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Implementation of Living Law in Indonesia's 2026 National Criminal Code: Opportunities and Challenges for the Recognition of Customary Law

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Abstract

Purpose: This study examines the implementation of living law under Law Number 1 of 2023 on the Indonesian Criminal Code (KUHP), which became fully effective in 2026, focusing on its potential to strengthen customary law recognition and the legal and practical challenges of its application.

Design/methodology/approach: This study employs normative legal research using statutory, conceptual, case, and comparative approaches. Primary, secondary, and tertiary legal materials were analyzed qualitatively through legal interpretation and legal reasoning, focusing on living law, legal pluralism, legal certainty, the principle of legality, human rights, and customary law within Indonesia's criminal justice system.

Findings: The findings indicate that the recognition of living law reinforces legal pluralism and reflects constitutional recognition of indigenous customary law communities. It also creates opportunities to promote substantive justice and strengthen restorative justice. However, implementation faces challenges related to the diversity of customary norms, verification of living customary law, potential conflicts with human rights principles, and the absence of comprehensive technical guidelines for law enforcement. The study proposes a Constitutional and Human Rights-Based Living Law Implementation Model based on five parameters: the existence of indigenous customary law communities, conformity with Pancasila and the 1945 Constitution, respect for human rights, legal certainty through objective verification, and judicial oversight.

Originality/value: This study develops a normative framework for implementing living law under Article 2 of the Indonesian Criminal Code by integrating customary law recognition with constitutional principles, human rights, legal certainty, objective verification, and judicial oversight

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1. Introduction

The enactment of Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code), which came into effect on January 2, 2026, marks a new chapter in the history of criminal law reform in Indonesia. The enactment of the National Criminal Code not only replaces *the Wetboek van The Criminal Code* (WvS) is a legacy of Dutch colonial rule that has been in effect for over a century, but it also reflects the state's efforts to build a criminal justice system rooted in the values of Pancasila, the 1945 Constitution of the Republic of Indonesia, and the socio-cultural character of Indonesian society. This reform is part of a national legal policy aimed at realizing a criminal law that is more responsive, just, and in line with developments in Indonesian society.

One of the most interesting updates to academics and legal practitioners is the accommodation of the concept of ***living law*** or law that lives in society through the provisions of Article 2 of the National Criminal Code. This provision provides space for the implementation of law that lives in society as long as it meets certain requirements and does not conflict with Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the community of nations. This regulation indicates a paradigm shift from the principle of legality that is purely formal to recognition of legality that also takes into account the legal values that live and develop in society (Rasiwan, 2026).

Recognition of *living Law* is a form of strengthening legal pluralism *in the* Indonesian legal system. Indonesia has long been known as a country with a diverse legal system consisting of state law, customary law, and religious law that coexist in the life of society. The existence of customary law as part of the nation's identity has received constitutional legitimacy through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which recognizes and respects customary law communities and their traditional rights as long as they are still alive, in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia. (Ari et al., 2026) . Therefore, the recognition *of living The law* in the National Criminal Code can be seen as a concrete implementation of the constitutional mandate in strengthening the existence of customary law as a source of national law.

On the other hand, the implementation *of living The inclusion of customary law* in the criminal justice system has also sparked various academic debates. Some believe that recognizing existing laws within a community is a progressive step in realizing substantive justice because it allows judges to consider local values that are alive and adhered to by the community. This approach is seen as capable of producing decisions that better reflect the community's sense of justice compared to the rigid application of positive law. Furthermore, recognizing customary law also strengthens the *restorative approach. justice* which has been the characteristic of dispute resolution in various indigenous communities in Indonesia (Ario et al., 2025).

However, some academics have also expressed criticism of this regulation. The use of unwritten laws in criminal law enforcement is considered to have the potential to create legal uncertainty , especially since customary law has diverse characteristics in each region.

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Differences in customary norms between regions can lead to disparities in the application of criminal law to the same acts. Furthermore, the implementation of *living Law enforcement* also faces challenges in proving the existence of customary norms, determining which customary law communities are still alive, the potential for conflict with the principles of non-discrimination and human rights, and the absence of comprehensive technical guidelines for law enforcement officers in implementing the provisions of Article 2 of the National Criminal Code. (Nur, 2026) . In fact, recent studies have noted that implementing regulations, which serve as a reference for implementing these provisions, are still a crucial requirement for ensuring their implementation in the field.

Various previous studies generally discuss *living law* before the National Criminal Code came into effect or focused more on conceptual and philosophical aspects. Meanwhile, studies that specifically analyze the implementation *of living Law enforcement* after the National Criminal Code comes into effect in 2026 remains relatively limited. However, the implementation phase is a crucial opportunity to assess the extent to which recognition of customary law can be realized in criminal justice practice without neglecting the principles of legal certainty, human rights protection, and legality, fundamental principles of modern criminal law.

Based on this description, this study aims to analyze the implementation of the *living concept. This study examines the inclusion of customary law* in the 2026 National Criminal Code, identifies the opportunities offered for strengthening the recognition of customary law in Indonesia, and examines the various legal and practical challenges that arise in its implementation. This research is expected to provide theoretical contributions to the development of a national criminal law based on legal pluralism, while also offering conceptual recommendations regarding the implementation model *for living customary law. law* that is able to maintain a balance between legal certainty, substantive justice, protection of human rights, and respect for the diversity of customary law in Indonesia.

2. Theoretical Framework

2.1.Living Law Theory

Living concept *law* was first introduced by Eugen Ehrlich through his monumental work *Fundamental Principles of the Sociology of Law* (1913). Ehrlich argued that true law is not only found in statutory regulations (*law in books*), but lives and develops in the practice of social life (*law in action*). According to him, the center of legal development is in society (*the center of gravity of legal development lies in society itself*), so that social norms that are obeyed and implemented consistently by society have the same important position as laws established by the state (Asriati & Rahmat, 2026).

In Ehrlich's perspective , *living Law* is a set of norms that develop naturally, are accepted as guidelines for behavior, and gain legitimacy through societal compliance. These norms can take the form of customs, habits, traditions, or social values that develop within a community (Asriati & Rahmat, 2026). Therefore, the existence *of*

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living Law is a reflection of the legal needs of society, which often develop faster than the formation of written laws by the state.

This concept has strong relevance to the Indonesian legal system, which adheres to legal pluralism. Indonesia recognizes not only state *law law*), but also recognizes the existence of customary law and religious law that live in society. Recognition of *living The law* in Article 2 of Law Number 1 of 2023 concerning the Criminal Code shows that the legislators adopted the paradigm that law does not solely originate from the state, but also originates from social norms that are still alive and adhered to by customary law communities.

In this study, the theory *of living Law* is used to analyze the philosophical basis for the recognition of customary law in the National Criminal Code and to explain the relationship between social norms and the formation of national criminal law.

2.2.*Theory* of *Legal Pluralism*

Legal pluralism is a theory that explains that more than one legal system can exist simultaneously in a country. John Griffiths distinguishes legal pluralism into *weak legal pluralism* , which is the recognition of other legal systems that remain under the domination of state law, and *strong legal pluralism* , which is the recognition that various legal systems can exist side by side without having to rely on state legitimacy (Kusumawarni, 2022).

Werner Menski developed the concept of legal pluralism through the *legal pluralism model. triangle* that describes the interaction between three main elements, namely state law (*state law*), social norms (*social norms*), and moral or religious values (*religious and ethical norms*) (Oktaviana et al., 2025). In the Indonesian context, these three elements interact dynamically in the formation and implementation of national law.

The existence of customary law communities in Indonesia is clear evidence that the national legal system is not solely based on statutory regulations but is also influenced by existing and widely adhered customary norms. Therefore, legal pluralism serves as a theoretical basis for explaining the position of customary law as part of the national legal system (Jayantiari et al., 2020).

Through this theory, the research will analyze the extent to which there is recognition of *living The law* in the National Criminal Code strengthens legal pluralism while identifying the boundaries of the relationship between state law and customary law.

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*2.3.*Theory *of Legality Principle*

The principle of legality is one of the fundamental principles in modern criminal law which is formulated through the adagium *nullum crimen , nulla poena sine lege* . This principle states that a person cannot be punished except based on criminal provisions that existed before the act was committed (Jayantiari et al., 2020).

Over time, the principle of legality has transformed from a formal concept to a more substantive one. Formal legality emphasizes that the source of criminal law comes solely from written laws. Conversely, material legality opens up the possibility of recognizing prevailing norms within society as long as they meet certain requirements and do not conflict with constitutional values (Adityatama, 2025).

Regulations regarding *living The law* in Article 2 of the National Criminal Code indicates that Indonesia is beginning to adopt a material legality approach. However, the implementation of this approach must still adhere to the principles of legal certainty, non- retroactivity , and protection of human rights to prevent arbitrary law enforcement (Nur, 2026).

In this study, the theory of the principle of legality is used to assess whether the implementation *of living The law* in the National Criminal Code remains in line with the principles of modern criminal law.

*2.4.*Theory *of Recognition of Customary Legal Communities*

Recognition of customary law communities has a constitutional basis in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states that the state recognizes and respects customary law communities and their traditional rights as long as they are still alive, in accordance with the development of society, and in line with the principles of the Unitary State of the Republic of Indonesia (Setyowati, 2023).

In addition, Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia emphasizes that the cultural identity and rights of traditional communities are respected in accordance with the development of the times and civilization. This constitutional provision serves as the basis for the legitimacy of the state in accommodating customary law as a source of national law (Soetijono et al., 2025).

Recognition of indigenous legal communities is not merely symbolic, but must also be realized through legal policies that provide space for the application of customary norms within the national legal system. In the context of the National Criminal Code, recognition of *living law* is one form of implementation of this principle (Syaputra & Syauket, 2025).

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This theory is used to analyze the relationship between constitutional recognition of indigenous legal communities and the implementation *of living standards. law* in the Indonesian criminal law system.

2.5.Restorative Justice Theory

Restorative justice is an approach to resolving criminal cases that emphasizes restoring relationships between the perpetrator, victim, and community, rather than solely imposing punishment. Howard Zehr explains that crime is essentially a violation of social relations, so its resolution must be directed at reparation, reconciliation, and restoring social balance (Baihaky & Isnawati, 2024).

The values of restorative justice have long been practiced in various traditional communities in Indonesia through mechanisms of deliberation, peace, customary compensation payments, and social sanctions aimed at restoring social harmony (Mamahit et al., 2026). Therefore, the application *of living The law* in the National Criminal Code has a close relationship with the restorative justice paradigm .

Through this theory, the research will examine whether the implementation *of living Law* is able to strengthen the resolution of criminal cases that are more oriented towards substantive justice, social recovery, and respect for local values without ignoring legal certainty.

2.6.Conceptual Framework of the Research

This research is built on the assumption that the implementation *of living The law* in the National Criminal Code is the result of the interaction between three main dimensions: the normative dimension, the sociological dimension, and the constitutional dimension. The normative dimension is realized through the provisions of Article 2 of Law Number 1 of 2023 concerning the Criminal Code. The sociological dimension is reflected in the existence of customary law that is still alive and adhered to by customary law communities. Meanwhile, the constitutional dimension is based on the recognition of customary law communities as regulated in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia (Herlina & Anggraeni, 2025).

The interaction of these three dimensions is then analyzed using the *living theory. law* , the theory of legal pluralism, the theory of the principle of legality, the theory of recognition of customary law communities, and the theory of restorative justice to answer questions regarding the opportunities and challenges of implementing *living law* in the National Criminal Code. Thus, this theoretical framework serves as an analytical basis for assessing whether recognition of customary law can be effectively

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realized without sacrificing the principles of legal certainty, human rights protection, and the goals of national criminal law reform.

3. Research methods

This research is normative legal research . which aims to examine the implementation of the concept *of living law* in the 2026 National Criminal Code (KUHP) and analyzes the opportunities and challenges of recognizing customary law in the Indonesian criminal law system (Rifa'i et al., 2023). Normative legal research was chosen because the object of study focuses on legal norms, legal principles, doctrines, and synchronization of laws and regulations that regulate the existence *of living law* as one of the sources of national criminal law.

3.1.Types of research

The type of research used is normative legal research with prescriptive and analytical characteristics . Prescriptive research aims to provide arguments regarding how the law should be applied (*das sollen*) based on applicable legal norms, while the analytical approach is used to examine the relationship between the provisions of the National Criminal Code and the principles of legal pluralism, the principle of legality, the recognition of indigenous legal communities, and the protection of human rights (Suyanto, 2023).

3.2.Research Approach

This research employs multiple approaches to ensure a comprehensive analysis of the recognition and implementation of *living law* within Indonesia's criminal law system (Setiawan, 2025). The first is the statutory approach, which is used to examine various laws and regulations concerning the recognition of *living law* and customary law communities. The legal instruments examined include the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 2023 concerning the Criminal Code, Law Number 48 of 2009 concerning Judicial Power, Law Number 39 of 1999 concerning Human Rights, and other relevant laws and regulations relating to customary law communities and criminal law.

The second is the conceptual approach, which is used to examine legal doctrines and theories developed in the relevant literature, particularly those concerning *living law*, legal pluralism, the principle of legality, recognition of customary law communities, and restorative justice (Ell, 2025). This approach provides the theoretical basis for constructing academic arguments concerning the position and role of customary law within the Indonesian criminal law system.

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The third is the case approach, which is conducted by examining relevant court decisions, particularly decisions of the Constitutional Court, the Supreme Court, and other courts concerning the recognition of customary law communities, the application of customary law, and the development of the principle of legality in judicial practice (Panggabean, 2021). The analysis of these decisions is intended to identify the tendencies in judicial interpretation regarding the relationship between state law and customary law.

The fourth is the comparative approach, which compares the regulation and implementation of customary law in Indonesia with those of countries that also recognize customary law systems, including New Zealand, Canada, the Philippines, and South Africa (Adila & Alexandra, 2025). This comparison aims to identify relevant practices that may serve as references for developing the implementation of *living law* in Indonesia. In the Indonesian context, Law Number 1 of 2023 concerning the Criminal Code has been in effect since January 2, 2026, and recognizes *living law* through Article 2. Further provisions concerning its procedures and criteria are regulated under Government Regulation Number 55 of 2025, which came into effect on January 3, 2026. Among other purposes, this Government Regulation provides guidelines for regional governments in determining customary criminal acts that are not regulated in the Criminal Code through regional regulations. The comparative analysis of the aforementioned countries is therefore used to provide a broader legal perspective for examining the opportunities and challenges of implementing *living law* within Indonesia's national criminal justice system.

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Aspect	Indonesia	New Zealand	Canada	Philippines	South Africa
Key terms	Customary law / law that lives in society (*living law) law*)	*Tikanga Maori*	*Indigenous rights , Aboriginal rights , customary law*	*Customary laws and* indigenous *practices*	*Customary law*
Main legal basis	1945 Constitution; Law No. 1 of 2023 (Criminal Code); Government Regulation No. 55 of 2025	Treaty of Waitangi ; various laws ; *common law developments law*	Constitution Act 1982, in particular s.35	Constitution 1987; Indigenous People 's Rights Act 1997 (RA 8371)	Constitution 1996, especially s.211–212
Customary legal status	Recognized as long as it meets the requirements specified by national law.	Increasingly recognized as a source of law and consideration in state law	Customary rights and customary agreements receive constitutional protection.	Explicitly recognized in indigenous communities and can be used in dispute resolution	Recognized as part of the legal system, but subject to the Constitution
Protected subjects	Customary law communities/communities that meet legal criteria	Māori , including *iwi* , *hapū* and related communities	First Nations , Inuit , and Métis	Indigenous Cultural Communities / Indigenous Peoples (ICCs / IPs)	Communities that implement customary legal systems and traditional leadership institutions
Constitutional recognition	The 1945 Constitution recognizes the unity of customary law communities and their traditional rights as long as they meet constitutional requirements.	Treaty of The Treaty of Waitangi is seen as an important constitutional document, although its legal force depends on recognition in statute.	Very strong: s.35 recognizes and affirms *existing Aboriginal and treaty rights*	The Constitution and IPRA provide a strong basis for the recognition of indigenous peoples' rights.	Very strong: s.211 directly recognizes the institutions, status and role of *traditional leadership* according to customary law
How customary law enters the state legal system	Through recognition/determination according to national and regional mechanisms	Through laws, court decisions, Treaty principles of Waitangi , and the development of *common law*	Through the Constitution, court decisions, treaties, and Indigenous governance mechanisms	Through laws, customary institutions, and customary dispute resolution mechanisms	Through the Constitution, laws, courts and traditional institutions
The role of the courts	Courts remain within the national judicial system; living law must be placed within the boundaries of national law.	Courts are increasingly considering *tikanga Māori* ; Law Commission notes that *tikanga* can be a source of enforceable rights/interests and is relevant to the development *of*	Courts have a major role in determining the existence, scope and protection of Indigenous rights.	The customary justice system can be used in Indigenous communities as long as it is in accordance with the national legal system and human rights (Philippines Coast Guard)	The Constitution expressly orders the courts to apply *customary law. law* if the law applies, subject to the Constitution and laws (

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Aspect	Indonesia	New Zealand	Canada	Philippines	South Africa
		common Law Commission			Ministry of Justice)
Customary institutions	Recognized sectorally/regionally, but there is not yet a uniform national customary institutional model	*Iwi* , *hapū* , *Māori Land Court* and related institutions	Indigenous governments and various First Nations institutions	Customary and *Indigenous institutions People 's justice / conflict resolution institutions*	*Traditional leaders* , *traditional authorities* , as well as the structure *of houses / councils of traditional leaders*
Settlement of customary disputes	It can be done through customary mechanisms, but it needs to be synchronized with the national legal system.	Emphasizing the context of community, *whānau* , *hapū* , and *iwi* ; resolution is not always oriented towards the Western litigation model (Law Commission)	Indigenous jurisdiction and governance within a reconciliation framework	Explicitly grants indigenous peoples the right to use their own justice systems and conflict resolution mechanisms (Philippines Coast Guard)	Traditional institutions have a role in the lives of local communities, while courts can apply customary law.
Customary law and land/resources	Recognition of customary rights and traditional rights is spread across various regulations.	Māori rights and relationships with land/resources are an important part of the development of Māori law	Very strong, especially *Aboriginal title* , treaty rights and land rights	*Ancestral Domains* and customary land rights receive protection through IPRA (Car Development)	Customary law is closely related to community, traditional leadership and management of community interests.
Relationship with Human Rights	Customary law must not conflict with Pancasila, the 1945 Constitution and statutory regulations.	*Tikanga* develops in dialogue with common law principles, human rights and state law.	Indigenous rights must be harmonized with Canadian rights Charter and constitutional system; recent developments emphasize reconciliation	The use of customary law must explicitly be compatible with nationally and internationally recognized human rights (Philippines Coast Guard)	Customary law is subject to the Constitution and *the Bill of Rights* . *Rights* ; for example protection of dignity, equality and freedom from violence
state-customary law relations	Controlled integration	The growing legal pluralism	Constitutional recognition & Indigenous rights	Recognition + community self-governance	Constitutional legal pluralism
Main strength	Having new momentum through the National Criminal Code and PP No. 55/2025	Development *of tikanga* through courts and legislation	Constitutional protection of Indigenous rights is very strong	The mechanisms of customary law and *self-governance* are regulated quite explicitly.	The Constitution directly mandates the application of customary law by the courts.
Challenge	*Living* identification *law* , variations between regions, legal certainty, potential conflicts with human rights and national law	The boundaries between *tikanga* and state law are still evolving.	Determining the scope of Indigenous rights and their relationship to state jurisdiction	Harmonization of customary law with human rights and national law	Potential conflicts between customary law, gender equality, human rights and constitutional law

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3.3.Legal Sources and Materials

This research uses three categories of legal materials: primary, secondary, and tertiary legal materials. Primary legal materials consist of the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 2023 concerning the Criminal Code, Law Number 48 of 2009 concerning Judicial Power, Law Number 39 of 1999 concerning Human Rights, Constitutional Court decisions relating to customary law communities, Supreme Court decisions, and other relevant regulations. Secondary legal materials include books on criminal law and customary law, national and international journal articles, dissertations, theses and other research findings, expert opinions or legal doctrines, proceedings of scientific seminars, and reports issued by relevant state institutions and international organizations. Meanwhile, tertiary legal materials comprise the Big Indonesian Dictionary (KBBI), *Black's Law Dictionary*, legal dictionaries, legal encyclopedias, and scientific indexes and databases used to support the identification and retrieval of relevant legal literature.

3.4.Legal Material Collection Techniques

The collection of legal materials was conducted through library research by systematically exploring primary, secondary, and tertiary legal sources relevant to the research focus. The search was carried out through libraries, scientific journal databases, university repositories, and databases containing legislation and court decisions. The collected legal materials were subsequently classified according to their relevance to the research questions and analytical focus.

3.5.Legal Material Analysis Techniques

The legal materials were analyzed qualitatively using methods of legal interpretation and legal reasoning (Aini et al., 2026). The analysis involved several stages. First, the legal materials were inventoried and classified according to the research focus. Second, the relevant legal norms governing *living law* and customary law communities were interpreted. Third, the relationship between the provisions of the National Criminal Code and the concepts of *living law*, legal pluralism, the principle of legality, and human rights protection was analyzed. Fourth, the opportunities and challenges associated with implementing *living law* within the Indonesian criminal law system were evaluated. Finally, the analysis was directed toward formulating an implementation model of *living law* capable of accommodating the existence of customary law while maintaining legal certainty, human rights protection, and the principles of the rule of law.

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3.6.Validity of Argumentation

To ensure the validity of the research arguments, triangulation of legal sources was conducted by comparing statutory provisions, court decisions, legal doctrines, and findings from previous studies (Nurfajriani et al., 2024). In addition, vertical and horizontal synchronization were employed to examine the consistency of the National Criminal Code with the 1945 Constitution and other laws and regulations governing indigenous customary law communities. Through these methodological procedures, the study seeks to provide a comprehensive analysis of the implementation of *living law* under the 2026 National Criminal Code while developing conceptual recommendations to strengthen the recognition of customary law within Indonesia's criminal law system without compromising the principles of legality, legal certainty, and human rights protection.

4. Results

4.1.Legal Policy on Recognizing Living Law *in the 2026 National Criminal Code*

The reform of criminal law through Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code) is part of the national legal policy aimed at freeing the Indonesian criminal law system from the influence *of the Wetboek. van Strafrecht* (WvS) is a legacy of Dutch colonial rule. For over a century, the Indonesian criminal justice system has relied on a legal positivism paradigm that places statutes as the sole source of criminal law. This paradigm is considered inadequate to accommodate the social dynamics and cultural diversity of Indonesian society, which still has various surviving customary legal systems.

Philosophically, the formation of the National Criminal Code is based on the values of Pancasila, the foundation of the state and the source of all legal sources. From this perspective, criminal law serves not only as an instrument for enforcing order, but also as a means of realizing social justice, respect for human dignity, and protecting the nation's cultural values (Zaidan, 2022), Therefore, recognition of *living Law* is a manifestation of legal politics that seeks to integrate state law with social values that develop in society.

Recognition of the law within society also demonstrates a shift in the orientation of criminal law reform, moving from a purely repressive approach to a more restorative and just approach. In the context of customary law communities, the resolution of criminal cases is not always interpreted as punishing the perpetrator, but rather is directed at restoring social balance, restoring relationships between perpetrators and victims, and re-establishing harmony within the community (DM et al., 2025). These values are in line with the *restorative paradigm. justice* which is one of the spirits of the National Criminal Code reform.

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From a legal political perspective, the regulation *of living The law* is also a form of implementation of the constitutional mandate, particularly Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which recognizes the existence of customary law communities and their traditional rights. Thus, the existence of Article 2 of the National Criminal Code is not only a criminal law norm, but also a constitutional instrument to strengthen the existence of customary law in the national legal system (Sofian & Kurniawan, 2026).

However, this recognition is not absolute. Lawmakers have limited the application of existing laws within society to the extent that they do not conflict with Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the community of nations. This limitation demonstrates that Indonesian legal policy adopts an integrative model of legal pluralism, recognizing customary law without disregarding constitutional supremacy and the principle of the rule of law.

4.2.Implementation of *Living Law in the 2026 National Criminal Code*

Living arrangements *The law* in the National Criminal Code represents one of the most progressive reforms in the history of Indonesian criminal law. Through Article 2 of the National Criminal Code, the state provides space for the application of existing laws within society as the basis for criminalizing acts not explicitly regulated in law (Putranto & Triadi, 2025).

The implementation of these provisions cannot be interpreted as unlimited recognition of all customary norms. On the contrary, the application *of living Law* must fulfill a number of strict requirements, namely: (1) the norm is truly still alive and is adhered to by society; (2) applies in a particular customary law community; (3) does not conflict with Pancasila and the 1945 Constitution of the Republic of Indonesia; (4) does not violate human rights; and (5) is in line with universally recognized general legal principles (Dewi & Rahman, 2026).

In practice, the implementation *of living Law* requires a complex process of proof. Judges cannot simply base their decisions on verbal acknowledgement of the existence of a customary norm; they must also ensure that the norm has social legitimacy, is consistently implemented, and continues to receive compliance from the indigenous community concerned. Therefore, proving the existence of *a living Law* is one of the aspects that determines the success of the implementation of Article 2 of the National Criminal Code (Putranto & Triadi, 2025).

In addition, the implementation *of living Law enforcement* also requires coordination between law enforcement officials, local governments, customary institutions, and customary law communities. Without a clear verification mechanism,

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the application of customary norms has the potential to create legal uncertainty and disparities in decisions across regions.

4.3.Opportunities for Recognition of Customary Law through Living Law

Recognition of *living Law* opens up significant opportunities for strengthening the existence of customary law within the national legal system. There are at least five main opportunities. First, this recognition strengthens the implementation of legal pluralism in Indonesia. Until now, customary law has often been positioned only as a supplementary law in resolving certain disputes. By accommodating *living law* in the National Criminal Code, customary law gains stronger legitimacy as part of the national legal system (Putranto & Triadi, 2025).

Second, the recognition *of living The law* expands protection of the rights of indigenous legal communities as guaranteed by the constitution. This demonstrates that the state not only formally recognizes the existence of indigenous legal communities but also provides space for customary legal values to play a role in enforcing criminal law (Siregar, 2025).

Third, the implementation *of living Law* has the potential to produce substantive justice. In many indigenous communities, the resolution of criminal cases not only considers legal certainty but also pays attention to social balance, peace, and the restoration of relations between residents (Wahyudhi, 2026). This approach can produce decisions that are more acceptable to the public than the rigid application of positive law.

Fourth, *living Law* strengthens the application of restorative justice in the Indonesian criminal justice system. The values of deliberation, peace, restitution, and social responsibility that characterize customary law align with the *restorative paradigm. justice* that develops in modern criminal law (Karjono & Malau, 2024)

Fifth, recognition of *living The law* has become a symbol of the decolonization of Indonesian criminal law. The existence of customary norms as a source of law demonstrates that the formation of national law is no longer simply adopting Western legal systems, but also integrating indigenous Indonesian legal values (Kristanto et al., 2025).

4.4.Challenges of Implementing Living Law in the National Criminal Code

In addition to these various opportunities, the implementation *of living Law* faces a number of challenges that are not easy. The first challenge is the potential for legal uncertainty . The unwritten nature of customary law means that the boundaries of prohibited acts and the sanctions often differ between communities. This can lead to disparities in the application of criminal law (Ari et al., 2026).

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The second challenge is the difficulty of proving the existence of a customary norm. Not all customary communities have written documentation regarding applicable customary law (Ari et al., 2026). As a result, judges must rely on statements from traditional figures or social practices that have developed in society, which has the potential to give rise to differences in interpretation.

The third challenge relates to human rights protection. Not all customary norms align with the principles of equality, non-discrimination, or the protection of vulnerable groups (Kristanto et al., 2025). Therefore, a filtering mechanism is needed so that only customary norms that are in accordance with the constitution and human rights instruments can be applied.

The fourth challenge is the lack of comprehensive technical guidelines for law enforcement officials. To date, there are no national standards for the identification, verification, and proof of *living conditions*. The absence of these guidelines has the potential to create inconsistencies in judicial practice (Baihaky & Isnawati, 2024).

The fifth challenge is the limited capacity of law enforcement officials to understand diverse customary laws. Indonesia has hundreds of customary law communities with varying characteristics, necessitating increased competence of judges, prosecutors, and investigators to effectively apply Article 2 of the National Criminal Code (Zaidan, 2022).

4.5.The Ideal Model for Implementing Living Law in the National Criminal Code

Based on the analysis, this study offers a Constitutional and Human Rights-Based *Living Law* Implementation Model as a conceptual contribution. This model places *living law at the heart of the concept of human rights. law* as a norm that can be applied if it meets five cumulative parameters, namely: 1) Existence Parameters**,** namely customary norms are still alive, obeyed, and recognized by customary law communities. 2) Constitutional Parameters**,** namely customary norms do not conflict with the 1945 Constitution of the Republic of Indonesia and Pancasila. 3) Human Rights Parameters**,** namely customary norms do not contain discrimination and respect the basic rights of every individual. 4) Parameters of Legal Certainty**,** namely the existence of customary norms can be verified through consistent social practices, statements from customary institutions, or recognition in regional regulations and other official documents.5) Judicial Supervision Parameters**,** namely the application *of living Law* must be subject to testing and assessment by judges through transparent, rational and accountable legal considerations.

This model emphasizes that recognition of *living The law* is not a form of ignoring the principle of legality, but rather an expansion of sources of criminal law that remain within the corridors of the rule of law, constitutional supremacy, and protection of human rights. Thus, the implementation *of living The law* not only strengthens the

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recognition of customary law, but also maintains the balance between legal certainty, substantive justice, and legal diversity that are characteristic of the Indonesian legal system.

5. Discussion

The results of the study show that the recognition *of living The law* in the 2026 National Criminal Code represents a paradigm shift in Indonesian criminal law, moving from a system based on legal positivism to one that better accommodates legal pluralism**.** This shift is evident in the recognition of existing laws within society as a basis for criminal liability, while remaining within the framework of the constitution and human rights. This finding demonstrates that lawmakers no longer view state law as the sole source of law, but instead acknowledge the existence of long-standing social norms within Indonesian society.

These findings are in line with the *living theory. law* proposed by Eugen Ehrlich. According to Ehrlich , true law develops within society and is not always identical to the law established by the state. In the Indonesian context, customary law has long served as an instrument of social control and dispute resolution in various communities. Therefore, recognition of *living The law* in the National Criminal Code can be understood as a form of institutionalization of social norms within the state's legal system. Thus, reform of Indonesian criminal law not only prioritizes formal legal certainty but also strives to provide justice consistent with prevailing social values.

The findings of this study also reinforce the theory of legal pluralism developed by John Griffiths and Werner Menski . Griffiths argues that in modern society, more than one legal system exists simultaneously, while Menski explains that state law, religious law, and social norms interact to form the legal system. This reality is evident in Indonesia, where state law coexists with customary law and Islamic law. Therefore, recognition of *living The law* in the National Criminal Code can be seen as a form of state recognition of the reality of legal pluralism that has developed in Indonesian society.

However, the research results also show that the implementation *of living Law* still faces serious issues regarding legal certainty. From the perspective of the principle of legality, the use of unwritten norms has the potential to create uncertainty if not accompanied by clear parameters regarding the existence and scope of applicable customary law. In modern criminal law, the principle of *nullum crimen , nulla poena The sine lege* aims to protect everyone from state arbitrariness through clear criminal norms. Therefore, recognition of *living law* should not be interpreted as ignoring the

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principle of legality, but rather as an expansion of legality that still requires constitutional limitations.

This finding differs from some previous studies which tended to view the recognition *of living law* merely as a form of expanding the principle of legality. This research shows that the main problem lies not in the expansion of the principle of legality itself, but rather in the lack of a normative mechanism that can be used to identify and verify living customary law. In other words, the challenge of implementing *living customary law law* is more institutional in *nature challenge*) rather than conceptual *problems challeng*.

This study also found that the success of the implementation *of living Law enforcement* is highly dependent on the state's ability to establish verification mechanisms for the existence of customary law communities and applicable customary norms. To date, there has been no national standard for customary law indicators that can be used as a basis for criminal penalties. Consequently, there is the potential for disparity in decisions if judges use different criteria to determine the existence of a *living community. This condition has the potential to reduce legal certainty and* disrupt the principle of equality before the law (*equality before the law*).

Apart from the issue of legal certainty, this study found a close relationship between *living law* and human rights protection. Not all customary norms can be automatically applied in the national criminal law system. Customary norms that are discriminatory, demeaning to human dignity, or contrary to human rights principles cannot be used as a basis for criminal prosecution. Therefore, recognition of *living Law* must always be placed within the framework of constitutional supremacy. This finding demonstrates that the relationship between customary law and human rights is not a conflicting one, but rather one that requires a process of harmonization through a constitutional review mechanism.

The main contribution of this research is to offer a Constitutional and Human Rights-Based ***Living Law*** Implementation Model**.** This differs from previous research, which generally only explains the concept of *living law. law* , this study formulates five normative parameters that can be used as guidelines in the application of Article 2 of the National Criminal Code, namely: (1) the existence of customary law communities and the continuity of customary norms; (2) conformity with Pancasila and the 1945 Constitution of the Republic of Indonesia; (3) respect for human rights; (4) the existence of legal certainty through objective verification mechanisms; and (5) judicial supervision by judges through rational and accountable legal considerations . These five parameters can be instruments to maintain a balance between recognition of customary law and the principles of the rule of law.

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From a legal policy perspective , *the* results of this study indicate the need for strategic steps to support the implementation *of living standards. law* in the National Criminal Code. The government needs to draft implementing regulations governing procedures for identifying and verifying customary law, including the mechanism for determining customary law communities that meet constitutional requirements. The Supreme Court also needs to develop guidelines for judges regarding procedures for proving *living law* in criminal cases to ensure uniform application of the law. In addition, local governments, along with customary institutions, need to conduct an inventory and documentation of existing customary laws as part of efforts to strengthen legal certainty.

Overall, this study confirms that the implementation *of living The inclusion of the law* in the National Criminal Code represents a progressive step in reforming Indonesian criminal law. However, its successful implementation depends not only on normative recognition in the law, but also on the state's ability to build a system capable of harmonizing customary law, the constitution, human rights, and the principle of legality. Thus, *living Law* can function as an instrument for criminal law reform that not only reflects the nation's legal identity, but also fulfills the principles of a democratic state based on the rule of law.

6. Conclusions

This study concludes that the implementation of *living law* under the 2026 National Criminal Code represents a shift toward a more responsive criminal law system that recognizes Indonesia's legal pluralism and customary norms while maintaining conformity with Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and universally recognized legal principles. The recognition of *living law* strengthens the constitutional position of indigenous customary law communities and creates opportunities for substantive and restorative justice; however, its implementation remains challenged by the diversity of customary norms, difficulties in verifying their existence, limited technical guidelines, and potential conflicts with human rights. To address these challenges, this study proposes a Constitutional and Human Rights-Based Living Law Implementation Model based on five parameters: the existence of customary law communities and living customary norms, conformity with Pancasila and the 1945 Constitution, respect for human rights, objective verification mechanisms ensuring legal certainty, and transparent judicial oversight. **The study recommends** that the government develop clear implementing regulations and verification mechanisms; the Supreme Court establish judicial guidelines for assessing *living law*, regional governments and customary communities

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document and map existing customary laws; higher education institutions and researchers conduct further empirical studies on its implementation, and law enforcement officials receive training in legal pluralism, customary law, and human rights. These measures are necessary to ensure that *living law* can contribute to criminal law reform while maintaining legal certainty, constitutional principles, human rights protection, and respect for Indonesia's customary legal diversity.

Author Contribution

Nurcahyani as the corresponding author, contributed to conceptualization, methodology, investigation, literature review, formal analysis, and writing the original draft. **Fadly** contributed to data curation, formal analysis, and validation. **Muhsin** contributed to conceptual development, literature review, and manuscript review and editing. **Nasrullah** contributed to methodology, data interpretation, and manuscript review and editing. **Eril** contributed to project administration, validation, and coordination of the submission and revision processes. All authors contributed substantially to the study, approved the final version of the manuscript, and agreed to be accountable for all aspects of the work.

Ethics Approval

This study involved no human participants or personal data; therefore, ethical approval and informed consent were not required. The research was based on normative legal analysis and publicly available legal and academic sources.

Declaration of conflicting interest

The author declares that there is no potential conflict of interest related to this article.

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Data Availability Statement

The authors confirm that the data presented in this study were obtained from the research field. All relevant data are available in this article. Further information regarding data availability may be obtained from the authors upon reasonable request.

AI Usage Declaration

The author used ChatGPT (OpenAI) to assist with translation, manuscript organization, and language clarity. AI was not used to generate findings, analyze data, interpret results, or develop conclusions. The author is fully responsible for the accuracy, originality, integrity, and final content of the manuscript.

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