

The Legality of the Living Law in the New Indonesian Penal Code

Ferry Fathurokhman ¹✉, Anna Erliyana ², Ali Masyhar ³, Mutiara Dwi Sari ⁴, Iren Sudarya ¹

¹ Faculty of Law, Universitas Sultan Ageng Tirtayasa, Serang, Indonesia

² Faculty of Law, Universitas Indonesia, Depok, Indonesia

³ Faculty of Law, Universitas Negeri Semarang, Semarang, Indonesia

⁴ Faculty of Education, Social Sciences, and Islamic Studies, Universiti Muhammadiyah Malaysia, Perlis, Malaysia

✉ Corresponding email: feryfathurohman@untirta.ac.id

Abstract

Since the Netherland introduced a Penal Code, The Indonesian people are required to rely on the principle of legality as the primary source of law in determining criminal offences. The old penal code does not allow living law to function as an independent source of law. On January 2nd, 2023, the new Indonesian Penal Code was finally established, which will enter into force within three years after its issuance. The provision of living law in the new Indonesian penal code is formulated in article 2. In its first verse, it is written that “provisions, as referred to Article 1 (legality principle), does not negate the validity of the law that live in a society which stipulates that someone deserves to be punished even though the act is not regulated in this Law.” In the explanation section, it is stated that “law that lives in society” (living law) refers to Adat Law, which should be codified through Regional Regulations (*Peraturan Daerah*). This raises two issues: first, it confines the concept of living

law solely to Adat Law; second, it requires Adat Law to be formalized in the form of regional legislation. If Adat Law must be regulated through Regional Regulations, the necessity of Article 2 becomes questionable. The purpose of recognizing living law is to address gaps in legal principles that cannot always keep pace with a rapidly changing society.

KEYWORDS *Legality principle, Living law, New Indonesian penal code*

Introduction

When Indonesia became independent in 1945, the Dutch East Indies Criminal Code (*Wetboek van Strafrecht voor Nederlands Oost Indië*) Criminal Code of Law for the Dutch East Indies)¹ was implemented in Indonesia through Law No. 1 of 1946, which was well known as the *Kitab Undang-Undang Hukum Pidana*/Criminal Code of Law (KUHP). *Nederlands Oost Indië* or Netherland East Indie was the name of Indonesia that was given by the Dutch before Indonesia became independent. Therefore, the KUHP, which currently prevails, is officially still the old Criminal Code of Law for the Dutch East Indies from 1918.² Attempts have been made to replace the old KUHP with a new criminal code. In 1963, the Indonesian government initiated a national law seminar that recommended establishing a new criminal code that fits Indonesian society.

As a result, the 1963 National Law Seminar³ formulated nine recommendations concerning the development of Indonesian national law, four of which were particularly related to the concept of living law. *First*, the Seminar emphasized the urgent need to complete the draft codification of the National Criminal Law as expeditiously as possible. *Second*, it recommended that the general part of the new Criminal Code, including its fundamental principles,

¹ Fajar Muhammad Nugraha, Reynaldo de Archellie, and Cresentia Carra Nethania Clement, "Kasus Ujaran Kebencian Dalam Berita Surat Kabar Di Hindia Belanda," *Paradigma: Jurnal Kajian Budaya* 10, no. 3 (2020): 226, <https://doi.org/10.17510/paradigma.v10i3.379>.

² Roelof H Haveman, *The Legality of Adat Criminal Law on Modern Indonesia* (Jakarta: Tatanusa, 2002). 1

³ Januar Rahadian Mahendara and Silas Oghenemaro Emovwodo, "Monodualistic and Pluralistic Punishment Politics in Criminal Code Reform: Lessons from Indonesia," *Journal Of Law, Environmental And Justice* 1, no. 3 (2023): 226, <https://doi.org/https://doi.org/10.62264/jlej.v1i3.17>.

be developed progressively in accordance with Indonesian cultural values and the dynamics of the national revolution, while also drawing lessons from the evolution of criminal law in other jurisdictions. *Third*, the Seminar recognized that criminal offenses would consist not only of acts expressly stipulated in the Criminal Code and other statutory regulations but also of conduct prohibited under prevailing customary law. This recognition was intended to ensure that the legal system remained responsive to societal values and the aspirations of an ideal Indonesian society, while requiring that customary sanctions uphold the dignity of the nation. *Finally*, the Seminar recommended the incorporation of elements of Religious Law and Customary Law into the Criminal Code, thereby affirming the importance of indigenous legal values as integral components of Indonesia's national criminal law framework.

These four recommendations attempt to integrate living law into the new criminal code. In 1964, the first bill was formed, and since then, it has been periodically revised. After decades, the Bill of the Indonesian Penal Code was finally accepted and promulgated on January 2nd, 2023 (Law No. 1/2023), which took force in January 2026.⁴ The legal provisions of the living law as recommended are regulated in article 2⁵ of the New Indonesian Penal Code. Article 2 of Law No. 1/2023 stipulates that living law within society remains valid, even for acts not explicitly regulated in the statute, provided it aligns with Pancasila, the 1945 Constitution, human rights, and general legal principles, while procedures and criteria for its recognition are governed by government regulations.

Article 2 above is intended to acknowledge living law, so it has a legal basis to prevail. This completes the legality principle that is stipulated in article 1 of the new Indonesian criminal code. Nevertheless, the explanation in article 2 is as follows: (1) Rules that, to strengthen the implementation of laws that live in society, regional government regulations (*peraturan daerah*) regulate criminal acts. It is also said that what it meant by "law that lives in society" is *Adat* law. This article relates to unwritten laws that are still valid and developing in Indonesia. The explanation clearly contradicts the core idea of living law. It

⁴ Edi Kristianta Tarigan et al., "Tinjauan Yuridis Perbandingan KUHP Lama Dan KUHP Baru," *Majalah Ilmiah Warta Dharmawangsa* 18, no. 3 (2024): 590–91, <https://doi.org/https://doi.org/10.46576/wdw.v18i3.4449>.

⁵ Nella Sumika Putri, "The Material Content of Regional Regulations as the Concretization of the Living Legal System in Society (Adat Law) Based on Article 2 of the Indonesian Penal Code (KUHP) 2023," *Jurnal Bina Mulia Hukum* 7, no. 2 (2023): 237, <https://doi.org/https://doi.org/10.23920/jbmh.v7i2.1101>.

enforces the unwritten law to become a written law. Consequently, to enforce living law, another administrative act is needed to form a legal provision called regional government regulation to exercise living law. This paper analyzes the paradox of the explanatory part, as stated above.

Several previous studies related to living law have been published, for example, in an article by Ali Mahsyar et al. published in 2025 entitled “Reclaiming the Unwritten: Living Law’s Prospects under Indonesia’s 2023 Penal Reform,” which emphasized that the recognition of living law in Law No. 1 of 2023 regarding the Criminal Code is a progressive but contradictory step. Unwritten legal norms tend to be implemented inconsistently depending on specific communities, creating legal uncertainty. Classifying customary law as living law and then implementing it in regional regulations is an act that reduces the essence of customary law.⁶

Another study on the same topic by Aris Hardinanto et al. in their paper entitled Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Toward Law Reform to Realize Justice with the Spirit of Pancasila. This study concluded that the concept of living law accommodated in Law No. 1 of 2023 is formulated inconsistently. This is because the true meaning of living law is broader in scope than just customary law. Narrowing living law customary law reduces the essence of living law, thereby degrading its meaning.⁷

Both studies discussed the concept of living law with reference to Eugen Ehrlich’s opinion. However, the research conducted was still descriptive in nature and did not explore Ehrlich thinking in depth in the context of law enforcement in Indonesia. Therefore, this study aims to comprehensively complement previous studies on Ehrlich’s thoughts, particularly his conception of living law and its relevance to the recognition of customary law as stipulated in Law No. 10 of 2023 on the Criminal Code. This study is expected to offer a more critical and in-depth analysis of the position of living law in the context of criminal law reform in Indonesia.

⁶ Ali Masyhar et al., “Reclaiming the Unwritten: Living Law’s Prospects under Indonesia’s 2023 Penal Reform,” *Jambe Law Journal* 8, no. 1 (2025): 269, <https://doi.org/10.22437/jlj.8.1.255-285>.

⁷ Aris Hardinanto et al., “Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila,” *Journal of Law and Legal Reform* 5, no. 3 (2024): 1052, <https://doi.org/https://doi.org/10.15294/jllr.v5i3.13923>.

The method used in this study is normative juridical⁸ with an approach consisting of (1) a statutory approach; through this approach, an in-depth study of the concept of living law in the new Criminal Code will be conducted with reference to Law No. 11 of 2012 concerning the Formation of Legislation. (2) Conceptual approach: This approach is used to analyze the concept of living law in reference to the Eugene Ehrlich doctrine. Both are the basis for studying the effectiveness of customary law as living law on criminal law reform in Indonesia. The analysis conducted in this study uses a qualitative method based on literature (library research) from various books, journals, and other related laws and regulations. This study specifically uses a legal interpretive approach as the main component of its analysis. This approach was chosen to reveal the true meaning of a legal text so that it can provide a clear, straightforward, and definitive explanation⁹, especially when the norm intersects with legal concepts that are dynamic and evolve along with changes in society.

Simplification of the Meaning of Living Law as Customary Law Reduces Living Values in Society

The new Criminal Code, which was ratified in December 2022 and enacted on January 2, 2023, is an effort by the government to decolonize¹⁰ the national criminal code system. Since 1918¹¹, the Indonesian people have been using the old Criminal Code for 104 years, which is a translation of the WvSNI (*Wetboek van Strafrecht voor Nederlandsch Indie*), a legacy of the Dutch colonial era. In essence, the old Criminal Code is no longer suitable for

⁸ Mochammad Rizky Eka Aditya et al., "The Problem of Interfaith Marriage in Indonesia: A Juridical-Normative Approach," *Jurnal Hukum Keluarga* 6, no. 2 (2023): 458, <https://doi.org/https://doi.org/10.22373/ujhk.v6i2.20059>.

⁹ Renata Christha Auli, "Catat! Ini 11 Jenis Interpretasi Hukum," *Hukum Online*, 2022, <https://www.hukumonline.com/klinik/a/11-jenis-interpretasi-hukum-lt62d50908c18c5/>.

¹⁰ Roby Satya Nugraha and Christina Febriani Silalahi, "Pembaharuan Berlakunya Asas Legalitas Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana," *Pakuan Law Review* 10, no. 1 (2024): 77, <https://doi.org/https://doi.org/10.33751/palar.v10i1>.

¹¹ Rokhmad, Abu et al., "Blasphemy as a Criminal Offense: Legal Transformation in Indonesia from Colonial Era to Modern," *Walisongo Law Review* 6, no. 1 (2024): 17, <https://doi.org/https://doi.org/10.21580/walrev.2024.6.1.22667>.

implementation.¹² The new Criminal Code has a very high degree of urgency to be implemented immediately, and the development of social and community conditions that are increasingly changing is one of the underlying factors. Moreover, the old Criminal Code is also considered irrelevant, open to multiple interpretations, and fails to protect vulnerable parties. For example, in the case of Minah, who was accused of stealing three kako beans belonging to PT Rumpun Sari Antan (RSA), the judge prioritized legal certainty (the principle of legality) in handing down his verdict. This cannot be separated from Indonesian criminal law, which still adheres to positivism.¹³ Article 1 (1) of the old Criminal Code was limited to the formal principle of legality, resulting in its rigid implementation without considering aspects of proportionality and the values of justice that exist in society.

There are two argumentative bases for implementing the new Criminal Code:

1. The reformulation of the new Criminal Code is expected to create a criminal justice system based on Pancasila, the 1945 Constitution of the Republic of Indonesia, with human rights, and accommodate living laws as widely as possible as part of the laws recognized by the state.
2. The content of criminal law is expected to be in line with the configuration of legal politics and the living conditions of the Indonesian nation and state.¹⁴

The new criminal code is a real manifestation of the value that lives within society, namely, the law that always limps with the development of the times. Its existence shows that law must always be updated and adaptive following the development of the times and types of crime. This reform is essentially aimed at creating a sovereign, just adaptive system that follows the development of the times, as well as an effort to leave dependence on the Dutch colonial legacy. On the other hand, the new Criminal Code also classifies customary law as living law, which reflects progress toward the criminal system in Indonesia. This situation is a momentum to revitalize the criminal system in accordance with the moral and ethical principles of the nation. However, the reformulation of

¹² Rinni Widyaastuty Sontayati Sihite and Fauziah Lubis, "Pokok Pokok Pemikiran KUHP Baru," *Journal Of Social Science Research* 4, no. 4 (2024): 3, <https://doi.org/https://doi.org/10.31004/innovative.v4i4.13509>.

¹³ Fikrotul Jadidah, "Kasus Nenek Minah Ditinjau Dari Perspektif Teori Hukum Positivisme," *IBLAM Law Review* 2, no. 3 (2022): 135, <https://doi.org/https://doi.org/10.52249/ilr.v2i3.98>.

¹⁴ Nafi Mubarak, "Sejarah Perkembangan Hukum Pidana Di Indonesia: Menyongsong Kehadiran KUHP 2023 Dengan Memahami Dari Aspek Kesejarahan," *Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 27, no. 1 (2024): 26–27.

the new Criminal Code does not guarantee that its contents and implementation will run smoothly without challenges.

There are at least two problems with the explanation of Article 2 of the New Indonesian Penal Code. First, It limits the concept of living law to Adat Law alone; furthermore, Adat Law should be codified and formalized in the form of Regional Government Regulations. We start with the first problem. As written earlier, article 2 mentions the law that lives in society, which is also well known as living law. However, article 2 does not mention *Adat* law or the *Adat* criminal act whatsoever; it emerges in the explanation part of article 2. Eugen Ehrlich describes living law as the law that dominates life itself even though it has not been posited in legal propositions.

On the other hand, positivists such as Hans Kelsen sharply criticized Eugen Ehrlich's argument in his conception of living law. Kelsen accepted the law only as it was, namely, in the form of existing and written regulations, and rejected non-juridical elements such as sociological, political, historical, and even ethical elements.¹⁵ Our understanding of this law stems primarily from modern legal documents and, secondly, from direct observation of life, commerce, customs, usages, and all social associations—including those recognized by law, those ignored or overlooked, and even those disapproved of by the legal system.¹⁶ It is clear that customs are just a part of the legal source of living law. Meanwhile Adat law is customary law-like, since the word '*adat*' is of Arabic origin and means 'custom'. Christian Snouck Hurgronje was the first person to introduce the term customary law in his book published in 1857-1963 entitled *De Atjehers/The Achense*. Broadly speaking, customary law is a set of rules that have existed and developed in society for a long time, preserved from generation to generation, and are unwritten in nature.¹⁷ Therefore, even though customary law has not been codified in writing, it still has a position

¹⁵ Darmini Roza and Gokma Toni Parlindungan S, "Teori Positivisme Hans Kelsen Mempengaruhi Perkembangan Hukum Di Indonesia," *Lex Jurnalica* 18, no. 1 (2021): 23, <https://doi.org/https://doi.org/10.47007/lj.v18i1.4056>.

¹⁶ David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities. Legal Pluralism, Privatization of Law and Multiculturalism," *Theoretical Inquiries in Law* 9, no. 1 (2008): 442–71.

¹⁷ Yehezkiel Genta, "Reinterpretasi Makna Asas Legalitas Sebagai Bentuk Pengakuan Hukum Pidana Adat Dalam Upaya Menjamin Hak Asasi Masyarakat Adat," *Padjadjaran Law Review* 7, no. 1 (2019): 53–54.

and role in Indonesia's national legal system¹⁸ Nevertheless, *Adat* law is slightly more common than customary law alone. The legal source of *Adat* law is not always custom-based acts; it can also be driven by 'desa-regulation', which is not derived from custom.¹⁹ Therefore, customary law and Adat law are part of living law. The explanation part of article 2 somewhat unduly restricts the meaning of living law, which has a broader idea.

Living law in society is essentially not only customary law but also includes customs, politeness, and religious norms that are unwritten but still exist within society.²⁰ The essence and reality of "living law" always leave unresolved problems. The meaning of the term living law has experienced distortion of meaning and direction. Living law should not be limited to "customary law"; some experts classify international customs and fundamental principles respected in world civilization as part of living law.²¹ The simplification of the understanding of living law in the criminal code caused the reformulation to lose its role as a progressive law. In fact, since 1963, the national Criminal Code has required that the Principle of Legality be formulated progressively in accordance with Indonesian culture and the development of the revolution by including elements of religious law and customary law.

The provision of Article 2, Section (1), accommodates living law so that it can also prevail and be enforced. This legal recognition is an innovative way to acknowledge living law as a legal provision. Therefore, the main article, i.e., Article 2 section (1), is a breakthrough considering the law-making process. On the positive side, this affirms the presence of customary criminal law as an integral part of national criminal law.

However, the problem is later found in the explanation of the article, According to this view, the concept of "living law" within society corresponds to Adat Law, which ought to be formally regulated by local legislation (*Peraturan Daerah*). If we require that Adat Law be regulated in regional

¹⁸ Budi Novianto and Ade Saptomo, "Application Of Customary Criminal Law In Deciding Crimes In The Marind Tribe Of Merauke," *Jurnal Ilmu Hukum Dan Tata Negara* 2, no. 1 (2024): 231, <https://doi.org/https://doi.org/10.55606/birokrasi.v2i1.905>.

¹⁹ Haveman, *The Legality of Adat Criminal Law on Modern Indonesia*. 5.

²⁰ Ramadhani Milenia, "Tantangan Implementasi Pengakuan Hukum Adat Dalam Kitab Undang-Undang Hukum Pidana Baru Di Indonesia," *Journal Syntax Idea* 6, no. 8 (2024): 3710, <https://doi.org/https://doi.org/10.46799/syntax-idea.v6i8.4356>.

²¹ Tody Sasmita Jiwa Utama, "Hukum Yang Hidup Dalam Rancangan Kitab Undang-Undang Hukum Pidana (KUHP): Antara Akomodasi Dan Negasi," *Masalah-Masalah Hukum* 49, no. 1 (2020): 22, <https://doi.org/https://doi.org/10.14710/mmh.49.1.2020.14-25>.

regulation, then it negates the meaning of Article 2. The purpose of living law is to complete the incompleteness of the legal principle, which mostly cannot follow dynamic society. Adat law is only one form of living law that lives in society.

On the other hand, problems arise when the explanation of Article 2 concerning the laws that exist within society is not detailed in its formulation. This condition creates ambiguity in scope, particularly with respect to certain indigenous communities, and raises questions regarding the differentiation between the concept of customary law offenses as a reflection of the principle of material legality, as stated in Article 1 paragraph (1) of the new Criminal Code.²² Combining adaptive and contextual customary law principles within the framework of formal criminal law raises concerns about the enforcement of legal certainty and reduces subjective interpretations that could undermine legal certainty.²³

Conflicts between customary criminal law and formal criminal law often occur, as exemplified by the murder case that took place in Papua on March 8, 2024. The defendant accused of killing his lawful wife was sentenced to five years in prison and paid a customary fine of Rp 1.500.050.000. However, the issue arose when the perpetrator was not released, although a customary agreement had been reached in this case.²⁴ Referring to the Criminal Code as formal criminal law, murder is a crime that must be processed in court and cannot be resolved through compensation alone. This situation creates a dilemma between law enforcement and the traditional community, which considers the case resolved under customary law, while the state continues to pursue criminal charges.

Since 2019, when the Criminal Code was drafted and had not yet been ratified, the Institute for Criminal Justice Reform (ICJR), as an independent criminal law study and research institution, has vocally provided notes on the

²² Faisal and Reski Anwar, "Legalitas Hukum Adat Dalam Kitab Undang-Undang Hukum Pidana Nasional," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 13, no. 2 (2024): 368, <https://doi.org/10.24843/JMHU.2024.v13.i0.2.p08>.

²³ Wirdi Hisroh Komeni and Ermania Widjajanti, "Ketidaktepatan Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Baru: Prespektif Teori Kepastian Hukum," *Journal Of Social Science Research* 4, no. 3 (2024): 8, <https://doi.org/https://doi.org/10.31004/innovative.v4i3.10586>.

²⁴ Jurnal Papua, "Sudah Bayar Denda Adat Rp 1,5 Miliar, Tapi Pelaku Masih Ditahan, Ini Jawaban Hukum Negara!," *Jurnal Papua*, 2025, https://www.jurnalpapua.id/2025/03/08/sudah-bayar-denda-adat-rp-15-miliar-tapi-pelaku-masih-ditahan-ini-jawaban-hukum-negara/?utm_source.

legal provisions that exist in society. The ICJR highlighted Article 2, which was seen as deviating from the provisions of Article 1 regarding the principle of legality. This is because in the case of questions, the principle of legality is no longer a fundamental part of the law.²⁵ There is another option, namely customary law, as the law that exists in society as the legitimacy of the application of criminal law. In fact, the principle of legality is considered the heart of criminal law in Indonesia. The principle of legality is the main foundation of criminal law and serves as the basis for applying criminal provisions.²⁶ In essence, the principle of legality emphasizes three main things, which can be described as follows:

1. Every criminal act can be subject to sanctions only if it has been regulated by statutory regulations;
2. Analogical interpretations are not permitted in determining criminal acts; and
3. Provisions in criminal law are non-retroactive, meaning they cannot be applied to acts that have been previously committed.²⁷

The ICJR strongly emphasizes the mapping of customary law jurisdictions. If customary law is accommodated in regional regulations, there will be at least 5000 new criminal codes in the future. This is because all customary laws are formalized. Such efforts have the potential to erode the magical and religious nature of customary law itself.²⁸

Interestingly, simplistic explanations that reduce the meaning of living law in earlier versions of the bill of the Indonesian Penal Code were not found. For example, the Indonesian Penal Code's bill explanation of the 2006 version merely stated that there are still unwritten legal provisions that live in society and exist as law in Indonesia. This also exists in the field of criminal law, namely, what is usually called *Adat* criminal offense (*tindak pidana adat*). To establish a firm legal foundation for the enforcement of *Adat* criminal law, this issue is

²⁵ Tongat, et al., "The Living Law in the National Criminal Law Reform," *Jurnal Konstitusi* 17, no. 1 (2020): 162, <https://doi.org/https://doi.org/10.31078/jk1717>.

²⁶ Amir Firman et al., "Implementation of the Legality Principle in the Criminal Justice System of Indonesia," *Journal of Political and Legal Sovereignty* 1, no. 4 (2023): 133, <https://doi.org/https://doi.org/10.38142/jpls.v1i4.139>.

²⁷ Nugraha Satya Robi et al., "The Transformation of Indonesia's Criminal Law System: Comprehensive Comparison between the Old and New Penal Codes," *Jurnal Reformasi Hukum* 29, no. 1 (2025): 12, <https://doi.org/https://doi.org/10.46257/jrh.v29i1.1169>.

²⁸ ICJR, "Ketentuan Hukum Yang Hidup Dalam Masyarakat Di RKUHP Ancam Hak Warga Negara," ICJR, 2019, <https://icjr.or.id/ketentuan-hukum-yang-hidup-dalam-masyarakat-di-rkuhp-ancam-hak-warga-negara/>.

specifically addressed within the Criminal Code. The provisions contained in this section constitute an exception to the general principle that criminal norms are governed by statutory legislation. The purpose of these Adat crimes is to fulfill the sense of justice that exists in certain communities. As we can see, the earlier explanation above did not narrow the meaning of living law; it recognized that one form of living law is Adat criminal offence. The same explanation, which acknowledges that Adat criminal offense is part of living law, can be found in other explanation versions of the bill, namely, the 2012 and 2015 versions. The problem of narrowing the meaning of living law into merely *Adat* criminal offences started in the 2019 bill version and then in the final version, i.e., 2023, which stipulates that what it meant by “law that lives in society” is *Adat* law. Obviously, the explanation contradicts article 2.

Although the explanation of Article 2 of the Criminal Code is intended to reinforce the principle of no punishment without a legal basis “*nulla poena sine jure*”, Eugen Ehrlich states in his book *Fundamental Principles of the Sociology of Law* that “*At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.*”²⁹ Therefore, when the concept of living law is codified by the explanation of Article 2, the meaning actually contains a paradox, reducing its organic dynamic nature. Living law should be allowed to develop in accordance with the natural processes of societal life. “*Das Recht ist im Leben selbst*”³⁰ (law exists within life itself). Thus, although the explanation of Article 2 of Law No. 1 of 2023 appears progressive, its essence is degraded, as it is bound by a rigid legal-formal structure, eroding its natural character as a responsive social norm.

In essence, the authors position living law not as a standalone basis for punishment but as a source of material that provides inspirational foundations for written law as well as guidelines for interpretation in the interpretation and application of norms. For example, in practice, living law has long been recognized through legal interpretation by judges (sociological interpretation).³¹ The Supreme Court’s decision on inheritance case No. 707 PK/Pdt/2011 is an example of a judge applying the concept of living law in his decision. This is evident in the consideration that “ideal positive law is law that reflects the

²⁹ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, Terj. Walter L. Moll (Cambridge: Harvard University Press, 1936).

³⁰ Ehrlich.

³¹ Satjipto Rahardjo, *Hukum Dan Masyarakat* (Bandung: Penerbit Angkasa, 2002).

concept of living law, which represents the values that exist in society.³² Equal recognition is also provided directly by Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This provision is a strong constitutional basis that guarantees the existence of living law without having to be used as a formal basis for criminal punishment.

Therefore, in this case, we agree with Eugene Ehrlich's opinion that living law is not always written down because of its dynamic nature, which is born together with the birth of society. *"Rules of law were not lifeless constructions which existed independently of the social reality. In contrast, they are parts of the 'living', i.e., functioning in an effective order of social communication, which protects certain interests privileged by society and discriminates those interests that are denounced and disapproved by society. Society itself engenders a general order of societal relations, which later is put into legal forms by social groups and individuals who act thereby in the capacity of lawmakers"*³³

Codification of Customary Law in Local Regulations Contradicts the Formation of Legislation

The second problem with article 2 is that the *Adat* Law should be written and provided in the Regional Government Regulation form. The requirements explained in the explanation section, that the *Adat* criminal act must be written in a regional regulation will cause the living law to undermine the intended flexibility and function of living law. Referring to Law No. 12 of 2011 concerning the formation of legislation, explanations of a law cannot be used as a legal basis for formulating derivative regulations or further regulations. Explanations serve solely as an interpretation of the original intent of the lawmaker regarding words, phrases, sentences/statements, and foreign terms/expressions and therefore must not contain normative provisions. The legislative bodies and parties involved in drafting the new Criminal Code have failed to follow and have negated the process of forming legislation. In the context of the new Criminal Code, the explanation of the principle of legality in Article 2 paragraph (1) states that, *what it means by law that live in society (living law) is Adat Law..., to strengthen the validity of the living law, Regional Regulation (Peraturan Daerah) regulates it (living law).*" This phrase is explicitly

³² Supreme Court Decision No. 707 PK/Pdt/2011, 15.

³³ Ehrlich, *Fundamental Principles of the Sociology of Law*, Terj. Walter L. Moll. 142.

and clearly contrary to Law No. 12 of 2011. The law mandates that explanations must not contain normative rules and are prohibited from serving as justifications for other rules.

In line with this, legal experts such as Bagir Manan and I Gede Pantja Astawa also agree that the explanation contained in the law does not have a binding legal force so that it cannot be recognized as part of formal law.³⁴ The logical consequence of the rules of the game requires that the explanation of the new Criminal Code be reformulated again. The accommodation of customary law in the Indonesian penal system through local regulations risks creating dualism in the form of disharmony between customary law, which is recognized and codified by the state, and customary law, which is unwritten but serves as a guide for community behavior.³⁵

In the colonization era, Cornelis van Vollenhoven conducted research and concluded that there are 19 circles of Adat criminal law that spread out within the Netherlands Indie (Indonesia), namely: 1. Atjeh, 2. Gajo, Alas and Batak, 3. Minangkabau, 4. South Sumatera, 5. East Sumatera, MalaJa and West Borneo, 6. Banka and Biliton, 7. Borneo (except Malaya and West Borneo), 8. Minahasa, 9. Gorontalo, 10. South Celebes, 11. Tanah Toraja, 12. Ternate Archipelago, 13. Ambon, 14. Netherlands-New Guinea, 15. Timor, 16. Bali and Lombok, 17. Central and East Java (incl. Madoera), 18. Principalities of Jogjakarta and Surakarta, 19. West Java.³⁶ Currently, the Epistema Institute has concluded that there are 538 adat law communities in Indonesia that spread from the westernmost part, i.e., Aceh, to the eastern part, i.e., Merauke.³⁷ Based on this data, it can be concluded that the state recognizes the existence of customary law as a form of social control and a preventive measure against conflict within society.³⁸

³⁴ Ilham Fajar and Ali Abdurahman Septian, "Status Hukum Penjelasan Undang-Undang Berdasarkan Sistem Peraturan Perundang-Undangan Indonesia," *Jurnal Hukum Dan Pembangunan* 51, no. 3 (2021): 823, <https://doi.org/10.21143/jhp.vol51.no3.3136>.

³⁵ Utama, "Hukum Yang Hidup Dalam Rancangan Kitab Undang- Undang Hukum Pidana (KUHP): Antara Akomodasi Dan Negasi." 16.

³⁶ Haveman, *The Legality of Adat Criminal Law on Modern Indonesia*. 26.

³⁷ Epistema Institute, "538 Komunitas Masyarakat Hukum Adat Telah Ditetapkan Pasca Putusan MK 35," Epistema Institute, 2017, <https://epistema.or.id/kabar/siaran-pers/komunitas-masyarakat-hukum-adat/>.

³⁸ Amrita Ajeng Safitri et al., "Eksistensi Hukum Adat Dalam Tata Hukum Indonesia," *Rechtenstudent* 3, no. 2 (2022): 216, <https://doi.org/https://doi.org/10.35719/rch.v3i2.124>.

The form of Adat criminal laws in Indonesia varies from place to place. Indonesia has had 38 provinces recently, which means that Adat criminal laws exist within these provinces. Some Adat criminal laws are written like those in Bali, yet many others have unwritten Adat criminal laws such as those in Baduy's Adat community in Banten Province. Therefore, the application of Adat criminal law to be expressed in written form is a violation of the existence of Adat law itself. Moreover, if the adat criminal offence should be stipulated in written form, then it negates Article 2, which provides a legal basis for living law. Classifying customary law as living law has clear limitations. Limitations are necessary because each region has its own customary laws that are limited in their applicability.

In practice, the presence of customary law as a living law often conflicts In accordance with the values embodied in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and the general principles of law recognized by the international community, as mandated by Article 2 paragraph (3) of the Criminal Code. For example, Balinese customs are considered degrading to human dignity through the *Kasepakang* sanction.³⁹ Another issue arises in the form of criminalization by local governments in the formulation of regional regulations. From the perspective of authority, the Regional People's Representative Council (DPRD) and the local government have broad and unrestricted authority to formulate customary law; however, criminalization should be avoided in the implementation of the new Criminal Code, which should be far more progressive. Thus, the state's action of narrowing down customary law as living law in an action that needs to be reviewed to ensure its conformity with the principle of legality and its binding nature in accordance with the essence of the law itself. This is because living law should be placed in a position that is in accordance with its natural nature, namely, unwritten.⁴⁰

In line with this, Dominikus Rato stated that the state's action to accommodate customary law in written form is an action that substantially reduces the meaning of the law. The unwritten nature of customary law actually reflects flexibility in responding to the development of the times and forms of

³⁹ Nella Sumika Putri, "Memikirkan Kembali Unsur "Hukum Yang Hidup Dalam Masyarakat" Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas," *Indonesia Criminal Law Review* 1, no. 1 (2021): 69.

⁴⁰ Anindita Tresa Valerina and Daud Rismana, "Hukum Yang Hidup Dalam Sistem Hukum Modern: Tantangan-Tantangan Terhadap Prinsip Legalitas," *Walisongo Law Review* 6, no. 1 (2024): 38, <https://doi.org/10.21580/walrev.2024.6.1.22062>.

crime that continue to evolve.⁴¹ As non-statutory law, customary law continues to grow and transform within society because written law in the form of legislation is not always responsive to the social dynamics law that plays a necessary role in addressing this gap.⁴² For example, in the process of forming legislation, drafting laws actually takes a very long time, so that if there is a change in a regulation, it takes a long time to amend it.⁴³ Therefore, if customary law is forced to be written, it has the potential to erode the meaning of unwritten law.

As Ehrlich noted, one of the sources of living law is modern legal documents. Before the New Indonesian Penal Code, living law in Indonesia already had its own legal sources. This, for example, is acknowledged in Article 18 B section (2)⁴⁴ of the Indonesian constitution, which states that “The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.” As a legal consequence, there are already laws that recognize living law, for example, Law No. 48/2009, regarding Judicial Power. Article 5 section (1) of the mentioned law states that “judges and constitutional judges are required to explore, follow, and understand legal values and a sense of justice that lives in society.” These regulations are legal documents, as Ehrlich needed, that are sufficient to provide the legal basis for living law to prevail. Limiting the provisions of living law to customary law has implications only for uncertainty and disharmony between norms. The state is considered to recognize but not truly protect the concept of living law.

⁴¹ Musmuliady, Jubair, and Aminuddin Kasim and Aminuddin Kasim Musmuliady, Jubair, “Turn on the Living Law: The Construction and Implications of Living Law in Ratification of Draft Criminal Code (RKUHP),” *Rechtsidee* 10, no. 2 (2022): 8, <https://doi.org/https://doi.org/10.21070/jihr.v1i10.798>.

⁴² Hasan Bachtiar Fadholi and Siska Diana Sari, “Hukum Negara Dan Hukum Adat: Dua Kutub Yang Saling Memperkuat,” *Jurnal Mengkaji Indonesia* 1, no. 1 (2022): 29, <https://doi.org/https://doi.org/10.59066/jmi.v1i1.49>.

⁴³ Aisha Nurul Fadilla, Defa An Nuur Kusumajakti and Fauzi and Rangga Maulana, “Analisis Pengaturan Living Law Dalam RUU KUHP Yang Dituangkan Pada Peraturan Daerah Ditinjau Berdasarkan Konstitusi,” *Jurist Diction* 7, no. 2 (2024): 230–31, <https://doi.org/10.20473/jd.v7i2.56121>.

⁴⁴ Ni Putu Rai, Dewa Gede Sudika Mangku and Ni Ketut Sari Adnyani Yuliartini, “Recognition of Society Rights in Tradition Specially in Tourism Regulation Based on Article 18B Paragraph (2) of the 1945 Constitution of the Republic Indonesia,” *Journal Equity of Law and Governance* 1, no. 1 (2021): 32, <https://doi.org/https://doi.org/10.22225/elg.v1i1.3242>.

Moreover, living law in society does not actually distinguish between civil and criminal matters. The logical consequence of this problem is the emergence of difficulties in accommodating the normalization of customary offenses because there is no clear distinction between the public and private spheres. Integrating customary law into regional regulations not only reduces its dynamic nature but also forces all provisions of customary law to be subject to criminal classification.

⁴⁵ On the other hand, this has the potential to cause conflict with the formal criminal justice system, as explained above, in the case of a murder in Papua that was resolved through the customary justice mechanism, but the case still must be resolved using the formal criminal paradigm. This difference in paradigms has the potential to cause conflict.

In terms of sociological aspects, the establishment of living law as part of formal criminal law disrupts the balance of the social and cultural order of society. Usually, living legal procedures are regulated based on aspects of deliberation and consensus, and the sanctions are purely social in nature. The formulation of living law as an *ultimum remedium* means that the Criminal Law should be the last resort to resolve every case that exists, especially since 2021, when Indonesia has been intensively using the concept of restorative justice as a form of recovery for criminal acts that are more in line with customs and cultural values.⁴⁶

In his paper, *The Sociology of Law*, Ehrlich also described that It is impossible to incorporate all law into formal legal provisions. Over recent centuries, the volume of such provisions has grown to the point where no legal scholar can completely command them for even a single state without losing reason. Meanwhile, the substance of life is even more abundant. To enclose the full spectrum of human activities within codified law is as futile as attempting to trap a stream in a pond; the portion that is contained ceases to flow and stagnates, while a significant part eludes capture entirely.⁴⁷ Therefore, the *Adat* criminal offence that 'holds' in the form of written law within regional government regulation is no longer an *Adat* criminal offence; it is a stagnant

⁴⁵ Edwing Gregorio Dewi Adi Kusumastuti and I Gusti Komang Wijaya Kesum, "Implikasi Pelunakan Pengaturan Asas Legalitas Dalam KUHPN Terhadap Konsep 'Hukum Yang Hidup Dalam Masyarakat,'" *Urist-Diction* 7, no. 2 (2024): 271, <https://doi.org/https://e-journal.unair.ac.id/JD/article/view/56124>.

⁴⁶ Anisa Fitri Wibowo, Azriel Viero Sadam and Muhammad Ramadavin, "Implikasi Pasal Living Law Dalam Undang-Undang Kitab Undang-Undang Hukum Pidana Terbaru Terhadap Kehidupan Masyarakat," *Jurnal Hukum Dan Bisnis* 9, no. 1 (2023): 126.

⁴⁷ Ehrlich Eugen and Nathan Isaacs, "The Sociology of Law," *Harvard Law Review* 36, no. 2 (1922): 133.

'law.' Genuine *Adat* criminal offences are more flexible than any legal provision considering legal positivism. In addition, *Adat* criminal law has its own system that differs from modern criminal law, which employs an adversarial system. *Adat* criminal law tends to use *musyawarah mufakat*, the process of noncoercive negotiation involving all interested parties⁴⁸ Therefore, Ehrlich emphasized that law "cannot be confined in a code," highlighting the need to consider society's role in shaping legislation and judicial decisions.⁴⁹ The obligation to put *adat* criminal offenses into regional government regulation was somehow influenced by legal positivism, especially the principle of legality that flourished in the nineteenth century, which also affected scholars' legal thinking worldwide, including in Indonesia.

To understand legal positivism, several fundamental principles form its notion. According to Kenneth S. Gallant, the principles most frequently associated with legality are *nullum crimen sine lege* and *nulla poena sine lege*⁵⁰. In essence, these rules assert that no conduct is criminal unless specified by law, and no sanction can be applied except as authorized by law. They are frequently linked to the Latin maxims *nullum crimen sine praevia lege* (nothing is a crime except under preexisting law) and *nulla poena sine praevia lege* (no punishment may be imposed except under preexisting law). Paul Johann Anselm Ritter von Feuerbach provided one of the most notable formulations of criminal law legality at the outset of the nineteenth century, uniting the three phrases *nulla poena sine lege*, *nulla poena sine crimine*, and *nullum crimen sine poena legali* to encapsulate the essence of the doctrine. In various legal systems, different designations are employed for parts or the whole of the principles of legality in criminal law, such as "the rule against ex post facto laws," "the principle of non-retroactivity of crimes and punishments," "the requirement of *lex certa* (that the law be clear or certain)," "the requirement of *lex stricta* (that the law be narrowly construed)," "the requirement that a court be (previously) established by law," and "*the rule jus de non evocando* (against removal of trial to special, rather than regularly existing, criminal courts)." A related principle, which holds that punishment is personal, prohibits imposing collective sanctions on individuals

⁴⁸ Petter Burns, *The Leiden Legacy: Concepts of Law in Indonesia* (Jakarta: Mc Graw Hill, 2021).

⁴⁹ Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities. Legal Pluralism, Privatization of Law and Multiculturalism."

⁵⁰ Deni Setya Bagus Yuherawan et al., "Asas Nullum Crimen Sine Poena Pada Rancangan Kitab Undang-Undang Hukum Pidana," *Jurnal Hukum Pidana & Kriminologi* 2, no. 1 (2021): 2, <https://doi.org/https://doi.org/10.51370/jhpk.v2i1.8>.

who are innocent of a specific act solely because they belong to the same family, clan, village, or other group as the actual perpetrators.⁵¹

However, it has become an eternal debate that the legal provision is not a panacea owing to its static and stagnant character of the legality principle, as Ehrlich said, Clearly, statutory provisions are incapable of covering the whole body of law, since judicial rulings emerge only from disputes formally submitted to the judiciary. Jurists generally concentrate on issues that reach the judiciary, although in practice only a limited number of cases are formally presented for judgment. The majority of matters are resolved without dispute. Countless individuals exist who engage in numerous legal relationships without ever interacting with courts or officials. Disputes are often resolved amicably, either through compromise, withdrawal of claims due to costs, or because weaker parties have little chance of success against powerful opponents. Moreover, it should be noted that generally only the rulings of the highest and most esteemed courts serve to establish legal provisions, and as numerous disputes involving minimal sums never reach these courts, their outcomes do not contribute to the formation of law. They remain without legal regulation, largely because legal writers have historically neglected issues involving persons deemed marginal.⁵²

In conclusion, the New Indonesian Penal Code is frankly a decade-long attempt to fill the loophole of the legality principle. The legality principle is written in Article 1, Section (1), as follows: “No act shall be punished unless by virtue of a prior statutory penal provision.” As we know that there are living laws that cannot be covered by the legality principle, Article 2 aims to complete the legality principle and provide a legal basis for living laws. Article 2 stipulates that the provisions of Article 1 section (1) do not preclude the recognition of living law in society, under which a person may still be punished even if the act is not explicitly regulated in this Law. These two articles address each weakness that exists in both laws (living law and the legal principle). Nevertheless, the explanation part of Article 2 seems to misinterpret the historical background of Article 2 by narrowing the living law meaning and instructing adat criminal offense to be written in regional government regulation. If Adat criminal offences are stipulated by the regional government, then actually, this is exactly what we call the legal principle. This means that it is covered already by Article 1 (legality principle); therefore, Article 2 (living law) has no meaning at all. It is in this context that Ehrlich’s book seems relevant that attempting To confine

⁵¹ Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (University of Arkansas: Cambridge University Press, 2009).

⁵² Isaacs, “The Sociology of Law.” 141.

law within codification is akin to restraining a river within a pond; it loses its vitality and turns stagnant⁵³ According to Roscoe Pound, The context of Ehrlich's life and teaching was marked by the convergence of modern and primitive law, where a complex industrial order interacted with long-established social groups.⁵⁴ The same situation occurs in Indonesia when modern law and Adat law (indigenous law) live side by side. However, while Ehrlich was able to distinguish the two, the new Indonesian penal code fails to understand that the two laws have different forms, systems, and ways of handling crimes. The new Indonesian penal code tries to recognize and incorporate living law into the code. Nevertheless, the attempt becomes paradoxical when the explanation urges the Adat law (living law) to be written in regional regulation form. This, however, contradicts the characteristics of Adat law itself. In an anthology book, Franz and Keebet Von Benda-Beckmann, entitled "*The Social Life of Living Law in Indonesia*", citing Van Vollenhoven, argued that Adat law for Van Vollenhoven was law, Irrespective of state power, customary law carries juridical effects and is inherently dynamic in addressing transformation.⁵⁵ The Adat law does not depend on state coercive power. Adat law has its own power to exercise. In the end, this paper should conclude to bridge this problem. If Adat law should be written in a formal regional regulation, then Adat law should have a privilege to be enforced first (*primum remedium*), and state law should be the last resort (*ultimum remedium*)⁵⁶ to handle the crime if Adat law fails to settle the case.

Reformulating customary law as national criminal law does not address the root cause of the ambiguity of the principle of legality. Its implementation faces obstacles, especially in classifying and identifying types of customary law and the identities of communities, which are not uniform.⁵⁷ On the other hand, there is potential for inequality in law enforcement, especially in terms of dispute resolution mechanisms. Customary criminal law, as part of the law whose existence has been recognized, already has an organized and independent

⁵³ Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Francis: Routledge, 2002).

⁵⁴ Roscoe Pound, "An Appreciation of Eugen Ehrlich," *Harvard Law Review* 36, no. 2 (1992): 130.

⁵⁵ Marc Hertogh, *Living Law: Reconsidering Eugen Ehrlich* (Inggris: Hart Publishing, 2009).

⁵⁶ Hamidah Abdurachman, et al., "Application of Ultimum Remedium Principles in Progressive Law Perspective," *International Journal of Criminology and Sociology* 10 (2021): 1012, <https://doi.org/https://doi.org/10.6000/1929-4409.2021.10.119>.

⁵⁷ Humas FH UI, "Living Law Dalam Rancangan Hukum Pidana Oleh Prof. Sulistyowati Irianto," Fakultas Hukum UI, 2022, <https://law.ui.ac.id/living-law-dalam-rancangan-hukum-pidana-oleh-prof-sulistyowati-irianto/>.

institutional structure.⁵⁸ The new Criminal Code does not describe the institutional structure or the scope of jurisdiction of customary courts. For example, when a violation occurs, it can be followed through a mechanism in accordance with formal procedures, including investigations and inquiries. Prosecution and verification process. The next question is whether there is a difference between law enforcement in living law cases and ordinary criminal cases because, if there is a difference, it will potentially trigger conflict, and even though it is considered the same, law enforcers, in this case, police officers and prosecutors, especially judges, must understand living law comprehensively and deeply. Such conditions also cause disharmonious relations between customary institutions and law enforcers.⁵⁹ This situation creates uncertainty and a legal vacuum in its implementation.

Snouck Hurgronje, in his statement, said that “The peculiarity of each native Adat- or common law that explains its virtue and deficiency rests, in my opinion, on its fluid character and in its ease in adapting to the consitions of society, whenever these conditions change.” He concretely and obviously rejects the proposal to codify customary law in written form. This will mainstream customary law as “dead law” according to Ehrlich.⁶⁰ In the end, customary law will lose its meaning as a law that is adaptive and flexible to the development and influence of the times. The new Criminal Code does not establish a clear normative reference in response to the duality of law and the principle of illegality.

The author also criticizes the revocation of Article 5 paragraph (3) letters b and c of Emergency Law Number 1 of 1951 concerning Temporary Measures to Organize the Unity of Power and Civil Court Proceedings. The article means that the state recognizes customary law for certain communities, in this case, the Swapraja people and those who are subject to the Customary Court. The penalties are also far more relevant, as if an act falls under the category of a criminal offense according to customary law, the perpetrator may still be sentenced to a maximum of less than three months in prison. If the perpetrator refuses to comply with the punishment as prescribed by customary law, the state

⁵⁸ Yoserwan, “Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan KUHP Baru,” *Unes Law Review* 5, no. 4 (2023): 2002–3, <https://doi.org/https://doi.org/10.31933/unesrev.v5i4>.

⁵⁹ Robbi Asadul Bahri, “Konsep Penegakan Hukum Pidana Adat Di Indonesia Berdasarkan Asas Kepastian Hukum,” *Law, Development, and Justice Review* 7, no. 1 (2024): 67, <https://doi.org/https://doi.org/10.14710/ldjr.7.2024.61-74>.

⁶⁰ Utama, “Hukum Yang Hidup Dalam Rancangan Kitab Undang- Undang Hukum Pidana (KUHP): Antara Akomodasi Dan Negasi.” 23.

court has the authority to impose an alternative penalty that is commensurate and proportional. On the other hand, if customary law is considered difficult, the judge is allowed to divert it into a state criminal form of a maximum of 10 years in prison for serious criminal cases, and if the case has a similar equivalent to the Criminal Code, the determination of sanctions is determined by referring to the article of the Criminal Code that is most relevant to the characteristics of the crime committed. The provisions above are essentially much more progressive in protecting the rights of indigenous people than those in Article 2 of the new Criminal Code previously described through Article 5 paragraph (3) of Emergency Law No. 1 of 1951. The customary court system was recognized as a stand-alone legal system, meaning that there is the potential for centralization in the statute justice system alone.

Since the enactment of the new Criminal Code in 2023, the government has yet to issue a Government Regulation on customary law as living law. In fact, according to administrative law, implementing Government Regulations should be drafted and enacted within a maximum of two years after a law is enacted. This means that the Government Regulation for Law No. 1 of 2023 should have been drafted and enacted before January 2025. The government's delay in drafting the Government Regulation has the potential to create a legal vacuum and uncertainty regarding customary law in Indonesia.

Conclusion

Finally this paper concluded and highlighted that there is a problem in the explanation part of Article 2 of the new Indonesia Penal Code. It simplifies the meaning of living law by reducing it to only Adat criminal offenses, which makes this explanation even more ambiguous. Adat criminal offences are only one form of living law. This means that laws that exist in society other than Adat criminal offences do not have a legal basis to exercise. In fact, in addition to Adat criminal offences, in Indonesia, there are also customs that have been enforced and accepted as legal practices. Indonesian people are accustomed to resolving laws in various ways, some of which involve non-litigation. However, with the narrowing of the meaning of the law that lives in society to only adat crimes, the living law concept has been obstructed. The New Indonesian Penal Code also has a vague concept caused by the explanation part of Article 2, which demands that Adat criminal offenses be written in regional government regulations. This explanatory section potentially deviates from the historical

intent of Article 2 and the principles underlying the formation of the new Criminal Code. The explanation clearly has a strong influence on legal positivism. In terms of legal thinking, of course, there is no problem with differences of opinion, yet in this context, the concept of law that lives in society has become meaningless.

References

- Amir, Firman et al. "Implementation of the Legality Principle in the Criminal Justice System of Indonesia." *Journal of Political and Legal Sovereignty* 1, no. 4 (2023): 133.
<https://doi.org/https://doi.org/10.38142/jpls.v1i4.139>.
- Amrita Ajeng Safitri et al. "Eksistensi Hukum Adat Dalam Tata Hukum Indonesia." *Rechtenstudent* 3, no. 2 (2022): 216.
<https://doi.org/https://doi.org/10.35719/rch.v3i2.124>.
- Anisa Fitri Wibowo Azriel Viero Sadam and Muhammad Ramadavin. "Implikasi Pasal Living Law Dalam Undang-Undang Kitab Undang-Undang Hukum Pidana Terbaru Terhadap Kehidupan Masyarakat." *Jurnal Hukum Dan Bisnis* 9, no. 1 (2023): 126.
- Aris Hardinanto et al. "Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila." *Journal of Law and Legal Reform* 5, no. 3 (2024): 1052. <https://doi.org/https://doi.org/10.15294/jllr.v5i3.13923>.
- Bahri, Robbi Asadul. "Konsep Penegakan Hukum Pidana Adat Di Indonesia Berdasarkan Asas Kepastian Hukum." *Law, Development, and Justice Review* 7, no. 1 (2024): 67.
<https://doi.org/https://doi.org/10.14710/ldjr.7.2024.61-74>.
- Budi Novianto and Ade Saptomo. "Application Of Customary Criminal Law In Deciding Crimes In The Marind Tribe Of Merauke." *Jurnal Ilmu Hukum Dan Tata Negara* 2, no. 1 (2024): 231.
<https://doi.org/https://doi.org/10.55606/birokrasi.v2i1.905>.
- Burns, Petter. *The Leiden Legacy: Concepts of Law in Indonesia*. Jakarta: McGraw Hill, 2021.
- Darmini Roza and Gokma Toni Parlindungan S. "Teori Positivisme Hans Kelsen Mempengaruhi Perkembangan Hukum Di Indonesia." *Lex Jurnalica* 18, no. 1 (2021): 23.
<https://doi.org/https://doi.org/10.47007/lj.v18i1.4056>.
- Deni Setya Bagus Yuherawan, et al. "Asas Nullum Crimen Sine Poena Pada

- Rancangan Kitab Undang-Undang Hukum Pidana.” *Jurnal Hukum Pidana & Kriminologi* 2, no. 1 (2021): 2. <https://doi.org/https://doi.org/10.51370/jhpk.v2i1.8>.
- Edi Kristianta Tarigan et al. “Tinjauan Yuridis Perbandingan KUHP Lama Dan KUHP Baru.” *Majalah Ilmiah Warta Dharmawangsa* 18, no. 3 (2024): 590–91. <https://doi.org/https://doi.org/10.46576/wdw.v18i3.4449>.
- Edwing Gregorio Dewi Adi Kusumastuti and I Gusti Komang Wijaya Kesum. “Implikasi Pelunakan Pengaturan Asas Legalitas Dalam KUHPN Terhadap Konsep ‘Hukum Yang Hidup Dalam Masyarakat.’” *Urist-Diction* 7, no. 2 (2024): 271. <https://doi.org/https://e-journal.unair.ac.id/JD/article/view/56124>.
- Ehrlich, Eugen. *Fundamental Principles of the Sociology of Law*, Terj. Walter L. Moll. Cambridge: Harvard University Press, 1936.
- Ehrlich, Eugene. *Fundamental Principles of the Sociology of Law*. Francis: Routledge, 2002.
- Emovwodo, Januar Rahadian Mahendara and Silas Oghenemaro. “Monodualistic and Pluralistic Punishment Politics in Criminal Code Reform: Lessons from Indonesia.” *Journal Of Law, Environmental And Justice* 1, no. 3 (2023): 226. <https://doi.org/https://doi.org/10.62264/jlej.v1i3.17>.
- Faisal and Reski Anwar. “Legalitas Hukum Adat Dalam Kitab Undang-Undang Hukum Pidana Nasional.” *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 13, no. 2 (2024): 368. <https://doi.org/10.24843/JMHU.2024.v13.i02.p08>.
- Fajar Muhammad Nugraha Reynaldo de Archellie and Cresentia Carra Nethania Clement. “Kasus Ujaran Kebencian Dalam Berita Surat Kabar Di Hindia Belanda.” *Paradigma: Jurnal Kajian Budaya* 10, no. 3 (2020): 226. <https://doi.org/10.17510/paradigma.v10i3.379>.
- Fikrotul Jadidah. “Kasus Nenek Minah Ditinjau Dari Perspektif Teori Hukum Positivisme.” *IBLAM Law Review* 2, no. 3 (2022): 135. <https://doi.org/https://doi.org/10.52249/ilr.v2i3.98>.
- Gallant, Kenneth S. *The Principle of Legality in International and Comparative Criminal Law*. University of Arkansas: Cambridge University Press, 2009.
- Genta, Yehezkiel. “Reinterpretasi Makna Asas Legalitas Sebagai Bentuk Pengakuan Hukum Pidana Adat Dalam Upaya Menjamin Hak Asasi Masyarakat Adat.” *Padjadjaran Law Review* 7, no. 1 (2019): 53–54.
- Hamidah Abdurachman, et al. “Application of Ultimum Remedium Principles in Progressive Law Perspective.” *International Journal of Criminology and*

- Sociology* 10 (2021): 1012. <https://doi.org/https://doi.org/10.6000/1929-4409.2021.10.119>.
- Haveman, Roelof H. *The Legality of Adat Criminal Law on Modern Indonesia*. Jakarta: Tatanusa, 2002.
- Hertogh, Marc. *Living Law: Reconsidering Eugen Ehrlich*. Inggris: Hart Publishing, 2009.
- Humas FH UI. "Living Law Dalam Rancangan Hukum Pidana Oleh Prof. Sulistyowati Irianto." Fakultas Hukum UI, 2022. <https://law.ui.ac.id/living-law-dalam-rancangan-hukum-pidana-oleh-prof-sulistyowati-irianto/>.
- ICJR. "Ketentuan Hukum Yang Hidup Dalam Masyarakat Di RKUHP Ancam Hak Warga Negara." ICJR, 2019. <https://icjr.or.id/ketentuan-hukum-yang-hidup-dalam-masyarakat-di-rkuhp-ancam-hak-warga-negara/>.
- Institute, Epistema. "538 Komunitas Masyarakat Hukum Adat Telah Ditetapkan Pasca Putusan MK 35." Epistema Institute, 2017. <https://epistema.or.id/kabar/siaran-pers/komunitas-masyarakat-hukum-adat/>.
- Isaacs, Ehrlich Eugen and Nathan. "The Sociology of Law." *Harvard Law Review* 36, no. 2 (1922): 133.
- Kusumajakti, Aisha Nurul Fadilla Defa An Nuur, and Fauzi and Rangga Maulana. "Analisis Pengaturan Living Law Dalam RUU KUHP Yang Dituangkan Pada Peraturan Daerah Ditinjau Berdasarkan Konstitusi." *Jurist Diction* 7, no. 2 (2024): 230–31. <https://doi.org/10.20473/jd.v7i2.56121>.
- Lubis, Rinni Widyaastuty Sontayati Sihite and Fauziah. "Pokok Pokok Pemikiran KUHP Baru." *Journal Of Social Science Research* 4, no. 4 (2024): 3. <https://doi.org/https://doi.org/10.31004/innovative.v4i4.13509>.
- Masyhar, Masyhar, et Al. "Reclaiming the Unwritten: Living Law's Prospects under Indonesia's 2023 Penal Reform." *Jambe Law Journal* 8, no. 1 (2025): 269. <https://doi.org/10.22437/jlj.8.1.255-285>.
- Milenia, Ramadhani. "Tantangan Implementasi Pengakuan Hukum Adat Dalam Kitab Undang-Undang Hukum Pidana Baru Di Indonesia." *Journal Syntax Idea* 6, no. 8 (2024): 3710. <https://doi.org/https://doi.org/10.46799/syntax-idea.v6i8.4356>.
- Mochammad Rizky Eka, Aditya et al. "The Problem of Interfaith Marriage in Indonesia: A Juridical-Normative Approach." *Jurnal Hukum Keluarga* 6, no. 2 (2023): 458. <https://doi.org/https://doi.org/10.22373/ujhk.v6i2.20059>.

- Mubarok, Nafi. "Sejarah Perkembangan Hukum Pidana Di Indonesia: Menyongsong Kehadiran KUHP 2023 Dengan Memahami Dari Aspek Kesejarahan." *Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 27, no. 1 (2024): 26–27.
- Musmuliady, Jubair, and Aminuddin Kasim. "Turn on the Living Law: The Construction and Implications of Living Law in Ratification of Draft Criminal Code (RKUHP)." *Rechtsidee* 10, no. 2 (2022): 8. <https://doi.org/https://doi.org/10.21070/jihr.v11i0.798>.
- Nelken, David. "Eugen Ehrlich, Living Law, and Plural Legalities. Legal Pluralism, Privatization of Law and Multiculturalism." *Theoretical Inquiries in Law* 9, no. 1 (2008): 442–71.
- Nugraha, Satya Robi et all. "The Transformation of Indonesia's Criminal Law System: Comprehensive Comparison between the Old and New Penal Codes." *Jurnal Reformasi Hukum* 29, no. 1 (2025): 12. <https://doi.org/https://doi.org/10.46257/jrh.v29i1.1169>.
- Papua, Jurnal. "Sudah Bayar Denda Adat Rp 1,5 Miliar, Tapi Pelaku Masih Ditahan, Ini Jawaban Hukum Negara!" *Jurnal Papua*, 2025. https://www.jurnalpapua.id/2025/03/08/sudah-bayar-denda-adat-rp-15-miliar-tapi-pelaku-masih-ditahan-ini-jawaban-hukum-negara/?utm_source.
- Pound, Roscoe. "An Appreciation of Eugen Ehrlich." *Harvard Law Review* 36, no. 2 (1992): 130.
- Putri, Nella Sumika. "Memikirkan Kembali Unsur "Hukum Yang Hidup Dalam Masyarakat" Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas." *Indonesia Criminal Law Review* 1, no. 1 (2021): 69.
- Putri, Nella Sumika. "The Material Content of Regional Regulations as the Concretization of the Living Legal System in Society (Adat Law) Based on Article 2 of the Indonesian Penal Code (KUHP) 2023." *Jurnal Bina Mulia Hukum* 7, no. 2 (2023): 237. <https://doi.org/https://doi.org/10.23920/jbmh.v7i2.1101>.
- Renata Christha Auli. "Catat! Ini 11 Jenis Interpretasi Hukum." *Hukum Online*, 2022. <https://www.hukumonline.com/klinik/a/11-jenis-interpretasi-hukum-lt62d50908c18c5/>.
- Rismana, Anindita Tresa Valerina and Daud. "Hukum Yang Hidup Dalam Sistem Hukum Modern: Tantangan-Tantangan Terhadap Prinsip Legalitas." *Walisono Law Review* 6, no. 1 (2024): 38. <https://doi.org/10.21580/walrev.2024.6.1.22062>.
- Roby Satya Nugraha and Christina Febriani Silalahi. "Pembaharuan

- Berlakunya Asas Legalitas Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana.” *Pakuan Law Review* 10, no. 1 (2024): 77. <https://doi.org/https://doi.org/10.33751/palar.v10i1>.
- Rokhmad, Abu et al. “Blasphemy as a Criminal Offense: Legal Transformation in Indonesia from Colonial Era to Modern.” *Walisongo Law Review* 6, no. 1 (2024): 17. <https://doi.org/https://doi.org/10.21580/walrev.2024.6.1.22667>.
- Sari, Hasan Bachtiar Fadholi and Siska Diana. “Hukum Negara Dan Hukum Adat: Dua Kutub Yang Saling Memperkuat.” *Jurnal Mengkaji Indonesia* 1, no. 1 (2022): 29. <https://doi.org/https://doi.org/10.59066/jmi.v1i1.49>.
- Satjipto Rahardjo. *Hukum Dan Masyarakat*. Bandung: Penerbit Angkasa, 2002.
- Septian, Ilham Fajar and Ali Abdurahman. “Status Hukum Penjelasan Undang-Undang Berdasarkan Sistem Peraturan Perundang-Undangan Indonesia.” *Jurnal Hukum Dan Pembangunan* 51, no. 3 (2021): 823. <https://doi.org/10.21143/jhp.vol51.no3.3136>.
- Tongat, et al. “The Living Law in the National Criminal Law Reform.” *Jurnal Konstitusi* 17, no. 1 (2020): 162. <https://doi.org/https://doi.org/10.31078/jk1717>.
- Utama, Tody Sasmitha Jiwa. “Hukum Yang Hidup Dalam Rancangan Kitab Undang-Undang Hukum Pidana (KUHP): Antara Akomodasi Dan Negasi.” *Masalah-Masalah Hukum* 49, no. 1 (2020): 22. <https://doi.org/https://doi.org/10.14710/mmh.49.1.2020.14-25>.
- Wirdi Hisroh Komeni and Ermania Widjajanti. “Ketidaktepatan Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Baru: Prespektif Teori Kepastian Hukum.” *Journal Of Social Science Research* 4, no. 3 (2024): 8. <https://doi.org/https://doi.org/10.31004/innovative.v4i3.10586>.
- Yoserwan. “Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan KUHP Baru.” *Unes Law Review* 5, no. 4 (2023): 2002–3. <https://doi.org/https://doi.org/10.31933/unesrev.v5i4>.
- Yuliartini, Ni Putu Rai Dewa Gede Sudika Mangku and Ni Ketut Sari Adnyani. “Recognition of Society Rights in Tradition Specially in Tourism Regulation Based on Article 18B Paragraph (2) of the 1945 Constitution of the Republic Indonesia.” *Journal Equity of Law and Governance* 1, no. 1 (2021): 32. <https://doi.org/https://doi.org/10.22225/elg.v1i1.3242>.

Customary law represents a “*living law*” that evolves to meet the changing needs of a community rather than acting merely as an artifact of tradition

Brendan Tobin

A Socio-Legal Scholar

Acknowledgment

The authors would like to thank all those who contributed to the writing of this journal. Despite not receiving funding support from any institution, the authors were determined to complete this paper independently without interference from other parties.

Funding Information

None

Conflicting Interest Statement

The authors state that there is no conflict of interest in the publication of this article.

Publishing Ethical and Originality Statement

All authors declared that this work is original and has never been published in any form and in any media, nor is it under consideration for publication in any journal, and all sources cited in this work refer to the basic standards of scientific citation.

Generative AI Statement Statement

N/A