DOI: 10.46924/jihk.v6i1.253

The Dialectics of the Principle of Legality and Living Law in the National Criminal Law System Post-Enactment of Law No. 1 of 2023

Najaruddin Toatubun[1]*, Djamaludin[2]

[1]Sekolah Tinggi Ilmu Ekonomi Port Numbay
[2]Sekolah Tinggi Ilmu Hukum Biak-Papua

Correspondence
Toatubun Najaruddin, STIE Port Numbay, Beringin, Entrop, Distrik Jayapura Selatan, Kota Jayapura, Papua 99224.
Email: najaruddin@gmail.com

How to cite
Toatubun , N., & Djamaludin, D. (2024). The Dialectics of the Principle of Legality and Living Law in the National Criminal Law System Post-Enactment of Law No. 1 of 2023. *Jurnal Ilmu Hukum Kyadiren*, 6(1), 85–94
https://doi.org/10.46924/jihk.v6i1.253.

Original Article

Abstract

Indonesia's criminal law system has entered a new phase with the enactment of Law No. 1 of 2023 on the Criminal Code. A key change is the recognition of living law as a source of criminal law alongside statutory regulations. This shift sparks debate over how to harmonize the principle of legality, the cornerstone of the Criminal Code, with the evolving nature of living law. This study examines the interaction between the principle of legality and living law in Indonesia's criminal justice system using a normative juridical method and statutory and conceptual approaches. The study highlights three key aspects: the background of living law recognition, the integration of the principle of legality with living law, and the impact of this integration on law enforcement. The findings reveal that incorporating living law into the new Criminal Code marks a transition from a rigid system to one more attuned to societal needs. However, challenges remain in aligning written law with customary law. These challenges include identifying valid living law, setting clear application boundaries, and regulating customary sanctions within the national legal framework.

Keywords: *principle of legality, living law, criminal law reform, legal pluralism, customary law*

Abstrak

Transformasi sistem hukum pidana Indonesia memasuki babak baru dengan berlakunya UU No. 1 Tahun 2023 tentang KUHP. Salah satu perubahan penting adalah pengakuan hukum yang hidup di masyarakat sebagai sumber hukum pidana selain peraturan perundang-undangan. Pengakuan ini menimbulkan pro dan kontra dalam menyelaraskan asas legalitas, yang selama ini menjadi pilar utama KUHP, dengan karakter dinamis hukum yang hidup. Penelitian ini membahas dinamika antara asas legalitas dan hukum yang hidup dalam sistem peradilan pidana nasional melalui kajian yuridis normatif dengan pendekatan perundang-undangan dan konseptual. Tiga aspek utama yang dibahas meliputi: latar belakang pengakuan hukum yang hidup, cara menyelaraskan asas legalitas dengan hukum yang hidup, dan dampaknya pada penegakan hukum. Hasil penelitian menunjukkan bahwa pengintegrasian hukum yang hidup ke dalam KUHP baru mencerminkan pergeseran dari sistem yang kaku menjadi lebih responsif terhadap kebutuhan masyarakat. Namun, pelaksanaannya masih menghadapi tantangan, seperti menentukan hukum yang hidup yang sah, menetapkan batas penerapannya, dan mengatur sanksi adat dalam kerangka hukum nasional.

Kata kunci: *asas legalitas, hukum yang hidup, pembaruan hukum pidana, keberagaman hukum, hukum adat*

1. INTRODUCTION

The transformation of Indonesia's criminal law system has entered a new phase with the enactment of Law Number 1 of 2023 concerning the Criminal Code (KUHP). This reform represents an effort to decolonize and recodify national criminal law, following over a century of reliance on the Wetboek van Strafrecht voor Nederlands Indie (WvS-NI), which has been in force since 1918. One significant and fundamental change is the incorporation of living law as a source of criminal law alongside statutory regulations, as stipulated in Article 2 of Law No. 1 of 2023.[1]

The recognition of living law within the national criminal law system introduces a paradigmatic shift in relation to the principle of legality, which has long served as a cornerstone of the Criminal Code. Previously, Article 1 Paragraph (1) of the former Criminal Code explicitly stipulated that "*no act shall be punishable except by virtue of criminal provisions established in legislation that existed prior to the commission of the act".*[2] This provision is grounded in von Feuerbach's postulate, "*nullum delictum, nulla poena sine praevia lege poenali*," which establishes the law as the sole legitimate source of criminal law.

The legal accommodations introduced in the new Criminal Code raise several questions regarding the reconciliation of dual sources of criminal law while maintaining legal certainty. On one hand, the recognition of living law represents an effort to integrate values that have evolved within Indonesia's pluralistic society. On the other hand, the implementation of living law poses potential risks of uncertainty, particularly concerning jurisdictional boundaries and enforcement mechanisms.

This issue is further complicated by the need to technically establish mechanisms for the institutionalization of living law within the national criminal law system. Article 2 of the new Criminal Code mandates the regulation of living law through Government Regulations and Regional Regulations. However, the process of formalizing living law into structured regulations risks undermining its essence, which is inherently dynamic and evolves alongside societal changes. As Eugene Ehrlich emphasized, living law represents the law that governs people's lives even in the absence of formal legal codification.

Empirical experience in the implementation of customary law in various regions, such as the application of Qanun in Aceh, demonstrates that integrating living law into the formal legal system requires careful and systematic mechanisms. This involves not only the substance of the law but also the institutional framework and the legal culture within society. The recognition of customary law communities as constitutionally acknowledged legal entities, as stipulated in Article 18B Paragraph (2) of the 1945 Constitution, presents challenges in harmonizing the diverse legal systems within society with the national criminal law framework.[3]

From the perspective of law enforcement, another issue arises: it is insufficient for law enforcement officials to merely master written law; they must also possess a thorough understanding of the laws developed and adhered to by local communities. This necessitates a shift in the perspective of Indonesia's criminal justice system, moving from a focus on strict legal formalities toward a more open and responsive approach that addresses the needs of society. Harmonizing the principle of legality with the laws practiced within communities is crucial for achieving genuine justice while respecting the diversity of legal systems in Indonesia.

This research focuses on the dialectic between the principles of legality and the laws present in the Indonesian criminal law system following the enactment of Law No. 1 of 2023. Specifically, the study addresses three key aspects: First, the legal recognition ratio established in the new Criminal Code; second, the harmonization mechanism between the principles of legality and living law; and third, the legal consequences of the dualism of criminal law sources on the criminal law enforcement system in Indonesia.

---

[1] Anugrah Sahtia Magala, "Akomodasi Hukum Yang Hidup Dalam Kuhp Baru Indonesia Menurut Perspektif Hukum Progresif," *Jurnal Spektrum Hukum* 20, no. 2 (2023): 115–27, https://doi.org/10.56444/sh.

[2] Magala.

[3] Nicholas Ardy Wibisana, Bernadeth Gisela Lema Udjan, dan Solfian, "Perlindungan Masyarakat Hukum Adat dalam Bentuk Pengakuan Masyarakat Adat (Studi Kasus Masyarakat Eks Desa Sendi, Pacet-Mojokerto)," *Sapienta et Virtus* 9, no. 1 (2024): 385–97, https://doi.org/10.37477/sev.v8i1.

The urgency of this research lies in its contribution to providing a conceptual framework for the implementation of the new Criminal Code, which will come into effect in 2025. The discussion regarding the dialectic of the principle of legality is critical, as there is no similar precedent in the history of Indonesian criminal law. It is hoped that the findings of this research will serve as a reference for policymakers in formulating implementing regulations and preparing law enforcement infrastructure that accommodates legal pluralism in Indonesia.

2. RESEARCH METHODOLOGY

In this research, the author employs a normative juridical method with both a statutory approach and a conceptual approach. The choice of this method is based on the characteristics of the research object, which focuses on analyzing legal norms in statutory regulations and legal concepts that have developed within the Indonesian criminal law system.

The legislative approach is conducted by examining the provisions in Law No. 1 of 2023 concerning the Criminal Code, particularly Articles 1 and 2, which regulate the principles of legality and living law. In addition, the research also elaborates on relevant laws and regulations, such as Article 18B of the 1945 Constitution concerning the recognition of customary law communities, Law No. 48 of 2009 concerning Judicial Power, as well as Constitutional Court decisions related to the research object.

Meanwhile, a conceptual approach is employed to analyze the evolving doctrines and views of legal scholars concerning the principles of legality and living law. The aim of this approach is to understand the paradigm shift in the Indonesian criminal law system, from a previously legalistic-positivistic system to one that is more responsive to legal pluralism.

The collection of legal materials was carried out through a literature review using three types of legal sources: First, primary legal materials, including statutory regulations, court decisions, and other official legal documents; second, secondary legal materials, consisting of books, academic journals, research findings, and other scholarly works related to the research topic; and third, tertiary legal materials, including legal dictionaries, encyclopedias, and other supporting sources.

The analysis of legal materials is conducted qualitatively using descriptive-analytical and prescriptive techniques. Descriptive-analytical techniques are employed to systematically describe and analyze the dialectic between the principles of legality and the laws present in the national criminal law system. Meanwhile, prescriptive analysis aims to provide arguments based on the research findings, particularly in the context of harmonizing the principles of legality and living law.

To ensure the validity of the research findings, source triangulation was performed by comparing the various legal materials collected. The analysis process is carried out in three stages: First, identifying and classifying the legal materials according to the research focus; second, analyzing the relationships between the various legal concepts and norms examined; and third, formulating a synthesis and conclusions that address the research problem.

3. RESEARCH RESULT AND DISCUSSION

3.1. The Current Legal Position in the Indonesian Criminal Law System

Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia affirms that the state recognizes the unity of indigenous communities and respects customary laws that remain in practice, provided they align with community development and state principles. In the Unitary State of the Republic of Indonesia, where these norms are acknowledged, the underlying customary rights must be protected. This recognition is not merely formal but represents the understanding that the law existing in society, as articulated by Soepomo, is a true reflection of the legal sentiments of the people. In this context, Customary Law is not static; it continues to evolve alongside the dynamics of society.

The state recognizes the unity of indigenous peoples not only due to Indonesia's local wisdom but also because they have managed to preserve their distinct identity as indigenous peoples and their regional identity as a unified indigenous community, despite the challenges posed by modernity. Maintaining the uniqueness of existing communities is indeed challenging in an era that is more affluent

than before, as noted by Prof. Van Vollenhoven.[4] This underscores the unique characteristics of customary law, which possesses coercive power (sanctions) but is not codified. This perspective reinforces the reality that the laws existing within Indonesian society have their own enforcement mechanisms, distinct from those of positive law. Traditional communities, formed from groups of people with shared origins, language, and cultural values, serve as the forum in which living laws are developed and enforced.

An Indigenous community is a group of people who have inhabited the same area for several generations, are descendants of common ancestors, and share the same language, customs, religion, politics, and other cultural aspects. They also tend to have a profound connection to nature and a set of shared values, all of which are highly respected regional characteristics. There are often relatively few individuals from outside the traditional community, as its members have parents who are also part of the community and children who will likewise become members of the group. Integration with an established society is one of the primary reasons why a society's traditions are preserved.

In theoretical perspective, Eugen Ehrlich[5] Through the concept of living law, it emphasizes that the core of legal development does not reside in legislation, court decisions, or legal science, but in society itself. This perspective aligns with the reality of customary law communities in Indonesia, which have their own judicial systems and dispute resolution mechanisms. Traditional elders, unlike judges in the formal justice system, perform law enforcement functions with a more contextual approach, deeply rooted in local values.

Customary law is a normative legal framework for indigenous groups. These rules have been passed down orally within indigenous communities but are widely recognized as authoritative regulations.[6] Planning, writing, debate, ratification, promulgation, and socialization are part of the process through which positive law is accepted as law. All of these steps must be documented in writing. In contrast, customary law is based on the rules of traditional groups and is passed down orally from one generation to the next. Indigenous peoples do not record these laws in writing, but instead retain only what is necessary, permitted, or prohibited. The Volksgeist theory put forward by F. K. Von Savigny [7] further emphasizes that customary law in various regions provides an illustration of the rich values and characteristics of each community. In line with the views of Prof. Sulistyowati Irianto[8] about legal pluralism, where there is co-existence between state law and non-state law in the arena of social life. Currently, efforts to establish Indonesian cultural values concerning elements of economic, political and legal life in the context of expanding Indonesian national culture are an important part of the national development agenda. The idea of a "disturbed balance" is part of the customary law system. [9] Residents will face the law if one of their members does something that disturbs the balance of their community.

Customary criminal law generally consists of rules that are simple and easy to understand. A person is considered to have violated customary law when their behavior does not align with the values upheld by the customary community and disrupts social harmony. This violation can be identified through conscience and an understanding of the traditional values embedded in society. So far, most customary criminal laws have not been documented in books or official records, but have been passed down orally from generation to generation. However, due to the diversity of indigenous tribes in

---

[4] Aisyah Dwi Ariyani, "Implementasi Hukum Adat Sebagai Dasar Hukum Dalam Membangun Sistem Hukum di Indonesia," *Madani: Jurnal Ilmiah Multidisiplin* 1, no. 12 (2024): 756–62, https://doi.org/10.5281/zenodo.10462328.

[5] Ayu Denis Chrisnawati, "Living Law Dalam KUHP Indonesia Perspektif Hukum Adat dan Dampaknya Terhadap Penegakan Hukum," *Civilia: Jurnal Kajian Hukum dan Pendidikan Kewarganegaraan* 3, no. 1 (2024): 87–97, https://doi.org/10.572349/civilia.v3i1.1689.

[6] Chrisnawati.

[7] Sekhar Chandra Pawana, "Polemik Atas Konsep 'Hukum Yang Hidup' Dalam Pembaharuan KUHP di Indonesia," *Judicatum: Jurnal Dimensi Catra Hukum* 1, no. 1 (2023): 51–62, https://doi.org/10.35326/judicatum.v1i1.4045.

[8] Pawana.

[9] Sahri Romodon, Rihan Ali Vareza, dan Ahmad Ansyari Siregar, "Implementasi Hukum Adat Dalam Sistem Peradilan Indonesia," *Jurnal Review Pendidikan dan Pengajaran (JRPP)* 7, no. 3 (2024): 9632–40, https://doi.org/10.31004/jrpp.v7i3.31305.

Indonesia, each with their own customs, there have been recent efforts to document and record these customary laws to facilitate their study and preservation.

In indigenous communities, there are special judicial institutions whose role is to resolve various issues or conflicts that arise between community members. These institutions use customary law as the basis for decision-making. When someone violates customary law, the punishment imposed has two main objectives: First, to ensure that the perpetrator acknowledges and regrets their mistake; and second, to provide a deterrent effect, preventing the perpetrator from repeating the offense in the future.[10] This shows that the customary justice system does not only focus on giving punishment, but places more emphasis on improving the perpetrator's behavior and restoring harmony in society.

In contrast to the modern justice system, which sometimes emphasizes aspects of retaliation or imprisonment, customary law prioritizes the aspects of education and the restoration of social relations within the community.[11] Traditional leaders or elders, who are seen as more familiar with standards and even as mediators between the community and the mystical part of traditional culture, usually oversee this kind of traditional justice.

Traditional elders, unlike judges in the national criminal justice system, are responsible for enforcing customary law. The parties involved in the discussion first raise the most pressing issues, after which other parties or representatives of indigenous groups consider them to help determine the most appropriate course of action. The customary justice system also decides whether the defendant has committed a customary violation. All participants are afforded equal protection under the law and are free to voice their opinions in an effort to reach a fair resolution.

Social impacts, such as ostracism, ridicule, exile, or, in extreme cases, expulsion from society, are common forms of customary punishment. It is important to note that there are no criminal consequences mentioned in this context.[12] However, because each customary group has its own set of norms and beliefs, the laws related to customary law, such as settlement and punishment processes, vary greatly.

Customary law is recognized as valid under Article 18B, paragraph (2) of the statutory regulations, which permits indigenous tribes to use their own conflict resolution methods outside the formal justice system. The primary focus is to serve local communities as effectively as possible. It should be noted that, in many cases, traditional penalties are more effective than standard fines. A state's acceptance of the resolution of a criminal case by conventional institutions as final and binding on all parties, without further review, is a characteristic of criminal procedural law.

In addition to the provisions of Article 18B, paragraph (2) of the 1945 Constitution, the existence of communities governed by customary law is also recognized in Article 28I, paragraph (3) of the same Constitution. This essay highlights the importance of protecting the rights and traditions of indigenous groups. Articles 32, paragraphs (1) and (2), further confirm the existence of customary law community organizations. These articles state that the government must protect and promote local traditions and languages, as they are vital components of the nation's history and identity.

The 1945 Constitution respects customary law and indigenous groups, ensuring that traditional knowledge and culture will continue to develop within a modern nation. This commitment to preservation helps protect regional and national identities that are increasingly threatened by globalization and technological advances. While humanity and civilization must progress, it is essential to remain mindful of the cultural traditions that have become integral to our national identity.

The state's involvement in this matter is crucial, given that the 1945 Constitution addresses only theoretical issues, and legal protection requires derivative provisions. As Indonesia is a rule-of-law country, its citizens must adhere to the regulations set forth in the Indonesian positive legal system.

---

[10] Siska Lis Sulistiani, *Hukum Adat di Indonesia*, ed. oleh Kurniawan Ahmad (Jakarta: Sinar Grafika (Bumi Aksara), 2021).

[11] Chrisnawati, "Living Law Dalam KUHP Indonesia Perspektif Hukum Adat dan Dampaknya Terhadap Penegakan Hukum."

[12] Chrisnawati.

This includes the obligations outlined in the 1945 Constitution, which establishes customary interests as a substantive standard in the development of legislative regulations.[13]

Violations of customary law are only subject to customary law jurisdiction if they occur within customary territories and involve members of indigenous communities. Since these laws originate from the sacred beliefs of indigenous peoples, other communities may hold different views on what is prohibited within the community, but not on their own land. Therefore, traditional thought plays a significant role in the formation of customary law.

The new National Criminal Code grants formal legitimacy to the existence of living law through Article 2. This recognition represents a significant step, marking a paradigm shift from the previously highly positivistic criminal law system. However, at the implementation level, this provision requires caution to avoid becoming entangled in formalization, which could ultimately undermine the essence of living law itself. Prof. Djojodigoeno.[14] It describes an important theoretical framework through the division of the formal and material dimensions of customary law. The unwritten nature of customary law is not a weakness, but rather demonstrates its flexibility in accommodating social change. The material dimension, which emphasizes the expression of social justice, is a crucial aspect of the concept of the essence of living law..

The challenge for the future lies in developing appropriate mechanisms to integrate living law into the national criminal justice system without compromising its fundamental characteristics as law that grows and evolves within society. A balance must be struck between the need for legal certainty and the respect for the diversity of values that exist in Indonesian society .

3.2. Dialectic of the Principles of Legality and Living Law in the New Criminal Code

Before the enactment of the new Criminal Code, the principle of legality in the Indonesian criminal law system was rigid and monolithic, as evidenced by Article 1, Paragraph (1) of the old Criminal Code, which adhered to the principle of "*nullum delictum nulla poena sine praevia lege poenali"*.[15] This provision is rooted in von Feuerbach's thinking, which places absolute emphasis on legal certainty through written codification..[16] This principle previously closed the space for the application of other sources of law outside of statutory regulations, including laws that live in society.

Prof. Barda Nawawi Arief[17] criticizes the rigidity of the principle of formal legality by stating that criminal law reform needs to take into account the legal values that exist in society. Criminal law must not be separated from the social roots and values that develop in society. This view is in line with Satjipto Rahardjo's progressive legal theory[18] which emphasizes that the law must serve human interests, not the other way around.

The new Criminal Code, through Article 2, introduces a new paradigm by accommodating the principle of material legality alongside the principle of formal legality. As stated by Muladi, this expansion provides an overview of the prismatic nature of Indonesian criminal law, combining various values that exist within society. The implementation of this concept requires adjustments to achieve a balance between legal certainty and justice.[19]

---

[13] Noor Efendy, Ahmadi Hasan, dan Masyitah Umar, "Membangun Hukum Yang Adil Dalam Bingkai Moralitas Pancasila," *Indonesian Journal of Islamic Jurisprudence, Economic and Legal Theory* 1, no. 4 (2023): 656–78, https://doi.org/10.62976/ijijel.v1i4.195.

[14] Siti Fatimah dan Erwin Syahruddin, *Hukum Adat*, ed. oleh Nining Yurista Prawitasari (Makassar: Yayasan Barcode, 2021).

[15] Irawan dan Pura, "Analisis Yuridis Ketentuan Hukum Yang Hidup Dalam Masyarakat Pada Kitab Undang-Undang Hukum Pidana Indonesia."

[16] Novita Angraeni et al., *Hukum Pidana: Teori Komprehensif* (Jambi: PT. Sonpedia Publishing Indonesia, 2024).

[17] Rocky Marbun, Mahmud Mulyadi, dan Fina Rosalina, *Hukum Acara Pidana: Landasan Filosofis, Teoretis, dan Konseptual* (Cirebon: Publica Indonesia Utama, 2021).

[18] Mardona Siregar, "Teori Hukum Progresif Dalam Konsep Negara Hukum Indonesia," *Muhammadiyah Law review* 8, no. 2 (2024): 1–15, https://doi.org/10.24127/mlr.v8i2.3567.

[19] Kurniawan Tri Wibowo, *Perspektif Hakim Pemeriksa Pendahuluan dalam Sistem Peradilan Pidana Indonesia* (Surabaya: Pustaka Aksara, 2021).

Gustav Radbruch, in his theory of the three fundamental legal values—justice, expediency, and legal certainty—provides an important framework for understanding this context. The legal accommodations in the new Criminal Code can be viewed as an effort to strike a balance between these three values. However, Radbruch emphasized that when there is a conflict between these values, justice must take precedence.[20]

Eugen Ehrlich, through the concept of "living law," emphasizes that the laws existing within society are often more effective in establishing social order than state laws. This perspective reinforces the argument for the necessity of accommodating these existing laws within the national criminal system.[21] However, as reminded by Prof. Sulistyowati Irianto[22], The process of formalizing living law into written regulations must be carried out carefully so as not to lose its dynamic essence.

At a practical level, the dialectic between the principles of legality and living law raises several crucial issues. First, there is the need for a mechanism to identify and verify living laws. The new Criminal Code mandates further regulation through Regional Regulations, but this process requires clear parameters to determine the validity of a customary law. Quoting Ter Haar's views[23], Customary laws that can be recognized are those that have received legitimacy from traditional stakeholders through customary decisions. Second, the issue of jurisdiction and limits to the application of living law. Van Vollenhoven[24] In his research, Ter Haar identified 19 customary law areas in Indonesia, each with its own unique characteristics. The application of living law must consider these territorial and personal boundaries to avoid conflicts between legal systems. As emphasized by Hazairin, the applicable customary law must align with community development and not conflict with national interests. Third, harmonization between customary sanctions and criminal sanctions is necessary. The new Criminal Code opens the possibility of applying customary sanctions in addition to criminal sanctions, but with the limitation that they must not conflict with the values of Pancasila, the Constitution, or human rights, as stated by Mochtar Kusumaatmadja[25] It emphasizes that legal reform must consider the values that exist in society, while still operating within a modern national legal framework.

This dialectic ultimately leads to the formation of a criminal law system that is more responsive and contextual. Philippe Nonet and Philip Selznick[26] In his theory of responsive law, he emphasizes the importance of laws that are capable of accommodating social changes and community values. The recognition of living law in the new Criminal Code can be seen as a step towards a more responsive criminal law system. This recognition of living law in the new Criminal Code is a manifestation of the concept of the Pancasila rule of law. In contrast to the Continental European concept of the rechtsstaat, which emphasizes legal certainty, or the Anglo-Saxon rule of law, which focuses on the supremacy of law, the Pancasila legal state, as explained by Arief Hidayat, has distinctive characteristics that prioritize a balance between formal and material legal values. From this perspective, the existence of Article 2 of the new Criminal Code, which accommodates living law, reflects efforts to realize social justice rooted in the values of Indonesian society. However, as Romli Atmasasmita has reminded[27], Its implementation requires caution to avoid legal uncertainty or abuse of authority in its implementation.

---

[20] Dino Rizka Afdhali dan Taufiqurrohman Syahuri, "Idealitas Penegakan Hukum Ditinjau Dari Perspektif Teori Tujuan Hukum," *Collegium Studiosum Journal* 6, no. 2 (2023): 555–61, https://doi.org/10.56301/csj.v6i2.1078.

[21] Sulistiani, *Hukum Adat di Indonesia*.

[22] Pawana, "Polemik Atas Konsep 'Hukum Yang Hidup' Dalam Pembaharuan KUHP di Indonesia."

[23] Kartika Dwi Irianto et al., "Masyarakat Hukum Adat Indonesia," in *Pengantar Hukum Adat Indonesia*, ed. oleh Rizki Tri Anugrah Bhakti (Padang: CV. Gita Lentera, n.d.).

[24] Marhaeni Ria Sombo dan Henny Wiludjeng, *Hukum Adat Dalam Perkembangannya* (Jakarta: Universitas Katolik Indonesia Atma Jaya, 2020).

[25] Shandya Alonso Eka Renanda dan Rizka Mufidah Sari, "Relevansi Hukum Adat Dalam Perkembangan Hukum Nasional Pada Era Modern," *Causa: Jurnal Hukum dan Kewarganegaraan* 3, no. 7 (2024): 76–86, https://doi.org/10.3783/causa.v2i9.2461.

[26] Teja Sukmana, Zahrah Salsabillah Ashari, dan Yadi Darmawan, "Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo," *Peradaban Journal of Law and Society* 2, no. 1 (2023): 92–106, https://doi.org/10.59001/pjls.v2i1.82.

[27] Jan S. Maringka, *Reformasi Kejaksaan Dalam Sistem Hukum Nasional* (Jakarta: Sinar Grafika, 2022).

Based on research into the dialectic between the principles of legality and law in the new Criminal Code, I am of the opinion that the transformation of the Indonesian criminal law system through Article 2 of the new Criminal Code offers realistic and progressive steps. Although the aim is ideal in accommodating legal pluralism, in practice, it will encounter several significant challenges. The results of my observations reveal the diverse characteristics of customary law across various regions. For instance, from the experience of implementing Qanun in Aceh, the harmonization process between customary law and national law necessitates a very careful and contextual mechanism. Not all customary law practices can be simply integrated into a formal system without compromising their essence.

There are three critical issues that require serious attention. First, clear and measurable criteria are needed to identify living laws so that they can be accommodated within the national criminal system. Second, an appropriate mechanism must be established to determine the jurisdiction and scope of living law application, ensuring it does not conflict with national law. Third, the harmonization of customary sanctions and formal criminal sanctions must be carefully formulated to avoid potential injustice. Based on an analysis of field practices and various literatures, it can be concluded that the successful integration of living law into the national criminal law system will largely depend on three key factors: the quality of the implementing regulations to be developed, the readiness of law enforcement officials to understand and apply this dual system, and public acceptance of the proposed harmonization model.

Based on this, a gradual and cautious approach is necessary in the implementation of this provision. The experiences of various countries that have previously adopted a system of legal pluralism demonstrate that the transition process requires time and adjustments that are not straightforward. Therefore, it is essential to conduct a pilot project in several traditional areas to test the effectiveness of the harmonization model that will be implemented nationally. Historical experience shows that the Dutch-inherited Criminal Code has systematically marginalized the laws that are living within Indonesian society. In this era of independence, I believe it is time for us to build a criminal law system that is more deeply rooted in the values and needs of Indonesian society, without sacrificing the universal principles of modern law.

3.3. Legal Consequences of Implementing Living Laws in the Criminal Justice System

The enactment of Law No. 1 of 2023 concerning the Criminal Code has significant legal implications for Indonesian criminal justice practice. At least three key aspects require serious attention. First, a paradigm shift in the law enforcement process. Judges are no longer solely focused on written provisions but are also obligated to explore and understand the values existing within society. This aligns with the provisions of Article 5, paragraph (1) of Law No. 48 of 2009 concerning Judicial Power. In practice, courts have been granted additional authority to hear cases that challenge the cultural values of certain communities, particularly indigenous communities. Second, the mechanisms for resolving criminal cases have become more diverse. In some customary areas, resolution through customary mechanisms often proves more effective in restoring social balance than conventional criminal approaches. However, the integration of the justice system requires careful planning between the formal justice system and customary justice. Third, there is a need for standardization in the application of sanctions. Article 2, paragraph (2) of the new Criminal Code mandates that the application of living laws must align with the values of Pancasila, the Constitution, and human rights principles. In my opinion, appropriate limits must be established to prevent potential arbitrariness in the application of customary sanctions .

Philippe Nonet and Philip Selznick[28] The concept of responsive law emphasizes the importance of laws that are capable of responding to social needs. The integration of living law into the criminal justice system aligns with this concept, where the law is no longer rigid and repressive. The implementation of living law presents several significant consequences:

[28] Sukmana, Ashari, dan Darmawan, "Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo."

1) Shifting Role of Law Enforcement
   Law enforcers, particularly judges, are required to understand not only positive law but also local customary values. This aligns with Eugen Ehrlich's view that "good law is law that corresponds to the laws that exist in society." In certain cases, judges who comprehend the local context are more likely to render decisions that are better accepted by the community.
2) Transformation of Case Resolution Mechanisms
   The case resolution process has become more diverse. In some areas, traditional institutions play an active role in the mediation process before cases are brought to formal court. This aligns with the concept of restorative justice, which emphasizes the restoration of social balance.
3) Barriers to Harmonization of Sanctions
   One of the practical challenges in the field during the implementation of the New Criminal Code is the potential overlap between criminal sanctions and customary sanctions. A clear mechanism is required to prevent double punishment (ne bis in idem). Several regions have developed integration models that are worth studying.
4) Influence on Legal Certainty
   Even though the intention is good, the application of living laws has the potential to create legal uncertainty if not regulated properly. The recording of customary law in the form of regional regulations must be carried out carefully so as not to eliminate the flexibility that is the basic character of customary law as stated by Van Vollenhoven..

The implementation of living laws brings about tangible changes in criminal justice practices. One of the most noticeable aspects is how judges are beginning to consider local wisdom when making decisions. Of course, this is not an easy task, as each region has its own distinct characteristics that must be well understood. Traditional dispute resolution mechanisms are often more effective in resolving issues than formal court proceedings. In certain areas, specific conflicts can be addressed through customary deliberations without resorting to the criminal justice system. As a result, these resolutions are more readily accepted by society and help restore disrupted social relations.

Many law enforcement officers still do not fully understand how to implement this dual system. There are concerns that the application of customary law may conflict with modern legal principles, particularly in the protection of human rights. Additionally, attention is needed on how to establish appeal or cassation mechanisms for decisions involving customary law, as our formal justice system is not yet fully prepared to accommodate this.

It is important to recognize that this adaptation process takes time. Equally important is ensuring that this process remains aligned with the spirit of national criminal law reform, namely the creation of a criminal justice system that is more just and consistent with the values that exist in Indonesian society. Of course, this is not an easy task, but with the commitment and cooperation of all parties, I am confident that we can achieve the right balance between legal certainty and substantive justice.

4. CONCLUSION

Research into the dialectic of the principles of legality and law present in the New Criminal Code reveals a significant breakthrough in the Indonesian criminal law system. The enactment of Law Number 1 of 2023 concerning the Criminal Code not only marks regulatory changes but also reflects a growing awareness of the need to build a legal system that is more deeply rooted in the realities of Indonesian society. Notably, the recognition of living law in the new Criminal Code has introduced new dynamics into criminal justice practices. The legal standing within the Indonesian criminal law system has deep roots, extending far beyond mere formal recognition in the constitution. The practice of resolving cases through customary mechanisms in various regions is an aspect that cannot be overlooked. For instance, in Aceh, the implementation of the Qanun has demonstrated that harmonizing customary law with national law is achievable, although it undoubtedly requires complex adjustments.

Another aspect is how the dialectic between the principles of legality and living law has prompted a shift in perspective within criminal law enforcement. Judges are no longer merely "mouthpieces for the law," but are now required to understand the social context and values that prevail in society. Court decisions that consider local wisdom tend to be more widely accepted by the community and are more effective in restoring social balance.

The implementation of this dual system is not without its challenges; at least three main obstacles must be overcome: first, difficulties in identifying and verifying living laws, the potential for overlapping jurisdictions, and the complexities involved in harmonizing sanctions. The process of recording current customary law must be carried out with great care to avoid eroding the flexibility that is one of its key strengths.

It can be concluded that the successful implementation of the new Criminal Code will heavily depend on the preparedness of the legal infrastructure—encompassing regulations, personnel, and society. A gradual and contextual approach is required, such as through pilot projects in select traditional areas, before nationwide implementation. Additionally, there is a need to enhance the understanding of law enforcement officers regarding pluralism and local wisdom.

REFERENCES

Journals

Afdhali, Dino Rizka, dan Taufiqurrohman Syahuri. "Idealitas Penegakan Hukum Ditinjau Dari Perspektif Teori Tujuan Hukum." *Collegium Studiosum Journal* 6, no. 2 (2023): 555–61. https://doi.org/10.56301/csj.v6i2.1078.

Ariyani, Aisyah Dwi. "Implementasi Hukum Adat Sebagai Dasar Hukum Dalam Membangun Sistem Hukum di Indonesia." *Madani: Jurnal Ilmiah Multidisiplin* 1, no. 12 (2024): 756–62. https://doi.org/10.5281/zenodo.10462328.

Chrisnawati, Ayu Denis. "Living Law Dalam KUHP Indonesia Perspektif Hukum Adat dan Dampaknya Terhadap Penegakan Hukum." *Civilia: Jurnal Kajian Hukum dan Pendidikan Kewarganegaraan* 3, no. 1 (2024): 87–97. https://doi.org/10.572349/civilia.v3i1.1689.

Efendy, Noor, Ahmadi Hasan, dan Masyitah Umar. "Membangun Hukum Yang Adil Dalam Bingkai Moralitas Pancasila." *Indonesian Journal of Islamic Jurisprudence, Economic and Legal Theory* 1, no. 4 (2023): 656–78. https://doi.org/10.62976/ijijel.v1i4.195.

Hikmah, Faidatul. "Studi Komparatif Penggunaan Analogi Dalam Hukum Pidana Indonesia Dengan Sistem Hukum Common Law dan Syariah." *Jurnal Interpretasi Hukum* 4, no. 2 (2023): 392–404. https://doi.org/10.55637/juinhum.4.2.8301.392-404.

Irawan, Ade, dan Margo Hadi Pura. "Analisis Yuridis Ketentuan Hukum Yang Hidup Dalam Masyarakat Pada Kitab Undang-Undang Hukum Pidana Indonesia." *Ajudikasi: Jurnal Ilmu Hukum* 7, no. 1 (2023): 59–74. https://doi.org/10.30656/ajudikasi.v7i1.6453.

Magala, Anugrah Sahtia. "Akomodasi Hukum Yang Hidup Dalam Kuhp Baru Indonesia Menurut Perspektif Hukum Progresif." *Jurnal Spektrum Hukum* 20, no. 2 (2023): 115–27. https://doi.org/10.56444/sh.

Pawana, Sekhar Chandra. "Polemik Atas Konsep 'Hukum Yang Hidup' Dalam Pembaharuan KUHP di Indonesia." *Judicatum: Jurnal Dimensi Catra Hukum* 1, no. 1 (2023): 51–62. https://doi.org/10.35326/judicatum.v1i1.4045.

Renanda, Shandya Alonso Eka, dan Rizka Mufidah Sari. "Relevansi Hukum Adat Dalam Perkembangan Hukum Nasional Pada Era Modern." *Causa: Jurnal Hukum dan Kewarganegaraan* 3, no. 7 (2024): 76–86. https://doi.org/10.3783/causa.v2i9.2461.

Romodon, Sahri, Rihan Ali Vareza, dan Ahmad Ansyari Siregar. "Implementasi Hukum Adat Dalam Sistem Peradilan Indonesia." *Jurnal Review Pendidikan dan Pengajaran (JRPP)* 7, no. 3 (2024): 9632–40.

https://doi.org/10.31004/jrpp.v7i3.31305.

Siregar, Mardona. "Teori Hukum Progresif Dalam Konsep Negara Hukum Indonesia." *Muhammadiyah Law review* 8, no. 2 (2024): 1–15. https://doi.org/10.24127/mlr.v8i2.3567.

Sukmana, Teja, Zahrah Salsabillah Ashari, dan Yadi Darmawan. "Responsive Law and Progressive Law: Examining the Legal Ideas of Philip Nonet, Philip Selznick, and Sadjipto Raharjo." *Peradaban Journal of Law and Society* 2, no. 1 (2023): 92–106. https://doi.org/10.59001/pjls.v2i1.82.

Wibisana, Nicholas Ardy, Bernadeth Gisela Lema Udjan, dan Solfian. "Perlindungan Masyarakat Hukum Adat dalam Bentuk Pengakuan Masyarakat Adat (Studi Kasus Masyarakat Eks Desa Sendi, Pacet-Mojokerto)." *Sapienta et Virtus* 9, no. 1 (2024): 385–97. https://doi.org/10.37477/sev.v8i1.

Yanto, Andri, dan Faidatul Hikmah. "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas." *Recht Studiosum Law Review* 2, no. 2 (2023): 81–91. https://doi.org/10.32734/rslr.v2i2.14162.

Books

Angraeni, Novita, Dewi Bunga, Citranu, dan Ardiyanti Aris. *Hukum Pidana: Teori Komprehensif*. Jambi: PT. Sonpedia Publishing Indonesia, 2024.

Fatimah, Siti, dan Erwin Syahruddin. *Hukum Adat*. Diedit oleh Nining Yurista Prawitasari. Makassar: Yayasan Barcode, 2021.

Irianto, Kartika Dwi, Budi Juliardi, Junaidi, Monica Belinda Oksavina, Rabu, Ratih Agustina Wulandari, Gregorius Cristison Bertholomeus, et al. "Masyarakat Hukum Adat Indonesia." In *Pengantar Hukum Adat Indonesia*, diedit oleh Rizki Tri Anugrah Bhakti. Padang: CV. Gita Lentera, n.d.

Lesmana, H. Sri Jaya, dan Inas Sofia Latif. *Kedudukan Hukum Adat di Indonesia*. Bali: Berkah Aksara Cipta Karya, 2023.

Marbun, Rocky, Mahmud Mulyadi, dan Fina Rosalina. *Hukum Acara Pidana: Landasan Filosofis, Teoretis, dan Konseptual*. Cirebon: Publica Indonesia Utama, 2021.

Maringka, Jan S. *Reformasi Kejaksaan Dalam Sistem Hukum Nasional*. Jakarta: Sinar Grafika, 2022.

Sombo, Marhaeni Ria, dan Henny Wiludjeng. *Hukum Adat Dalam Perkembangannya*. Jakarta: Universitas Katolik Indonesia Atma Jaya, 2020.

Sulistiani, Siska Lis. *Hukum Adat di Indonesia*. Diedit oleh Kurniawan Ahmad. Jakarta: Sinar Grafika (Bumi Aksara), 2021.

Wibowo, Kurniawan Tri. *Perspektif Hakim Pemeriksa Pendahuluan dalam Sistem Peradilan Pidana Indonesia*. Surabaya: Pustaka Aksara, 2021.