

Gender-responsive sentencing for women defendants in Indonesia: Integrating living law and feminist legal reasoning

Abdul Mutalib¹, Pujiyono¹, Sukirno¹, Rahmat Hi. Abdullah^{1,2*}, Ota Musashi³

¹ Universitas Diponegoro, Semarang, Central Java, Indonesia

² Institut Agama Islam Negeri Ternate, North Maluku, Indonesia

³ University of New South Wales, Sydney, Australia

Article Information	Abstract:
Submitted: 2026-03-23 Revised: 2026-06-06 Published: 2026-07-05	Women defendants in Indonesia frequently experience double victimization, functioning simultaneously as offenders and as victims of domestic violence, sexual exploitation, and economic pressure rooted in asymmetrical gender power relations. This study examines how living law, interpreted through constitutional values and feminist legal reasoning, can be operationalized to enable gender-responsive sentencing for women defendants in Indonesia. Using a normative-juridical method with statutory, conceptual, and doctrinal-analytical approaches, the study analyzes legal materials through grammatical, teleological, and systematic interpretation. The findings reveal three main points. First, Article 2 extends the principle of legality into a material dimension through a constitutional filter that ensures gender responsiveness and rejects discriminatory customary legal practices. Second, Article 54 provides space for gender-responsive sentencing by allowing consideration of women's victimization and structural conditions. Third, the study develops a Gender-Responsive Living Law Model that integrates living law and feminist legal reasoning into a structured, measurable, and accountable judicial process. The study concludes that Articles 2 and 54 of the National Criminal Code provide a normative framework for gender-responsive sentencing through a constitutional filter against discriminatory practices. However, its effectiveness depends on the application of a structured and integrative model to ensure that judicial discretion remains measurable and accountable. This study contributes to gender and socio-legal studies by integrating living law and feminist legal reasoning into an operational framework for criminal adjudication in Indonesia.

Keywords:

Living Law; Feminist Legal Reasoning; Gender-Responsive Sentencing; Women Defendants; Indonesian National Criminal Code.



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***Corresponding author:** Rahmat Hi. Abdullah, Doctor of Law Program, Faculty of Law, Universitas Diponegoro, Semarang, Central Java, Indonesia; Institut Agama Islam Negeri Ternate, Ternate, North Maluku, Indonesia e-mail: abdullahrahmat@iain-ternate.ac.id

INTRODUCTION

Women in conflict with criminal law in Indonesia occupy a paradoxical position as both offenders and victims of structural gender inequality. The colonial legacy of the Criminal Code, with its gender-neutral and retributive approach (*daad-strafrecht*), tends to ignore the structural background of offenders. As a product of a masculine legal perspective, it treats women acting under coercion in domestic violence contexts in the same way as offenders acting on their own free will, while law enforcement officials often fail to understand unequal power relations (Savitri & Gunarsa, 2008; Gill et al., 2021; Hulley et al., 2023). Approximately 10,098 women are incarcerated. The CATAHU 2024 report documented 106 cases of women in conflict with the law in the state domain, including 15 cases of sexual violence during judicial proceedings (Komnas Perempuan, 2025). In addition, 36% of 120 service institutions reported the criminalisation of domestic violence victims (Komnas Perempuan, 2021). This double victimisation (Kuswandi & Madianwati, 2025) underpins the enactment of Law No. 1 of 2023, which introduces the *daad-dader strafrecht* paradigm by balancing the objective factor of the criminal act and the subjective circumstances of the offender (Dwijayanto, 2026; Hiariej & Santoso, 2023).

Numerous previous studies have examined living law and gender. This study maps the existing literature into three main research streams. First, studies on living law in the National Criminal Code have not only addressed fundamental issues concerning material and formal legality but also examined the inventory of customary crimes and their formalisation into various regional regulations (Gregorio et al., 2024; Tongat, 2022; Valerina & Risma, 2024; Mulyadi, 2013; Febrianty et al., 2023). Second, studies on gender justice in criminal law have focused on the protection of victims of sexual violence through feminist legal theory, the regulation of femicide, and the application of restorative justice for women in conflict with the law (Ningrumsari et al., 2022; Salamor et al., 2024; Zaltina & Nurtjahyo, 2024). Third, studies on sentencing reform in the National Criminal Code have discussed the concepts of *rechterlijk pardon* and substantive justice (Barlian & Arief, 2017; Nurcahyo et al., 2024; Faisal et al., 2024). Accordingly, this study fills a scholarly gap by explicitly integrating Article 2, which recognises living law, with Article 54, which provides sentencing guidelines, as a coherent doctrinal instrument to protect women defendants from gender-unjust sentencing through the perspective of feminist legal reasoning.

This study aims to develop the application of living law provisions in the National Criminal Code as an instrument for protecting women defendants from gender-unjust sentencing. Specifically, this aim encompasses two objectives: first, to identify the normative space for gender justice in sentencing through a systematic reading of Articles 2 and 54 of the National Criminal Code; and second, to formulate a gender-responsive model for applying living law by integrating feminist legal reasoning as a doctrinal reference for judges in rendering decisions. The study addresses the following research question: how can the living law provisions in the National Criminal Code be optimised to protect women defendants from gender-unjust sentencing? This problem is operationalised into two sub-research questions: (1) how does a systematic reading of Article 2 and Article 54 provide normative space for gender justice considerations in sentencing women defendants? and (2) how can a gender-responsive model for the application of living law be formulated as a doctrinal reference for judges in rendering decisions?

The main argument of this study is that Articles 2 and 54 of the National Criminal Code, when read systematically and filtered through Article 2(2), provide a normative space for gender-just sentencing without undermining the principle of legality. This study offers an interpretation of living law grounded in constitutional principles and feminist legal

reasoning, enabling judges to consider gender-based vulnerability, histories of victimisation, caregiving responsibilities, economic duress, and asymmetric power relations in sentencing women defendants. The novelty of this study lies in three contributions: (1) theoretically, it integrates living law and feminist legal reasoning; (2) practically, it develops a four-component operational model for gender-responsive sentencing; and (3) analytically, it formulates parameters for distinguishing gender-responsive customary practices from discriminatory ones through the filtering mechanism of Article 2(2) of the National Criminal Code. Accordingly, this study is situated at the intersection of gender and socio-legal studies and contributes to the development of gender-sensitive approaches to substantive justice for women defendants.

METHOD

Research Approach

This study employs a normative-juridical method examining positive legal norms, principles, and doctrines (Marzuki, 2017), operationalised through three hierarchically ordered approaches. The statute approach (Budianto, 2020) examines legislation vertically and horizontally, focusing on Article 2(1) of Law No. 1 of 2023 concerning the National Criminal Code which recognises living law as a source of substantive criminal law Article 54(2) on sentencing guidelines based on the offender's personal circumstances, Article 5(1) of Law No. 48 of 2009 concerning Judicial Power, and Law No. 12 of 2022 concerning Sexual Violence Crimes. The conceptual approach (Marzuki, 2017) examines three principal concepts: living law as formulated by Ehrlich (1936); gender justice within feminist legal theory (Chamallas, 2013; Savitri & Gunarsa, 2008); and gender-responsive sentencing guidelines recognising victimisation history, asymmetric power relations, and economic duress as relevant variables. The doctrinal-analytical approach, introduced to address operationalisation, translates these conceptual relationships into measurable indicators, with the three approaches sequenced from normative baseline through interpretive framework to operational criteria.

Legal Materials and Selection Criteria

Legal materials are selected on transparent criteria. Primary materials the 1945 Constitution, Law No. 1 of 2023, Law No. 48 of 2009, Law No. 12 of 2022, Law No. 23 of 2004, and Supreme Court Regulation No. 3 of 2017 are selected on normative relevance to the protection of women defendants, hierarchical authority, and currency. Secondary materials are selected on thematic relevance, recency (priority for publications from 2018 onward), and source standing (priority for Scopus-indexed and accredited national journals). Tertiary materials clarify terminology only. The construct of “potential of living law as an instrument of gender justice” is operationalised through three measurable parameters: the proportion of Article 2(2) indicators satisfied (range 0–4); alignment with the five gender-responsive criteria articulated in the findings (range 0–5); and compatibility with the sentencing objectives in Article 51 of the National Criminal Code.

Analytical Indicators and Interpretive Techniques

Living law is operationalised through four analytical indicators derived from Article 2(2) of the National Criminal Code: consonance with Pancasila, the 1945 Constitution, international human rights instruments (particularly CEDAW and the ICCPR), and general principles of law recognised by civilised nations. A customary practice qualifies as gender-responsive living law only if it satisfies all four indicators, with the human rights indicator operationalised through CEDAW Article 1's non-discrimination principle. Three interpretive

techniques are applied in hierarchical order (Mertokusumo, 2014): grammatical, teleological, and systematic interpretation, sequenced from linguistic clarity through purposive analysis to systemic harmonisation. Triangulation is achieved through three external validation procedures: internal-textual validation against Article 5(1) of the Judicial Power Act, Law No. 12 of 2022, and Supreme Court Regulation No. 3 of 2017; comparative-doctrinal validation against Article 9a of the Dutch Criminal Code and the comparative sentencing literature (Barlian & Arief, 2017; Hiariej & Santoso, 2023); and international-normative validation against the United Nations Bangkok Rules (UNGA, 2010) and CEDAW.

Methodological Limitation

This study has several methodological limitations. First, the analysis is limited to the normative space of the National Criminal Code, rather than the empirical application of living law by judges in cases involving women. Second, the doctrinal-prescriptive approach employed in this study formulates legal arguments and gender-responsive legal criteria but does not measure judicial practice empirically. Third, the application of Article 2(2) requires interpretive judgement to assess the conformity of customary norms with Pancasila, the 1945 Constitution, international human rights instruments, and general principles of law. Therefore, the proposed model still requires further empirical validation through court decision analysis and interviews with judges, prosecutors, lawyers, and women defendants.

RESULTS AND DISCUSSION

Result

The normative construction of living law as a source of substantive criminal law

In this section, gender serves as the primary analytical variable in examining the normative construction of living law under Article 2 of the Criminal Code. Drawing on feminist legal theory (Chamallas, 2013; Savitri & Gunarsa, 2008), gender is not treated as a derivative of human rights and Pancasila, but as a determining lens for assessing the eligibility of customary practices as living law. The analysis is guided by three questions: gender-based assumptions, the reproduction or transformation of gender power relations, and the accommodation of structural conditions, including victimization, economic pressure, and caregiving responsibilities, that shape women's pathways to criminal liability. These questions operationalize gender as the main analytical variable, while Article 2 paragraph (2) functions as the constitutional basis for affirming gender-responsive practices and excluding discriminatory ones, rather than as the primary source of gender-based considerations.

Article 2 paragraph (1) of Law No. 1 of 2023 states that the formal principle of legality, as regulated in Article 1 paragraph (1), does not preclude the application of living law, which allows criminal liability to be imposed even when an act is not regulated by statutory law (Adhari et al., 2021). Drawing on Ehrlich (1936), law is understood not merely as a product of the state, but as social norms that grow and are practiced within society. This recognition expands the principle of legality from a formal dimension (*nullum crimen sine lege*) to a material dimension (*nullum crimen sine iure*), affirming that the sources of criminal law are not limited to written legal texts (Hiariej & Santoso, 2023). However, Article 2 paragraph (2) limits the applicability of living law by requiring its conformity with Pancasila, the 1945 Constitution, human rights, and general principles of law recognized by civilized nations. This limitation clause serves as a highly significant normative filter for determining which customary legal practices may be accepted and which must be rejected as sources of material criminal law.

Table 1

Normative Construction of Living Law in Article 2 of the National Criminal Code

No.	Aspect	Findings	Description
1	Recognition of Living Law	Article 2(1) recognizes that the formal principle of legality does not preclude the applicability of living law within society.	This marks the expansion of legality from the formal dimension (<i>nullum crimen sine lege</i>) to the material dimension (<i>nullum crimen sine iure</i>).
2	Theoretical Foundation	The provision reflects Ehrlich's concept of living law, which views law as social norms that grow, develop, and are practiced in everyday life.	It demonstrates the influence of legal sociology in Indonesia's criminal law reform.
3	Normative Filter	Article 2(2) limits the applicability of living law by requiring conformity with Pancasila, the 1945 Constitution, human rights, and general principles of law.	It functions as a normative filter for assessing whether living law is compatible with constitutional and universal legal values.
4	Implication for Gender Justice	Discriminatory customary practices cannot acquire normative legitimacy, whereas gender-responsive practices may be recognized as valid living law.	This creates space for gender-responsive living law within the framework of the National Criminal Code.
5	Integration Challenge	The unwritten, local, and variable nature of living law raises concerns regarding legal certainty and consistent enforcement.	It requires documentation, institutional guidelines, and judicial interpretive frameworks to prevent arbitrary application (Komeni & Widjajanti, 2024; Masyhar et al., 2025).

Source: Processed by the authors, 2026.

Table 1 reveals three principal findings regarding the normative construction of living law under Article 2. First, the recognition of living law in Article 2(1) expands legality from a purely formal dimension to a material dimension, creating the doctrinal prerequisite for customary practices to enter criminal adjudication. Second, the normative filter in Article 2(2) functions as a constitutional gate that systematically distinguishes gender-responsive customary practices from discriminatory ones. Third, the integration challenge posed by the unwritten and variable nature of customary law necessitates the gender-screening mechanism developed in this study.

Based on the findings, gender justice is not merely a subsequent consequence of constitutional filtering but constitutes the main analytical outcome. Customary practices that discriminate against women such as requiring silence in response to violence, imposing disproportionate compensation, or blaming women as the moral cause of criminal acts fail to pass the normative filter because they contradict human rights and the principle of non-discrimination. Conversely, practices that recognize women's relational position, including deliberation, forgiveness, and the restoration of social relations that are sensitive to asymmetrical power relations, acquire legitimacy because they align with the second and fifth principles of Pancasila. This construction creates space for gender-responsive living law within the National Criminal Code, in which Article 2 paragraph (2) functions as a gender filter that separates patriarchal practices from those that accommodate women's structural vulnerability. The codification of customary law through regional regulations provides a documentary basis for the systematic application of gender-responsive parameters.

Sentencing guidelines under Article 54 and the space for gender-contextual considerations

To distinguish gender-responsive customary practices from discriminatory ones in the application of Article 2 paragraph (2), this analysis applies five explicit parameters derived from Article 1 of CEDAW and the United Nations Bangkok Rules (UNGA, 2010). A customary

practice may only be categorized as gender-responsive if it satisfies all five parameters: (1) recognition of asymmetrical power relations as a relevant factor; (2) accommodation of histories of victimization in determining culpability; (3) consideration of caregiving responsibilities; (4) absence of burdens or stigma imposed on female defendants based on gendered moral expectations; and (5) the availability of restorative alternatives without compromising bodily, economic, or familial autonomy. Conversely, any practice that fails to meet one of these parameters is deemed discriminatory and rejected by the filter. The 421 discriminatory regional regulations documented by Komnas Perempuan (2018), insofar as they are derived from customary norms, are shown to fail one or more of these parameters and therefore may legitimately be excluded from the domain of living law.

Article 54(1) of the National Criminal Code explicitly prescribes eleven factors that judges must consider in sentencing, including under (j) victim/family pardon and (k) societal legal values and justice the imperative "must be considered" gives binding force. Article 54(2) further allows non-imposition based on triviality, personal circumstances of the offender, or the situational context, with due regard to justice and humanity. The phrase "personal circumstances," teleologically interpreted under Article 51's sentencing objectives, opens significant interpretive room for gender-contextual factors, including violence histories, power asymmetries, and structural economic duress (Ariyanti, 2020). This reading coheres with the individualisation of punishment (*individualisatie van de straf*) characterising the *daad-dader strafrecht* paradigm (Plesničar, 2013), and with the *rechterlijk pardon* concept adapted from Article 9a of the Dutch Criminal Code (Elucidation of Article 54(2)).

Table 2

Normative space for gender justice in Article 54 of the National Criminal Code

No.	Provision	Key Phrase	Interpretive Implication
1	Article 54(1)(j)	Pardon from the victim and/or the victim's family	Establishes victim's pardon as a mandatory consideration in sentencing, although it does not automatically determine the sentence.
2	Article 54(1)(k)	Legal values and the sense of justice living in society	Connects sentencing guidelines with societal legal values and opens a link to the living law framework recognized under Article 2.
3	Article 54(2)	Personal circumstances of the offender and circumstances surrounding the offence	Opens interpretive space for considering victimization history, asymmetrical power relations, caregiving burdens, and economic duress.
4	Article 54(2)	Considerations of justice and humanity	Reinforces that sentencing must reflect the humanistic and contextual dimensions of the case.
5	Article 54(2) / <i>Rechterlijk pardon</i>	Authority not to impose a sentence or measure despite proven guilt	Allows judicial pardon where punishment would contradict justice and humanity, particularly in light cases or where the offender's personal circumstances justify non-punishment.

Source: Processed by the authors, 2026.

Table 2 reveals that Article 54 provides five distinct normative entry points for gender-contextual sentencing, each with specific implications for women defendants. The analysis demonstrates that the mandatory consideration of victim's pardon (Article 54(1)(j)) enables recognition of reconciliation processes within gender-responsive customary practices. The reference to legal values prevalent in society (Article 54(1)(k)) connects sentencing directly to the living law recognised in Article 2, creating a doctrinal bridge between customary justice and formal adjudication. Most significantly, the phrase "personal circumstances of the offender" in Article 54(2) permits teleological interpretation that encompasses

victimisation history, asymmetric power relations, and economic duress structural conditions disproportionately shaping women's pathways into criminal liability. The *rechterlijk pardon* mechanism allows judges to waive sentencing entirely where punishment would contradict justice, providing the most expansive normative space for gender-responsive adjudication. Collectively, these provisions demonstrate that the National Criminal Code, when read together with Article 5(1) of the Judicial Power Act, the TPKS Act, and Supreme Court Regulation 3/2017, constitutes a coherent normative system providing adequate space for gender justice in sentencing.

The coherence of this normative system is reinforced by external instruments. Law No. 12 of 2022 (TPKS Act) explicitly recognises the vulnerability of victims of gender-based violence and provides for psychological recovery rights (Article 70), which is directly relevant for understanding the backgrounds of women who experience double victimisation. Supreme Court Regulation 3/2017 directs judges to consider gender equality and non-discrimination in adjudication. These instruments confirm that the normative space identified in Articles 2 and 54 is not merely theoretical but is supported by an operational legal infrastructure that positions gender-contextual reasoning as a legitimate and indeed obligatory dimension of sentencing women defendants.

A four-component gender-responsive living law application model

To address the operationalisation concern, each component of the model is articulated with explicit performance indicators that delineate the boundary between gender-responsive and discriminatory application, and that constrain judicial discretion within reviewable parameters. The first component identification of gender-responsive living law is operationalised through three indicators: (1) documentary verification of the customary practice through the testimony of at least two independent customary law experts; (2) explicit application of the four indicators of Article 2(2) (Pancasila, Constitution, human rights, general legal principles); and (3) written record of the verification in the trial dossier. Judges are required to identify customary law practices in the community where the offence was committed considering the position and condition of women in conflict resolution, as demonstrated by customary conflict resolution practices across Indonesia including deliberation and consensus in the *nagari* of West Sumatra (Nova, 2023), deliberation forums in Lampung, and Dayak customary mediation (Halawa, 2025).

The second component criteria for assessing the offender's gender context operationalises the phrase "personal circumstances" in Article 54(2) through an explicit five-factor checklist: (1) history of gender-based violence including physical, psychological, sexual, and economic neglect as under Law 23/2004; (2) power relations between the offender and the victim or the coercing party; (3) socio-economic constraints on the offender's choices; (4) caregiving responsibility as primary caregiver of dependants; and (5) impact of imprisonment on the offender's children and dependants, elaborated via the Bangkok Rules (Rules 61-62). The third component of integrative legal reasoning requires judges to include in the court's written judgment: identification of gender-responsive living law with Article 2(2) analysis, gender-context analysis based on the checklist, and a clear explanation of how these influenced the sentencing outcome, including the possible application of *rechterlijk pardon* (54(2)), supervisory punishment (75), or community service (85). The fourth component of accountability control is operationalised through the prohibition of stereotyping (SC Reg 3/2017), the availability of appellate review for departures from the reasoning structure, and the transparency of reasoning to permit subsequent doctrinal scrutiny.

Table 3

Components of the Gender-Responsive living law application model

No.	Component	Function	Operational Reference
1	Identification of Gender-Responsive <i>Living Law</i>	To identify customary practices that take women's position into account in conflict resolution.	Conducted through the testimony of customary experts, community leaders, and adat institutions; filtered through Article 2(2) of the National Criminal Code (Halawa, 2025; Nova, 2023).
2	Assessment of the Female Offender's Gender Context	To operationalise the phrase "personal circumstances of the offender" under Article 54(2).	Five factors are assessed: history of violence, power relations, socio-economic constraints, caregiving responsibilities, and the impact of imprisonment (UNGA, 2010, Rules 61–62).
3	Integrative Legal Reasoning Formulation	To embed <i>living law</i> and a gender perspective into judicial reasoning.	Includes three reasoning elements: identification of relevant <i>living law</i> , gender-context analysis, and a link to sentencing outcomes, including <i>rechterlijk pardon</i> , supervision punishment under Article 75, or community service under Article 85.
4	Accountability Control Mechanism	To prevent arbitrariness and safeguard legal certainty.	Relies on verified trial facts, prohibition of gender stereotyping under Supreme Court Regulation No. 3 of 2017, transparency of judicial reasoning, and review through appeal and cassation.

Source: Processed by the authors, 2026.

Table 3 shows that the Gender-Responsive Living Law Application Model consists of four main integrated components. The first component functions to identify customary legal practices that take women's position into account in conflict resolution through constitutional filtering. The second component operationalizes the assessment of the female offender's gender context, including histories of violence, power relations, economic constraints, caregiving responsibilities, and the impact of imprisonment. The third component requires judges to formulate legal reasoning that integrates the identification of living law, gender-context analysis, and its connection to sentencing outcomes, such as judicial pardon, supervision punishment, or community service. The fourth component ensures accountability through the prohibition of stereotyping, transparency in judicial reasoning, and review mechanisms through appeal and cassation.

This model consists of four interrelated components. The first component identifies gender-responsive customary practices through the testimony of customary experts, community leaders, and *adat* institutions, which are then filtered through the constitutional parameters of Article 2 paragraph (2) to ensure conformity with Pancasila, human rights, and the principle of non-discrimination. The second component operationalizes the phrase "personal circumstances of the offender" under Article 54 paragraph (2) through five factors: histories of gender-based violence, asymmetrical power relations, socio-economic constraints, caregiving responsibilities, and the impact of imprisonment on dependents, with reference to the principles set out in the Bangkok Rules. The third component requires judges to formulate integrative legal reasoning that includes the identification of living law, gender-context analysis, and its connection to sentencing outcomes, including the possible application of *rechterlijk pardon*, supervision punishment, or community service. The fourth component ensures accountability through the prohibition of stereotyping, transparency in legal reasoning, and legal remedies through appeal and cassation.

Discussion

The study of living law, feminist legal reasoning, and gender-responsive sentencing in the National Criminal Code reveals three key findings. First, Article 2 extends formal legality into material legality and functions as a constitutional filter that distinguishes gender-responsive customary practices from discriminatory ones within the national criminal law system. Second, Article 54 provides normative space for gender-responsive sentencing by requiring judges to consider victim forgiveness, societal legal values, and the offender's personal circumstances, thereby enabling contextual assessment of victimization and structural inequalities affecting women defendants. Third, the study develops a Gender-Responsive Living Law Model that integrates living law and feminist legal reasoning through four interrelated components: identification of customary norms, gender-context assessment, integrative legal reasoning, and accountability control, translating normative provisions into structured, measurable, and reviewable judicial practice. Thus, Articles 2 and 54 establish a normative foundation for gender-responsive sentencing; however, their effectiveness depends on the consistent application of the proposed model to filter discriminatory customary practices and ensure accountable consideration of women defendants' gendered circumstances.

The social relevance of these findings is reinforced by the fact that female defendants in Indonesia often occupy a paradoxical legal position: they are treated as perpetrators of criminal offences while simultaneously being victims of structural gender inequality (Londoño, et al., 2021; Martínez-Bacaicoa et al., 2024). This is evidenced by data from the Directorate General of Corrections, which records 10,098 female prisoners, as well as 106 cases of women in conflict with the law documented by Komnas Perempuan (2025), including cases involving the criminalization of victims of domestic violence (Komnas Perempuan, 2021). The model proposed in this study addresses the concrete needs of women experiencing double victimization by providing a structured framework for judges to consider histories of victimization, caregiving responsibilities, asymmetrical power relations, and economic pressure. These factors disproportionately shape women's pathways to criminal liability but have long been systematically overlooked within the gender-neutral colonial legacy of the Criminal Code (Kuswandi & Madianwati, 2025; Savitri & Gunarsa, 2008).

Theoretically, this study integrates three distinct doctrinal frameworks: living law theory (Ehrlich, 1936), feminist legal theory (Chamallas, 2013), and the doctrine of *daad-dader strafrecht*, which together generate three mutually reinforcing operational boundaries (Hiariej & Santoso, 2023). First, the constitutional boundary established in Article 2 paragraph (2) prioritizes human rights when they conflict with living law, thereby systematically protecting women from discriminatory customary practices and giving precedence to individual dignity. Second, the doctrine of *daad-dader strafrecht* bridges the tension between gendered context and legal certainty through a balanced approach, in which histories of victimization enrich the assessment of the offender without negating the elements of the criminal act. Third, the Judicial Power Law and Supreme Court Regulation No. 3 of 2017 establish substantive equality as a procedural boundary, requiring judges to examine gender-based contextual facts. Critically, the ambiguity identified by Tongat (2022) and Valerina and Rismansa (2024) is constructive in nature, enabling judicial dialogue between written law and living law, and transforming normative tension into a space for dynamic interpretation without abandoning commitment to the rule of law.

This study demonstrates that criminal law is never gender-neutral; a norm that appears universal may, in fact, reproduce structural injustice against women, as emphasized

by Chamallas (2013) and Savitri and Gunarsa (2008). The fundamental insight drawn from this study is that the transformation of the Criminal Code toward *daad-dader strafrecht* is not merely a technical shift, but an ethical entry point for viewing offenders as whole subjects embedded within the full context of their lives. Plesničar (2013) and Dancig-Rosenberg & Dagan (2019) remind us that the individualization of punishment requires attention to the specific circumstances of the offender. However, this study extends that argument by showing that such circumstances must be interpreted through a structural lens: histories of violence, asymmetrical power relations, and economic vulnerability are not merely additional factors, but essential components with normative legitimacy. The most valuable lesson is that procedural justice alone is insufficient; judges need to be equipped with concrete parameters so that contextual consideration does not end as mere discretion but becomes an accountable practice of justice.

A comparative engagement with previous studies strengthens the validity of this study's findings. Campos and Bussinguer (2023) show that gender-blind sentencing in Brazil violates equality and proportionality, which is consistent with the finding that Article 54 paragraph (2) enables consideration of gendered contexts. Ambel (2025) documents the development of gender-sensitive adjudication in Chile, thereby supporting the need for structural reform, while Akano (2025) emphasizes the necessity of specific gender-based recognition. Hellum et al. (2023) and Seear and Mulcahy (2021) observe that seemingly neutral laws contain biases that disadvantage women, and Penovic and Debeljak (2024) underscore the elimination of stereotypes through contextual reasoning. The distinctive contribution of this study lies in its integration of living law theory and feminist legal theory into a single operational model, thereby addressing a gap in the literature (Abdrasulov et al., 2025; Kaur, 2025). The model's alignment with the Bangkok Rules (UNGA, 2010) situates Indonesian practice within an international framework, while Nurlaelawati and Witriani (2023) affirm that Article 54 paragraph (2), when read together with Article 2 and Supreme Court Regulation No. 3 of 2017, provides a domestic doctrinal foundation consistent with CEDAW and the ICCPR.

The findings of this study provide recommendations in three interrelated implications. For judicial practice, the four-component model bridges the gap between the normative recognition of living law under Article 2, sentencing guidelines under Article 54, and the operational needs of judges in cases involving women who are victims of gender-based injustice. Strengthening judges' capacity to identify and apply gender-responsive living law, supported by expert assistance and accountability mechanisms, is therefore a key prerequisite. For legal policy, the Criminal Code already contains an adequate normative infrastructure; thus, reform should be directed toward judicial training, the preparation of case-file templates, and protocols for judgment writing through collaboration among the Supreme Court, Komnas Perempuan, and judicial training institutions. For gender studies, the formulation of four indicators under Article 2 paragraph (2) and five gender-responsive parameters derived from CEDAW and the Bangkok Rules offers a replicable analytical tool for evaluating living law across plural legal jurisdictions, while also enriching comparative feminist legal scholarship.

CONCLUSION

This study concludes that the National Criminal Code provides a normative infrastructure for gender-responsive sentencing through the integration of living law and feminist legal reasoning in a systematic reading of Articles 2 and 54. Article 2 extends the principle of formal legality into material legality by providing a constitutional filter that

rejects discriminatory customary legal practices while recognizing gender-responsive practices. Article 54 opens space for judges to consider the victim's pardon, histories of victimization, unequal power relations, and women's structural conditions through the phrase "the personal circumstances of the offender." However, such normative recognition does not guarantee gender justice in the absence of an operational model that includes the identification of gender-responsive living law, assessment of the offender's context, integrative legal reasoning, and accountability mechanisms. Without such a framework, this normative space may become a form of judicial discretion that is unmeasured and insufficiently accountable.

Theoretically, this study contributes by developing a four-component operational model that integrates living law, feminist legal reasoning, and the doctrine of *daad-dader strafrecht* into a coherent framework for gender-responsive sentencing. This integration addresses a gap in the literature by demonstrating how the relationship between living law, legal certainty, and gender justice can be operationalized through explicit normative parameters for judicial decision-making. Practically, the model provides a structured framework for judges, judicial training institutions, and policymakers in applying gender-responsive sentencing. It also offers an evaluative reference for appellate courts and the Supreme Court to promote greater consistency, transparency, and accountability in judicial reasoning through appeal and cassation review.

Three limitations circumscribe the scope of these claims and suggest directions for future research. First, the study is normative-doctrinal; its findings describe available normative space rather than empirical judicial behaviour, necessitating subsequent analysis of court decisions involving women defendants under the National Criminal Code. Second, the model requires further operationalisation through judicial training, dossier templates, and decision-writing protocols, calling for action-research collaboration with the Supreme Court, Komnas Perempuan, and judicial training institutions. Third, comparative analysis of gender-responsive sentencing models across jurisdictions with plural legal frameworks would refine the model's applicability and identify transferable design elements.

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AUTHOR CONTRIBUTION STATEMENT

Abdul Mutalib: Conceptualization; Data Curation; Formal Analysis; Methodology; Visualization; Writing Original Draft; Writing Review & Editing. **Pujiyono:** Formal Analysis; Visualization; Writing Review & Editing. **Sukirno:** Formal Analysis; Methodology; Validation; Writing Review & Editing. **Rahmat Hi Abdullah:** Conceptualization; Data Curation; Formal Analysis; Methodology; Writing Original Draft; Writing Review & Editing. **Ota Musashi:** Conceptualization; Formal Analysis; Writing Review & Editing.

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