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Legal Politics Behind the Arrangement of Living Law Provisions in Law Number 1 of 2023 Concerning the Criminal Code

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ABSTRACT

Living law, based on traditional community values, is recognized by the state in Article 18B (2) of the 1945 Constitution and further regulated in Law No. 1 of 2023 (KUHP), effective in 2026. This provides a legal basis for its application through government and regional regulations. This study explores the legal politics behind the inclusion of living law in KUHP 2023 and the criteria for its adoption into local regulations. It focuses on the diverse customary laws in West Sumatra, particularly in Minangkabau communities. The main questions are: (1) What is the political basis for recognizing living law in KUHP 2023? and (2) What forms of living law still exist in West Sumatra? The research uses normative legal methods, supported by interviews and fieldwork in areas including Tanah Datar, Solok, and Agam.

1. Introduction

Indonesia implements a legal system that constructed on and hold up into noble values contained in the Pancasila and UUD NRI 1945. Despite aforementioned condition, in its implementation, it respects the pluralistic existence and validity of western legal provisions, Islamic legal provisions, and customary legal provisions. The implementation of the national legal system, apart from referring to written rules (in the understanding of the concept of law state (*rechtsstaat*) *vide* Article 1 paragraph (3) of UUD NRI 1945), it also originates from regulatory rules contained in unwritten norms which are believed in and recognized by society. The concept of law that lives in society refers to a series of norms related to laws that are still valid or developing in the social order in a region or known as customary law.[1] Recognition of living laws in society is important in the context of national criminal law reform. As expressed by Jufianty Trisna Putri, living law is a manifestation of indigenous communities in the national criminal law system, which emphasizes the importance of integrating local values into positive law.[2] Therefore, recognition of living law is important because it provides a framework for local justice based on traditional values. However, it should be noted that the integration of customary norms into positive law will be followed by the emergence of problems and challenges, especially in relation to the principles of legality and legal certainty, if the normative regulations are not formulated clearly.

The provisions of national criminal law are generally derived from the provisions contained in the

[1] Ade Irawan and Margo Hadi Pura, "Analisis Yuridis Ketentuan Hukum Yang Hidup Dalam Masyarakat Pada Kitab Undang-Undang Hukum Pidana Indonesia," *Ajudikasi : Jurnal Ilmu Hukum* 7, no. 1 (2023): 67, https://doi.org/10.30656/ajudikasi.v7i1.6453.

[2] Jufianty Trisna Putri, "Eksistensi Living Law Sebagai Perwujudan Masyarakat Adat Dalam Pembaruan Sistem Hukum Pidana Nasional," *Eksekusi : Jurnal Ilmu Hukum Dan Administrasi Negara* 2, no. 2 (2024): 94, https://doi.org/10.55606/eksekusi.v2i2.1080.

Criminal Code (KUHP) (which was adapted from the *Wet-book van Strafrecht* (1915) which practiced in the Netherlands) then after entering the era of independence its validity was maintained through adoption into the national legal system through Law Number 1 of 1946 concerning Criminal Law Regulations. Since the era of independence, the government has made various efforts to establish an effort to reform the Criminal Code, with the aim of replacing the Criminal Code inherited from the Dutch colonial era which is considered no longer relevant. Criminal law reform is a reform of the basic ideas or principles that serve as its foundation and guidelines.[3] Criminal law reform can be understood as an effort to change western values of individualism, liberalism, and individual rights to values that are befitting the socio-culture of the Indonesian nation.[4] Finally, the efforts to reform the Criminal Code reached its peak with the enactment of Law Number 1 of 2023 concerning the Criminal Code (KUHP 2023) on January 2nd, 2023, and will come into effect after a 3-year socialization period, precisely in January 2026.[5] As explained by Ahmad Gelora Mahardika, this reform aims to create a criminal law system that is more aligned with the values of the Indonesian nation and the development of society. The government stated that KUHP 2023 was drafted as an adjustment to national legal policies and the dynamics of community life that upholds human rights.[6]

One important aspect of KUHP 2023 is the recognition of living laws in society. In Book I, Article 2 paragraph (1) of KUHP 2023, it is stated that the application of criminal provisions does not reduce the validity of existing laws in society. Furthermore, the Minister of Law and Human Rights explained that what he meant was local criminal law: customary norms that "determine that someone deserves to be punished" still apply even if the act is not regulated by positive law.[7] Paragraph (2) of Article 2 also confirms that living law applies as long as it does not conflict with fundamental values and morals that reflected on Pancasila, UUD NRI 1945, human rights and general principles of law. In addition, KUHP 2023 includes a special chapter related to crimes based on living law. Article 597 of Book II Chapter XXXIV states: "*Any person who commits an act which according to the law prevailing in society is declared as a prohibited act, shall be subject to criminal penalties*." KUHP 2023, specifically in Article 66 paragraph (1) letter f, also includes specific customary sanctions in the form of fulfilling customary obligations as additional punishment which reflects the sociological-jurisprudence approach in formulating norms by policy makers.

The arrangement of living law's provisions in KUHP 2023 cannot be separated from the legal political approach (legal politics/legal policy). Legal politics is the process by which the state through authorized power bodies or officials, issues policies, decides which laws need to be updated, amended, or preserve, and regulates laws related to the state and government administration.[8] According to Bagir Manan, the scope of legal politics includes two main aspects:

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3 Tongat et al., "The Living Law in the National Criminal Law Reform," *Jurnal Konstitusi* 17, no. 1 (2020): 158, https://doi.org/10.31078/jk1717.

4 Barda Nawawi Arief, "Beberapa Aspek Pengembangan Ilmu Hukum Pidana," Inaugural Speech of Professor at the Faculty of Law, Diponegoro University, June 25th, 1994, p. 7., as cited by Hanafi Amrani, *Politik Pembaruan Hukum Pidana* (Yogyakarta: UII Press, 2019), 14.

5 "RUU KUHP Disahkan, Bagaimana Masyarakat Hukum Adat?," KMMH FKT UGM, 2022, https://kmmh.fkt.ugm.ac.id/2022/12/09/ruu-kuhp-disahkan-bagaimana-masyarakat-hukum-adat/#:~:text=Rancangan Undang,Kegiatan.

6 "UU 1/2023: Kitab Undang-Undang Hukum Pidana (KUHP)," JDIH Maritim, 2023, https://jdih.maritim.go.id/uu-12023-kitab-undang-undang-hukum-pidana-kuhp.

7 "Menkumham Sebut KUHP Baru Atur Hukum Yang Hidup Di Masyarakat Tetap Berlaku," Kompas.id, 2023, https://nasional.kompas.com/read/2023/07/26/05180001/menkumham-sebut-kuhp-baru-atur-hukum-yang-hidup-di-masyarakat-tetap-berlaku.

8 Farras Audia Raihany, Aria Zurnetti, and Edita Elda, "Legal Policy of the Establishment of Deputy Attorney General for Military Affairs in the Structure of the Attorney General's Office of the Republic of Indonesia," *Nagari Law Review* 7, no. 3 (2024): 581, https://doi.org/10.25077/nalrev.v.7.i.3.p.578-591.2024.

law making policy and law enforcement policy.[9] Legal policy plays a vital role in the legislative process. This is because it is necessary to lay a fundamental foundation for the formulation and design of legal principles. Both are important because laws and regulations and their design constitute the bridge between legal policy and legal implementation.[10]

In the context of KUHP 2023, the discussion of legal politics leads to the subject of criminal law policy, defined as "a rational effort to combat crime by using criminal law".[11] As part of the study of legal politics in general, criminal law policy also generally includes both laws making policy and law enforcement policy in the field of criminal law. In KUHP 2023, law making policy is reflected in legislative efforts that accommodate the arrangement of customary law provisions, while law enforcement policy is related to the implementation and enforcement of the normative legal provision. As explained by Umi Rozah and Aldi Yudistira, this approach is important to ensure that living law can be effectively integrated into the national legal system.[12] In short, the decision to formulating and arranging living laws provisions into KUHP 2023 can be seen as a realization of law making policy, an initiative that reflect positive values, including strengthening the values of Indonesian society, also aiming for encouraging law enforcement officers to prioritize legal justice and as a balance to the principle of legality.[13] Thus, it reflects the essence of criminal law policy which is to direct or create best criminal legislation for the upcoming future.[14]

Furthermore, in the discussion regarding law enforcement policy, in line with the provisions of Article 2 paragraph (3) of KUHP 2023, living laws provisions require support from implementing regulations, such as government regulations and regional regulations, to identify and determine what factors must be met by a living law provision in relation to determined which are classified as acts that violate living law provisions, and to ensure effective implementation. As expressed by Nella Sumika Putri, regional regulations play a key role in the concretization of customary law, but there are still challenges in standardizing the content of these regulations. [15]The need for further regulation regarding criminal acts against living laws in society cannot be separated from the consideration of the existence of 'differences' or 'characteristics' of each living law (customary law), so that research is needed to be carried out in order to be able to collect customary laws that still exist and are respected by society in order to facilitate the legislative stage by the regional government in the future. Thus, from a legal political perspective, the next urgency is to ensure the accommodation of additional legislative instruments to support the law enforcement process especially in the implementation of living law provisions in the future.

Based on the legal problem described above, this study aims to identify the key considerations policymakers take into account when incorporating living law provisions into the arrangement of KUHP 2023. It also seeks to understand the specific factors a living law provision must meet to be

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9 Bagir Manan, *Hukum dan Politik Indonesia; Tinjauan Analisis Dekrit Presiden dan Otonomi Daerah* (Jakarta: Pustaka Sinar Harapan, 199), 144., as cited by R L Sinaulan, "Politik Hukum Uu No 35 Tahun 2009 Tentang Nakotika Dalam Kaitannya Dengan Pergeseran Paradigma Pemidanaan Bagi Penguna /Pecandu Narkotika," *JRP (Jurnal Review Politik)* 06, no. 01 (2016): 53, http://jurnalfuf.uinsby.ac.id/index.php/JRP/article/view/1100.

10 Cecep Ibnu Ahmadi, Dian Ekawaty Ismail, and Andika W. Machmud, "The Politics of Criminal Law in Self-Defense in Indonesia: Regulatory And Enforcement Discourses," *Jurnal Legalitas* 16, no. 1 (2023): 6, https://doi.org/10.33756/jelta.v16i1.17079.

11 Maroni, *Pengantar Politik Hukum Pidana* (Lampung: CV. Anugerah Utama Raharja, 2016), 5.

12 Umi Rozah and Aldi Yudistira, "Penal Policy Analysis of The Formulation of Customary Law in The 2023 KUHP," *Indonesian Journal of Criminal Law Studies* 10, no. 1 (2025): 90, https://doi.org/https://doi.org/10.15294/ijcls.v10i1.19939.

13 Eddy O.S. Hiarie, "Pertentangan Asas Legalitas Formil dan Materiil dalam RUU KUHP," *Jurnal Penelitian Hukum* 2, no. 1 (2015): 30., as cited by *Op. Cit.*, Ade Irawan and Margo Hadi Pura, (2023): 70.

14 Edi Ribut Harwanto, *Politik Hukum Pidana* (Lampung: Sajwawai Publishing, 2019), 63.

15 Nella Sumika Putri, "The Material Content of Regional Regulations As the Concretization of the Living Legal System in Society (Adat Law) Based on Article 2 of the Indonesian Penal Code (Kuhp) 2023," *Jurnal Bina Mulia Hukum* 7, no. 2 (2023): 231–242, https://doi.org/10.23920/jbmh.v7i2.1101.

included in implementing regulations, such as regional laws. Given the diversity of living laws among Indonesia's indigenous communities, this study will focus on the perspective of the Minangkabau community. Based on that research background statement, this study will focus on examining 2 research questions: 1) How is the legal politics behind the arrangement of living law provision in KUHP 2023; and 2) What are the types of living law that still exist in West Sumatra?

2. Method

This study will be mainly carried out through a normative legal research approach which will examine the law conceptualized as norms or rules that apply in society and become a reference for each person's behavior.[16] As stated by E. Saefullah Wiradipradja, normative legal research focuses on studying positive legal norms as its main subject.[17] This study focuses on the formulation of living law provisions in the national criminal law reform product, namely KUHP 2023. This study attempts to explore legal politics in the formulation of living law regulatory norms, especially those found in Article 2 and Chapter XXXIV, specifically Article 597 of KUHP 2023. In addition, this study also attempts to explore information related to the types of acts that are classified as violations of living law, especially in the Minangkabau customary area, West Sumatra in providing an overview of the exploration of the substance of criminal acts against living law provisions that will be formulated in regional regulations. In general, normative research focuses on the extraction of secondary data in the form of legal materials, however this research will also be supported by the results of interviews conducted at the research location, namely several areas in Sumatra Barat, including the areas of Tanah Datar, Solok, Lima Puluh Kota, Pesisir, Agam, and Padang Pariaman. The integration of primary data, in the form of interview results in this normative research is expected to present perspectives, thoughts, and experiences that cannot be replaced by other sources.[18]

Lastly, data processing involves an editing stage which is preceded by an inventory stage of data acquisition so that can be used as a basis for analyzing the legal issues.[19] The processed data carried out by using a descriptive method, where the researcher will provide a description or explanation of the research subjects and objects based on the results of the research that has been carried out.[20] As the nature of normative research, the analysis will be supported by several approaches, namely 1) a legislative approach, making various legislative provisions the basis for viewing the direction of legal policy, especially towards the arrangement of living law in KUHP 2023; 2) conceptual approach, based on doctrines that have developed in legal science; and 3) a historical approach, examining the journey of recognition and formulation of living law in the national legal system.[21]

3. Result and Discussion

3.1. Legal politics behind the arrangement of living law in the KUHP 2023

The recognition of living law in society in KUHP 2023 is a real representation of a new paradigm in national legal development. Previously, the Indonesian criminal law system was dominated by the principle of formal legality as regulated in the Dutch colonial legacy of the *Wetboek van Strafrecht* (WvS), which emphasized that only written law could be used as a basis for criminal punishment. However, this approach is considered no longer adequate to meet the needs of Indonesia's socially

16 Wiwik Sri Widiarty, *Buku Ajar Metode Penelitian Hukum* (Yogyakarta: Publika Global Media, 2024), 24.

17 *Ibid.*, 27.

18 Tiyas Vika W., Achmad Irwan H., & Fajar Dian A, *Metodologi Penelitian Dan Penulisan Bidang Ilmu Hukum: Teori Dan Praktek* (Medan: PT Media Penerbit Indonesia, 2024), 37.

19 Muhammad Syarif et al., *Metode Penelitian Hukum* (Padang: GET PRESS INDONESIA, 2024), 51.

20 Sigit Sapto Nugroho, Anik Triharyani, & Farkhani, *Metode Riset Hukum* (Karanganyar: Oase Pustaka, 2020), 93.

21 *Ibid.*, 95–100.

and legally pluralistic society. Therefore, KUHP 2023 adopts a more contextual and progressive approach by recognizing the existence of living laws in society as a justification for criminalization, *vide* Article 2.[22] In the Academic Manuscript of KUHP 2023, it is explained that living law is a social norm that is consistently implemented by society and has a strong binding force. It is not merely a cultural heritage or a symbol of local identity, but rather a law that is actually applied in social practice and has an influence on the legal behavior of society.[23] This makes living law a legitimate source of material criminal law, inasmuch as it does not contradict with the values that reflected in Pancasila, UUD NRI 1945, and human rights. The incorporation of local norms serves as a remedy for the discrepancies between statutory law and communal law that have arisen under the colonial legal system.

In legal political terms, this step is part of criminal law policy, namely state policy through the legislative process in deciding the content, direction, and form of criminal law. According to Bagir Manan, legal policy consists of two forms: law making policy and law enforcement policy.[24] In the context of KUHP 2023, law making policy is seen from the recognition of customary law as part of positive criminal law which must then be formalized through government regulations and regional regulations. Meanwhile, law enforcement policy emphasizes the need to equip law enforcement officers with an understanding of customary norms so that there are no violations of the principles of justice and human rights protection.

The whole arrangement process of integrating the living law provisions into KUHP 2023 is also reflected in the treaties of the discussion RKUHP between the Government and the DPR. For instance, in the treatise of the DPR Commission III meeting on May 25th, 2022, it was agreed that recognition of living law must be accompanied by a formal codification and legitimacy mechanism through Regional Regulations and Government Regulations, to ensure legal certainty and prevent the misuse of local norms that are no longer relevant or potentially discriminatory.[25] This shows that even though there is a tendency to decentralize legislation, the central government still plays a role as a normative filter on the application of customary law in the criminal realm. Further discussion of the treatise at the meetings on July 6th, 2022, although not explicitly mentioned, the living law has gone through an intensive discussion stage in the Working Committee and has been declared as part of the draft that is already final in substance.[26] It was also emphasized during the hearing held on October 3rd, 2022, where some experts were brought upon in the meeting such Prof. Harkristuti, Prof. Pujiyono, and Prof. Topo, highlighted the need for the implementation of these customary norms to involve legal experts, academics, and customary leaders to ensure that the formalized norms are truly living laws, not cultural products that have died socially.[27] On the other hand, law enforcers are also encouraged to receive training on legal pluralism so that there are no mistakes in understanding the customary norms that will be enforced.

The development of discussions and positions on the living law provision in RKUHP, can be seen from this table below, which obtained by author from concluding some of the treatise of the meeting of Indonesian legislative body:

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22 Article 2 of Law Number 1 of 2023 Concerning Criminal Code (KUHP 2023).

23 DPR RI Expert Body, "Academic Manuscript of the Draft Criminal Code Bill" (2022).

24 Bagir Manan, *Politik Hukum Di Indonesia* (Yogyakarta: UII Press, 2005), 29.

25 "Treatise of the Meeting of Commission III of the Indonesian House of Representatives and the Government, May 25th," 2022.

26 "Treatise of the Meeting of Commission III of the Indonesian House of Representatives and the Government, July 6th," 2022.

27 "Treatise of the Meeting of Commission III of the Indonesian House of Representatives and the Government, October 3rd," 2022.

Table 1. The positions of the parliament house on the arrangement of living law

Period	Event / Meeting	Government Position	Civil Society / DPR Response	Remarks
18 Sep 2019	- Working Meeting with Menkumham.	Living law recognized as part of national law in the spirit of "decolonization of law".	Concerns about unclear boundaries and the application of customary law as living law	It is said that it is important that the new Criminal Code respects customary law but still requires vertical and horizontal synchronization and a constitutionality test at the Constitutional Court.
May–July 2022	- Working Meeting with Wamenkumham (25 May 2022) - Working Meeting with Menkumham (6 July 2022)	Strong support. Living law seen as part of decolonizing the criminal code and recognizing local customary law.	Mostly neutral or supportive. Discussions centered around the concept, not enforcement.	Emphasis on legal pluralism and national identity.
23 Aug 2022	RDPU with PDHI, ACTA, Dewan Pers	Living law is considered important for national criminal law that is contextual & non-colonial	Civil society concerns that living law is merely cosmetic if its application is not explained in the articles	PDHI proposes that the articles regulating living law have a clear separation of wrongdoing and criminal offences and be based on the principle of legality.
3 Oct 2022	Hearing with Wamenkumham	Government still supports but acknowledges public debate.	Members of DPR begin expressing concern over potential legal uncertainty.	Start of questioning the legality and application of unwritten norms.
9 Nov 2022	Working Meeting with Menkumham	Acknowledges need for clarification. Proposes adding explanations and limiting conditions in the RKUHP.	Some DPR members request stricter limits. Still split between supporters and skeptics.	First sign of compromise. Government opens to technical revisions.
14 Nov 2022	Public Hearing with Aliansi Reformasi KUHP	Reiterates support but silent on structural amendments.	Strong rejection from civil society. Warns of human rights	Accusations of "rubber articles" and potential for abuse arise.

			violations and vague legal foundations.	
24 Nov 2022	Working Meeting with Wamenkumham	Government proposes verification mechanism for customary law by regional authorities.	DPR debates content, but no clear agreement. PKS had yet to submit DIM.	Living law kept in the draft with some procedural adjustments.

The arrangement of living law provisions in KUHP 2023 is not merely a technocratic product but reflects a participatory and reflective legal-political process. This approach portrays how the state's organs response to Indonesia's legal pluralism and represents such efforts to set up a national criminal law system that is inclusive, just, and contextual. It signifies a deliberate departure from the colonial legacy of the previous KUHP, originally adopted from the Dutch Wet-boek van Strafrecht voor Nederlandsch-Indie, which is increasingly seen as incompatible with the realities of modern Indonesian society. The incorporation of living law in KUHP 2023 is thus part of the government's broader legal-political agenda to decolonize national law and affirm a legal identity rooted in Indonesia's local values and social realities, including customary law. The formal mechanism recognizing living law acts as a crucial bridge that connecting state law with customary norms, local wisdom with universal principles, and normative frameworks with the empirical realities of the communities they govern.

Philosophically, the regulation of living law in KUHP 2023 reflects the desire to expand the principle of legality in criminal law. Referring to the explanation section of Article 2 paragraph (1) and (2) of KUHP 2023, it is stated that the legal norms that exists in society can be the basis for criminal punishment, as long as it does not conflict with Pancasila, UUD NRI 1945, human rights, and general legal principles that are recognized internationally. This provision marks a shift from formal legality to material legality, where substantive justice becomes the primary concern. The formulators of KUHP 2023 acknowledged that customary law that is alive and adhered to by the community can and should be used as a source of national criminal law. This aligns with the constitutional mandates outlined in Article 18B, paragraph (2) of UUD NRI 1945, which affirms that the state acknowledges and honors indigenous communities and their ancestral rights, provided they are still active and adhere to the tenets of the Indonesian legal framework.[28]

From a sociological point of view, Indonesian society is known as a culturally and legally pluralistic society. Many indigenous communities still adhere to customary norms that regulate their lives, including dispute resolution and the imposition of social sanctions. In this context, recognition of living law is a form of recognition of local wisdom and the existence of indigenous communities who have lived side by side with the state legal system. The government also hopes that through this regulation, harmony will be created between national and local laws and provide a more authentic sense of justice for the community.[29] From juridical perspectives, the existence of living law has had a basis since the implementation of Emergency Law Number 1 of 1951 concerning Temporary Measures to Organize the Unity of the Powers and Procedure of Civil Courts. The stipulations in Article 5 paragraph (3) point b of this law allow an individual to face penalties according to prevailing laws within the community, despite lacking mention in the Criminal Code. In KUHP 2023,

[28] Aisha Nurul Fadilla, Defa An Nuur Kusumajakti, and Rangga Maulana Fauzi, "Analisis Pengaturan Living Law Dalam RUU KUHP Yang Dituangkan Pada Peraturan Daerah Ditinjau Berdasarkan Konstitusi," *Jurist-Diction* 7, no. 2 (2024): 225, https://doi.org/10.20473/jd.v7i2.56121.

[29] Ayu Denis Christinawati, "Living Law Dalam KUHP Indonesia Perspektif Hukum Adat Dan Dampaknya Terhadap Penegakan Hukum," *Civilia: Jurnal Kajian Hukum Dan Pendidikan Kewarganegaraan* 3, no. 1 (2024): 84–85.

this provision is formalized again in Article 2, Article 597, and several other articles that regulate the fulfillment of customary obligations as additional criminal penalties. However, in contrast to the previous Criminal Code, which was more open, KUHP 2023 mandates that customary criminal acts be codified in Regional Regulations to guarantee legal certainty. This, on the one hand, provides a clearer legal framework, but also raises concerns about rigidity and formality that could hamper the dynamic nature of customary law.[30]

As an inseparable part of the discussion of legal politics, the process of formulating living law provisions was also influenced by the political configuration during the period of formation and discussion of KUHP 2023. In the study of legal politics, a democratic political structure characterized by the populist and responsive nature of its legal outputs, alongside an authoritarian political structure marked by the conservative and elitist essence of its legal outputs.[31] Further explanation on the political configuration includes:

a. Democratic political structure is an organizational framework that allows for comprehensive citizen engagement to proactively shape overarching policies.

b. Authoritarian political structure is a governmental framework that enables the state to assume an engaged role and undertake nearly all initiatives in formulating state policies.[32]

The characteristics of legal products are divided into 2, namely:

a. Responsive/populist legal offerings are legal solutions that embody a sense of fairness and meet the aspirations of the community. In their creation, there is substantial and comprehensive engagement of social factions or individuals within society. The outcomes align with the needs of social factions or individuals in the community.

b. Conservative/orthodox/elitist legal products are legal frameworks whose contents align more with the social vision of the political elite, better represent the desires of the government, and are characterized as positivist-instrumentalist in nature, serving to execute state ideology and programs. In contrast to responsive law, orthodox law is more resistant to the aspirations of groups and individuals within society. During its formulation, the involvement and influence of the community are minimal.[33]

Furthermore, in relation to the political constellation and the positions of political party factions concerning the living law provisions, various opinions appeared during the RKUHP deliberation process. Based on information and document analysis of opinion polls and statements from several political party factions, the following table summarizes each faction's stance on the inclusion and formulation of living law in the RKUHP:[34]

Table 2. Parties standing on Living Law Provision

Faction	Position on Living Law
PPP	Fully supports the living law as recognition of local values rooted in Pancasila and human rights.

30 Aditya Weriansyah et al., *Mengurai Benang Kusut Hukum Yang Hidup Di Masyarakat Dalam KUHP* (PHBI and LBHM, 2024), 2–5.

31 Mahfud MD, *Politik Hukum Di Indonesia* (Jakarta: Rajawali Press, 2009), 22.

32 Ahmad Hunaeni Zulkarnaen, "Konfigurasi Politik Dan Karakter Hukum Dalam Perumusan Perjanjian Kerja Perorangan Dan Perjanjian Kerja Bersama," *Jurnal Hukum Mimbar Justitia* 4, no. 1 (2018): 106, https://doi.org/10.35194/jhmj.v4i1.369.

33 *Op. Cit.*, Mahfud MD, 2009, 31–32.

34 Data obtained through document studies conduct by the author from the valid online document obtained from informers.

Democrat	Supports with caution; emphasizes the need to avoid criminalization and calls for law enforcer education.
PDI-P	No explicit statement on living law; generally, supports the bill with notes on other issues (e.g., cohabitation).
PKS	Appreciates the respect for local wisdom through the legality principle in the KUHP.
Golkar	Agrees with the bill generally; provides no specific remarks on living law.
NasDem	Supports with a note that living law provisions must not violate the legality principle.
Gerindra	No specific comments on living law; agrees with the proposed bill.
PAN	Emphasizes that legality must ensure utility, fairness, and legal predictability.
PKB	Offers no particular opinion on living law; agrees with the bill in general.

The formulation of KUHP 2023, examined trough theory of political configuration is believed to be occurred under a democratic political configuration, marked by the active involvement of the executive, legislature (DPR), legal experts, and civil society. This inclusive process allowed for responsive lawmaking and gave birth into a responsive legal product. The discussion stage reflects open participation of law-making process, reflects social needs, allows public participation, adapts to technological developments, and aligns with human rights values. The process reflected Indonesia's evolving democratic legal culture and its effort to decolonize its legal system.

3.2. The types of living law that still exist in West Sumatra

The concept of living law pertains to unwritten regulations that thrive and evolve within a society, encompassing customary practices, spiritual principles, and societal conventions. Living law embodies the cultural and ethical standards of local populations that have been inherited through generations and are followed without formal enforcement by the government. According to Eugen Ehrlich, living law is the dominant law in social life and does not have to be recorded in legislation; it grows with society and comes from everyday social interactions.[35]

> "Living law is a legal provision that was born together with the birth of society and is implemented because of moral duty, not because of the coercive power of the state."[36]

The acknowledgment of living law is clearly articulated in Article 2 of the KUHP 2023, which indicates that an individual may be held accountable based on the law that prevails within society, even if their behavior is not explicitly addressed in the Criminal Code, provided that: a) The law remains effective in the jurisdiction where it is recognized; and b) It does not contradict Pancasila, UUD NRI 1945, human rights, and the fundamental legal principles acknowledged by the international community.[37]

> "Customary criminal acts must be regulated in Regional Regulations as a form of written law that accommodates customary law."[38]

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35 Syofyan Hadi, "HUKUM POSITIF DAN THE LIVING LAW (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," *DiH: Jurnal Ilmu Hukum* 5, no. 2 (2018): 260–261, https://doi.org/10.30996/dih.v0i0.1588.

36 *Ibid*., 260.

37 *Op. Cit*., Aditya Weriansyah et al., 2024, 3–5.

38 *Ibid*., 3.

Additionally, for an act to be punishable under living law, it must meet the following criteria:

1) It is an act that is considered to violate local customary norms that are still alive and obeyed by the community.
2) It is not regulated in the Criminal Code or other national laws.
3) It does not conflict with the fundamental principles of the rule of law, such as: Pancasila, UUD NRI 1945, Human Rights, Universal legal principles accepted by the international community.[39]

In this case, the punishment imposed is in the form of fulfilling customary obligations, and if not carried out, can be replaced with: a) Fine (category II, max. Rp. 10 million); b) social work; or c) supervision.[40]

The Minangkabau people stand for a traditional law community found in the region that is currently appointed as West Sumatra Province. The term 'Minangkabau' is considered approximate as it does not mirror the exact implication of 'West Sumatra.' This distinction arises because 'Minangkabau' carries a deeper socio-cultural significance, while 'West Sumatra' conveys geographic and administrative connotations.[41] The definition of Minangkabau is broader than the borders of the West Sumatra Province, namely to the north to Singkiling Air Bangis, bordering South Tapanuli Regency (North Sumatra Province), to the east to Taratak Air Hilir, bordering Inderagiri, to Sialang Balantak Basi, bordering Pelalawan, to the southeast to Sipisak Pisau Hanyuik, Durian Ditakuak Rajo, Tanjuang Simaludu, bordering Jambi, to the south to Mount Patah Sambilan, also bordering Jambi, and to the west with Lauik Nan Sadidieh (Indonesian Ocean). More concretely, in Tambo it is explained that the boundaries of the Minangkabau Realm include the areas and parts mentioned above, such as:

> *Dari riak nan badabua, sahiliran pasia nan panjang, gunuang malintang hilia, lalu ka batu basurek, sialang balantak basi, hinggo sipisak pisau hanyuik, durian ditakuak rajo, gunuang patah sambilan, sampai kalauik nan sadidieh.*[42]

The Minangkabau ethnic community in West Sumatra Province, which is known for its strong adherence to traditional and cultural teachings, has its own customary law which needs to be observed in enforcing customary criminal law. The Minangkabau natural customs that are adhered to and developed by the Minangkabau people have traditional teachings that have their own special characteristics, especially in the matrilineal nature (drawing on the mother's lineage) with the *matriachaat* kinship system (mother's descent) among the traditional community systems that exist in Indonesia and even the world in general adhere to the patrilineal system (drawing on the father's lineage) with the *patriachaat* kinship system (father's descent). This kinship system is a customary law that is still firmly upheld by the Minangkabau ethnic group in West Sumatra Province, even though they have spread out to all corners of the world, leaving their ancestral land and birthplace, namely the Minangkabau realm.[43]

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[39] Anisa Fitri Wibowo, Azriel Viero Sadam, and Muhammad Ramadavin, "Implikasi Pasal Living Law Dalam Undang-Undang Kitab Undang- Undang Hukum Pidana Terbaru Terhadap Kehidupan Masyarakat," *Selisik: Jurnal Hukum Dan Bisnis* 9, no. 1 (2023): 123, https://journal.univpancasila.ac.id/index.php/selisik/article/download/5222/2432.

[40] *Op. Cit.*, Aditya Weriansyah et al., 2024.

[41] Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam Dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung, 1984), 122.

[42] Muhammad Radjab, *Sistem Kekerabatan Di Minangkabau* (Padang: Centre for Minangkabau Studies, 1969), 201.

[43] Alam Minangkabau is a term referring to the territory or area/region of Minangkabau expressed in tambo with its boundaries, namely the central area of Minangkabau nature (Luhak Tanah Datar, Luhak Agam and Luhak Limo Puluah Koto) with their respective diaspora areas containing descendants of the Minangkabau ethnic group. Check Sumbar LKAAM, *Pelajaran Adat Minangkabau (Sejarah Dan Budaya)* (Padang: Trofic Offset Printing, 1990), 27.

In addition to the kinship system above, the Minangkabau indigenous community has customary laws that are adjusted to the matrilineal system and the religion they adhere to. The laws applied in society arise because the Minangkabau community from the luhak to the rantau is a community of customs and religion, moral and humane as expressed in the adat proverb, "*adat basandi syarak, syarak basandi kitabullah*".[44] Synchronization of customary law with religion (Islam) has long been applied by the Minangkabau community in West Sumatra after the Bukit Marapalam, Batusangkar agreement in the early 19th century. The consensus in the agreement is that customary law does not conflict with Islamic teachings or make changes according to the conditions of the customary community. The reception of Islamic law into customary law[45] did not experience significant turmoil because it was resolved wisely by customary and religious figures.[46]

It turns out that not all Minangkabau customary law has been accepted into national law, especially criminal law which can be applied to indigenous communities in law enforcement. In fact, Minangkabau is a country of law, but because the law only applies on ancestral land, "bundo kanduang" and only for the Minangkabau ethnic group, it is not codified. The applicable law is Minangkabau kinship law.[47] Minangkabau Customary Criminal Law can be accepted into national criminal law from customary crime cases in community life. For example, visiting at night at a widow's house is a disgraceful act.[48] Minangkabau customary (criminal) law recognizes the Law of Nan Duo Puluah, which is categorized into (1) the Law of Nan Salapan, and (2) the Law of Nan Duo Baleh. Within the Nan Salapan, various types of offenses are outlined, namely (1) tikam–bunuah, (2) upas–racun, (3) samun–sakar, (4) siar–bakar, (5) maliang – curi, (6) dago–dagi, (7) umbuak– umbai, and (8) sumbang–salah. The Nan Duo Baleh is divided into 2, namely the first 6 is regarding proofs of guilt, namely (1) bajajak bak bakiak, basuriah bak sipasin, (2) bajalan bagageh-gageh, pulang-pai basah-basah, (3) manjua bamurah-murah, (4) dibao pikek dibao langau (5) terbayang– tertabur, and (6) anggang lalu atah jatuah, anak rajo ditampa. In the second 6 is about indictment/accusations: (1) taikek-takabek, (2) tacentang-taretas, (3) terlalah- terkejar, (4) tambang ciak, (5) putuih tali, and (6) tatangkok tangan.

The Minangkabau Customary Criminal Law above becomes terra incognito or unknown criminal law in national criminal law, if it is not explored, discovered and developed to contribute to the renewal of criminal law. Customary Criminal Law that has grown and developed in West Sumatra Province is an embodiment of the spirit and values of the Minangkabau indigenous community. The Minangkabau people's vision of achieving a just and prosperous society is impossible to achieve without norms and laws to regulate it. However, the applicable Customary Criminal Law is an unwritten law which is different from the criminal law regulated in the Criminal Code. The Minangkabau Customary Criminal Law in the Nan Duo Puluah Law is the law of all rulers to maintain and secure the lives of their children, nephews and all members of society by upholding truth, justice, honesty and devotion to The Almighty God. For the Nan Duo Puluah Law to be applied to figure out the guilt of a person in a court of law, it is necessary to explore the criminal law that occurs in indigenous communities. The refinement of the formation of Customary Criminal Law

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44 This means that customs are based on religious (laws), religious (laws) are based on the Al-Qur'an.

45 At the beginning of the 19th century, orientalist thought discourse in the Dutch East Indies applied Islamic law. The courts apply Islamic law to Muslims. This period is known by traditional law experts as receptio in complexu. The figures are Solomon Keyzer and L.W.C van den Berg. Check Sayuti Thalib, *Receptio a Contrario Hubungan Hukum Adat Dan Hukum Islam* (Jakarta: Academia, 1980), 46.

46 Edison M.S Sungut and Nasrun Dt. Marajo, *Tambo Minangkabau Budaya Dan Hukum Adat Di Minangkabau* (Bukittinggi: Kristal Multimedia, 2010), 297.

47 Dt. B. Nurdin Yakub, *Hukum Kekerabatan Minangkabau, Jilid I* (Bukittinggi: Pusaka Indonesia, 1995), 13.

48 The behavior of civil servants (PNS) in Gunung Medan, Dhamasraya visiting a widow's house in the middle of the night is a violation of Customary Criminal Law with the sanction of being evicted by moving house outside the village and a fine of 50 sacks of cement. Check "Bertamu Tengah Malam, PNS Diamankan Didenda 50 Zak Semen," *Padang Ekspress*, May 24, 2012, 12.

requires the unanimity of the Nagari Customary Council (KAN) so that customary regulations are made to apply as positive law for the Minangkabau customary community.[49]

In the research agenda conducted through the Forum Group Discussion by the Criminal Department of the Faculty of Law, Andalas University to conduct research into villages or villages, there are many sources of law that live in society, one of which is in the Lima Puluh Kota area, precisely in Nagari Situjuah Batua, Situjuah Limo Nagari District, Lima Puluh Kota Regency, where long before the existence of the National Criminal Code was enforced, there were customary criminal provisions that became a form of law that lived in society. In general, these regulations have been obeyed with regulatory guidelines and based on the Nan Duo Puluah Law, each case resolution is resolved according to custom with customary thinking that matches the discussion by customary leaders, but based on the results of the research in question, there are several provisions for changing customs, one of which is regarding KAN.

Next are the villages in Tanah Datar Regency, in the Minangkabau natural area, their own laws are known and practiced, known as the Law of Nan Duopuluh. In the Plakat Panjang it was stated that the Dutch did not participate in trying civil and criminal cases which were handed over to the indigenous people themselves. The Nan Duopuluh is divided into two parts, namely Nan Salapan and the Nan Duobaleh. The Nan Duobaleh is also divided into nan dihilia and nan dimudiak. The Nan Salapan states criminal acts, and the Nan Duobaleh explains evidence and indictment of the action that violates the Nan Salapan.[50]

The systematics of the Nan Salapan, including:

Table 3. Nan Salapan Law; types of crime

1) Dago-dagi	Dago: creating chaos by spreading rumors Dagi: spreading slander that harms another person
2) Sumbang-salah	Sumbang: inappropriate or improper acts according to public perception Salah: committing adultery
3) Samun-saka	Samun: robbery involving murder Saka: robbery involving violence and physical abuse
4) Maliang-curi	Maliang: theft involving damage to the place where the item was stored Curi: theft or stealing someone else's belongings
5) Tikam-bunuh	Tikam: an act of injuring a person Bunuh: an act of taking someone's life using violence
6) Kicuah-kicang	Kicuah: fraud that causes loss to another person Kicang: forgery that causes harm to others
7) Upeh-racun	An act that causes someone to suffer illness after consuming food or drink that has been mixed with poison

[49] Suardi Mahyudin, *Dinamika Hukum Adat Minangkabau Dalam Yurisprudensi Mahkamah Agung* (Jakarta: Candi Cipta Paramuda, 2009), 226.

[50] Dt. Toeah, 1989, *Tambo Alam Minangkabau*, Bukittinggi: Penerbit Pustaka Indonesia, p. 116.

8) Sia-baka	Sia: the act of causing a fire that leads to someone else's property burning Baka: the act of intentionally burning someone's property until it's completely destroyed

The Law on Duo Baleh is divided into two parts, the first six are classified as "cemo", the second six are included as accusations. The systematics of the Nan Duobaleh, including:

Table 4. Nan Duo Baleh Law; the accusation & evidence

1) Tatu mbuak	The defendant must admit that they are the person who committed the act.
2) Tatando/ Tabukti	Tatando: The defendant's personal belongings were found at the scene. Tabukti: Evidence was found on the body or clothing.
3) Taikek/ Takabek	Taikek: The perpetrator was caught in the act. Takabek: The defendant was caught and could not escape from the scene.
4) Tercencang/ Tarageh	Tercencang: Tracks or traces were found as a result of the defendant's actions at the scene. Tarageh: Marks were found on the defendant's body caused by objects at the scene.
5) Tahambek/ Tapukua	Tahambek: The defendant could not escape from people surrounding them. Tapukua: The defendant was caught after being beaten by the pursuers.
6) Talalah/ Takaja	Talalah: The defendant was found in hiding after being tracked. Takaja: The suspect was caught during the chase.
7) Basuruik bak sipasan/ Bajajak bak bakiak	Footprints were found leading to the accused.
8) Anggang lalu/ Atah jatuah	Someone was found at the crime scene at the same time the act was committed.
9) Kecondongan mato urang banyak	Many people witnessed the event at the time it happened.
10) Bajura bamurah-murah	Someone sold goods at an extremely low price, raising suspicion that the goods were not theirs.
11) Bajalan bagageh gageh	The defendant was walking quickly; their facial expression showed fear.

12) Dibaok pikek, dibaok langau	Someone was pacing back and forth at a location without a clear reason, which aroused suspicion.

Based on the research, certain adat nan salapan provisions (Minangkabau customary criminal law) remain actively upheld, particularly offenses like sumbang salah and dago-dagi. In a 1998 case in Talago Gunung, Sawahlunto, a man named Jamalis was sanctioned by the local KAN for entering a woman's house who was not his wife, deemed a sumbang salah violation. Similarly, in Parambahan Batusangkar, a man who defied the ninik mamak's decision was barred from holding the datuk title. Another case in Mandaliko involved elopement where the family refused to report the offense, resulting in their exclusion from community ceremonies. These actions violated adat nan sarak and were punished by fines or symbolic restitution, such as ceremonial apologies (bali for men, tapak for women). Non-compliance could lead to social banishment. The local community strongly supports enforcing such sanctions to uphold moral order.

4. Conclusion

Based on the results of the discussion, it can be concluded that the regulation of living law in the 2023 Criminal Code is part of the national criminal law policy that reflects a democratic and responsive political configuration. Recognition of living laws in society, as stated in Article 2 and Article 597 of the 2023 Criminal Code, is a form of state recognition of legal pluralism and decolonization of the national criminal law system. Legally, living law is recognized as a basis for criminal punishment as long as it does not conflict with the fundamental values of a state based on law such as Pancasila, the 1945 Constitution, human rights, and general legal principles that are recognized internationally. However, so that this provision does not conflict with the principles of legality and legal certainty, the 2023 Criminal Code requires that customary criminal provisions must be codified in the form of Regional Regulations. This is a challenge considering the dynamic, unwritten nature of living law, which varies between communities. Therefore, the recognition of customary law as positive criminal law requires careful filtering, both sociologically, philosophically, and juridically. In the local context, research on the Minangkabau indigenous community in West Sumatra shows that living law is still alive and adhered to, especially in the form of customary criminal law such as sumbang-salah and dago-dagi, which are included in the Nan Salapan and Nan Duo Baleh legal provision. However, many of these norms yet unofficially documented, and thus risk not properly recognized within national legal systems.

To ensure that the implementation of living law in the 2023 Criminal Code is effective and fair, the central government needs to at once draft a Government Regulation that outlines the criteria and mechanisms for legitimate customary law as a basis for criminal punishment. The regional government together with the DPRD must also actively inventory customary laws that are still in force and compile them in Regional Regulations in a participatory manner. Law enforcement officers need to be provided with training on legal pluralism and cultural sensitivity, so that they do not make mistakes in interpreting or applying customary norms. Meanwhile, academics are encouraged to conduct in-depth and contextual research to document customary law scientifically and become the basis for policy. Indigenous communities and customary institutions also need to strengthen their laws through revitalization and active involvement in the legislative process, so that customary laws remain alive, relevant, and in line with the principles of justice and human rights.

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