

The Limitations of Living Law as a principle of Material Legality in the renewal of Criminal Law

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Abstract

*The reform of criminal law constitutes an unavoidable response to the dynamic development of societal values and demands for justice. The enactment of the New Criminal Code, particularly the recognition of living law in Article 2, has generated fundamental debate concerning its implications for the principle of legality. This article aims to examine the philosophical and normative foundations of the inclusion of living law and to critically analyze the appropriate limitations of living law as a manifestation of material legality within the framework of criminal law reform. This study employs normative legal research using a statutory approach and a conceptual approach. The analysis of Article 2 of the New Criminal Code is conducted through systematic interpretation, by positioning the living law clause within the overall structure of the criminal law system, and teleological interpretation, by examining its objectives in balancing justice and legal certainty. The study is grounded in legal positivism and the doctrine of legal certainty as its primary theoretical analytical tools to assess the coherence of living law with the fundamental principles of legality, particularly *lex certa*, *lex stricta*, and *lex scripta*. The findings indicate that the principle of legality in the New Criminal Code is formulated in a material sense by acknowledging legal values that live and develop within society, in line with Article 28 of the Law on Judicial Power, which obliges judges to explore and understand the living values of law and justice. Nevertheless, the recognition of living law without clear normative boundaries poses a potential risk to legal certainty and predictability in criminal law enforcement. Therefore, this article argues that living law must be strictly limited through formal regulation at the provincial level, as mandated by Article 2 of the New Criminal Code. Such limitations are essential to ensure the protection of customary law maintained by Indigenous Communities while simultaneously safeguarding the principle of legality as the core foundation of criminal law.*

Keywords: Criminal Code (KUHP), Limitation of Living Law, Material Legality

1. INTRODUCTION

The legal reality in Indonesia, which remains highly juridical-formal and heavily influenced by the positivistic legacy of Dutch colonial law, has resulted in law being understood merely as a set of written rules that emphasize formal and procedural notions of truth and justice.¹This condition underscores the need

¹ Imam Sukadi, "The Powerless of Law in the Process of Law Enforcement in Indonesia," *Risalah Hukum* 7, no. 1 (2011): 39–53.

for reform, as the practice of law in everyday social life is of crucial significance, given that the true purpose of law is realized precisely through its implementation.

Indonesia's legal system, heavily imbued with positivistic tendencies as embodied in the Criminal Code (KUHP), has long confined legal practice within a rigidly formalistic framework. Nevertheless, the long-anticipated reform of the Criminal Code—originally enacted through the *Staatsblad* of 1915 No. 732—was finally realized after nearly six decades. The Draft Criminal Code (RUU KUHP), which had been under formulation since 1963, was ultimately enacted into law during the plenary session of the Indonesian House of Representatives (DPR RI) on December 6, 2022.²

With the enactment of the New Criminal Code, the traditionally formalistic paradigm of law—grounded solely in formal legality—has begun to shift toward a paradigm of material legality. This shift is evident in the recognition of *living law* (customary law) within the framework of the New Criminal Code. Members of the drafting committee of the Draft Criminal Code, including Prof. Barda Nawawi and Prof. Muladi, supported the incorporation of customary law into the draft. They emphasized that the recognition of customary criminal law (*the living law*) represents not only an implementation of the mission of decolonization but also a realization of the mission of particularization within the broader objective of comprehensive codification.³ This comprehensive recodification replaced the colonial-era codification of criminal law, which had merely replicated the Dutch Criminal Code of 1886.

The New Criminal Code (KUHP) represents a tangible realization of the Indonesian nation's noble aspiration to liberate itself from the constraints of colonial law, as enshrined in the Preamble to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Moreover, its formulation was undertaken with careful consideration of Indonesia's socio-philosophical, socio-political, and socio-cultural dimensions. This commitment is reflected in its provisions, which emphasize “the recognition of living law within society as a source of law, judicial clemency, and the prioritization of restorative justice over mere punitive measures.”⁴

Nevertheless, the incorporation of the *living law* clause has generated considerable debate among criminal law scholars, including members of the Draft Criminal Code drafting team established by the Ministry of Law and Human Rights. Critics voiced concern that such a clause might contravene the long-standing prohibition on the use of analogy. This concern is explicitly addressed in the enacted Criminal Code, where Article 1(2) reaffirms that “in determining the existence of a criminal act, the use of analogy is strictly prohibited.”

Accordingly, strict limitations must be imposed on the application of *living law*. As an exception to the principle of legality, *living law* requires carefully defined boundaries, as not all norms existing within society can serve as valid grounds for departing from the principle of legality. In practice, the *living law* clause has the potential to generate significant legal challenges. Against this backdrop, this paper focuses on examining the

² Badan Pembinaan Hukum Nasional, “RUU KUHP Disahkan menjadi Undang-undang,” n.d., <https://bphn.go.id/publikasi/berita/202212061210189/ruu-kuhp-disahkan-menjadi-undang-undang#:~:text=Jakarta%20%E2%80%93%20Rancangan%20Undang%20Dundang%20Kitab,06%2F12%2F2022>.

³ Pusat Kajian Hukum Adat ‘Djojodigono’, “Hukum yang Hidup dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana,” in *Brief Paper: Fakultas Hukum Universitas Gadjah Mada* (2020).

⁴ Ikatan Alumni Fakultas Hukum UNDIP, “IKA FH Undip Dukung Pengesahan RUU KUHP,” n.d., <https://www.ikaundip.org/readmore/36456-ika-fh-undip-dukung-pengesahan-ruu-kuhp>.

philosophical foundations for incorporating the *living law* clause into the Criminal Code and on developing an ideal framework for delimiting *living law* as a principle of material legality in the context of criminal law reform.

As a step to address the issues examined, this study employs a normative legal research method using a statutory approach and a conceptual approach. The analysis is carried out through systematic interpretation and teleological interpretation of the provisions of Article 2 of the Criminal Code, grounded in legal positivism and the doctrine of legal certainty as the primary theoretical analytical tools to assess the coherence of living law with the principles of *lex certa*, *lex stricta*, and *lex scripta*.

2. ANALYSIS AND DISCUSSION

2.1. The Philosophical Foundations for Incorporating the Living Law Clause into the Criminal Code (KUHP)

Statutory law is fundamentally constructed as a set of normative prescriptions, intended to serve as a reliable guide for human conduct within society. When such laws succeed in fulfilling their intended functions, they enable the establishment of a well-ordered and highly integrated social system. From this emerges a sociological conviction—namely, the belief that *law is society*.⁵

As long as the prescriptions of statutory law remain substantively aligned with the norms prevailing in society, the legitimacy of the law in practice will not be called into question. It is from this premise that the doctrine of *ignoratio iuris* emerged—namely, the principle that no individual may deny the binding force of a law upon themselves on the grounds of ignorance of its existence.⁶

Building on this argument, it is anticipated that a genuine harmony will emerge between the government and society in relation to each draft law, thereby providing a fundamental basis for collaboration in pursuing shared objectives. In this way, the national spirit (*volksgeist*)⁷ as conceived by Von Savigny can be meaningfully accommodated within legislation. Consequently, the resulting legal products will be functional and effective within the broader framework of national and state life (*positive law*). A new law may be regarded as embodying the spirit of the nation only when it is consistent with and aligned with the values enshrined in Pancasila and the Constitution.⁸

The incorporation of the *living law* clause in the New Criminal Code is, in essence, consistent with Von Savigny's historical school, which posits that law must correspond to the *Volksgeist*, or the spirit of the nation—that is, the values deeply embedded in the cultural fabric of Indonesian society. As Barda Nawawi Arief observes, the reform of criminal law fundamentally entails a reorientation and reconstruction of criminal law in harmony with the central socio-political, socio-philosophical, and socio-cultural values

⁵ Adam Podgorecki and Christopher J. Welan, *Pendekatan Sosiologi terhadap Hukum (Sociological Approaches to Law)*, diterjemahkan oleh Wiyaningsih dan G. Kartasapoetra (Jakarta, Bina Aksara, 1999), pg. 252-254

⁶ Soetandyo Wignjosebroto, "Negara Hukum dan Permasalahan Akses Keadilan di Negeri-Negeri Berkembang Pasca-Kolonial," *Makalah. Disampaikan pada Konferensi dan Dialog Nasional* (Jakarta), October 2012. pg.9-10.

⁷ Shidarta, *Karakter Penalaran hukum dalam Konteks ke Indonesian* (Bandung: Utomo, 2006). pg.257-265

⁸ Ana Fauzia et al., "The Revitalization of the Indonesian Legal System in the Order of Realizing the Ideal State Law," *Journal Progressive Law Review* 3, no. 1 (2021): 12–25.

of Indonesian society, which form the foundation for social policy, criminal policy, and law enforcement policy in Indonesia.⁹

In the Indonesian context, criminal law reform and criminal law policy are fundamentally directed toward alignment with the nation's *rechtsidee*, namely Pancasila. Pancasila holds significance not merely as the *staatsfundamentálnorm*, but also as the guiding legal ideal that shapes the substance and orientation of criminal law within society.¹⁰ In other words, Pancasila serves as the *filosofische grondslag*—the philosophical foundation—and as a common platform (*kalimatus sawa*) uniting Indonesian society. Its significance lies in its role as a national consensus on shared ideals, a consensus that is indispensable for sustaining both the Constitution and the broader project of constitutionalism in Indonesia.¹¹ These shared ideals, at their highest level of abstraction, provide the strongest basis for articulating the common interests of citizens who, in practice, must coexist within a pluralistic and diverse society.¹²

As the nation's *rechtsidee* (legal ideal), Pancasila assumes particular importance in the ratification of the Draft Criminal Code (RUU KUHP), which stands as a concrete manifestation of Indonesia's broader project of criminal law reform.¹³ The incorporation of Pancasila into the New Criminal Code, particularly through the *living law* clause, seeks to ensure that the principle of legality is applied without undermining the pursuit of justice within society. While the principle of legality remains essential, its formulation in the New Criminal Code moves beyond a merely formal conception—confined to written, rigid, and narrow provisions characteristic of the colonial-era Code. Instead, the principle of legality is re-conceptualized in a material sense, one that embraces the dynamic legal values that continue to live, evolve, and develop within Indonesian society¹⁴.

This construction is consistent with the mandate of Law No. 48 of 2009 on Judicial Power. Article 5 of this statute requires judges to explore, heed, and internalize the legal values and sense of justice prevailing within society. The article itself does not elaborate on the meaning or scope of this obligation; it simply clarifies that the purpose of the provision is to ensure that judicial decisions correspond with both the law and the community's sense of justice.

Barda Nawawi Arief, as a member of the drafting committee for the new Criminal Code, stated: “Drawing on Indonesia's prior legislative policies, such as Law No. 1/Drt/1951 and Law No. 14 of 1970, the material expansion of the principle of legality in the new Criminal Code cannot be regarded as an entirely novel idea. Rather, it represents a continuation and implementation of concepts that had already been articulated in earlier legislative frameworks.”¹⁵

⁹ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Citra Aditia Bakti, 1996).

¹⁰ Bono Budi Priambodo, “Positioning Adat Law in the Indonesia's Legal System: Historical Discourse and Current Development on Customary Law,” *Udayana Journal of Law and Culture* 2, no. 2 (2018): 140, <https://doi.org/10.24843/ujlc.2018.v02.i02.p02>.

¹¹ Ana Fauzia and Fathul Hamdani, “Aktualisasi nilai-nilai pancasila dan konstitusi melalui pelokalan kebijakan Hak Asasi Manusia (HAM) di daerah,” *Jurnal Indonesia Berdaya* 2, no. 2 (2021): 157–66.

¹² Jimly Asshiddiqie, “Konstitusi dan Hak Asasi Manusia,” Jakarta, Makalah. 2008.

¹³ A. Ramdan, “Kontroversi Delik Penghinaan Presiden/Wakil Presiden Dalam RKUHP,” *Yudisial* 13, no. 2 (2020): 245–66.

¹⁴ Hyronimus Rhiti Vincentius Patria Setyawan, “Relasi Asas Legalitas Hukum Pidana Dan Pemikiran Hukum Alam,” *Inovasi Penelitian* 2, no. 12 (2022): 3814.

¹⁵ Arief, *Bunga Rampai Kebijakan Hukum Pidana*. *Op.cit*, pg.90.

The material expansion of the principle of legality finds its justification in four principal foundations:¹⁶

- a. **Legislative foundations**, namely post-independence national legislative policies, including Law No. 1/Drt of 1951 and Law No. 14 of 1970;
- b. **Scholarly foundations**, reflected in the consensus achieved through national legal seminars;
- c. **Sociological foundations**, grounded in Indonesia's familial legal culture. As Satjipto Rahardjo observes, an individualistic legal culture produces the concepts of *liberal legism* and the *rule of law*, while a familial legal culture generates *familial legism* and the concept of the *rule of justice* or *morality*.
- d. **International foundations**, particularly Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which recognizes two bases for declaring an act punishable:
 - 1) The positive law in force (paragraph 1); and
 - 2) The general principles of law recognized by the community of nations (paragraph 2).

The retention of the principle of legality ensures the continued preservation of legal certainty. This principle serves not only as a protective safeguard within criminal law but also as an instrumental function that empowers the government, while simultaneously maintaining the integrity of societal values. The incorporation of both legal foundations creates a balance between them, thereby giving the principle of legality a material character—commonly referred to as the principle of *material legality*.

A closer examination reveals that the principle of legality, as articulated in national criminal codes and constitutional frameworks, constitutes a fundamental doctrine indispensable for preserving legal certainty. Its meaning must be interpreted with prudence, particularly within the broader framework of law enforcement and justice. Historically, when considered against the circumstances of its origin, the principle of legality was designed to safeguard individual interests—an aim that reflects the central tenet of criminal law as conceived by the classical school of thought.¹⁷

The application of the principle of legality varies significantly across jurisdictions, shaped in part by whether the prevailing political system is democratic or authoritarian, and by the legal tradition to which the state belongs. In Continental European systems, the principle of legality is applied more rigidly, functioning primarily as a constraint on state power. By contrast, in Common Law jurisdictions, the principle is less accentuated, as the values underpinning the *rule of law* are already secured through the development of the doctrine of *due process of law*, reinforced by well-established procedural safeguards.¹⁸

Accordingly, the *living law* clause in the New Criminal Code is intended to revitalize the judicial role by enabling judges to explore, engage with, and internalize

¹⁶ Endang Pristiawati, "Konsekuensi yang Timbul Dari Asas Legalitas dalam Hukum Pidana Materiil." Syariah: Jurnal Hukum dan Pemikiran," no. 2, 2013, 13:1–6.

¹⁷ Sri Rahayu, "Implikasi Asas Legalitas terhadap Penegakan Hukum dan Keadilan," *Jurnal Inovatif* 7, no. 3 (2014): 1–12.

¹⁸ Muladi Demokrasi, *Hak Asasi Manusia, dan Reformasi di Indonesia* (Habibie Center, 2002). pg.74

the legal values and sense of justice embedded in society. Historically, judges in Indonesia have often been constrained by the rigid confines of formal legality, a tendency reflected in numerous domestic cases. The introduction of the *living law* clause seeks to free judges from an exclusive reliance on written statutes as the primary source of law in the criminal justice system. Instead, judges are encouraged to transcend the narrow boundaries of formalistic legality when statutory provisions no longer correspond to the evolving demands of justice within society.

The regulation of *living law* within the New Indonesian Criminal Code (KUHP Baru) constitutes one of the most significant aspects of Indonesia's criminal law reform. This concept is frequently understood and interpreted as a form of recognition of the existence of customary law that continues to live and be practiced within society. Within the broader context of criminal law reform, the acknowledgment of living law may be regarded as a progressive step taken by the state to respond to legal pluralism and to the dynamic development of societal values of justice in Indonesia.¹⁹

The paradigm of national criminal law has undergone a fundamental shift with the enactment of Law Number 1 of 2023, or the New Criminal Code (KUHP Baru), which brings significant changes to the normative construction of Indonesian criminal law. The main foundation of this shift lies in Article 2 of the New Criminal Code, which functions as a normative bridge between formal legal certainty and the achievement of substantive justice. Through its recognition of living legal values within society and justice based on Pancasila, this article acknowledges the plurality of laws operating simultaneously within the same social space, aligning with the framework of Legal Pluralism Theory. Consequently, Article 2 not only emphasizes the applicability of written law but also provides normative legitimacy for unwritten norms that evolve socially, including customary law, as long as they remain consistent with constitutional principles and human rights.

Textually, Article 2 paragraph (1) states that the provisions of Article 1 paragraph (1) do not diminish the applicability of living law in society, which determines that a person may be criminally liable even if their conduct is not regulated in formal legislation. The choice of the term "living law in society" reflects a deliberate decision by the drafters to avoid the term "customary law," while simultaneously emphasizing the flexibility of legal norms to remain relevant in a dynamic social context. From the perspective of Modern Legal Positivism, this can be understood as an effort to codify norms that previously existed outside the formal legal system, yet doctrinally it creates tension with the classical principle of *nullum delictum sine lege praevia*, which maintains that criminal law applies only if explicitly regulated in *lex scripta*. Textual analysis of this phrase reveals that living law functions as a controlled deviation from formal legality to pursue material justice, while its applicability is still constrained by Article 2 paragraph (2), which requires alignment with the values of Pancasila, the 1945 Constitution, human rights, and the general principles of law recognized by the international community.

¹⁹ S.I. Pradhani, "Dynamics of Adat Law Community Recognition : Struggle To Strengthen Legal Capacity," *Mimbar Hukum - Fak. Huk. Univ. Gadjah Mada* 31, no. 2 (2019): 279–96.

In this context, the phrase “in accordance with the values of Pancasila” is not merely political rhetoric but serves as a validity test for customary law to be integrated into the national criminal legal system. Theoretically, this reflects a socio-legal jurisprudential approach, where the validity of a legal norm is determined not only by its formal source but also by its correspondence with the *Volksgeist*, or the spirit of the nation, crystallized in the values of Pancasila. Such limitation is essential to maintain the principle of *lex certa*, ensuring that living law does not generate uncertainty or arbitrariness that could undermine individual rights. Consequently, Article 2 occupies a central position as a mechanism to “tame” customary law, keeping it within the bounds of modern constitutionalism while respecting the locality and legal traditions of the society.

The implementation of Article 2 expands the doctrine of legality from its formal conception into material legality, where judges are no longer merely *la bouche de la loi* but interpreters of living legal values. This aligns with the mandate of Article 5 of Law No. 48 of 2009 on Judicial Power, which obliges judges to explore, consider, and internalize the legal values and sense of justice prevailing in society. Judges are thus given the discretion to evaluate social phenomena in depth through close reading, uncovering legal norms that are truly “living” and relevant to the sociological context, rather than merely those recorded in written statutes.²⁰

Judicial knowledge of customary law becomes a critical determinant of decision quality, as the moral and sociological legitimacy of a ruling heavily depends on a judge’s capacity to comprehend and internalize living law. Accordingly, the living law clause not only provides interpretive flexibility but also reinforces the active role of judges in achieving substantive justice. The application of this principle aligns with Indonesia’s criminal law reform, which promotes the recognition of legal pluralism, where customary law becomes part of the national legal system, yet is normatively regulated to ensure consistency with human rights, Pancasila values, and legal certainty.

Furthermore, the recognition of living law reflects the state’s initiative to protect Indigenous communities and maintain the vitality of customary law within society, representing a progressive measure amid political uncertainty surrounding the Indigenous Peoples Bill. By formally acknowledging customary law under Article 2, the state normatively recognizes the existence of Indigenous communities as part of the national legal system while empowering them within a legitimate legal framework. The implementation of the New Criminal Code, particularly in relation to material legality, is expected to deliver significant benefits for both legislative drafting and judicial practice. By situating legal interpretation within material legality, formal norms can be applied responsively to social realities, enabling citizens to experience substantive justice in practice. This approach reinforces the balance between positive legislation and collective societal aspirations, positioning criminal law not merely as an instrument of social control but as a means of achieving social justice.

²⁰ S. I. Pradhani, “Dynamics of Adat Law Community Recognition : Struggle To Strengthen Legal Capacity,” *Mimbar Hukum - Fak. Huk. Univ. Gadjah Mada*, Vol. 31 No. 2 (2019), hlm. 284.

Within this framework, judges are required to possess competence, understanding, and a continuous commitment to studying customary law. When an issue is not yet regulated in writing, judges are not only authorized but also obliged to render decisions that reflect the prevailing sense of justice in society. In this way, judicial rulings become tangible manifestations of the community's living legal consciousness, inseparable from a deep understanding of customary law and prevailing socio-cultural values.

Thus, Article 2 of the New Criminal Code underscores a synthesis between formal legal certainty and substantive justice through the application of material legality and recognition of living law. The key phrases analyzed textually and examined through legal theoretical frameworks Modern Legal Positivism, Legal Hermeneutics, Socio-Legal Jurisprudence, and Legal Pluralism Theory demonstrate that the New Criminal Code represents not merely a formal reform but a substantive transformation of the Indonesian criminal legal system. By positioning Pancasila as the *philosophische grondslag* and a controlling norm for living law, Article 2 provides a normative foundation for the application of criminal law that is just, contextual, and pluralistic, while maintaining harmony between local values and universal principles. Normative recognition of living law, bounded by Pancasila and human rights parameters, positions the New Criminal Code as a modern, progressive instrument of criminal law, deeply rooted in Indonesia's socio-cultural context, capable of bridging societal aspirations, individual rights, and legal certainty.

2.2. The Ideal Construction of Limiting the Living Law as a Principle of Material Legality in Criminal Law Reform

Nevertheless, the concept of the living law is not a mere terminology, but a fundamental notion that has been historically examined across various branches of legal studies, including legal anthropology. At its core, the living law refers to the normative order that genuinely operates and is observed within society. Within the framework of legal pluralism, it is recognized that state law does not exclusively monopolize the regulation of social behavior.²¹ In everyday social reality, customary law, religious law, community traditions, or their hybrid forms operate with equal effectiveness in regulating relationships among individuals. While state law, by virtue of its supremacy, possesses the strongest binding authority—enabling state representatives such as the police to act swiftly when a legal violation is suspected—it is, in fact, seldom encountered in daily interactions. State law typically surfaces only in contexts involving population administration, civil transactions, or criminal offenses.

The living law clause in the New Criminal Code cannot be simplistically equated with customary law, for such an equation risks conceptual misinterpretation. Customary law is not a static system; rather, it engages with other normative orders, transforms, and generates ever-evolving forms of “hybrid” law. It may also extend beyond its original setting, as indigenous communities migrate across borders and establish new settlements. In such contexts, these communities construct identities of “biculturalism,” maintaining traditional norms—particularly those tied to life-cycle events such as birth,

²¹ A. Bedner and Y. Arizona, “Adat in Indonesian Land Law: A Promise for the Future or a Dead End?,” *Asia Pacific Journal Anthropology* 20, no. 5 (2019): 416–34.

marriage, death, inheritance, and even resource ownership in their place of origin—while simultaneously adopting diverse values, legal norms, and lifestyles from their new environment.

Accordingly, the formulation of living law in Article 2 of the New Criminal Code is effectively confined to customary law, specifically to those norms that continue to be observed and sustained by Indigenous Law Communities within Indonesian society.²² In this regard, if Article 2 of the New Criminal Code were to adopt an expansive interpretation of the living law, it could give rise to legal uncertainty and undermine the application of the principle of material legality in society. This is due to the fact that, in its broadest sense, the concept of living law encompasses all forms of normative order, including both unwritten and informal rules prevailing within the community.²³ Therefore, the formulation of Article 2 of the New Criminal Code, which restricts the scope of the living law to customary law, represents an effort to safeguard the continuity of customary norms preserved by Indigenous Law Communities, while simultaneously upholding the principle of legality—particularly material legality—as the very core of criminal law.

The formulation of Article 2 of the New Criminal Code, which affirms that the living law refers to customary law, was developed in tandem with the role of regional governments in enacting Regional Regulations grounded in the substance of local customary norms. As clarified in the explanatory notes to Article 2, the validity of customary law is substantively recognized and given effect through its codification in Regional Regulations within each jurisdiction.²⁴ With respect to Article 2 of the New Criminal Code and its accompanying explanation, the author offers three critical observations. First, the explanatory notes to Article 2, which emphasize the importance of Regional Regulations in facilitating the application of customary law as the living law, are misplaced. Within legislative drafting practice, explanatory provisions are intended solely to “clarify” ambiguities within the statutory text, rather than to introduce substantive requirements such as the formulation of Regional Regulations.²⁵ This implies that explanatory notes must not introduce new regulatory content or provisions; as such matters properly belong within the substantive articles of the legislation itself.²⁶ Referring to the explanatory notes of Article 2 of the New Criminal Code, the stipulation regarding further regulation through Regional Regulations constitutes a substantive norm that ought to have been incorporated directly into the statutory text of the New Criminal Code, rather than placed within its explanation.

Second, the mandate to implement Article 2 of the New Criminal Code through Regional Regulations concerning customary law as the living law in society risks generating legal uncertainty. The explanatory notes to Article 2 do not clearly specify whether such regulations are to be enacted at the provincial or at the regency/municipal

²² Jubair Musmuliady and Aminuddin Kasim, “Turn on the Living Law: The Construction and Implications of Living Law in Ratification of New KUHP,” *Rechtsidee* 11, no. 2 (2022): 1–18.

²³ S. Irianto, *Praktik Penelitian Hukum: Perspektif Sosiolegal*, “dalam Metode Penelitian Hukum: Konstelasi & Refleksi” (Yayasan Pustaka Obor Indonesia, 2013). pg. 31.

²⁴ V. Kristiani, “Hukum Yang Berkeadilan Bagi Hak Ulayat Masyarakat Hukum Adat (Kajian Dan Implementasi,” *ADIL Jurnal Hukum* 11, no. 1 (2020): 143–63.

²⁵ A. Redi, *Hukum Pembentukan Peraturan Perundang-Undangan* (Sinar Grafika, 2018). pg. 91.

²⁶ B.D. Anggono, *Pokok-Pokok Pemikiran Penataan Peraturan Perundang-Undangan di Indonesia* (Konstitusi Press, 2020). pg. 55.

level. This lack of clarity creates the possibility of normative disharmony, as both levels of local government may issue overlapping regulations concerning the same customary law within a particular community. Third, the limitation of the living law under Article 2 of the New Criminal Code would be more appropriately and effectively delineated through provincial-level Regional Regulations. Not only are provincial governments institutionally positioned closer to the socio-cultural dynamics of their populations, but such an approach would also help prevent conflicts or inconsistencies between different customary laws that may exist across various regencies or municipalities.

In light of the foregoing, the government should respond swiftly to the issue of limiting the scope of the living law under the New Criminal Code. Without such careful attention, the formulation of the living law—which is closely intertwined with the judiciary—risks being exploited by certain actors for purposes beyond its intended function. Moreover, the effective implementation of the living law must be accompanied by substantive efforts to honor and safeguard the existence of indigenous communities. Indonesia, as a nation-state, encompasses its multiple smaller nations grounded in ethnic identities, some of which maintain their own systems of belief. Recognition of this diversity is essential: it entails refraining from coercing these communities into registering as ordinary organizations, and respecting their testimonies in judicial proceedings even when such testimonies cannot be sworn based on the six officially recognized religious scriptures.

2. CONCLUSION

The principles of Pancasila are reinforced in the New Criminal Code through the recognition of the living law clause, which aims to ensure the achievement of substantive justice in society without being constrained by the rigid application of formal legality as in the previous Criminal Code. This clause rests on multiple justificatory foundations, including post-independence national legislative policies (Law No. 1 Drt/1951 and Law No. 14/1970), scholarly consensus from national seminars, Indonesia's communitarian legal culture, and international principles as stipulated in Article 15 of the ICCPR. To ensure that the living law clause is applied prudently, normative limitations are necessary, which can be operationalized through the explanatory note to Article 2 of the New Criminal Code, recognizing substantive customary law and its codification through Regional Regulations.

Based on these conclusions, this article offers a normative framework for limiting the application of living law according to the principle of modern legality, while also providing a model for harmonizing unwritten criminal law norms with the New Criminal Code, thereby supporting the implementation of just and contextually responsive criminal law in Indonesian society.

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