PERFECT EDUCATION FAIRY
Volume 4, Number 4, 2026

The Regulation of 'Living Law in Society' in Article 2 of Indonesia's National Criminal Code: An Analysis of Risks and Impacts

Annisa Rahmi Faisal[1*], Dwi Afrimetty Timoera[1], Martini[1]
[1]Faculty of Social Sciences and Law, Universitas Negeri Jakarta, Jakarta, Indonesia
Corresponding author: annisarahmi@unj.ac.id

ABSTRACT
Article 2 of Law Number 1 of 2023 on the Criminal Code (KUHP Nasional) allows the law that lives in society to determine that a person deserves punishment even when the Code is silent. This article aims to explain what the living law means in Indonesian criminal law, how the Code and Government Regulation Number 55 of 2025 (GR 55/2025) regulate it, and what legal risks the arrangement creates and how those risks can be mitigated. It employs normative legal research with statutory, conceptual, and historical approaches, combined with a risk-based analysis that traces each risk to its normative source and to the regulatory response. The results show that the implementing rules have narrowed living law from a broad sociological concept to adat (customary) criminal norms codified in regional regulations and verified by the Minister of Law. The arrangement generates six risk clusters: erosion of the legality principle, legal uncertainty, regional disparity, subjectivity in identifying living norms, conflict with human rights, and overlap between adat and national offences. GR 55/2025 reduces the first two risks by requiring codification in regional regulations, yet it leaves residual risks in fair notice for non-members of adat communities, the politicisation of regional law-making, a thin human rights screening, overlap with sectoral statutes, and the absence of a methodological standard for identifying living norms. The article concludes that recognition of living law avoids overcriminalisation only under controlled legal pluralism, a four-layer model of identification, verification and determination, harmonisation, and publication and supervision, which protects legality where the state punishes and leaves restorative adat practice outside codification.

Keywords:
Living Law; National Criminal Code; Customary Criminal Law; Legal Risk; Legal Pluralism

DOI: https://doi.org/10.56442/pef.v4i4.1607

1. Introduction

Indonesia replaced the colonial *Wetboek van Strafrecht* (WvS) with Law Number 1 of 2023 on the Criminal Code (Kitab Undang-Undang Hukum Pidana, hereinafter the National Criminal Code or KUHP Nasional), which entered into force on 2 January 2026 (Law Number 1 of 2023, Article 624). The new Code keeps the principle of legality in Article 1 paragraph (1), which states that no act may be punished except on the basis of a criminal provision in statutory law that existed before the act was committed. Article 2 then opens a door that the old Code kept closed. Its first paragraph provides that Article 1 paragraph (1) "does not diminish the applicability of the law that lives in society which determines that a person deserves to be punished even though the act is not regulated in this Law". The second paragraph limits that law to the place where it lives, to matters the Code does not regulate, and to norms consistent with Pancasila, the 1945 Constitution, human rights, and the general principles of law recognised by the community of nations. The third paragraph delegates the procedures and criteria for determining that law to a Government Regulation (Law Number 1 of 2023, Article 2 paragraphs (1)–(3); all translations of Indonesian legal texts are the authors').

The provision has divided scholars since the drafting stage. Supporters argue that unwritten criminal norms still operate in many regions, that adat (customary) communities

regard them as more just than state law, and that their recognition expresses the national character of the Code. Opponents argue that punishing a person on the basis of an unwritten norm contradicts the legality principle in Article 1 and damages legal certainty (Putri, 2021). The constitutional basis for recognition is Article 18B paragraph (2) of the 1945 Constitution, which recognises adat law communities and their traditional rights as long as they still exist and accord with the development of society and the principles of the unitary state. The same Constitution, however, guarantees every person fair legal certainty in Article 28D paragraph (1). The tension between these two commitments is the starting point of this article.

Three developments in 2026 have moved the debate from the question of whether living law should be recognised to the question of how it should be governed. Government Regulation Number 55 of 2025 on the Procedures and Criteria for Determining the Law that Lives in Society (hereinafter GR 55/2025; in Indonesian, *Peraturan Pemerintah*), enacted on 31 December 2025, now channels customary offences through regional regulations verified by the Minister of Law. Law Number 1 of 2026 on Criminal Adjustment (hereinafter Law 1/2026) amended Article 597 of the Code, which criminalises acts prohibited by the living law and limits the penalty to the fulfilment of adat obligations (Law Number 1 of 2026, Article VII point 46). Petitioners have also brought Article 2 before the Constitutional Court (Mahkamah Konstitusi, MK) in Cases Number 295/PUU-XXIV/2026 and 318/PUU-XXIV/2026, arguing that the provision lacks clear parameters for punishment ("MK Gelar Sidang Perdana", 2026; "Uji Hukum yang Hidup", 2026). At the time of writing, the Court has not decided either case.

The existing literature can be grouped into three strands. The first strand measures Article 2 against the legality principle and concludes that living law threatens legal certainty, creates a duality of customary law, and burdens law enforcers who must understand local norms (Arifin & Primadianti, 2023). The second strand comes from legal pluralism and legal anthropology. Utama (2021) argues that the construction of adat law as "living law" will freeze its dynamic character and entrench state domination, Niko and colleagues (2026) read the arrangement as state co-optation of indigenous legal systems, Fathurokhman and colleagues (2026) question the necessity of Article 2 once adat law must be formalised in regional regulations, and Hermanto and colleagues (2025) question the role that adat criminal law can play in the reform at all. The third strand is concerned with integration. It calls for inventories of customary offences, regional regulations, customary courts, procedural standards, and judicial training (Hardinanto et al., 2024; Heliany et al., 2023; Sueni et al., 2025). Selajar and Martha (2023) add that the application of living law requires control by law enforcement institutions. This journal has also published a study on the legal and regulatory framework of adat courts as an alternative dispute resolution mechanism (Tirtakusuma, 2026). Table 1 summarises the position of the most relevant studies.

Table 1. Position of This Study against Previous Research

Study	Focus and approach	Main contribution	Gap left open
Putri (2021)	Article 2 of the Criminal Code Bill (RKUHP) measured against legality; normative	Living law as a basis for punishment conflicts with legality and invites abuse of power	Written before GR 55/2025; no mitigation model
Utama (2021)	Adat incorporation in the Bill; legal pluralism	Codification freezes adat and entrenches state domination	Does not assess which controls could limit that cost
Arifin and Primadianti (2023)	Implications of Article 2(1); socio-legal and conceptual	Uncertainty, duality of customary law, and burden on law enforcers	Risks listed, not traced to their normative source

Study	Focus and approach	Main contribution	Gap left open
Heliany et al. (2023); Hardinanto et al. (2024)	Pluralism and formulation of Article 2; statutory, historical, comparative	Inventory of adat offences, regional regulations, and customary courts	Focus on recognition, not on control of punitive effects
Sueni et al. (2025)	Hybrid justice and integration; normative	Need for procedural standards and oversight mechanisms	Oversight mechanisms not specified
Fathurokhman et al. (2026); Niko et al. (2026)	Legality of living law; state co-optation	Formalisation through regional regulations is paradoxical and serves state control	No risk-by-risk evaluation of GR 55/2025
This article	Risk-based assessment of Article 2, Article 597, GR 55/2025, and Law 1/2026	Six risk clusters, residual risks after GR 55/2025, and a four-layer control model	–

Source: compiled by the authors from the cited literature.

These studies offer valuable insights, but they leave a gap that matters now that the Code is in force. Most of them were written before GR 55/2025 existed. They treat the risks of living law as a list of objections to Article 2, without tracing each risk to the specific norm that produces it. Those who propose safeguards seldom specify at which point in the life of a living norm a control should operate. Existing scholarship has therefore debated whether Article 2 is compatible with legality and has called for safeguards, but it has not assessed, risk by risk, what GR 55/2025 mitigates and what it leaves unresolved. This article fills that gap, and its novelty lies in three related contributions. It offers a risk-by-risk assessment of the living law arrangement after GR 55/2025 and Law 1/2026 came into force, tracing each risk to the provision that produces it, which the studies in Table 1 have not undertaken. It separates the risks that the implementing regulation has mitigated from the residual risks it leaves unresolved. It then converts those residual risks into a control model that assigns a specific safeguard to each stage in the life of a living norm. The central argument is that the main problem of living law no longer lies in recognition as such. The problem lies in the conversion of a social norm into a norm backed by state coercion, and that conversion requires controls placed at each stage where risk arises. Accordingly, this article pursues three questions: what the law that lives in society means in Indonesian criminal law; how the National Criminal Code and its implementing regulation govern it; and what legal risks the arrangement generates and how they can be mitigated.

2. Method

This study is normative legal research. It examines the law that lives in society as a question of positive criminal law: how Law Number 1 of 2023 on the Criminal Code and its implementing regulation turn an unwritten social norm into a norm that the state may enforce through criminal sanction. The object of the study is therefore the norms, the principles behind them, and their coherence with the constitutional order. The study does not examine how adat communities practise their norms in any particular region.

The study uses three approaches. The statutory approach examines Articles 1 and 2 of the National Criminal Code together with their Elucidation, Article 597 as amended by Law Number 1 of 2026 on Criminal Adjustment, Government Regulation Number 55 of 2025, and Article 18B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution. It identifies what each provision says and how the provisions relate to one another. The conceptual approach sets out the concepts the analysis relies on. These are living law in

Ehrlich's (1936) sense, Griffiths' (1986) distinction between strong and weak legal pluralism, the legality principle and its requirements of *lex scripta*, *lex praevia*, and *lex certa*, and overcriminalisation as Husak (2008) describes it. The historical approach traces the recognition of adat offences from Article 5 paragraph (3) letter b of Emergency Law Number 1 of 1951 to the drafting of the National Criminal Code. This lets the study separate what the new Code carries over from the earlier law from what it changes.

The primary legal materials are the 1945 Constitution, the National Criminal Code and its Elucidation, Law Number 1 of 2026, Government Regulation Number 55 of 2025, and Emergency Law Number 1 of 1951. The secondary legal materials are books and journal articles on criminal law, legal pluralism, legal anthropology, and regulatory studies. Among them are studies published between 2021 and 2026 that address Article 2 directly or deal with adat criminal law under the new Code (Table 1). The study also uses news reports on Constitutional Court Cases Number 295/PUU-XXIV/2026 and 318/PUU-XXIV/2026, but only to establish where the review stands procedurally, because the Court had not decided either case when this article was written. The authors collected all materials through library research up to October 2026.

The analysis is qualitative and prescriptive. The authors read the provisions using grammatical, systematic, and teleological interpretation. Grammatical interpretation focuses on the phrases that set the scope of Article 2, namely "in the place where that law lives" and "not regulated in this Law". Systematic interpretation reads Article 2 together with Article 1 paragraphs (1) and (2), Article 66 paragraph (1) letter f, Article 79 paragraph (1), Article 597, and the provisions of Government Regulation Number 55 of 2025. Teleological interpretation asks what each provision is meant to protect. On top of this doctrinal reading, the study applies a risk-based approach taken from regulatory studies. In that approach a regulator identifies the risks a rule creates, traces them to their source, and directs controls to the points where they materialise (Black, 2005; Black & Baldwin, 2010). This article adapts the approach to criminal law and uses "legal risk" to mean the possibility that a norm, as drafted or as applied, infringes a principle of criminal law or a constitutional right. The authors examine each risk through the same four-part matrix: the normative source of the risk, the way it materialises, the response that Government Regulation Number 55 of 2025 provides, and the residual risk that remains. Tables 2 and 3 record the results. In the prescriptive stage, the authors propose a control for each residual risk, and together these controls make up the model of controlled legal pluralism.

The study has three limits. It does not use field data on how adat offences are enforced, and it does not examine any regional regulation on customary offences or any court decision applying Article 2. The risks it identifies are therefore risks that follow from how the norms are designed. The study does not measure how often they occur. Finally, the analysis reflects the law as it stood in October 2026, before the Constitutional Court ruled on the pending petitions.

3. Results and Discussion

a. Living Law in Indonesian Criminal Law: From a Sociological Concept to a Statutory Category

The term living law comes from Eugen Ehrlich (1936), who argued that the centre of gravity of legal development lies in society itself, and that the law which dominates social life is often not laid down in legal propositions. Later scholarship on legal pluralism refined this idea. Moore (1973) described social groups as semi-autonomous social fields that generate

rules internally while remaining open to the larger legal order, and Merry (1988) showed that state law and non-state normative orders constitute each other instead of standing apart. In the sociological sense, therefore, living law is a broad category. It covers adat law, religious norms, village rules, and other norms that people obey in practice.

Indonesian criminal law has known a narrower version of this idea for a long time. Article 5 paragraph (3) letter b of Emergency Law Number 1 of 1951 allowed courts to punish an act that adat law regarded as an offence and that had no counterpart in the Criminal Code, with a substitute penalty of up to three months' imprisonment or a fine where the adat sanction was not carried out. The drafters of the national Code, whose work began in the 1960s, carried this tradition forward and moved it from a transitional statute into the general part of the Code (Arief, 2008). Recognition of living law in criminal matters is thus not new. What is new is its position as an express qualification of the legality principle in the first articles of the Code.

The Code and its implementing rules, however, narrow the sociological concept considerably. The Elucidation of Article 2 paragraph (1) explains that the living law refers to adat law which determines that a person deserves punishment, and that the government should compile customary offences derived from the regional regulations of each place where adat law applies. Article 597, as amended by Law Number 1 of 2026, makes every act declared prohibited by the living law a criminal offence and limits the penalty to the fulfilment of adat obligations under Article 66 paragraph (1) letter f for natural persons or Article 120 paragraph (1) letter d for corporations. GR 55/2025 then defines the living law as adat law that determines that a person who commits a certain act deserves punishment, and it organises the regulation into provisions on the formation of regional regulations on customary offences and provisions on the handling and settlement of those offences (GR 55/2025, Article 1 and Chapters II–III). Under GR 55/2025, the living law must be consistent with Pancasila, the 1945 Constitution, human rights, and universally recognised legal principles, and it must be recognised and practised by the adat law community (GR 55/2025, Article 4). A customary offence must be contrary to the living law, be threatened with the fulfilment of adat obligations, not be regulated in the Code, and apply generally within the relevant adat territory (GR 55/2025, Article 5).

The procedure is equally state-centred. A proposal for a regional regulation may come from the regional government, the regional legislature, or an adat community through either of them, and the proposer must conduct direct research involving community members, academics, and civil society organisations (GR 55/2025, Article 7). The draft is then submitted to the Minister of Law, who verifies its conformity with the criteria within thirty days and may approve it, approve it with revisions, or reject it (GR 55/2025, Articles 12–13). Once a customary offence occurs, the sanction takes the form of the fulfilment of adat obligations whose value is equivalent to a category II fine, which Article 79 paragraph (1) of the Code sets at ten million rupiah (GR 55/2025, Article 15). Settlement prioritises deliberation coordinated by the local adat institution and involving the victim, the alleged offender, and the community. If the offender refuses to comply, the case proceeds under the law of criminal procedure (GR 55/2025, Articles 16–22).

This arrangement transforms a sociological concept into a statutory category. Living law in the criminal sense now means an adat criminal norm that has passed through three state gates: research by regional authorities, verification by the Minister, and enactment by the regional legislature. In Griffiths' (1986) terms, the Code adopts weak legal pluralism. Adat communities produce the norm, but the state decides whether that norm may carry criminal

consequences. This design answers part of the legality critique, because a written regional regulation now precedes punishment. It also confirms the concern of Fathurokhman et al. (2026) and Utama (2021) that the living character of adat is the price of formalisation. Consequently, the question for Indonesian criminal law is no longer whether living law is compatible with legality in the abstract. The question is whether each state gate controls the risks it is supposed to control.

This reading both confirms and qualifies earlier work. It agrees with Hardinanto et al. (2024) and Heliany et al. (2023) that Article 2 expresses the pluralist character of the national Code, but those studies treat codification as the point at which recognition is completed, whereas the present analysis treats it as the point at which new risks begin. It shares the view of Hermanto et al. (2025) that the place of adat criminal law in the reform remains contested, yet it locates the contest in the procedures of GR 55/2025 rather than in the text of Article 2 alone. It also complements Tirtakusuma (2026), who examines adat courts as a forum for dispute resolution, by focusing on the punitive side of the same institutions.

b. **Mapping the Legal Risks of Living Law**

A risk-based reading starts from the observation that the risks of Article 2 do not come from the existence of adat law. They come from the moment a social norm acquires the coercive force of the state. Table 2 maps six risk clusters, the norm that produces each of them, and the principle each one threatens.

Table 2. Risk Map of the Living Law Arrangement

Risk cluster	Normative source	How the risk materialises	Principle at stake
Erosion of legality	Art. 2(1) as an exception to Art. 1(1)	Punishment based on a norm that is not lex scripta or lex certa	Nullum crimen sine lege
Legal uncertainty	Art. 2(2): "in the place where that law lives"	Territorial reach unclear to residents and visitors; vague drafting of adat offences	Fair notice; Art. 28D(1) of the Constitution
Regional disparity	Art. 2(3), Art. 597, and regional regulations	The same act punishable in one regency and lawful in the next	Equality before the law
Subjectivity in identifying living norms	GR 55/2025 on research and proposals	Elite or political capture in deciding what "still lives"	Legitimacy; non-arbitrariness
Conflict with human rights	Art. 2(2) value test; Art. 66(1)(f)	Discriminatory or degrading adat sanctions, especially for women and minorities	Human rights; proportionality
Overlap of adat and national offences	Art. 2(2): "not regulated in this Law"	Double sanction by adat and state; conflicts with sectoral statutes	Ne bis in idem; coherence of the system

Source: authors' analysis of Law Number 1 of 2023, Law 1/2026, and GR 55/2025. Art. = Article; GR = Government Regulation.

The first risk concerns legality. Article 1 paragraph (1) embodies the classic demand that a crime be defined in written, prior, and precise law, and Article 1 paragraph (2) prohibits analogy in determining a criminal offence (Ashworth & Horder, 2013). Article 2 paragraph (1) suspends the first demand for living law. If a judge applied Article 2 directly, without a prior written norm, the defendant would face a crime whose content the judge discovers only at trial. GR 55/2025 reduces this risk by requiring codification in a regional regulation. The written character of the norm, however, does not guarantee its precision. A regional regulation that prohibits acts "contrary to adat decency" would satisfy *lex scripta* while failing *lex certa* (Hiariej, 2016).

The second risk concerns legal certainty and fair notice. Article 2 paragraph (2) makes living law applicable "in the place where that law lives". The phrase adopts a territorial

criterion, so a person who is not a member of the adat community may be bound by an adat offence once that person enters its territory. Migrants, workers, and tourists in regions such as Bali, Papua, or West Sumatra may not know the content of local adat, and publication in a regional gazette does little to inform them. Fair notice is the core of the guarantee of legal certainty in Article 28D paragraph (1) of the Constitution, and a penal norm that its addressees cannot reasonably know fails that guarantee even when it is formally promulgated.

The third risk is disparity. Indonesia has 514 regencies and municipalities, and each of them may in principle enact its own regional regulation on customary offences. The same act could therefore be an offence in one regency and lawful in the neighbouring one. GR 55/2025 caps the value of the sanction at the level of a category II fine, which limits disparity in the severity of punishment. It does not limit disparity in criminalisation itself, which is the more serious problem for equality before the law. Arifin and Primadianti (2023) identified this duality before GR 55/2025 was issued, and the implementing regulation has not removed it.

The fourth risk lies in the identification of living norms. Somebody must decide which norm still lives, who belongs to the adat community, and who may speak for it. Adat institutions are often dominated by senior men and customary elites, and the norms they report may differ from the norms that younger members or women actually follow. The regional legislature that enacts the regulation is a political body whose members respond to electoral incentives. This is where the warning about state co-optation becomes concrete: the state selects the version of adat that becomes criminal law, and that selection may serve political interests (Niko et al., 2026). Bedner and van Huis (2008) have shown that the return of the native in Indonesian legislation has repeatedly produced official definitions of adat communities that do not match social reality. GR 55/2025 requires research involving academics and civil society, but it does not set a methodological standard or an evidentiary threshold for concluding that a norm still lives.

The fifth risk concerns human rights. Some adat sanctions carry social exclusion, banishment, or ritual obligations that fall heavily on the offender's family. Studies of adat sanctions have reported that their burden may fall disproportionately on women and minorities (Hermanto et al., 2025; Sueni et al., 2025). Article 2 paragraph (2) subjects living law to a value test based on Pancasila, the Constitution, and human rights, and GR 55/2025 limits the sanction to the fulfilment of adat obligations of a fixed value. These are real safeguards. The test, however, is performed by the Minister of Law within thirty days, without a formal role for the National Commission on Human Rights or the National Commission on Violence against Women. A screening of that kind is thin compared with the depth of the questions it must answer.

The sixth risk is overlap. Article 2 paragraph (2) excludes acts that the Code already regulates, and GR 55/2025 repeats that a customary offence must not be regulated in the Code. The exclusion refers to "this Law", meaning the Code. It does not expressly cover acts regulated by sectoral statutes, such as forestry, environmental, or child protection laws, so an act could be both a customary offence and a sectoral offence. Overlap also arises in practice when an adat community settles an act that the Code criminalises, such as theft or assault, and the state then prosecutes the same act. The sentencing guidelines of the Code allow judges to consider the values of law and justice living in society, which may soften double punishment, but the Code contains no rule that makes an adat settlement bar prosecution.

Compared with earlier studies, this risk map extends the objections raised by Putri (2021) and Arifin and Primadianti (2023) in two respects: it ties each risk to a specific provision, and it assesses each risk after GR 55/2025 came into force. The finding on human

rights is consistent with Hermanto et al. (2025) and Sueni et al. (2025), and the finding on the identification of living norms gives concrete form to the co-optation thesis of Niko et al. (2026). Selajar and Martha (2023) placed the main burden of control on law enforcement. The map suggests that control at the enforcement stage comes too late for risks that originate earlier, in the identification and drafting of the norm.

Taken together, these six risks share one root. Each of them appears at the point where a norm moves from the social field of an adat community into the coercive field of the state. The danger is overcriminalisation, which Husak (2008) describes as the use of criminal law beyond the limits that justify state punishment. In the context of Article 2, overcriminalisation would occur if adat norms entered criminal law without sufficient filtering, or if the state used the label of adat to criminalise conduct for political reasons. The risks therefore call for controls that follow the life cycle of a living norm, from its identification to its enforcement.

c. Controlled Legal Pluralism: Four Layers of Control and the Residual Risks of GR 55/2025

This article proposes controlled legal pluralism as a model for governing living law in criminal matters. The model accepts that living law belongs to Indonesia's legal pluralism and that its recognition has a constitutional basis. It also accepts that the state must control the conversion of adat norms into criminal norms, because criminal punishment is the most coercive power the state holds. The model places controls at four points in the life cycle of a living norm: identification, verification and determination, harmonisation, and publication and supervision. Table 3 compares each layer with the response of GR 55/2025 and identifies the residual risk.

Table 3. Control Layers, the Response of GR 55/2025, and Residual Risks

Control layer	Risks addressed	Response in GR 55/2025	Residual risk	Proposed mitigation
Identification	Subjectivity; human rights	Direct research with community, academics, and civil society (Art. 7)	No methodological standard or threshold of proof; internal minorities unheard	National guideline on adat research; participation of women and minority members; documented evidence
Verification and determination	Legality; human rights; subjectivity	Ministerial verification within 30 days; enactment by regional regulation (Arts. 12–13)	Executive-only screening; political bargaining in the regional legislature	Opinion of the human rights commissions; published reasons for verification
Harmonisation	Overlap; disparity; legal certainty	Criteria in Arts. 4–5; exclusion of acts regulated in the Code; sanction capped at category II	Overlap with sectoral statutes; vague drafting; variation between regions	Harmonisation against all statutes; drafting standard for adat offences; regional coordination
Publication and supervision	Legal certainty; overcriminalisation	Promulgation of regional regulations; adat deliberation and court proceedings (Arts. 16–22)	Weak notice to non-members; little data on enforcement	National registry of adat offences; periodic evaluation; judicial guidance and training

Source: authors' analysis of GR 55/2025. Art. = Article; Arts. = Articles.

The first layer is identification. Before a norm can become a criminal offence, the state must know that the norm exists, that the community still practises it, and what sanction the community attaches to it. GR 55/2025 requires direct research, which is a meaningful step. The residual risk lies in the absence of a methodological standard. Research commissioned by a regional government may rely on interviews with a few customary leaders. The Ministry of Law, together with the National Law Development Agency, should therefore issue a methodological guideline that requires documented evidence of practice, a period of continuous observance, and the participation of women, young people, and minority members of the community. This guideline would turn identification into an evidentiary process and reduce the subjectivity identified above.

The second layer is verification and determination. GR 55/2025 assigns verification to the Minister of Law and enactment to the regional legislature. This sequence gives the central government a veto over criminalising regional regulations, which reduces the risk of local politicisation. The residual risk is that the screening is executive in character and fast. The verification procedure should include a written opinion from the National Commission on Human Rights and, where gender issues arise, from the National Commission on Violence against Women. The reasons for each verification decision should be published. Judicial review of regional regulations by the Supreme Court remains available, but it operates only after the norm has entered into force.

The third layer is harmonisation. GR 55/2025 sets substantive criteria and excludes acts regulated in the Code, and the sanction cap prevents adat offences from producing severe state punishment. The residual risks are overlap with sectoral statutes and vague drafting. Harmonisation should therefore test each proposed adat offence against all statutes, not only the Code, and should apply a drafting standard that requires the conduct element, the fault element, and the adat obligation to be stated precisely. Regional governments with adat territories that cross administrative borders should coordinate their regulations so that one adat community is not governed by two different criminal norms.

The fourth layer is publication and supervision. Promulgation of a regional regulation satisfies the formal requirement of publication, but it does not give real notice to non-members who enter an adat territory. The Elucidation of Article 2 already anticipates a government compilation of customary offences. That compilation should take the form of a national, public, and searchable registry. Supervision also requires data. The Ministry of Law and the Supreme Court should record the number of adat cases, their settlement through deliberation, and the cases that proceed to court, and the government should evaluate each regional regulation periodically. The Supreme Court should also issue guidance for judges on confirming adat settlements and on weighing a completed adat settlement in sentencing for offences under the Code, so that one act does not attract two punishments.

The strongest objection to this model comes from the legal pluralism literature. Utama (2021) argues that codification freezes adat, and Niko et al. (2026) see state co-optation in the selection of valid norms. This article accepts part of that critique. Controlled legal pluralism does freeze the adat norms that it converts into criminal offences. That cost is justified only within the narrow field of punitive norms, because a person facing state punishment is entitled to know the prohibition in advance. The model therefore separates punitive living law from restorative living law. Punitive living law, which creates new offences, must pass through all four layers. Restorative living law, which settles disputes through apology, compensation, or reconciliation, should remain outside codification and enter the state system through restorative justice and sentencing considerations (Widjajanto et al.,

2025). This distinction lets the state control what it punishes without absorbing every adat practice into the criminal code. Seen against recent studies, the model gives concrete content to the procedural standards and oversight mechanisms that Sueni et al. (2025) called for without specifying them. It also answers the necessity question raised by Fathurokhman et al. (2026) in a different way. Article 2 remains necessary, not as a direct basis for punishment, but as the anchor that obliges the state to channel adat offences through controlled procedures.

The model also offers a reading that the Constitutional Court could adopt in the pending cases. Declaring Article 2 unconstitutional would remove the constitutional commitment to adat communities in Article 18B paragraph (2). Leaving the provision without interpretation would preserve the uncertainty that the petitioners challenge. A conditional interpretation would avoid both outcomes. Under that interpretation, Article 2 would be constitutional only if it is read to require that a living norm be codified in a regional regulation that precedes the act, describes the prohibited conduct with sufficient precision, and has passed a human rights screening. This reading turns the first three control layers into constitutional requirements and leaves the details of the fourth layer to the legislature and the government (Hiariej & Santoso, 2025; Tim Perumus UU KUHP, 2023).

The theoretical implication goes beyond Indonesia. Many post-colonial states face the same choice between a codified criminal law inherited from Europe and customary orders that remain socially effective. The Indonesian case shows that recognising living law in a criminal code does not resolve that choice. It relocates the problem into the procedures by which the state selects, verifies, and publishes customary norms. A risk-based approach makes those procedures visible and testable. In this sense, controlled legal pluralism is a form of weak legal pluralism that is honest about its limits: it protects the defendant's claim to legality where the state punishes, and it leaves room for *adat* to remain living law where the state does not.

4. Conclusion

This article finds that the law that lives in society has moved, in Indonesian criminal law, from a broad sociological concept to a narrow statutory category. Article 2 of the National Criminal Code recognises that law, but Article 597, Law 1/2026, and GR 55/2025 have narrowed the recognition to adat criminal norms codified in regional regulations and verified by the Minister of Law. The arrangement generates six clusters of risk, namely erosion of legality, legal uncertainty, regional disparity, subjectivity in identifying living norms, conflict with human rights, and overlap between adat and national offences, all of which arise at the point where a social norm acquires the coercive force of the state. GR 55/2025 reduces the risks to legality and certainty through codification and caps the sanction at the value of a category II fine. It leaves residual risks in fair notice for non-members, the politicisation of regional law-making, a thin human rights screening, overlap with sectoral statutes, and the absence of a methodological standard for identifying living norms. The Ministry of Law should therefore issue a methodological guideline for adat research and involve the national human rights commissions in verification, regional governments and legislatures should draft adat offences with the precision required by *lex certa*, the Supreme Court should guide judges on confirming adat settlements and preventing double punishment, and the Constitutional Court could declare Article 2 conditionally constitutional on the requirements of prior codification, precision, and human rights screening. These measures constitute controlled legal pluralism, a model that protects the legality principle where the state punishes while leaving restorative

adat practice outside codification, in line with the Pancasila commitment to both legal certainty and social justice. Further research should test the four control layers empirically in regions that have enacted regional regulations on customary offences under GR 55/2025.

References

Journals

Arifin, Khofifah Karalita, and Helena Primadianti, 2023, "Reviewing the Implications of the Living Law as an Expansion of the Legality Principle in the Criminal Code", *Sriwijaya Crimen and Legal Studies*, Vol. 1, No. 1, pp. 44–55, https://doi.org/10.28946/scls.v1i1.2732.

Bedner, Adriaan, and Stijn van Huis, 2008, "The Return of the Native in Indonesian Law: Indigenous Communities in Indonesian Legislation", *Bijdragen tot de Taal-, Land- en Volkenkunde*, Vol. 164, No. 2/3, pp. 165–193, https://doi.org/10.1163/22134379-90003655.

Black, Julia, 2005, "The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom", *Public Law*, pp. 512–548.

Black, Julia, and Robert Baldwin, 2010, "Really Responsive Risk-Based Regulation", *Law & Policy*, Vol. 32, No. 2, pp. 181–213, https://doi.org/10.1111/j.1467-9930.2010.00318.x.

Fathurokhman, Ferry, et al., 2026, "The Legality of the Living Law in the New Indonesian Penal Code", *Lex Scientia Law Review*, Vol. 10, No. 1, pp. 39–66, https://doi.org/10.15294/lslr.v10i1.29908.

Griffiths, John, 1986, "What is Legal Pluralism?", *Journal of Legal Pluralism and Unofficial Law*, Vol. 18, No. 24, pp. 1–55, https://doi.org/10.1080/07329113.1986.10756387.

Hardinanto, Aris, et al., 2024, "Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila", *Journal of Law and Legal Reform*, Vol. 5, No. 3, pp. 1029–1066, https://doi.org/10.15294/jllr.v5i3.13923.

Heliany, Ina, Widowati, and Muhenri Sihotang, 2023, "The Pluralism of Indonesian Criminal Law: Implications and Orientations in the Post-New Criminal Code", *SASI*, Vol. 29, No. 3, pp. 514–523, https://doi.org/10.47268/sasi.v29i3.1494.

Hermanto, Bagus, et al., 2025, "Questioning the Role of Adat Criminal Law in Indonesia's Criminal Law Reform: A KUHP Nasional Perspective", *Sriwijaya Crimen and Legal Studies*, Vol. 3, No. 1, pp. 25–45.

Merry, Sally Engle, 1988, "Legal Pluralism", *Law & Society Review*, Vol. 22, No. 5, pp. 869–896, https://doi.org/10.2307/3053638.

Moore, Sally Falk, 1973, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", *Law & Society Review*, Vol. 7, No. 4, pp. 719–746, https://doi.org/10.2307/3052967.

Niko, Nikodemus, et al., 2026, "The Living Law in Indonesia's New Criminal Code: Legal Pluralism, Indigenous Autonomy, and the Risk of State Co-Optation", *Masalah-Masalah Hukum*, Vol. 55, No. 1, pp. 231–257, https://doi.org/10.14710/mmh.55.1.2026.231-257.

Putri, Nella Sumika, 2021, "Memikirkan Kembali Unsur 'Hukum yang Hidup dalam Masyarakat' dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas", *Indonesia Criminal Law Review*, Vol. 1, No. 1, Article 5, https://scholarhub.ui.ac.id/iclr/vol1/iss1/5.

Selajar, Sophian Yahya, and Aroma Elmina Martha, 2023, "Indonesian Criminal Code, Living Law and Control in Law Enforcement in Indonesia", *SASI*, Vol. 29, No. 4, pp. 705–716, https://doi.org/10.47268/sasi.v29i4.1697.

Sueni, Annisa Sabilla, et al., 2025, "Living Law and Hybrid Justice: The Integration of Customary Criminal Law in Indonesia's 2023 National Criminal Code", *Jurnal Hukum Progresif*, Vol. 13, No. 2, pp. 253–284, https://doi.org/10.14710/jhp.13.2.253-284.

Tirtakusuma, Andreas Eno, 2026, "The Legal and Regulatory Framework of Adat Courts as an Alternative Dispute Resolution in Indonesia", *Jurnal Pembaharuan Hukum*, Vol. 13, No. 2, pp. 518–532, https://doi.org/10.26532/jph.v13i2.50917.

Utama, Tody Sasmitha Jiwa, 2021, "Between Adat Law and Living Law: An Illusion of Customary Law Incorporation into Indonesia Penal System", *Journal of Legal Pluralism and Unofficial Law*, Vol. 53, No. 2, pp. 269–289, https://doi.org/10.1080/07329113.2021.1945222.

Widjajanto, Agus, I Gusti Putu Astawa, and M. Rulyandi, 2025, "Decolonising Restorative Justice in Indonesia: A Comparative Study across Customary Law Traditions", *Legality: Jurnal Ilmiah Hukum*, Vol. 33, No. 2, pp. 470–492, https://doi.org/10.22219/ljih.v33i2.40481.

Books

Arief, Barda Nawawi, 2008, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, Kencana, Jakarta.

Ashworth, Andrew, and Jeremy Horder, 2013, *Principles of Criminal Law*, 7th ed., Oxford University Press, Oxford.

Ehrlich, Eugen, 1936, *Fundamental Principles of the Sociology of Law*, translated by Walter L. Moll, Harvard University Press, Cambridge, MA.

Hiariej, Eddy O.S., 2016, *Prinsip-Prinsip Hukum Pidana*, revised ed., Cahaya Atma Pustaka, Yogyakarta.

Hiariej, Edward Omar Sharif, and Topo Santoso, 2025, *Anotasi KUHP Nasional*, Rajawali Pers, Jakarta.

Husak, Douglas, 2008, *Overcriminalization: The Limits of the Criminal Law*, Oxford University Press, New York.

Tim Perumus UU KUHP, 2023, *Modul Pelatihan Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana*, Direktorat Jenderal Peraturan Perundang-undangan, Kementerian Hukum dan Hak Asasi Manusia, Jakarta.

Laws and Regulations

Emergency Law Number 1 of 1951 on Interim Measures to Organise the Unity of Composition, Powers, and Procedures of Civil Courts.

Government Regulation Number 55 of 2025 on the Procedures and Criteria for Determining the Law that Lives in Society.

Law Number 1 of 2023 on the Criminal Code.

Law Number 1 of 2026 on Criminal Adjustment.

The 1945 Constitution of the Republic of Indonesia.

Internet Sources

"MK Gelar Sidang Perdana Uji Pasal 2 KUHP tentang Living Law", *Literasi Hukum*, 2 September 2026, https://literasihukum.com/berita/mk-uji-parameter-dan-ruang-lingkup-living-law-dalam-kuhp-w5wgjx, accessed 6 October 2026.

"Uji Hukum yang Hidup dalam Masyarakat di KUHP Dipersempit", *Literasi Hukum*, 26 August 2026, https://literasihukum.com/berita/uji-hukum-yang-hidup-dalam-masyarakat-di-kuhp-dipersempit-jd55tr, accessed 6 October 2026.