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The Dialectic Between the Principle of Legality and Legal Pluralism in The National Criminal Code

ABSTRACT

The Indonesian national Criminal Code, in force since 2 January 2026, recognises the living law as a basis for determining that a person deserves punishment even where the act is not regulated in the Code. Article 2 stands in tension with the principle of legality in Article 1(1), which demands legal certainty through written, clear, and non-retroactive rules. This article analyses the concept and regulation of living law in the national Criminal Code, the dialectic between legality and living law and its implications for legal certainty, and the form of legal pluralism it embodies together with the challenges of implementation. It is a normative legal study using statutory and conceptual approaches. The findings show that the tension is not eliminated but bridged by the conditions in Article 2(2) and Government Regulation No. 55 of 2025, which require customary offences to be established in regional regulations. This restores part of the legal certainty, but makes the pluralism in the Code state-controlled and leaves issues such as wording that may open the door to analogy, dual enforcement, and human rights protection.

Keywords: living law; principle of legality; legal certainty; legal pluralism; national Criminal Code

INTRODUCTION

On January 2, 2026, Law Number 1 of 2023 concerning the Criminal Code will come into effect, replacing the *Wetboek van Strafrecht*—a legacy of the Dutch East Indies era. One of the most contentious updates is Article 2 which stipulates that the principle of legality does not preclude the application of "living law" (*hukum yang hidup*)—customary or unwritten laws that remain active and continue to evolve within Indonesian society—to determine that an individual is subject to criminal liability, even if the act in question is not explicitly defined in the Criminal Code.

This provision stands in direct tension with the principle of legality. In criminal law doctrine, this principle dictates that no act may be penalized unless it has been previously defined by statute; furthermore, it prohibits the use of analogy to establish criminal liability and forbids the retroactive application of criminal laws (Moeljatno, 2008). This principle serves as a safeguard for citizens against the arbitrary exercise of power by the state; consequently, any deviation

from it naturally raises concerns regarding the erosion of legal certainty. Such a safeguard is essential because criminal law—understood as a body of rules governing prohibited conduct, the associated sanctions, and the procedures for imposing them—entails more severe consequences than any other branch of law (Hasan, 2025).

On the other hand Indonesia is a pluralistic society. The Constitution recognizes and respects customary law community units along with their traditional rights (The 1945 Constitution of the Republic of Indonesia, Article 18B, paragraph (2)) and long before the national Criminal Code, Emergency Law Number 1 of 1951 had already created a framework for the criminalization of acts that—under "living law"—are considered offenses, even though they have no equivalent in the Criminal Code. The debate regarding the concept of "material unlawfulness" (substantive illegality) even reached the Constitutional Court within the context of corruption offenses (Constitutional Court Decision Number 003/PUU-IV/2006 (judicial review of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption Crimes), delivered on July 25, 2006.). From a theoretical perspective this situation serves as an example of legal pluralism—the coexistence of multiple normative orders within a single social sphere (Griffiths, 1986).

To address concerns regarding legal certainty, the Government issued Government Regulation Number 55 of 2025 concerning the Procedures and Criteria for Determining "Living Law" (law that exists within society) on December 31, 2025. This regulation defines "living law" as customary law that stipulates that an individual who commits a specific act is subject to criminal penalties (Government Regulation Number 55 of 2025 concerning Procedures and Criteria for Determining Living Law in Society (promulgated on December 31, 2025, State Gazette of 2025 Number 197), Article 1 paragraph (1)). Nevertheless, the dialectic between legal certainty and justice—as derived from society—remains unresolved. This article examines this issue through the following three research questions.

Research Questions

1.What is the concept of "living law"—law that exists within a society—and how is it regulated under the national Criminal Code (KUHP)?

2.What is the dialectic between the principle of legality and "living law," and what are its implications for legal certainty?

3.How is legal pluralism reflected in the regulation of "living law," and what are the challenges regarding its implementation?

RESEARCH METHODS

This study employs a normative legal research method, utilizing both statutory and conceptual approaches. Primary legal sources include the national Criminal Code (KUHP), Government Regulation Number 55 of 2025, the 1945 Constitution, and Constitutional Court rulings. Secondary legal sources consist of books, articles, and legal reports containing expert opinions. The analysis is conducted using a qualitative-prescriptive approach. This article does not examine specific local regulations or court rulings that apply Article 2, as the study focuses on the normative and conceptual framework.

RESULT AND DISCUSSION

The Concept of "Living Law" and Its Regulation in the National Criminal Code

a. Theoretical roots

The concept of "living law"—in a scholarly sense—is associated with Eugen Ehrlich, a legal sociologist who distinguished between law as a set of norms used by the state for decision-making and the law that truly governs social life (*lebendes Recht*). According to Ehrlich, the locus of legal development does not lie in legislation or judicial decisions, but rather within society itself (Ehrlich, 1936). In other words, "law in books" may differ from "law in action."

In the Indonesian context, "living law" is commonly equated with *hukum adat* (customary law)—unwritten customary rules that exist within society and are enforced through sanctions (Hadikusuma, 1992). Customary criminal law is, in itself, not a new phenomenon. Long before the arrival of Dutch colonial rule, the various kingdoms across the Indonesian archipelago already recognized criminal norms—known as customary criminal law—which were generally

unwritten, localized, and varied from one region to another, as the practice of codification was not yet known at that time (Hasan, 2025). For example is the Kuntara Raja Niti code in Lampung, which was in effect during the early 16th century.13 Those who formulated the criminal law reform incorporated "living law" as part of an effort to align criminal law with the nation's social values and realities, ensuring that criminal law does not rely solely on the formal legality inherited from the colonial era (Arief, 2002).

b. Provisions in the National Criminal Code (KUHP)

Article 1 paragraph (1) of the national Criminal Code reaffirms the principle of legality while paragraph (2) prohibits the use of analogy in establishing the existence of a criminal offense. Article 2 paragraph (1) further states that the principle of legality does not preclude the application of "living law"—customary or community-based law—that deems an individual liable for punishment. Paragraph (2) sets forth specific conditions: such law applies only within the jurisdiction where it is practiced, provided the matter is not already regulated by the Criminal Code, and provided it aligns with the values of *Pancasila*, the 1945 Constitution, human rights, and general legal principles recognized by the international community. Paragraph (3) delegates the procedures and criteria for the application of such laws to a Government Regulation. Article 597 complements this by establishing criminal penalties for acts that are prohibited under the "living law" of a given community.

This recognition is not entirely novel. Emergency Law Number 1 of 1951 previously acknowledged customary offenses—those with no direct equivalent in the Criminal Code—subject to specific limitations on the penalties that could be imposed. The most significant advancement in the national Criminal Code is the formal incorporation of this recognition into the codified law, accompanied by delegated regulatory provisions and more detailed criteria.

The Dialectic Between the Principle of Legality and "Living Law": Implications for Legal Certainty

a. The Principle of Legality and Legal Certainty

Moeljatno defined three aspects of the principle of legality: no act may be prohibited or made subject to criminal penalties unless it has been explicitly defined as such by statute; analogy may not be employed to establish the existence of a criminal offense; and criminal laws may not be applied

retroactively. In the evolution of legal doctrine, these requirements are often further articulated as the mandates that laws must be written (*lex scripta*), clear (*lex certa*), strictly construed (*lex stricta*), and in existence prior to the commission of an act (*lex praevia*).

In Indonesian criminal law literature, the principle of legality is regarded as the foundation for criminalization and the juridical basis for the enforcement of criminal law, while simultaneously serving to protect the public against the abuse of power by the government. Referring to Sudarto, the consequence is that an act not explicitly stipulated in legislation cannot be subject to criminal punishment; thus, unwritten law lacks the authority to be applied. This formulation illustrates why Article 2 of the national Criminal Code (KUHP) serves as a significant exception to the classical understanding of the principle of legality.

The principle of legality upholds the value of legal certainty. Satjipto Rahardjo, drawing on the ideas of Radbruch, identifies certainty, justice, and utility as fundamental legal values—values that do not always align and often exist in a state of tension with one another (Rahardjo, 2012) It is precisely this tension that is reflected in Article 2: "living law" prioritizes the justice perceived by the community, whereas the principle of legality prioritizes predictability.

b. Thesis, antithesis, and synthesis

Within a dialectical framework, formal legality represents the thesis, "living law" serves as the antithesis, and Article 2—along with its implementing regulations—functions as a synthesis. Criticism of this synthesis has been sharp. Prof. Andi Hamzah, for instance, argues that Article 2 effectively nullifies the principle of legality by allowing for the criminalization of acts not defined within the Criminal Code. He contends that the principle of legality is only restored through Article 2, paragraph (3), which governs "living law" via Government Regulation; he further suggests that this article should be revised to ensure that customary criminal sanctions are incorporated into local (regional) regulations (Hukumonline, “Mendorong Revisi Pasal Living Law dalam KUHP Baru,” hukumonline.com, 6 Juni 2023).

Proponents of this provision emphasize that Article 2 does not constitute a "blank check." "Living law" applies only within the specific context where it exists, pertains exclusively to acts not already covered by the Criminal Code, and must remain consistent with *Pancasila*, the 1945 Constitution, human rights, and general legal principles (National Criminal Code, Article 2, paragraphs (2)

and (3)). Consequently the recognition of "living law" is intended to establish a form of legality in a limited, material sense—rather than opening the door for any social norm to serve as a basis for criminal punishment. Concerns regarding legal certainty also arose in a Constitutional Court ruling concerning the concept of "material unlawfulness" (*materiale wederrechtelijkheid*) in its positive function within the context of corruption offenses; this was deemed to lack legal certainty, as it allowed for criminal liability to be imposed based on unwritten standards (Constitutional Court Decision Number 003/PUU-IV/2006). While that ruling did not specifically address Article 2 of the national Criminal Code, it serves as a reminder that constitutional reasoning on legal certainty is highly relevant to the concept of "living law." This article does not examine whether or not Article 2 has been subject to judicial review by the Constitutional Court.

c. Government Regulation Number 55 of 2025 as a Bridge to Legal Certainty

Government Regulation Number 55 of 2025 establishes two criteria for "living law" (customary law): it must align with the values of Pancasila, the 1945 Constitution, human rights, and general legal principles, and it must be recognized and practiced by the local customary law community. For an act to constitute a customary criminal offense, it must meet several cumulative criteria: it must be considered unlawful under the prevailing living law; it must carry a sanction in the form of fulfilling a customary obligation; it must not be regulated under the Criminal Code (KUHP); and it must be applicable to everyone within that customary legal jurisdiction (article 4 and article 5). If the elements of an act are identical or can be deemed equivalent to a criminal offense defined in the Criminal Code, then the provisions of the Criminal Code shall apply (article 3).

The most crucial step toward ensuring legal certainty is the requirement to codify customary criminal offenses into regional regulations (*peraturan daerah* or *perda*). Such regional regulations must specify, among other things, the name of the customary law community, the boundaries of its legal jurisdiction, prohibited acts, procedures for handling cases, the manner in which customary obligations are to be fulfilled, and the applicable sanctions—all of which must be formulated with the involvement of the customary law community itself (article 6,10 and 11). Through this mechanism norms that were previously unwritten become codified and known before an act is committed, thereby better satisfying the requirements of *lex scripta* (written law) and *lex praevia* (prior law). In practice, "material legality" functions through procedures that resemble those of "formal legality."

Nevertheless, some scholars have raised concerns regarding the phrase "can be deemed equivalent" (*dapat dipersamakan*) in Article 3, arguing that it could function as a "magnet provision" that opens the door to the use of analogy. Conversely, others contend that the phrase actually serves to define boundaries, as it applies only to elements of an act that are truly commensurate (Dandapala.com, 22 October 2026). This divergence in interpretation suggests that legal certainty will largely depend on how law enforcement officials and the drafters of regional regulations formulate and interpret these norms, rather than solely on the literal text of the regulations as written.

Legal Pluralism in the National Criminal Code and the Challenges of Its Implementation

a. Strong and weak legal pluralism

John Griffiths distinguishes between legal pluralism in a "weak" sense—where the state recognizes and regulates the existence of other legal orders—and legal pluralism in a "strong" sense—where various normative orders exist and operate autonomously within society, independent of state recognition (Griffiths, 1986). Sally Engle Merry adds that the study of modern legal pluralism must consider how state law and non-state normative orders influence one another, rather than merely existing side by side(Merry, 1988.

b. The character of pluralism in the national Criminal Code

Viewed from this framework, the regulation of "living law" in the national Criminal Code leans closer to "weak" pluralism. Customary law is recognized as a basis for criminalization only after it meets criteria established by the state and is incorporated into local regulations. While this recognition is rooted in a constitutional mandate to respect customary law communities, it simultaneously positions the state as the ultimate arbiter of which customary laws may serve as a basis for criminal prosecution. On the other hand, there are elements that shift toward a more participatory form of pluralism—namely, the obligation to involve customary law communities in the drafting of local regulations and in establishing procedures for handling [such matters].

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Such recognition is also frequently interpreted as part of the spirit of decolonizing criminal law—a desire to break away from a colonial-era codification that imposed a rigid, unified structure while ignoring the legal diversity inherent across the Indonesian archipelago (Dandapala, Oktober 2026). The true test of this decolonization effort will lie in the extent to which the drafters of local regulations genuinely explore and incorporate living customary law, rather than merely replicating the patterns found in the national Criminal Code.

c. Implementation challenges

An analysis of the aforementioned normative framework reveals several challenges that must be anticipated:

- Identification of customary law communities (*masyarakat hukum adat*). Local regulations (*Perda*) must specify the names of these communities and the boundaries of their legal territories. In areas where such communities have not yet been documented, or where their territorial boundaries are in dispute, this requirement may hinder the formal recognition process.
- Dual enforcement. Customary law communities possess their own internal enforcement mechanisms, while local regulations are enforced by regional government authorities, and the national Criminal Code (*KUHP*) is upheld by state law enforcement agencies. Defining the division of roles

and establishing procedures for handling overlapping cases present practical challenges.

- Restorative justice and customary dispute resolution. Restorative justice is understood as an approach to resolving criminal cases that involves the offender, the victim, their families, and other relevant parties, emphasizing the restoration of the situation to its original state rather than focusing on retribution. The same literature notes that the national Criminal Code is shifting from a purely retributive approach toward one rooted in corrective, restorative, and rehabilitative justice. While this restorative perspective offers a useful framework for understanding customary dispute resolution—which prioritizes social balance and relationships—it cannot be equated with every existing customary mechanism; furthermore, the application of such mechanisms must remain consistent with prevailing legal provisions.
- Protection of human rights. The requirement for alignment with human rights standards means that not all customary norms can be codified into criminal law—for instance, those that are discriminatory toward women or specific groups. Assessing this requires both capacity and careful deliberation on the part of local governments and regional legislative councils (*DPRD*).39
- Clarity in drafting. Local regulations must be drafted with precision to avoid merely shifting uncertainty from unwritten customary norms to vague, written legal provisions.
- •Regional capacity and diversity. Drafting local regulations based on thorough research and meaningful public participation requires significant resources; however, the capacity and level of preparedness vary considerably across different regions.

CONCLUSION

Based on the discussion, the conclusions of this article are as follows. First, "Living law" within the national Criminal Code (KUHP) is understood as unwritten customary law that remains active within society. This concept is rooted in the ideas of Ehrlich and is stipulated in Articles 2 and 597 of the national Criminal Code, with the conditions that such law must be applicable in the locality

where it exists, not already covered by the Criminal Code, and must be consistent with Pancasila, the 1945 Constitution, human rights, and general legal principles.

Second, there is an inherent tension between the principle of legality and "living law" regarding legal certainty; however, this tension is bridged by Article 2 paragraph (2) and Government Regulation Number 55 of 2025, which require customary criminal offenses to be codified in local regulations (*peraturan daerah*). While this mechanism restores a degree of legal certainty, certain phrases—such as "can be equated with" (*dapat dipersamakan*) in Article 3—remain open to varying interpretations.

Third, legal pluralism within the national Criminal Code is "weak" and state-controlled, yet it incorporates elements of participation from customary law communities (*masyarakat hukum adat*). Challenges in its implementation include the identification of these customary law communities, the risk of double jeopardy (or dual enforcement), the protection of human rights, the clarity of legal formulations, and the capacity of local governments.

Recommendations

1. Local governments and Regional People's Representative Councils (DPRD) are advised to draft local regulations on customary criminal offenses based on empirical studies, ensure meaningful participation from customary law communities, and clearly define both the prohibited acts and their corresponding sanctions to satisfy the requirements of legal certainty.

2. Law enforcement officials and judges are advised to interpret Article 2 of the national Criminal Code and Article 3 of Government Regulation Number 55 of 2025 strictly, avoiding any expansion of their scope through analogy.

3. The central government is advised to develop guidelines and provide guidance to local governments, including clarifying the division of roles between customary authorities and state law enforcement agencies.

4. For academics and future researchers, it is recommended to examine the regional regulations (perda) that have been enacted, court rulings that apply Article 2, and any constitutional reviews thereof, in order to test the arguments presented in this article against empirical data.

REFERENCES

Arief, Barda Nawawi. Bunga Rampai Kebijakan Hukum Pidana. Bandung: Citra Aditya Bakti, 2002.

Dandapala. “Quo Vadis Tindak Pidana Adat di KUHP Nasional.” dandapala.com. Diakses 22 Oktober 2026.

Ehrlich, Eugen. Fundamental Principles of the Sociology of Law. Translated by Walter L. Moll. Cambridge, MA: Harvard University Press, 1936.

Griffiths, John. “What is Legal Pluralism?” Journal of Legal Pluralism and Unofficial Law 24 (1986): 1–55.

Hadikusuma, Hilman. Pengantar Ilmu Hukum Adat Indonesia. Bandung: Mandar Maju, 1992.

Hasan, Zainudin. Hukum Pidana. Cilacap: CV Alinea Edumedia, 2025.

Hukumonline. “Ini 12 Ketentuan KUHP Baru yang Potensial Timbulkan Masalah.” hukumonline.com, 2026.

Hukumonline. “Mendorong Revisi Pasal Living Law dalam KUHP Baru.” hukumonline.com, 6 Juni 2023.

Merry, Sally Engle. “Legal Pluralism.” Law & Society Review 22, no. 5 (1988): 869–896. Moeljatno. Asas-Asas Hukum Pidana. Jakarta: Rineka Cipta, 2008.

Peraturan Pemerintah Nomor 55 Tahun 2025 tentang Tata Cara dan Kriteria Penetapan Hukum yang Hidup dalam Masyarakat.

Rahardjo, Satjipto. Ilmu Hukum. Bandung: Citra Aditya Bakti, 2012. Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006.

Undang-Undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan, Kekuasaan dan Acara Pengadilan-Pengadilan Sipil.

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.