

The Legal Foundations for the Application of Living Law as the Basis for Criminal Sentencing According to Law No. 1 of 2023

Mohammad Retno Bachtiar Rachman¹, Susan², Trisna Agus Brata³, Abdul Halim⁴, Muslimah Hayati⁵, Sahrul⁶

¹Sultan Adam College of Law, Banjarmasin, Indonesia, retnobachtiar38@gmail.com

¹Sultan Adam College of Law, Banjarmasin, Indonesia, retnobachtiar38@gmail.com

²Sultan Adam College of Law, Banjarmasin, Indonesia, tensisusan63@gmail.com

³Sultan Adam College of Law, Banjarmasin, Indonesia, trisnaagusbrata224@gmail.com

⁴Sultan Adam College of Law, Banjarmasin, Indonesia, abdulhalim@stihsa-bjm.ac.id

⁵Sultan Adam College of Law, Banjarmasin, Indonesia, muslimahhayati24@gmail.com

⁶Sultan Adam College of Law, Banjarmasin, Indonesia, arulsam87@gmail.com

Corresponding Author: retnobachtiar38@gmail.com

Abstract

Living law (customary law) as the basis for sentencing under Law Number 1 of 2023 on the Criminal Code represents a paradigm shift in Indonesian criminal law. This recognition of living law creates legal dialectics because it opens space for multiple interpretations and challenges the principle of formal legality, which demands clarity and certainty. Using a normative juridical method, the study analyzes statutes and concepts to assess whether living law aligns with legality standards. The findings show that the New Criminal Code acknowledges living law in a limited manner, aiming to balance textual legal certainty with community-based justice, as reflected in Articles 1 and 2. Living law is positioned as complementary, filling legal gaps while ensuring material justice, provided it does not conflict with state principles or human rights. Article 2 allows punishment of conduct outside the Code if consistent with local norms, but requires codification into Regional Regulations under Government Regulation Number 55 of 2025. Judges may interpret living law through Articles 66 and 597. Thus, living law decolonizes progressive law yet demands strict boundaries to maintain legal clarity and certainty.

Keywords: Criminalization, Law Number 1 of 2023 concerning the Criminal Code, Living Law, Principle of Legality.

A. INTRODUCTION

Law No. 1 of 2023, establishing the New Criminal Code, makes significant modifications to living law. This regulation transforms the formal notion of legality into a material one, serving as a step toward decolonization by adapting criminal law to local traditions. Despite the challenges of legal uncertainty, the presence of living law is officially recognized in Article 2 paragraph (1). However, this provision is conditional: living legislation must be defined in a Regional Regulation and adhere to the norms of the legal hierarchy above it (Manurung & Lubis, 2025).

The incorporation of living law in the Criminal Code is really necessary. This regulation reforms the national criminal justice system, bridging the gap between justice for indigenous communities and the certainty of state law. Furthermore, regional administrations are allowed the authority to create regulations that comply with customary criminal law, as long as they do not violate the idea of legality (Putra, 2025). This condition empowers law enforcement to take action against criminals based on conduct that are perceived to violate living law, even if the legislation does not specifically indicate so (Aufa, 2022).

The incorporation of unwritten standards or customary law into national criminal rules is governed by Article 2 of the New Criminal Code, which underlines that a person can still be penalized even if their actions are not explicitly stated in the law. This provision is further enhanced by Article 597, which allows for the imposition of sanctions in the form of customary requirements on perpetrators of customary crimes. The existence of these norms has aroused debate among practitioners and academics, notably about the potential of conflicting with the notion of legality and threatening legal certainty.

Some academics believe that the adoption of living law into the new Criminal Code is not based on urgent public needs. This codification actually threatens the basic principle of legality (Article 1 paragraph (1)). This is because codification will eliminate the flexible essence of customary law. Its unwritten nature and limited scope for vulnerable groups trigger bias in law enforcement, disparities in sentencing, and uncertainty for legal subjects (Nissa, 2026). Others, however, see this action positively as a strategic tool for protecting and recognizing customary law. Regardless of the positives and cons, the government deems this an opportunity to legitimate disadvantaged ancestral heritage (Purnamasari, Rita, & Harbowo, 2022).

The recognition of living law in the new Criminal Code has sparked a debate over legality and normative pluralism. The fundamental concern is the loss of legal certainty, which has resulted in a variety of interpretations outside the law. Ideal criminal law laws necessitate consistent and explicit rules. As a result, the application of unwritten (customary) law as a legal basis raises concerns about the nature of the offense, the persons involved, and the manner of sanctions (Dewi & Rahman, 2026).

The customary sentence levied against comedian Pandji Pragiwaksono reflects the acknowledgment of unwritten law. In February 2026, he was fined a pig and five chicks in Tana Toraja for using comic material that was considered insulting to the Rambu Solo rite. According to traditional elders, the purpose of this sanction was to apologize to ancestral spirits and restore broken communal peace. Pandji Pragiwaksono is not a member of the traditional community and may have committed the violation with no malicious intent. Alternatively, local ways can be employed to address issues, such as the stealing of religious things in Bali, which results in

ostracism or kasepekang. This approach is consistent with the notion of living law established in Article 2 of the New Criminal Code.

Furthermore, Supreme Court ruling No. 592 K/Pid/2024 expressly overturned the Padang District Court's *ontslag* ruling regarding customary land disputes. This case demonstrates that the state adheres to customary law in the transfer of inherited assets. Given the novelty and uniqueness of research on legal principles and living law (New Criminal Code), it moves away from rigid formal legality (*nullum delictum sine lege scripta*) and toward material legality (customary law). The limits of living law in society must then be examined in order to achieve material justice (Article 2 paragraph 1) without jeopardizing the principle of legal certainty (Article 1 paragraph 1).

Renaldy Saputra et al. found that while the new Criminal Code acknowledges living law as a source of criminal law, it does not negate the principle of legality and aims to prioritize legal values in Indonesian society. These two things must work together or be balanced, and they have restrictions (Saputra, Suyanto, & Ayudyanti, 2026). However, according to Zul Khaidir Kadir, living law does not serve as an equitable bridge between social standards and state criminal law. The primacy of law is not destroyed; rather, it is reformed to be more adaptable to societal values (Kadir, 2026). The purpose of this research is to identify and analyze the principles of legality and living law found in the new Criminal Code to guarantee that they meet the principles and requirements of criminalization as a component of legal certainty.

B. RESEARCH METHOD

The type of research method used by the author is the Normative Legal Research Method, namely a method or procedure used to solve problems by

researching basic legal materials or norms (Nur Dewata & Achmad, 2017). This study was conducted in a library and covered legal principles, legal systematics, legal inventory, the level of legal synchronization, comparative law, and legal history. This research approach makes use of legal materials, the first of which are primary legal sources that offer analyses of statutory rules.

This study used a statute approach, a juridical approach, and a case approach to confirm whether the principle of legality in the New Criminal Code can be used as a basis for sentencing and whether it meets the principle of legal certainty. This study was conducted using qualitative descriptive analysis.

C. RESULT AND DISCUSSION

1. The Existence of Living Law as a Criminal Law Source

The principle of legality states that "there is no crime and no punishment without law." This principle is a fundamental principle in Indonesian criminal law that ensures legal certainty for all individuals. This principle is expressed in Article 1 paragraph (1) of the New Criminal Code, which provides that no one shall be punished except in accordance with the terms of the existing legislation (Dewi & Rahman, 2026). Indonesia criminal justice system is currently changing, both literally and formally. Law enforcement is one of the new system's implementations, with significant social ramifications. Its efficiency or inefficiency has a wide range of consequences for both communities and individuals. The legal system and practice have experienced substantial changes under the New Criminal Code, with the introduction of "statutory criminal law" and "living criminal law." (Lestari et al., 2024)

The principle of legality in criminal law requires that any behavior considered a crime be clearly specified in law. This is intended to provide legal certainty to the public, allowing them to comprehend the bounds of allowed and unlawful action. Individuals who have clarity can make better decisions and avoid the possibility of criminal fines for conduct they are unaware of violating the law (Muhammad Idris Nasution, Muhammad Ali, & Fauziah Lubis, 2024). The most recent rules in the New Criminal Code gradually acknowledge and enforce living law inside national criminal law. This is also supported by Government Regulation No. 55 of 2025, which clarifies the guidelines and procedures for implementing living law. The implementation of living law in the new Criminal Code is founded on three major principles: philosophical, social, and legal. Recognizing living law honors societal norms of substantive justice, rather than just formal certainty (Muliadi Nur, 2026).

Customary law, also known as living law, is an unwritten standard that society upholds and acknowledges as law. The acceptance of legal pluralism, which affirms that law is not just restricted to state legislation (*ius constitutum*) but also incorporates customary norms and conventions, is the fundamental tenet of living law in the Indonesian legal system. In Living Law Theory, Eugen Ehrlich contends that communal activities, rather than laws (written law), are the core of legal growth. True law is not just written official legislation but also societal norms, conventions, and traditions that are followed in daily life (Zahra & Shafanuha, 2026).

The 1945 Constitution's Article 18B paragraph (2), which acknowledges the unity of customary law communities and their traditional rights, and Article

5 paragraph (1) of the Judicial Power Law, which mandates that judges investigate, uphold, and comprehend the legal values and sense of justice that permeate society, both highlight the applicability of Eugen Ehrlich's Living Law Theory in Indonesia (Susan, 2019). In South Sulawesi, theft offenders (To'bokona) are punished by being paraded around the village carrying stolen goods while shouting "I have stolen" to create a deterrent effect and shame. In Central Kalimantan, marriage customs violations are settled thru customary court, where violators are subject to fines in the form of *Bewer* (goods or money) or *tumbang* (sacrificial animals) as a way to restore the balance of nature. In Minangkabau customs regulate that women inherit large inheritance.

Three qualities define a living law: first, it is based on custom, a norm derived from a deeply ingrained tradition that is infused with ideals that society considers to be true. Second, there is no concept of incarceration and social sanctions, where violators are subject to customary sanctions (different regions have their own norms and processes for executing sanctions based on their own customs). Third, its features vary depending on the local environment. Because Indonesian civilization is so diverse, every region has its own set of customs.

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Indonesian civilization is so diverse, every region has its own set of customs (Ariesta, Sukron, & Aurelia Putri, 2026).

Recognition of existing law within the current national criminal justice system is not always freely implemented, although it is based on Pancasila, the Republic of Indonesia's 1945 Constitution, Human Rights, and general legal concepts recognized by the international world. On the other hand, Article 2 (Paragraph) 2 places Regional Regulations in a critical position as instruments for regulating the application of these living laws. As a result, criminal law reform does not fully abandon the notion of formal legality, but rather reconstructs the system to suit the multiplicity of laws that exist and evolve in Indonesia (Diva, Efridadewi, & Harmain, 2026). The four missions of the 2023 Criminal Code then gave birth to regulations regarding living law, as stated in Article 12 paragraph (2) of the 2023 Criminal Code, which states that in order to be declared a Criminal Act, an act threatened with criminal sanctions and/or actions by statutory regulations must be unlawful or contrary to existing societal laws. This indicates that if a person does an illegal conduct or violates societal laws, they can face punishment. The use of the phrase "or" implies that a person may be penalized if he does an illegal or opposite act to the laws of society, even if the act committed is not governed by law as a criminal act (Andini, 2024).

The regulation of living law (customary law) as a sentencing guideline, in accordance with Article 12 paragraph (2) of the 2023 Criminal Code, seeks to strike a balance between the required legal objectives. This balance encompasses the public and individual interests, the perpetrator's and victim's interests, actions and inner attitudes, certainty and justice, national and universal values, and

human rights and obligations. The primary focus of this subject is the balance between written law and the law that exists in society (Andini, 2024).

Any acknowledgment of living law must be rigorously tested in light of the principles of non-discrimination, vulnerable group protection, and human autonomy. From a legal standpoint, this discussion illustrates that living law cannot be taken at face value and must be recreated inside a constitutional framework to correspond with human rights as the ultimate normative limit (Ario, Situngkir, Situngkir, & Elviandri, 2025). The existence of living law will be legally invalidated if the norm violates the principles of Pancasila, the Republic of Indonesia's 1945 Constitution, human rights, and general legal principles recognized by the international community. Researchers see this constraint as a safeguard to defend human dignity within the framework of a state founded on the rule of law. This demonstrates that the state retains ultimate authority in ensuring the national legal system's coherence. In addition to establishing living law as a legitimate source of material law, Article 2 determines the nature of punishment in the judicial process. Article 66 paragraph (1) letter f describes fulfilling local customary responsibilities as one sort of supplementary penalty. Judges can impose punishments in the form of measures designed to restore social balance based on local wisdom. This approach adheres to the notion of restorative justice, which emphasizes reconciliation among perpetrators, victims, and the community. The implication is that the Indonesian criminal system is now more in line with the country's sociological realities (Nurrahmah & Husna, 2026).

As a country that follows a civil law system, one of the hallmarks of the system is the codification of the applicable regulations. Codification of the law is one of the system's hallmarks. The goal of codifying the law is to make a collection of applicable legislation easier and more harmonious. Essentially, the Civil Law system is a legal system that creates written law (law is a legal system that creates written law (positive law), specifically laws or statute books as a source of positive law). The codification system in general (Redy S, Alsa, & Sembiring, 2025).

Specifically, the implementation of living law as the basis for criminal punishment in the New Criminal Code, which changes the principle of formal legality to material with the main rules in:

- a. Article 2 paragraph (1) of the New Criminal Code recognizes living law, which stipulates that a person can be penalized for doing an act that, according to the law that exists in society, is a form of behavior that can be punished, even if it is not regulated by law.
- b. According to Article 2 paragraph (2) of the Batu Criminal Code, laws are valid if they align with Pancasila values, the 1945 Constitution, human rights, and accepted legal concepts.
- c. Article 2 paragraph (3) of the New Criminal Code requires that the methods and criteria for defining living law be further defined by Government Regulation (PP).
- d. Article 597 of the New Criminal Code governs the closure provisions for customary criminal conduct, which might result in sanctions.

Criminal sanctions are sanctions that each individual carefully considers and applies to the best of their ability. Criminal sanctions are more urgent than civil or administrative sanctions for criminals (e.g., environmental and customary). These criminal sanctions are intended to prohibit criminal conduct from occurring. This is because criminal sanctions have psychological consequences for both the perpetrator and the community. This psychological impact can make people fearful of committing the crime (Susan & Zulkifli, 2022). The notion of legality contributes to the maintenance of social fairness. People feel more secure when the principle of legality is implemented because they know the law cannot be applied arbitrarily and that criminal acts must follow established laws. This also promotes transparency and accountability in the legislative process, ensuring that citizens have the right to know and understand the laws that control their behavior.

One of the major obstacles in its implementation is identifying and establishing the presence of living law. Customary law is typically unwritten, changeable, and differs from region to region. This circumstance makes it difficult for law enforcement officials to evaluate whether a customary standard is actually alive and being followed by the local community, or if it is only symbolic. As a result, the participation of customary institutions and community leaders is critical as a source of social legitimacy in determining the validity of a customary norm. The next issue is for law enforcement personnel, including judges, prosecutors, and detectives, to understand the community's customary beliefs and social environment. Not all law enforcement officers have a thorough understanding of customary law, thus there is a risk of misinterpretation or

oversimplification of complicated customary standards (Ari, Sugiarto, Sudrajad, Rasiwan, & Triestanto, 2026).

Conceptually, the conflict between living law and human rights represents the tension between communal justice orientated toward societal harmony and justice based on individual dignity, which is the foundation of modern human rights. In this context, the design of Article 2 of the Criminal Code tends to accommodate the goals of social peace, although it does not fully ensure proper protection of individual rights. Thus, the issue of living law is more than just a technical matter of law enforcement; it also raises fundamental normative concerns about the limits of cultural relativism and the state's commitment to safeguard the dignity of all citizens (Ario et al., 2025).

2. The New Criminal Code's Application of the Legality Principle

According to H.D. Stout, the principle of legality in state administrative law includes three aspects: the negative aspect (*het negatieve aspect*), which determines that a government action must not conflict with higher legal regulations; the formal-positive aspect (*het formeel-positieve aspect*), which determines that the government only has the authority that can be carried out based on the law; and the material-positive aspect (*het materieel-positieve aspect*), which determines (Asshiddiqie & Safa'at, 2006). This principle protects against potential abuse of authority by law enforcement officers by banning the retroactive application of legislation. The theory of the principle of legality has developed over time to meet changing social and technical demands. This principle seeks to provide more definitive direction to law enforcement

personnel while reducing the danger of irregularities in law enforcement activities (Iskandar et al., 2024) .

In law enforcement practice, the idea of legality requires officers to follow the terms of the law. This means that any law enforcement action must be founded on established legal standards and cannot be taken arbitrarily. If no law governs a conduct, it cannot be subject to criminal penalties. The principle of legality is also intimately linked to the preservation of human rights. This principle states that individuals have the right to know and understand applicable laws, as well as the right not to be penalised without a clear legal foundation. This is consistent with human rights ideals, which prioritise fairness and protect persons from arbitrary measures (Fitri, Muftia, Trilia, Munthe, & Ramlan, 2024).

The notion of legality in Indonesian criminal law is derived from Paul Johann Anselm von Feuerbach's Theory of Legality, which asserts that "there is no crime or punishment without a written statute preceding it." This idea is intended to protect civilians from the arbitrary actions of those in power. Its core tenet is that a person can only be punished if their acts breach rules that existed before the conduct was committed. Thus, the law must be written (*lex scripta*), firm (*lex stricta*), and not retroactive (*lex praevia*). This principle underpins modern criminal law (Fitri et al., 2024).

Indonesia accepts the principle of legality in Article 1 paragraph (1) of the New Criminal Code, which declares that no act can be punished except under the authority of statutory laws, often known as the proverb "*nullum delictum nulla poena sine praevea Lege poenali*". This principle guarantees legal certainty, protects civilians from arbitrary actions by authorities, and assures that only

activities designated as criminal can be sanctioned. The fundamental premise of the principle of legality that can ensure actions that reflect legal certainty is as follows:

- a. Written Legal Basis: Criminal activities must be based on law, not custom.
- b. Laws may not be applied retroactively.
- c. Judges are banned from utilizing analogy to create new criminal offenses in order to protect individual rights.
- d. The application of the Legality Principle: the requirement for written laws prior to any action.

According to Barda Nawawi Arief, when seen thru the Material Legality Theory, which emphasizes actual justice over mere formal certainty, an act can be punished in accordance with "living law" (customary/unwritten law) in society. Thus, while Article 1 paragraph (1) of the Criminal Code governs the Principle of Legality, it underlines that a person cannot be penalized unless the act is deemed a criminal in the law prior to the act being committed. However, Article 1 paragraph (2) states that "the legal provisions that apply in the event of a change in the law (during the transition period) are legal provisions that benefit or relieve the defendant." So Article 1 paragraph (2) states that when faced with two legislative options as a result of modifications, "the law that relieves the defendant must be adopted. As a result, we might say that the idea of subsidiarity (Arief, 2017).

The notion of legality is crucial in criminal law, stating that a person can only be punished if his activities were regulated and banned by written law prior to the crime. Article 1 paragraph (1) of the Criminal Code establishes legal

clarity and protects citizens' rights. Previously, the notion of legality in Indonesian criminal law acknowledged just one source of punishment: the law. Sudarto stated that the principle of legality in Article 1 of the old Criminal Code meant that a conduct that was not listed as a crime could not be punished (Yanto, Azzahra, Gladisya, Zakirin, & Anawar, 2023).

However, as time passes and the law evolves in tandem with societal dynamics, the premise of legality is deconstructed in favor of the acceptance of the reality of customary law. The normative determination of Article 2 Paragraph (1) of the Criminal Code, which emphasizes the validity of living law as an alternative source of punishment to statutes, alters the definition of legality in the current Indonesian criminal law system (Yanto & Hikmah, 2023). The article's meaning is expanded by limiting the concept that determines whether a person must be punished even if the act is not covered by this law. In contrast, paragraph (2) reads that "the law that lives in society as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated by this law." With the incorporation of the customary law system into the current Criminal Code, Indonesian criminal law has become monodualistic, with two (two) forms of punishment recognized by law enforcement (Hidayat, Andryani, Rifa'i, & Muliani, 2025).

According to Darmawan and Aturkian Laia, Article (1) does not invalidate existing societal law that concludes that a person deserves to be punished even if the act is not authorized by statute. Article (2) specifies that current law in society, as intended in Article (1), applies based on where the law is in force, as long as it is governed by regional norms. Article (3) states that existing legal

provisions in society must align with Pancasila values, the 1945 Indonesian Constitution, human rights, and recognized legal principles in the community of nations (Darmawan & Laia, 2026).

The legality premise in the New Criminal Code shifts from simply formal legality to material legality, acknowledging customary law (living law) as the foundation for criminal punishment (Article 2). This bridges the gap between formal legal certainty and tangible social fairness by specifying that it must be stated in a Regional Regulation and not violate Pancasila or the 1945 Constitution. The inclusion of living law in the Criminal Code aims to promote decolonization, legal pluralism, and substantive justice in line with Pancasila principles and the 1945 Constitution (Andri, Hasibuan, & Samosir, 2026).

The history of customary law in Indonesia has seen ups and downs as a source of national law. Although Indonesia has a legal system based on Western law, specifically civil law, the government recognizes and accords legal status to customary law. This legal system recognizes customary law, as evidenced by several regulations: Articles 18B and 28I of the 1945 Constitution recognize and protect indigenous peoples' rights. Law Number 5 of 1960, covering Agrarian Principles, recognizes indigenous peoples' rights to their traditional land. Law 39 of 1999 on Human Rights recognizes the rights of indigenous peoples. Law No. 23 of 2014, covering Regional Government, allows for the acknowledgment and safeguarding of local wisdom and customs at the regional level. Furthermore, implementing policies govern forest management and allow indigenous peoples to participate in forest resource management (Halim, Setyawan, & Brata, 2022)

The acknowledgment of customary law attempts to respect Indonesia's diverse cultures and communities while maintaining a balance between national and customary law. However, the implementation of this recognition has not always been smooth, and there are still challenges to effectively protecting indigenous peoples' rights (Halim et al., 2022). The recognition of living law as the basis for sentence in the Criminal Code represents a shift toward restorative justice and pluralism, in which criminal law is founded on both written regulations (*lex scripta*) and unwritten law (*nullum crimen sine iure*). Important topics in the regulation of Living Law in the New Criminal Code include:

1. Legal Basis and Scope: According to Article 2 paragraph (1) of the New Criminal Code, the principle of legality does not limit the application of living law in society in determining whether a person is deserving of punishment, even though it is not regulated in the Criminal Code, which is guided by the principle of *nullum crimen sine iure*, as opposed to formal legality: *nullum crimen sine lege*.
2. Applicable Conditions: Living Law applies unless otherwise specified in the New Criminal Code and local customary law. Criminal sanctions may not exceed or diverge from established and observed customary law.
3. Sanctions and Mechanisms: Article 597 of the New Criminal Code acknowledges customary crimes and emphasizes restorative justice, requiring perpetrators to fulfill customary obligations in order to restore social balance. Fines, customary rites, and ostracism are all possible sanctions. The procedures for implementing them are further outlined in

Government Regulations and Regional Regulations on Customary Criminal Law.

4. Criticism and challenges: Civil society groups emphasized the possibility of multiple interpretations (Article 2 and Article 597), which could jeopardize freedom due to the ambiguous bounds of customary law and perhaps contradict with the ideal of legal certainty.

Thus, the regulation of living law as a source of criminal law is aimed to decolonize criminal law in order to better reflect the characteristics of the Indonesian people. The primary concerns are limiting arbitrariness, the risk of legal uncertainty (differences in choices), and the possibility of excessive criminalization as a result of customary norms codified into hard written legal laws. The use of living law as the basis for criminal punishment in the new Criminal Code is not a direct departure from the principle of legality, but rather an extension of the idea of legality to the material. This seeks to strike a balance between the certainty of state law and fairness in a changing society.

D. CONCLUSION

Law Number 1 of 2023 recognizes living law in a limited way, aligning written legal certainty with society norms (Articles 1 and 2). The New Criminal Code achieves a balance between formal legal certainty and material justice by incorporating living law into national criminal law, so long as it does not violate the state's foundations or human rights. The principle of legality in the New Criminal Code emphasizes that criminal acts are based on written law, but it also acknowledges customary law that exists in society as long as it is consistent with Pancasila and human rights.

Living law in national criminal law aims to decolonize progressive law, which yet requires stringent limitations to guarantee legal certainty. Article 2 of the New Criminal Code recognizes living law, which allows for the punishment of activities not covered by the Criminal Code. However, these acts must align with local norms. Living law is a supplement to cover the gap and fulfill the principle of legal certainty (legality). Living law that might criminalize the perpetrator must be formulated into Regional Regulations as customary crimes, as required by the execution of PP Number 55 of 2025. Although not all regions have customary law, courts can help explore and interpret living law in accordance with Article 66 and Article 597 of the New Criminal Code.

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