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Asserting Living Law through the Negative Function of Material Unlawfulness under Law Number 1 of 2023

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Abstract

Indonesian criminal law reform through Law Number 1 of 2023 recognizes living law as a source of criminal law, as stipulated in Article 2 of the Criminal Code. This provision reflects the integration of the principles of formal and material legality and recognition of the constitutional rights of indigenous peoples. However, its implementation has been controversial, particularly because it emphasizes the positive nature of unlawfulness, while in practice, society still applies material unlawfulness in a negative function. Phenomena such as *gresek/ngasak* in Java and *elopement* in Lombok demonstrate the difference between the assessment of customary law and national criminal law regarding an act. Although existing studies have examined living law and the principle of material legality, a research gap remains in comprehensively examining the application of material unlawfulness in its negative function as a basis for excluding the unlawfulness of an act that formally constitutes a criminal offense under the Criminal Code but is not regarded as unlawful under the living law of the community. This study is among the first to examine the

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negative function of material unlawfulness under Article 2 of the Indonesian Criminal Code. This study uses a normative juridical method, with a qualitative approach, based on a literature review of primary and secondary legal materials. The results demonstrate the need to consider living law in society as a basis for assessing material unlawfulness. The doctrine of material unlawfulness in a negative function has been applied in Supreme Court jurisprudence, particularly in Decisions Number 42 K/Kr/1965 and Number 81 K/Kr/1973. In both cases, although the formal elements of the crime were met, the judges considered that the unlawful nature could be eliminated based on the principles of justice, unwritten law, and the concept of material justice, so that the perpetrators were not punished. In the development of judicial practice, this teaching tends to be ignored. Conversely, in the lives of rural communities in Batang and Banjarnegara, this principle remains alive, reflected in the practice of *gresek/ngasak*, which is seen as a form of social solidarity and is not considered an unlawful act.

Keywords

Living Law, Criminal Code, Material Legality Principle, Criminal Law Reform, Substantive Unlawfulness.

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Introduction

The reform of Indonesian criminal law has resulted in the creation of new norms that differ from the old Criminal Code. The process of reforming criminal law through the Criminal Code still leaves many problems, one of which is the debate regarding the provisions of Article 2 of Law Number 1 of 2023 on the Criminal Code, regarding the validity of living laws.[1]

Recognition of customary law, or living law, is understood as a manifestation of the continuity of cultural values, as well as a means of enabling a more flexible, contextual, and recovery-oriented criminal justice mechanism. Strengthening traditional norms in criminal law reform is positioned as part of the process of decolonizing national law and an effort to provide justice that is more in line with the social diversity of society. This issue has become increasingly prominent following the enactment of the Criminal Code[2]. Article 2 of the Criminal Code recognizes living law within the community as the basis for criminal punishment, provided its provisions are regulated through implementing regulations at the regional level.[3]

Article 2 of the Criminal Code is a source of criminal law that not only recognizes written legal sources contained in statutory regulations (national criminal law), but also recognizes the existing law in society as a source of criminal law in Indonesia. There is a formal legal origin and the principle of material legality in it, providing space for the validity of existing law in indigenous communities as a legal basis for the imposition of customary punishment for customary crimes. The existence of Article 2 of the Criminal Code is a manifestation of the constitutional rights of indigenous communities guaranteed in Article 18B of the 1945

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1 Nella Sumika Putri, "Memikirkan Kembali Unsur 'Hukum Yang Hidup Dalam Masyarakat' Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas," *Indonesia Criminal Law Review* 1, no. 1 (2021): 5.

2 Pemerintah Republik Indonesia, "Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana" (2023).

3 Dheny Wahyudhi, Herlambang Herlambang, and Elly Sudarti, "Integrasi Hukum Adat Dalam Kerangka KUHP Baru: Evaluasi Pluralisme Hukum Dan Tantangan Implementasi Restoratif Justice," *Indonesian Journal of Law and Justice* 3, no. 2 (December 3, 2025): 9, https://doi.org/10.47134/ijlj.v3i2.5186.

Constitution and a concrete form of the existence of the original legal source of Indonesia.

Following[4], the formal criminal law framework for enforcing substantive criminal law, there are important considerations regarding the application of this substantive principle. In principle, the substantive principle has both positive and negative unlawful characteristics. However, the application of Article 2 of the Criminal Code emphasizes the positive unlawful nature. This means that customary crimes are crimes that have no equivalent in the Criminal Code but are still practiced by indigenous communities and are considered to violate the customary criminal law within that community.

The application of substantive law within a community is further regulated by Government Regulation Number 55 of 2025 on Procedures and Criteria for Determining Substantive Law within a Community.[5] Although, in principle, indigenous communities spread throughout Indonesia have used their customary laws to resolve cases considered as customary violations, the reality is that, currently, all must comply with the provisions contained in the Criminal Code, Criminal Procedure Code, and Government Regulation 55 of 2025. Some indigenous communities have even regulated their customary laws in the form of regional regulations. However, it has not been clearly distinguished which fall into the realm of criminal, civil, or administrative law.

However, when examined in relation to the resolution of customary law cases, it tends to rely on deliberation and consensus. In one case, the Jambi Malay Customary Institution of Tanah Pilih Pusako Batuah has produced a decision regarding a sexual harassment case that occurred in Paal Lima Village, involving the initials PH, aged 18 (eighteen) years old, and the initials AG, aged 36 (thirty-six) years old. This case was resolved with customary norms or applicable customary law because the victim's parents reported this incident to the Jambi Malay Customary Institution, and the perpetrator was a resident of Paal Lima Village, Jambi. Due to this act, the Customary Institution imposed

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[4] Pemerintah Republik Indonesia, "Undang-Undang Nomor 20 Tahun 2025 Tentang Kitab Undang-Undang Hukum Acara Pidana" (2025).

[5] Pemerintah Republik Indonesia, "Peraturan Pemerintah Nomor 55 Tahun 2025 Tentang Tata Cara Dan Kriteria Penetapan Hukum Yang Hidup Dalam Masyarakat," 2025.

a customary sanction on AG in the form of 1 livestock, namely a cow, and cash of Rp. 2,500,000 (two million five hundred thousand rupiah) in accordance with the rules recommended by the customary leader.[6]

Conversely, there are also social practices within indigenous communities that are culturally considered normal and not considered criminal acts, but from a positive legal perspective can be classified as criminal acts. One example is the practice of gresek or ngasak, which is prevalent in several regions in Java. This practice refers to the community's habit of taking leftover crops left on agricultural land after the main harvest has been completed by the landowner. In the local social context, this practice is seen as a form of social tolerance and a mechanism for sharing resources, and therefore is not considered an unlawful act. However, when viewed from a positive criminal law perspective, this act can be equated with the crime of petty theft as stipulated in the 2023 Criminal Code.

Another example can be found in the cultural practice of elopement, known in Lombok society. In this tradition, the marriage process begins with the prospective groom carrying off or "running away" with a girl before the official wedding ceremony. From the perspective of the local indigenous community, this practice is part of a long-standing marriage ceremony and is recognized as a cultural tradition. However, within the framework of national criminal law, the act of carrying off a woman without the consent of her family can be equated with the provisions of Article 454 of the Criminal Code, which regulates the act of carrying off a woman without the permission of the authorized party.

These two examples demonstrate the difference in assessment between customary law and national criminal law regarding certain actions. In indigenous communities, these practices are not considered criminal acts because they have become part of collectively accepted social and cultural norms. Conversely, from the perspective of the Criminal Code, these actions can be classified as criminal acts because

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[6] Muhammad Ridho Nasution and Faisal Riza, "Analisis Hukum Pidana Adat Melayu Jam.bi Terhadap Pelaku Tindak Pidana Pelecehan Seksual (Studi Di Lembaga Adat Melayu Jambi Tanah Pilih Pusako Batuah)," *Ranah Research : Journal of Multidisciplinary Research and Development* 6, no. 5 (August 23, 2024): 2201–9, https://doi.org/10.38035/rrj.v6i5.1107.

they are deemed to conflict with generally applicable positive legal provisions.

Based on these cases, a fundamental issue arises regarding how the law should respond when an act is classified as a crime under the Criminal Code but is not considered a violation from the perspective of indigenous communities. This difference in assessment raises questions about the possibility of applying living law as a basis for determining whether an act is unlawful.

In this context, the idea arose to consider the application of the principle of material legality, which views unlawfulness negatively, by considering the legal values that exist within the community. Through this approach, an act that formally meets the definition of a crime in law can be reconsidered if it is not materially considered reprehensible by the community where the norms exist. Therefore, this article will further discuss this issue, specifically regarding the possibility of applying living law within the framework of the principle of material legality.

Research examining the application of the principle of material legality in criminal law has been undertaken several times, including a study by Andri Yanto and Faidatul Hikmah[7]in an academic article entitled "The Accommodation of Living Law in the Criminal Code from the Perspective of the Principle of Legality", which found that the formulation of living law in the Criminal Code is consistent with the principle of legality through the process of institutionalising and normalising living law in local regulations, which subsequently become a source of norms providing legal certainty.□[8]There is also a study conducted by Reki Anwar titled "The Existence of the Principles of Formal and Material Legality in the National Criminal Code." The findings of this study indicate that formal legality serves to curb arbitrary government actions. In contrast, material legality is necessary to bridge

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[7] Andri Yanto and Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Recht Studiosum Law Review* 02, no. 02 (2023): 2985–9867, https://talenta.usu.ac.id/rslr.

the gap with unwritten laws that still exist in society. The study notes that to address deviations in criminal acts, the deconstruction of the principle of legality is achieved by incorporating customary legal values, thereby emphasising not only written law but also unwritten law.[9]

In addition, research was also conducted by Andri Kurniawan titled "The Concept of Substantive Unlawfulness in the Negative Sense in Traffic Offenses Resulting in Death," which found that the concept of material unlawfulness in the negative sense had been widely applied even long before the Wetboek van Strafrecht voor Nederlandsch-Indië (WvSNI) came into effect. The use of the absence of material unlawfulness as a justification in the Netherlands has only ever been invoked in the *Veearts Arrest* (Veterinarian Arrest) case. This differs from the situation in Indonesia: following the Supreme Court's decision dated January 1966, No. 42KKr.11965, in the case of sugar quota abuse in South Kalimantan, the doctrine of substantive unlawfulness as a justification has been repeatedly applied. Still, for traffic offenses resulting in a person's death, as in the example case, this principle has not been applied.[10] Although all three have discussed the material legality set forth in Article 2 of the Criminal Code, none of them has comprehensively addressed the positive and negative functions of its unlawfulness, particularly with regard to the exercise of the negative function of material unlawfulness. Based on the explanation above, the discussion in this research includes the applicability of the principle of material legality in its negative function in Law No. 1 of 2023 and the existence of living law in society for acts that are not considered criminal acts by society.

This article is written using data obtained through normative legal research. The object of study of this normative legal research is focused on the legal norm system, including legal rules or regulations related to the structure of a legal event system. Normative legal research focuses

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[9] Reski Anwar, "Eksistensi Asas Legalitas Formil Dan Materil Pada KUHP Nasional," *Jurnal Fakta Hukum* 2, no. 1 (September 14, 2023): 46–57, https://doi.org/10.58819/jfh.v2i1.106.

[10] Andri Kurniawan, "Sifat Melawan Hukum Materiil Dalam Fungsi Negatif Pada Tindak Pidana Lalu Lintas Yang Mengakibatkan Korban Meninggal," *Jurnal Penegakan Hukum Indonesia* 4, no. 1 (April 8, 2023): 46–56, https://doi.org/10.51749/jphi.v4i1.87.

more on the scope of legal concepts, legal principles, and legal rules (regulations), rather than on human behavior that applies regulations or the application of law in its implementation in legal institutions or society.[11] The juridical-normative method is carried out by examining legal rules through an analysis of the main problem.[12]

The legal materials used are primary legal materials, namely legal materials consisting of statutory regulations, official treatises, court decisions, and official state documents. Primary legal materials in this research were Government Regulation Number 55 of 2025, Criminal Code, Criminal Procedural Code, and Decisions Number 42 K/Kr/1965 and Number 81 K/Kr/1973. Secondary legal materials consist of: law books, legal journals containing basic principles (legal principles), the views of legal experts (doctrines), legal research results, legal dictionaries, and legal encyclopedias.13

The technique for collecting legal materials or secondary data in this normative legal research is carried out by means of a literature study of legal materials, including primary legal materials, secondary legal materials, tertiary legal materials, and/or non-legal materials.[14] In addition, several legal documents in the form of customary decisions and court decisions that accommodate the customary law of indigenous communities are collected.

The analysis used in this study utilizes qualitative analysis methods. Qualitative analysis is used in research aimed at testing the substantive quality of legal norms, where the formulation of justification is based on the quality of the opinions of legal experts, doctrines, theories, and the formulation of the legal norms themselves.[15]

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[11] Muhaimin, *Metode Penelitian Hukum*, 2020.

[12] B Bachtiar, *Metode Penelitian Hukum* (Tangerang Selatan: Unpam Press, 2019), 55.

[13] Peter Mahmud Marzuki, *Penelitian Hukum*, 1st ed. (Jakarta: Prenada Media Group, 2008).

[14] Bachtiar, *Metode Penelitian Hukum*.

[15] Meruy Hendrik Mezak, "Jenis, Metode Dan Pendekatan Dalam Penelitian Hukum," *Law Review* 5, no. 3 (2006): 94.

A. The Applicability of the Principle of Material Legality in its Negative Function in Law Number 1 of 2023

The Principle of Legality was created by Paul Johan Anselm von Feuerbach (1775-1833), a German criminal law scholar, in his book Lehrbuch des penlichen Rechts in 180. According to Bambang Poernomo, what was formulated by Feuerbach has a very deep meaning, which in Latin reads: nulla poena sine lege (no crime without law), nulla poena sine crimine (no crime without criminal act), nullum crimen sine poena legali (no criminal act without punishment according to law).[16]

In Indonesia, the principle of legality is one of the crucial basic standards in criminal law regulation.[17] This principle places more emphasis on the value of legal certainty, with the aim of limiting arbitrary actions by the authorities and, at the same time, protecting human rights.[18] With this principle, every government action must be based on applicable laws and regulations, preventing it from acting beyond its established authority. The First National Seminar of 1963 marked a significant milestone in the development of the principle of legality in Indonesia. Over time, in accordance with the conditions of Indonesian society, the principle of legality has expanded in meaning, including the principle of material legality, which recognizes the existence of unwritten law as the legal basis for criminal punishment.[19] Legal experts asserted that, in addition to written law, unwritten law (customary and religious) must also be recognized, provided it did not hinder the political ideals of

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[16] Bambang Poernomo, "Manfaat Telaah Ilmu Hukum Pidana Dalam Membangun Model Penegakan Hukum Di Indonesia," in *Pidato Pengukuhan Jabatan Guru Besar Pada Fakultas Hukum Universitas Gadjah Mada* (Yogyakarta: Universitas Gadjah Mada, 1989), 8.

[17] Reski Anwar, "Eksistensi Asas Legalitas Formil Dan Materil Pada KUHP Nasional," *Jurnal Fakta Hukum* 2, no. 1 (2023): 46–57.

[18] Aksi Sinurat, *Azas-Azas Hukum Pidana Materil Di Indonesia* (Kupang: Penerbit Lembaga Penelitian Universitas Nusa Cendana, 2023).

[19] Sudaryono and Natangsa Surbakti, *Hukum Pidana Dasar-Dasar Hukum Pidana Berdasarkan KUHP Dan RUU KUHP* (Yogyakarta: Muhammadiyah University Press, 2017).

the time.[20] Nowadays, this concept has found its formal expression in Article 2 of the 2023 Criminal Code, which recognizes "the law that is alive in society" as the basis for criminal punishment.

In this regard, in Law Number 1 of 2023 on the Criminal Code, provisions related to the principle of legality are maintained in Article 1 with the phrase: "No act may be subject to criminal sanctions and/or action, except by virtue of criminal regulations in laws and regulations that existed before the act was committed." Article 1 establishes the principle of formal legality, which aims to provide legal certainty.

However, the Criminal Code provides an exception to the principle of legality by providing recognition to sources of punishment other than statutory regulations, namely through living law. Implicitly, this provision is emphasized in Article 2 Paragraph (1), which states that: "the provisions as referred to in Article 1 do not reduce the application of living law in society in determining whether a person should be punished even though the act committed is not regulated in statutory regulations."

The provisions of Article 2 have the consequence that the current Criminal Code not only adheres to the principle of formal legality but also to the principle of material legality. This article also annuls the monopolistic nature of the legality principle and accommodates space for the application of living law within society within the Indonesian criminal legal system.[21]

Viewed from its meaning, the principle of material legality stipulates that the basis for determining whether an act is unlawful or a criminal act is the values that exist in society (customary law).[22] With the existence of the principle of material legality, the consequence is that even though it is not regulated in legislation, if a person's actions are criminally

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[20] Collected by Barda Nawawi Arief, *Kumpulan Hasil Seminar Hukum Nasional Ke I s/d VIII Dan Konvensi Hukum Nasional 2008 Tentang UUD 1945 Sebagai Landasan Konstitusional Grand Design Sistem Dan Politik Hukum Nasional* (Semarang: PDIH UNDIP, 2008), 4–8.

[21] Parningotan Malau, "Tinjauan Kitab Undang-Undang Hukum Pidana (KUHP) Baru 2023," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 5, no. 1 (June 13, 2023): 837–44, https://doi.org/10.37680/almanhaj.v5i1.2815.

[22] Tongat, *Dasar-Dasar Hukum Pidana Indonesia Dalam Perspektif Pembaharuan* (Malang: UMM Press, 2008), 51.

punishable, then that person can be punished with reference to existing law.[23]

The formal definition in the 2023 Criminal Code is not the sole criterion for determining whether an act is unlawful; rather, it is still necessary to assess whether the act conflicts with the living law of society in order to be deemed unlawful, as recognized under the principle of the absence of material unlawfulness (*afwezigheid van alle materiele wederrechtelijkheid*—AVAW). Material unlawfulness means violating the legal interests that the legislature intends to protect through the formulation of criminal offences. In relation to the above material unlawful nature in criminal law literature, there are two functions of the teaching of material unlawful nature, namely:

a. the doctrine of material unlawfulness in its positive function, namely, an act, even though it is not determined by statutory regulations to be unlawful, but if, in the judgment of society, the act is unlawful, the act in question is still unlawful;
b. the doctrine of material unlawfulness in its negative function, namely, an act, even though it is unlawful according to statutory regulations, but if, in the judgment of society, the act is not unlawful, the act in question is an act that is not unlawful. The concept of material unlawfulness, in its negative function, acknowledges the possibility that factors existing outside the law may negate the unlawfulness of an act that meets the statutory definition, and such factors are considered justifications outside the law. This is as referred to in Article 35 of the 2023 Criminal Code, which states that the absence of the unlawfulness of an act punishable by criminal sanctions under statutory law or the living law constitutes a justification, which in this case interprets unlawfulness in its negative function. This aligns with the decriminalization of certain acts, particularly when considered in relation to the principles of parsimony and restraint in the application of criminal law. According to Herbert L. Packer, the indiscriminate use of criminal sanctions by treating all criminal acts as equivalent and

[23] Ach. Tahir, "Menggali Makna Asas Legalitas Dan Perkembangannya Di Indonesia," *Al-Mazahib* 1, no. 2 (2012).

applying them coercively results in the criminal justice system becoming the "prime threatener".[24] Therefore, the use of criminal sanctions should be avoided whenever possible.

Based on the provisions of Article 2 of the 2023 Criminal Code, with the phrase "the provisions as referred to in Article 1 paragraph (l) do not reduce the validity of the law that lives in society which determines that a person should be punished even though the act is not regulated in this Law", it is clear that the teaching of the unlawful nature in its positive function is contained in this article. In its positive function, the principle of legality treats unwritten laws derived from the local wisdom of the community as the basis for determining whether an act should be subject to criminal punishment. An act may be subject to criminal punishment under the living law of a specific community for offences that have no equivalent or are not specifically regulated by statute.[25] The fulfillment of the elements of a crime as set forth in the text of a statutory provision is not the sole criterion for imposing a criminal penalty, but also depends on whether an act is materially unlawful and is considered reprehensible by society, in order to be deemed unlawful as recognized under the principle of the absence of material unlawfulness (*afwezigheid van alle materiele wederrechtelijkheid*—AVAW). Furthermore, related to the unlawful nature of the material in its negative function, it is necessary to analyze that in Article 2 of the 2023 Criminal Code there is a phrase, "the law that lives in society," as one of the bases for punishment.

If examined further in PP 55 of 2025, it is stated that the law that lives in society is customary law, which determines that a person who commits certain acts deserves to be punished. In addition, the law that lives in society is also regulated in a limited manner in Article 2 paragraph (2) of the 2023 Criminal Code and PP 55 of 2025 with the phrase "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 and recognized and implemented by the local Customary Law Community". To be

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[24] Herbert L. Packer, *The Limits of Criminal Sanctions* (California: Stanford University Press, 1986), 87.

[25] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Bandung: Citra Aditya Bakti, 1996), 76.

recognized as a customary law community in Article 4 paragraph (2), it must have been recognized and determined in accordance with the provisions of statutory regulations. In the explanation of PP 55 of 2025, it is also stated that to strengthen the enforcement of Living Law in Society, criminal acts and customary criminal sanctions that live in the community must be determined in Regional Regulations.

Based on these provisions, the material unlawful nature in its negative function is not implicitly contained in Article 2 of the 2023 Criminal Code because the law that lives in society can be used as one of the eradication of unlawful nature if the law 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 and recognized and implemented by the local Customary Law Community, which is determined through statutory regulations. In addition, the application of the law that lives in society, criminal acts, and customary criminal sanctions that live in the community must be determined in Regional Regulations. The extension of the principle of legality regarding the doctrine of material unlawfulness in its negative function acknowledges the existence of factors outside the law (customary law) as a basis for negating unlawfulness. This means that even if an act meets the statutory definition of a criminal offence, its unlawfulness may be negated by provisions outside the statute that justify the act, which can serve as a basis for negating the unlawfulness of an act.

Upon closer examination, the emergence of material legality represents a novelty in the development of criminal law in Indonesia. It explores legality itself to achieve balance in the formulation of principles, resulting in the emergence of material and formal legality. This novelty should align with the ideals of the Indonesian nation. Material legality provides space for indigenous communities or legal systems that still exist within existing communities to be recognized within national law.[26]

The application of living law in society shows that criminal law, specifically the "concept of the principle of legality", is seen to have experienced a shift in meaning; in other words, a person can be punished

[26] Anwar, "Eksistensi Asas Legalitas Formil Dan Materil Pada KUHP Nasional," 2023.

based on the law that lives in society, even though the law does not explicitly determine that the act is a criminal act.[27]

The regulation of customary law as living law in the National Criminal Code transforms the Indonesian criminal law system into a monodualistic one, with two sources of punishment recognized in law enforcement.[28] However, this recognition is not without various normative consequences. While the provisions of customary criminal law in the New Criminal Code are intended to protect the existence of customary criminal law, on the other hand, the requirements and restrictions imposed may threaten the continuity or even diminish the existence of customary criminal law itself.[29]

The normative determination of Article 2 Paragraph (1) of the National Criminal Code, which affirms the validity of living law as an alternative source of punishment besides statutes, changes the understanding of the principle of legality in the Indonesian criminal law system. The decision to narrow the understanding of living law as customary law shows the ratio legis of the changes to the Criminal Code to limit the scope of the law's breadth that can give rise to normative conflicts and uncertainty. As emphasized by Eugene Ehrlich, living law has the meaning of "..the law that dominates life itself, even though it has not been printed in legal propositions".[30]

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[27] Dita Deviyanti, "The Principle of Legality in Relation to Living Law Arrangements in the Reform of the Criminal Code and the Prosecution Function of the Prosecutor ' s Office of the Republic of Indonesia Asas Legalitas Terhadap Living Law Dalam Pembaharuan KUHP Dan Penunt" 3, no. 3 (2025): 15–29.

[28] Anisa Fitri Wibowo, Azriel Viero Sadam, and Muhammad Ramadavin, "Implikasi Pasal Living Law Dalam Undang-Undang Kitab Undang-Undang Hukum Pidana Terbaru Terhadap Kehidupan Masyarakat," *Jurnal Hukum Dan Keadilan* 9, no. 1 (2023).

[29] Immanuel Joyson B. Manurung and Andi Hakim Lubis, *Formulasi The Living Law Sebagai Pembaharuan Hukum Pidana Nasional Melalui Pendekatan Antropologi Hukum* (Yayasan Daarul Huda Krueng Mane, n.d.), 217–24.

[30] Nurlaila Isima, "URGENSI PENGAKUAN HUKUM YANG HIDUP PADA MASYARAKAT DALAM ASAS LEGALITAS DITINJAU DARI PERSPEKTIF SOSIOLOGI HUKUM," *Jurnal JINNSA (Jurnal Interdipliner Sosiologi Agama)* 2, no. 1 (June 30, 2022): 29–36, https://doi.org/10.30984/jinnsa.v2i1.266.

This view is based on the idea that living law is law that applies and develops in society, even if it is not recognized or codified in writing. From a legal perspective, this definition has a very broad scope, due to the pluralistic nature of norm formation. There are several sources of norms recognized in general legal principles, including religious norms, customs, morality, decency, and legal norms.[31]

Furthermore, according to Pradiva, to a certain extent, the existence of the teaching of material unlawfulness in the formulation of Article 2 of the National Criminal Code also broadens the meaning and position of the principle of legality, which is no longer merely formal (emphasizing the provisions of the applicable written laws and regulations), but also legality which is material in nature.[32]

Another problem then is regarding the principle of material legality as stated in Article 2 paragraph (1) namely, first, the determination of actions based on living law or unwritten law and its punishment becomes the absolute authority of the state through its law enforcement agencies; Second, the existence of living law after being standardized in national criminal law; Third, the large number of caseloads that will be experienced by law enforcers; Fourth, there are so many living laws in Indonesia because they differ from one region to another; Fifth, regarding the interpretation of living law, including customary criminal law, even though some consider that what exists is a violation of custom and the nature of the responsibility can be delegated to other family members, while criminal law recognizes individual responsibility. Sixth, related to the prohibition on the use of analogy.[33] This condition becomes increasingly relevant when linked to the basic principles underlying the modern criminal law system, namely the principle of legality.

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[31] Anthony C. Diala, "The Concept of Living Customary Law: A Critique," *The Journal of Legal Pluralism and Unofficial Law* 49, no. 2 (May 4, 2017): 143–65, https://doi.org/10.1080/07329113.2017.1331301.

[32] I. G. N. B. Pradiva and D.R.S. Hariyanto, "Perluasan Asas Legalitas Dalam RKUHP Sebagai Upaya Pembaharuan Hukum Pidana Indonesia," *Jurnal Kertha Semaya* 10, no. 8 (2022): 1766–78.

[33] Ramadan Tabiu and Eddy O.S Hiariej, "Pertentangan Asas Legalitas Formil Dan Materiil Dalam Rancangan Undang-Undang KUHP," *Jurnal Penelitian Hukum* 2, no. 1 (2015): 28–36.

The principle of legality in criminal law is established to guarantee legal certainty, prevent arbitrariness, and ensure that individuals can only be punished based on clear, definite, and pre-existing written laws. Conversely, customary law arises from social practices, is passed down through generations, and is local and particular in nature, making it difficult to meet the standards of lex scripta, lex certa, or lex praevia. This difference creates the potential for uncertainty, interregional discrimination, and even conflicts with the principle of non-retroactivity, as customary law can change over time. Furthermore, the collective nature of customary sanctions also conflicts with the principle of individual responsibility in modern criminal law. Therefore, while recognizing living law within society is an effort to return law to its roots in national culture, its integration into positive law must be carried out through careful formalization and clear harmonization mechanisms to avoid diminishing the principle of legality, a key pillar of the Indonesian criminal law system.[34]

Furthermore, it is feared that living law as a general principle in the Criminal Code will also reduce the meaning of living law itself, as a law that develops dynamically and flexibly according to the circumstances of society itself.[35] Another potential problem that could occur is the state's domination of customary criminal law enforcement rather than providing recognition and protection for the existence of living law.[36]

If conceptualized as customary law, existing laws within society are considered to have the potential to create legal uncertainty regarding the basis for criminal penalties, given the highly complex diversity of customs

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[34] Yabbes J. M. Manangkalangi, Adensi Timomor, and Hendrasari B. R. Rawung, "Tinjauan Terhadap Asas Legalitas Dan Hukum Yang Hidup Dalam Masyarakat Sebagai Dasar Pemidanaan Menurut Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana," *Inovasi: Jurnal Sosial Humaniora Dan Pendidikan* 5, no. 1 (2026).

[35] Kompas, "Mempersoalkan Living Law Dalam KUHP Baru," Kompas.com, 2022, https://nasional.kompas.com/ read/2022/12/19/09243351/mempersoalkan-living-law-dalam-kuhp-yang-baru.

[36] Enggar Wijayanto and Muhammad Haris Makarim, "Politik Hukum Living Law Dan Hak Asasi Manusia Terhadap Rancangan Perda Tindak Pidana Adat Dalam KUHP," *Jurnal Legislasi Indonesia* 22, no. 2 (2025): 159–76.

in Indonesia across various regions. This could then become an obstacle to law enforcement and potentially lead to human rights violations.[37]

Lawrence M. Friedman further stated that "the legal system is not a machine; it is run by human beings." Functional interdependence will always be apparent in the process of implementing/enforcing the law. Friedman also stated that there are at least three dominant components that influence the law enforcement process: the legal structure component, the legal substance component, and the legal culture component.[38]

When discussing legal substance in the context of reforming the Criminal Code, it's not just about the rules in the statute book, but also about how the law operates in society. Thus, the three components of the legal system proposed by Friedman interact and are not in conflict with one another. Failure in one component can result in the ineffectiveness of the others.[39]

Furthermore, the public's tendency to seek justice through living law requires the government to be cautious in formulating regulations. The various types of living law existing in society cannot be formulated; there are numerous forms of customary law, religious law, customs, ethics, and norms. If this legal pluralism is combined, it will diminish the essence of living law within society.[40]

The National Criminal Code has attempted to adapt to Universal principles and values of human rights, accompanied by the necessary adjustments to differentiate them from colonial methods, which borrowed from Prof. Muladi's term, the Indonesian Way, based on Pancasila and the 1945 Constitution. Principles such as balance, harmony, and alignment between progress and tradition, and between

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[37] Wirdi Hisroh Komeni and Ermania Widjajanti, "Ketidaktepatan Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Baru: Prespektif Teori Kepastian Hukum," *Innovative: Journal Of Social Science Research* 4, no. 3 (May 6, 2024): 1051–59, https://doi.org/10.31004/innovative.v4i3.10586.

[38] Fithriatus Shalihah, *Sosiologi Hukum*, *PT RajaGrafindo Persada*, 1st ed. (Kota Depok: PT RajaGrafindo Persada, 2017).

[39] Immanuel Joyson B Manurung and Andi Hakim Lubis, "Formulasi The Living Law Sebagai Pembaharuan Hukum Pidana Nasional Melalui Pendekatan Antropologi Hukum," *Media Hukum Indonesia* 2, no. 5 (2025).

[40] Shinta, "Living Law Dalam RKUHP," accessed February 25, 2026, https://ylbhi.or.id/informasi/kegiatan/living-law-dalam-rkuhp/.

unification and "scattered" customary law, are the main principles and ideals in the formation of the National Criminal Code. However, the National Criminal Code still requires various prerequisites that must be present before the National Criminal Code is effectively implemented in the context of the teachings on the unlawful nature of material law that go hand in hand with efforts to advance customary law.[41]

B. The Existence of Living Law in Society for Acts that are Not Considered Criminal Acts by Society

Referring to the original nature of criminal law, which is national in nature and seeks to target and reach all parties within a country's territory without exception, and tends to be stable (difficult to change unless there is a change in law), strict and rigid (related to the principle of legality). Very different from the nature of customary law, which is based on geography (where a particular indigenous community resides) and genealogy (based on descent and the submission of members of the indigenous community), and tends to be dynamic, unwritten, and very fluid.[42]

Von Savigny, a German legal scholar, put forward his views on law. For Von Savigny, law is an expression, one of the most important expressions of the people's spirit (volksgeist). Savigny's view is that law is the soul of the people (law reflects volksgeist). Therefore, customary law that grows and develops in the womb of volksgeist must be seen as the true law of life. True law is not made; it must be discovered.[43] According to Von Savigny's opinion, law is derived from values that have long

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[41] Setya Indra Arifin, "Rekonstruksi Sifat Melawan Hukum Pidana Materiil Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang KUHP," *AL WASATH Jurnal Ilmu Hukum* 4, no. 1 (2023): 29–42, https://doi.org/https://doi.org/10.47776/alwasath.v4i1.638.

[42] Arifin, "Rekonstruksi Sifat Melawan Hukum Pidana Materiil Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang KUHP."

[43] Bernard L. Tanya, Yoan N. Simanjutak, and Markus Y. Hege, *Teori Hukum, Strategi Tertib Manusia Lintas Ruang Dan Generasi* (Yogyakarta: Genta Publishing, 2013), 94.

existed in society. There is an organic relationship between the law and authenticity of a nation's character, which causes a tight integration.[44]

The regulation of customary law in Article 2 of the New Criminal Code seems to be a double-edged sword. On the one hand, this article accommodates customary law into the national criminal justice system, an effort to protect Indonesia's cultural diversity and indigenous laws. However, on the other hand, the clause "to the extent not regulated in this Law" indirectly limits the scope for the application of customary law.[45]

Reforming the Criminal Code by compiling customary criminal offenses will shift its status from living law, which should be able to develop within society. This will limit the ability of living law to develop within society. By partially incorporating living law regulations, which regulate customary law in sentencing, the state's authority will be expanded.[46] Customary criminal law is a source of criminal law as a form of unwritten law that constitutes an extension of the principle of legality, encompassing not only the concept of formal unlawfulness but also that of material unlawfulness.[47]

According to Muladi, the applicability of the doctrine of material unlawfulness means that the living law serves several functions, including as a basis for criminal punishment when there is no equivalent in positive law, as a ground for exempting a person from criminal liability

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[44] Cahya Wulandari et al., "Penal Mediation: Criminal Case Settlement Process Based on the Local Customary Wisdom of Dayak Ngaju," *Lex Scientia Law Review* 6, no. 1 (2022): 75.

[45] Yoserwan Yoserwan, "EKSISTENSI HUKUM PIDANA ADAT DALAM HUKUM PIDANA NASIONAL SETELAH PENGESAHAN KUHP BARU," *UNES Law Review* 5, no. 4 (June 10, 2023): 1999–2013, https://doi.org/10.31933/unesrev.v5i4.577.

[46] Yayasan Lembaga Bantuan Hukum Indonesia and Pusat Kajian Hukum Adat 'Djojodigoeno' Fakultas Hukum Universitas Gadjah Mada, "Koalisi Masyarakat Sipil Tolak Living Law Dalam RKUHP," Brief Paper: Hukum Yang Hidup Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana, 2020.

[47] Ani Triwati, "Hukum Pidana Adat Sebagai Sarana Mewujudkan Nilai Keadilan Pancasila," in *Revitalisasi Hukum Pidana Adat Dan Kriminologi Kontemporer* (Yogyakarta: Genta Publishing, 2018), 4–5.

(justification), and as a ground for aggravating the punishment.[48] Certainly, this presents a unique dialectic if the principle of legality, in relation to the concept of material unlawfulness, is interpreted as applying only to the positive functions that are unlawful, rather than also applying the concept of unlawfulness in its negative functions, thereby negating an act that, according to the living law, is not considered a criminal offense. This serves as a justifying reason because the absence of unlawfulness in an act means it is not subject to criminal punishment. In practice, this can be seen in certain acts that have become customary in specific regions. Although they have equivalents in the national Criminal Code, they are not actually considered criminal offenses under the living law of the community. We should not punish people who commit offenses merely because their actions are improper. Still, we also should not punish people who commit offenses simply because their behavior is not worthy of censure.[49]

The new Criminal Code implicitly condemns the very existence of customary law. Restrictions on freedom of movement and unclear recognition of customary law can lead to the loss of the cultural values contained within it. Customary norms will disappear and be replaced by positive norms within the formal legal system, gradually eroding the identity of indigenous communities. Therefore, more serious efforts are needed to provide adequate legal protection for customary law and its implementation.[50] This indirectly negates the teaching of material unlawfulness in its negative function. However, in practice and in the history of law enforcement in Indonesia, the teaching of material unlawfulness in its negative function is still implemented.

For example, it has become a habit for rural communities in Java who have limited land and are landless to carry out gresek/ngasak

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48 Suteki, *Masa Depan Hukum Progresif*, Cetakan Pe (Yogyakarta: Thafa Media, 2015), 98.

49 Roger B. Dworkin, "The Limits of the Criminal Sanction, by Herbert L. Packer," *Indiana Law Journal* 44, no. 3 (1969): 495–96, https://www.repository.law.indiana.edu/ilj/vol44/iss3/7.

50 Priskila Hutabarat, Haryadi Haryadi, and Elizabeth Siregar, "Keberadaan Sanksi Adat Terhadap Penegakan Hukum Pidana Dalam KUHP Baru," *PAMPAS: Journal of Criminal Law* 6, no. 1 (February 27, 2025): 1–15, https://doi.org/10.22437/pampas.v6i1.41483.

(interviews with several farmers in Batang, February 18-25, 2010). Gresek is taking the remaining harvest of rice, kapok, clove leaves, and other agricultural products. There is an unwritten agreement in Javanese society, especially in rural areas, that taking the remaining harvest (gresek/ngasak) is not theft. Gresek/Ngasak for Javanese people is interpreted as "nggoleki turahan sing duwe" (looking for the owner's leftovers). Turahan (leftovers) will not be used again by the owner.[51]

For people in rural Java, farming is not just about earning a living, but also has a social function. The spirit of living together (communalism) in rural communities is always maintained to create harmony among residents. "Eman-eman sing keri, ayo do di dangsagi ben keno pangan maneh" (It's a shame what's left, let's gather it to eat). Where there is farming, there is ngasak/gresek. People who ngasak/gresek come from the "little people" who have no authority (politically), no land (economically), and whose lives are miserable, scavenging for turahan because they have to survive. The results of ngasak/gresek are meager, only enough to survive today, not enough to accumulate. This ngasak/gresek habit has been going on for a long time, passed down from generation to generation, and is carried out continuously to this day.[52]

A similar phenomenon can be seen in Banjarnegara Regency, where landowners often leave leftover crops such as rice, cloves, peanuts, and corn for the local community to collect. This practice has become common in local agrarian life. Even though landowners are aware that others are taking these leftovers, the practice is generally not a problem. This demonstrates the social values of tolerance, solidarity, and sharing that remain prevalent in rural communities.

In a socio-cultural context, this practice can be understood as a form of local wisdom reflecting a harmonious relationship between landowners and the surrounding community. Leftover harvests, no longer considered of high economic value by landowners, are instead utilized by others in need. Thus, this practice not only serves as a mechanism for optimal resource utilization but also strengthens social

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[51] Widodo Dwi Putro, "Perselisihan Hukum Modern Dan Hukum Adat Dalam Kasus Pencurian Sisa Panen Randu Kajian Putusan Nomor 247/Pid.B/2009/PN.Btg," *Jurnal Yudisial Antinomi Penegakan Hukum* 4, no. 2 (2011), https://doi.org/https://doi.org/10.29123/jy.v4i2.190.

[52] Putro.

relations and creates a sense of togetherness within the agrarian community in Banjarnegara Regency. Furthermore, in some cases of theft of insignificant amounts, they are also resolved through deliberation and consensus. This is in accordance with Surah Al-A'raf, verse 199, which states:

خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَاَعْرِضْ عَنِ الْجٰهِلِيْنَ

> Meaning: Be forgiving, command (people) to what is good, and turn away from stupid people.

However, if seen from the positive law of Indonesia, namely the 2023 Criminal Code, the activity of taking the remaining harvest belonging to other people is included in Article 478 of the 2023 Criminal Code which reads "If the Criminal Act as referred to in Article 476 and Article 477 paragraph (1) letters f and g is carried out not in a house or closed yard where there is a house, and the price of the goods stolen is not more than IDR 500,000.00 (five hundred thousand rupiah), it is punished for minor theft, with a maximum fine of category II".

Based on this description, it can be understood that in social life, there are a number of customs that are viewed by local communities as normal and not considered illegal. However, when viewed from the perspective of positive law in force in Indonesia, these customs can actually be classified as criminal acts. This situation indicates a potential discrepancy between the social norms that develop in society and the provisions of positive law that formally regulate and define the limits of punishable acts.

Another example is one of the famous cultures of the Lombok people, or the Sasak people, which is the tradition of elopement (Merariq). Merariq is a popular example of a Sasak wedding tradition. When a man wants to propose to a woman, he first takes her away secretly, usually at night. Merariq is part of the Sasak wedding procession.[53]

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[53] Muh Muhsinin, Ni Luh Arjani, and Ni Made Wiasti, "Tradisi Kawin Lari (Merariq) Pada Suku Bangsa Sasak Di Desa Wanasaba, Lombok Timur," *Sunari Penjor: Journal of Anthropology* 6, no. 1 (2022): 51–58.

In the Sasak language, "merarik kodeq" refers to the act of running away (merarik) from the house or residence of her parents before marriage, signifying that the child is free from the supervision of her parents/guardians, as the initial stage of the marriage process. Running away must be done in the afternoon or evening. Merarik can also be interpreted as theft or stealing a girl from her parents' supervision.[54]

The tradition of merariq is considered quite extreme. A man who wants to propose to a woman must first kidnap her and then bring her to the man's family home. This is considered a violation of human rights because merariq is inextricably linked to the word "kidnapping." In contrast, kidnapping is synonymous with negative actions such as violence against individuals and acts that demean human dignity.[55] If viewed from a positive legal perspective, merariq is a violation of Article 454 of the 2023 Criminal Code, which states that:

1. Any person who takes away a child against the will of the parent or guardian, but with the consent of the child himself, with the intention of ensuring control over the child, whether within or outside of marriage, shall be punished for running away with the child, with a maximum prison sentence of 7 (seven) years.
2. Any person who takes away a woman by trickery, violence, or threat of violence, with the intention of ensuring control over the woman, whether within or outside of marriage, shall be punished for running away with the woman with a maximum prison sentence of 9 (nine) years.

Furthermore, in the history of law enforcement in Indonesia regarding the teaching of material unlawfulness, an example of a decision by the Supreme Court of the Republic of Indonesia regarding the application of the teaching of material unlawfulness in its negative function can be put forward, namely in the Decision of the Supreme Court of the Republic of Indonesia dated January 8, 1966 Number 42 K/Kr/1965 with the defendant Machroes Effendi, Patih at the Office of

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[54] Habibi Habibi and I Putu Pasek Bagiartha W, "MERARIK KODEQ ANTARA TRADISI DAN PROBLEMATIKA YURIDIS PADA MASYARAKAT SUKU SASAK LOMBOK," *Jurnal Hukum Agama Hindu Widya Kerta* 8, no. 1 (May 8, 2025): 1–21, https://doi.org/10.53977/wk.v8i1.2466.

[55] Muhsinin, Arjani, and Wiasti, "Tradisi Kawin Lari (Merariq) Pada Suku Bangsa Sasak Di Desa Wanasaba, Lombok Timur."

the Regent/Head of the Level I Region of Sambas, whose actions have fulfilled the elements of the criminal provisions contained in Article 372 in conjunction with Article 52 in conjunction with Article 64 paragraph (1) of the Criminal Code.[56]

In this case, the judge in his consideration stated that "an action in general can be declared unlawful not only based on a provision in legislation, but also based on the principles of justice or unwritten legal principles of a general nature, in this case, for example, the factors: the State is not harmed, the public interest is served, and the defendant himself does not gain any benefit".[57]

In addition, in the Decision of the Supreme Court of the Republic of Indonesia dated March 30, 1977, Number 81 K/Kr/ 1973, with the defendant Ir. Moch. Otjo Danaatmadja bin Danaatmadja, Head of the Forest Pruning Unit of Garut Regency, whose actions have fulfilled the elements of the criminal provisions contained in Article 415 in conjunction with Article 64 in conjunction with Article 1 sub c of Law Number 24 prp 1960.[58]

In his consideration, the judge stated that "the material law is an unwritten fait d'execuse as formulated by doctrine and jurisprudence, so that in accordance with the objective of the principle of material law, an act which is a criminal act cannot be punished if the act is socially adequate; therefore, the Bandung High Court Decision must be revised because the accused's act is declared not to be a crime or violation, whereas in fact the act is a crime (fulfilling the formal elements), but the accused cannot be punished".[59]

The examples above demonstrate a difference in perspective between customary law, which exists and develops within society, and

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[56] Chidir Ali, *Yurisprudensi Indonesia Tentang Hukum Pidana Korupsi* (Jakarta: Bina Cipta, 1979), 15.

[57] Mhd Ridha Haykal, "Analisis Yuridis Penerapan Unsur Melawan Hukum Materiil Dalam Putusan Mahkamah Agung Atas Extraordinary Crime Pada Tindak Pidana Korupsi Pasca Putusan Mahkamah Konstitusi Nomor: 003/PPU-IV/2003," *Warta Dharmawangsa*, no. 55 (2018).

[58] Ali, *Yurisprudensi Indonesia Tentang Hukum Pidana Korupsi*, 579–83.

[59] Haykal, "Analisis Yuridis Penerapan Unsur Melawan Hukum Materiil Dalam Putusan Mahkamah Agung Atas Extraordinary Crime Pada Tindak Pidana Korupsi Pasca Putusan Mahkamah Konstitusi Nomor: 003/PPU-IV/2003."

the positive legal provisions stipulated in the 2023 Criminal Code. In the practice of indigenous communities, a number of acts are not socially and culturally considered violations worthy of criminal sanctions. These acts are often understood as part of traditions, conflict resolution mechanisms, or social norms long recognized and accepted by the local indigenous community.

However, within the national legal framework codified through the 2023 Criminal Code, these acts can be classified as criminal acts because they violate generally applicable positive legal norms throughout the country. This indicates a potential disharmony between local and contextual customary legal values and the formal, written, and universally applicable national criminal law system.

This difference essentially reflects the dynamics of legal pluralism in Indonesia, where state law and customary law can have different standards for evaluating an act. Therefore, the 2023 Criminal Code requires a sensitive approach to the social and cultural context of indigenous communities, so that the application of criminal law does not ignore local values that are still alive and adhered to by the community. Therefore, harmonization between national law and customary law is crucial to creating a legal system that not only guarantees legal certainty but also takes into account the sense of justice inherent in society.

Efforts to harmonize national and customary law are not merely conceptual but are also reflected in the practice of law enforcement through court decisions. In some cases, judges consider the values of justice prevalent in society as a basis for assessing whether an act is unlawful. One example that can be used as a reference is the application of the term "unlawful" with a negative function, as reflected in Supreme Court Decision No. 42 K/Kr/1965 in the Mahroes Efendi case.

In the legal reasoning, the judge stated that "an act can generally be rendered unlawful not solely based on statutory provisions, but also based on principles of justice or unwritten, general legal principles." The judge noted that the defendant's actions deviated from the original stated objective. However, from a societal perspective, the defendant's actions

constituted a service that benefited the community and could be considered to serve the public interest.[60]

Therefore, the most appropriate formulation for the spirit and efforts to accommodate living law within society is a negative formulation, not a positive one, which should continue to operate according to each individual's customary procedures. With a formulation that adheres to the teaching of the unlawful nature of material law in its negative function, it ultimately does not need to contradict the Constitutional Court Decision No. 3/2016. Even then, it still requires a prerequisite and needs to be emphasized: that the instruments for advancing the rights of indigenous peoples, particularly in matters of recognition, respect, and fulfillment, cannot be forgotten or abandoned by lawmakers if they wish to continue this national criminal law project. This prerequisite is the guarantee of protection for indigenous peoples themselves in carrying out and continuing their lives in a "fully fulfilled" manner.[61]

Furthermore, the existence of living (customary) law can essentially be equated with customary law. Although customary law is a source of law, its status is complementary to statutes and cannot override statutes.[62] However, the placement of customary law as a complement to statutes within the national legal system also has certain consequences for its recognition and implementation. This complementary position requires a clear regulatory mechanism to ensure the continued existence of customary law without neglecting national legal principles. It is in this context that issues arise regarding the criteria for recognizing indigenous communities and the customary norms that apply within them.

If the state applies overly strict recognition criteria, the living space of indigenous communities could be further restricted, as unwritten or undocumented norms could be deemed illegitimate. For the effective

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[60] Didik Endro Purwoleksono dalam Yanto Yunus, Juwita Sarri, and Syahirudin Syahir, "Hilangnya Sifat Melawan Hukum Pidana Materil Dalam Tindak Pidana Korupsi Pasca Pengembalian Seluruh Kerugian Keuangan Negara," *Media Iuris* 4, no. 2 (2021): 243.

[61] Arifin, "Rekonstruksi Sifat Melawan Hukum Pidana Materiil Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang KUHP," 29–42.

[62] Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)* (Yogyakarta: Liberty, 2005).

implementation of customary recognition, clearer implementing regulations are needed to bridge the gap between the Criminal Code and customary dynamics. Furthermore, human rights protection must be part of state oversight, so that customary norms that could potentially harm vulnerable groups are not applied indefinitely.[63]

Provisions regarding the recognition of indigenous communities are also emphasized in Law Number 39 of 1999 on Human Rights. Article 6, paragraph (1) states that in the context of upholding human rights, the differences and needs of indigenous legal communities must be considered and protected by law, society, and the government. This provision shows that the state recognizes the existence of indigenous communities and the values and norms that exist within them, so that in the formation and implementation of laws, it is necessary to consider the characteristics and interests of these indigenous communities.

Conclusion

The provision of Article 2 of the 2023 Criminal Code, which recognizes "living law within society" as the basis for criminal punishment, demonstrates that the principle of material unlawfulness, in its positive function, has been accommodated within the national criminal law system. This means that an act can be punished even if it is not explicitly regulated in law, as long as it is deemed to conflict with the prevailing law within society. Furthermore, Government Regulation 55 of 2025 emphasizes that this living law refers to customary law, with the limitation that it must align with the values of Pancasila, the 1945 Constitution, human rights, and universally recognized general legal principles. Its applicability must be determined through statutory

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[63] Wahyudhi, Herlambang, and Sudarti, "Integrasi Hukum Adat Dalam Kerangka KUHP Baru: Evaluasi Pluralisme Hukum Dan Tantangan Implementasi Restoratif Justice." *See also* Rena Yulia, and Ridwan Arifin. "From Customary Sanctions to State Law: Legal Intervention in Social Exclusion and Informal Punishment in Indonesian Villages". *The Indonesian Journal of Legal Intervention in Social Problems* 1, no. 1 (2026): 131-160; Andi Bangun Sanjaya, "When Vigilantism Becomes Social Justice: Legal Intervention in Community-Based Punishment in Indonesia". *The Indonesian Journal of Legal Intervention in Social Problems* 1, no. 1 (2026): 1-30.

regulations, including Regional Regulations. However, this regulation implicitly limits and even tends to eliminate the applicability of the principle of material unlawfulness in its negative function, namely as a basis for eliminating unlawfulness. Within the construction of the 2023 Criminal Code, living law within society is positioned more as a basis for criminal punishment, rather than as justification or forgiveness. In practice, the negative function of the material unlawful nature of the law has been applied in Supreme Court jurisprudence, including in Decisions Number 42 K/Kr/1965 and Number 81 K/Kr/1973. In both cases, although the defendant's actions formally met the elements of a crime, the judges considered that the unlawful nature could be eliminated based on the principles of justice, unwritten law, and the concept of material law as a justification. Considerations such as the absence of state losses, the public interest being served, and the socially adequate nature of the act provided grounds for not punishing the perpetrator. However, this development indicates a tendency to eliminate the negative function of this principle in judicial practice. On the other hand, in Indonesian social practices, particularly in rural Java, namely in Batang and Banjarnegara Regency, the negative function of the material unlawful nature of the law remains alive. This is reflected in the practice of gresek/ngasak, which involves taking leftover harvest produce that is no longer used by the landowner and is not socially considered theft. This practice, carried out by underprivileged community groups, reflects the values of solidarity, tolerance, and communalism, and has been carried out for generations.

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