

Living Law in Society as a Legal Consideration in the Settlement of Disputes Between Customary Legal Communities in Indonesia

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ABSTRACT

This study aims to analyze the position and urgency of living law in the Indonesian judicial system, particularly in resolving cases involving Indigenous Law Communities (MHA). The method used is normative legal research with a conceptual approach and literature study. The results of the study indicate that the recognition of customary law in the Indonesian legal system has a strong constitutional, juridical, and philosophical basis, as stated in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. However, in practice, the enforcement and recognition of customary law still face various challenges. Therefore, strengthening living law as a consideration for judges is very urgent. This not only realizes substantive justice for indigenous law communities but also functions as a means of more effective, accommodating, and sustainable conflict resolution. This strengthening can be done through reinterpretation of positive law by judges, increasing the capacity of judges in understanding legal pluralism, and using customary law as a basis for juridical considerations in decisions.

Keywords: Living law; Customary law; Judge's considerations

INTRODUCTION

Indonesia is a country with a vast diversity of laws and cultures. In various regions, indigenous communities still maintain a set of social norms that have been passed down through generations to govern their lives. These norms are referred to as living law, or law that lives within society, that is, law formed from customs, cultural values, and everyday social practices. The concept of living law was first popularized by Eugen Ehrlich, who stated that the primary source of legal development lies within society, not solely in statutory texts. This idea is relevant to the Indonesian context because customary law still functions as an ethical guideline and dispute resolution mechanism within indigenous communities.¹

In judicial practice, tensions often arise between uniform state law and particularistic customary law. This is reflected in customary land disputes, where formal national agrarian law sometimes ignores the values of indigenous communities. Juridical research reveals that disputes over customary rights are often difficult to substantively accommodate

¹ W.M. Herry Susilowati. Kritik Terhadap Aliran Sociological Jurisprudence Eugen Ehrlich. *Perspektif*. 2000; 5(1):26-37. DOI: <https://doi.org/10.30742/perspektif.v5i1.230>

under state law.² Sociological studies also show that customary social norms in indigenous communities are not in line with formal legal structures, so that solutions that only use positive law often feel unfair in the eyes of indigenous communities.³

Meanwhile, in the criminal realm, the 2023 Criminal Code attempts to recognize living law, allowing the use of customary obligations as additional sanctions, but this has caused controversy because not all customary norms are equal and can be legally verified.⁴ The Supreme Court recognizes the need for national guidelines on the identification of indigenous legal communities, a mechanism for compiling a list of customary norms, and how to assess their applicability in specific cases. This proposal is intended to provide judges with a uniform basis for assessing customary norms as legal considerations.⁵

Furthermore, state recognition of living law also has social and cultural implications. Strategic studies show that integrating customary norms into national law can strengthen social stability, especially for communities whose values are still alive and practiced. However, there is a risk of conflict between certain customary norms and human rights principles, particularly

regarding gender, social status, or specific customary sanctions. Therefore, the integration of living law requires a cautious approach to avoid neglecting the protection of the fundamental rights of indigenous peoples.⁶

Given the importance of living law as a bridge between customary norms and the formal justice system, this study is designed to explore in depth how living law within a community is taken into account by the courts in resolving customary law cases. This research is expected to provide policy recommendations to strengthen the interaction between customary law and the state legal system, while ensuring the fair and contextual protection of indigenous peoples' rights.

METHODS

This research uses a normative juridical method with several approaches as follows:

1. Statute Approach, this research analyzes the laws and regulations that form the basis for the recognition and application of customary law.
2. Conceptual Approach, this approach is used to examine basic concepts such as living law, legal pluralism, the principle of material legality, and customary law theories. Academic literature is used to strengthen understanding of the relationship between customary law and the state legal system.
3. Case Approach, this research examines several court decisions that use or reject customary law considerations in resolving cases. This analysis aims to determine how judges apply customary values in judicial practice.
4. Historical and Sociological Approach (Historical & Socio-Legal Approach), The historical approach is used to trace the development of customary law within the Indonesian legal system,

² Umar, U., Hadi, T., & Hanafi, A. Analisis Yuridis Terhadap Sengketa Tanah Adat dalam Perspektif Hukum Agraria Nasional. *Legal Note*. 2025; 1(2):53–58. DOI:

<https://ejournal.kalibra.or.id/index.php/legalnote/article/view/107/102>

³ Aini Rahma Ramadhani, Q., Kamilah, A., Mulyana, A., & Yulianah, Y. Harmonisasi Hukum Negara dan Norma Adat: Analisis Sosiologis atas Penyelesaian Sengketa Tanah Adat di Indonesia. *Journal of Contemporary Law Studies*. 2025; 2(3):209-222. DOI: <https://doi.org/10.47134/lawstudies.v2i3.3363>

⁴ Andini, O. G. Membedah Living Law Dalam KuHP 2023 Dari Perspektif Pembedaan Dan Jenis Sanksi. *Jurnal Yuridis*. 2025; 11(2):349-373. DOI: <https://ejournal.upnvj.ac.id/Yuridis/article/view/9348/3654>

⁵ Mahkamah Agung RI. (2023). Naskah Akademik dan Usulan RPP tentang Hukum yang Hidup dalam Masyarakat. <https://marinews.mahkamahagung.go.id/berita/mahkamah-agung-ri-usulkan-berbagai-ketentuan-penting-0hx>

⁶ Luthfie Sulistiawan. Pengaruh Legalisasi Hukum Yang Hidup Dalam Masyarakat Pada UU KUHP Terhadap Stabilitas Geopolitik Indonesia. *Jurnal Lemhannas RI*. 2023; 11(3):178-186. DOI: <https://doi.org/10.55960/jlri.v11i3.477>

while the sociological approach is used to understand the applicability of living law in the social practices of indigenous communities.

Data Analysis Techniques

All data were analyzed qualitatively, namely by interpreting and connecting legal materials to discover principles, patterns, and meanings relevant to this research. The analysis was conducted descriptively and analytically to outline the relationship between living law and its application in resolving indigenous community disputes.

DISCUSSION

Legal Basis for Recognition of Customary Law/Living Law in the Indonesian Judicial System

Customary law in Indonesia holds an important and strategic position within the national legal system. Recognition of customary law as "living law" or law that exists within society can be found in various regulations, both at the constitutional and statutory levels. Article 18B paragraph (2) of the 1945 Constitution states that the state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with societal developments. This shows that customary law is not only recognized but also protected by the constitution.⁷ This article is the highest basis for the legitimacy of customary law and the state's obligation to protect customary law communities.

Legally, the Civil Code (*Burgerlijk Wetboek*) in Article 1349 paragraph (2) recognizes the validity of unwritten law. Meanwhile, the General Explanation number III (1) of Law Number 1 of 2023 concerning the Criminal Code (New Criminal Code) explicitly states that legal regulations that exist in society (living law) can be considered by judges in deciding

⁷ Retno Kus Setyowati. Pengakuan Negara Terhadap Masyarakat Hukum Adat, *Binamulia Hukum*. 2023; 12 (1):131-142. DOI: <https://doi.org/10.37893/jbh.v12i1.601>

cases. This is a major breakthrough that accommodates legal pluralism. In Law Number 48 of 2009 concerning Judicial Power, Article 5 paragraph (1) states that judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that exist in society. The statements "explore" and "understand" implicitly and explicitly refer to living law.

Furthermore, the Constitutional Court (MK) has affirmed the position of MHA and their rights in various decisions, such as Decision Number 35/PUU-X/2012 concerning Customary Forests. These Constitutional Court decisions strengthen the position of customary law as law recognized by the state and provide guidance for judges at all levels to consider.⁸

A relevant case study is the land dispute resolution in Wae Sano Village, East Nusa Tenggara, where the local indigenous community used customary law to resolve a conflict with a plantation company. This process took into account not only positive law but also prevailing local norms and values.⁹ Thus, the recognition of customary law as living law is not only a theory, but also a real practice in solving problems in society.

However, challenges remain, particularly in terms of harmonizing customary law and national law. Several cases demonstrate overlap between customary law and positive law, which often leads to conflict. Therefore, further efforts are needed to strengthen the position of customary law in the judicial system so that it can function synergistically with national law.¹⁰

⁸ The Recognition of Customary Rights by Indonesian Constitutional Court. *Academic Journal of Interdisciplinary Studies*. 2021; 10(3):308. DOI: <https://doi.org/10.36941/ajis-2021-0086>

⁹ Sulistio, Rian; Nurjaya, I Nyoman; MADJID, Abdul. The Living Law in Judicial Decisions: Formulation and Implications of the National Criminal Code. *Jurnal Dinamika Hukum*. 2025; 25(1):70-90. DOI: <https://doi.org/10.20884/1.jdh.2025.25.1.15469>

¹⁰ Dina Rahmita, Muthi'ah Muthi'ah, Iqbal Hardiansyah, Wahyu Setiawan Rambe, &

The Urgency of Strengthening Living Law as a Consideration for Judges

Strengthening living law in the Indonesian judicial system is crucial, particularly in the context of resolving cases involving indigenous peoples¹¹. Judges' consideration of customary law in their decisions not only reflects social justice but also respects long-standing local wisdom. In many cases, indigenous peoples have dispute resolution methods that align more closely with the values and norms prevailing in their communities.¹²

In this context, strengthening living law will help judges understand the social and cultural context behind a dispute,¹³ and has strategic urgency in law enforcement in Indonesia.

First, Realizing Substantive Justice.

Positive law is often general and abstract, so its rigid application can lead to injustice for indigenous peoples (MHA). By considering living law, judges can decide cases that are not only formally correct (according to the law) but also contextually just (according to the community's sense of justice). This aligns with the purpose of law, which is to achieve social welfare and peace.

Muhammad Alfarizi Lubis. Analisis Komparatif Sistem Hukum Adat dan Hukum Positif dalam Harmonisasi Kebijakan Publik di Indonesia. *Presidensial: Jurnal Hukum, Administrasi Negara, Dan Kebijakan Publik*. 2025; 2(1):107–120. DOI: <https://doi.org/10.62383/presidensial.v2i1.456>

¹¹ Dedihasriadi, L. O. Penguatan Eksistensi Hukum Adat Dalam Ketatanegaraan Di Indonesia. *JURNAL RECHTENS*. 2023; 12(1):49-66. DOI: <https://doi.org/10.56013/rechtens.v12i1.1965>

¹² Bismar Siregar. Living Law Dan Dinamika Sosial: Integrasi Nilai-Nilai Kearifan Lokal Ke Dalam Hukum Nasional: *Lex Lectio: Jurnal Kajian Hukum*. 2025; 4(1):14-28. DOI: <https://jurnalgrahakirana.ac.id/index.php/JLL/article/view/103/0>

¹³ Ayu Denis Christinawati. Living Law Dalam Kuhp Indonesia Perspektif Hukum Adat Dan Dampaknya Terhadap Penegakan Hukum. *Civilia: Jurnal Kajian Hukum Dan Pendidikan Kewarganegaraan*. 2024; 3(1):8-97. DOI: <http://jurnal.anfa.co.id/index.php/civilia/article/view/1689/1558>

Second, Effective Conflict Resolution and Restoration of Social Harmony.

Customary law generally aims to restore social balance and harmony, not simply punish perpetrators. Its resolution mechanisms, such as deliberation and restorative compensation, are often more effective in resolving disputes at the grassroots level and preventing recurrence of conflict than modern judicial mechanisms that tend to be adversarial.

Third, Protecting the Existence and Cultural Identity of Indigenous Peoples (MHA).

Ignoring customary law in the judicial process is a form of marginalization of local knowledge systems and values. By recognizing and considering living law, the state is essentially helping to preserve local wisdom and the cultural identity of indigenous peoples (MHA) from erosion due to globalization and legal homogenization.

Fourth, Filling Legal Vacuums (Rechtsvacuum).

Not all legal issues in society have been regulated in detail in positive law. In such situations, living law serves as a legal source that can fill this vacuum, so that judges cannot refuse to rule on cases on the grounds that the law does not exist.

An example of this urgency is the case in Bali, where local customary law is ignored in formal legal processes. As a result, many disputes remain unresolved, fueling dissatisfaction among indigenous communities. Strengthening living law as a consideration for judges can prevent similar cases from recurring and create more equitable justice.¹⁴

By strengthening living law, it is hoped that judges will be more sensitive to local values and more judicious in rendering decisions.

¹⁴ M. O. C. Wiguna. “Mempertimbangkan Aspek-Aspek Non-Legal Formal Dalam Penyelesaian Sengketa Tanah Adat Di Bali,” *Masalah-Masalah Hukum*. 2024; 53(3):249-260. DOI: <https://doi.org/10.14710/mmh.53.3.2024.249-260>

This will not only increase public trust in the judicial system but also strengthen the position of customary law within the context of national law.

CONCLUSION

The recognition of customary law, or living law, in the Indonesian judicial system has a strong legal basis, spanning the constitution, laws, and jurisprudence. However, normative recognition alone is not enough. The urgency of strengthening living law as a judicial consideration lies in its capacity to realize substantive justice, provide effective and restorative conflict resolution, and protect the cultural identity of Indigenous Peoples. To achieve this, the commitment and capacity of law enforcement officials, particularly judges, to wisely explore, understand, and integrate the values of living law into their decisions, while still adhering to the principles of the rule of law and universal human rights.

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