

Operationalizing Living Law to Ensure Fair Trial and Prevent Abuse of Power in Indonesia's Criminal Justice System

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Abstract. *This study analyzes the role of living law in realizing the principle of fair trial within the Indonesian criminal justice system following its formal recognition in the Indonesia's 2023 Criminal Code. It aims to examine how living law can be operationalized as a legal instrument to bridge the gap between formal legality and substantive justice, while preventing abuse of power across criminal proceedings. Despite its normative acknowledgment, the implementation of living law remains inconsistent and often constrained by a positivistic legal approach, resulting in disparities and legal uncertainty in judicial practice. This research employs a normative juridical method using statutory and conceptual approaches, supported by an analytical-descriptive design based on secondary legal materials, including legislation, jurisprudence, and legal doctrines. The findings demonstrate that living law contributes significantly to the realization of fair trial principles by incorporating societal values, ensuring proportionality in sentencing, recognizing customary sanctions, and preventing double punishment (ne bis in idem). However, the absence of standardized criteria, formal validation mechanisms, and procedural guidelines creates risks of subjectivity and arbitrariness. The novelty of this study lies in positioning living law as an operational and structured legal mechanism within criminal justice, emphasizing the need for a comprehensive regulatory framework integrated with human rights safeguards to ensure legal certainty, consistency, and substantive justice.*

Keywords: Criminal; Justice; Law; Legal; Pluralism.

1. Introduction

The development of criminal law in Indonesia reflects an ongoing tension between legal positivism and the recognition of social values embedded within society. Law should not merely function as a rigid system of written rules, but must also reflect the living values and social realities within society (Prasetyo, 2021; Anisa et al., 2024; Sukmana, 2023). This perspective becomes increasingly relevant with the enactment of the Indonesian Criminal Code (KUHP 2023), which explicitly acknowledges the existence of living law as a legitimate source in determining criminal liability. The recognition of living law signifies a paradigm shift from strict formal legality toward a more substantive and value-oriented legal system (Iqbal Nasution, 2025).

However, in practice, the application of living law within the criminal justice system remains problematic. Although Article 2 paragraph (1) of KUHP recognizes unwritten law, law enforcement officers particularly judges often remain confined within a positivistic legal framework. Judicial reasoning in Indonesia still tends to prioritize statutory provisions over societal values, leading to a gap between normative expectations and empirical realities (Putri, 2025; Malik et al., 2024). This condition raises concerns regarding the consistency of legal application and the realization of justice, particularly in cases involving customary law and local wisdom.

From a theoretical standpoint, the integration of living law into criminal justice aligns with the concept of responsive law, which positions law as an instrument to achieve justice and social welfare rather than merely enforcing order (Khoirunnisa, & Didi, 2023; Toatubun & Djameludin, 2024; Atuegwu, 2025). The use of customary sanctions and community-based dispute resolution mechanisms can enhance fairness, restore social balance, and prevent over-penalization (N. Afifah, 2024; Karjono et al., 2024; Aribandi & Wahyudi, 2025). Nonetheless, the risks associated with the absence of clear parameters, including legal uncertainty and the potential abuse of power by law enforcement authorities (Ahmad, 2025; Horoshynskyi, 2023; Sadjijono & Santoso, 2017).

In Indonesian, several judicial decisions demonstrate the dual nature of living law implementation. On one hand, recognition of customary sanctions has strengthened principles such as *ne bis in idem* and substantive justice. On the other hand, inconsistent application and lack of procedural standards have led to disparities in sentencing and potential arbitrariness. This indicates a structural problem within the criminal justice system, where the incorporation of living law is not yet supported by clear regulatory frameworks or standardized judicial guidelines.

The gap, therefore, lies between the normative recognition of living law in statutory regulations and its inconsistent and sometimes problematic

implementation in judicial practice. Ideally, living law should function as a mechanism to enhance fairness and protect human rights within the criminal justice process. In reality, however, its application often depends on subjective judicial interpretation, creating risks of legal uncertainty and unequal treatment before the law. This discrepancy highlights the urgent need for a more structured and accountable framework governing the use of living law in criminal proceedings.

Previous studies have primarily focused on the philosophical and sociological dimensions of living law, as well as its role in legal pluralism. However, limited research has specifically examined how living law can be operationalized as a mechanism to ensure the principle of fair trial while simultaneously preventing abuse of power within the criminal justice process. This research seeks to fill that gap by analyzing the role of living law not only as a normative concept but also as a practical instrument in achieving procedural and substantive justice.

Therefore, this research aims to analyze the role of living law in realizing the principle of fair trial within the Indonesian criminal justice system and to formulate a conceptual framework for its implementation in order to prevent arbitrariness and ensure legal certainty.

2. Research Methods

This study employs a normative juridical (doctrinal) method that focuses on examining legal norms governing the recognition and implementation of living law within the Indonesian criminal justice system. The approach used consists of a statutory approach and a conceptual approach, by analyzing relevant regulations such as the 1945 Constitution, Law No. 48 of 2009 on Judicial Power, and provisions of the Indonesian Criminal Code (KUHP 2023), as well as legal doctrines related to progressive law, responsive law, and criminal law policy. Normative legal research is understood as “a scientific research procedure to find truth based on the logic of legal science from its normative side” (Negara, 2023; Soekanto & Mamudji, 2010). The research specification is analytical-descriptive, aiming to systematically describe and critically evaluate the role of living law in realizing the principle of fair trial and preventing abuse of power in criminal proceedings. The data collection method relies on secondary data, consisting of primary legal materials (legislation and jurisprudence), secondary materials (books, journal articles, and legal opinions), and tertiary materials (legal dictionaries and supporting references). Data are analyzed using qualitative juridical analysis, emphasizing legal interpretation, argumentation, and systematic construction of norms (Hamzani et al., 2023). Legal analysis in normative research is conducted by “analyzing legal materials qualitatively to understand their meaning, coherence, and relevance in resolving legal issues” (Marzuki, 2017). The research process in this study follows a structured flow, starting from literature review, legal material

identification, classification, analysis, and conclusion drawing, as illustrated in the research flow diagram below.

3. Results and Discussion

3.1. The Role of Living Law in Realizing the Principle of Fair Trial in Indonesian Criminal Justice

The recognition of living law within the Indonesian Criminal Code (*KUHP 2023*) marks a significant transformation in the paradigm of criminal law, shifting from strict formal legality toward material legality, where unwritten norms embedded in societal life are acknowledged as a legitimate source of law. This transformation reflects the broader evolution of legal thought, particularly within the framework of progressive law, which emphasizes that law must serve human interests and social justice rather than merely enforce rigid statutory provisions. Law enforcement should not be confined to “the black-letter law,” but must instead explore deeper meanings to achieve substantive justice (Fradella, 2022; Bakhshay, 2025). In this regard, living law becomes a critical instrument in aligning formal legal systems with the socio-cultural realities of Indonesian society.

From a theoretical perspective, the incorporation of living law is closely related to the concept of responsive law, which positions law as an adaptive institution responsive to social needs and values (Dixon, 2023; Fineman & Spitz, 2023). Responsive law rejects rigid formalism and instead promotes flexibility, justice, and social welfare. Within the Indonesian criminal justice system, this theoretical framework justifies the inclusion of customary norms and community-based values in judicial reasoning. The principle of fair trial, which is guaranteed under constitutional and human rights frameworks, requires not only procedural fairness but also substantive justice. Thus, the integration of living law provides an avenue for judges to ensure that decisions reflect not only legality but also fairness, proportionality, and humanity.

Judicial practices in Indonesia reveal that the application of living law has made a meaningful contribution to the realization of fair trial principles, particularly through the consideration of societal norms and customary sanctions in criminal adjudication. In several Supreme Court decisions, judges have acknowledged sanctions previously imposed through customary mechanisms, thereby preventing double punishment (*ne bis in idem*) and strengthening the principle of legal certainty. This pattern demonstrates a shift toward a more substantive approach to justice, where legal outcomes are not solely determined by statutory provisions but also by the social context in which disputes arise. Such an approach reflects the growing recognition of legal pluralism within the Indonesian legal system.

This tendency is consistent with Surjanti et al. (2025) who observe that Indonesian courts have, in certain instances, incorporated local norms to achieve more equitable outcomes, particularly in cases involving indigenous or customary communities. Their study highlights that judicial openness to non-state normative systems can enhance fairness by aligning legal decisions with the lived realities of the parties involved. Likewise, Sutanti et al. (2025) demonstrates that customary dispute resolution mechanisms are capable of promoting restorative justice by emphasizing reconciliation, compensation, and social harmony rather than retributive punishment. These mechanisms not only reduce the burden on formal legal institutions but also provide outcomes that are more acceptable to the community.

Living law functions as a protective mechanism for human rights, particularly in ensuring proportionality in sentencing and preventing excessive use of state power. By recognizing sanctions that have already been fulfilled within the community, the criminal justice system can avoid duplicative punishment and uphold the dignity of the accused. At the same time, this approach reinforces the principle of fairness by ensuring that legal responses are balanced, context-sensitive, and oriented toward substantive justice rather than rigid formalism.

The role of living law in promoting fair trial can also be understood through the lens of criminal law policy (penal policy). Popoviciu (2022) criminal law policy must be oriented not only toward repression but also toward the protection of societal values and the achievement of social welfare. The integration of living law into criminal proceedings reflects a value-oriented approach that seeks to balance legal certainty with justice. By considering customary values and social context, judges are able to deliver decisions that are more equitable and socially acceptable. This approach also aligns with restorative justice principles, which emphasize reconciliation, reparation, and the restoration of social harmony rather than mere punishment.

In practice, the application of living law strengthens the legitimacy of judicial decisions. When court rulings reflect the values and norms of the community, they are more likely to be accepted and respected by society. This enhances public trust in the legal system and promotes compliance with legal norms. Living law thus serves as a bridge between state law and customary law, reducing the tension between formal legal institutions and community-based dispute resolution mechanisms. Simonetti (2022) legal pluralism is an inherent characteristic of many post-colonial legal systems, including Indonesia, where multiple normative orders coexist and interact. The recognition of living law within the formal legal system is therefore a necessary step toward achieving legal integration and social justice.

However, despite its potential benefits, the implementation of living law in realizing fair trial principles is not without challenges. One of the main issues identified in this research is the lack of clear parameters and procedural guidelines

governing the application of living law. This creates a risk of subjectivity in judicial decision-making, as different judges may interpret and apply living law in varying ways. Benson (2025) notes that the absence of standardized criteria for recognizing customary law can lead to inconsistencies and legal uncertainty. This condition undermines the principle of equality before the law, as similar cases may result in different outcomes depending on the discretion of individual judges.

Moreover, the potential for abuse of power remains a significant concern. Without clear limitations, the incorporation of living law may be used to justify arbitrary decisions or to legitimize practices that are inconsistent with human rights standards. This highlights the importance of ensuring that the application of living law is conducted within a framework that upholds constitutional principles, human rights, and the rule of law. In this regard, living law should not be viewed as a substitute for statutory law, but rather as a complementary instrument that enhances the pursuit of justice.

The role of living law in realizing the principle of fair trial in Indonesian criminal justice is both significant and multifaceted. It provides a mechanism for integrating social values into legal decision-making, enhances the protection of human rights, and promotes substantive justice. However, its effectiveness depends on the establishment of clear guidelines and safeguards to ensure consistency, accountability, and compliance with fundamental legal principles. By addressing these challenges, living law can serve as a powerful tool in achieving a more just and equitable criminal justice system in Indonesia.

3.2. Implementation of Living Law in Criminal Proceedings to Prevent Abuse of Power

The implementation of living law within the Indonesian criminal justice system constitutes a strategic legal mechanism to prevent abuse of power, particularly within the framework of criminal proceedings that involve significant discretionary authority. In the context of modern criminal law, discretion is an inherent feature at every stage of the process investigation, prosecution, adjudication, and sentencing. However, without adequate normative and sociological control, such discretion may lead to arbitrariness, over-criminalization, and violations of fundamental rights. Therefore, integrating living law into criminal proceedings reflects an effort to balance state authority with community-based justice, aligning with the theoretical foundation of responsive law, which emphasizes adaptability, fairness, and social legitimacy (Atuegwu, 2025; Hamja, 2025; Wahyudhi et al., 2025).

At the investigation stage, law enforcement officers, particularly the police, hold extensive discretionary powers in determining whether a case should be pursued. This authority, if exercised without sufficient checks, may result in excessive criminalization, especially in cases where disputes have already been resolved

through customary mechanisms. Empirical findings in this research indicate that several criminal cases processed formally had, in fact, been settled through community-based or customary mechanisms, yet were still pursued by investigators. Indonesian law enforcement often prioritizes formal legality over social resolution, thereby undermining local dispute settlement practices (Lubis, 2025) (Sukriono et al., 2025). Living law can function as a filter mechanism, allowing investigators to assess whether a case has been substantively resolved and whether further legal action would contradict the principles of justice and proportionality. Theoretically, this approach aligns with the concept of restorative justice, which prioritizes reconciliation and social harmony over punitive measures (Anderson et al., 2025; Adebobola & Alaba, 2024).

At the prosecution stage, the principle of *dominus litis* grants prosecutors the exclusive authority to determine whether a case should proceed to court. This position places prosecutors at a critical junction in the criminal justice system, where decisions must balance legal certainty, efficiency, and justice. The integration of living law enables prosecutors to evaluate whether the objectives of punishment such as deterrence, retribution, and rehabilitation have already been achieved through customary sanctions imposed by the community. Kardas (2023) emphasizes that criminal law policy must adopt both a pragmatic and value-oriented approach, ensuring that legal processes do not become excessively formalistic. Supporting this view, Amirthalingam (2013) found that prosecutorial discretion in Indonesia often lacks clear guidelines, leading to inconsistencies in case handling. By incorporating living law into prosecutorial considerations, decisions can be made more proportionally, avoiding unnecessary trials and reducing the burden on the judicial system while still achieving substantive justice.

In the adjudication stage, judges occupy a central role in ensuring that the application of law reflects both legal norms and societal values. Article 5 paragraph (1) of Law No. 48 of 2009 explicitly mandates judges to “explore, follow, and understand the values of law and justice living in society.” This provision provides a strong normative foundation for the incorporation of living law into judicial reasoning. In practice, judges may apply living law through several mechanisms: interpreting the material unlawfulness of an act, recognizing customary sanctions already imposed, and integrating local values into the proportionality of sentencing. Empirical analysis of jurisprudence within this research reveals that certain court decisions have acknowledged customary sanctions as a mitigating factor, thereby reducing or eliminating further punishment. Widjajanto et al. (2025) who argue that Indonesian courts have increasingly engaged with non-state normative systems to achieve equitable outcomes. From a theoretical standpoint, this reflects the shift from legal formalism toward legal realism, where judicial decisions are influenced by social context and practical consequences rather than purely abstract legal rules.

At the sentencing stage, the application of living law contributes significantly to the realization of proportional and humane punishment. Traditional punitive approaches often emphasize retribution, which may result in excessive or disproportionate sentencing. By contrast, the incorporation of customary sanctions allows judges to consider whether the offender has already undergone a form of social or moral accountability within the community. This approach aligns with the principle of fair trial, which requires that punishment be not only lawful but also reasonable, proportional, and respectful of human dignity. Adebobola & Kunlere (2024) demonstrates that community-based sanctions often achieve restorative outcomes more effectively than formal imprisonment, particularly in cases involving minor offenses or communal disputes. Furthermore, this approach is consistent with the concept of humanistic criminal law, which prioritizes rehabilitation and social reintegration over punitive excess (Dana et al., 2024; Dewi & Setiawati, 2026).

Despite these advantages, the implementation of living law in criminal proceedings faces significant structural and normative challenges. One of the primary issues identified in this research is the absence of standardized criteria for determining the existence and applicability of living law. Unlike statutory law, which is codified and universally applicable, living law is inherently local, dynamic, and context-dependent. This creates difficulties for law enforcement officers and judges in identifying which norms qualify as living law and how they should be applied in specific cases. Achmad & Basuki (2024) highlights that legal pluralism in Indonesia often leads to uncertainty due to the coexistence of multiple normative systems without clear hierarchical relationships.

Another major challenge is the lack of formal mechanisms for recognizing and validating customary law within the state legal system. While the Constitution acknowledges the existence of customary communities, the operationalization of this recognition remains limited. As a result, the application of living law often depends on the subjective interpretation of individual law enforcement officers or judges. This condition increases the risk of inconsistency and unequal treatment before the law, which contradicts the principle of legal certainty. Kochanski (2025) notes that the absence of institutional guidelines may lead to selective or arbitrary use of customary law, potentially undermining the rule of law.

Furthermore, there is a risk that living law may be misused to justify practices that are inconsistent with human rights standards. Not all customary norms align with contemporary principles of equality, non-discrimination, and due process. Therefore, it is essential to ensure that the application of living law remains within the framework of constitutional values and international human rights norms. This requirement reflects the principle that legal pluralism must be balanced with universal standards of justice, as emphasized in human rights jurisprudence.

To address these challenges, this research proposes the establishment of a comprehensive regulatory framework, particularly in the form of a Government Regulation that outlines the procedures and criteria for determining living law. Such a framework should include clear definitions of customary law, mechanisms for identification and validation, guidelines for its application in criminal proceedings, and safeguards to ensure compliance with human rights standards. Additionally, capacity-building programs for law enforcement officers and judges are necessary to enhance their understanding of legal pluralism and the role of living law in achieving justice.

The implementation of living law in criminal proceedings serves as a vital instrument for preventing abuse of power and promoting substantive justice within the Indonesian legal system. By integrating community-based norms into formal legal processes, living law provides a mechanism for balancing state authority with societal values, thereby enhancing the fairness and legitimacy of criminal justice. However, its effectiveness depends on the establishment of clear guidelines, institutional support, and a consistent approach that harmonizes legal certainty with social justice. Without such measures, the potential of living law to contribute to a fair and equitable legal system may not be fully realized.

4. Conclusion

The recognition of living law in the Indonesia's 2023 Criminal Code represents a significant paradigmatic shift toward a more responsive and value-oriented criminal justice system; however, this study finds that its implementation remains normatively acknowledged but procedurally underdeveloped. Living law has demonstrable potential to strengthen the principle of fair trial by integrating societal values, preventing double punishment, ensuring proportionality, and limiting excessive state power through restorative and community-based mechanisms. At the same time, its application across investigation, prosecution, adjudication, and sentencing stages reveals persistent risks of subjectivity, inconsistency, and legal uncertainty due to the absence of standardized criteria and institutional safeguards. This structural gap undermines equality before the law and opens space for discretionary abuse. Therefore, the novelty of this study lies in positioning living law not merely as a sociological concept but as an operational legal instrument that must be governed by a clear regulatory framework. It is recommended that the government establish binding procedural guidelines, validation mechanisms, and human rights-based limitations to ensure that the integration of living law enhances legal certainty, accountability, and substantive justice within Indonesia's criminal justice system.

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