in the implementation of a nation's legal products in another nation lead to legal disruptions in the enforcement process. Substantive justice becomes elusive, culminating in procedural justice.[34] This premise was fully agreed upon during the First National Law Seminar in 1963, which determined that the effort to formulate a New Criminal Code with a genuine paradigm must promptly take into account the social values of Indonesian society and provide room for living law.[35] In the final formulation, ratified as Law 1 of 2023, the Indonesian Criminal Code revisits the legality principle by expanding the sources of criminalization to encompass unwritten law. This provision is stipulated in Article 2(1), as stated: "The provisions, as explained in Article 1 Paragraph (1) (the principle of legality), do not reduce the enactment of laws in society that determine that a person should be punished even though the act is not regulated in this law."

Furthermore, living law is circumscribed by the provisions of Article 2(2), as stated: "The law that lives in the community 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 community of nations."

Further expounding in the explanatory section, the intent of Article 2(1) is elucidated as follows: "What is denoted by the law residing in society is customary law, which dictates that someone who commits certain actions deserves punishment.

31 Lalu Alex Tantoi, Abdul Madjid, and Milda Istiqomah, "Comparison of the Concept of Legal Certainity in the Regulation of the Death in the Old Criminal Code and the National Criminal Code (Indonesia)," *International Journal of Business, Law, and Education* 4, no. 2 (2023), 1085–93, https://doi.org/10.56442/ijble.v4i2.271.

32 Wulandari et al., "Penal Mediation."

33 Satjipto Raharjo, *Hukum Dalam Jagat Ketertiban* (Jakarta: UKI Press, 2006), 89–91.

34 Paul J. Stancil, "Substantive Equality and Procedural Justice," *Iowa Law Review* 102, no. 4 (2017), 1633–84, https://ilr.law.uiowa.edu/print/volume-102/substantive-equality-and-procedural-justice.

35 Flora, "The Living Law's Restorative Justice."

This provision's acknowledgment of the law within society pertains to unwritten laws that remain valid and evolving in the lives of the Indonesian people. Regional regulations govern these customary crimes, reinforcing law enforcement for community members."

The integration of living law into national legal frameworks proves to be exceedingly intricate, given the inherently pluralistic, diverse, and regionally dispersed nature of living law, which markedly differs from the administrative governance map.[36] Nevertheless, the incorporation of Article 2(1) into the Criminal Code yields four key interpretations. Firstly, there are two valid and acknowledged sources of criminalization in Indonesia, namely national law and living law. Secondly, the scope of living law that can be considered a source of criminalization includes customary law governing the imposition of sanctions for specific actions. Thirdly, before it can be applied, living law must be codified in regional regulations (provincial/regional laws). Fourthly, living law is applicable within the delimited environment of its origin, as long as it remains extant, is not regulated in the criminal code, and does not contravene Pancasila, the Constitution of 1945, Human Rights, and general legal principles recognized by society.

Pluralism of Living Law: The Linkage of Customary Law and Sharia Law

The Indonesian Criminal Code specifically confines the definition of living law to customary law. Customary law, in this context, refers to a legal practice that is observable and deemed by relevant actors to be a legal opinion or a necessity.[37] It is locally applied by society based on socio-cultural relations. Snouck Hurgronje, in his view, terms customary law "adat recht." [38] However, there is a theoretical discrepancy between the delineation of living law in the Criminal Code and the intricate social reality of Indonesian society, which encompasses a third legal sub-

[36] Yusuf Saefudin, "Living Law in The Perspective of Progressive Law: The Urgency of Its Regulation in The Draft Indonesian Criminal Code," *Jurnal Dinamika Hukum* 21, no. 2 (2021), 358, https://doi.org/10.20884/1.jdh.2021.21.2.3526.

[37] Max Gluckman, *Ideas Procedures in African Customary Law: Studies Presented and Discussed at the Eighth International African Seminar at the Haile Selassie I University, Addis Ababa* (London: Routledge, 1966).

[38] Eva Achjani Zulfa, "Recent Indonesian Criminal Law Development: The State of Adat Court in National Law System," *Indonesian Law Review* 7, (2015), 11–26.

system: sharia law. Determining whether sharia law is an integral part of customary law or vice versa proves to be a complex endeavour.[39]

Intense debates and theoretical conflicts concerning the relationship between customary law and sharia law, as manifestations of living law, underscore that both have a social foundation for enforcement in Indonesia.[40] Various theories have attempted to elucidate this relationship. Broadly, two predominant perspectives expound upon the relationship between customary law and sharia law in Indonesia.[41] Firstly, the viewpoint posits that Islamic law dominates the cultural landscape of Indonesian society, exerting a direct influence on the transition of customary law to align with it. This perspective emphasizes that customary law operates under the dominance of Islamic sharia law. Included in this conceptualization are the Receptio in Complexu theory, introduced by C.F. Winter-Salomon Keyzer, and the Receptio a Contrario theory, introduced by Hazairin. Secondly, the perspective suggests that customary law and sharia law are distinct entities, often in competition due to differences in values and norms. This implies occasional conflicts between customary law and sharia law, except when Islamic law has permeated customary law. Included in this viewpoint are the Reception theory introduced by Snouck Hurgronje and Van Vallenhoven.[42]

Since gaining independence, Indonesia's legal system, defining national law, has consisted of three legal subsystems: the Western legal system, customary law, and Islamic sharia law.[43] However, among these three legal subsystems contributing to the construction of national law, the most significant theoretical conflict arises between customary law and Islamic law. In the author's research, this theoretical conflict results in three forms of relationships between customary law and sharia law. Firstly, there are communities with genuine customary law that reject sharia law, such as the Badui community in Java and the Dayak in Kalimantan.[44] Secondly, there are communities adhering to sharia law and rejecting customary law that contradicts

[39] Arskal Salim, *Contemporary Islamic Law in Indonesia: Sharia and Legal Pluralism* (Edinburgh: Edinburgh University Press, 2022), https://edinburghuniversitypress.com/book-contemporary-islamic-law-in-indonesia.html.

[40] Tongat, "The Ambiguous Authority."

[41] Tolkah Tolkah, "Customary Law Existency in The Modernization of Criminal Law in Indonesia," *Varia Justicia* 17, no. 1 (2021), 72–89, https://doi.org/10.31603/variajusticia.v17i1.5024.

[42] Tongat, "The Ambiguous Authority."

[43] Muslihun, "Legal Positivism."

[44] Liz Alden Wily, "Transforming Legal Status of Customary Land Rights: What This Means for Women and Men in Rural Africa," in *Land Governance and Gender: The Tenure-Gender Nexus in Land Management and Land Policy*, ed. Uchendu Eugene Chigbu, 169–81 (Wallingford: CABI, 2021), https://doi.org/10.1079/9781789247664.0014.

Islamic values, as applied by the Aceh community in Sumatra.[45] Thirdly, there are communities that acculturate customary law and sharia law for joint application as living law, exemplified by the Minangkabau community in Sumatra.

The complexity of the relationships between customary law and sharia law necessitates an understanding that 'living law' in the Criminal Code should not be narrowly interpreted as only customary law, which implies adat law, but rather as living law comprising two aspects: customary law and sharia law. Although the term 'sharia law' is not explicitly mentioned to avoid religious conflict and discrimination (given Indonesia's religious diversity, with Islam constituting 86.9 % of the total population), the referenced customary law should be understood to encompass traditional values, Sharia, and their acculturation, depending on the perspective of the community practicing customary law. Without this understanding, the meaning of living law in the Criminal Code becomes depreciative and may overlook the entities of sharia law and its acculturation with customary law.[46]

Implications for Legal Certainty

Within the framework of criminal policy, the law that prevails in society, whether customary law or sharia law, is not automatically acknowledged as a positive legal source. Statutes (written law) serve as the foundation for society's acknowledgment of the law as a positive legal source that is both legitimate and rational.[47] For a pluralistic society with diverse perspectives and socio-cultural anthropology, the rationalization of living law in written law is the most impactful option. A historical example is the enactment of the Wetboek van Strafrecht voor Nederlands Indie in 1918, which incorporated the Dutch Colonial Legal System into the structure of Indonesian society and remains formally relevant to this day.[48] Although the New Criminal Code seeks to establish a new paradigm and substance for criminal law, the legal positivist framework remains unchanged, and living law must first be established in writing through legislation before it can be applied. This choice,

45 Inayatillah Inayatillah et al., "Social History of Islamic Law from Gender Perspective in Aceh: A Study of Marriage Traditions in South Aceh, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (2022), 573–93, https://doi.org/10.22373/sjhk.v6i2.14598.

46 Tody Sasmitha Jiwa Utama, "Between Adat Law and Living Law: An Illusion of Customary Law Incorporation into Indonesia Penal System," *The Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (2021), 269–89, https://doi.org/10.1080/07329113.2021.1945222.

47 M. Syamsudin, "Reorientation of Approaches in Indonesian Customary Law Studies," *Journal of Indonesian Adat Law (JIAL)* 1, no. 1 (2020), 1–33.

48 Flora, "The Living Law's Restorative Justice."

as stipulated in Article 2(1), empowers regional governments to create regulations governing living law.

The transition from living law to positive law carries logical consequences, transforming its flexible, dynamic nature into a rigid, certain one. Structurally, the main difference between living law and positive law is the dynamic, easily adaptable nature of living law, applied in accordance to the needs of the community.[49] Functionally, living law prioritizes achieving justice and utility, as it is local and constrained by the community's socio-cultural bonds. By making living law into positive law, these values become rigid norms that are not easily changed and apply consistently within national administrative boundaries. However, living law has different territorial mappings than state administration, such as the living law of the Dayak community in Kalimantan, which spans five provinces on the island.

This scenario yields two potential outcomes for living law after undergoing positivization: a transition into acknowledged living law and a transformation into zombie law. In the first scenario, living law could serve as a bridge toward establishing a pluralistic and substantively just criminal legal system. However, this is contingent on regional regulations refraining from overly detailed prescriptions regarding living law. Instead, they should focus on identifying and acknowledging living law within specific areas of their administration. Analogous to the Criminal Code's recognition of living law as a legitimate source of punishment, regional regulations need only recognize the existing types of living law and provide a framework for its implementation by the community. The ideal enforcement mechanisms for living law will be explored in the following subsection.

The second scenario posits that the positivization of living law might render it as zombie law. Drawing on Werner Menski's perspective, the recording and codification of customary law would not culminate in a definitive collection but rather create another competing set of rules about customary laws.[50] In this context, customary law, integral to 'living' law, undergoes fragmentation and classification into several fragments. Only a select few are officially recognized as 'customary law' within the legal system. In the Indonesian context, this categorization aligns with Article 2(1) of the Criminal Code, implying that not all aspects of 'customary law' can be considered living law. The selective approach to customary law not only fails to

[49] Saefudin, "Living Law."

[50] Roberto Scarciglia and Werner F. Menski, *Normative Pluralism and Religious Diversity: Challenges and Methodological Approaches* (CEDAM, 2018), 56–70.

imbue it with a 'living' essence but may, in fact, stifle it by eliminating segments that do not meet the criteria for positivization. Consequently, customary law in this context ceases to be living law and is relegated to the status of zombie law.[51]

In Kenya, Africa, the incorporation of living law into positive law poses practical challenges, as it necessitates formalization in legislation.[52] However, a crucial question arises: for what purpose? It is evident that the courts seek a solution to ensure certainty in the application of customary law. Essentially, they require documentation or other reliable resources that can serve as legal authorities.[53] Magistrates, lawyers, and other legal professionals handling claims based on customary law should possess foundational knowledge and have access to comprehensive reference materials regarding the essence of customary law.[54] Therefore, transforming living law into positive law does not lead to the achievement of legal pluralism; instead, it risks diminishing the substance of customary law.[55] Formulating precise criminal policy requires careful consideration.

The Implementation of Living Law through Adat Courts

The implementation of living law in criminal policy should be grounded in the principle of legitimacy rather than legalization. Customary and sharia law, integral components of living law in Indonesia, do not necessitate state recodification or legislation for enforcement. Instead, they require recognition and clear legitimacy within the national legal system. This understanding is critical, as it is not explicitly stated in Article 2(1) of the Criminal Code, leaving room for dualistic interpretations with significantly different consequences.

The normative logic within Article 2(1) of the Criminal Code provides regional governments with flexibility to regulate provisions related to existing living law in

51 Heather Brook, "Zombie Law: Conjugality, Annulment, and the (Married) Living Dead," *Feminist Legal Studies* 22, no. 1 (2014), 49–66, https://doi.org/10.1007/s10691-013-9246-9.

52 Bwonwong'a Momanyi, *Procedures in Criminal Law in Kenya* (Nairobi: East African Educational Publishers Ltd., 1994), 156–89.

53 Maurice D. Okech Owiti, *Criminal Law in Kenya: A Critique* (Nairobi: University of Nairobi Research, 1995), 3–6, https://erepository.uonbi.ac.ke/handle/11295/34131.

54 T. L. Chenda, "Momanyi Bwonwong'a, Procedures in Criminal Law in Kenya. Nairobi: East African Educational Publishers Ltd, 1994. Xxix + 320 Pp." *Journal of African Law* 41, no. 1 (1997), 155–56, https://doi.org/10.1017/s0021855300010172.

55 Saldi Isra and Hilaire Tegnan, "Legal Syncretism or the Theory of Unity in Diversity as an Alternative to Legal Pluralism in Indonesia," *International Journal of Law and Management* 63, no. 6 (2021), 553–68, https://doi.org/10.1108/IJLMA-04-2018-0082.

their respective areas. These regional regulations serve as the basis for enforcing living law as a source of criminal sanctions. However, as previously explained, the positivization of living law transforms the values of customary and sharia law into rigid, formal positive law. In this position, the state takes over living law from the community for exclusive enforcement by law enforcement authorities. Although codification renders living law certain and enforceable consistently, it contradicts the essence of living law itself, which is flexible, dynamic, and oriented towards creating justice and benefits for the community. Codified customary law no longer qualifies as living law; rather, it becomes positive-based customary law.

The paradigmatic distinction between positive law and living law poses a fundamental challenge, introducing the potential for inconsistency and the prospect of criminalizing communities. When customary law is codified and transformed into positive law, its application becomes universal within specific administrative boundaries. Conversely, customary law remains inherently local, lacking universal applicability, and maintaining its distinct jurisdiction.[56] The conversion of customary law into positive law may, in parallel, encounter challenges tied to the displacement of its supporting indigenous population, consequently impacting its geographical scope.[57] For instance, within the cultural context of the Dayak Kalis community in Kalimantan, their customary criminal law exclusively binds the local population, excluding newcomers to the region. Moreover, customary law is integral to the community's social traditions. State intervention and the resolution of cases through direct court proceedings jeopardize indigenous communities' rights to uphold criminal law in accordance with their local wisdom, thereby undermining the attainment of justice and utility.

The regulatory framework regarding the existence of customary law in Indonesia should be based on a recognition-based paradigm.[58] Recognition of customary law necessitates antecedent acknowledgment of the indigenous community's identity as the custodian of these traditional values. In this context, there must exist an institution within the indigenous community that assumes regulatory functions (bestuurstaad), and its legitimacy is duly recognized by the regional government. Conceptually, Article 18B Paragraph (4) of the 1945 Constitution asserts that: "The

[56] Greg Acciaioli, "From Customary Law to Indigenous Sovereignty: Reconceptualizing Masyarakat Adat in Contemporary Indonesia," in *The Revival of Tradition in Indonesian Politics* (London: Routledge, 2007), 315–38.

[57] Syamsudin, "Reorientation of Approaches".

[58] Faisal et al., "Genuine Paradigm."

state recognizes and respects legal communities along with their traditional rights as long as they persist, without conflicting with the Unitary State of the Republic of Indonesia." In tandem with Article 2(1) of the Criminal Code, this "recognition" of the legal community is bestowed by the regional government.

In the realm of legal enforcement, indigenous legal communities are not obligated to undertake codification or entrust their original customary social and legal values to be positivized through government legislation. Indigenous legal communities continue to uphold their customary law in its authentic form, whether in written or unwritten form. Concerning implementation, indigenous legal communities enforce their customary law through Adat Courts or similar entities endowed with the capacity to render decisions and impose customary sanctions.[59]

To prevent conflicts between customary law and national law, the enforcement of customary law by Adat Courts must be authorized by the local District Court or High Court. The Chief Judge of the District Court may establish a Deliberation Judge Assembly comprising judges to decide whether a case can be resolved through customary law or should proceed through the formal court system. In making such determinations, the Deliberation Judge Assembly may consider four key variables:

1. Instances that do not constitute criminal offenses under national law but are deemed criminal acts in customary law.
2. Cases that qualify as criminal offenses under both national and customary law but are categorized as minor offenses, allowing for resolution through customary practices without posing a potential violation of human rights. In this context, the Deliberation Judge Assembly needs to ensure that the applicable legal form is met. If there is a finding that potential legal sanctions may violate human rights, the case should be handled through the formal court system.
3. Cases that qualify as criminal offenses under both national and customary law and are classified as offenses with significant impact, such as cases of assault, torture, robbery, or murder, are to be adjudicated in a formal court.
4. Exceptions to the jurisdiction of Adat Courts for these cases should only be granted with the conviction of the Deliberation Judge Assembly that their resolution will not cause unrest in the community and will not contravene regulations and human rights principles.

[59] Zulfa, "Recent Indonesian Criminal Law Development."

We argue that the implementation of Adat Courts serves as a mechanism to ensure the contextual application of law within local communities. This proposition can be analyzed through the lens of the Chaos Theory of Law, which conceptualizes law as a dynamic and fluid construct—melee in nature—whose effectiveness is contingent upon its congruence with localized and contextual values.

To date, positive law, as codified in statutory instruments, has predominantly been perceived as a formal tool of penal enforcement, whereas sharia and customary law have often been relegated to the status of alternative or supplementary norms. However, once these alternatives are elevated to the realm of positive law, the establishment of Adat Courts may help preserve the authenticity and normative integrity of indigenous values embedded in them, thereby enhancing public acceptance and legitimacy.

Moreover, Adat Courts are not an entirely novel construct; they have long existed under various names across diverse cultural communities in Indonesia. What remains necessary is their formal recognition and institutionalization. This approach offers a promising, contextually grounded legal solution for harmonizing plural normative systems within the framework of national law.

In order to prevent decisions that may contravene human rights or lead to social unrest, the court is obligated to provide guidance to Adat Courts in their case resolutions. Moreover, the court, with the Supreme Court's support, can promulgate regulations outlining directives for decision-makers within Adat Courts to ensure their rulings comply with human rights and the fundamental principles of criminal law. This approach guarantees that granting autonomy to communities governed by customary law fosters the establishment of substantive justice and utility.

The court's oversight of the implementation of customary law by Adat Courts is essential to mitigate the risk of arbitrary civil adjudication. Despite the recognition and integration of customary law into the national criminal legal system, its practical application necessitates adherence to meticulous procedures and robust oversight. This guarantees that the law does not serve as a tool for justifying civil judgments but rather functions as a vehicle for realizing substantive justice and utility within society.

Throughout history, Adat Courts have been integral components of Indonesia's legal framework. Village and Adat Courts played significant roles during the colonial period

of the Dutch East Indies, characterized by clearly defined jurisdictions.[60] However, in the post-independence era, concerns arose about preserving Adat Courts due to their perceived association with backward political ideals. This sentiment was fueled by the state's eagerness, especially during its early independence, to swiftly unify the judicial system, viewing the judiciary as a symbol of state authority.[61] Ambiguity arose in delineating the position of Adat Courts within the national judicial system. The core issue lay in the country's unclear legal-political landscape, leaving Adat Courts in a state of "neither here nor there." Despite the formal legality principle and the streamlining of the judicial system under Emergency Law 1 of 1951, which could be interpreted as a rejection of Adat Courts, there were ample legislative bases for recognizing Adat Court decisions, including through jurisprudence.[62] Locally, Adat Courts such as Peradilan Gampong and Peradilan Damai in Aceh and Papua demonstrated this existence.[63]

The idea of establishing Adat Courts gained momentum after the reform era. Debates within various consortia focused on critical issues related to the chosen format—whether the Adat justice system should be integrated into the national judicial system, the importance of formalizing it, the government's capacity to accommodate it, and whether improvements to existing systems would suffice. The political choice embedded in the new criminal code to accommodate living law clearly signals a crucial direction for establishing Adat Courts as institutions authorized to enforce it. This choice is apt and forward-thinking, positioning Adat Courts outside the national judicial system. Moreover, the effective implementation of the Adat justice system in Aceh, a province with special status, further underscores the strategic, implementable, and prospective nature of establishing Adat Courts to apply living law and realize substantive justice transformation in Indonesia's criminal law.

60 Herlambang P. Wiratraman, "Adat Court in Indonesia's Judiciary System: A Socio-Legal Inquiry," *Journal of Asian Social Science Research* 4, no. 1 (2022), 43–62, https://doi.org/10.15575/jassr.v4i1.62.

61 Nanda Amalia, Mukhlis, and Yusrizal, "*Adat* Court Judge: Tradition and Practice of Dispute Resolution Between Societies in Aceh," *Journal of Law, Policy and Globalization*, 77 (2018), 74–84.

62 Teuku Muttaqin Mansur, Sulaiman Sulaiman, and Hasbi Ali, "Adat Court in Aceh, Indonesia: A Review of Law," *Jurnal Ilmiah Peuradeun* 8, no. 2 (2020), 423–42, https://doi.org/10.26811/peuradeun.v8i2.443.

63 Hazar Kusmayanti et al., "Adat Court in the Context of Supply Chain Legal Pluralism Management in Indonesia," *International Journal of Supply Chain Management* (IJSCM) 9, no. 6 (2020), 176–86, https://ojs.excelingtech.co.uk/index.php/IJSCM/article/view/5674.

Conclusion

The incorporation of living law into the new criminal code marks the commencement of a transformative era in Indonesia's criminal justice system. The explicit acknowledgment of dual sources of penalization signifies a fundamental shift in legal philosophy, recognizing both positive law and the dynamic, evolving norms rooted in diverse cultural traditions across the archipelago. Living law, grounded in indigenous values and norms, stands in stark contrast to positive law because of its uncodified, dynamic, and region-specific nature within customary territories. However, latent challenges loom large, particularly in the lead-up to the anticipated enforcement of the new criminal code in 2025. Addressing these challenges is imperative to eliminate normative clashes between indigenous law and positive law and to foster a coherent legal landscape. One key challenge is the absence of a well-defined regulatory framework for the indigenous justice system, which hinders its operationalization and perpetuates the existing dualism within national law.

The proposed strategic solution is the establishment of Adat Courts, which presents an innovative approach to preserving the integrity of indigenous law without necessitating its codification into positive law. Adat Courts offer a means of upholding the original values and enforcing the law with a sense of certainty. By operating within this framework, indigenous law can be consistently upheld, mitigating the risks of dualism and emerging as a potent instrument in realizing substantive justice throughout Indonesia. In summary, the impending introduction of Adat Courts stands as a strategic response to the challenges posed by the dualism between living law and positive law. This innovative legal mechanism shall ensure the preservation of cultural authenticity and the enforcement of indigenous legal principles.

We argue that implementing Adat Courts could face key challenges, including questions of institutional legitimacy, unclear jurisdictional boundaries, and the absence of standardized procedures aligned with constitutional guarantees. Customary justice mechanisms, being informal and orally transmitted, risk inconsistency and potential violations of rights. Additionally, limited resources, lack of trained personnel, and insufficient documentation of customary norms further hinder effective operationalization.

To overcome these issues, we propose a dual approach. *Ricœur's hermeneutics* offers a framework for integrating customary values into formal law, while *Sampford's Chaos Theory* supports legal adaptability in pluralistic societies. Practically, the

state must: (i) establish a regulatory framework recognizing *Adat Courts*, (ii) clarify jurisdiction, and (iii) set minimum procedural standards. Documentation, training, and oversight mechanisms will ensure these courts function with legitimacy and contribute meaningfully to Indonesia's legal pluralism. This will mark the new beginning of Indonesia's modern criminal law system towards substantive justice.

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