

## The paradox of living law positivization in the new criminal code: a critique of legal formalism

### Paradoks positivisasi hukum yang hidup dalam kitab undang-undang hukum pidana baru: kritik terhadap formalisme hukum

Erwin Susilo<sup>1</sup>, Teuku Muttaqin Mansur<sup>2\*</sup>

<sup>1</sup> Pangkalan Balai District Court, South Sumatra, Indonesia

<sup>2</sup> Faculty of Law, Syiah Kuala University, Indonesia

<sup>1</sup> erwinowam@gmail.com, <sup>2</sup> tmuttaqien@usk.ac.id

\*Corresponding Author: tmuttaqien@usk.ac.id

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#### ABSTRACT

The recognition of living law in the New Criminal Code (NCC) indicates a shift toward legal pluralism, but it also raises serious conceptual and practical issues. However, there is still a lack of research specifically examining the gap between the recognition of living law in the NCC and its application when confronted with the principle of legality. This study aims to examine the conflict between the principle of legality and the effort to positivize living law through regional regulations that risk eliminating its organic and contextual nature. This research uses a normative juridical method, drawing on statute, legal philosophy, and socio-legal conceptualization, through an analysis of the regulation of living law in the NCC and Eugen Ehrlich's thoughts on living law in society and the principle of legality. The research results show that the positivization model in the NCC actually transforms living law into rigid written norms, thereby reducing its dynamic character and turning it into little more than a symbol of legitimacy in court decisions. This research also found that this formalization reproduces the logic of colonial law, which places state law above the social realities of society. As a reconstruction, this research proposes integrating living law through judicial discretion and legal discovery mechanisms, rather than through rigid formal codification that restricts living law itself. In conclusion, living law can only function fairly if it is maintained as organic law by strengthening the role of judges and customary institutions within the criminal justice system and customary courts.

Keywords: living law; principle of legality; criminal law reform; legal pluralism; judges.

#### ABSTRAK

Pengakuan living law dalam Kitab Undang-Undang Hukum Pidana yang baru (KUHP Baru) menunjukkan pergeseran menuju pluralisme hukum, tetapi sekaligus memunculkan persoalan konseptual dan praktis yang serius. Namun, masih terdapat keterbatasan penelitian yang secara khusus mengkaji kesenjangan antara pengakuan living law dalam KUHP Baru dan persoalan penerapannya apabila dihadapkan dengan asas legalitas. Penelitian ini bertujuan mengkaji pertentangan antara asas legalitas dan upaya positivisasi living law melalui peraturan daerah yang berpotensi menghilangkan sifat organik dan kontekstualnya. Penelitian ini menggunakan metode yuridis normatif dengan pendekatan perundang-undangan, filsafat hukum, dan konseptual sosio-legal, melalui analisis terhadap pengaturan living law dalam KUHP Baru serta pemikiran Eugen Ehrlich mengenai hukum yang hidup dalam masyarakat dan asas legalitas. Hasil penelitian menunjukkan bahwa model positivisasi dalam KUHP justru mengubah living law menjadi norma tertulis yang kaku, sehingga mereduksi karakter



*dinamisnya dan menjadikannya hanya sebagai simbol legitimasi dalam putusan pengadilan. Penelitian ini juga menemukan bahwa formalisasi tersebut mereproduksi logika hukum kolonial yang menempatkan hukum negara di atas realitas sosial masyarakat. Sebagai rekonstruksi, penelitian ini mengusulkan integrasi living law melalui diskresi hakim dan mekanisme penemuan hukum, bukan melalui kodifikasi formal yang kaku dan membatasi living law itu sendiri. Kesimpulannya, living law hanya dapat berfungsi secara adil apabila tetap dipertahankan sebagai hukum organik dengan memperkuat peran hakim dan lembaga adat dalam sistem peradilan pidana dan peradilan adat.*

*Kata kunci: living law; asas legalitas; pembaruan hukum pidana; pluralisme hukum; hakim.*

## 1. INTRODUCTION

The formal-legal paradigm, which is a legacy of the colonial legal framework, still influences the Indonesian legal system. This paradigm was inherited from the *Wetboek van Strafrecht* (WvS), enacted in 1918 and later adopted after independence as the Kitab Undang-Undang Hukum Pidana, with editorial changes (Butt, 2023). This legacy places written norms at the center of legality, so the law is often understood primarily as a product of the state. The consequence of this is that legal pluralism and social practices that are alive, developing, and even adhered to by society are often marginalized. Critique of this orientation can be examined through the thoughts of Eugen Ehrlich, particularly regarding "living law," which has become a significant milestone in modern legal sociology because it shifts the center of "legal gravity from state-formed norms to actual social practices" (Bílý, 2021). Ehrlich views the true law as norms practiced and adhered to in daily life, even though they are unwritten. Law, therefore, is a dynamic reality, moving in accordance with social changes and gaining legitimacy from societal acceptance rather than merely from formal recognition by the state (Osina, 2022).

Ehrlich's thought in the Indonesian legal system is recognized, among other things, through the New Criminal Code (NCC), which, promulgated through Law Number 1 of 2023, formally acknowledges "living law" through Article 2 paragraph (1) as the basis for criminal punishment (Susilo, 2025). This recognition is normatively realized through Article 2 of the NCC, which seeks to accommodate legal pluralism into the Indonesian criminal justice system. However, this recognition simultaneously raises conceptual issues. Living law in the NCC is pushed toward positivization through regional regulations, a mechanism that has the potential to transform norms that were originally fluid, contextual, and adaptive into rigid, written rules subject to the procedural logic of the state. This condition creates tension with the "principle of legality that demands certainty through pre-established written norms, while living law grows from social practices whose boundaries are difficult to formulate rigidly." In this case, the role of judges as discoverers of law (*rechtsvinding*) becomes very important. Through the principle of *jura novit curia*, judges are required to unearth the living law within society and connect it with legal certainty without stifling its social vitality.

Several previous studies have discussed the position of living law within the framework of Indonesian criminal law reform, particularly concerning the principle of legality and judicial authority. Andri Yanto and Faidatul Hikmah emphasize integrating living law into criminal law reform through the legality principle and institutionalization via regional regulations, drawing on the precedent of the Aceh Qanun (Yanto & Hikmah, 2023). Yoserwan emphasizes that excessive formalization and restriction can actually undermine the existence of customary criminal law; thus, an approach that respects the development of customary norms is needed (Yoserwan, 2023). Irwansyah Tanjung examines the authority of judges in uncovering the values of justice and religious wisdom as a bridge between legal texts and social realities (Tanjung, 2023). Yuber Lago et al. offer a middle ground between the principle of legality and unwritten law, emphasizing judges' obligation to consider unwritten law under the Judicial Power Law (Lago et al., 2023). Meanwhile, Agnes Harvelian et al. demonstrate the relevance of criminal law enforcement in environmental protection as a space for the application of living norms (Ashraf et al., 2024).

Although these studies make important contributions, most remain descriptive and operate within a normative-institutional framework that assumes living law must ultimately be transformed into written or semi-written norms to function within the criminal justice system. What has been extensively studied is the recognition of living law, its compatibility with the principle of legality, and the role of judges in its application. However, what has not been extensively explored is the conceptual contradiction that arises when living law is positivized through state instruments, particularly how this process transforms the ontology of living law from organic social norms into formal state norms. Previous studies have also examined coloniality only minimally in legal formalism, namely the ongoing tendency to subordinate social norms to state law. In this space, this article positions itself.

Based on this, this research focuses on the paradox of the positivization of living law in the NCC. It offers a reconstruction that preserves the organic nature of living law through judicial interpretation, rather than through mandatory codification. The novelty of this research lies in the proposal of an integration model in which living law is actualized casuistically through judicial decisions, rather than reduced to regional legislation. In this case, the judge is portrayed as a figure who harmonizes social norms with legal certainty. This article proposes an alternative model of legality that remains faithful to Ehrlich's idea of law as a living social phenomenon.

Based on this framework, this research examines two main issues: first, how the concept of living law is understood by Ehrlich, including its characteristics, differences from positive law, and sources. Second, how the regulation of living law in the NCC potentially conflicts with the principle of legality, and what reconstruction is needed for living law to remain truly alive as organic law. Theoretically, this research contributes to the development of legal thought by linking Ehrlich's living law theory with contemporary issues in Indonesian criminal law and deepening the debate between legal positivism and legal pluralism. In practice, this research offers guidelines for lawmakers and judicial institutions for designing responsive regulations and interpretive techniques that maintain a balance between legal certainty, justice, and social utility without negating the essence of living law itself.

## **2. RESEARCH METHOD**

This research employs a normative juridical research method that combines statutory, legal-philosophical, and socio-legal conceptual approaches. Normative legal research examines legal norms, principles, doctrines, and the consistency of a legal system (Soekanto & Mamudji, 2010) (Marzuki, 2008). The statutory approach is used to examine the regulation of living law in the NCC, along with related regulations, to understand how its normative construction is formed, what its legal limitations are, and how it impacts the national criminal justice system.

Next, a legal-philosophical approach is used to examine the conceptual relationship between Ehrlich's idea of living law and the principle of legality, particularly in relation to the values of justice, legal certainty, and the legitimacy of unwritten norms in criminal law. In addition, a socio-legal conceptual approach is used to understand living law as norms that arise from social practices, enduring customs, and the reality of legal pluralism in Indonesia.

The legal materials used consist of primary legal materials in the form of statutory documents and secondary legal materials in the form of legal methodology books, textbooks, scientific journal articles, legal doctrines, and opinions of scholars relevant to criminal law reform and legal pluralism. The analysis technique used is prescriptive qualitative analysis, conducted in three stages. First, inventory and classification of relevant legal materials. Second, systematic interpretation of statutes and comparison with related legal doctrines. Third, a critical evaluation of the tension between the recognition of living law in the NCC and the principle of legality. Based on these stages, this research then formulates a reconstruction model aimed at preserving the organic character of living law without disregarding legal certainty in Indonesian criminal law.

### 3. RESULTS AND DISCUSSION

#### 3.1 Living Law in the New Criminal Code and Its Conflict with the Principle of Legality Recognition and Positization of Living Law

One of the fundamental principles in criminal law is the principle of legality (Alotaibi, 2021). The principle of legality, which is closely related to legal certainty, asserts that there is no crime or punishment without a criminal law that governs it (Lagioia & Sartor, 2020). Simply put, the principle of legality means that a person can only be punished if there is a clear legal provision that explicitly defines the act as an offense and specifies its sanction. The main purpose of this principle is to limit state power and prevent arbitrary actions (Austin, 2020). The elements of the principle of legality can be formulated as shown in the following table:

**Table 1: Elements of the Principle of Legality**

Element	Formulation	Main Meaning
Lex praevia	No crime and punishment without law previously in force	Criminal law may not be applied retroactively, except when it is more lenient for the offender.
Lex stricta	No crime and punishment through analogical interpretation	Criminal norms may not be extended by analogy and must be applied strictly according to their formulation.
Lex certa	No crime and punishment without certainty	The formulation of crimes and sanctions must be clear, precise, and unambiguous.
Lex scripta	No crime and punishment without written law	Only written rules can establish crimes and sanctions, not unwritten law.

**Source:** Author's elaboration from Brian T. Austin, "Nullum crimen, nulla poena sine lege: The Principle of Penal Legality in the *ius vigens*," *Studia Canonica* 54, no. 1 (2020): 5–29.

The four elements above complement each other and form a framework of protection for individuals. The principle of prior law affirms the prospective nature of criminal law, which is to protect every person from the retroactive application of criminal law. Lex stricta ensures that criminal norms are not interpreted analogously so that judges or authorities cannot expand the meaning of an offense beyond its formulation. Legal certainty demands clarity in the formulation of offenses and sanctions so that everyone can know with certainty what actions are prohibited and the legal consequences that are established. Meanwhile, lex scripta ensures that the source of criminal legality comes only from officially promulgated written rules, thus protecting society from the threat of vague or undocumented norms.

When critically examined, these four dimensions show that the principle of legality serves not only as a doctrine but also as a constitutional guaranty to limit "the state's power to impose penalties." In relation to the NPC, the recognition of living law and unwritten norms creates tension with the principles of lex scripta and lex certa, as criminal liability could be based on norms that have not yet been codified or that lack uniform limitations.

The principle of legality stated in Article 1 (1) of the NCC affirms that "no act can be subject to criminal sanctions and/or measures unless by virtue of criminal regulations in existing legislation prior to the commission of the act." This formulation contains two important principles (Gani & Ansar, 2025). First, the principle of lex praevia, which requires criminal law to apply prospectively and rejects the application of the principle of retroactivity. Second is the principle of lex stricta (Pastor Muñoz, 2023), which is affirmed through the prohibition of applying analogies as stated in Article 1(2) (Naibaho & Ningsih, 2026). Conceptually, these two principles strengthen the principle of legality as the

foundation for legal certainty and the protection of human rights from potential arbitrary criminalization by the state.

### **Findings on the Conflict with the Principle of Legality**

However, the legal certainty idealized by the principle of legality becomes problematic when the NCC accommodates living law in Article 2 (1). This provision states that the law living within society can be used as a basis for punishment as long as it is not regulated by law and does not conflict with "Pancasila values, the Indonesian Constitution, human rights, and general legal principles recognized by nations." On one hand, this recognition demonstrates the courage of Indonesian criminal law to acknowledge legal pluralism. However, on the other hand, it creates a fundamental contradiction: "The principle of legality demands certain written laws, while living law is dynamic, undocumented, and arises from social practices whose boundaries are difficult to ascertain" (Hutagalung et al., 2026).

This contradiction becomes even more apparent because Article 2 (3) of the NCC stipulates that the procedures and criteria for determining living law must be regulated through government regulations, and in practice, these are further elaborated in regional regulations (Faishal et al., 2026). With this mechanism, living law loses its natural character as law that is truly alive in society because it is transformed into written law subject to formal state procedures. In other words, living law in the NCC is no longer organic and dynamic law but merely customary law that has been standardized in the text of regulations. This is what fundamentally sets it apart from Ehrlich's thinking.

Ehrlich asserted that true law does not reside in statutes, court decisions, or academic doctrines, but rather in the social rules that are genuinely practiced in the daily lives of society. He called it living law. For Ehrlich, state law (*staatliches Recht*) is only one layer of legal reality, while truly effective law that governs societal behavior grows from social associations such as family, religious communities, professional groups, and customs that are actually followed. State power is only secondary, because the core of legal strength stems from social acceptance (Barikova, 2022). Therefore, Ehrlich's version of living law is always dynamic and adapts to social changes, unlike state law, which tends to be static.

In this case, the NCC version of living law is actually the opposite of Ehrlich's idea. Instead of acknowledging the vitality of law born from society, the NCC actually limits its applicability through legal-formal mechanisms. Once living law is formalized through regional regulations, it ceases to be living law and transforms into written law that is similar in nature to state law. This raises a fundamental question: does the NCC truly recognize living law, or is it merely co-opting customary law to keep it under state control? Ehrlich's critique of state law dominance becomes highly relevant here, as the NCC tends to reduce living law to a mere supplement to positive law, rather than an autonomous source of law. So, the regulation of living law in the NCC appears problematic because it actually obscures the original spirit of the concept. It didn't truly bring customary law to life but rather formalized and controlled it to align with the logic of the state. As a result, the principle of legality in the NCC still leaves serious tension between legal certainty, justice, and the responsiveness of the law to societal dynamics.

## **3.2 Ehrlich's Critique, Legal Positivism, and Judicial Reconstruction**

### **Background of Ehrlich's Critique of Living Law**

Eugen Ehrlich's critical thought in the sociology of law emerged as a critique of the view that locates law solely in the state. Ehrlich viewed law as actually growing and developing from the social life of society. At the beginning of the 20th century, the idea that law could arise spontaneously from social practices was already widely recognized, particularly through the 19th-century debates over the role of customs, which highlighted the distinction between state law (*staatliches Recht*) and societal law (*gesellschaftliches Recht*) (Rabault, 2024). This background led Ehrlich to develop the concept of living law, which is closely related to customary law as taught by the German Historical School. Ehrlich, therefore,

defended the school against accusations of romanticism by asserting that its thinking was, in fact, authentic sociological realism.

Historically, Ehrlich observed that since the 16th century, the state has begun to monopolize the formation of law. As a result, in the early 20th century, legal scholars and law faculties focused more on state law. As a result, customary law is recognized, but it is often viewed as second-class law that applies only when sanctioned by lawmakers. In response to this situation, Ehrlich offered a new framework based on legal sociology and encouraged the state to study living law, which is law that is truly alive and practiced in society, not just norms written in legislation (Hopman, 2022). Ehrlich's views are relevant to the NCC, especially when the state attempts to incorporate social norms into written criminal law. The important question is whether norms that naturally arise within society can retain their character after being institutionalized through state law.

### **Basic Concept of Living Law**

Ehrlich's initial ideas on living law began to emerge when he established a research institute and introduced his line of thought through the Vienna weekly "Juristische Blätter" in an article titled "Ein Institut für lebendes Recht (An Institute for Living Law)." His ideas were further deepened through the research "Das lebende Recht der Völker der Bukowina (The Living Law of the Peoples of Bukovina)," which became an important foundation for the development of his works in the sociology of law (Varga, 2025).

Ehrlich viewed living law as norms genuinely adhered to in daily life, even though they are not always formally created or enforced by the state. Ehrlich rejects the view that law only develops through legislation, legal doctrine, or court decisions. According to him, law actually arises from internal order within various social groups, such as families, religious communities, professional groups, and other social organizations that recognize certain rules as binding (Fuchs, 2020). The validity of law in Ehrlich's perspective does not only rely on state enactment but also on societal acceptance and its effectiveness in regulating behavior.

Ehrlich also emphasized that the state often merely reformulates norms that have previously existed within society. At the same time, new forms of living law will continue to emerge in response to social changes and societal needs (Machura, 2025). Therefore, the law is fundamentally dynamic and always moves in accordance with the developments of social life. This perspective is important for evaluating the NCC's policy that recognizes living law as part of national criminal law. The main issue is whether norms that are born flexibly within society can still retain their original nature when transformed into written criminal law.

### **Critique of Legal Positivism**

The difference from positive law lies in the fact that living law is far broader and more dynamic than legislated law, or in other words, between law in books and law in action. This classic difference persists to this day and has even developed into an important discourse in legal science, particularly in the debate regarding legal monism and pluralism. Legal monism holds the view that there is only one legitimate source of law, namely state law formed through formal mechanisms, so that social norms, customary law, or religious law do not have an independent status. Conversely, legal pluralism recognizes the existence of more than one legal system coexisting, such as state law, customary law, religious law, and other social norms, each with its own authority and role in regulating societal behavior (Přibáň, 2020). In this case, the classic issue between living law and positive law becomes a conceptual problem, as well as the basis for a broader debate regarding the relationship between state law and community law.

Additionally, living law challenges the dominance of positive law through three key aspects: first, state law is seen as only producing secondary norms that are lower in status than social norms; second, by recognizing social norms as part of the law, living law rejects the hierarchical view that places state law as the sole authority; third, state law is actually

placed lower than community law, which is understood cosmopolitically with dispersed centers of power (Murphy, 2022). This confirms that, according to Ehrlich, law is not static but rather emerges from dynamic social energy, moving through the interaction between individuals, society, and institutions, making its scope broader than state law because it is rooted in real social life.

By observing these differences, it's clear that positive law often becomes merely a formal instrument that restricts movement, while living law affirms the vitality of law that coexists with society. Therefore, this difference teaches us that the strength of law does not come solely from the text or state commands but from its acceptance and relevance in real social life. This distinction becomes crucial for assessing the New Criminal Code's attempt to formalize living law, particularly when dynamic, community-based norms are codified as state provisions.

### **Sources of Living Law**

According to Ehrlich, the law that truly lives and works in society does not originate from laws or court decisions but rather from real social life (Verma, 2024). In *Fundamental Principles of the Sociology of Law*, he asserts that living law is "the law that dominates life itself, even though it has not been printed in legal propositions," meaning the law that governs life even though it is not codified in written legal formulations (Ehrlich, 2017).

To uncover this living law, Ehrlich points to two main sources. First, modern legal documents, such as contracts, family law, inheritance law, and judicial records, which can serve as references because they show legal practices in social reality. Second, direct observation of real life, including trade practices, customs, traditions, and forms of social association—whether recognized, ignored, or even rejected by state law. According to Ehrlich, only through empirical observation of our social reality can we truly understand the law, because "we grope in the dark everywhere." We only need to open our eyes and ears to learn everything that is important for the law in our time" (Ehrlich, 2017).

Ehrlich also emphasized that living law differs from norms for decisions, which serve as the basis for judges or officials in deciding cases. While norms for decisions are based on positive legal texts, living law arises from the evolving and widely observed patterns of social interaction within a community. This is evident, for example, in the practice in Bukowina, where parents take the wages of their working children. Although the practice contradicts the Austrian Civil Code, it persists because it is recognized as a social norm that binds the local community (Tan, 2022). Thus, the primary source of living law is none other than social life itself, which is reflected in both modern legal documents and everyday social practices.

### **Judicial Reconstruction in Indonesian Criminal Law**

The NCC, through Article 2 (1), explicitly provides space for living law as a basis for punishment, stating that the law that lives in society refers to customary law, which determines that someone who commits certain actions is worthy of punishment. The explanation of this article emphasizes that what is meant is the unwritten law that is still valid and developing in Indonesian society, which must then be codified in regional regulations to strengthen its validity. Thus, from the outset, the NCC reduced the organic concept of living law to institutionalized positive law.

Article 2 (2) further narrows the scope of living law by limiting its application to areas where customary law is practiced. The explanation of this provision provides guidance that living law or customary crimes can only apply to anyone who commits such acts within a specific jurisdiction. Meanwhile, Article 2 (3) leaves it to government regulations to serve as a guideline for regions in incorporating the living law of society into regional regulations.

Conceptually, this construction poses a problem. Living law, which should have grown organically, was instead forced to conform to legal-formal procedures in the form of codification into regional regulations. In fact, regional regulations themselves have long been authorized to include criminal provisions through Law No. 12 of 2011 jo. Law No. 13 of 2022.

Article 15 (1) of the law has explicitly stated that criminal content can be included in laws, provincial regulations, and district/city regulations, with a limitation of a maximum prison sentence of six months or a fine of no more than fifty million rupiah (Article 15 (2) and (3)). This means that even without the intervention of the NCC, regional regulations can already establish criminal provisions with a specific scope.

The NCC then expanded this construction in Article 597 (1), which states that anyone can be punished for committing an act that is declared illegal according to the law in force in society. Even further, Article 597 (2) in conjunction with Article 66 (1) letter f of the NCC recognizes the additional form of punishment as fulfilling local customary obligations. The implication is clear: penalties in regional regulations are no longer limited as they are under the Law on the Formation of Legislation, because the NCC provides new legitimacy in the form of additional penalties derived from custom.

However, this is where the paradox lies. When customary or living law is normalized and codified in regional regulations, the essence of living law, which is inherently dynamic, fluid, and contextual, is lost. It turned into rigid positive law, losing the flexible nature that should distinguish customary law from state law. In other words, living law is killed by the process of positization.

Therefore, the provisions in Article 2 and its explanation are actually worthy of criticism. It is more appropriate for living law to remain active in society without being intervened by written normative frameworks. If judges wish to accommodate customary obligations in their decisions, this can be achieved through supervised probation. Article 76 (3) of the NCC already provides for space with specific conditions, such as the convict being required to compensate for damages resulting from the crime or being required to do or not do something without diminishing religious belief and political freedom. This model is more adaptive because it allows judges to incorporate customary obligations as special conditions, without reducing living law to a mere local regulation.

Such an approach can be empirically verified, for example, in the Ruteng District Court Decision Case Number 5/Pid.Sus-LH/2026/PN Rtg, which acquitted the Defendant Yohanes Flori in an environmental case after considering the existence of the Manggarai indigenous community, the defendant's customary relationship with the land he managed, and the utilization of forest products to meet basic living needs. The decision refers to one of the Supreme Court's decisions, namely Number 2639 K/Pid.Sus/2024, which recognizes the existence of customary law communities even though formal recognition through regional government decisions has not yet been fully issued (Yudi, 2026). This case shows that living law has functioned concretely in practice through the judge's considerations and assessment of trial facts, without first being positivized into regional regulations.

As previously explained, the regulation of living law in the NCC actually presents a conceptual problem because it forces the law that lives in society to be institutionalized in the form of local regulations. To clarify the fundamental differences between the existing construction in the NCC and the proposed reconstruction alternatives, a systematic comparison is presented in Table 2 below.

**Table 2: Reconstruction of Living Law in the Criminal Code**

Aspect	Current NCC	Proposed Reconstruction
Definition of living law	Unwritten law that is positivized through regional regulations	Organic law that remains alive within society
Instrument of validity	Mandatory regional regulation + Government Regulation as guidelines	Through judicial discretion by legal discovery
Implication	Loss of the essence of living law	Living law remains alive, flexible, and integrated into judicial

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*Source: Researcher's elaboration, 2025.*

The table above shows that the NCC approach places living law within a rigid normative framework through regional regulations and government regulations as guidelines, thus losing its organic nature. The proposed reconstruction actually restores living law to its essence as law that grows within society by placing judges as guardians of balance. Through the power of legal discovery, judges can proportionally integrate living law into their decisions without having to reduce it to written norms. In this way, legal certainty is maintained, justice can be realized, and local values that are alive in society are still respected within the national criminal justice system.

### **The Role of Judges in Harmonizing State Law and Living Law**

Judges, in interpreting the law, play an important role in determining what constitutes law, especially when there is a "normative gap or tension" between state and societal law. Scholten, Gray, and Colón-Ríos argue that the law born through judicial decisions (judge-made law) is indeed limited to the parties in a case but gradually enriches the legal system through precedents without necessarily becoming a general norm in the form of legislation (Zikra & Minh, 2022).

This is relevant to "living law," as the principle of *jura novit curia* requires judges to uncover the law that lives within society and use it as the basis for legal considerations (Möschel, 2022). In the Indonesian legal system, this function is explicitly set out in Article 5, paragraph (1), of Law Number 48 of 2009 on Judicial Power, which mandates judges to "explore, follow, and understand the legal values and sense of justice that live in society." This provision indicates that Indonesian judges are not only bound by the law but are also required to bridge written law with social reality.

However, a dilemma arises when judges must balance two important values in law: certainty and justice. On the one hand, judges must uphold the principle of legality, which emphasizes the primacy of written law. On the other hand, society demands fair rulings that take into account living social norms. Hans Kelsen, in the pure theory of law, stated that law must be separated from morality, politics, and culture so that it can be understood as it is in a specific time and space (Hadi & Michael, 2022).

However, in the context of Indonesian judicial practice, the exclusive legal positivist approach is often inadequate, as judges face cases that involve multidimensional values such as "customary values, familial relationships, reconciliation of parties, and local sense of justice." "Therefore, the role of judges is crucial in balancing the two axes of values in law, namely 'certainty and justice.'"

Legal certainty remains a cornerstone of the rule of law. This principle guarantees the protection of legitimate expectations and the predictability of norms so that society can plan its actions based on clear, consistent, prospective, and stable rules. However, legal certainty is not identical to absolute rigidity, as changes in interpretation remain possible as long as the procedure is correct and the argumentation is justifiable (Janderová & Hubálková, 2021). For Indonesian judges, legal certainty should be understood as a guideline, not an obstacle to achieving justice in concrete cases.

In the context of interpretation, Neal Goldfarb's ordinary meaning approach is an important tool. He emphasizes that legal understanding should not rely solely on the text but also consider how words or phrases are used in everyday language, which can be identified through corpus linguistics (Goldfarb, 2021). Lawrence Solan also reminds us that legal language often has multiple meanings (polysemy), so interpretation must be sensitive to context (Tobia et al., 2023). This approach is relevant in Indonesia, where judges interpret open terms such as decency, propriety, public order, and public unrest, which are heavily influenced by local social context.

Additionally, judges can use a socio-legal perspective to understand the relationship between state law and community law. The concepts of legal pluralism and semi-autonomous social fields explain that communities can develop their own internal norms while remaining within the framework of state law (Walker, 2022) (Humphress, 2024). This is also relevant for Indonesia, which operates under legal pluralism encompassing state law, customary law, and religious norms. Therefore, Indonesian judges need to understand that dispute resolution does not rely solely on state law but is also influenced by social norms.

From a hermeneutical perspective, a judge's ruling is not only intended to resolve the current dispute but also to maintain social harmony and legal legitimacy in the future (Barcellos, 2022). In Indonesia, every judicial decision has broader implications, as it can affect public trust in the courts, especially in cases involving local communities or customary values. Therefore, judges must consider the social impact of their decisions, not just the normative aspects.

The main challenge for judges in this matter is not only the technique of interpretation but also the ability to reconcile legality, justice, and social reality. Judges are required to transcend rigid positivism without falling into arbitrary subjectivity. Every decision needs to represent a moral space to deliver justice. This is important for judges in Indonesia as a bridge between legal texts and social realities, between state law and living law, and between formal legality and justice.

Although living law has been recognized as part of the national legal sources, its implementation still faces significant challenges. Not all judges have an adequate socio-cultural perspective and understanding to apply it contextually. In line with Tody Sasmita Jiwa Utama's findings, living law in court rulings is often treated merely as an abstract symbol to legitimize verdicts rather than being linked to real practices and the social experiences of the community (Utama, 2021). This highlights the importance of enhancing Indonesian judges' capacity through training, interpretation guidelines, and adequate evidentiary methods when applying living law in their decision-making.

In that context, a wiser approach is not to centralize interpretation solely on state judges, but rather to build collaboration with customary institutions or community leaders who have cultural legitimacy and proximity to local practices. Normatively, this model has been exemplified in Aceh Qanun Number 9 of 2008 concerning the Development of Customary Life and Customs, which places customary institutions as important actors in determining norms, resolving disputes, and imposing customary sanctions, while the state plays a facilitating role (Ramadhani, 2020). A collaborative model like this can help Indonesian judges better understand living law and avoid one-sided interpretations in the courtroom.

Although living law still faces epistemic challenges, this concept provides a corrective framework against excessive formalism. By positioning living law as a law that grows from social reality, rather than merely an object of codification, the risk of misunderstanding and misuse can be reduced. As long as Indonesian judges perform their roles wisely as guardians of legal certainty while bridging social values, living law remains capable of enriching fair judgments without undermining the principle of legality.

#### **4. CONCLUSION**

This research confirms that the objective stated in the Introduction section, namely to examine the conflict between the principle of legality and the recognition of customary law within the NCC, has been answered through the results and discussion presented. The research results indicate that the living legal arrangements, through codification and local regulations, actually transformed them into rigid written rules. As a result, living law loses its natural character as law that is alive, evolving, and dependent on social context and creates tension with the principle of legality, which demands legal certainty.

Based on these findings, this study concludes that living law is more appropriately integrated through the role of judges in legal discovery rather than through a mandatory

codification. This approach allows judges to consider the social norms that truly exist in society without eliminating them in the form of static, formal rules. Looking ahead, the findings of this study open up opportunities for further research, particularly empirical studies on the application of living law in court decisions and comparative studies on how plural legal systems in other countries integrate unwritten law. Thus, this research provides a basis for criminal law reform that ensures legal certainty while remaining sensitive to the social realities of society.

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