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The Living Law in Judicial Decisions: Formulation and Implications of the National Criminal Code

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Abstract:
A just law is a law that is in accordance with the law that lives in the community (living law) and in accordance with the reflection of the values prevailing in the community and in its development, living law has been accommodated in Article 2 paragraph (1) of the National Criminal Code. This research analyzes the formulation of community living law provisions in the National Criminal Code and its implications for judges in making legal considerations in their decisions. This research uses normative juridical research methods with statutory, conceptual, and analytical approaches. The results showed that the formulation of Laws Living in community in the National Criminal Code contained 15 provisions with five variations of terms such as "laws living in community", "norms of decency", "values of law and justice", "local customary obligations", and "fulfillment of customary obligations". The implications of laws living in the community in the National Criminal Code have consequences for Judges, who can be a reference for adjudicating cases involving customary law and additional obligations in criminal considerations. Although there are no follow-up rules in the form of Government Regulations and Regional Regulations regarding laws that live in the community, Judges are still obliged to explore legal values and a sense of justice that live in the community.

Keywords:
judicial decisions; living law; national criminal code.

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Introduction

Indonesia is a nation whose people have a diversity of ethnicities, races, religions, and customs spread in cities and villages. This diversity is a wealth and potential possessed by Indonesians. In social life, law and community are two things that cannot be separated. *Ibi ius ibi societas*, where there is a community, there is the law. Therefore, a rule of law is needed to regulate social life in order to achieve public order. The rule of law is both written and unwritten. It applies nationally and regionally in the field of public law and private law.[1]

The concept of living law has been incorporated into Article 2 Paragraph (1) of the Criminal Code (2023) which states that it does not reduce the applicability of laws that live in the community which determine that a person should be punished even though the act is not regulated in this law, then further Article 2 Paragraph (2) the applicability of laws that live in the community applies in the place where the law lives and develops and as long as it is not regulated in this law and in accordance with the values of Pancasila, the 1945 Constitution of

[1] Soepomo, *Bab-Bab Tentang Hukum Adat* (Jakarta: Pradnya Paramita, 1967).

the Republic of Indonesia, human rights, and generally accepted legal principles recognized by the community of nations. With the provisions of Article 2 above, a person should be punished based on the laws that live in the community even though the act is not specifically regulated in the National Criminal Code. The Elucidation of Article 2 paragraph (1) of the National Criminal Code explains that what is meant by the living law in the community that determines the punishment of a person is "Customary Criminal Law".

The problem that arises is what kind of customary law can be included in the Regional Regulation. The Elucidation of Article 2 Paragraph (1) of the National Criminal Code states that the law living in the community in this article relates to unwritten laws that are still valid and developing in the lives of the people in Indonesia. Meanwhile, the characteristics of customary law are initially the main criminal offence, while with the inclusion in the National Criminal Code it becomes the main criminal offence or additional criminal offence or in other words becomes positive or complementary law.

Its validity is determined by community trust and the existence of local officials who function to enforce these customary norms. Moreover, Soerjono Soekanto also emphasized that living law is not the same as community customs where in his view, customs are more of propriety that is repeated without having to be enforced by local officials.[2] Another provision that contains the living law in the community (living law) as stated in Article 66 paragraph (1) letter f and paragraph (2) that the Judge in imposing the main punishment is not sufficient to achieve the purpose of punishment, then additional punishment can be imposed "fulfillment of local customary obligations". Whereas the character of customary criminal sanctions was originally as a main punishment or main sanction, not an additional punishment in other words, it becomes positive or complementary law.

Accommodating the law that develops in the community into the Criminal Code seems to have become a necessity for judges in considering sentencing decisions. This is confirmed in Article 54 Paragraph (1) letter k of the Criminal Code, which states that "In sentencing, the value of law and justice that lives in the community shall be considered". Thus, this provision requires judges to not only adhere to the rules of positive law but also pay attention to legal norms that develop in the community as part of the considerations in making decisions. Consequently, judges have additional responsibilities in the process of examining cases at trial and in formulating the basis for their considerations before making a decision.

However, problems arise related to how the law that lives in this society plays a role in the punishment system. The question is whether the law that develops in society can be categorized as the main basis for determining a criminal offence or only serves as a complementary norm in the positive legal system. This issue is crucial because it can affect the way judges make sentencing decisions. Suppose the law that lives in society is seen as the main element in sentencing. In that case, judges have an obligation to give greater weight to the values that develop in society in every decision. Conversely, if the law is only considered a complementary factor, then its application in the punishment system is more

[2] Sri Wahyu Kridasakti, Abd. Majid, and Henny Yuningsih, "Restorative Justice Tindak Pidana 'Elopement' Hukum Adat Dalam Konstruksi Hukum Pidana Positif Indonesia," *Jurnal Supremasi* 12, no. 2 (September 2022): 94–110, https://doi.org/10.35457/supremasi.v12i2.1839.

supplementary and does not have a strong binding force. Therefore, further study is needed on how laws that develop in society can or should influence sentencing decisions in the Indonesian legal system.

Several articles on customary criminal law have been written by Indonesian scholars. Yoserwan (2023) argues that the regulation of customary criminal law affects its existence due to the processes of formalization, requirements, and restrictions in its application.[3] Watkan and Budiman (2022) highlight that customary criminal law remains alive within customary law communities that continue to uphold their traditional values. However, within Indonesia's positive legal system, the existence of customary criminal law remains ambiguous, positioned between recognition and non-recognition.[4] Meanwhile, Nurrohmah (2021) explains that customary criminal law, which is dispersed across various customary legal entities, reflects the indigenous civilization of Indonesian society, characterized by communitarian and religio-magical thought.[5] This article extends the in-depth analysis of previous studies by examining the implications of incorporating living law provisions into the National Criminal Code (KUHP) and their relevance to the duties, principles, and functions of judges in adjudicating criminal cases.

This article aims to analyze two main aspects. First, how the formulation of the law that lives in society in the National Criminal Code applies, either as the main criminal offense (positive law) or as an additional criminal offense (complementary law). Second, the implications of incorporating the law that lives in society into the National Criminal Code concerning sentencing guidelines for judges. The article's significant contribution to the international community is that it provides insight into the state of customary criminal law in a developing country that has recently codified a new penal code.

Method

This research examines the formulation and implications of living law within judicial decisions, particularly in the context of its recognition in the National Criminal Code. Given this objective, the study employs normative legal research, which focuses on analyzing legal rules, principles, and doctrines relevant to the issue. According to Peter Mahmud Marzuki, normative legal research involves a systematic approach to identifying and interpreting legal norms to resolve legal problems.[6] This research primarily adopts a statute approach, supported by a statutory, conceptual and analytical approach.[7] The legal framework examined includes the National Criminal Code (2023), the 1945 Constitution of the Republic of Indonesia, the Human Rights Law (1999), and various Supreme Court Regulations (*Peraturan*

[3] Yoserwan Yoserwan, "Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan Kuhp Baru," *UNES Law Review*, 2023, https://doi.org/10.31933/unesrev.v5i4.577.
[4] Fransiscus X Watkat and Eren Arif Budiman, "Hukum Pidana Adat 'Antara Ada Dan Tiada,'" *Jurnal Ius Publicum* 2, no. 2 (April 28, 2022): 242–64, https://doi.org/10.55551/jip.v4i4.38.
[5] Putri Risna Nurrohmah, "Peranan Hukum Pidana Adat Dalam Pembangunan Hukum Nasional Di Era Globalisasi Milenial," *De Juncto Delicti: Journal of Law* 1, no. 1 (August 18, 2021): 61–75, https://doi.org/10.35706/djd.v1i1.5471.
[6] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2008).
[7] Irwansyah and Ahsan Yunus, *Penelitian Hukum Pilihan Metode Dan Praktik Penulisan Artikel* (Yogyakarta: Mirra Buana Media, 2022).

Mahkamah Agung - PERMA) related to customary law. Additionally, the study explores legal doctrines and principles related to living law.[8]

The data for this research is obtained through a systematic review of legal documents from official sources, including the Central Library of Brawijaya University Malang and the Legal Documentation and Information Center (PDIH) of the Faculty of Law, Brawijaya University Malang. The data collection method involves an extensive literature review, which includes reading, categorizing, and analyzing legal texts, expert opinions, and relevant regulations. The analysis is conducted using interpretative techniques, specifically grammatical, systematic, and prescriptive interpretation, to ensure a comprehensive understanding of the legal provisions and their application in judicial decisions.

Discussion

1. The Formulation of Living Law Provisions in the National Criminal Code

The law that lives in community (living law), according to Eugene Ehrlich, "The law that dominates life itself, even though it has not been printed in legal propositions".[9] This view can explain that living law is a law centred on community, not on the state. Therefore, the law that lives in the community does not only include customary criminal law but also customs, decency, politeness, and religious norms that are part of the law that lives and exists in the community. Soepomo's opinion also states that customary law is law that lives in a community because the law was born and developed from the values that exist in the real life of a community. Customary law is part of the living law that continues to grow and develop in accordance with the times. Cicero stated, "*ubi societas ibi ius*," which means that in every community life, there will always be laws that have a function to regulate the behaviour or actions of its community members.[10]

Customary criminal law can come from written and unwritten sources. Strictly speaking, unwritten sources are habits that arise, are followed, and are obeyed continuously and from generation to generation by the community concerned. Then, the written sources of customary criminal law are all regulations that are written down, such as on palm leaves, leather, or other materials.[11] Living law is not tied to formal texts or regulations but rather to the relevance and justice felt by the community. This law is formed through legislation, court decisions, and social interaction in society. In criminal law, criminal norms can change with the evolution of society's views on criminal offences. Therefore, a living criminal law is more responsive to changing times and perspectives on crime, victims, and law enforcement and encourages flexibility in the application of the law without ignoring the principles of justice.

There are at least 15 provisions in the National Criminal Code with five variations of terms such as "laws living in community", "norms of decency", "values of law and justice",

[8] Taufani Suteki and Galang, *Metodologi Penelitian Hukum: Filsafat, Teori Dan Praktik* (Depok: Rajawali Press, 2018).
[9] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, ed. Walter Lewis Moll (Cambridge: Harvard University Press, 1936).
[10] Ni Putu Ari Setyaningsih and Putu Chandra Kinandana Kayuan, "Kompilasi Delik Adat Dalam Peraturan Daerah Sebagai Dasar Pemidanaan Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP)," *Jurnal Yustitia* 16, no. 1 (May 2022): 71–79, https://doi.org/10.62279/yustitia.v16i1.902.
[11] Lilik Mulyadi, *Hukum Pidana Adat : Kajian Asas, Teori, Norma, Praktik, Dan Prosedur* (Bandung: Alumni, 2015).

"local customary obligations", and "fulfillment of customary obligations". Even the term "customary law" is not found in the National Criminal Code, it is in the explanation. The following five variations of the term "living law in the community" in the National Criminal Code can be seen in the table below:

Table 1. Recognition of Living Law as a Basis of Punishment

No.	Article in the National Criminal Code	Terms used
1	Article 2 paragraph (1) The provisions referred to in Article 1 paragraph (l) shall not prejudice the applicability of the law living in the community which determines that a person should be punished even though the act is not regulated in this Act.	Law living in the community
2	Article 2 paragraph (2): The law that lives in the community as referred to in paragraph (1) shall apply in the place where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the community of nations.	Law that lives in the community
3	Article 12 paragraph (2): To be declared a criminal offense, an act that is threatened with criminal sanctions and/or actions by the laws and regulations must be unlawful or contrary to the law that lives in the community.	Law that lives in the community
4	Article 172: Pornography is images, sketches, illustrations, photographs, sounds, moving images, animations, cartoons, conversations, gestures, or other message sounds through various forms of communication media and/or public performances, which contain obscenity or sexual exploitation that violates the norms of decency in community.	Norms of decency

Source: the New Penal Code (2023)

Table. 2. Considerations in Punishment

No.	Article in the National Criminal Code	Terms used
1	Article 597 paragraph (1): Each person who commits an act which by virtue of the law existing in the community is declared to be a prohibited act, threatened with criminal penalties.	Law existing in the community
2	Considering letter c: Regulate the balance between public or state interests and individual interests, between protection of perpetrators and victims of criminal acts, between elements of actions and inner attitudes, between legal certainty and justice, between written law and laws that live in community, between national values and universal values, and between human rights and human obligations;	Laws that live in community
3	Article 54 paragraph (1) letter k: In sentencing, consideration shall be given to: (one of them) the value of law and justice that lives in community;	The value of law and justice
4	Article 56 letter g: In sentencing a corporation, consideration must be given to: (one of them) the value of law and justice that lives in community;	The value of law and justice

Source: the New Penal Code (2023)

Table. 3. Types of Punishment Related to Customary Law

No.	Article in the National Criminal Code	Terms used
1	Article 66 paragraph (1) letter f: Additional punishment as referred to in Article 64 letter b consists of: (one of them) fulfillment of local customary obligations;	Local customary obligations
2	Article 96 paragraph (1): Additional punishment in the form of fulfillment of local customary obligations shall be prioritized if the Criminal Offense committed meets the provisions as referred to in Article 2 paragraph (2).	Local customary obligations
3	Article 96 paragraph (2): The fulfillment of local customary obligations as referred to in paragraph (1) shall be deemed comparable to a category II fine.	Local customary obligations
4	Article 97: Additional punishment in the form of fulfillment of local customary obligations may be imposed even though it is not stated in the formulation of the Criminal Offense with due observance of the provisions of Article 2 paragraph (1).	Local Customary obligations
5	Article 116 letter b: Additional punishment as referred to in Article 114 letter b consists of: (one of them) b. fulfillment of customary obligations.	Fulfillment of customary obligations
6	Article 120 paragraph (1) letter d: Additional punishment for Corporations as referred to in Article 118 letter b consists of:(one of them) fulfillment of customary obligations.	Fulfillment of customary obligations
7	Article 597 paragraph (2): The punishment as referred to in paragraph (1) shall be in the form of fulfillment of customary obligations as referred to in Article 66 paragraph (1) letter f.	Fulfillment of customary obligations

Source: Center for Customary Law Studies 'Djojodigoeno

In relation to the Development of Recognition of Living Law in Indonesia Outside the Criminal Code, recognition of living law has been seen in several legal instruments:

a. Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia.
b. Article 5 Paragraph (3) sub b of the Emergency Law on the Unification of Civil Court System (1951);
c. Article 5 Paragraph (1), Article 10, and Article 50 of the Judicial Power Law (2009);
d. *PERMA* Number 2 of 2012 concerning the Adjustment of the Limitation of Minor Crimes and the Amount of Fines in the Criminal Code; and
e. *PERMA* Number 1 of 2024 concerning Guidelines for Adjudicating Criminal Cases Based on Restorative Justice.

These regulations reflect Indonesia's gradual formalization of living law in its legal system, emphasizing the need to harmonise written and customary law. Based on the regulatory context, the fifteen provisions mentioned above, the regulation of laws that live in the community or customary law can be classified into 3 (three) orientations as follows:

a. Customary Law as a Basis for Punishment

The expansion of the interpretation of the principle of legality in Article 1 paragraph (1) of the Criminal Code to the principle of material legality through Article 2 paragraph (1) of the Criminal Code allows a person to be convicted even though there are no regulations governing criminal threats, based on unwritten law or laws that live in the community. The use of living law is limited by Article 2 Paragraph (2) of the Criminal Code, which states that the law applies where the law lives and is in accordance with the constitution, the values of Pancasila, the 1945 Constitution, human rights, and legal principles prevailing in civilized society. The applicability of living law is also limited by the Criminal Code and will be outlined in Government Regulations and Regional Regulations;

b. Customary Law as a consideration in punishment

The living law is first contained in the weighing section letter c of the National Criminal Code. In this section, the Living Law and the written law become components, with the balance between the two being (one of) the objectives of the national criminal law. This is because customary law is one of the important sources for obtaining materials for the development of national law towards legal unification through legislation, without ignoring the emergence/growth and development of customary law.[12] So, customary crimes can apply even though they are not set out in the form of laws and regulations because the nature and legal sanctions and methods of the settlement are in accordance with the times and conditions of society or in other words customary law is a dynamic law.[13] It is only the unique characteristics of customary law that match the philosophy and culture of this nation;[14]

In the concept of the rule of law fair legal certainty is not only pursued by arguments in the law, because Indonesia is not only a country based on law, but also looks at developments and values that live in society, such as customary law.[15] Therefore, customary law is a continuous process, constantly evolving and responding to changing perceptions of justice in society and adapting to changing times.[16] Similarly, the National Criminal Code also uses the term 'the value of law and justice that lives in the community' as a guideline in sentencing (Article 54 paragraph (1) letter k of the Criminal Code) for individuals and corporations (Article 56 letter g of the Criminal Code). The addition of the word 'value' provides a more abstract meaning compared to the phrase 'living law', which refers to teachings about the virtues of legitimate life in various contexts. Justice is an example of a value in the legal system, so regulating Living Law as

[12] Helnawaty Helnawaty, "Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Binamulia Hukum* 6, no. 2 (December 2017): 149–60, https://doi.org/10.37893/jbh.v6i2.79.
[13] Adi Kusyandi, Sahda Salsabila, and Murtiningsih Murtiningsih, "Kedudukan Hukum Pidana Adat Dalam Hukum Pidana Indonesia," *Yustitia* 9, no. 2 (2023): 74–83, https://doi.org/10.31943/yustitia.v10i2.205.
[14] Lukman Arake et al., "Non-Binary Gender in Siyasah Syar'iyah Perspective: Study at Religious Universities in South Sulawesi," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 3 (October 2023): 1708, https://doi.org/10.22373/sjhk.v7i3.20152.
[15] La Syarifuddin, "Sistem Hukum Adat Terhadap Upaya Penyelesaian Perkara Pidana," *Risalah Hukum* 15, no. 2 (2019): 1–10.
[16] Suci Flambonita, "The Concept of Legal Pluralism in Indonesia in the New Social Movement," *Jurnal Analisa Sosiologi* 10, no. 3 (July 2021): 361–73, https://doi.org/10.20961/jas.v10i0.45939.

a value provides wider room for interpretation than as a norm, especially for judges in handing down decisions;[17]

c. Customary Law as Criminal Sanction

The National Criminal Code places 'customary obligations' as an additional punishment and a principal punishment. As an additional punishment, adat obligations are imposed if the main punishment is deemed insufficient, so the perpetrator must undergo both. As a main punishment, customary obligations are imposed for acts that violate living law. In relation to Living Law, customary obligations function first as a basis for punishment for acts that are not regulated in law and second as an additional sanction for acts that violate laws and regulations without using Living Law as a basis for punishment;[18]

As for the description of this first part, it can be concluded that every region in Indonesia has local wisdom and forms of customary law that existed long before the Dutch arrived in Indonesia. Snouck Hurgronje's research in 1891-1892 identified 19 customary jurisdictions across the archipelago.[19] In order to prepare for the implementation of the National Criminal Code related to living law, it is necessary to conduct an updated mapping of customary law areas in Indonesia. This mapping can refer to the old mapping, but it should be more detailed, expanded, and developed to support the implementation of living law. The mapping is expected to provide guidance on the number and types of customary jurisdictions, as well as those that need to be recognized in criminal law through Government Regulations and Regional Regulations.

From the explanation above, it can be concluded that the position of customary law in the National Criminal Code is 3 (three), namely 1) As a basis for sentencing contained in Article 2 paragraph (1) and (2); Article 12 paragraph (2), Article 180 and Article 597 paragraph (1). 2) As a consideration in sentencing contained in the considering section letter c; Article 54 paragraph (1) letter k; and Article 56 letter g, and 3) As a criminal summary contained in Article 66 paragraph (1) letter f; Article 96 paragraph (1); Article 96 paragraph (2); Article 97; Article 116 letter b; Article 120 paragraph (1) letter d; and Article 597 paragraph (2) of the National Criminal Code.

The recognition of living law as the basis for determining criminal offences is based on the principle of formal legality but it also recognizes unwritten law as long as it is in accordance with the values of Pancasila and nationally and internationally recognized legal principles. National values refer to religious morals, humanity, nationality, democracy, and social justice, while international values refer to the general principles of law recognized in Article 15, paragraph (2) of the ICCPR (International Covenant on Civil and Political Rights). The National Criminal Code can be considered a positive and complementary law, with living

[17] Flambonita.
[18] Flambonita.
[19] Ali Aridi and Yana Sukma Permana, "Kedudukan Hukum Adat Dalam Penguatan Pelestarian Nilai-Nilai Adat Dalam Yurisprudensi," *The Juris* 6, no. 2 (December 2022): 352–62, https://doi.org/10.56301/juris.v6i2.602.

law as a complement to the principle of formal legality. Once enacted, the community can determine criminal offences through living law in accordance with Article 2 Paragraph (2) of the Criminal Code, while fines are outlined in Regional Regulations published into Government Regulations as a reference for judges, although not all regions have Government Regulations.

The substance of Article 2 of the National Criminal Code actually already exists in the judicial power law which, among other things, states that in adjudicating cases, judges are obliged to explore the laws that live in society. This means that the substance of this article is not new. There are 7 things related to Article 2 of the National Criminal Code that are important to know:[20]

a. The philosophical foundation of this article is nulla poena sine jure or no punishment without law. The law here is in a broad sense, both written and unwritten law;
b. The applicability of the law that lives in the community is not only used to impose punishment but can also be used to release a person from criminal liability as an embodiment of the principle of balance in this Criminal Code;
c. Article 2 is used if the offence is not regulated in this KUHP;
d. The use of Article 2 is only intended for minor offences;
e. This article is not intended to revive dead customary criminal law institutions but as a state legitimization of customary criminal law institutions that are still valid;
f. The enforcement of this article is strictly limited by Pancasila, the 1945 Constitution, Human Rights and general legal principles recognized by civilized nations in the world, and
g. This article is enforced based on the guidelines established in the Government Regulation.

Article 2 of the National Criminal Code lists laws that live in the community to protect legal values and a sense of justice. Some of these laws are codified in Government Regulations and apply as regulations outside the Criminal Code, while the rest continue to develop in the community. These regulations only apply to minor crimes and must meet four conditions: not contradict Pancasila, the 1945 Constitution, human rights, and universally recognized legal principles.

2. Implications of the Living Law Provisions in the National Criminal Code on Judges' Decisions

Indonesian judges, particularly in first-instance courts, sometimes incorporate local customary law (living law) into their rulings, especially in regions where indigenous traditions hold strong legal and social authority. There are examples of cases demonstrating Living Law in Indonesian Courts: Decision of the Sinjai District Court Number 92/Pid.Sus/2021/PN.Snj sentenced the defendant Emang bin Sudding to 14 years in prison and a fine of

[20] Eddy Hiariej and Topo Santoso, *Anotasi KUHP Nasional* (Depok: Rajawali Press, 2025).

Rp1,000,000,000 for the crime of sexual intercourse with a minor.[21] Meanwhile, in Tual District Court Decision Number 2/Pid.B/2019/PN Tul, five defendants were sentenced to two years imprisonment for acts of violence against others committed as a form of reaction to violations of Kei customary norms called Larwul Ngabal Customary Law.[22] The decision of the Tual District Court reflects the existence of living law in the practice of criminal justice in Indonesia. The judge recognized that the defendant's actions were rooted in local customary law that is still respected by his community. However, because the acts of violence committed were contrary to positive law, the defendants were still sentenced under the Criminal Code. This shows that although customary law is recognized, its application must still be in line with national law.

Furthermore, the following data is presented on the decision of a criminal case that is oriented towards the law that lives in the community before the National Criminal Code was passed, namely Decision Number 247/Pid.B/2009/PN.Btg. The situation is that it is a custom for villagers in Java who have narrow and landless land to gresek/ngasak or take the remaining harvest of rice, randu, clove leaves and other agricultural products. There is an unwritten agreement in Javanese society, especially in rural areas, that taking the rest of the harvest is not considered theft. Gresek/ngasak for the Javanese is defined as looking for what is left over. For Javanese people in rural areas, farming is not only about earning a living but also has a social function. The judge's verdict sentenced 4 (four) defendants to 24 (twenty-four) days imprisonment each.

These cases show that living law is not just a theoretical concept but also influences judicial practice in Indonesia, especially in indigenous communities. The new Criminal Code accommodates living law through Article 2, which allows customary law to be the basis for punishment. However, without clear implementing regulations, judges face challenges in applying them without violating the principles of legality and human rights. Lilik Mulyadi emphasized that the integration of customary offences in national criminal law increases the responsibility of judges to understand and upholding the justice that lives in society. This is particularly important in Indonesia, a country rich in a diversity of customs that are respected by various ethnic groups.[23] The task of a judge is to find a balance between the applicable customary law regulations and the actual situation in the community. This is carried out so that the implemented decision does not result in a conflict between the applicable customary law and the social reality in community life.

When examined intensely, in detail and in detail as the basis for the authority of judges to impose customary sanctions in the form of fulfillment of local customary obligations or obligations according to the laws that live in the community" is confirmed by the provisions of Article 97 of the National Criminal Code which determines:

[21] Pengadilan Negeri Sinjai, "Putusan No. 92/Pid.Sus/2021/PN Snj: Kasus Embang Bin Sudding," Mahkamah Agung, 2022, https://putusan3.mahkamahagung.go.id/search.html.
[22] Pengadilan Negeri Tual, "Putusan No. 2/Pid.B/2019/: Kasus Ali Rahareng Alias Ali," Mahkamah Agung, 2019, https://putusan3.mahkamahagung.go.id/search.html.
[23] Mulyadi, *Hukum Pidana Adat : Kajian Asas, Teori, Norma, Praktik, Dan Prosedur*.

"Additional punishment in the form of fulfillment of local customary obligations may be imposed even though it is not listed in the formulation of the Criminal Offense while still paying attention to the provisions of Article 2 paragraph (2)."

Then, the fulfillment of local customary obligations or obligations according to the laws that live in the community is the main or preferred punishment if the criminal offence committed meets the provisions. Furthermore, local customary obligations or obligations according to the laws that live in the community are considered comparable to Category I fines and may be subject to substitute punishment for fines if the local customary obligations or obligations according to the laws that live in the community are not fulfilled or not carried out by the convicted person and the substitute punishment can also be in the form of compensation.[24]

The logical consequence of the above context dimension can be stated that if the judge tries customary criminal offenses, it means that in order for the punishment imposed to be proportional and acceptable and well understood by the community and the perpetrator, the judge must consider the guidelines for punishment and the purpose of punishment as explicitly stated in Article 54 Paragraph (1) of the National Criminal Code.

In sentencing must be considered:

a. the form of guilt of the perpetrator of the Crime;
b. the motive and purpose of committing the Crime;
c. the inner attitude of the perpetrator of the Crime;
d. whether the crime was committed premeditatedly or unpremeditatedly;
e. the manner of committing the Crime;
f. the attitude and actions of the perpetrator after committing the Crime;
g. life history, social circumstances, and economic circumstances of the perpetrator of the Crime;
h. the influence of the life, social condition, and economic condition of the perpetrator of the Criminal Offense;
i. the influence of the Criminal Offense on the Victim or the Victim's Family;
j. forgiveness from the Victim and/or the Victim's family, and/or
k. the values of law and justice that live in the community.

The above sentencing guidelines are guidelines or terms of reference by judges in determining the sentence to be given to a defendant who is found guilty of committing a criminal offence. Sentencing guidelines aim to assist judges in ensuring that the punishment given is in accordance with the severity of the crime committed, considering justice for all parties involved, and creating consistency in sentencing across various criminal cases.[25] As for the use of these sentencing guidelines, the formulation is a cumulative alternative. This means that the judge is still given the freedom to choose one or more of the 11 factors above and can add other considerations in addition to the 11 factors mentioned. The sentencing guidelines listed in Articles 53 and 54 of the National Criminal Code will be used by judges as guidelines in adjudicating criminal cases with the principle of balance because these guidelines are summarized from the influence of criminology, victimology, restorative justice, and

[24] Mulyadi.
[25] Hiariej and Santoso, *Anotasi KUHP Nasional*.

customary law in Indonesia. In this context, the above sentencing guidelines actually have 5 aspects, which are:

a. Subjective aspects (Article 54 paragraph (1) letters a, b, and c)
b. Objective aspects (Article 54 paragraph (1) letters d and e)
c. Aspects of Criminal Offenders (Article 54 paragraph (1) letters f, g, h, and i)
d. Aspects of Victims of Crime (Article 54 paragraph (1) letter j)
e. Aspects of the law that lives in the community (Article 54 paragraph (1) letter k)

Instead, according to Tholib Setiady, Judges must assess a customary law rule to determine its relevance in the life of Indigenous peoples.[26] The aim is to prevent conflict between the application of customary law regulations and the development of a sense of justice in the community. In addition to their primary obligations set out in the Criminal Procedure Code, Judges also have additional responsibilities in carrying out their role. Judges' functions are not limited to the court but also include roles in providing legal education to the public and in finding the law. In the process of law discovery (*rechtsvinding*), the role of Judges is of great significance.

In connection with the unavailability of Government Regulations and Regional Regulations that officially regulate laws that live in the community, this legal vacuum plays an important role for a Judge in carrying out the process of law discovery (*rechtsvinding*) and recognizing the urgency of applying customary law provisions in criminal law because the efforts of the executive and legislative bodies to fill the legal vacuum require time and a complicated process. In this case, careful consideration is needed in organizing the provisions of customary offences to handle criminal cases. Judges play an important role in this process, in accordance with the provisions of Law No. 48/2009 on Judicial Power, which gives Judges the authority to refer to sources of law other than written laws.[27] The compilation of customary offences in the Regional Regulation will have implications for law enforcement by Judges, considering Article 5 paragraph (1) of Law No. 48/2009 on Judicial Power that states "Judges and constitutional judges are obliged to explore, follow, and understand the values of law and sense of justice that live in community". This provision means that the law that lives in the community is recognized.

Furthermore, Article 50 paragraph (1) of Law No. 48/2009 on Judicial Power stipulates that "Court decisions must not only contain the reasons and basis for the decision but also contain certain articles of the relevant laws and regulations or unwritten sources of law that are used as the basis for judging". The compilation of customary offences, which are unwritten laws, will raise issues regarding customary offences that can be used as the reasons and basis for decisions in criminal cases, possibly only limited to customary offences that have been compiled or can use customary offenses that are not accommodated in regional regulations.[28]

[26] Tolib Setiady, *Intisari Hukum Adat Indonesia* (Jakarta: Alfabeta, 2018).
[27] Damianus Rama Tene, Andi Muliyono, and Nurjanah Lahangatubun, "Implikasi Penerapan Hukum Pidana Adat Dalam Penyelesaian Tindak Pidana Pasca Pembaruan Hukum Pidana Nasional Indonesia," *Ekspose: Jurnal Penelitian Hukum Dan Pendidikan* 22, no. 2 (December 2023): 29–41, https://doi.org/10.30863/ekspose.v22i2.4151.
[28] Setyaningsih and Kayuan, "Kompilasi Delik Adat Dalam Peraturan Daerah Sebagai Dasar Pemidanaan Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP)."

In the context of the National Criminal Code, this principle emphasizes that legal certainty must be based on clear laws.

Legal certainty, especially in the suspension of criminal law relating to customary law, is important because one of the main characteristics of criminal law is that it can revoke human rights. However, as customary law is often unwritten or not regulated in detail in formal laws, this principle requires further regulation to ensure that Judges and parties involved in the justice system have good guidelines in the form of Government Regulations and Regional Regulations to implement customary law consistently. This fact reflects the necessity for the government to draft the pertinent Regional Regulation regulating customary offences promptly before the National Criminal Code prevails on January 2, 2026.

Lex stricta means that a criminal formulation must be interpreted strictly, and no analogous interpretation is allowed.[29] Instead, the polarization of customary law actually does not distinguish between customary criminal law, customary civil law, customary constitutional law, and others. The logical consequence is that customary law does not recognize a strict separation between criminal law and civil law (private), and between the two are correlated with each other. In connection with this, there is no difference in principle in the procedure for resolving cases of violation of customary law. In the event of a violation, legal functionaries (rulers/customary chiefs) are authorized to take concrete action, either on their own initiative or based on complaints from the aggrieved party.[30]

The existence of norms, principles and practices of customary criminal law are still applied by judges who are guided by customary criminal law, as reflected in *PERMA* Number 1644 K/Pid/1988 dated May 15, 1991. In this case, the defendant who committed sexual intercourse outside of marriage was subject to customary sanctions by the customary chief and could not be brought back to court on the same charges. Despite Indonesia's lack of precedent, the case was retried by the police and brought to the Kendari District Court, where the judge found the perpetrator guilty of fraud and rejected the nebis in idem argument.[31]

Furthermore, in judicial practice, customary violations are also based on civil law dimensions. For example, *PERMA* No. 3898 K/Pdt/1989, dated November 19, 1992 which, states that if two adults have consensual sexual intercourse which results in the woman becoming pregnant, the man is not responsible for the pregnancy. A customary sanction must be imposed in the form of payment of *belis* (fee or dowry) from the male party to the female party (known as Adat Pualeu Manleu). *Belis* is conceptualized and enacted as a basic requirement in the marital tradition of the East Nusa Tenggara people.[32] If the man is already married and wants to leave the family of the woman (whom he impregnated), the man is also required to pay *belis* in the form of a child from his marriage and several cows (domesticated animals) and some money or customary medicine (known as Adat Tam-noni).

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[29] Institute for Criminal Justice Reform (ICJR), "Ketentuan Hukum Yang Hidup Dalam Masyarakat Di RKUHP Ancam Hak Warga Negara," 2019, https://icjr.or.id/ketentuan-hukum-yang-hidup-dalam-masyarakat-di-rkuhp-ancam-hak-warga-negara/.
[30] Mulyadi, *Hukum Pidana Adat : Kajian Asas, Teori, Norma, Praktik, Dan Prosedur*.
[31] Deri Ardiansyah, Rayhan Dwi Kurnia, and Rika Rahayu, "Formulasi RPP Pelaksanaan Pidana Adat Sebagai Upaya Harmonisasi Penerapan Hukum Adat Guna Mewujudkan Kepastian Hukum," *WICARANA* 3, no. 1 (March 29, 2024): 11–22, https://doi.org/10.57123/wicarana.v3i1.64.
[32] Siti Rodliyah et al., "Between Economic Burden and Cultural Dignity: Belis in the Marital Custom of the NTT Society," *Komunitas* 9, no. 1 (March 2017): 92–103, https://doi.org/10.15294/komunitas.v9i1.8672.

In customary criminal law, the existence of the criminal sanctions and the purpose of punishment have a close and important correlation. In principle, the draft of Criminal Code Bill 2012 formulates the purpose of punishment. This aspect and dimension is a progress that is quite representative of Indonesian criminal law. The provision of Article 54 paragraph (1) letter c of the National Criminal Code stipulates, "punishment aims to resolve conflicts caused by criminal offences, restore balance, and bring a sense of peace in community". This dimension must be considered by the judge in making a decision so that the judge's overall decision has the dimensions of legal justice, moral justice, and social justice.

In order to fulfil this dimension concretely, the practice of law enforcement has also determined the existence of additional punishment as stipulated in Article 67 paragraph (1) letter e in the form of "fulfillment of local customary obligations or obligations according to the laws that live in the community". Existing legal frameworks primarily focus on recognition or accommodation, but they lack the depth and precision needed to ensure detailed legal certainty. As a result, there remains a pressing need for the establishment of *lex specialis* provisions—specialized legal arrangements tailored to address specific issues comprehensively and effectively.[33]

Criminal punishment in the form of fulfillment of local customary obligations or obligations according to the laws living in the community is considered equivalent to Category I fines in the amount of Rp 6,000,000.00 (six million rupiah) and may be subject to substitute punishment for fines if the local customary obligations or obligations according to the laws living in the community are not fulfilled or not carried out by the convict. Barda Nawawi Arief mentioned that additional punishment in the form of customary obligations or laws that live in the community in the concept of the Criminal Code is a form of protection for victims, which also functions as compensation for victims, namely indigenous peoples.[34] Recognition of living law gives a heavy duty to Judges to understand and explore legal values that live in the community, especially in pluralistic Indonesia with various customs, traditions, and cultures that are still maintained as living law. Soedarto mentions that the Judge's eyes, mind and feelings must be sharp to be able to capture what is happening in the community.[35]Therefore, their decision does not sound discordant. Judges with their entire personalities, must be responsible for the correctness of their decisions both formally and materially.

In addition, an understanding of the culture, customs, local wisdom and customary laws that form the background of a community is crucial for Judges who handle cases, especially if the case is related to the customary laws of the local community. This can shape the Judge's ability to find space for substantive justice both in positive law and customary law. Knowledge of customs allows Judges to understand the cultural and social context in which customary law is applied. By understanding customs, Judges can provide decisions that are not only legal but also substantively fair. This means a verdict that is in line with the justice felt by the

[33] Ade Irawan and 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 (June 2023): 59–74, https://doi.org/10.30656/ajudikasi.v7i1.6453.
[34] Barda Nawawi Arief, "Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan," *Kencana Prenada Media Group*, 2018.
[35] Sudarto, *Hukum Dan Hukum Pidana* (Semarang: Yayasan Sudarto, 1977).

Indigenous people themselves.[36] In furtherance of this, if the philosophy of punishment that ignores peace (traditionally) is allowed to continue, there is concern about the legal culture in society.[37]

Conclusion

There are 15 provisions in the National Criminal Code with five variations of terms such as "laws living in community", "norms of decency", "values of law and justice", "local customary obligations", and "fulfillment of customary obligations". However, it can also be classified into 3 positions, namely customary law as the basis for punishment, customary law as a consideration in punishment, and customary law as a criminal sanction. Moreover, the implication of the community living law under the National Criminal Code has consequences for Judges and can be a reference for adjudicating cases involving customary law and additional obligations in criminal considerations. Even though there are no follow-up rules in the form of Government Regulations and Regional Regulations regarding laws that live in the community, Judges are still obliged to explore legal values and a sense of justice that live in the community. Furthermore, regarding positive law or complementary law, The National Criminal Code places 'customary obligations' as an additional punishment and a principal punishment. As an additional punishment, adat obligations are imposed if the main punishment is deemed insufficient, so the perpetrator must undergo both. As a main punishment, customary obligations are imposed for acts that violate living law.

To ensure the effective implementation of *living law* within the National Criminal Code, legislative and executive institutions should promptly draft Government Regulations and prepare Regional Regulations so that by the time the Code is officially enacted on January 2, 2026, the necessary follow-up and technical regulations are ready for execution. In the absence of such regulations, the judiciary—particularly the Supreme Court of the Republic of Indonesia and lower judicial bodies—must continue to explore *living law* when adjudicating cases involving customary law, as mandated by Article 5, paragraph (1) of the Judicial Power Law. However, this study acknowledges certain limitations. First, it relies solely on secondary data, analyzing Indonesian courts' perspectives on *living law* through judicial interpretations without directly interviewing judges to understand the rationale behind their decisions. Second, as this article was written before the enforcement of the National Criminal Code, future cases may emerge once the Code takes effect in 2026, offering a broader and more dynamic discussion on *living law*. This article acknowledges several limitations. First, it relies solely on secondary data by analyzing Indonesian courts' perspectives on the concept of *living law* through the interpretation of court decisions, without directly interviewing judges to understand the rationale behind their rulings. Second, this article was written before the enforcement of the National Criminal Code. Since the Code will come into effect in 2026,

[36] Milenia Ramadhani, "Tantangan Implementasi Pengakuan Hukum Adat Dalam Kitab Undang-Undang Hukum Pidana Baru Di Indonesia," *Syntax Idea* 6, no. 8 (August 19, 2024): 2708–3716, https://doi.org/10.46799/syntax-idea.v6i8.4356.
[37] Budi Suhariyanto, "Eksistensi Pembentukan Hukum Oleh Hakim Dalam Dinamika Politik Legislasi Di Indonesia," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 4, no. 3 (December 31, 2015): 413, https://doi.org/10.33331/rechtsvinding.v4i3.14.

there is potential for new cases to arise, providing a broader and more dynamic discussion on *living law*.

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