

Real Justice, Real Impact with the Prosecutors in Action



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ABSTRACT

The prosecution service, as *dominus litis*, plays a pivotal role in ensuring the balance between the principle of legality and the pursuit of substantive justice within the criminal justice system. The enactment of the 2023 National Criminal Code, which formally recognizes the concept of living law, represents a significant paradigm shift by requiring criminal law enforcement to respond to social values and local community norms rather than relying solely on a rigid textual framework. This study addresses two central research questions: first, how the Criminal Procedure Code structurally constrains prosecutorial authority at the investigation and pre-prosecution stages; and second, how the formal recognition of living law generates implementation challenges, including normative conflict, discriminatory application, and legal uncertainty. Using a normative juridical research method with statutory, conceptual, and comparative approaches, this study finds a fundamental paradox within the prosecutorial function. Although prosecutors possess formal legitimacy as controllers of criminal cases, they lack adequate legal instruments to exercise this authority substantively. The absence of clear operational standards for applying living law risks undermining legal certainty and weakening the principle of equality before the law. Comparative analysis of prosecutorial practices in Canada, the Netherlands, and Germany demonstrates alternative models that integrate restorative justice, legal pluralism, and prosecutorial supervision more effectively. This study concludes that strengthening the prosecutorial role requires not merely procedural reform of the Criminal Procedure Code, but also ethical reinforcement, professional capacity building, and judicial verification mechanisms to ensure alignment with constitution, and universal human rights principles.



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1. Introduction

The Prosecutor's Office occupies a very strategic position in the Indonesian criminal justice system because it acts as the *dominus litis*, or case controller, namely the party that determines whether a case is worthy of being continued in court.¹ This position makes the prosecutor a key actors in ensuring the upholding

¹ Omrit Avni, Joshua Guetzkow, and Badi Hasisi, "Bias in Prosecutorial Decision Making: Bridging Focal Concerns & Group Threat," *Journal of Criminal Justice* 92 (2024): 102192, <https://doi.org/10.1016/j.jcrimjus.2024.102192>

of justice while guaranteeing legal certainty.² However, this authority in practice remains limited by the construction of criminal procedural law, as regulated in the Criminal Procedure Code (Law No. 8 of 1981). The Criminal Procedure Code adheres to the principle of functional differentiation between investigators, prosecutors, and judges, so that the prosecutor's room for movement is limited.³ The impact is seen in weak coordination at the pre-prosecution stage; often, case files are not in line with the results of the investigation, leading to the emergence of the practice of terminating investigations that do not always comply with the provisions of Article 109 paragraph (2) of the Criminal Procedure Code.⁴

On the other hand, the enactment of the 2023 National Criminal Code (Law No. 1 of 2023) introduced a new paradigm by recognizing *living law*, or customary criminal law, as a legitimate source of criminal law.⁵ This change broadens the understanding of the principle of legality from merely written law to norms that exist within society.⁶ However, the recognition of *living law* is not necessarily free from problems.⁷ To date, there are no substantive criteria or formal procedures governing the boundaries, methods of proof, or enforcement mechanisms for customary norms used as the basis for criminal penalties.⁸ This gap has the potential to create legal uncertainty, conflicts between legal systems, and even open up opportunities for discrimination in law enforcement practices.⁹ To understand this dynamic, it is necessary to examine the performance of the prosecutor's office as a concrete reflection of its role.¹⁰ Data from the 2024 Indonesian Attorney

² Henning Glaser Anis Mashdurohatun, Bambang Sugihartono, Nurul Masrifah, Arief Indra Kusuma Adhi, "Combating Digital Defamation: Regulations, Challenges and Protecting Reputation Anis," *Journal of Sustainable Development and Regulatory Issues (JSDERI)* 3, no. 3 (2025): 486–514, <https://doi.org/10.53955/jsderi.v3i3.147>

³ I. Gusti Ayu Ketut Rachmi Handayani F. Nugroho, Hartiwiningsih, "Rethinking Subsidiary in Corruption Cases: Indonesian Experiences," *Journal of Human Rights, Culture and Legal System* 5, no. 2 (2025): 686–713, <https://doi.org/10.53955/jhcls.v5i2.714>

⁴ Femmy Silaswaty Faried, Hadi Mahmud and Suparwi, 'Mainstreaming Restorative Justice in Termination of Prosecution in Indonesia', *Journal of Human Rights, Culture and Legal System*, 2.1 (2022), 66–77 <https://doi.org/10.53955/jhcls.v2i1.31>

⁵ Budi Mulya et al., "Asas Dominus Litis Bagi Kejaksaan Dalam Penuntutan Tindak Pidana Berdasarkan Undang-Undang," *Wajah Hukum* 6, no. 2 (2022): 367, <https://doi.org/10.33087/wjh.v6i2.950>

⁶ Alexa Cinque et al., "Program Outcomes in a Light-Touch Prosecutor-Led Misdemeanor Diversion Program," *Journal of Criminal Justice* 101 (2025): 102498, <https://doi.org/10.1016/j.jcrimjus.2025.102498>

⁷ F. Nugroho, Hartiwiningsih.

⁸ Peter J Buckley et al., "International Business Theory and the Criminal Multinational Enterprise," *Journal of World Business* 59, no. 5 (2024): 101553, <https://doi.org/10.1016/j.jwb.2024.101553>

⁹ Lianlian Liu, "A Jurisprudential Analysis of the Concurrent Criminal Jurisdiction over Cross-Border Telecom Fraud Crime," *Journal of Financial Crime* 28, no. 4 (2020): 1296–1316, <https://doi.org/10.1108/JFC-09-2019-0123>

¹⁰ Kuanaliyeva Guldana Amangeldiyevna, "Some Issues of International Legal Standards Compliance in the Area of Individual Rights in Criminal Proceedings of the Republic of

General's Office Government Agency Performance Report (LKjIP) can provide valuable insights in assessing how these legal changes have influenced prosecutorial functions and highlight areas that require further policy development and legal clarity.¹¹

Table 1. Performance of the Indonesian Attorney General's Office in 2024

Element	Target / Proposal	Realization	Percentage of Achievement
Restorative Justice (RJ)	2,053 case proposals	2,019 cases resolved	98.34%
Restorative Justice House (RRJ)	-	4,653 units	-
SPDP received & Phase I	132,944 cases	126,888 completed	95.44%
Prosecution Stage	106,342 cases	103,349 completed	97.19%
Execution of General Criminal Decisions	91,200 cases	90,699 cases	99.45%
Execution of Evidence	77,791 units	58,039 units	74.61%

Source: 2024 Indonesian Attorney General's Office Government Agency Performance Report (LKjIP)

The high rate of case resolution through restorative justice and the establishment of Restorative Justice (RJ) Houses across Indonesia suggest that the prosecution service is evolving beyond strict formal legality and toward recognition of the living law.¹² Although a resolution rate exceeding 95 percent in general criminal cases demonstrates administrative efficiency, it also raises concerns regarding the substantive quality of case handling.¹³ Ongoing challenges in managing evidentiary items reveal structural barriers that undermine victims' rights. These concerns underscore the urgent need to reform the Criminal Procedure Code (KUHAP) to strengthen the prosecutorial role, improve coordination with investigators, and achieve a balance between legal certainty and substantive justice.¹⁴

These developments emphasize the prosecution service's strategic role in connecting the formal certainty of the Criminal Procedure Code (KUHAP) with the substantive justice envisioned by the 2023 National Criminal Code (KUHP).¹⁵

Kazakhstan," *Procedia - Social and Behavioral Sciences* 81 (2013): 552–57, <https://doi.org/10.1016/j.sbspro.2013.06.475>

¹¹ Akira Goto, "Citizen Participation in Criminal Trials in Japan," *International Journal of Law, Crime and Justice* 42, no. 2 (2014): 117–29, <https://doi.org/10.1016/j.ijlcrj.2013.07.001>

¹² Jonathan Hobson and Brian Payne, "Building Restorative Justice Services: Considerations on Top-down and Bottom-up Approaches," *International Journal of Law, Crime and Justice* 71 (2022): 100555, <https://doi.org/10.1016/j.ijlcrj.2022.100555>

¹³ Kejaksaan Agung RI, "Laporan Kinerja Instansi Pemerintah (LKjIP) Kejaksaan RI Tahun 2024."

¹⁴ Camilo A Cepeda-Francese and Aurora A Ramírez-Álvarez, "Reforming Justice under a Security Crisis: The Case of the Criminal Justice Reform in Mexico," *World Development* 163 (2023): 106148, <https://doi.org/10.1016/j.worlddev.2022.106148>

¹⁵ Ahmad Rivai Ardiansyah Harahap, Sayyid Al Farros, and Asmak Ul Hosnah, "Implementation of Pancasila Values in the Formation of Law No. 1 of 2023 (New Criminal Code)," *Formosa Journal of Science and Technology* 4, no. 1 SE-Articles (January 13, 2025): 27–38, <https://doi.org/10.55927/fjst.v4i1.13001>

Although quantitative outcomes appear favorable, they do not ensure substantive justice in practice. Addressing this gap requires clearer guidelines for restorative justice and targeted capacity building for prosecutors to facilitate the integration of customary criminal law values.¹⁶

Recent scholarship establishes a strong foundation for this analysis. Saraswati (2019) argues that reform of Indonesian criminal law must address contemporary social needs by prioritizing substantive justice. This approach aligns with the recognition of the living law in the 2023 KUHP, which necessitates integration between formal law and prevailing social norms.¹⁷ Similarly, Saputra (2020) identifies the limited authority of prosecutors during the investigative stage and underscores the significance of the prosecutorial role as *dominus litis* in both administrative and substantive terms.¹⁸ Iskandar (2024) examines the challenges posed by the legality principle in a pluralist legal system and warns that expanding legality through recognition of the living law requires normative safeguards to prevent uncertainty and discrimination. These findings are directly relevant to the implementation of Article 2 of the 2023 KUHP.¹⁹ Muhdor (2024) demonstrates that the effectiveness of restorative justice in Indonesia is contingent on prosecutorial institutional capacity and oversight mechanisms, indicating that high completion rates require critical assessment against standards of substantive justice.²⁰ Arief (2023) argues that the 2023 KUHP represents a reconstruction of Indonesian criminal law, aiming to reconcile legal certainty with the concept of living law. He further cautions that, without revising KUHAP as procedural law, the implementation of the new KUHP will face significant challenges.²¹

This article extends prior scholarship by examining the prosecutorial function and the recognition of the living law within an integrated analytical framework. It specifically analyzes how structural limitations within the Criminal Procedure

¹⁶ Ian D Marder, "Mapping Restorative Justice and Restorative Practices in Criminal Justice in the Republic of Ireland," *International Journal of Law, Crime and Justice* 70 (2022): 100544, <https://doi.org/10.1016/j.ijlcj.2022.100544>

¹⁷ Rico Yodi Tri Utama and Retno Saraswati, 'Independensi Dan Urgensi Restrukturisasi Sistem Peradilan Pidana Indonesia Berdasarkan Aspek Kekuasaan Kehakiman', *Ajudikasi: Jurnal Ilmu Hukum*, 5.1 (2021), 53–70 <https://doi.org/10.30656/ajudikasi.v5i1.2740>

¹⁸ Denny Saputra and others, 'Peran Jaksa Dalam Sistem Peradilan Di Indonesia', *Halu Oleo Law Review*, 6 (2022), 218–37 <https://doi.org/10.33561/holrev.v6i2.7>

¹⁹ Dedi Iskandar and others, 'Perkembangan Teori Dan Penerapan Asas Legalitas Dalam Hukum Pidana Indonesia', *Jimmi: Jurnal Ilmiah Mahasiswa Multidisiplin*, 1 (2024), 293–305 <https://doi.org/10.71153/jimmi.v1i3.147>

²⁰ Algifari Malhanie Muhdor, Agung Adi Saputra and Universitas Bandar Lampung, 'Efektivitas Restorative Justice Dalam Mengurangi Tindak Pidana Di Tinjauan Dari Perspektif Kejaksaan', *Journal of Science and Social Research*, 4.6 (2024), 1242–51 <https://doi.org/10.31004/innovative.v4i6.16250>

²¹ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)*, 3rd edn (Kencana, 2011) <https://jdih.maritim.go.id/bunga-rampai-kebijakan-hukum-pidana>

Code constrain prosecutors' capacity to uphold substantive justice and how these constraints intersect with the challenges arising from the implementation of living law under the 2023 National Criminal Code.²² By linking domestic issues with international practices, this approach offers a comprehensive perspective on criminal law reform in Indonesia.²³

Within this context, the study addresses two research questions: How do the weaknesses of the Criminal Procedure Code (KUHAP) affect prosecutors' ability to ensure substantive justice? What are the implications of recognizing the living law in the 2023 National Criminal Code (KUHP) for prosecutorial practice, and what lessons can be drawn from international experience and the objective is to analyze the prosecutorial role within procedural constraints and evaluate its capacity to integrate customary criminal law into Indonesia's justice system.

2. Research Method

In legal studies, research methods are more than technical tools; they help reveal justice within written norms.²⁴ This study analyzes the prosecutor's position as *dominus litis* under the Criminal Procedure Code and the challenges of recognizing *living law* in the 2023 National Criminal Code. To address these issues, a normative juridical approach is employed, supplemented by empirical data from the 2024 Indonesian Attorney General's Government Agency Performance Report, with a focus on general criminal cases and *restorative justice*. Several methods are combined: the legislative approach covers the Criminal Procedure Code (Law No. 8 of 1981), the 2023 National Criminal Code (Law No. 1 of 2023), and Prosecutor's Regulation No. 15 of 2020 concerning Restorative Justice; the conceptual approach examines legality, *dominus litis*, and *substantive justice*; the comparative approach reviews *restorative justice* practices in other jurisdictions; and the historical approach traces Criminal Procedure Code and Criminal Code reforms.²⁵ Legal materials include primary sources (laws, regulations, court decisions), secondary sources (academic literature, journal articles, dissertations), and tertiary sources (legal dictionaries, encyclopedias, and reports such as the LKjIP.²⁶ All materials are analyzed qualitatively through systematic interpretation, regulatory relationships,

²² Leandro Mancano and Deborah Russo, "Punishment of Criminals," in *Encyclopedia of Violence, Peace, & Conflict (Third Edition)*, ed. Lester R Kurtz, Third Edit (Oxford: Academic Press, 2022), 539–51, <https://doi.org/10.1016/B978-0-12-820195-4.00160-6>

²³ Tomoya Mukai, Yuma Matsuki, and Eiichiro Watamura, "Who Participates in Criminal Justice? An Exploratory Study in Japan," *International Journal of Law, Crime and Justice* 77 (2024): 100670, <https://doi.org/10.1016/j.ijlcj.2024.100670>

²⁴ S Sunaryo et al., "The Narrating Ontology Morality of Corruption Law in Indonesia based on Islamic Value," *Jurnal Hukum Unissula* 41, no. 1 (2025): 133–56, <https://doi.org/10.26532/jh.v41i1.37154>

²⁵ Faried, Mahmud and Suparwi.

²⁶ Moh Iqra Syabani Korompot, Sholahuddin Al-Fatih and David Pradhan, 'The Principle of Equality Before the Law in Indonesian Corruption Case: Is It Relevant?', *Journal of Human Rights, Culture and Legal System*, 1.3 (2021), 135–46 <https://doi.org/10.53955/jhcls.v1i3.13>

and international comparisons. The results provide conceptual and practical contributions to strengthening the prosecutorial role and integrating *living law* into national criminal law.²⁷

3. Results and Discussion

Reassessing Dominus Litis: Procedural Limitations of the Criminal Procedure Code

The prosecutor's status as *dominus litis* within the Indonesian criminal justice system is fundamentally shaped by the normative framework of the 1981 Criminal Procedure Code.²⁸ In theory, this framework designates the prosecutor as the controller of cases, authorized to assess the appropriateness of investigations for court submission.²⁹ Nevertheless, the Criminal Procedure Code, grounded in functional differentiation, restricts prosecutorial discretion.³⁰ Investigative authority is predominantly reserved for the police, while prosecutorial powers are confined to pre-prosecution activities.³¹ Although this structure was intended to balance power among law enforcement agencies, it has instead produced fragmented authority, resulting in inconsistent and often ineffective enforcement of criminal law.³² These structural constraints have significant consequences.³³ The division of authority between investigators and prosecutors has created a legal gap between the normative legitimacy of *dominus litis* and the limited legal mechanisms available for its realization.³⁴ From a legal theoretical standpoint, restricting prosecutorial involvement in investigations constitutes institutional

²⁷ Abdul Kadir Jaelani and Resti Dian Luthviati, "The Crime Of Damage After the Constitutional Court 's Decision Number 76 / PUU-XV / 2017," *Journal of Human Rights, Culture and Legal System* 1, no. 1 (2021): 31–41, <https://doi.org/10.53955/jhcls.v1i1.5>

²⁸ Randikha Prabu Raharja Sasmita, Sigid Suseno, and Patris Yusrian Jaya, "The Concept of Reasons for Eliminating Corporate Crime in Criminal Law in Indonesia," *Heliyon* 9, no. 11 (2023): e21602, <https://doi.org/10.1016/j.heliyon.2023.e21602>

²⁹ S Carr, E Piasecki, and A Gallop, "Demonstrating Reliability through Transparency: A Scientific Validity Framework to Assist Scientists and Lawyers in Criminal Proceedings," *Forensic Science International* 308 (2020): 110110, <https://doi.org/10.1016/j.forsciint.2019.110110>

³⁰ Sasmita, Suseno and Jaya.

³¹ Li Yang, Branko Milanovic, and Yaoqi Lin, "Anti-Corruption Campaign in China: An Empirical Investigation," *European Journal of Political Economy* 85 (2024): 102559, <https://doi.org/10.1016/j.ejpoleco.2024.102559>

³² H Swofford and C Champod, "Probabilistic Reporting and Algorithms in Forensic Science: Stakeholder Perspectives within the American Criminal Justice System," *Forensic Science International: Synergy* 4 (2022): 100220, <https://doi.org/10.1016/j.fsisyn.2022.100220>

³³ Brent E Turvey, "Chapter 1 - A History of Criminal Profiling," ed. Brent E B T - Criminal Profiling (Fifth Edition) Turvey (Academic Press, 2023), 3–45, <https://doi.org/10.1016/B978-0-12-815583-7.00001-0>

³⁴ Hamidah Abdurrachman and Abdul Malik Mufty, "Analisis Penerapan Asas Dominus Litis Untuk Menjaga Keseimbangan Kewenangan Antara Kejaksaan Dan Kepolisian Dalam Sistem Peradilan Pidana," *Proceedings Series on Social Sciences & Humanities* 23, no. SE-Articles (June 11, 2025): 1–7, <https://doi.org/10.30595/pssh.v23i.1541>

over-differentiation, undermining the integrated criminal justice system envisioned by the Criminal Procedure Code.³⁵

Empirical evidence suggests that the recurring exchange of case files leads to administrative inefficiency and extends legal uncertainty for both suspects and victims.³⁶ This practice directly contravenes the principle of prompt, straightforward, and affordable justice as stipulated in Article 4, paragraph (2) of the Judicial Power Law.³⁷ The annual failure to follow up on approximately 30,000 to 35,000 Notices of Commencement of Investigation (SPDPs) (Indonesian Attorney General's Office, 2022–2023) reveals a significant structural deficiency, namely the risk of concealed impunity arising from inadequate coordination between investigators and prosecutors. Case files, which should serve as the evidentiary foundation, often fail to meet prosecutorial standards, prompting prosecutors to return them repeatedly for revision.³⁸ Despite this, prosecutors retain full responsibility for the outcome of prosecutions, even though their capacity to supervise investigations is limited.³⁹ This dynamic produces a paradox: while prosecutors possess formal authority as *dominus litis*, their actual function is largely reduced to processing the work of investigators.⁴⁰ This paradox highlights the Criminal Procedure Code's (KUHP) inability to ensure accountability in law enforcement, rendering prosecutorial dominance largely symbolic rather than substantive.⁴¹

This situation illustrates the positivistic-legalistic orientation of the Criminal Procedure Code (KUHP), which prioritizes procedural certainty over

³⁵ Erwin Susilo and others, 'Pretrial Failures in Ensuring the Merit of Cases: Critical Analysis and Innovative Reconstruction', *Journal of Ecohumanism*, 3.8 SE-Articles (2024), 8602 – 8612 <https://doi.org/10.62754/joe.v3i8.5477>

³⁶ Ahmad Siboy and others, 'Judicial Review in Indonesia: A Simplification Model', *Lex Scientia Law Review*, 6.2 (2022), 359 – 390 <https://doi.org/10.15294/lesrev.v6i2.54848>

³⁷ Dessi Perdani Yuris Puspita Sari, Handityo Basworo and Haedah Faradz, *Implementation of Principles Is Simple, Fast and Low Cost in the Banyumas District Court Class II* (Atlantis Press SARL, 2023) https://doi.org/10.2991/978-2-38476-164-7_73

³⁸ Budhi Purwanto et al., "Submission of Criminal Case Files from Investigators to Prosecutors in Criminal Law Enforcement in Indonesia," *International Journal of Social Science and Human Research* 08, No. 07 (2025): 5497–5503, <https://doi.org/10.47191/ijssshr/v8-i7-70>

³⁹ 'Prosecutors, Voters, and the Criminalisation of Corruption in Latin America', in *Prosecutors, Voters, and the Criminalization of Corruption in Latin America: The Case of Lava Jato*, ed. by Ezequiel A Gonzalez-Ocantos and others, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2023), pp. i-i <https://www.cambridge.org/core/product/AA7C612437F29C3A7A3895346B7853CB>

⁴⁰ Irawan EM et al., "The Reconstruction of the Prosecutor's Authority Regulation as Dominus Litis in the Enforcement of Corruption Criminal Acts Based on the Values of Justice," *International Journal of Social Science Research and Review* 8, no. 7 SE-Main Articles (July 12, 2025), <https://doi.org/10.47814/ijssrr.v8i7.2724>

⁴¹ Naomi Artadinata and Sahuri Lasmadi, "Pengaturan Jaksa Penuntut Umum Dalam Penanganan Tindak Pidana Korupsi Berdasarkan Asas Dominus Litis," *PAMPAS: Journal of Criminal Law* 4, no. 3 SE-Articles (December 1, 2023): 311–21, <https://doi.org/10.22437/pampas.v4i3.28637>

substantive justice.⁴² While the principle of legality enshrined in the KUHAP ensures legal certainty, its application of *dominus litis* diminishes the prosecutorial role as a guardian of justice.⁴³ This underscores the necessity for reform in criminal procedure law: prosecutorial authority should extend to the investigative stage, ensuring that their influence is substantive rather than merely normative.⁴⁴ This deficiency becomes increasingly significant with the 2023 National Criminal Code's shift toward recognizing living norms within society (living law), moving the focus from formal legality to social practice.⁴⁵ The paradox inherent in the prosecutor's *dominus litis* role demonstrates the KUHAP's inability to reconcile legality with substantive justice.⁴⁶ When procedural certainty supersedes the substance of justice, the law forfeits its social legitimacy. Although the 2023 National Criminal Code introduces the concept of living law, the inflexible nature of the KUHAP continues to impede the integration of customary legal values into prosecutorial practice.

From a checks and balances perspective, the 1981 Criminal Procedure Code's commitment to functional differentiation has resulted in institutional imbalance. Rather than establishing mechanisms for reciprocal oversight among law enforcement agencies, the Code grants investigative monopoly to the police and relegates prosecutors to a passive role during pre-prosecution.⁴⁷ This arrangement undermines the prosecutor's function as *dominus litis* by preventing substantive oversight of investigations from the outset. Consequently, instead of promoting accountability, the Indonesian criminal procedure system perpetuates fragmented authority, which is detrimental to the principle of *an integrated criminal justice system*.

These limitations can also be understood through Lawrence Friedman's framework of legal effectiveness, which emphasizes three key components: legal structure, legal substance, and legal culture. Structurally, these constraints can be

⁴² Olena Boryslavska, "Judicial Reforms in Eastern Europe: Ensuring The Right To a Fair Trial or an Attack on The Independence of The Judiciary?," *Access to Justice in Eastern Europe* 9, no. 1 (2021): 122–42, <https://doi.org/10.33327/AJEE-18-4.1-a000049>

⁴³ Armunanto Hutahaean and Erlyn Indarti, "Implementation of Investigation by the Indonesian National Police in Eradicating Corruption Crime," *Journal of Money Laundering Control* 23, no. 1 (2020): 136–54, <https://doi.org/10.1108/JMLC-12-2018-0075>

⁴⁴ Nadja Capus and Melody Bozinova, "Impression Management in Corporate Corruption Settlements: The Storied Self of the Prosecutorial Authority," *International Journal of Law, Crime and Justice* 73 (2023): 100578, <https://doi.org/10.1016/j.ijlcrj.2023.100578>

⁴⁵ Carlos E. Gallegos Anda, "Good Living as a Living Law," *Australian Journal of Indigenous Education* 47, no. 1 (2018): 30–40, <https://doi.org/10.1017/jie.2017.30>

⁴⁶ Made Sinthia Sukmayanti et al., "Dominus Litis Pada Komisi Nasional Hak Asasi Manusia Dalam Penegakan Hak Asasi Manusia Di Indonesia," *Jurnal Yustitia Fakultas Hukum Universitas Ngurah Rai* 18, no. 1 (2024): 11–19, <https://doi.org/10.62279/yustitia.v18i1.1190>

⁴⁷ Sidik Sunaryo and Sholahuddin Al-Fatih, 'How Corruptor Should Be Punished? A Comparative Study Between Criminal Law, Islamic Law, and Customary Law', *International Journal of Criminal Justice Sciences*, 17.2 (2022), 91 – 100 <https://doi.org/10.5281/zenodo.4756112>

further analyzed using Lawrence Friedman's framework of legal effectiveness, which comprises legal structure, legal substance, and legal culture. Structurally, the Criminal Procedure Code (KUHP) confines prosecutorial authority to pre-prosecution; substantively, it overemphasizes procedural certainty at the expense of substantive justice; and culturally, law enforcement remains entrenched in legalistic and formalistic practices. The interplay of these factors impedes the criminal law system's capacity for effective oversight, reducing the prosecutor's *dominus litis* role to a largely administrative function, due to power relations. The KUHP is not a neutral construct, but rather an instrument that contributes to normalizing police dominance while weakening the capacity of the prosecutor's office in the criminal justice system. Thus, Indonesian criminal procedure law not only fails to fulfill the principles of legality and substantive justice, but also serves to reproduce institutional inequalities that favor one institution over another. This perspective emphasizes that the reconstruction of the KUHP is not merely a technical normative matter, but also a legal political demand to dismantle the unequal power structure in criminal law enforcement.

The restrictions on prosecutorial authority outlined in the Criminal Procedure Code extend beyond normative concerns and have tangible effects on law enforcement practices. Coordination between investigators and prosecutors is frequently formalistic, reducing the pre-prosecution function to administrative review of case file completeness rather than substantive oversight.⁴⁸ The persistent exchange of incomplete files highlights a structural deficiency.⁴⁹ Prosecutors are tasked with ensuring legal accountability but lack the authority to guide investigations from the outset.⁵⁰ Consequently, prosecutorial success depends more on the quality of investigative work than on prosecutorial oversight as *dominus litis*. This misalignment between responsibility and authority undermines the integration of the criminal justice system. Prosecutors are held accountable for prosecution outcomes but lack sufficient means to guarantee investigative quality. In criminal law theory, such procedural barriers erode the prosecutor's central role in striking a balance between legal certainty and substantive justice.

This trend is increasingly apparent in the 2024 performance data of the Indonesian Attorney General's Office. The 2024 Government Agency Performance

⁴⁸ Amal Abuanzeh, "The Rationale for Detention in the Jordanian Code of Criminal Procedure: A Comparative Study with French Law," *Heliyon* 8, no. 10 (2022): e11164, <https://doi.org/10.1016/j.heliyon.2022.e11164>

⁴⁹ Nina Persak, "Beyond Public Punitiveness: The Role of Emotions in Criminal Law Policy," *International Journal of Law, Crime and Justice* 57 (2019): 47–58, <https://doi.org/10.1016/j.ijlcj.2019.02.001>

⁵⁰ Kuo-Chang Huang, Kong-Pin Chen, and Chang-Ching Lin, "Does the Type of Criminal Defense Counsel Affect Case Outcomes?: A Natural Experiment in Taiwan," *International Review of Law and Economics* 30, no. 2 (2010): 113–27, <https://doi.org/10.1016/j.irle.2009.09.005>

Report (LKjIP) of the Indonesian Attorney General's Office confirms the structural limitations faced by prosecutors in the criminal justice system. Throughout 2024, the Attorney General's Office received 132,944 Notices of Commencement of Investigation (SPDP) and completed 126,888 cases at the pre-prosecution stage, representing approximately 95.44 percent of the total. At the prosecution stage, of the 106,342 cases received, 103,349 were successfully resolved (97.19%). Meanwhile, the execution of general criminal decisions reached 90,699 out of 91,200 cases (99.45%). Despite the high rate of verdict completion, evidence management remains a challenge. Of the 77,791 pieces of evidence that should have been executed, only 58,039 were successfully processed, or approximately 74.61 percent. This suggests the presence of administrative and technical barriers that can lead to dissatisfaction, particularly for victims seeking redress. On the other hand, the implementation of restorative justice (RJ) has shown significant progress. Of the 2,053 proposed cases, 2,019 were resolved through the RJ mechanism, resulting in a success rate of 98.34%. The Attorney General's Office has also established 4,653 Restorative Justice Centers throughout Indonesia as supporting institutions. While this achievement reflects progress in the implementation of living law, questions remain regarding the consistency of the application of RJ criteria, for example, regarding sentences under five years or the status of a first-time offender. This quantitative data illustrates two things: first, the administrative effectiveness of the prosecutor's office; second, questions arise about the substantive quality of law enforcement. The high number of case resolutions does not necessarily guarantee the upholding of substantive justice, as the limited authority of prosecutors within the framework of the Criminal Procedure Code remains a major factor hampering the integration of the criminal justice system.

Philosophically, the 1981 Criminal Procedure Code assigns prosecutors a dominant role solely during the prosecution phase, thereby restricting their influence over investigations and diminishing their capacity as guardians of substantive justice.⁵¹ This imbalance produces a disconnect between formal legality and societal demands for genuine justice, exemplifying the enduring tension in modern law between procedural rules and substantive outcomes. In this context, the Criminal Procedure Code demonstrates limited responsiveness to evolving social realities, particularly in relation to the recognition of living law, which the 2023 National Criminal Code seeks to address by aligning positive law with actual social practices.

The adoption of restorative justice (RJ) principles underscores the necessity for a legal system that is both adaptive and humane. RJ prioritizes conflict resolution

⁵¹ Panca Sarjana Putra and others, 'Legal Politics of Investigation Authority in Criminal Offences Under the Draft Criminal Procedure Code (RKUHAP)', *JUSTISI*, 11.3 SE-Articles (2025), 686–701 <https://doi.org/10.33506/js.v11i3.4273>

through participatory processes, engaging victims, offenders, and the community as active participants. Nonetheless, philosophical concerns persist regarding the consistent application of RJ criteria, including the scope of criminal penalties, the treatment of first-time offenders, and the equitable satisfaction of all parties' interests.⁵² These challenges underscore the importance of integrating the Criminal Procedure Code (KUHP), the 2023 Criminal Code (KUHP), and substantive justice principles to ensure that prosecutorial roles transcend procedural enforcement. Ideally, prosecutors should serve as normative mediators, connecting formal legal frameworks with societal realities and ensuring that law addresses moral, ethical, and practical considerations.

A comprehensive evaluation requires critical reflection on both the existing legal framework and prevailing criminal justice practices. Normative reform and the incorporation of living law principles are essential strategies for reconciling formal legality with substantive justice, while also reinforcing the role of prosecutors as agents who can integrate legal certainty with moral and social considerations. This perspective emphasizes that effective law enforcement is not merely measured by case resolution rates, but by the attainment of genuine, sustainable, and contextually appropriate justice.

Given these conditions, KUHP is an urgent normative measure to address the demands of contemporary law enforcement. The revised KUHP should extend prosecutorial authority to the investigative stage, enabling prosecutors to actively supervise and direct investigations in accordance with rigorous and accountable evidentiary standards. Enhancing coordination between investigators and prosecutors through well-defined mechanisms is crucial for producing high-quality case files, minimizing procedural errors, and strengthening the credibility of the criminal justice system. Additionally, regulations governing the termination of investigations should be clarified and strengthened to ensure accountability and prevent arbitrary decisions, thereby upholding justice. Comparative legal systems, such as those in the Netherlands and Germany, grant prosecutors substantial supervisory powers over investigations, including the authority to halt cases at early stages.⁵³ The absence of such mechanisms in Indonesia exposes an institutional gap, leaving prosecutors with ultimate responsibility but insufficient oversight authority. Adopted by the Criminal Procedure Code (KUHP) and the principles of substantive justice, so that criminal law not only upholds procedures but also addresses the social and moral needs of society. The measured integration of restorative justice mechanisms within the KUHP framework is a crucial

⁵² Han Wang and Mengliang Dai, "Moralization of Law, Heavy-Penaltyism, and Retributive Justice: A Corpus-Assisted Study of Legal Consciousness on Chinese Social Media," *International Journal of Law, Crime and Justice* 79 (2024): 100700, <https://doi.org/10.1016/j.ijlcrj.2024.100700>

⁵³ S.H.M.H.D.L.S.H.M.H.D.S.N.S.H.M.H. Dr. Rio Saputra, *Reformasi Hukum Acara Pidana: Menyongsong KUHP Baru* (Langgam Pustaka, 2025) <https://books.google.co.id/books?id=bnFREQAQBAJ>

strategy, enabling participatory case resolution while adhering to the fundamental objectives of criminal law. Therefore, this normative reform is not merely technical but also philosophical, emphasizing that the law must harmonize procedural certainty with substantive justice. This, in turn, makes the role of prosecutors and criminal justice institutions as a whole more effective, responsive, and equitable. Reconstruction of the KUHAP is not only a technical necessity but also a philosophical demand that Indonesian criminal procedure law align with social dynamics and the principles of substantive justice. Without reconstruction of the KUHAP, *dominus litis* will remain a pseudo-doctrine that fails to provide substantive meaning to criminal justice. Without it, the prosecutor's position as *dominus litis* will remain symbolic and lose practical meaning. Integrating restorative justice into the Criminal Procedure Code (KUHAP) is not merely a policy option, but a normative imperative to ensure that criminal law is not merely repressive but also transformative.⁵⁴

Prosecutorial Practice and Its Impact on the Realization of Justice

The 2023 National Criminal Code marks a significant paradigm shift in Indonesian criminal law.⁵⁵ It explicitly recognizes living law as a source of criminal law. This change aims to reconstruct positive law so it is more responsive to societal norms. Consequently, the law is no longer limited to formal texts but also reflects social practices and values recognized by customary law communities. However, this recognition has serious consequences for prosecutorial practice. It raises challenges for ensuring consistency, certainty, and alignment with principles of substantive justice.⁵⁶ The recognition of living law in the 2023 National Criminal Code demonstrates a fundamental reconstruction in Indonesian criminal law policy. Customary norms, which were once considered solely sociological, now serve as a legitimate source of criminal law. This transformation aims to make criminal law more responsive to societal dynamics. It also emphasizes a substantive justice orientation that goes beyond formal legality. Therefore, criminal law is now expected to extend beyond the text of the law. It should also respond to the social practices within customary law communities.

However, this recognition presents a significant implementation problem. The lack of clear criteria regarding *living law* can lead to differing interpretations in prosecution practices. This may cause conflicting norms between customary law and positive law. For example, an act might not be considered a crime from a customary perspective, but national law may classify it as such, or vice versa. This

⁵⁴ Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi, Dan Peninjauan Kembali* (Jakarta: Sinar Grafika, 2009).

⁵⁵ Reski Anwar, 'Eksistensi Asas Legalitas Formil Dan Materil Pada KUHP Nasional', *Jurnal Fakta Hukum (JFH)*, 2.2 (2023), 145–59 [https://doi.org/10.58819/jurnalfaktahukum\(jfh\).v2i2.106](https://doi.org/10.58819/jurnalfaktahukum(jfh).v2i2.106)

⁵⁶ Emmilia Rusdiana Ervindo Delpiro, "PIDANA PERPAJAKAN DIKAITKAN DENGAN KUHAP Ervindo Delpiro Emmilia Rusdiana Abstrak Abstrak," *Jurnal Novum* 8, no. 4 (2021): 1–15, <https://doi.org/10.2674/novum.v0i0.38018>

situation creates a legal dilemma. On the one hand, the state wants to accommodate legal plurality. On the other hand, it must guarantee legal certainty for all citizens. Further, recognizing *living law* challenges the prosecutor's office in fulfilling its prosecutorial function. Prosecutors must safeguard procedural legality as stipulated in the Criminal Procedure Code. They also need to interpret and bridge the gap between written law and prevailing societal norms. This dual role has serious consequences.⁵⁷ Without standard implementation guidelines, prosecutors risk accusations of discrimination or inconsistency in their application of the law. Therefore, developing detailed implementing regulations and increasing the capacity of law enforcement officers are key. These steps help ensure that recognition of living law strengthens substantive justice, rather than causing legal uncertainty.

Table 2. Comparison of the 1981 Criminal Procedure Code and the 2023 Criminal Code

Perspective	Criminal Procedure Code 1981	Criminal Code 2023
Characteristic	The Criminal Procedure Code (Law No. 8 of 1981) focuses on investigation, prosecution and trial procedures.	The Criminal Code (Law No. 1 of 2023), is material in nature, replacing the colonial Criminal Code.
Objective	Regulates the mechanisms of criminal procedure, including investigation (Article 1 number 2, Articles 6–12 of the Criminal Procedure Code), prosecution (Articles 137–144 of the Criminal Procedure Code), and trial.	Adjusting criminal law to the values of Pancasila and the 1945 Constitution, while simultaneously abolishing colonial law (Article 2, Article 598 of the 2023 Criminal Code).
Types of Crime	Regulates the main and additional penalties according to the old Criminal Code (refer to Article 10 of the old Criminal Code, used through the Criminal Procedure Code).	Eliminating the dichotomy between crimes and violations (Article 1 paragraph (2) of the 2023 Criminal Code), and introducing new criminal penalties such as community service (Article 65) and supervision (Article 66).
Human Rights Protection	Guaranteeing the principle of <i>presumption of innocence</i> (Article 8 paragraph (1) of the Criminal Procedure Code), the right to legal aid (Article 56), and the prohibition of torture (Article 117 paragraph (1)).	Maintaining the principle of legality (Article 1 paragraph (1) of the 2023 Criminal Code), adding the concept of <i>judicial pardon</i> (Article 52 of the 2023 Criminal Code).
Corporations as Subjects	It is not regulated, because the Criminal Procedure Code only refers to individuals as perpetrators of criminal acts.	Corporations are recognized as subjects of criminal law (Articles 45–50 of the 2023 Criminal Code) with provisions for corporate criminal liability.
Alternative Sentencing	There are no alternative punishments, only traditional principal and additional punishments.	Introducing alternative punishments: community service (Article 65 of the 2023 Criminal Code) and supervision (Article 66 of the 2023 Criminal Code).
Penal System	Traditional system with principal and additional penalties as per Article 10 of the old Criminal Code.	Adopting a <i>double track system</i> in the form of criminal and action (Articles 82–84 of the 2023 Criminal Code).
Living Law	Unknown; criminal procedural law is purely based on the principle of formal legality.	Recognizing <i>living law</i> as a source of criminal law (Article 2 paragraph (1) of the 2023 Criminal Code), as long as it is in

⁵⁷ Brian G Sellers and Bruce A Arrigo, "The Narrative Framework of Psychological Jurisprudence: Virtue Ethics as Criminal Justice Practice," *Aggression and Violent Behavior* 63 (2022): 101671, <https://doi.org/10.1016/j.avb.2021.101671>

		accordance with Pancasila, human rights, and the 1945 Constitution.
Harmonization of Procedural Law	The 1981 Criminal Procedure Code does not adapt to new developments in material law.	The 2023 Criminal Code requires a revision of the Criminal Procedure Code so that the implementation of new norms, including <i>living law</i> , can run effectively (Article 624 of the 2023 Criminal Code regulates the transition).
Source: Processed by the author based on Law Number 8 of 1981 concerning Criminal Procedure Law and Law Number 1 of 2023 concerning the Criminal Code		

A comparison of the 1981 Criminal Procedure Code and the 2023 National Criminal Code demonstrates fundamental differences in the nature, objectives, and orientation of criminal law.⁵⁸ These differences extend beyond functional distinctions, such as procedural versus substantive law, and reveal a significant paradigm asymmetry. The Criminal Procedure Code (Law No. 8 of 1981) focuses on procedural aspects, particularly the regulation of investigations, prosecutions, and trials. It was designed to ensure institutional differentiation, assigning investigations to the police and prosecutions to the prosecutor's office. While this structure aims to maintain *checks and balances among* law enforcement agencies, it has resulted in fragmentation and diminished the effectiveness of the prosecutor's role as *dominus litis*. In contrast, the 2023 Criminal Code (KUHP) adopts a progressive approach by integrating criminal law with social norms, including the recognition of living law as stipulated in Article 2. Criminal law is now conceptualized as an open system responsive to the dynamics of indigenous communities. Nevertheless, a temporal asymmetry persists: the KUHP advances normative pluralism, whereas the Criminal Procedure Code (KUHP) remains rigid and positivistic, leaving procedural instruments inadequately aligned with the new substantive law.⁵⁹

The 2023 Criminal Code (Law No. 1 of 2023) replaces the colonial-era code with a framework more responsive to Pancasila, the 1945 Constitution, and contemporary societal needs. While upholding the principle of legality (Article 1 paragraph (1)), it introduces new concepts, including *judicial pardon* (Article 52), community service (Article 65), supervisory punishment (Article 66), and corporate criminal liability (Articles 45–50). The most notable change is the formal recognition of *living law* as a legitimate source of criminal law, provided it is consistent with Pancasila, human rights, and the 1945 Constitution. However, this recognition presents significant implementation challenges, particularly for prosecutorial practice. In the absence of clear operational guidelines, the risks of normative conflict, discrimination, and legal uncertainty increase. Prosecutors must operate within a rigid procedural framework, even as substantive law demands greater flexibility to accommodate customary norms. This paradox

⁵⁸ Gani Hamaminata, 'Perkembangan Sistem Peradilan Pidana Di Indonesia', *Jurnal Hukum, Politik Dan Ilmu Sosial*, 2.4 (2023), 52–64 <https://doi.org/10.55606/jhps.v2i4.2334>

⁵⁹ Yahya Harahap.

generates structural tension: the Criminal Code seeks to integrate legal certainty and substantive justice, while the Criminal Procedure Code undermines the prosecutor's integrative function.⁶⁰ Unless the Criminal Procedure Code is revised to align with the 2023 Criminal Code, normative conflicts and inconsistent implementation will persist within the Indonesian criminal justice system.

The recognition of *living law* in the 2023 Criminal Code represents a progressive development; however, the absence of clear operational criteria generates systemic legal uncertainty. This doctrine shifts the principle of legality from written statutes to often undocumented local norms, imposing interpretive burdens on prosecutors and judges without objective or testable standards.⁶¹ As a result, legal application may become ad hoc, reliant on the discretion of officials, and susceptible to abuse, regional inconsistencies, and erosion of the *lex certa* principle. Additionally, the requirement to formalize living law through Regional Regulations (Perda) introduces a paradox. While formalization aims to ensure legal certainty, standardizing customary norms through Perda risks eliminating the inherent adaptability of customary law. If Perda or relevant Government Regulations are not enacted, a regulatory vacuum may arise, resulting in regional heterogeneity and potential overlaps in authority between customary institutions and state officials, thereby increasing the likelihood of implementation conflicts.

Evidentiary challenges arise under the current Criminal Procedure Code, particularly as Article 184 is structured to establish material facts through written documents and formal witnesses. This framework does not accommodate evidence derived from oral tradition, communal consensus, or customary ritual practices. Consequently, public prosecutors must prove not only the defendant's actions but also the existence, validity, and scope of relevant customary norms. This expanded burden of proof is difficult to meet, especially given the ambiguous legal status of testimony from customary elders, who may be classified as either factual or expert witnesses. The absence of clear regulations can result in judicial inconsistencies and even case dismissals. Moreover, without substantive safeguards, the recognition of *living law* may institutionalize discriminatory customary norms, such as those based on gender, caste, or social status. In these circumstances, the state risks reinforcing social injustice by legitimizing harmful customary decisions. This issue is fundamental, as it challenges the rule of law's commitment to equality and justice for all citizens. Article 2 of the Criminal Code, which accommodates *living law*, introduces a dualism in the principle of legality, distinguishing between formal legality and material legality based on customary

⁶⁰ Nursyamsudin Nursyamsudin and Samud Samud, 'Sistem Peradilan Pidana Terpadu (Integrated Criminal Justice System) Menurut Kuhap', *Mahkamah: Jurnal Kajian Hukum Islam*, 7.1 (2022), 149 <https://doi.org/10.24235/mahkamah.v7i1.10413>

⁶¹ Sholahuddin Al-Fatih and Sayed Khalid Shahzad, 'Rethinking How Laws Are Made: Indonesia's Legal Method Dilemma', *Journal of Sustainable Development and Regulatory Issues*, 3.2 (2025), 170 – 190 <https://doi.org/10.53955/jsderi.v3i2.32>

norms. This dualism necessitates a robust transition mechanism to prevent practical disharmony. However, limited discretionary instruments and a prevailing positivistic culture in law enforcement often result in selective and ad hoc application of living law, typically through restorative justice in minor cases rather than structural integration. The broad interpretation of "public interest" and the absence of implementation guidelines further increase the risk of political intervention and legal discrimination.

The recognition of *living law* in the 2023 Criminal Code has significant practical implications. First, it poses a serious threat to the principle of equality before *the law* due to potential regional inconsistencies. An act classified as a criminal offense in one indigenous community may be permissible in another, resulting in divergent legal consequences for identical conduct.⁶² This undermines the principle of universal justice foundational to the modern rule of law. Second, recognizing *living law* without implementing legal instruments risks creating a legal vacuum (*rechtsvacuum*).⁶³ In the absence of Government or Regional Regulations specifying criteria and mechanisms for living law, the norms in Article 2 of the Criminal Code remain unenforceable. Law enforcement officials lack standardized guidelines, leading to uncertainty and enforcement dilemmas. Third, prosecutors and courts face substantial evidentiary challenges, as they must establish not only the crime but also the existence, validity, and scope of customary norms. This process demands significant resources, including legal anthropological expertise, and extends case timelines, thereby reducing the efficiency of criminal law enforcement. Fourth, without a substantive filter, the state may enforce customary decisions that are discriminatory. In such cases, prosecutors risk legitimizing unjust practices embedded in customary norms, such as discrimination based on gender, social status, or ethnicity. If this occurs, the recognition of living law may undermine, rather than strengthen, the legitimacy of national law.

Systematic mitigation is required at three levels. At the normative level, the government should promptly issue a Government Regulation (PP) to implement Article 2 of the Criminal Code, providing a definition of *living law*, establishing criteria, and regulating judicial review before customary norms are enforced. At the institutional level, the Prosecutor's Office must develop standard operating procedures (SOPs) or Attorney General Regulations to govern identification, verification, and the involvement of legal anthropologists, supported by a national database on *living law*. At the cultural level, *capacity building* for prosecutors, the creation of specialized units, and regular monitoring and evaluation mechanisms

⁶² Tobias Bernet and others, 'Stadt von Rechts?', 7 (2019), 7–22 <https://doi.org/http://dx.doi.org/10.17169/refubium-2370>

⁶³ Merijn Oudenampsen, 'The Conservative Embrace of Progressive Values : On the Intellectual Origins of the Swing to the Right in Dutch Politics', 2018 <https://api.semanticscholar.org/CorpusID:165549570>

are necessary to prevent discrimination in the implementation of living law.⁶⁴ These measures will facilitate the integration of formal legal certainty and substantive justice, ensuring that the recognition of living law enhances, rather than undermines, the legitimacy of national law.

Given the identified vulnerabilities, urgent and structured mitigation measures are necessary to prevent legal uncertainty and discrimination arising from the recognition of living law. The government must promptly issue a Government Regulation (PP) to implement Article 2 of the Criminal Code. This regulation should provide an operational definition of *living law*, recognition criteria, territorial boundaries, and requirements for compliance with Pancasila, the 1945 Constitution, human rights, and general legal principles. Without this normative framework, the recognition of *living law* will remain abstract and susceptible to subjective interpretation.

Second, every customary ruling to be executed by the state must go through a "court ruling" mechanism as a mandatory screening.⁶⁵ This step serves as a *safeguard* to ensure that the applied customary norms have undergone a material review, particularly regarding aspects of non-discrimination and respect for human rights. Therefore, prosecutors may not enforce customary rulings without the legitimacy of a formal court. Third, laws and implementation guidelines must establish the principle of non-discrimination as an overriding parameter: customary norms proven to be discriminatory must be automatically set aside to ensure equality before the law.

Fourth, reforming criminal procedural law is a prerequisite for the evidentiary mechanism to accommodate the characteristics of *living law*. This reformulation involves recognizing the legal status of traditional elders as a source of strengthened evidence, establishing community verification standards, and accepting collective and ritual evidence as valid forms of evidence. Fifth, the Attorney General's Office needs to issue internal guidelines (SOPs or Attorney General Regulations) that explicitly regulate the mechanisms for identification, verification, mediation, and the involvement of legal anthropologists. These SOPs should be complemented by a national *database on living law* and a rapid consultation platform accessible to prosecutors in all regions.⁶⁶

Sixth, *capacity building* is a key agenda. It is necessary to establish a unit or cluster of prosecutors specializing in legal anthropology, mediation, and human rights protection. This program can begin with a *pilot project* in areas where *living*

⁶⁴ Siboy and others.

⁶⁵ Nur Putri Hidayah and Sholahuddin Al-Fatih, 'Recognition and Strengthening the Customary Land Ownership in Central Borneo Province', *Jurnal Hukum Novelty*, 10.1 (2019), 11 – 22 <https://doi.org/10.26555/novelty.v10i1.a12980>

⁶⁶ R N Erdianti and S Al-Fatih, 'Fostering as an Alternative Sanction for Juveniles in the Perspective of Child Protection in Indonesia', *Journal of Indonesian Legal Studies*, 4.1 (2019), 119–28 <https://doi.org/10.15294/jils.v4i01.29315>

law is well-documented. Seventh, to prevent abuse of authority, oversight mechanisms must be strengthened, including by guaranteeing the right to sue or appeal for parties who feel aggrieved by customary decisions. Finally, every policy implementing *living law* must be subject to a periodic evaluation mechanism (*impact assessment*) and be provided with an evaluation clause or *sunset clause*, so that norms proven discriminatory can be promptly reviewed.

Table 3. Comparison of Recognition and Implementation of Living Law / Restorative Justice

Element	Netherlands	Canada	German	Indonesia (Criminal Code 2023)
Main model	<i>Mediation in Penal Matters</i> (penal mediation)	<i>Indigenous Justice Programs</i> (including <i>Sentencing Circles</i>)	<i>Täter-Opfer-Ausgleich</i> (TOA) / <i>Offender-Victim Mediation</i>	Recognition of <i>living law</i> (Article 2 of the Criminal Code) and development of <i>Restorative Justice</i> (RJ)
Recognition of customary law/communal norms	Not explicitly customary law, but recognizing social norms through mediation.	Explicitly recognizes the customary laws and forums of indigenous peoples (First Nations, Inuit, Métis).	Not based on custom, but recognizing the consensus mechanism between the victim and the perpetrator.	Explicitly recognizes customary criminal law as a source of law (<i>living law</i>).
Authorization authority	The results of the mediation must be approved by the prosecutor or judge to be valid.	The results of <i>sentencing circles</i> are verified by the court; the court has the authority to reject them if they violate human rights.	TOA results are verified by the prosecutor/judge; they are not binding without formal approval.	Customary decisions must be formalized through Regional Regulations (Perda); there is no mechanism for court rulings.
Substantive filters (human rights, non-discrimination)	Yes: judges/prosecutors are obliged to reject agreements that conflict with national law/human rights.	Yes: the results of the customary forum must not be discriminatory, the courts still have control.	There is: a mediation agreement must not violate the victim's rights or the principles of substantive justice.	Weakness: Article 2 of the Criminal Code recognizes <i>living law</i> without clear operational criteria; potentially discriminatory.
Legal basis	Netherlands Criminal Procedure Code	Criminal Code Canada + <i>Indigenous</i>	The German Strafprozessordnung (StPO) (German	2023 Criminal Code Article 2, Law No. 11 of

	and special regulations on penal mediation.	<i>Justice Program Guidelines</i> .	Criminal Procedure Code) regulates TOA as an alternative to sentencing.	2021 (Amendments to the Criminal Procedure Code have not yet been made).
Institutional instruments	Official mediation institution with certified mediators.	Indigenous forums with state supervision; there is government funding for indigenous community programs.	Mediation is carried out by an official mediator under the supervision of a prosecutor/judge.	The Prosecutor's Office (through RJ Houses, 4,653 units in 2024) and customary forums; there is no standard SOP on <i>living law</i> .
Excess	The procedures are clear, there is formal approval, maintaining a balance between legal certainty and social flexibility.	Providing ample space for local wisdom, but still maintaining the supremacy of the constitution and human rights.	Effectively reduce the caseload, maintain social consensus, without removing formal legal oversight.	Providing explicit recognition of customary law; in line with the principle of Indonesian legal pluralism.
Weakness	It takes additional costs and time for the mediation process.	Potential for heterogeneity among indigenous communities; requires strong supervision.	More effective for minor cases; does not fully accommodate customary-based <i>living law</i> .	The criteria are unclear, there is a risk of discrimination, conflict of norms, heavy burden of proof, potential abuse of power.

Source: Extracted from the *Criminal Code of Canada* and *Indigenous Justice Program Guidelines* (Canada), the *Criminal Procedure Code* (Germany), and the *Criminal Code of 2023* and the *Criminal Procedure Code of 1981* (Indonesia).

A comparative analysis of the Netherlands, Canada, and Germany reveals distinct approaches to integrating communal justice mechanisms within contemporary criminal systems.⁶⁷ Each country represents a unique legal tradition, yet all have formalized mediation and restorative justice in ways that provide instructive models.⁶⁸ The Netherlands exemplifies the formalization of restorative

⁶⁷ Sholahuddin Al Fatih and Asrul Ibrahim Nur, 'Does the Constitutional Court on Local Election Responsive Decisions?', *Journal of Human Rights, Culture and Legal System*, 3.3 (2023), 569–96 <https://doi.org/10.53955/jhcls.v3i3.74>

⁶⁸ Roni Sulistyanto Luhukay and Abdul Kadir Jaelani, 'Penataan Sistem Peraturan Perundang-Undangan Dalam Mendukung Penguatan Konstitusi Ekonomi Indonesia', *JATISWARA*, 34.2 (2019), 155–170 <https://doi.org/10.29303/jtsw.v34i2.200>

justice through judicial validation, a process relevant to Indonesia, which is recognized in its 2023 Criminal Code but currently lacks sufficient judicial oversight.⁶⁹ Canada's legal plurality demonstrates how indigenous customary law can be recognized while upholding constitutional and human rights protections.⁷⁰ Germany, while not recognizing customary law, has institutionalized offender-victim mediation in its criminal code, underscoring the importance of procedural rigor and oversight.⁷¹ Collectively, these examples indicate that the recognition of communal values requires clear procedures, judicial validation, and institutional capacity. For Indonesia, adopting these safeguards is necessary to ensure legitimacy, legal certainty, and protection against abuses in the application of living law.

A robust process for handling cases involving living law begins with the prompt identification of alleged crimes at the time of reporting or discovery. At this stage, the prosecutor must assess the relevance of customary norms and determine whether the case should proceed under national law or incorporate living law mechanisms. When appropriate, participatory customary forums are convened, but their outcomes require subsequent legal validation. Prosecutors are responsible for verifying customary norms against national principles, including Pancasila and the 1945 Constitution, and must obtain concrete evidence from local sources.⁷² District courts conduct judicial reviews to ensure compliance with national law and human rights, and only validated customary decisions are enforced. If validation is denied, cases revert to standard criminal law procedures. The process protects the rights of all parties by providing opportunities for objection and appeal.⁷³ Recording each living law case in a national database promotes consistency and oversight, facilitating nationwide evaluation and analysis. This approach strikes a balance between community legitimacy and state legal authority, ensuring legal certainty, cultural respect, and the protection of

⁶⁹ Bagus Hanindyo Mantri, . Hartiwingsih, and Muhammad Rustamaji, "Termination of Prosecution by Public Prosecutor in Corruption Crime in Indonesia: A Comparison with Various Countries," *Journal of Ecohumanism* 3, no. 8 SE-Articles (January 1, 2025): 10341 – 10352, <https://doi.org/10.62754/joe.v3i8.5645>

⁷⁰ Mouna Hazgui, Peter Triantafillou and Signe Elmer Christensen, 'On the Legitimacy and Apoliticality of Public Sector Performance Audit: Exploratory Evidence from Canada and Denmark', *Accounting, Auditing and Accountability Journal*, 35.6 (2022), 1375–1401 <https://doi.org/10.1108/AAAJ-04-2020-4508>

⁷¹ Cornelia Körthl and Imad Chbib, "Illicit Enrichment in Germany: An Evaluation of the Reformed Asset Recovery Regime's Ability to Confiscate Proceeds of Crime," *International Review of Law and Economics* 80 (2024): 106230, <https://doi.org/10.1016/j.irle.2024.106230>

⁷² Harahap, Farros and Hosnah.

⁷³ Oliver M Tuazon et al., "Law Enforcement Use of Genetic Genealogy Databases in Criminal Investigations: Nomenclature, Definition and Scope," *Forensic Science International: Synergy* 8 (2024): 100460, <https://doi.org/10.1016/j.fsisyn.2024.100460>

human rights.⁷⁴ The 2023 Criminal Code's recognition of living law marks progress toward a more responsive criminal law system, but this advancement could result in uncertainty or injustice without adequate supporting procedures in place.⁷⁵ Three pillars are critical: detailed implementation of regulations, judicial verification through the courts, and capacity-building for law enforcement in evidence and mediation.⁷⁶ These safeguards are essential to uphold legality and human rights, which are central to a state based on the rule of law.⁷⁷

4. Conclusion

The recognition of living law in the 2023 Criminal Code presents a paradox: it is progressive in acknowledging customary law, yet problematic due to the absence of clear operational criteria. Legal uncertainty, normative conflicts, and potential discrimination among citizens arise, while the dualism between formal and material legality risks undermining the consistency of law enforcement and the principle of equality before the law. Empirical data on the application of restorative justice indicate the need for prosecutors to act as normative mediators, rather than merely formal enforcers, so that positive law and living law can be bridged substantively. Effective implementation requires harmonization between the Criminal Code (KUHP) and the Criminal Procedure Code (KUHP), as well as technical regulations for verifying and executing customary law decisions, a legal anthropological capacity for law enforcement officials, and preventive measures against discrimination. For society, living law is meaningful only if it delivers substantive justice rather than adding complexity. As an *ius constituendum*, a Government Regulation is needed to define operational criteria, establish court ratification mechanisms, and set non-discrimination standards, along with strengthening the Prosecutor's Office internal SOPs, creating a national living law data center, and a specialized unit trained in mediation and human rights. With these measures, Indonesian criminal law can evolve into a responsive, integrative, and just system, balancing legal certainty, substantive justice, and social benefit as the pillars of a modern rule of law.

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⁷⁵ Xian Liu, Wen Wang, and Shoujun Huang, "Criminal Enforcement and Environmental Performance: Evidence from China," *Ecological Economics* 224 (2024): 108267, <https://doi.org/10.1016/j.ecolecon.2024.108267>

⁷⁶ Carlos de Miguel Perales and George Wilkinson, "Criminal Enforcement of Environmental Law in the European Union and the United States," ed. Philip B T - *Encyclopedia of Toxicology* (Fourth Edition) Wexler (Oxford: Academic Press, 2024), 311–16, <https://doi.org/10.1016/B978-0-12-824315-2.00051-8>

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