

THE LIVING LAW IN INDONESIA'S NEW CRIMINAL CODE: LEGAL PLURALISM, INDIGENOUS AUTONOMY, AND THE RISK OF STATE CO-OPTATION

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Abstract

This study critically examines the incorporation of living law into Law Number 1 of 2023 concerning the Indonesian Criminal Code (KUHP), with particular attention to how the state defines, recognizes, and regulates legal norms originating from Indigenous and local communities. Although living law is often framed as a progressive instrument for accommodating legal pluralism, its formal inclusion in criminal law raises complex sociological concerns regarding the relationship between state authority and community-based normative systems. This study employs a qualitative socio-legal approach through critical analysis of statutory provisions, legal documents, and relevant scholarly debates on legal pluralism, customary law, and criminal law reform in Indonesia. The analysis shows that the recognition of living law in the new Criminal Code is not merely an acknowledgment of social norms that already exist within society. Instead, such recognition operates through state-defined criteria that determine which customary norms may be considered valid, legitimate, and enforceable within the formal criminal justice system. As a result, living law becomes a mechanism through which the state validates, regulates, and potentially absorbs Indigenous and local normative orders into the structure of national law. This process creates an ambivalent legal condition: while customary norms appear to gain formal recognition, their autonomy may be restricted by the requirements, classifications, and institutional procedures imposed by the state. This study argues that the incorporation of living law reflects not only an effort to recognize legal diversity, but also a broader strategy of governance that reinforces state control over legal plurality. The originality of this study lies in its sociological critique of living law as a regulatory instrument within contemporary Indonesian criminal law reform. By shifting the focus from formal recognition to power relations, this study contributes to debates on legal pluralism, Indigenous legal autonomy, and the politics of criminal law codification in Indonesia.

Keywords: Indigenous Autonomy; Living Law; Indigenous People; Criminal Code; Legal Pluralism.

A. Introduction

Law constitutes an inseparable component of social life and develops in constant interaction with cultural values, social institutions, and power relations. In Indonesia, a country characterized

by extensive ethnic, linguistic, and cultural diversity, law operates not only as a formal system of rules but also as a social institution embedded within local normative orders (Utama, 2021; Rohmah & Alfatdi, 2022; Zulfikar et al., 2024). Consequently, understanding law solely through a doctrinal or positivistic lens is insufficient, particularly in a context where legal pluralism has long shaped the relationship between state law and community-based normative systems (Prasojo, 2015; Buana, 2016; Bedner & Van Huis, 2008).

The recognition of legal pluralism in Indonesia is closely connected to the existence of Indigenous Peoples and customary law communities. According to the Indigenous Peoples Alliance of the Archipelago (AMAN), Indonesia is home to at least 2,512 Indigenous communities comprising approximately 20 million people, while broader estimates place the Indigenous population between 50 and 70 million individuals (Dalidjo, 2021). The constitutional foundation for the recognition of Indigenous Peoples is found in Article 18B(2) of the 1945 Constitution, which acknowledges customary law communities and their traditional rights, provided that they remain socially viable and are consistent with the principles of the Republic of Indonesia. Similar recognition is reflected in several legislative instruments, including Law No. 5 of 1960 on Basic Agrarian Principles, Law No. 39 of 1999 on Human Rights, Law No. 27 of 2007 on the Management of Coastal Zones and Small Islands, and Law No. 32 of 2009 on Environmental Protection and Management (AMAN, 2022). Furthermore, the Constitutional Court's landmark decision in 2013 strengthened the legal position of Indigenous Peoples by recognizing customary forests as distinct from state forests.

Despite these formal guarantees, the relationship between Indigenous communities and the state remains characterized by persistent tensions. Indigenous communities continue to experience land dispossession, criminalization, and exclusion from decision-making processes related to development, natural resource extraction, and infrastructure expansion (Pradhani, 2018; Angga, 2018; Rumiarta et al., 2022; Marino & Winanti, 2023; Niko, 2024). Between 2016 and 2021, more than 300 cases of customary land dispossession were recorded, affecting approximately 8.5 million hectares of customary territories, while over 600 Indigenous individuals faced criminalization related to land and resource conflicts (Ikhsan, 2021). These realities illustrate that constitutional recognition does not necessarily translate into substantive protection of Indigenous rights.

The enactment of Law No. 1 of 2023 concerning the Criminal Code introduces a new dimension to this debate. One of the most significant innovations of the new Criminal Code is the incorporation of the concept of *living law* (*hukum yang hidup dalam masyarakat*) into the criminal justice framework. This concept is principally reflected in Article 2, which recognizes the possibility of imposing criminal liability based on legal norms that live within society, even when such norms are not explicitly codified in statutory legislation. Article 2 simultaneously establishes conditions under which such norms may be applied, including conformity with constitutional principles, human rights, and generally recognized legal values. Through this provision, the Criminal Code seeks to accommodate legal pluralism within the framework of the principle of legality while providing a formal basis for the recognition of customary criminal norms (Sulistio et al., 2025).

However, the incorporation of *living law* into the Criminal Code has generated significant scholarly debate. On the one hand, it is viewed as an important step toward recognizing the normative diversity that has historically characterized Indonesian society. On the other hand, critics argue that the state's formal recognition of customary norms may simultaneously function as a mechanism for regulating, validating, and controlling those norms. This concern becomes particularly relevant when recognition is conditioned upon state-defined criteria that determine which customary norms are legally acceptable and which are excluded from legal enforcement.

From the perspective of legal sociology, law cannot be understood as a neutral and autonomous system detached from social and political processes (Pramono, 2020; Aulia, 2020;

Astuty & Tohari, 2025). Rather, legal concepts emerge through ongoing struggles over meaning, authority, and legitimacy. The concept of *living law* is therefore not merely a technical legal term but also a site of contestation between state institutions and local normative orders (Sanders, 1987). Although legal pluralism has long existed in Indonesia, the relationship between state law and customary law has historically been characterized by asymmetrical power relations in which the state retains the authority to define the boundaries of legal legitimacy (Febrianty et al., 2023; Buana, 2016; Manurung & Lubis, 2025).

Against this background, this article addresses two central research questions. First, how is the concept of *living law* constructed and regulated within Law No. 1 of 2023, particularly in relation to the principle of legality and the recognition of customary criminal norms? Second, to what extent does the incorporation of *living law* represent a genuine accommodation of legal pluralism, or alternatively function as a mechanism through which the state reasserts authority over Indigenous and community-based normative systems? These questions are particularly significant when viewed in a comparative perspective. Across many jurisdictions, including countries with plural legal traditions such as New Zealand, South Africa, Canada, and India, the recognition of customary or Indigenous norms has generated continuing debates concerning the balance between state sovereignty, legal certainty, and the autonomy of local normative orders (Barrett & Strongman, 2013; Randeria, 2007; McKerracher, 2023; Nhlapo, 2017). Indonesia's experience therefore forms part of a broader global discussion on the challenges of integrating non-state legal systems into modern national legal frameworks.

To answer these questions, the article adopts a socio-legal approach that combines doctrinal analysis of the relevant provisions of Law No. 1 of 2023 with a sociological examination of the broader historical, political, and institutional contexts in which the concept of *living law* is deployed. Rather than limiting the analysis to statutory interpretation, this study investigates how legal recognition of customary norms may reshape power relations between the state and Indigenous communities. The article proceeds in four stages. First, it examines the doctrinal foundations of *living law* within the Criminal Code, focusing on Article 2 and its relationship to the legality principle. Second, it situates the concept within broader debates on legal pluralism and the sociology of law, including comparative discussions on the recognition of Indigenous and customary law in different national contexts. Third, it critically analyzes how state recognition of customary norms may operate as a mechanism of legal validation and governance.

By bridging doctrinal legal analysis and socio-legal critique, this study contributes to ongoing debates regarding the meaning of *living law* in contemporary Indonesia. More specifically, it argues that the recognition of customary norms within the Criminal Code should not automatically be interpreted as a progressive expansion of legal pluralism. Comparative experiences from global south countries demonstrate that legal recognition often involves complex negotiations between Indigenous autonomy and state control, rather than a straightforward transfer of legal authority (Meur, 2015; Tamanaha, 2021; Perry, 2011; Twining, 2009). In the Indonesian context, therefore, such recognition must be examined critically in light of the power relations through which the state defines, regulates, and potentially co-opts Indigenous normative systems. Through this perspective, the article offers a deeper understanding of the tensions between legal pluralism, state authority, and social justice in Indonesia while situating these issues within wider international debates on the governance of legal diversity.

B. Method

This study adopts a socio-legal research approach that combines doctrinal legal analysis with qualitative document analysis. The socio-legal framework was selected because the concept of *living law* in Law No. 1 of 2023 cannot be understood solely through textual interpretation of statutory provisions. Rather, its meaning must be examined in relation to broader social, political, and institutional contexts in which legal norms are formulated, interpreted, and implemented

(Arvidsson, 2013). Accordingly, the study investigates both the normative construction of *living law* within the Criminal Code and the sociopolitical implications of its incorporation into the formal legal system.

The doctrinal component focuses on the analysis of legal materials directly related to the recognition of *living law* in the Criminal Code. Primary legal materials include Law No. 1 of 2023 concerning the Criminal Code, particularly Article 2 and related provisions concerning the principle of legality and customary criminal norms. The analysis also draws upon relevant constitutional provisions, including Article 18B(2) of the Indonesian 1945 Constitution, as well as Constitutional Court decisions concerning the recognition of Indigenous Peoples and customary rights. To understand legislative intent, the study examines the Academic Manuscript (*Naskah Akademik*) of the Criminal Code Bill and publicly available records of parliamentary deliberations concerning the inclusion of *living law* within the new Criminal Code framework. These legal materials were analyzed through doctrinal interpretation, focusing on statutory language, legislative objectives, and the relationship between the Criminal Code and broader principles of legal pluralism.

The qualitative component consists of document analysis of secondary materials, including scholarly publications, policy papers, legal commentaries, reports from civil society organizations, and studies addressing Indigenous Peoples, legal pluralism, and the sociology of law in Indonesia. Documents were selected based on their relevance to three analytical themes: (1) the conceptual development of *living law* in Indonesian legal thought; (2) debates concerning legal pluralism and state recognition of customary law; and (3) critiques of state regulation of Indigenous normative systems. Through thematic analysis, these materials were examined to identify recurring patterns, competing interpretations, and underlying assumptions regarding the relationship between state law and customary law.

In addition to documentary sources, the study incorporates insights derived from a multi-stakeholder guided discussion organized by Community Legal Aid Institute in 2024 concerning the implementation and implications of the new Criminal Code. The forum involved academics, legal practitioners, representatives of civil society organizations, and Indigenous community advocates. The first author participated in the discussion as an invited expert. The discussion is not treated as a primary empirical dataset; rather, it serves as a supplementary source of contextual understanding and critical reflection that informs the interpretation of documentary and legal materials. Consequently, the discussion was utilized to enrich the analysis of contemporary debates surrounding *living law*, rather than as evidence for independent empirical claims.

The analytical process proceeded in three stages. First, doctrinal legal analysis was conducted to identify how *living law* is defined, regulated, and justified within Law No. 1 of 2023 and related legal instruments. Second, thematic analysis of documentary sources was undertaken to examine how the concept has been interpreted in academic, legal, and policy discourses. Third, these findings were critically evaluated through a socio-legal lens, drawing upon scholarship in legal sociology, legal pluralism, and state-society relations. This analytical strategy enables an assessment not only of the normative content of *living law* but also of its broader implications for Indigenous Peoples, legal pluralism, and the distribution of legal authority in contemporary Indonesia (Campbell, 2016; Gregersen, 2022). By integrating doctrinal legal inquiry with socio-legal analysis, this methodology provides a systematic framework for examining whether the incorporation of *living law* in Law No. 1 of 2023 constitutes a meaningful recognition of legal diversity or, alternatively, a mechanism through which the state regulates and redefines community-based normative systems.

C. Results and Discussion

1. Historical and Theoretical Foundations of Living Law in Indonesia

The concept of living law occupies a significant position in Indonesian legal discourse because it reflects the long-standing tension between state law and the diverse normative systems that exist within society. Although the term has gained renewed prominence following its incorporation into Law No. 1 of 2023 concerning the Criminal Code (KUHP), its intellectual and historical roots predate the establishment of the Indonesian state. Understanding the origins and theoretical foundations of living law is therefore essential for assessing both its legal significance and its sociopolitical implications. The theoretical origins of living law are commonly associated with the work of Austrian legal scholar Eugen Ehrlich, who argued that the true source of law is not found primarily in legislation or judicial decisions, but in the social norms that regulate everyday life (Nelken, 2008). In his seminal work *Fundamental Principles of the Sociology of Law*, Ehrlich maintained that legal rules derive their effectiveness from social acceptance rather than formal state recognition. For Ehrlich, the living law consisted of norms, customs, and practices that emerged organically from social interactions and guided behavior within communities. This perspective challenged legal positivism, which regarded law as valid only when formally enacted by state authorities (Karvatska, 2017).

Ehrlich's ideas became highly influential within the sociology of law because they shifted attention from law as a system of formal rules to law as a social phenomenon. Rather than viewing society as merely an object regulated by law, the living law perspective understands law as emerging from society itself. Legal norms are therefore not static commands imposed from above but dynamic social constructions shaped by historical experience, cultural values, and collective practices (Ikhsan et al., 2025; Sueni et al., 2025). This theoretical orientation provides an important foundation for understanding legal pluralism, particularly in societies characterized by substantial cultural diversity.

The relevance of living law in Indonesia is closely connected to the country's colonial history and its long tradition of legal pluralism. During the Dutch colonial period, legal scholars and administrators recognized that indigenous communities throughout the archipelago possessed their own systems of customary law (Fasseur, 2007). Among the most influential figures was Cornelis van Vollenhoven, whose extensive studies documented the diversity of customary legal systems across the Netherlands East Indies. Van Vollenhoven argued that customary law represented a legitimate legal order with its own principles, institutions, and mechanisms of dispute resolution (Satory et al., 2025). His work challenged colonial efforts to impose a uniform legal system and established the intellectual basis for the recognition of legal diversity in Indonesia.

The concept was further developed by Ter Haar, who emphasized that customary law should be understood through the actual practices and decisions of communities rather than through abstract legal doctrines. According to Ter Haar (1976) law existed because communities recognized and enforced particular norms in everyday life. This understanding resonates strongly with Ehrlich's conception of living law, as both approaches locate legal authority within social relations rather than solely within state institutions (Syamsudin, 2017).

Following Indonesian independence, debates concerning customary law and legal pluralism continued to shape legal development. The founders of the Indonesian legal system faced the challenge of building a unified national legal order while accommodating the cultural diversity of the archipelago (Manse, 2024). As a result, customary law was neither completely abolished nor fully integrated into state law. Instead, the Indonesian legal system developed through a complex coexistence of statutory law, religious law, and customary law. This pluralistic arrangement is reflected in Article 18B(2) of the 1945 Constitution, which recognizes customary law communities and their traditional rights, provided that they remain consistent with national interests and constitutional principles.

Despite constitutional recognition, the relationship between state law and customary law has remained deeply ambivalent. On the one hand, customary law is frequently celebrated as evidence of Indonesia's cultural richness and legal diversity. On the other hand, state institutions have consistently retained authority to determine which customary norms are considered valid and enforceable. Consequently, the recognition of customary law has often been conditional rather than autonomous. This dynamic reveals an important theoretical tension within the concept of living law: while it is presented as a recognition of community-based norms, it may simultaneously function as a mechanism through which the state regulates and defines the boundaries of legal legitimacy (Sutanti, Rochaeti & Damora, 2025).

From the perspective of legal pluralism theory, this tension is unsurprising. Legal pluralism challenges the assumption that the state possesses a monopoly over law (Swenson, 2018). Scholars of legal pluralism argue that multiple normative orders frequently coexist within the same social space, including customary law, religious law, community norms, and state law (Petersen, 2007; Twining, 2009). In Indonesia, legal pluralism is not merely an academic concept but an empirical reality. Many Indigenous and local communities continue to regulate social relations through customary institutions that operate independently of formal state mechanisms. These institutions often govern issues related to land tenure, resource management, dispute resolution, marriage, and social obligations.

However, critical scholars have noted that state recognition of non-state legal systems does not necessarily eliminate power inequalities. Instead, recognition may become a strategy through which the state incorporates alternative normative systems into its own regulatory framework. In this context, the concept of living law can be interpreted not only as a recognition of legal diversity but also as a technique of governance. By determining the conditions under which customary norms may be legally enforced, the state effectively acquires authority over norms that previously derived legitimacy from community acceptance (Petersen, 2007).

These theoretical debates are particularly relevant to the inclusion of living law in Law No. 1 of 2023. The new Criminal Code seeks to accommodate social norms that continue to exist within particular communities, thereby acknowledging the limitations of a purely positivistic conception of legality. At the same time, the application of such norms remains subject to state-defined requirements, including conformity with constitutional values, human rights principles, and national legal objectives. Consequently, living law is transformed from a purely social phenomenon into a legally regulated category.

The historical development of living law in Indonesia therefore illustrates a broader transformation in the relationship between law, society, and the state. What began as a sociological concept emphasizing the autonomy of community norms has increasingly become embedded within formal legal institutions. This evolution raises important questions regarding the extent to which state recognition genuinely empowers Indigenous and local communities or instead subjects their normative systems to greater state oversight. Understanding this historical and theoretical trajectory is crucial for evaluating the contemporary role of living law within Indonesia's criminal justice system and for assessing its implications for legal pluralism, Indigenous rights, and state authority (Erwin & Yusriyadi, 2024; Kurniawan et al., 2025; Sukirno & Natalis, 2025).

From a sociological standpoint, the concept of living law refers to a set of rules transmitted across generations within a specific customary community tied to a particular territorial setting. This concept suggests that law is not a static entity but rather a dynamic and responsive mechanism that adapts to changes in social, cultural, and environmental conditions. In contemporary legal studies—especially through the lens of sociology—the term living law is highly relevant in explaining the interplay between social norms and formal legal institutions. It denotes a form of law that grows, evolves, and is practiced in everyday community life, even when it is not codified in statutory legal texts. Accordingly, living law is inseparable from local social and cultural

practices, often manifesting through customary law, religious prescriptions, or other locally recognized norms (Belmessous, 2012).

In the context of Indonesia's customary communities, the sociological recognition of living law necessitates the presence of authoritative figures capable of interpreting and enforcing these laws legitimately and with communal recognition. In this regard, the role of the customary criminal judge becomes central as a socially legitimized figure who embodies the authority to enforce law in accordance with the values embedded in the community.

Conceptually, living law diverges from state law, which is typically codified and hierarchical. Living law operates within networks of social relations, is legitimized through collective practice, and is preserved through the community's collective memory. From the perspective of legal sociology, living law illustrates how social norms—continuously practiced and collectively endorsed—can carry normative force equal to that of formal legal systems. In customary societies, these norms often take the form of unwritten customary laws passed down through oral traditions and preserved through cultural transmission mechanisms such as folklore, myths, and magico-religious symbols (Chiba, 2013).

In customary criminal law arrangements, criminal acts are not necessarily perceived as offenses against the state but rather as disruptions to social and cosmic harmony. Therefore, a sociological approach to living law emphasizes that the resolution of such offenses is not primarily punitive but restorative—aimed at restoring disturbed social equilibrium. This is commonly achieved through restorative justice mechanisms such as mediation, compensation, apologies, or culturally embedded rituals believed to heal ruptured social bonds.

One significant dimension of customary law, as a concrete manifestation of living law, is its magico-religious and communalistic nature. In many customary communities, violating customary norms is not only seen as an offense against the community but also as a disruption of spiritual balance or an affront to the sacredness of nature (Basiago, 1995; Mutawali, 2022; Niko, 2025c). Such transgressions may lead to social sanctions, curses, or obligations to perform restorative rituals. Despite being undocumented in written form, these norms possess strong social authority, rooted in belief systems and kinship structures that bind communities together.

Minister of Home Affairs Regulation No. 52 of 2014, which outlines guidelines for recognizing and protecting customary law communities, reflects the state's initial move to formally accommodate customary law within the national legal framework (Niko & Sangkhamanee, 2026). However, effective implementation of this recognition requires a fundamental understanding that customary law is not a static legal system. It is living law, which continually adapts to the socio-economic and ecological changes within the community.

The distinction between living law and customary law lies in their scope and operational frameworks. Living law encompasses all socially binding norms recognized as law in practice, including customary, religious, and other local norms. In contrast, customary law is more particularistic, applying only within specific communities and lacking the cross-regional or cross-cultural applicability of broader social norms.

From the standpoint of legal sociology, both systems underscore the notion of law as a social construct. Law does not solely originate from the state; it emerges from complex social processes involving customs, values, symbols, and collective legitimacy. Thus, recognizing living law is not merely acknowledging the existence of customary law but affirming the broader reality of legal pluralism in Indonesia's diverse society.

For the national legal system to meaningfully integrate living law, it must adopt an inclusive and adaptive legal framework. This entails state recognition of non-state legal practices and their legitimate operation within local contexts. It also requires formal mechanisms that support the institutional recognition of customary judges, customary courts, and customary sanctions (Huda et al., 2018). However, such formalization risks excessive state intervention into the autonomous legal spaces of customary communities.

Incorporating living law into positive law also introduces potential tensions between customary norms and modern legal principles, such as human rights, gender equality, and due process. In some instances, customary norms retain discriminatory elements against specific groups, including women and minorities—for example, certain customary marriage laws among the Minangkabau in West Sumatra and the Dayak in Kalimantan (Febria et al., 2022; Nugraha, 2022). Therefore, a sociological approach to living law must also critically engage with ethical dimensions and individual rights.

To construct a more responsive and contextually grounded legal system, living law must be understood as a manifestation of bottom-up legal development. Legal reform should not be driven solely by top-down legislative processes but also by empowering customary communities to formulate and administer their own legal systems (Anaya, 2007). In Indonesia, the sociological conception of living law captures the dynamic nature of law as it evolves in tandem with the rhythms of social life. Acknowledging living law thus entails recognizing an alternative legal system that coexists with formal law. With a strong sociological foundation, the integration of living law into the national legal system can enhance social justice, preserve legal diversity, and foster a more democratic and participatory legal order.

2. Legal Pluralism and the Coexistence of State Law and Indigenous Norms

Indonesia represents one of the most prominent examples of legal pluralism in the contemporary world. As a nation composed of thousands of islands, hundreds of ethnic groups, and diverse religious traditions, Indonesia has never been governed exclusively by a single legal system. Instead, legal regulation has historically emerged through the interaction of multiple normative orders, including state law, customary law, religious law, and locally developed social norms. This pluralistic legal landscape has shaped not only legal institutions but also the ways in which communities understand authority, justice, and social order (Buana, 2016; Bedner & Van Huis, 2008).

Legal pluralism refers to the coexistence of two or more normative systems within the same social and political space (Berman, 2009). Unlike legal centralism, which assumes that law derives exclusively from the state, legal pluralism recognizes that communities often regulate their affairs through norms and institutions that exist independently of formal governmental authority. In Indonesia, legal pluralism is not merely a theoretical concept but a social reality that predates colonial rule and continues to influence everyday life across many regions (Febrianty et al., 2023).

Historically, Indigenous communities throughout the archipelago developed sophisticated systems of customary law to regulate social relationships, land ownership, inheritance, marriage, conflict resolution, and resource management (Watofa et al., 2025). These legal systems emerged from local cultural values and collective experiences rather than from centralized political authority. Consequently, customary law derives its legitimacy primarily from community acceptance and social practice. For many Indigenous communities, compliance with customary norms is not solely a legal obligation but also a moral and cultural responsibility embedded within collective identity.

The Dutch colonial administration formally acknowledged this legal diversity through its recognition of customary law. Scholars such as Vandenbosch (1932) documented the existence of numerous customary legal systems and argued that these systems constituted legitimate forms of law. However, colonial recognition did not necessarily place customary law on equal footing with colonial law. Rather, customary law was incorporated into a hierarchical legal structure in which the colonial state retained ultimate authority. This pattern established a legacy that continues to influence the relationship between state law and customary law in post-independence Indonesia.

Following independence, the Indonesian government faced the challenge of constructing a unified national legal system while accommodating diverse local traditions. The resulting legal framework reflects a compromise between national integration and legal diversity. On one hand,

the state has consistently pursued legal unification through codification and centralized legislation. On the other hand, constitutional and statutory provisions acknowledge the continued existence of customary law communities and their traditional rights. Article 18B(2) of the 1945 Constitution explicitly recognizes customary law communities, while numerous sectoral laws provide varying degrees of protection for Indigenous rights and local legal institutions.

In practice, however, the coexistence of state law and Indigenous norms is often characterized by negotiation, adaptation, and conflict. State law generally claims supremacy as the formal legal framework governing the nation, yet customary law continues to play a significant role in many communities. In numerous Indigenous territories, disputes concerning land boundaries, resource use, family relations, and communal obligations are frequently resolved through customary institutions rather than state courts (Short, 2014). These local mechanisms are often regarded as more accessible, culturally legitimate, and socially meaningful than formal legal procedures.

Religious law constitutes another important component of Indonesia's plural legal order. Islamic law, in particular, has a significant influence on legal regulation in areas such as marriage, inheritance, family law, and religious affairs. The interaction between customary law and religious law has produced diverse legal arrangements across different regions. In some communities, customary norms and religious principles coexist harmoniously, while in others they compete for authority over social and legal matters. This interaction further illustrates the complexity of Indonesia's normative landscape, where multiple sources of legal legitimacy operate simultaneously.

Despite its apparent diversity, legal pluralism in Indonesia is not a relationship among equal legal systems. State institutions retain the authority to determine the legal status of customary and religious norms. As a result, recognition of non-state legal systems is often conditional upon their conformity with national legislation, constitutional principles, and state-defined public interests. This asymmetrical relationship reveals an important paradox: legal pluralism is officially acknowledged, yet its boundaries are largely determined by the state itself.

This tension is particularly evident in the context of Indigenous rights. Although Indigenous communities are constitutionally recognized, many continue to experience marginalization in disputes involving land, forests, and natural resources. Development projects, extractive industries, conservation initiatives, and infrastructure expansion frequently place Indigenous territories under pressure (Niko, 2024; Rumiarta et al., 2022). In such cases, customary claims to land and resources often encounter legal obstacles because state institutions possess the authority to define the conditions under which customary rights are recognized. Consequently, legal pluralism may coexist with significant inequalities in the distribution of legal power.

The incorporation of living law into Law No. 1 of 2023 introduces a new dimension to these longstanding debates. Through Article 2, the Criminal Code formally acknowledges the possibility that legal norms existing within communities may serve as a basis for criminal liability. This provision appears to strengthen legal pluralism by recognizing that state legislation is not the sole source of normative authority. It also reflects an attempt to reconcile the principle of legality with Indonesia's diverse social realities.

However, the recognition of living law does not eliminate the hierarchical relationship between state law and customary norms. The application of customary norms remains subject to state-defined requirements, including consistency with constitutional values, human rights standards, and national legal principles. Consequently, the state retains the authority to determine which community norms qualify as living law and which do not. This arrangement transforms customary norms from autonomous sources of authority into norms that require formal validation by state institutions.

From a socio-legal perspective, this development highlights the dual character of legal pluralism in Indonesia (Hariri & Babussalam, 2024). On one level, the recognition of living law represents an acknowledgment of normative diversity and the continued relevance of Indigenous

legal traditions. On another level, it demonstrates how the state seeks to manage and regulate legal plurality through formal legal mechanisms. Rather than existing outside the state, customary norms become incorporated into a broader framework of state governance.

The Indonesian experience therefore illustrates that legal pluralism is not simply the coexistence of multiple legal systems but also a field of ongoing negotiation over authority, legitimacy, and power. The interaction between state law, customary law, religious law, and local normative systems reflects broader struggles concerning who has the authority to define law and whose norms are entitled to legal recognition. In this context, the debate surrounding living law extends beyond technical legal questions and raises fundamental issues regarding the future of Indigenous rights, legal diversity, and the relationship between society and the state in contemporary Indonesia.

The concept of living law refers to social norms that emerge and evolve within communities and are observed as binding, despite not being codified within the state's formal legal system. This form of law reflects the actual and functional social practices embedded in daily life. Its existence affirms the presence of legal pluralism, where multiple legal systems coexist within a community (Borrows, 2005; Anaya, 2007). In the Indonesian context, this pluralism manifests through the presence of customary criminal law, religious law, Islamic law, and even legal norms practiced by foreign residents in Indonesia (Halim et al., 2019).

One key expression of living law is customary law. Customary law consists of unwritten norms developed and upheld by communities and is binding due to its collective observance (Adygezalova & Kurdyuk, 2018). Though not codified in the state's legal system, it is normatively recognized through various policies and regulations, such as the Ministry of Home Affairs Regulation No. 52 of 2014. The defining characteristics of customary law include its magico-religious nature, its foundation in communitarian values, and its concrete and immediate application.

Within customary law, it is not always easy to distinguish between legal norms and social customs. Both types of norms regulate behavior, but only some carry enforceable sanctions. Customary law comprises those customs that are backed by sanctions—be they social or spiritual—such as the threat of misfortune or cosmic imbalance (Pradhani, 2018). In contrast, customs lacking such sanctions tend to be more flexible and loosely enforced.

A vital dimension of customary law is the customary criminal act. This refers to violations against traditional norms upheld by a particular community (Apriyani, 2018). These acts are rooted in local values and interpreted contextually by the society in question. They may include theft, adultery, acts of disrespect towards elders, or desecration of sacred sites (Astuti, 2015). Such behaviors are seen as disruptions to both social and cosmic order and are thus addressed through customary legal mechanisms.

The adjudication of customary crimes is typically handled by traditional authorities with social legitimacy, such as customary elders, religious leaders, or village councils. These processes usually emphasize restorative justice, aiming to restore social harmony rather than impose punitive sanctions. For instance, in a case of theft, the perpetrator may be required to pay compensation, publicly apologize, or undergo a cleansing ritual. The primary goal of such mechanisms is to reestablish balance and prevent the escalation of conflict within the community.

The strength of customary law lies not only in its normative aspects but also in its cultural symbolism, which facilitates intergenerational transmission. Legends, myths, folktales, and oral traditions serve as powerful tools for conveying customary legal values. These symbols reinforce collective identity while embedding legal norms into the community's social consciousness. A distinctive feature of customary law—including its criminal dimensions—is its flexibility and capacity for adaptation (Citrawan, 2021). While some norms are conservative, customary law is inherently dynamic, evolving in response to shifts in social, economic, and political contexts. It

should therefore not be perceived as a static entity but as part of a broader historical and cultural process.

Nonetheless, the coexistence of customary law with state law is not always frictionless. In some cases, the application of customary law may conflict with principles of positive law or even international human rights standards. Issues such as gender inequality, discrimination against minority groups, or violations of individual rights may arise when customary norms are not critically examined (Valerina & Rismana, 2024). Despite these challenges, customary criminal law serves as a crucial instrument for maintaining local social order and resolving disputes.

The sustainability and legitimacy of customary law within the national legal framework depend heavily on its ability to adapt to modern demands for justice and recognition of individual rights. A harmonizing approach between state law and customary law offers a strategic path toward achieving contextual, inclusive, and sustainable justice in Indonesia's pluralistic and diverse customary communities.

3. Mechanisms and Practices of Customary Justice: Restorative and Community-Based Approaches

One of the most significant characteristics of Indigenous legal systems in Indonesia is their emphasis on restoring social harmony rather than imposing punitive sanctions. Unlike the modern criminal justice system, which is largely oriented toward determining guilt and administering punishment, customary justice generally seeks to repair damaged relationships, restore communal balance, and reintegrate offenders into the social fabric of the community. This orientation reflects a fundamentally different understanding of law, justice, and social order, making customary justice an important component of Indonesia's plural legal landscape.

In many Indigenous communities, customary law is not merely a collection of rules but a normative system embedded within social, cultural, and spiritual relationships. Violations of customary norms are therefore understood not only as offenses against individuals but also as disruptions to collective harmony. As a result, customary justice mechanisms often prioritize reconciliation, compensation, and social restoration over retribution. The objective is not simply to identify a wrongdoer but to repair the social consequences of the violation and restore equilibrium within the community.

The handling of customary criminal acts typically involves community-based institutions and leaders who possess social legitimacy derived from tradition and collective recognition. Depending on the local context, these actors may include customary chiefs, elders, clan leaders, religious figures, or customary councils. Their authority does not stem from formal state appointment but from their position within the social and cultural structure of the community. Consequently, the legitimacy of customary adjudication is rooted in community trust and acceptance rather than statutory authority.

The adjudication process itself differs significantly from formal judicial proceedings. State courts generally operate through adversarial procedures that separate judges, prosecutors, defendants, and victims into distinct legal roles. In contrast, customary justice mechanisms often employ deliberative and consensus-oriented approaches. Disputes are discussed collectively, and all relevant parties—including victims, offenders, families, community representatives, and customary authorities—may participate in the process. The goal is to achieve an outcome that is perceived as fair and capable of restoring social relationships rather than merely enforcing legal rules.

Across many Indigenous communities in Indonesia, customary sanctions commonly take the form of compensation, public apology, restitution, ceremonial obligations, or community service. These sanctions are designed to acknowledge wrongdoing while facilitating reconciliation between the parties involved. In some communities, customary ceremonies are required to symbolically restore harmony between individuals, families, and the broader social group. Such

mechanisms reflect the belief that social conflicts generate collective consequences that extend beyond the immediate parties to a dispute.

The restorative orientation of customary justice has attracted increasing attention within contemporary legal scholarship. Restorative justice emphasizes repairing harm, promoting accountability, and involving affected parties in the resolution process. Although restorative justice is often presented as a modern innovation within criminal justice reform, many Indigenous legal systems have practiced restorative principles for generations. In this sense, customary justice can be understood as an established form of community-based restorative justice that predates contemporary legal reforms.

The social functions of customary justice extend beyond dispute resolution. Customary legal institutions also play an important role in maintaining social cohesion, preserving cultural values, and reinforcing collective identity. Through customary adjudication processes, communities reproduce shared understandings of acceptable behavior and reaffirm the moral principles that govern social life. Consequently, customary justice serves not only legal functions but also educational, cultural, and social functions that contribute to community stability.

Another distinctive feature of customary justice is its emphasis on contextual decision-making. Formal criminal law generally relies upon codified rules that seek uniform application across different social settings. Customary justice, by contrast, often considers the specific circumstances surrounding an offense, including the offender's intentions, family relationships, social status, and broader community interests. This flexibility enables customary institutions to adapt legal responses to local realities, although it may also create variations in legal outcomes between communities.

Despite these strengths, customary justice systems are not free from criticism. Some scholars have raised concerns regarding procedural safeguards, consistency of decision-making, and the protection of individual rights within customary adjudication. Questions have also emerged regarding the treatment of women, children, and marginalized groups in certain customary settings. These concerns have become increasingly important as human rights norms gain greater prominence in national and international legal discourse. Consequently, debates regarding the recognition of customary justice frequently involve balancing respect for cultural autonomy with commitments to constitutional rights and equality before the law.

The incorporation of living law into Law No. 1 of 2023 has brought these issues into sharper focus. By recognizing legal norms that exist within communities, the Criminal Code appears to acknowledge the continuing relevance of customary justice mechanisms. The recognition of customary criminal norms may provide greater legal space for Indigenous communities to maintain their traditional approaches to dispute resolution and social regulation. From this perspective, the concept of living law can be interpreted as an effort to bridge formal criminal law with local normative realities.

However, the relationship between customary justice and state law remains complex. Although customary norms may be recognized, their legal validity is ultimately determined by state-defined criteria. The state retains authority to assess whether customary practices conform to constitutional principles, human rights standards, and national legal objectives. Consequently, customary justice does not operate as a fully autonomous legal system but rather as a normative order whose recognition depends upon state approval.

This arrangement creates a fundamental tension within the recognition of living law. On one hand, the state acknowledges the social legitimacy and restorative value of customary justice. On the other hand, the process of recognition subjects Indigenous legal practices to external standards and regulatory oversight. What was once a community-based mechanism grounded in local authority becomes incorporated into a broader framework of state governance.

From a socio-legal perspective, customary justice demonstrates that law is not solely a product of legislation or state institutions. Indigenous communities continue to generate, interpret, and

enforce norms that regulate social life and resolve conflicts through restorative and community-centered approaches. These practices reveal alternative conceptions of justice that prioritize reconciliation, collective responsibility, and social harmony. The recognition of living law within the new Criminal Code therefore raises important questions regarding whether state law is genuinely accommodating these alternative legal traditions or whether it is transforming them into instruments that operate under state-defined conditions. The answer to this question is central to understanding the future of legal pluralism and Indigenous autonomy in Indonesia.

4. The Role of Social Norms, Cultural Symbols, and Community Authority in Enforcing Living Law

The effectiveness of living law within Indigenous and local communities cannot be understood solely through formal legal mechanisms. Unlike state law, which derives its authority primarily from legislation and institutional enforcement, living law is sustained through social norms, cultural values, collective beliefs, and community authority. Its legitimacy emerges from everyday social interactions and shared understandings regarding acceptable behavior. Consequently, compliance with living law is often achieved not through coercive state sanctions but through social, cultural, and moral mechanisms deeply embedded within community life.

One of the most important foundations of living law is the existence of social norms that regulate relationships among community members. Social norms function as collectively accepted standards of behavior that define rights, obligations, and expectations within a particular social group (Nadler, 2017). These norms are transmitted across generations through socialization processes and become part of a community's moral framework. Individuals comply with such norms not merely because they fear punishment but because adherence is closely associated with social acceptance, reputation, and communal belonging.

In many Indigenous communities, violations of customary norms are perceived as actions that disrupt social harmony rather than simply breaches of legal rules. Consequently, social sanctions often play a more significant role than material punishments. Individuals who violate community norms may face public criticism, social exclusion, loss of prestige, or restrictions on participation in communal activities. It's called collective action (Beard & Dasgupta, 2006). The sanctions can be highly effective because social identity and collective membership occupy a central place within community life. The prospect of losing social recognition frequently serves as a powerful deterrent against behavior considered harmful to communal values.

The enforcement of living law is also closely linked to cultural symbols and collective narratives that provide moral legitimacy to customary norms. Symbols, rituals, and traditions serve as mechanisms through which communities communicate and reinforce shared values. They transform legal obligations into culturally meaningful practices that are integrated into everyday life. Through ceremonies, customary gatherings, and ritual performances, communities continuously reproduce the norms that govern social conduct and reaffirm collective commitments to customary principles.

Folklore and oral traditions represent another important mechanism through which living law is maintained. Stories, myths, legends, and historical narratives often contain moral lessons concerning proper behavior, social obligations, and the consequences of violating community norms. These narratives function as informal legal education by transmitting normative values across generations. In many Indigenous societies in Indonesia, oral traditions preserve legal knowledge and historical memory more effectively than written legal texts (Zurbuchen, 2005).

Through storytelling and collective remembrance, communities sustain a shared understanding of justice, responsibility, and social order. Magico-religious beliefs also contribute significantly to the enforcement of customary norms in many Indigenous contexts. In numerous communities, customary law is intertwined with spiritual understandings of the relationship between humans, ancestors, nature, and supernatural forces (Van Engelenhoven, 2021). Violations

of customary norms may be viewed not only as social transgressions but also as actions capable of disturbing cosmic balance or provoking spiritual consequences. Such beliefs reinforce legal compliance by linking social obligations to moral and spiritual responsibilities.

For example, certain customary prohibitions concerning sacred forests, ancestral lands, rivers, or ceremonial sites are often upheld through beliefs regarding supernatural sanctions (Boomgaards, 1995; Fowler, 2003). Community members may believe that violations will result in illness, misfortune, environmental disruption, or other forms of spiritual retribution. Whether these beliefs are interpreted literally or symbolically, they function as powerful mechanisms of social regulation by strengthening community commitment to customary norms. In this context, law, morality, religion, and cosmology become inseparable elements of a single normative system.

Community authority constitutes another crucial pillar of living law. The enforcement of customary norms typically relies on leaders who possess social legitimacy within the community. These figures may include customary chiefs, elders, clan leaders, religious authorities, or customary councils. Their authority is not primarily bureaucratic or legalistic but relational, deriving from collective trust, cultural knowledge, and social recognition. Because they are regarded as custodians of community values, their decisions often carry significant moral weight.

Community leaders perform multiple functions within customary legal systems. They act as mediators in disputes, interpreters of customary norms, facilitators of reconciliation, and guardians of cultural continuity. Their authority enables them to resolve conflicts through persuasion, deliberation, and consensus-building rather than through coercive enforcement. This process reinforces the communal character of living law by emphasizing collective participation and shared responsibility in maintaining social order.

The relationship between community authority and collective identity is particularly important. Indigenous legal systems often operate within social structures where law is closely connected to kinship, territory, ancestry, and cultural heritage. Compliance with customary norms therefore reflects not only obedience to legal rules but also affirmation of group identity. By following customary law, individuals reaffirm their membership within the community and contribute to the preservation of collective traditions. As a result, living law functions simultaneously as a mechanism of social regulation and a means of sustaining cultural continuity.

From a sociological perspective, these mechanisms demonstrate that legal authority does not depend exclusively on state institutions. Communities possess their own capacities to generate compliance, resolve conflicts, and maintain social order through normative systems grounded in cultural legitimacy. The persistence of living law across generations reflects the effectiveness of these social and symbolic mechanisms in shaping behavior and reinforcing collective values.

However, the incorporation of living law into Law No. 1 of 2023 raises important questions regarding the future of these community-based forms of authority. When customary norms become subject to formal state recognition, the basis of their legitimacy may gradually shift. Norms that previously derived authority from social acceptance and cultural tradition may increasingly require validation through legal and administrative processes established by the state. This transformation has the potential to alter the relationship between community authority and legal legitimacy.

The challenge therefore lies in preserving the social foundations of living law while accommodating its recognition within the national legal framework. Social norms, cultural symbols, folklore, magico-religious beliefs, and community leadership are not merely supplementary elements of customary law; they constitute the very conditions that enable living law to function effectively. Any effort to formalize or institutionalize customary norms must therefore recognize that their authority originates not from state legislation but from the collective social and cultural life of the communities that sustain them. In this sense, the continued vitality of living law depends on maintaining the community-based sources of legitimacy that have historically given it meaning and force.

The drafting process of the new Indonesian Penal Code marks a significant milestone in the broader reform of the national criminal justice system. One of the most contentious issues in this process is the inclusion of the concept of “living law,” which has not only triggered conceptual debates but also sparked widespread rejection from civil society, particularly among Indigenous communities. As outlined in the 4 July 2022 draft, eleven articles recognize living law as a basis for criminalization, judicial consideration, and the imposition of penalties. However, rather than serving as a progressive legal innovation, the inclusion of this concept raises concerns about potential violations of Indigenous rights and the risk of elite capture and misuse.

Proponents of the new Indonesian Penal Code argue that the recognition of living law represents an effort to decolonize the legal system and challenge the colonial legacy of strict legal positivism. The incorporation of a material principle of legality implies that individuals may be subject to punishment even if their actions are not explicitly prohibited by formal legislation—so long as they contravene community norms regarded as binding. While this framework is presented as a recognition of customary law, it is deeply problematic. It potentially undermines the constitutional rights of Indigenous peoples, especially because the legitimacy of living law under the Indonesian Draft Penal Code depends on its codification through regional regulations (Puspitasari, 2023). This requirement effectively subjects Indigenous law to state validation, thereby reducing Indigenous communities’ autonomy over their own normative systems.

The implementation of this policy signifies a fundamental shift in authority—from Indigenous communities to the state. Through its legal apparatus, including the police, prosecutors, and judges, the state potentially assumes the role previously held by Indigenous communities in resolving internal disputes. Consequently, customary adjudication processes, once sacred and participatory within Indigenous institutions, risk being replaced by rigid formal judicial mechanisms (Harun et al., 2023). This shift leads to a substantive erosion of the meaning of customary law and undermines the principle of Indigenous self-determination.

Another major criticism concerns the formalization of customary law through regional regulations, which threatens to freeze its inherently flexible, contextual, and evolving nature. Unwritten customary law represents a dynamic social consensus, binding community members through deliberation and mutual agreement. When transformed into formal legal texts, its essence as a living normative system is diminished. Moreover, the formal process of drafting regional regulations is often undemocratic, costly, and lacks meaningful participation from the very groups most affected. In a 2024 focus group discussion convened by the Community Legal Aid Institute) in Surabaya, participants highlighted that the drafting of *Perda* is highly susceptible to domination by local political elites, effectively sidelining the voices and authority of Indigenous communities.

Social realities further reveal the continued criminalization of Indigenous peoples, particularly in contexts involving agrarian conflicts, land dispossession, and development projects that encroach upon ancestral territories (Niko, 2025a; 2025b). In this context, the recognition of living law in the RKUHP fails to offer any meaningful guarantee of protection for collective Indigenous rights. On the contrary, these provisions may serve as tools for state or corporate actors to legitimize the oppression of Indigenous peoples under the guise of formal legality (Niko et al., 2024). This indicates that the incorporation of living law in the RKUHP does not exist in a political vacuum, but rather operates within a broader socio-political landscape marked by structural inequality and systemic discrimination.

In response to these challenges, civil society coalitions have proposed a number of key recommendations aimed at safeguarding Indigenous rights. First, they argue that the recognition of customary law should not be embedded in the Penal Code, but instead in the Code of Criminal Procedure. Such an approach would avoid the substantive codification of customary norms into a rigid legal framework, and would instead oblige the state to respect customary decisions and consider the applicability of customary law in criminal proceedings. Second, customary law must not be treated merely as a basis for criminalization. Rather, it should be recognized as a legitimate

basis for mitigating or even eliminating criminal liability. In practice, this would require the formal justice system to accommodate the application of customary law in a broader, more dignified manner, while upholding the autonomy of Indigenous communities to resolve internal disputes in accordance with their own traditions. Third, the right of Indigenous peoples to practice customary law and resolve conflicts within their territories must be firmly guaranteed. The state must refrain from intervening in ways that disrupt longstanding socio-cultural arrangements, including abstaining from appropriating the mechanisms of customary hearings and the imposition of customary sanctions.

Beyond rejecting the codification of living law within the new Indonesian Penal Code, structural reform efforts must also prioritize the passage of the Indigenous Peoples Bill. This legislation is widely regarded as crucial for granting full legal recognition and protection to Indigenous rights, including their authority over land, legal systems, and modes of social organization (Mamo, 2023). Enacting this law would help reduce the structural imbalance between the state and Indigenous communities and address the widespread criminalization that continues to affect Indigenous peoples across Indonesia.

Thus, the drafting of the new Indonesian Penal Code reveals a broader discursive struggle—between the promise of legal decolonization and the enduring structural challenges to Indigenous human rights. While the state claims to accommodate customary law through the recognition of living law, it is imperative to critically assess whether such measures genuinely strengthen Indigenous self-determination or instead function as instruments of domestication and co-optation. Therefore, strengthening the position of Indigenous peoples within the national legal system must be pursued through more equitable, participatory, and culturally grounded approaches that honor the diversity of local legal traditions still very much alive across the archipelago.

5. Challenges in Integrating Living Law into Formal Legal Systems

The incorporation of living law into Law No. 1 of 2023 concerning the Criminal Code has been widely presented as an effort to accommodate Indonesia's legal pluralism and acknowledge the continuing relevance of customary norms within society. From this perspective, the recognition of living law appears to represent a progressive legal development that bridges the gap between state law and community-based normative systems. However, the formal integration of living law into the national legal framework also raises a number of complex challenges. These challenges relate to the risks of codification, expanding state intervention in customary affairs, the potential erosion of Indigenous autonomy, and tensions between customary norms and contemporary human rights standards.

One of the most significant challenges concerns the transformation of living law from a socially embedded normative system into a formally recognized legal category. Historically, living law has derived its legitimacy from collective acceptance and everyday social practice. Its authority rests upon community recognition rather than statutory enactment. Once incorporated into formal legal institutions, however, living law becomes subject to legal definitions, procedural requirements, and state oversight. This process fundamentally alters the nature of the concept itself.

The risk of codification is particularly important in this regard. Customary law is often dynamic, flexible, and responsive to changing social circumstances. Its interpretation frequently depends upon local context, communal deliberation, and evolving cultural values. Codification, by contrast, tends to require the stabilization and formalization of norms into clearly defined legal categories. While such formalization may provide legal certainty, it may also reduce the adaptability that has historically characterized customary legal systems. As customary norms are translated into legal language, their social meanings may be simplified, standardized, or detached from the cultural contexts that originally gave them legitimacy.

This tension reflects a broader contradiction between legal pluralism and legal centralism. Although the recognition of living law appears to acknowledge multiple sources of normative

authority, the process of recognition remains controlled by the state. In practice, the state determines which customary norms are legally valid, under what conditions they may be applied, and how they should be interpreted. Consequently, recognition does not necessarily imply autonomy. Instead, it may transform community-based norms into legal instruments that operate within a framework established by state institutions.

The expansion of state intervention into customary affairs is therefore another major concern. Indigenous communities have historically maintained their own mechanisms for regulating social behavior, resolving disputes, and enforcing collective obligations (Alemie & Mandefro, 2018). These mechanisms derive legitimacy from community authority and cultural continuity rather than from external approval. However, once customary norms become integrated into formal legal systems, state agencies—including courts, prosecutors, and administrative authorities—acquire greater influence over their interpretation and implementation. This shift may weaken the authority of customary institutions and reduce the capacity of communities to govern their own normative affairs.

From a socio-legal perspective, this process can be understood as a form of legal incorporation or co-optation. Rather than recognizing customary law as an autonomous legal order, the state absorbs selected elements of customary law into its own legal framework. In doing so, the state simultaneously expands its authority over domains that were previously regulated through community-based mechanisms (Calfucura, 2018). The result is a paradoxical situation in which legal recognition may increase state control rather than strengthen Indigenous self-determination.

The potential erosion of Indigenous autonomy is especially relevant in Indonesia, where many Indigenous communities continue to struggle for recognition of collective rights, territorial sovereignty, and cultural self-governance. Although constitutional provisions acknowledge the existence of customary law communities, recognition is often conditional upon compliance with state-defined criteria. Similar conditions are evident in the application of living law under the new Criminal Code. Customary norms may be recognized only when they conform to constitutional principles, national interests, and other legal requirements established by the state (Buchanan, 1993). This arrangement places Indigenous legal systems in a subordinate position, where their validity depends on external evaluation rather than community acceptance.

Another challenge arises from the diversity of customary legal systems themselves. Indonesia is home to thousands of Indigenous and local communities, each possessing distinct social structures, cultural traditions, and normative practices. As a result, there is no single or uniform form of living law. The attempt to integrate such diverse legal traditions into a national legal framework inevitably raises questions regarding representation and interpretation. Which norms are recognized as living law? Who possesses the authority to define them? How are competing interpretations resolved? These questions reveal the difficulties involved in translating localized legal practices into universally applicable legal categories.

The integration of living law also generates important debates concerning human rights and modern legal principles. Supporters of legal pluralism often emphasize the importance of respecting cultural diversity and Indigenous autonomy. However, some customary practices may conflict with contemporary understandings of equality, non-discrimination, due process, and individual rights. Concerns have been raised regarding the treatment of women, children, minority groups, and vulnerable individuals within certain customary contexts (Natalis et al., 2025). Consequently, the recognition of customary norms cannot be separated from broader discussions regarding human rights protection.

This tension creates a difficult legal and ethical dilemma. Excessive state intervention in the name of human rights may undermine Indigenous self-governance and weaken legal pluralism. Conversely, unconditional recognition of all customary norms may risk legitimizing practices that conflict with constitutional principles and internationally recognized rights. Balancing these

competing concerns remains one of the most challenging aspects of integrating living law into formal legal systems.

The principle of legal certainty presents an additional challenge. Modern criminal law generally relies upon the principle of legality, which requires criminal offenses and sanctions to be clearly defined in advance. This principle aims to protect individuals from arbitrary punishment and ensure predictability in legal enforcement. The concept of living law, however, introduces norms that may be unwritten, locally specific, and subject to evolving interpretation. Critics argue that reliance on such norms could create uncertainty regarding what conduct constitutes a criminal offense and how legal sanctions are determined.

The inclusion of living law in Law No. 1 of 2023 therefore reflects an ongoing effort to reconcile two competing objectives: the recognition of legal diversity and the preservation of legal certainty. While the Criminal Code attempts to establish conditions for the application of customary norms, questions remain regarding how these norms will be identified, interpreted, and enforced in practice. The effectiveness of this framework will depend largely on how state institutions, courts, and communities negotiate the boundaries between formal legality and social legitimacy.

6. Policy Implications and Recommendations for Protecting Indigenous Legal Autonomy

The incorporation of living law into Law No. 1 of 2023 presents both opportunities and risks for Indigenous Peoples and customary law communities in Indonesia. On the one hand, it creates formal recognition of legal norms that have long existed outside the framework of state legislation. On the other hand, it raises concerns regarding the expansion of state authority over Indigenous normative systems and the potential erosion of community autonomy. Consequently, the challenge for policymakers is not merely to recognize living law, but to ensure that such recognition strengthens rather than weakens Indigenous self-determination. This requires a legal and policy framework capable of balancing legal pluralism, constitutional principles, and human rights protections while respecting the autonomy of Indigenous communities.

One of the most important policy implications emerging from this study is the need to distinguish between the recognition of Indigenous legal systems and their incorporation into state-controlled legal structures. Recognition should not automatically imply absorption into a centralized legal framework. Instead, Indigenous legal institutions should be acknowledged as legitimate normative authorities with the capacity to regulate social life within their respective communities. Such an approach would move beyond symbolic recognition and support substantive legal pluralism in which multiple legal orders coexist without requiring complete subordination to state institutions.

Civil society organizations have played a significant role in advocating for this perspective. Indigenous organizations, legal aid institutions, and human rights groups have consistently argued that legal recognition must be accompanied by meaningful guarantees of Indigenous participation in legal and policy processes. Organizations such as the Indigenous Peoples Alliance of the Archipelago (AMAN), legal advocacy networks, and various Indigenous rights movements have repeatedly emphasized that customary law should not be interpreted exclusively through state-defined categories. Rather, Indigenous communities themselves must be recognized as primary actors in determining the content, interpretation, and application of their legal traditions. These civil society interventions highlight the importance of shifting from a state-centered model of recognition toward a community-centered approach grounded in Indigenous self-governance.

A second policy priority concerns legislative reform. Although Article 18B(2) of the 1945 Constitution recognizes customary law communities and their traditional rights, the implementation of this constitutional mandate remains fragmented across multiple sectoral laws. The absence of a comprehensive legal framework governing Indigenous rights has contributed to inconsistencies in recognition and protection. For many years, Indigenous organizations and civil

society groups have advocated for the enactment of a specific Indigenous Peoples Law that would provide clear legal guarantees regarding territorial rights, cultural preservation, political participation, and legal autonomy. Such legislation could establish stronger safeguards against arbitrary state intervention and clarify the relationship between customary legal systems and national law.

The debate surrounding living law within the Criminal Code further demonstrates the urgency of developing legal mechanisms that protect Indigenous autonomy while ensuring accountability and rights protection. Future legislative initiatives should therefore establish transparent procedures for recognizing customary legal institutions without transferring excessive interpretive authority to state agencies. Recognition processes should be participatory and involve Indigenous communities directly rather than relying solely on administrative or judicial determinations. Community participation is essential because Indigenous legal systems derive legitimacy from collective social acceptance rather than external certification.

Another important recommendation concerns the role of Indigenous institutions in dispute resolution and community governance. Rather than treating customary legal mechanisms as subordinate alternatives to state institutions, policymakers should recognize their contributions to social cohesion, restorative justice, and conflict resolution. In many Indigenous communities, customary institutions continue to provide accessible and culturally appropriate mechanisms for resolving disputes. Strengthening these institutions can contribute to legal accessibility while reducing dependence on formal legal processes that may be geographically, culturally, or economically inaccessible.

At the same time, protecting Indigenous legal autonomy requires careful engagement with human rights principles. Legal pluralism should not be understood as a justification for practices that undermine constitutional rights or discriminate against vulnerable groups. However, human rights protection should not serve as a pretext for excessive state intervention into Indigenous governance. Instead, a dialogical approach is needed in which Indigenous communities participate actively in defining how customary norms can evolve in ways that remain culturally meaningful while respecting principles of equality, dignity, and justice. Such an approach recognizes Indigenous communities as agents of legal development rather than passive subjects of legal regulation.

Capacity-building initiatives also constitute an important policy strategy. Many Indigenous communities face challenges in documenting customary norms, defending territorial rights, and engaging with formal legal institutions. Support for legal education, community-based documentation, and institutional strengthening can enhance Indigenous communities' ability to protect their legal traditions while navigating increasingly complex legal and political environments. These initiatives should be designed collaboratively and respect the diversity of Indigenous legal systems rather than imposing standardized legal models.

Judicial institutions also have a critical role to play in safeguarding Indigenous legal autonomy. Courts should adopt interpretations of living law that emphasize community consent, cultural context, and Indigenous participation rather than narrowly focusing on administrative recognition. Judicial review mechanisms can help ensure that the application of customary norms remains consistent with constitutional guarantees while avoiding unnecessary restrictions on community self-governance. In this respect, the judiciary can function as an important mediator between legal pluralism and constitutionalism.

Furthermore, policy development concerning living law should be informed by meaningful consultation with Indigenous communities. Too often, legal reforms affecting Indigenous Peoples are designed and implemented without adequate participation from those most directly affected. Meaningful consultation requires more than formal representation; it requires the incorporation of Indigenous perspectives into all stages of policy formulation, implementation, and evaluation.

Such participation is essential for ensuring that legal reforms reflect the lived realities of Indigenous communities rather than solely the priorities of state institutions.

Ultimately, the future of living law in Indonesia depends on whether legal recognition is accompanied by genuine respect for Indigenous autonomy. If recognition merely functions as a mechanism through which the state defines, regulates, and controls customary norms, then the promise of legal pluralism will remain limited. Conversely, if recognition enables Indigenous communities to maintain meaningful authority over their own legal traditions, living law can contribute to a more inclusive and socially responsive legal order.

The policy challenge therefore lies in moving beyond symbolic accommodation toward substantive protection of Indigenous legal autonomy. Achieving this goal requires comprehensive legislative reform, stronger community participation, protection of customary institutions, careful balancing of human rights and cultural rights, and ongoing dialogue between state institutions and Indigenous communities. Only through such measures can the recognition of living law become a vehicle for strengthening Indigenous self-determination rather than an instrument for extending state control over community-based normative systems.

D. Conclusion

This study demonstrates that the recognition of *living law* under Law No. 1 of 2023 on the Indonesian Criminal Code should not be understood merely as a progressive acknowledgment of legal pluralism. Historically and sociologically, *living law* refers to norms that emerge from the collective experiences of communities and are maintained through customary authorities, cultural values, spiritual beliefs, and social mechanisms aimed at restoring communal harmony. Its existence reflects the reality that law is not exclusively produced by the state but is also embedded in the social practices and normative orders recognized by indigenous peoples and local communities. However, the findings reveal that the state's recognition of *living law* within the new Criminal Code is mediated through a set of criteria and procedures established by the state itself. Consequently, customary norms that previously derived their legitimacy from social acceptance must now undergo formal validation before they can be legally recognized. This situation exposes a fundamental paradox within Indonesia's legal pluralism: while the state formally acknowledges the coexistence of multiple legal systems, it simultaneously retains the authority to define the boundaries of their legitimacy. As a result, the incorporation of *living law* into the national legal framework does not automatically strengthen the autonomy of indigenous communities; rather, it may function as a mechanism through which customary law is regulated, standardized, and ultimately subordinated to state authority.

Furthermore, the study highlights that the future of *living law* in Indonesia will depend largely on the state's ability to balance legal certainty, human rights protection, and respect for indigenous self-governance. The formal integration of customary norms into the national legal system presents several challenges, including the risk of codification that may undermine the dynamic and adaptive nature of customary law, increased state intervention in community affairs, and the marginalization of customary institutions that have traditionally served as restorative mechanisms for conflict resolution. Therefore, the recognition of customary law should not be directed toward the homogenization or domestication of local normative systems within the framework of state law. Instead, it should focus on strengthening the capacity of indigenous communities to preserve, interpret, and develop their own legal traditions. Meaningful legal reform requires the establishment of a comprehensive regulatory framework for indigenous peoples, greater community participation in legal and policy-making processes, stronger recognition of customary adjudicatory institutions, and the development of inclusive mechanisms that facilitate dialogue between customary values, constitutional principles, and international human rights standards. Through such an approach, *living law* can serve not merely as an extension of state authority but

as a foundation for social justice, legal diversity, and the realization of indigenous peoples' right to self-determination in contemporary Indonesia.

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