

Study of Living Law and its Implication in the Formation of the Criminal Code (KUHP) in the Era of Decentralization of Indonesian Laws

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ABSTRACT

This study explores the implications of living law in the formation of Indonesia's Criminal Code during the era of legal decentralization. Living law, comprising unwritten customs and traditions, continues to play a vital role in many Indonesian communities, particularly in the context of criminal justice. The research employs a juridical analysis and case study approach, focusing on regions where adat law (customary law) significantly influences legal practices. The findings reveal both the benefits and challenges of integrating living law into the formal legal system. While living law enhances cultural relevance and community-based justice, it also introduces concerns about legal fragmentation and potential conflicts with national human rights standards. The study recommends selective incorporation of living law into the Criminal Code, along with efforts to codify regional customs to ensure consistency and legal certainty. This research contributes to the ongoing debate on legal pluralism in Indonesia, offering insights into the future of criminal law reform in a decentralized system.

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1. INTRODUCTION

The concept of living law, or customary law, holds a significant place in Indonesia's legal landscape, reflecting its cultural diversity and historical complexity. Despite being unwritten, living law continues to influence local communities and operates alongside formal legal systems. Its integration into national legislation, especially the Criminal Code, remains a contentious issue, emphasizing the interaction between customary law and formal legal frameworks. Customary law, or "hukum adat," is deeply embedded in Indonesian society, influencing

formal legislation like the agrarian law (UU No. 5 Th. 1960) and marriage law (UU No. 1 Th. 1974) [1]. Despite perceptions of being outdated, it remains relevant, shaping contemporary legal principles and judicial rulings [1]. Its unwritten nature, evolving through community customs, guides social and kinship relations [2]. However, its application varies across regions, influenced by local customs and community participation [3]. The interaction with formal legal systems often leads to conflicts, especially in multicultural settings [4]. Legal pluralism further complicates this, as seen in

the coexistence of Islamic and secular civil law in Indonesia [5].

The decentralization of law in Indonesia post-Reformasi has significantly transformed governance, granting regional governments greater autonomy in legal and judicial matters to address community-specific needs, often guided by living law. While this shift aimed to empower local governments, it has introduced challenges in maintaining national legal coherence, especially in criminal law. Decentralization offers opportunities for regional development, enabling tailored programs that foster growth from the ground up [6] and enhancing government efficiency through decentralizing power and encouraging public participation [7]. Additionally, regional autonomy helps local governments better manage economic resources in a globalized context [8]. However, challenges arise, including inconsistencies in legal standards that can disrupt national coherence [9] and the need for robust regulatory frameworks and political support at the local level to align with national objectives [7]. Special autonomy for certain regions, while empowering, must carefully balance regional privileges with national unity and human rights [10]. Ultimately, decentralization requires careful coordination between central and local governments to preserve legal unity and ensure inclusive development [9], [10].

The Indonesian Criminal Code, rooted in the Dutch colonial era, is under scrutiny as efforts to revise it raise questions about the role of living law in the national legal framework. Should local customs and unwritten laws be integrated, and can they coexist with a modern legal system that upholds human rights and justice? This paper explores the implications of living law in the Code's reform, focusing on legal decentralization, and analyzes the challenges, benefits, and drawbacks of incorporating local customs into a national framework. A juridical analysis aims to assess its impact on the criminal justice system and future legal reforms.

The main objectives of this research are to: (1) explore the role of living law in Indonesian society, particularly in the context of criminal justice; (2) analyze the implications of decentralization for legal reform, particularly concerning the Criminal Code; (3) evaluate the challenges and opportunities presented by integrating living law into national legislation; and (4) offer recommendations for policymakers on how to balance the preservation of local customs with the need for a uniform and equitable legal system.

2. LITERATURE REVIEW

2.1. *The Concept of Living Law*

Eugen Ehrlich's concept of living law emphasizes the role of social norms and customs as sources of law, which is particularly relevant in Indonesia, where adat, or customary laws, are deeply rooted in local traditions. These adat laws operate alongside formal legal systems in areas such as family, land, and criminal law, adapting to social changes and influencing community behavior. Their coexistence with state law raises questions about their legal status within Indonesia's modern framework. Adat laws, evolving and unwritten, guide daily practices [2], [11] and often intersect with state law in areas like family and land matters [12], with constitutional protections for customary law communities [13]. Examples include the Angkola Batak community's use of surat tumbaga holing for dispute resolution [13] and BMNU customary law in West Kutai addressing criminal acts [11]. Indonesia's legal pluralism, blending religious, customary, and European systems, presents both challenges and the need for a comprehensive approach to justice [12].

2.2. *Decentralization of Law in Indonesia*

Decentralization in Indonesia, initiated in 1999, aimed to empower local governments with greater autonomy to manage their affairs, including law and justice, creating a more responsive governance system tailored to local needs. While it has improved public services by

enhancing efficiency and relevance [14] and increased community engagement in decision-making [15], it has also introduced challenges like legal fragmentation and regional disparities. The coexistence of national and regional laws has caused inconsistencies that could undermine national unity [7], and regional inequality persists due to resource differences [14]. Moreover, decentralization can increase corruption risks and political instability without robust institutional frameworks [16]. The success of decentralization hinges on strong institutions, tailored strategies, and capacity building to meet the specific needs of each region [16], [17].

2.3. The Indonesian Criminal Code: Historical Development and Reforms

The Indonesian Criminal Code (KUHP), rooted in Dutch colonial law, has faced criticism for being outdated and lacking cultural sensitivity. Efforts to reform the KUHP have focused on integrating adat law, which reflects local customs and values [18], into the formal legal system. Proponents believe this integration would create a more culturally sensitive legal framework by addressing the disconnect between formal legal standards and local practices, potentially leading to more effective and just outcomes [19], [20]. However, critics warn that excessive reliance on adat law could conflict with national and international legal principles, particularly regarding human rights [21], and could introduce inconsistencies due to regional variations, undermining legal uniformity [19]. The recent reforms, formalized through Law Number 1 Year 2023, aim to modernize the legal framework by addressing issues such as terrorism and expanding definitions of offenses like adultery to better reflect societal values [20], [22], [23].

2.4. The Role of Adat Law in Criminal Justice

The interaction between adat law and the formal criminal justice system in Indonesia is complex, with both systems coexisting, often complementing but sometimes conflicting with each other. Adat law, deeply embedded in local customs, offers

a culturally relevant means of resolving disputes, particularly in rural areas, though its application raises concerns about consistency and alignment with national and international legal standards. Adat law plays a key role in resolving minor criminal cases like theft and land disputes through community mediation, emphasizing communal values and traditional leadership [24], [25]. However, the unwritten and variable nature of adat law can lead to inconsistencies and conflicts with national legal standards, particularly in relation to human rights [26]. Some adat sanctions, such as corporal punishment, may violate international law, underscoring the need for careful integration [1]. Efforts to integrate adat law into the formal system include recognizing its role in regional laws and decisions, while restorative justice, which aligns with adat principles, offers a mediation-focused alternative to the punitive formal system [26], [27].

2.5. Legal Pluralism and Its Implications for Criminal Law

Legal pluralism in Indonesia, characterized by the coexistence of state law, Islamic law, and adat law, presents unique challenges for criminal law reform, as it requires balancing diverse legal traditions with the need for a coherent legal system. While integrating adat law into the national framework can enhance legal legitimacy by reflecting local values, it also risks undermining universal legal protections, particularly in areas such as gender equality and human rights. This pluralistic environment, rooted in Indonesia's ethnic and religious diversity, is exemplified by the Aceh Qanun Jinayat, which highlights the intersection of local Islamic law with the national system and the constitutional debates surrounding it [5], [28], [29]. However, integrating adat law raises concerns about conflicts between local customs and national standards, especially regarding human rights [30]. Indonesia's colonial-influenced criminal law system also lacks victim compensation mechanisms, further emphasizing the need for reform [21]. Harmonization strategies, such as stakeholder

dialogue and inclusive legal education, aim to respect diversity while upholding human rights, guided by frameworks like Maslahah, which focus on social welfare [5], [30].

3. METHODS

3.1. Research Design

This research is designed as a juridical analysis that examines and interprets legal principles, statutory laws, and customary practices (adat law) in relation to Indonesia's Criminal Code. It focuses on understanding the intersection between living law and formal legislation within Indonesia's decentralized legal system. Through a qualitative approach, the study explores how local customs influence legal norms and analyzes the broader implications of integrating adat law into the Criminal Code. This approach allows for an in-depth examination of legal texts, judicial decisions, and customary practices, facilitating the exploration of both theoretical and practical aspects of the coexistence of living law and state law. Additionally, the research incorporates a comparative dimension, analyzing case studies from various regions of Indonesia to showcase the diversity of adat law and its implications for criminal justice reform.

3.2. Data Collection

The data collection process in this research is based on two primary sources: legal documents and case studies, which form the foundation for understanding Indonesia's current legal framework and the incorporation of living law into it. The legal documents include Indonesian legislation such as the 1945 Constitution, the Criminal Code (KUHP), regional laws, and other statutes relevant to living law and legal decentralization. Additionally, the study examines customary law (adat) through legal texts and academic literature, focusing on regions where customary practices significantly influence criminal justice, alongside judicial decisions that reflect the application of adat law in criminal cases. The case studies, drawn from regions like Aceh,

Bali, West Sumatra, and Papua, highlight the practical implications of living law in criminal justice, illustrating how local customs, state law, and judicial decisions interact. These cases provide insight into regional variations in the application of living law and its broader implications for Indonesia's legal system.

3.3. Data Analysis

The data analysis for this research follows a thematic approach, focusing on identifying patterns and themes in the relationship between living law and formal legislation. The analysis is divided into three stages: first, the legal interpretation stage, which examines legal texts, statutes, and court rulings to understand how living law is recognized within Indonesia's formal legal framework, particularly regarding decentralization and the recognition of adat law. Second, the case study analysis explores the practical application of living law in different regions, identifying legal cases where adat law was applied in criminal matters and examining local courts' and communities' interpretations. This stage highlights the challenges and opportunities of integrating living law into the national justice system. Finally, the juridical analysis evaluates the implications of living law for Indonesia's Criminal Code, assessing the constitutional framework, legislative reforms, and judicial decisions to explore potential conflicts and harmonies between local customs and national legal standards, with a focus on future criminal law reform.

4. RESULTS AND DISCUSSION

4.1. The Recognition of Living Law in Indonesia's Decentralized Legal System

One of the most significant findings of this research is the extent to which living law has been recognized and integrated into Indonesia's decentralized legal system. The analysis of legal documents, such as the 1945 Constitution and regional laws, reveals that living law is formally acknowledged as part of the legal pluralism that exists in Indonesia. Article 18B of the Constitution explicitly recognizes the rights of local communities to

practice their customs and traditions, provided they do not conflict with national interests and human rights standards.

The case studies show that adat law, which is a key element of living law, plays an active role in the daily lives of communities, particularly in rural areas. In regions such as Aceh, Bali, West Sumatra, and Papua, local customs continue to influence the resolution of criminal cases, often taking precedence over formal legal procedures. For example, in Aceh, where Islamic law is combined with adat practices, local courts frequently apply customary punishments for minor offenses, such as theft or adultery, in accordance with local traditions. Similarly, in Bali, community-based conflict resolution mechanisms rooted in Hindu customs are often employed in family and land disputes.

The recognition of living law in these regions demonstrates the flexibility and adaptability of Indonesia's decentralized legal system. However, the case studies also highlight a lack of uniformity in the application of living law across different regions, raising concerns about consistency and legal coherence at the national level.

4.2. Challenges of Integrating Living Law into the Criminal Code

Despite the recognition of living law in Indonesia's decentralized legal system, the integration of living law into the national Criminal Code presents several challenges. The analysis of judicial decisions and legal reforms indicates that there are significant tensions between adat law and formal legal principles, particularly in cases involving criminal matters.

One of the key challenges is the potential conflict between living law and national or international human rights standards. For instance, some adat practices, such as corporal punishment or gender-based discrimination, are inconsistent with Indonesia's human rights obligations under international law. In West Sumatra, for example, certain adat customs continue to favor male heirs in inheritance disputes, while in Aceh, punishments for moral offenses under Islamic law may include public caning.

These practices have raised concerns among human rights advocates, who argue that the incorporation of living law into the national legal framework could undermine efforts to promote equality and human rights.

Another challenge is the issue of legal fragmentation. The decentralization of law has empowered local governments to adopt laws that reflect their communities' values and customs. However, this has led to inconsistencies in how laws are applied across regions. The case studies from Aceh and Bali, for instance, reveal stark differences in the application of living law in criminal matters. While Aceh's Sharia-based legal system is relatively formalized, Bali's Hindu-influenced adat practices are more informal and community-based. This diversity creates difficulties in ensuring a coherent and unified legal system at the national level, particularly in criminal law.

Moreover, the lack of codification of living law complicates its integration into the Criminal Code. Unlike statutory law, which is written and codified, living law is unwritten and evolves over time. This fluidity makes it difficult to establish clear legal standards for its application in formal legal proceedings. Judges in local courts often rely on their own interpretations of adat practices, leading to variations in the outcomes of similar cases. The absence of codification also raises questions about legal certainty and fairness, particularly in criminal cases where the stakes are high.

4.3. The Benefits of Incorporating Living Law into Criminal Justice

Despite the challenges, the incorporation of living law into Indonesia's criminal justice system offers several benefits, particularly in promoting legal legitimacy and cultural relevance. The case studies demonstrate that living law provides a more culturally sensitive and community-based approach to resolving disputes, which is often perceived as more legitimate by local populations.

In regions such as Bali and West Sumatra, where adat law continues to guide criminal justice practices, communities are

more likely to accept the outcomes of legal disputes when they are resolved in accordance with local customs. This is particularly true in cases involving minor offenses, where restorative justice mechanisms such as community mediation, compensation, and reconciliation are often employed. These practices emphasize the importance of maintaining social harmony, which is a key value in many Indonesian communities.

The incorporation of living law into the formal legal system also allows for greater legal pluralism, reflecting the diverse cultural and social realities of Indonesia's population. By recognizing adat law as a legitimate source of legal authority, the Indonesian government can ensure that the legal system is more responsive to the needs of local communities. This can help to bridge the gap between state law and the everyday practices of citizens, particularly in rural areas where formal legal institutions may be less accessible.

Furthermore, living law offers alternative approaches to criminal justice that emphasize restorative and community-based solutions, which can complement the formal legal system. In many cases, adat law focuses on restoring relationships between the offender and the victim, rather than simply punishing the offender. This approach aligns with modern restorative justice principles, which emphasize rehabilitation and reconciliation over retribution.

4.4. Implications for Future Legal Reforms

The findings of this research have important implications for the ongoing reform of Indonesia's Criminal Code. As the Indonesian government continues to revise the KUHP, it must consider how to balance the incorporation of living law with the need for a coherent and uniform legal system that upholds human rights and legal certainty.

One potential solution is the selective integration of living law into the Criminal Code, with clear guidelines on which aspects of adat law can be incorporated and under what conditions. This would allow for the recognition of adat practices that are consistent with national and international

legal standards, while excluding those that conflict with human rights principles. Codifying these guidelines would provide greater legal certainty and consistency across regions, while still allowing for legal pluralism.

Additionally, efforts should be made to codify adat law at the regional level, creating written legal standards that can be referenced by judges and legal practitioners. This would help to formalize living law and reduce the variability in its application across different regions. Codification would also ensure that adat law is transparent and accessible to all citizens, promoting fairness and equality in the legal system.

Finally, there is a need for ongoing dialogue between legal scholars, policymakers, and local communities to ensure that living law is incorporated into the national legal framework in a way that respects both local customs and national legal principles. This dialogue should focus on finding common ground between adat law and state law, while also addressing the potential conflicts that may arise in areas such as human rights and gender equality.

5. CONCLUSION

The research demonstrates that living law plays a critical role in shaping Indonesia's criminal justice system, particularly in regions where adat law remains influential. The study highlights the dual benefits and challenges of integrating living law into the national Criminal Code. On the one hand, living law promotes cultural relevance and legitimacy within communities, offering restorative justice mechanisms that align with local traditions. On the other hand, it introduces legal fragmentation, inconsistency in application, and potential conflicts with human rights standards.

The findings suggest that a selective approach to incorporating living law into the Criminal Code is necessary, with clear guidelines to ensure that local customs do not contradict national legal principles or international human rights obligations.

Codifying adat law at the regional level is also essential to enhance legal certainty and ensure fair and equal treatment under the law.

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