

Reconstruction of the Principle of Legality in Law Number 1 of 2023: An Analysis of the Extension of Living Law in Society and Its Implications for Legal Certainty

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Manuscripts received : 28/02/2026, Revision and Review : 14/03/2026, Approved 05/04/2026

ABSTRACT

This study examines the effect of the application of living law on legal certainty in Indonesia's criminal justice system after the enactment of Law Number 1 of 2023. The analysis is based on 412 court decisions from 2022 to 2025, comparing conditions before and after the reform. The findings show a significant increase in the intensity of living law application, reflected in higher references to local norms, stronger sociological reasoning, and greater influence on judicial decisions. At the same time, legal certainty declined, as indicated by reduced decision consistency, increased judging disparity, and higher rates of legal appeals. Regression results confirm that all indicators of living law application have a negative and significant effect on legal certainty. The strongest effect comes from the influence of living law on judicial decisions, followed by sociological reasoning and references to local norms. This study provides an empirical contribution to the literature on legal pluralism and criminal law reform by demonstrating how the expansion of non-written norms affects judicial consistency. The findings highlight the need for clear interpretative guidelines to ensure balance between flexibility and legal certainty.

Keywords : *Living law, legal certainty, criminal justice, sentencing disparity.*

A. Introduction

Criminal law reform in Indonesia, through Law No. 1 of 2023, introduced recognition of living law within society as the basis for sentencing considerations. This provision expands legal sources beyond written norms and provides judges with greater latitude in assessing cases based on evolving social values .¹ This change marks a shift from the principle of formal legality to material legality. In the classical concept, the principle of legality requires that an act can only be punished if it is clearly regulated in written regulations. This principle serves to maintain legal certainty through clear norms and limits

¹ B. Arief, *Development of the Indonesian Criminal Law System* , Jakarta: Kencana, 2021.
<https://scholar.google.com/scholar?q=Perkembangan+Sistem+Hukum+Pidana+Indonesia+Barda+Nawawi+Arief>

on judicial discretion. However, the recognition of living law demonstrates that legal sources are no longer limited to formal texts.²

From the perspective of legal pluralism theory, law is understood as a system comprised of various sources of norms, including customary norms and social practices. The integration of living law into criminal law broadens the basis of legal legitimacy because it reflects evolving values within society. However, this expansion also changes the structure of legal application. Sources of norms become more diverse, the scope for judicial interpretation expands, and the potential for differences in application across regions increases.³ This situation creates tension between two key principles. Legal pluralism emphasizes flexibility and social legitimacy, while the principle of legality demands certainty and consistency. When the norms used are open and contextual, the boundaries of what can be punished become less clear. Consequently, the risk of inconsistent decisions and disparities in sentencing increases.⁴

Judicial practice data demonstrates significant variation in judicial considerations in cases involving social or customary norms. According to the 2020–2024 Annual Report of the Supreme Court of the Republic of Indonesia, there has been an increase in the number of criminal cases filed at the appeal and cassation levels, with an average increase of around 8–12 percent per year. This increase indicates dissatisfaction with first-instance decisions, which are often influenced by differing legal reasoning between judges. Furthermore, the report also notes differences in sentencing patterns for the same type of case across jurisdictions, particularly in cases involving morality, assault, and community-based conflict.⁵ Theoretically, legal certainty requires clarity of norms and consistency of application. However, the widespread application of living law without clear interpretative guidelines has the potential to undermine both aspects. Previous research has been predominantly normative and has not empirically tested this relationship.⁶

Based on these conditions, this research focuses on one main problem, namely: how the application of living law affects the level of legal certainty in the criminal justice system after the enactment of Law Number 1 of 2023. This focus also places the relationship between legal pluralism and the principle of legality as the basis of analysis to explain the dynamics of legal certainty in Indonesian criminal justice practices.

The main concepts in this research include living law, legal certainty, and the criminal justice system. Living law refers to social and customary norms that are recognized and practiced in reality in society. In the Indonesian context, the recognition of living law is

² A. Hamzah, *Principles of Criminal Law in Indonesia*, Jakarta: Rineka Cipta, 2022. <https://scholar.google.com/scholar?q=Asas-Asas+Hukum+Pidana+Andi+Hamzah+2022>

³ S. Irianto, "Legal Pluralism in the National Legal System," *Journal of Law & Development*, vol. 51, no. 2, pp. 210–225, 2021. <https://jhp.ui.ac.id/index.php/home/article/view/>

⁴ M. Ali, "Judicial Discretion and Legal Certainty in Criminal Cases," *Jurnal Yudisial*, vol. 15, no. 1, pp. 1–15, 2022. <https://jurnal.komisiyudisial.go.id/index.php/jy/article/view/>

⁵ Supreme Court of the Republic of Indonesia, *Supreme Court Annual Report 2024*, Jakarta, 2024. <https://www.mahkamahagung.go.id>

⁶ FS Susanti, "Legal Certainty in the Reform of the National Criminal Code," *Jurnal Rechts Vinding*, vol. 11, no. 3, pp. 345–360, 2022. <https://rechtsvinding.bphn.go.id>

formally legitimized through Law Number 1 of 2023 concerning the Criminal Code. Legal certainty is understood as a state where norms are clearly formulated and consistently applied by law enforcement officials. The criminal justice system is an institutional mechanism that includes the police, prosecutors, courts, and correctional institutions in enforcing criminal law.

Theoretically, this research is based on the theory of legal certainty. Peters explains that legal certainty encompasses clarity of norms, regulatory stability, and consistency of application⁷. Legal certainty is a prerequisite for the legitimacy of a modern rule of law. In the criminal justice system, legal certainty is reflected in consistent decisions, proportionality of sentencing, and low disparity between courts. The legal certainty variable in this study is operationalized through indicators of decision consistency and the level of subsequent legal action.

The second relevant theory is legal pluralism. Michaels asserts that legal pluralism recognizes the existence of more than one normative system within a single social space⁸. In multicultural societies, state law often interacts with local customary norms and social practices. The integration of living law into the formal system can enhance social legitimacy, but it also has the potential to lead to fragmented interpretations if not strictly regulated.

The relationship between living law and legal certainty can be explained through the perspective of judicial discretion. Butt and Lindsey demonstrate that expanding judges' interpretive space can enrich considerations of substantive justice, but also increase variation in decisions across jurisdictions⁹. This variation impacts perceptions of legal certainty. Thus, the intensity of application of living law is thought to influence the level of consistency and predictability of court decisions.

Previous empirical research has yielded mixed findings. Bedner found that recognizing customary law in Indonesia increases social acceptance of court decisions, but does not guarantee consistency across regions¹⁰. This study supports the assumption that social legitimacy does not always align with formal legal certainty. This research is still qualitative and has not statistically tested the relationship between variables.

Crouch examined judicial reform and found that regulatory changes without strengthening interpretative standards can increase sentencing disparities¹¹. This finding supports the hypothesis that expanding open norms has the potential to reduce legal certainty. Conversely, a study published in *the Asian Journal of Comparative Law* in 2022 showed that judicial discretion can improve contextual justice if balanced with clear guidelines. These discrepancies in the results demonstrate the inconsistency of empirical findings in the literature.

⁷ A. Peters, "Legal Certainty Revisited," *German Law Journal*, vol. 21, no. 4, pp. 641-660, 2020

⁸ R. Michaels, "Global Legal Pluralism," *Annual Review of Law and Social Science*, vol. 18, pp. 245-263, 2022.

⁹ S. Butt and T. Lindsey, "Judicial Discretion and Legal Certainty in Indonesia," *Asian Journal of Comparative Law*, vol. 17, no. 2, pp. 145-168, 2022.

¹⁰ D. Bedner, "Indonesian Legal Pluralism and the Recognition of Customary Law," *Journal of Legal Pluralism*, vol. 52, no. 3, pp. 215-230, 2020

¹¹ M. Crouch, "Law Reform and Judicial Reform in Indonesia," *Law & Policy*, vol. 43, no. 1, pp. 3-25, 2021.

Although various studies have addressed legal pluralism and judicial discretion, gaps remain. First, few quantitative studies have specifically measured the impact of the application of living law on indicators of legal certainty after the enactment of the new Criminal Code. Second, most research focuses on normative analysis or limited case studies. Third, there is no empirical model that tests the causal relationship between the intensity of the application of living law and disparities in decisions on a national scale.

Based on previous theories and findings, this study constructs a conceptual framework that positions the application of living law as the independent variable and legal certainty as the dependent variable. The intensity of the application of living law is assumed to influence the consistency of decisions, disparities in sentencing, and the frequency of further legal action. This conceptual model integrates the theories of legal certainty and legal pluralism to explain the normative and empirical dynamics in the Indonesian criminal justice system. This framework serves as the basis for testing hypotheses through a quantitative approach based on court decision data.

B. Research Methods

This study employed a quantitative design with a comparative explanatory approach. The explanatory approach aims to examine the causal relationship between the application of living law and the level of legal certainty in the criminal justice system. The comparative approach was used to compare the characteristics of decisions before and after the enactment of Law Number 1 of 2023. The study was non-experimental in nature, as there was no manipulation of variables; instead, it analyzed legally binding decision documents.¹²

The data used is secondary data in the form of copies of district court and high court decisions for the 2022 to 2025 period. The data was obtained through the official Supreme Court directory.¹³

1. Operationalization of Variables

The independent variable in this study is the intensity of the application of living law. This variable is measured using a composite index consisting of three main indicators:

1. Frequency of references to social or customary norms, namely the number of mentions of customary norms, local customs, or social values in legal considerations.
2. The depth of sociological argumentation, as measured by the scale:
 1. 1 = mentioned without explanation
 2. 2 = explained in a limited way
 3. 3 = explained in depth and linked to the facts of the case
3. Influence on the verdict, with a scale:
 1. 1 = no effect

¹² T. Ginsburg and M. Versteeg, "The Boundaries of Legal Reform," *International Journal of Constitutional Law*, vol. 18, no. 3, pp. 687-713, 2020.

¹³ J. Light, "Sentencing Disparities and Judicial Consistency," *Journal of Empirical Legal Studies*, vol. 18, no. 4, pp. 890-915, 2021.

2. 2 = as an additional consideration
3. 3 = as the main basis for the decision

The variable value is calculated as the average of the three indicators. This approach allows for structured and standardized measurement of intensity. The dependent variable is legal certainty, which is measured through three indicators: consistency of decisions, disparity in sentencing between regions, and frequency of further legal action.

2. Decision Coding Mechanism

The data collection process is carried out using document analysis techniques with the following systematic coding procedures:

1. **Selection of decisions** based on general criminal case criteria that include social or customary considerations.
2. **Text segmentation** by focusing analysis on the legal considerations section.
3. **Preparation of a coding scheme** consisting of:
 - 1) NL (local norms)
 - 2) AS (sociological argument)
 - 3) PH (influence on decision results)
4. **Double coding process**, where two researchers code the decisions independently.
5. **The inter-coder reliability test** used Cohen's Kappa coefficient with a minimum limit of 0.75.
6. **Resolve differences** through discussion until consensus is reached.

This procedure ensures consistency and objectivity in the measurement of variables.

3. Validity and Reliability of Instruments

The research instrument consisted of a systematically developed structured coding sheet. Validity and reliability testing were conducted in several stages:

1. **Content validity** was conducted through expert review by five criminal law and research methodology experts.
2. **Construct validity** was tested using exploratory factor analysis (EFA) with a minimum factor loading limit of 0.50.
3. **Internal reliability**, measured using Cronbach alpha with a minimum value of 0.70.
4. **Instrument trials** were conducted on 30 decisions to ensure clarity of indicators and reduce measurement bias.

4. Population and Sample

The study population included all general criminal decisions that incorporate social or customary norms. The sampling technique used stratified random sampling based on jurisdiction and case type. A minimum sample size of 400 decisions was set to meet the requirements of multivariate regression analysis.

5. Data Analysis Techniques

The analysis was conducted in two stages. The first stage used descriptive statistics to describe the data distribution. The second stage used independent mean difference

tests and multiple linear regression to examine the effect of independent variables on legal certainty. Tests were conducted at a 5 percent significance level. The analysis used IBM SPSS Statistics software and was supplemented with classical assumption tests such as normality, multicollinearity, and heteroscedasticity.

C. Results and Discussion

The study analyzed 412 general criminal decisions, consisting of 206 decisions before and 206 decisions after the enactment of Law Number 1 of 2023 concerning the Criminal Code. Descriptive analysis shows an increase in the intensity of legal references in judges' deliberations after the new regulation was enacted.

Table 1. Descriptive Statistics of Research Variables

Variables	Indicator	Period	Mean	Elementary School
The Intensity of Living Law	Local Norm Frequency (NL)	Before	1.38	0.59
The Intensity of Living Law	Local Norm Frequency (NL)	After	2.91	0.71
The Intensity of Living Law	Sociological Argumentation (AS)	Before	1.45	0.62
The Intensity of Living Law	Sociological Argumentation (AS)	After	2.76	0.69
The Intensity of Living Law	Influence on Decision (PH)	Before	1.42	0.61
The Intensity of Living Law	Influence on Decision (PH)	After	2.94	0.73
Intensity Index (Average)	NL+AS+PH Composite	Before	1.42	0.61
Intensity Index (Average)	NL+AS+PH Composite	After	2.87	0.74
Legal certainty	Consistency of Decisions	Before	3.76	0.58
Legal certainty	Consistency of Decisions	After	3.21	0.64
Legal certainty	Sentencing Disparity	Before	0.48	0.21
Legal certainty	Sentencing Disparity	After	0.67	0.26
Legal certainty	Further Legal Efforts	Before	0.29	0.14
Legal certainty	Further Legal Efforts	After	0.41	0.18

Descriptive analysis shows an increase in all indicators of the intensity of the application of living law. The frequency of references to local norms increased from 1.38 to 2.91. The depth of sociological argumentation increased from 1.45 to 2.76. Influence on verdicts increased from 1.42 to 2.94. Overall, the composite index increased from 1.42 to 2.87.

For the legal certainty variable, verdict consistency decreased from 3.76 to 3.21. Sentencing disparity increased from 0.48 to 0.67. The frequency of further legal action also increased from 0.29 to 0.41. This pattern indicates an initial relationship between increasing legal intensity and decreasing legal certainty.

Multiple linear regression analysis shows that the intensity of the application of living law has a negative effect on legal certainty.

Table 2. Multiple Linear Regression Results

Independent Variables	Beta	t	Sig.
Local Norm Frequency (NL)	-0.28	-4.92	0.000
Sociological Argumentation (AS)	-0.31	-5.44	0.000
Influence on Decision (PH)	-0.36	-6.18	0.000
Regional Control	-0.17	-2.98	0.003
Type of Case	-0.13	-2.21	0.021

The regression results show that all indicators of the intensity of the application of existing laws have a negative and significant effect on legal certainty. The variable influencing the verdict has the largest coefficient (-0.36), followed by sociological arguments (-0.31) and the frequency of local norms (-0.28).

An R² value of 0.41 indicates that the model is able to explain 41 percent of the variation in legal certainty. This result is stronger than the previous model because it uses more detailed and measurable indicators.

These findings indicate that the expansion of the application of living law correlates with increased variation in decisions and disparities in sentencing. These results align with the theory of legal certainty, which emphasizes the importance of clear norms and consistent application. As the scope for interpretation expands, sentencing standards become more diverse.

These findings also support the judicial discretion perspective, which states that open norms increase flexibility but risk decreasing predictability. This finding is consistent with previous research that found that expanding judicial discretion increases variation in decisions across jurisdictions. However, it differs from studies that suggest that integrating social norms can increase legitimacy without compromising consistency. This discrepancy

is likely influenced by the lack of detailed technical guidelines for the application of living law.

Practically, the results of this study demonstrate the need for clearer interpretative guidelines for judges to prevent excessive disparity in the application of living law. The Supreme Court needs to develop standard parameters or technical guidelines to maintain national consistency without diminishing local sensitivities.

This research's theoretical contribution lies in integrating the analysis of legal pluralism with quantitative measurements of legal certainty. This research strengthens the argument that legal pluralism requires institutional harmonization mechanisms to prevent the stability of the criminal justice system.

This study has limitations. The data only cover the initial period of the regulation's implementation, so it does not reflect the long-term stabilization of judicial practices. Furthermore, the social legitimacy variable was not directly measured. Further research is recommended using a longer, longitudinal design and incorporating public perceptions of justice.

D. Conclusions and Recommendations

This study demonstrates that the intensity of the application of living law in criminal decisions significantly influences the level of legal certainty. Regression results indicate a strong negative relationship between the application of living law and the consistency of decisions. The primary hypothesis is accepted. The higher the intensity of the application of living law, the greater the variation in decisions and the disparity in sentencing. These findings suggest that the expansion of socially based norms without clear interpretative guidelines can reduce the predictability of the criminal justice system. Policy implications include the need to develop living standards for legal application and strengthen judicial oversight to maintain national consistency. The limitations of this study lie in the relatively short observation period and the use of quantitative indicators that do not directly capture aspects of social legitimacy. Future research is recommended to expand the timeframe and combine quantitative approaches with public perception surveys to obtain a more comprehensive picture.

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