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Reconfiguring the Principle of Legality in Indonesia's New Criminal Code: Between Legal Certainty and Living Law

Eneng Raima Kordelina Saputri^{1*}, Padilah², Dewi Anggraeni³¹Nusa Putra University, Sukabumi, Indonesia, eneng.raima_mh25@nusaputra.ac.id²Nusa Putra University, Sukabumi, Indonesia, padlilah@nusaputra.ac.id³Nusa Putra University, Sukabumi, Indonesia, rrdewianggraeni@nusaputra.ac.id*Corresponding Author: eneng.raima_mh25@nusaputra.ac.id¹

Abstract: The enactment of Law No. 1 of 2023 on the Indonesian Criminal Code reconfigures the principle of legality by retaining formal legality while recognizing living law as a potential basis for criminal liability. This development raises a fundamental question concerning whether the recognition of unwritten customary norms strengthens substantive justice or undermines legal certainty and protection against arbitrary punishment. This study examines the transformation of the principle of legality from Law No. 1 of 1946 to Law No. 1 of 2023 and evaluates the compatibility of living law with the requirements of *lex scripta*, *lex praevia*, *lex certa*, and *lex stricta*. The research employs a normative legal method using statutory, conceptual, historical, and internal comparative approaches. Legal materials are analyzed through grammatical, systematic, historical, teleological, and conceptual interpretation. The study finds that Article 1 of Law No. 1 of 2023 maintains the requirement of prior legal regulation and expressly prohibits the use of analogy in determining criminal offences. The non-retroactivity principle also remains applicable, subject to the *lex mitior* rule when subsequent legal changes are more favorable to the offender. However, Article 2 recognizes living law within society, thereby extending the sources of criminal law beyond written legislation. This construction may accommodate legal pluralism and substantive justice, but it also creates risks relating to accessibility, foreseeability, consistency, and human rights protection. The article contributes to the legality debate by arguing that living law may only be applied through strict normative safeguards, clear evidentiary standards, territorial limitations, and consistent compliance with constitutional principles, human rights, and the prohibition of analogy.

Keywords: principle of legality, Indonesian Criminal Code, living law, legal certainty, *lex mitior*, prohibition of analogy.

INTRODUCTION

The enactment of Law No. 1 of 2023 on the Indonesian Criminal Code constitutes a significant stage in the reform and decolonization of Indonesian criminal law. For decades, Indonesia continued to apply a criminal code derived from the Dutch *Wetboek van Strafrecht*

voor *Nederlandsch-Indië*, which was maintained after independence through Law No. 1 of 1946. Although the former Criminal Code underwent several amendments, its basic structure continued to reflect the formal and positivistic orientation of continental European criminal law. The adoption of the National Criminal Code was therefore intended not merely to replace a colonial statute, but also to reconstruct Indonesian criminal law according to constitutional values, human rights, and the sociocultural characteristics of Indonesian society (Malau, 2023; Hasibuan et al., 2024).

One of the most important issues arising from this reform concerns the reconfiguration of the principle of legality. The principle, commonly expressed through the maxim *nullum crimen, nulla poena sine lege*, protects individuals from criminal conviction and punishment without a pre-existing legal basis. In international legal discourse, legality is recognized as a fundamental rule-of-law and human rights guarantee. Article 15 of the International Covenant on Civil and Political Rights and Article 7 of the European Convention on Human Rights prohibit retrospective criminalization and the imposition of a heavier penalty than the one applicable when the offence was committed. Article 22 of the Rome Statute further requires criminal offences to be strictly construed and prohibits their extension by analogy (United Nations, 1966; Council of Europe, 1950; International Criminal Court, 1998).

Doctrinally, the principle of legality encompasses at least four interrelated requirements. *Lex scripta* requires criminal liability to be based on legally recognized norms; *lex praevia* prohibits the retroactive application of criminal law; *lex certa* requires criminal prohibitions to be formulated with sufficient clarity; and *lex stricta* prohibits the creation or extension of criminal offences through analogy. Together, these requirements ensure that criminal law is accessible and reasonably foreseeable, allowing individuals to understand which conduct may result in criminal liability while limiting the discretionary power of law enforcement authorities and courts (Claes & Krolkowski, 2008; Murphy, 2010; Olasolo, 2007).

Under the former Criminal Code, the principle of legality was primarily formulated as a written and formal requirement. Article 1 paragraph (1) prohibited punishment in the absence of a pre-existing criminal provision, while Article 1 paragraph (2) recognized the application of a subsequent law that was more favorable to the accused through the principle of *lex mitior*. Law No. 1 of 2023 retains the requirement of prior legal regulation in Article 1 paragraph (1) and expressly prohibits the use of analogy in determining the existence of a criminal offence in Article 1 paragraph (2). However, Article 2 introduces a significant qualification by recognizing “the law living in society” as a possible basis for imposing criminal liability even when the relevant conduct is not expressly regulated in statutory legislation.

The recognition of living law reflects Indonesia’s legally pluralistic character and may provide space for customary norms that continue to regulate conduct within particular communities. It may also support substantive justice by preventing national criminal law from disregarding normative systems that remain socially authoritative. Nevertheless, the use of unwritten norms as a basis for criminal punishment creates tension with the conventional requirements of legality. Questions arise concerning how citizens can access and foresee customary criminal norms, how the existence and territorial scope of those norms should be established, which institutions are authorized to identify them, and how inconsistent or discriminatory customary practices can be prevented from becoming a basis for criminalization. Although Article 2 limits living law through Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by the community of nations, these limitations still require clear standards of interpretation and application (Tongat, 2022; Irawan et al., 2023; Pawana, 2023; Yanto & Hikmah, 2023).

Previous studies have examined the expansion of the principle of legality, the position of living law in the National Criminal Code, and the relationship between customary norms and Indonesian criminal law reform. These studies generally recognize that Article 2 represents an effort to accommodate legal pluralism and substantive justice, while also identifying potential problems regarding legal certainty and the authority to determine the existence of living law (Setiawan, 2022; Vincentius, 2023; Ramadhani et al., 2024). However, the existing literature has not sufficiently integrated the comparison between the former and new Criminal Codes with a systematic assessment of living law based on the requirements of *lex scripta*, *lex praevia*, *lex certa*, and *lex stricta*. The relationship between Article 1 and Article 2 also requires further examination because the National Criminal Code simultaneously maintains formal legality and permits criminal liability based on norms that may not be contained in written legislation.

Against this background, this article addresses two research questions. First, how does Law No. 1 of 2023 reconfigure the principle of legality compared with the former Criminal Code under Law No. 1 of 1946? Second, to what extent is the recognition of living law compatible with legal certainty, foreseeability, the prohibition of analogy, and human rights protection? This article contributes to the existing literature by demonstrating that the National Criminal Code does not simply replace formal legality with material legality. Instead, it establishes a dual construction in which statutory legality remains the general rule, while living law operates as a limited and exceptional source of criminal liability. The article further argues that the legitimacy of this construction depends on strict normative safeguards concerning accessibility, proof, territorial applicability, judicial scrutiny, constitutional compatibility, and the prohibition of analogical criminalization.

METHOD

This study employs doctrinal or normative legal research to examine the reconfiguration of the principle of legality in Indonesian criminal law. The research applies statutory, conceptual, historical, and internal comparative approaches. The statutory approach examines the relevant legal provisions, particularly Article 1 of Law No. 1 of 1946 on the former Criminal Code and Articles 1 and 2 of Law No. 1 of 2023 on the National Criminal Code. The conceptual approach is used to analyze the doctrinal dimensions of the principle of legality, including *lex scripta*, *lex praevia*, *lex certa*, *lex stricta*, non-retroactivity, *lex mitior*, the prohibition of analogy, and living law. The historical approach traces the development of the principle of legality within Indonesian criminal law reform. The internal comparative approach identifies the continuity, modification, and expansion of the principle of legality between the former and National Criminal Codes.

The legal materials examined in this study consist of primary and secondary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law No. 1 of 1946, Law No. 1 of 2023, and relevant international legal instruments concerning the principle of legality. Secondary legal materials include scholarly books, peer-reviewed journal articles, legal commentaries, and previous studies relevant to legality, legal certainty, legal pluralism, human rights, and living law. These legal materials were collected through document-based legal research and analyzed through grammatical, systematic, historical, teleological, and conceptual interpretation. Grammatical interpretation was used to examine the wording of the relevant provisions, while systematic interpretation assessed the relationship between Article 1 and Article 2 of Law No. 1 of 2023. Historical and teleological interpretations were applied to identify the legislative development and objectives of criminal law reform. Conceptual interpretation was used to evaluate whether the recognition of living law is compatible with legal certainty, foreseeability, human rights protection, and the prohibition of analogy.

RESULT AND DISCUSSION

Normative Dimensions of the Principle of Legality

The principle of legality is a fundamental limitation on the exercise of the state's punitive authority. It is commonly expressed through the maxim *nullum crimen, nulla poena sine lege*, meaning that no conduct may be treated as a criminal offence and no punishment may be imposed without a pre-existing legal basis. The principle performs a protective function by preventing arbitrary criminalization and punishment, as well as an instrumental function by defining the legal boundaries within which the state may investigate, prosecute, adjudicate, and punish criminal conduct (Hiariej, 2012; Setyawan, 2021).

In modern criminal law, the principle of legality is generally associated with four interrelated requirements. First, *lex scripta* requires criminal liability to be based on a legally recognized source rather than an undefined moral or political judgment. Second, *lex praevia* requires the criminal norm to exist before the conduct occurs and therefore prohibits retroactive criminalization. Third, *lex certa* requires criminal offences and their legal consequences to be formulated with sufficient clarity. Fourth, *lex stricta* requires criminal provisions to be interpreted restrictively and prohibits the creation or expansion of criminal offences through analogy (Claes & Krolkowski, 2008; Murphy, 2010; Olasolo, 2007).

These requirements are closely related to accessibility and foreseeability. A criminal norm must be sufficiently accessible so that individuals have a reasonable opportunity to know its contents. It must also be sufficiently foreseeable so that individuals can reasonably anticipate whether particular conduct may result in criminal liability. Absolute linguistic precision is not always possible, and courts inevitably interpret legal provisions. Nevertheless, judicial interpretation must remain consistent with the essence of the offence and must not retroactively create criminal liability that could not reasonably have been anticipated when the conduct occurred (Murphy, 2010).

The principle of legality is also recognized as a human rights guarantee. Article 15 paragraph (1) of the International Covenant on Civil and Political Rights prohibits conviction for conduct that did not constitute a criminal offence when it was committed and prohibits the imposition of a heavier penalty than the one applicable at that time. The same provision recognizes *lex mitior* by requiring the application of a lighter penalty when the law subsequently provides for one. Article 7 of the European Convention on Human Rights similarly protects individuals against retroactive criminalization and punishment. Article 22 of the Rome Statute further requires definitions of crimes to be strictly construed and expressly prohibits their extension by analogy (United Nations, 1966; Council of Europe, 1950; International Criminal Court, 1998).

Accordingly, legality cannot be reduced to the formal existence of a criminal provision. It also concerns the quality, accessibility, clarity, temporal validity, and restrictive application of that provision. These dimensions provide the analytical framework for assessing the continuity and transformation of the principle of legality from the former Indonesian Criminal Code to Law No. 1 of 2023.

The Principle of Legality under the Former Criminal Code

The former Criminal Code established the principle of legality through Article 1 paragraph (1), which provided that no act could be punished except under a criminal provision that had existed before the act was committed. This formulation represented a predominantly formal conception of legality because criminal liability was required to derive from a prior statutory criminal provision. It protected individuals from punishment based solely on moral disapproval, administrative discretion, or a legal rule created after the conduct occurred (Malau, 2023; Hasibuan, 2024).

Article 1 paragraph (1) embodied the requirement of *lex praevia* by prohibiting the retrospective creation of criminal offences and more severe penalties. It also supported *lex scripta* by locating criminalization within statutory law and *lex certa* by requiring a legally identifiable criminal provision. Although the former Criminal Code did not expressly state that analogy was prohibited, the prohibition was doctrinally derived from the legality principle. An analogy that extends a criminal provision to conduct outside its legally defined scope would permit a court to create criminal liability rather than merely interpret an existing offence. Such an extension would be inconsistent with the protective function of legality and the requirement of *lex stricta* (Prastowo, 2018; Setyawan, 2021).

The former Criminal Code did not, however, apply the temporal principle in an absolute manner. Article 1 paragraph (2) provided that when legislation changed after an act had been committed, the provision most favorable to the accused had to be applied. This constituted an express recognition of *lex mitior*. Consequently, the former Criminal Code combined two temporal rules: it prohibited retroactive criminalization or the retroactive imposition of a more severe rule, while permitting and requiring retroactive application when a subsequent legal change benefited the accused.

The earlier statement that the former Criminal Code adhered to non-retroactivity “without exception” is therefore doctrinally inaccurate. *Lex mitior* was already recognized under the former Criminal Code and was not introduced for the first time by Law No. 1 of 2023. The relevant distinction is that the National Criminal Code regulates the consequences of subsequent legal changes in greater detail. Non-retroactivity and *lex mitior* should also not be treated as contradictory principles. Non-retroactivity prevents an individual from being placed in a worse legal position through a subsequent criminal law, whereas *lex mitior* allows a subsequent, more favorable legal rule to benefit the individual (Prastowo, 2018; Yuherawan et al., 2021).

Within the framework of the former Criminal Code, therefore, legality primarily emphasized written statutory authority, prior enactment, legal certainty, and protection from unfavorable retroactivity. The Code did not expressly establish living customary law as an autonomous basis for criminal liability. This formal orientation strengthened predictability but provided limited doctrinal space for accommodating unwritten norms maintained by particular customary communities.

Reconfiguration of the Principle of Legality under Law No. 1 of 2023

Law No. 1 of 2023 retains the formal foundation of the legality principle. Article 1 paragraph (1) provides that no act may be subject to a criminal sanction and/or measure except under a criminal provision contained in legislation that existed before the act was committed. This formulation preserves the central requirement that the state’s punitive authority must rest on a prior legal norm. The reference to both criminal sanctions and measures also clarifies that legality applies not only to conventional punishment but also to other criminal-law measures imposed in response to an offence.

Article 1 paragraph (2) expressly prohibits the use of analogy in determining the existence of a criminal offence. This explicit formulation is an important clarification compared with the former Criminal Code, under which the prohibition of analogy was principally derived through doctrine. The prohibition does not eliminate judicial interpretation. Courts may interpret the wording, context, structure, and purpose of a criminal provision, but interpretation may not be used to create a new offence or extend an existing offence to conduct that does not fall within its legally established scope. The distinction between interpretation and analogy must therefore be maintained to prevent judicial reasoning from becoming a substitute for legislative criminalization (Malau, 2023; Ramadhani et al., 2024).

Law No. 1 of 2023 also elaborates the operation of *lex mitior* in Article 3. Article 3 paragraph (1) provides that when legislation changes after the conduct has occurred, the new legislation applies unless the former legislation is more favorable to the perpetrator or accomplice. Subsequent paragraphs regulate the consequences of decriminalization, including the termination of criminal proceedings, release from detention, and termination of the execution of a final sentence. Article 3 also requires adjustment when a final conviction has been imposed but the new legislation provides for a lighter maximum penalty.

The principal development is therefore not the initial recognition of *lex mitior*, because that principle was already contained in Article 1 paragraph (2) of the former Criminal Code. The innovation lies in the more detailed regulation of its procedural and substantive consequences, including circumstances in which conduct is decriminalized after proceedings have commenced or after a judgment has acquired final legal force.

The most significant reconfiguration appears in Article 2. Article 2 paragraph (1) provides that Article 1 paragraph (1) does not exclude the application of law living in society that determines that a person deserves punishment even though the conduct is not regulated in the National Criminal Code. Article 2 paragraph (2) limits its operation to the place where the law lives and requires that it apply only insofar as the conduct is not regulated in the National Criminal Code. The living law must also conform to Pancasila, the 1945 Constitution, human rights, and general principles of law recognized by the community of nations. Article 2 paragraph (3) delegates the procedures and criteria for determining living law to a Government Regulation.

The relationship between Article 1 and Article 2 demonstrates that Law No. 1 of 2023 does not completely replace formal legality with material legality. Article 1 continues to establish statutory legality as the general rule, while Article 2 introduces living law as a limited and exceptional basis for criminal liability. The resulting model is therefore more accurately characterized as a dual or expanded construction of legality: formal legality remains the principal foundation, while material legality operates within conditions imposed by the National Criminal Code (Widayati, 2011; Setiawan, 2022; Vincentius, 2023).

This distinction is important because describing the National Criminal Code as adopting only material legality may incorrectly imply that prior written legal authority is no longer central to Indonesian criminal law. Conversely, describing Article 2 merely as an ordinary extension of written legality understates the tension created when an unwritten and locally applicable norm may provide a basis for criminal punishment. The decisive issue is therefore not whether Article 2 recognizes legal pluralism, but whether its application can remain compatible with the safeguards inherent in the legality principle.

Living Law between Substantive Justice and Legal Certainty

Recognition of living law reflects the plural character of Indonesian society. Customary communities may maintain normative systems that continue to regulate conduct, resolve conflict, restore social relations, and define obligations independently of national statutory law. From this perspective, excluding all customary norms from criminal law may cause the national legal system to disregard forms of social ordering that remain legitimate and authoritative within particular communities. Article 2 may therefore provide a basis for accommodating legal pluralism and substantive justice (Mallarangan, 2021; Irawan et al., 2023; Yanto & Hikmah, 2023).

Nevertheless, the recognition of living law cannot automatically be regarded as legal progress. Its legitimacy depends on whether its application protects individuals against arbitrary and unforeseeable punishment. A norm may be socially accepted within a particular community but still lack the accessibility, clarity, and institutional certainty normally required of a criminal prohibition. This creates tension between the pursuit of context-

sensitive substantive justice and the demand for legal certainty (Tongat, 2022; Pawana, 2023).

The first issue concerns accessibility. Statutory criminal provisions are formally promulgated and can be consulted through official legal publications. Living law may instead be transmitted through oral traditions, customary decisions, communal practices, or the authority of customary leaders. The absence of an authoritative and publicly accessible formulation may make it difficult for an individual to determine the exact content of the norm, the conduct it prohibits, the persons to whom it applies, and the consequences of its violation.

Official documentation or identification of living law may improve accessibility, but such documentation must not be used to create a criminal norm retrospectively. Its proper function is to establish and communicate the existence, territorial scope, and content of a norm that can be demonstrated to have existed before the alleged conduct. A post hoc declaration that a customary prohibition existed would conflict with *lex praevia* and create a substantial risk of arbitrary criminalization.

The second issue concerns foreseeability. A customary norm may have different interpretations among community members or may change through social practice without a clear date of amendment. Before imposing criminal liability, a court must therefore determine whether the accused could reasonably have known that the conduct was prohibited and punishable under the living law applicable in that community. Mere moral objection or retrospective communal disapproval should not be sufficient to establish criminal liability.

The third issue concerns institutional authority and proof. Article 2 does not mean that every social practice or statement by a customary leader automatically constitutes living criminal law. The existence of the norm must be established through reliable evidence concerning its continuing validity, consistent application, acceptance by the relevant community, territorial scope, and content before the conduct occurred. The parties must also have an opportunity to challenge evidence presented by customary authorities, experts, local government institutions, or other sources. The burden of proving the existence and applicability of the norm should rest on the party seeking to impose criminal liability.

The fourth issue concerns territorial and personal applicability. Article 2 paragraph (2) provides that living law applies in the place where it lives. This limitation requires courts to identify the relevant customary community and geographical area with precision. It must also be determined whether the norm applies to every person physically present in the area or only to individuals who have a meaningful normative connection with the customary community. Applying an unfamiliar local norm to an outsider without adequate notice would raise serious concerns regarding foreseeability and fairness.

The fifth issue concerns the prohibition of analogy. A court must ascertain an existing living norm rather than construct one by comparing the alleged conduct with a different customary prohibition. The recognition of living law should not become a mechanism for circumventing Article 1 paragraph (2). Where the existence, content, or scope of the customary norm is uncertain, the uncertainty should not be resolved by extending the norm against the accused. In criminal adjudication, ambiguity must be addressed consistently with restrictive interpretation and protection against analogical criminalization.

The sixth issue concerns constitutional and human rights limitations. A norm may be accepted within a particular community but still be incompatible with equality, dignity, freedom from discrimination, due process, or other constitutional rights. Article 2 paragraph (2) expressly subjects living law to Pancasila, the 1945 Constitution, human rights, and general principles recognized by the community of nations. These conditions must operate as enforceable legal limitations rather than merely aspirational considerations. Courts must

therefore conduct substantive review before recognizing a customary norm as a basis for criminal liability (Hariri et al., 2022; Irawan et al., 2023).

The seventh issue concerns consistency and equality before the law. Local variation is inherent in legal pluralism, but criminal liability based on different local norms may result in different legal consequences for similar conduct. Such differentiation is not necessarily unjustified, but it must be based on a demonstrable customary context, a legitimate purpose, and clear territorial boundaries. Without these safeguards, Article 2 may produce fragmented criminalization and unequal exposure to punishment.

These concerns indicate that living law should operate as a narrowly construed and residual source of criminal liability. Its application should require proof that the norm existed before the conduct, remained valid and consistently observed, was sufficiently accessible and foreseeable, applied within an identifiable territory, and complied with constitutional and human rights standards. The norm should not apply where the same conduct has already been comprehensively regulated by national legislation, because Article 2 expressly positions living law within the space left unregulated by the National Criminal Code.

The Government Regulation mandated by Article 2 paragraph (3) should therefore establish strict criteria for identifying, documenting, proving, and reviewing living law. However, an implementing regulation alone cannot eliminate every legality concern. Courts must continue to apply restrictive interpretation, prohibit analogy, provide an adversarial procedure for testing the alleged customary norm, and decline its application when its existence or scope cannot be established with sufficient certainty.

Comparative Analysis of the Former and National Criminal Codes

The transformation of the principle of legality can be summarized through the following comparison:

Table 1. Legality Principle Comparison (Former Criminal Code vs. Law No. 1/2023)		
Aspect	Former Criminal Code	Law No. 1 of 2023
Principal legal basis	Article 1 paragraphs (1) and (2) of the former Criminal Code	Articles 1, 2, and 3
General model of legality	Predominantly formal statutory legality	Formal statutory legality as the general rule, supplemented by a limited material-legality exception
Prior legal basis	A criminal provision had to exist before the conduct occurred	Article 1 paragraph (1) retains the requirement of a prior criminal provision
Source of criminal liability	Within the Code's legality framework, criminal liability was based on statutory criminal provisions	Statutory criminal provisions and, exceptionally, living law meeting the conditions of Article 2
Prohibition of analogy	Not expressly formulated, but doctrinally derived from the legality principle	Expressly prohibited by Article 1 paragraph (2)
Non-retroactivity	Prohibited unfavorable retroactive criminalization and punishment	The prohibition of unfavorable retroactivity is retained
<i>Lex mitior</i>	Already recognized in Article 1 paragraph (2)	Retained and regulated in greater detail under Article 3
Consequences of decriminalization or a lighter subsequent law	Recognized generally through the most-favorable-law rule	Detailed consequences are provided for ongoing proceedings, detention, final judgments, execution of punishment, and lighter maximum penalties
Recognition of living law	Not expressly established as an autonomous basis for criminal liability under Article 1	Expressly recognized under Article 2
Territorial scope of living	Not applicable as a specific legality	Limited to the place where the living law

law	provision	exists
Substantive limitations on living law	Not specifically regulated within the legality provision	Must conform to Pancasila, the 1945 Constitution, human rights, and general principles of law recognized by the community of nations
Principal advantage	Strong emphasis on predictability and protection from arbitrary punishment	Greater capacity to accommodate legal pluralism and locally grounded substantive justice
Principal risk	Rigidity and limited accommodation of unwritten customary norms	Reduced accessibility, foreseeability, consistency, and equality if living law is applied without strict safeguards

The comparison demonstrates that the main transformation is not a complete movement from formal legality to material legality. Formal legality remains explicitly protected through Article 1, including the requirement of a pre-existing criminal provision and the prohibition of analogy. Material legality enters through Article 2 as a qualified exception that recognizes living law in specific circumstances.

The National Criminal Code's principal innovations are therefore threefold. First, it expressly prohibits analogy. Second, it provides a more detailed framework for subsequent changes in criminal legislation and the implementation of *lex mitior*. Third, it recognizes living law as a potential basis for criminal liability subject to territorial, constitutional, human rights, and general legal limitations. The first two developments reinforce legal certainty, while the third creates a more complex relationship between legal certainty and substantive justice.

Accordingly, the recognition of living law cannot by itself establish that Law No. 1 of 2023 is more effective or fair than the former Criminal Code. Such an affirmative conclusion would depend on how Article 2 is implemented and interpreted. If applied through accessible standards, reliable proof, restrictive interpretation, constitutional review, and a strict prohibition of analogy, living law may contribute to substantive justice without abandoning the protective function of legality. If those safeguards are absent, however, the same provision may weaken foreseeability, facilitate inconsistent criminalization, and expose individuals to punishment based on norms that they could not reasonably identify before acting.

CONCLUSION

The comparison between the former Criminal Code and Law No. 1 of 2023 demonstrates that the Indonesian principle of legality has not been replaced by a purely material conception. Formal legality remains the general foundation through the requirement of a pre-existing criminal provision, the prohibition of unfavorable retroactivity, the application of *lex mitior*, and the express prohibition of analogy. At the same time, Article 2 introduces a limited material dimension by recognizing living law as a possible basis for criminal liability when the conduct is not regulated in the National Criminal Code. This construction reflects an attempt to accommodate legal pluralism and substantive justice, but it also creates tension with accessibility, foreseeability, legal certainty, equality before the law, and protection against arbitrary punishment.

The recognition of living law should therefore not automatically be regarded as evidence that the National Criminal Code is more effective or just than the former Criminal Code. Its legitimacy depends on the standards governing its identification, proof, interpretation, and application. Without strict safeguards, unwritten local norms may expose individuals to criminal liability based on rules whose existence, content, territorial scope, and legal consequences were not reasonably knowable before the conduct occurred. Article 2

must consequently be interpreted as a narrow and exceptional provision rather than as a general authorization to criminalize conduct through customary norms.

Normatively, the application of living law must be subject to several cumulative requirements. The relevant norm must be proven to have existed before the alleged conduct, remain valid and consistently observed within an identifiable customary community, and possess sufficiently clear content and territorial scope. Its application must comply with Pancasila, the 1945 Constitution, human rights, equality and due process guarantees, and general principles of criminal law recognized by the community of nations. Courts must apply restrictive interpretation, prohibit any extension by analogy, provide the accused with an effective opportunity to challenge the existence and applicability of the customary norm, and decline its application whenever the norm cannot be established with sufficient certainty. The implementing regulation mandated by Article 2 should also provide clear criteria for documentation, evidentiary standards, institutional authority, territorial applicability, and constitutional review of living law.

This study is limited to normative and internal comparative analysis of the former Criminal Code and Law No. 1 of 2023. It does not examine judicial practice, the implementation of Article 2 in particular customary communities, or the practical effects of recognizing living law on defendants, victims, customary authorities, and law enforcement institutions. Further research should therefore evaluate the implementation of living law after the National Criminal Code becomes operational, including the consistency of judicial decisions, the evidentiary methods used to establish customary norms, and the effectiveness of constitutional and human rights safeguards. Such empirical examination is necessary to determine whether the expanded construction of legality ultimately strengthens substantive justice without weakening the protective function of the principle of legality.

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