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Recognition Of Living Law In Article 2 Of Indonesia's National Criminal Code: Positivism And Customary Legal Pluralism

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ABSTRACT

Indonesia's Law Number 1 of 2023 on the National Criminal Code places the formal principle of legality in Article 1(1) alongside the recognition of living law in Article 2, creating a fundamental question about the relationship between legal certainty and customary legal pluralism. This study examines the philosophical consistency of that arrangement by incorporating Government Regulation Number 55 of 2025 and Constitutional Court judicial review case Number 295/PUU-XXIV/2026. It employs doctrinal legal research with statutory, conceptual, and case approaches. Primary and secondary legal materials are examined qualitatively through grammatical, systematic, and teleological interpretation. The analysis shows that Article 2 does not displace the legality principle; rather, it extends legality toward a material dimension that remains cumulatively limited by subsidiarity, the territorial scope of customary law, and conformity with Pancasila, the 1945 Constitution, human rights, and general legal principles. Nevertheless, the requirement to formalize customary offences through regional regulations may generate state-managed or quasi legal pluralism by converting dynamic customary norms into fixed legal texts while leaving ambiguity concerning certainty and the prohibition of analogy. The study therefore proposes a restricted material legality framework based on graduated formalization, proportional sanction ceilings, and participatory verification as a conceptual route for reconciling positivism and customary legal pluralism.

Keywords: Customary Law; Legal Certainty; Material Legality.**INTRODUCTION**

Indonesia's criminal law system entered a paradigmatic transition with the enactment of Law Number 1 of 2023 on the National Criminal Code, which became effective in early 2026 and replaced the colonial-era *Wetboek van Strafrecht* (Prahassacitta, 2026). Among its most consequential innovations is the explicit recognition of law that lives within society, commonly described as living law, in Article 2. Under this provision, conduct may remain punishable even when it is not formulated as an offence in national legislation, provided that the conduct is regarded as punishable under the law living in the relevant community and that the applicable customary norm remains compatible with Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by the community of nations (Republic of Indonesia, 2023). The provision therefore brings customary normativity into a field traditionally structured around written criminal legislation.

The philosophical difficulty arises because Articles 1 and 2 bring two legal traditions with different epistemological premises into the same normative architecture. Article 1(1) retains the formal legality principle rooted in Continental European legal positivism: *nullum crimen, nulla poena sine praevia lege poenali*. In this tradition, legal certainty requires criminal norms to be written, sufficiently precise, strictly interpreted, and non-retroactive. Article 2, by contrast, acknowledges non-state normative orders generated through the legal consciousness and practices of customary communities. This second orientation reflects sociological jurisprudence and legal pluralism, both of which criticize the assumption that valid law can only originate from the state (Nurjaya, 2004; Rahardjo, 2006). The key problem is consequently not whether customary norms exist, but whether a criminal justice system can recognize their normative force without eroding the predictability demanded by the legality principle.

The problem has also moved beyond scholarly debate. In September 2026, the Constitutional Court heard judicial review case Number 295/PUU-XXIV/2026 challenging Article 2(1), Article 2(2), Article 2(3), and their explanations. The petition questioned whether a person could face criminal consequences on the basis of norms that were initially unwritten, not uniformly published, and potentially difficult to identify in

advance (ANTARA News, 2026; Media Indonesia, 2026). The Government responded that living law under the National Criminal Code is restricted rather than automatic: it is intended for conduct not otherwise regulated and, according to the implementing structure of Government Regulation Number 55 of 2025, must first be formalized through a regional regulation before functioning as a basis for criminal enforcement (ANTARA News, 2026). This constitutional controversy demonstrates that the relationship between customary pluralism and legal certainty has direct implications for the legitimacy of criminal adjudication.

Existing scholarship tends to follow two broad trajectories. An affirmative-sociological line treats Article 2 as part of the decolonization of Indonesian criminal law and as recognition of substantive justice and legal plurality (Ario et al., 2025; Helianny et al., 2023). A critical-normative line stresses ambiguity, legal certainty, the risk of unequal application, and possible tension with the prohibition of analogy (Universitas Sultan Ageng Tirtayasa, 2025; Universitas Muhammadiyah Yogyakarta, 2025). Other studies describe the juridical difficulties of Article 2 or contrast substantive justice with certainty, but largely stop at identifying implementation problems or proposing legislative techniques (Universitas Negeri Zaragoza Law Review, 2025; Jurnal Dinamika Hukum dan Masyarakat, 2024). Likewise, jurisprudential work on the relationship between living law and legality has primarily examined the normative construction of Articles 1 and 2, without fully integrating the later implementing regulation and the 2026 constitutional review (Saputra, 2024).

Three gaps therefore remain. First, Article 2 has rarely been examined as an object of legal philosophy through an explicit comparison between the epistemological premises of legal positivism and legal pluralism. Second, the relationship among Article 2, Government Regulation Number 55 of 2025, and the ongoing constitutional review has not commonly been analyzed within a single coherent framework. Third, scholarship has not sufficiently developed a philosophical bridge between the demands of certainty and the social authority of customary law. Addressing these gaps, this study analyzes Article 2 as an expansion of legality from a formal toward a material dimension, evaluates the philosophical consistency between customary legal pluralism and legal certainty, and formulates a reconciliatory framework capable of explaining how the two traditions may coexist within Indonesia's criminal law system.

LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK

Living Law and Sociological Jurisprudence

The concept of living law was systematically developed by Eugen Ehrlich, who argued that the center of gravity of legal development lies not primarily in statutes, judicial decisions, or doctrinal formulations, but in society itself (Ehrlich, 1936/2002). From this perspective, state law constitutes only one layer within a broader normative order. Social practices, recurring expectations, customary arrangements, and collectively accepted patterns of conduct may operate as law because they effectively organize social life. This understanding parallels the distinction between law in books and law in action: written rules may not fully describe the normative order that people actually observe. In Indonesia, the relevance of this perspective is strengthened by continuing customary practices through which communities regulate relationships, resolve conflicts, and preserve social order. Living law therefore refers not merely to formally named customary law, but to norms that maintain social authority because they are embedded in collective legal consciousness (Universitas Pamulang, 2026).

Legal Pluralism

Legal pluralism rejects legal centralism, namely the proposition that law can only originate from the state as a single sovereign source. Griffiths (1986) distinguishes weak legal pluralism, in which the state recognizes and incorporates non-state normative systems into the official legal hierarchy, from strong legal pluralism, in which multiple normative orders operate with a significant degree of autonomy and without complete subordination to state law. Tamanaha (2008) further explains that modern societies are simultaneously governed by overlapping normative layers, including state law, religious rules, customary norms, and informal social expectations. These layers may reinforce one another, but they may also compete. Article 2 of the National Criminal Code is conceptually closer to weak legal pluralism because customary norms acquire enforceable criminal significance through a state-recognized mechanism, particularly formalization by regional regulation, rather than operating as wholly autonomous criminal law.

Legal Positivism and the Principle of Legality

Classical legal positivism in criminal law is closely associated with Feuerbach's formulation of *nullum crimen, nulla poena sine praevia lege poenali*. The principle is designed to prevent arbitrary punishment by requiring prior legal authorization. Hart (2012) later explains legal validity through the rule of recognition: a norm belongs to a legal system when it satisfies the formally accepted criteria by which that system identifies valid law. From a positivist standpoint, the predictability of criminal law depends on the possibility of tracing prohibitions to recognizable and publicly authoritative sources. The tension with legal pluralism is therefore epistemological as much as institutional.

Positivism asks whether a norm is valid because it has been authoritatively enacted, whereas pluralism also asks whether a norm is socially effective because it is accepted and practiced. Article 2 attempts to combine both sources of authority, thereby making philosophical consistency a central question rather than a merely technical question of statutory drafting.

Prior Research and Position of the Study

Ario et al. (2025) connect living law to legal certainty and human rights within the legislative politics of the 2023 Criminal Code, but their emphasis is on the politics of legal reform rather than a direct test of philosophical consistency between competing paradigms. Asmawi et al. (2025) examine living law in relation to *urf* in Islamic law, providing a valuable comparative perspective without developing a general positivism-pluralism framework. Heliany et al. (2023) discuss the implications of pluralism after the enactment of the new Criminal Code, while Hermawan et al. (2022) and Heryanti and Sihotang (2022) provide sociological-jurisprudential and participatory-justice perspectives on indigenous communities and customary land disputes. Studies by Universitas Negeri Zaragoza Law Review (2025) and Jurnal Dinamika Hukum dan Masyarakat (2024) identify uncertainty in the criteria for living law, yet do not integrate Government Regulation Number 55 of 2025 with the later constitutional dispute. This study occupies that gap by comparing the premises of positivism and pluralism explicitly and by treating the most recent regulatory and constitutional developments as part of the analytical context.

METHODS

This study uses doctrinal legal research, treating legal norms as components of a system whose internal coherence can be examined through authoritative texts and legal concepts. Three approaches are combined. The statutory approach examines Article 1 and Article 2 of Law Number 1 of 2023 on the National Criminal Code together with Government Regulation Number 55 of 2025 as the implementing framework for determining living law. The conceptual approach analyzes the relationships among living law, legal pluralism, legal positivism, legal certainty, and the principle of legality through established legal theory. The case approach examines the arguments presented in Constitutional Court judicial review case Number 295/PUU-XXIV/2026 as a concrete representation of the constitutional tension surrounding the norm.

The legal materials consist of primary materials, including the 1945 Constitution, Law Number 1 of 2023, and Government Regulation Number 55 of 2025; secondary materials, including books, peer-reviewed national and international journal literature, and institutional or journalistic materials reporting the development of the constitutional review; and tertiary materials used to clarify legal terminology. Materials were collected through library research and organized according to the study's three analytical questions. Analysis was qualitative and employed grammatical interpretation to identify the literal meaning of Article 2, systematic interpretation to relate Article 2 to the wider structure of the Criminal Code, including Articles 1 and 597, and teleological interpretation to assess the provision against the purposes of criminal-law decolonization, substantive justice, and legal certainty. The interpreted materials were then arranged in comparative matrices to test the philosophical compatibility of positivist and pluralist premises.

RESULTS AND DISCUSSION

Results

Normative Structure of Article 2: From Formal to Material Legality

A systematic reading of Articles 1 and 2 indicates that the two provisions need not be understood as mutually cancelling rules. Article 1(1) expresses the formal dimension of legality: criminal responsibility requires a prior legal norm. Article 2 creates space for a material dimension by recognizing socially effective customary norms, but only within prescribed boundaries. In explanations surrounding the constitutional review, the Indonesian House of Representatives has emphasized that Article 2 is not intended to authorize analogy in the creation of criminal offences and that the recognition of living law operates within legally defined conditions (Pelitabar, 2026). The distinction can therefore be understood as one between the source and form of the norm rather than a complete abandonment of legality. Table 1 summarizes this normative architecture.

Table 1. Comparison of Formal Legality (Article 1) and Material Legality (Article 2) of the National Criminal Code

Aspect	Article 1(1): Formal Legality	Article 2: Material Legality / Living Law
Source of law	Written legislation (<i>lex scripta</i>)	Unwritten law that lives and develops within a community
Philosophical basis	Legal positivism; legal certainty (<i>Rechtssicherheit</i>)	Legal pluralism; substantive and sociological justice
Conditions of validity	Enactment and general legal force	Cumulative: conduct not otherwise regulated; customary norm remains living; conformity with

		Pancasila, the 1945 Constitution, human rights, and general legal principles
Territorial scope	National	Limited to the community and territory in which the customary norm lives
Mechanism of application	Direct application by law-enforcement institutions from statutory text	Requires further determination through a regional regulation under Government Regulation No. 55/2025

Note. Adapted from Republic of Indonesia (2023) and Pelitabaru (2026).

Table 1 shows that Article 2 does not simply eliminate *lex scripta*. Instead, it shifts the point at which written form enters the legal process. The customary norm may originate outside legislation, but its use as a basis for criminal enforcement is linked to formal recognition at the regional level. Consequently, the claim that Article 2 necessarily permits punishment through completely unwritten and unpublished norms requires qualification. If regional codification is treated as a mandatory condition before prosecution, the written element remains present, although it is supplied by regional rather than national legislation. This conclusion is consistent with the sociological-jurisprudential position described by Hermawan et al. (2022): state recognition of indigenous legal communities does not remove the state's function as guarantor of legal certainty, but changes that function from exclusive norm creation toward the formal validation of norms that already possess social authority.

Cumulative Conditions and Juridical Limits on Living Law

The wording of Article 2 and its implementing framework indicates that living law is not an open-ended basis for punishment. Its legal operation depends on several conditions that must function cumulatively. These requirements can be understood as safeguards designed to reduce the uncertainty associated with criminal liability derived from norms that originate outside national legislation. Table 2 organizes the six principal limitations identified in the source materials.

Table 2. Cumulative Conditions for Living Law to Operate as a Basis of Criminal Liability

No.	Cumulative condition	Restrictive function
1	The conduct has not been regulated in the National Criminal Code (subsidiarity)	Prevents living law from creating duplicate offences or displacing already codified offences
2	The customary norm genuinely remains living and is observed by the relevant community	Prevents revival of norms that have become sociologically obsolete
3	The norm is consistent with Pancasila and the 1945 Constitution	Places constitutional principles as the highest normative filter
4	The norm does not conflict with human rights	Restricts excessive or degrading customary sanctions
5	The norm is compatible with general legal principles recognized by the community of nations	Connects customary criminal norms to general and international legal standards
6	The norm is further determined through a regional regulation under Government Regulation No. 55/2025	Promotes publicity and predictability before the norm is used as a basis for punishment

Note. Adapted from Republic of Indonesia (2023, 2025) and ANTARA News (2026).

The cumulative requirements show that the legislature recognized the inherent uncertainty associated with non-written sources and attempted to respond through layered safeguards. The most consequential safeguard is the requirement of formal determination in a regional regulation. This requirement supports the Government's position that a customary norm cannot automatically become an offence merely because a law-enforcement officer believes that it exists; an institutional process of identification and formalization must occur first (ANTARA News, 2026). Yet the same solution generates a philosophical paradox. Formal codification may change the nature of the very norm being recognized. A rule that develops through community practice, adaptation, and collective acceptance may be frozen into a statutory formulation once converted into a regional regulation. Scholarship on the implementing regulation has described this risk as state-managed or quasi legal pluralism, because customary law is recognized only after passing through the state's formal legal machinery (Universitas Muhammadiyah Yogyakarta, 2025). The mechanism thus strengthens predictability while potentially weakening the fluid and socially responsive character that gives living law its distinctive authority.

Discussion

Dialectic of Legal Positivism and Customary Legal Pluralism

The central philosophical question is whether Article 2 genuinely reconciles positivist and pluralist premises or merely places them side by side while leaving their contradiction unresolved. The relevant differences concern the source of legal validity, the principal value pursued, the method of reasoning permitted in criminal law, and the institutional status of customary norms. Table 3 presents the comparative matrix used to assess those points of convergence and tension.

Table 3. Dialectical Matrix of Legal Positivism and Legal Pluralism in Article 2 of the National Criminal Code

Analytical criterion	Legal positivism (Hart; Feuerbach)	Legal pluralism (Ehrlich; Griffiths)
Source of normative validity	Rule of recognition and formal authorization by a sovereign legal order	Community legal consciousness and the social effectiveness of norms (law in action)
Primary value	Legal certainty and predictability	Substantive justice and contextual-cultural appropriateness
Position on analogy	Analogy is prohibited in defining criminal liability to prevent arbitrariness	Contextual reasoning is more open where it reflects the community's legal consciousness
Convergence in Article 2	Written determination through regional regulation preserves an element of <i>lex scripta</i>	The substantive content originates from living customary law rather than solely from legislative will
Residual tension	Evaluative criteria such as compatibility with general legal principles may remain open to interpretation	Codification through regional regulation may freeze the dynamic nature of customary law and subordinate it to state law

Note. Analytical synthesis based on Hart (2012), Ehrlich (1936/2002), and Griffiths (1986).

The matrix supports a finding of partial rather than absolute philosophical consistency. Article 2 retains a positivist architecture because enforceability depends on a formally recognizable legal act. In Hartian terms, regional formalization supplies a rule-recognition pathway through which the state identifies which customary norm can enter the criminal-law system. At the same time, the content being formalized is not intended to be invented by the state; it is expected to originate from a norm that is already socially effective within a customary community. Article 2 therefore combines formal validation with sociological origin. This can be described as formalized material legality: the material content comes from living social norms, while criminal enforceability remains dependent on formal legal recognition.

The synthesis, however, is not fully stable. First, criteria such as compatibility with 'general legal principles recognized by the community of nations' are evaluative and may generate different interpretations among regional legislators and judges. Such disparity would undermine the predictability that the legality principle is intended to secure (Universitas Negeri Zaragoza Law Review, 2025). Second, converting customary offences into regional regulations is itself an act of positivization. From the standpoint of strong legal pluralism, this risks transforming recognition into subordination because customary law receives criminal authority only after state approval (Griffiths, 1986). Third, the residual position of customary offences within the hierarchy of the National Criminal Code confirms that living law is supplementary rather than co-equal with state criminal law (Universitas Muhammadiyah Yogyakarta, 2025). Article 2 thus creates a negotiated form of pluralism, but one whose final institutional authority remains located within the state legal system.

Risks of Multiple Interpretation and Implications for Legal Certainty

The most immediate consequence of this incomplete synthesis is interpretive risk. A system that recognizes living law must be able to distinguish norms that genuinely remain socially authoritative from norms that are historical, disputed, or selectively reconstructed. Without a transparent method for proving that a norm is still living, regional governments and law-enforcement institutions may either revive norms that have lost social legitimacy or fail to recognize norms that continue to regulate community life. A related problem concerns the constitutional and human-rights filters. These filters are indispensable, yet their application may itself become inconsistent if decision-makers lack clear evaluative criteria. As noted in discussion surrounding the constitutional challenge, the danger is not simply that customary law exists, but that its boundaries, evidentiary status, and compatibility with higher legal norms may be determined unevenly (Hukumonline, 2026). Such unevenness can particularly affect groups whose interests are not strongly represented in local political or customary institutions.

A further concern is the relationship between living law and the prohibition of analogy. The House of Representatives has stated that Article 2 does not authorize analogy in defining offences (Pelitabar, 2026). Conceptually, that position is consistent with the legality principle. In practice, however, a court may still face difficult questions when determining whether specific conduct falls within a customary offence

that has been formalized in general terms. The line between interpreting a customary offence and extending it by analogy may be difficult to maintain where the relevant norm depends on local context, community practice, and evaluative concepts such as 'conduct considered punishable' (Universitas Sultan Ageng Tirtayasa, 2025). The quality of judicial reasoning and the methodology used to establish customary law in evidence therefore become central safeguards. Legal certainty cannot be secured solely by the existence of a regional regulation; it also requires transparent standards for identifying the community, establishing the continuing vitality of the norm, defining its material elements, and explaining the relationship between the customary rule and constitutional limitations.

Novel Contribution: A Restricted Material Legality Framework

On the basis of the preceding analysis, this study proposes restricted material legality as a conceptual framework for reconciling legal positivism and customary legal pluralism. The framework does not treat formal legality and living law as mutually exclusive. Instead, it accepts the social origin of customary norms while requiring criminal enforceability to remain bounded by procedural and substantive safeguards. Three pillars structure the proposal. The first is graduated formalization. A regional regulation should not be treated as a final and permanent codification of customary law; it should contain a mechanism for periodic review so that the written formulation can be tested against continuing social practice. Such review preserves the responsiveness associated with Ehrlich's conception of living law while maintaining the publicity required by criminal legality. The second pillar is a proportional sanction ceiling. The conversion or recognition of customary sanctions within the state criminal-law system must be subject to proportionality and human-rights standards, rather than mechanically equating customary sanctions with existing statutory punishment categories. The third pillar is participatory verification. Before a norm is formalized, the process should involve customary authorities, affected community members, legal anthropologists, and independent research institutions to determine whether the norm genuinely remains living and is not merely reconstructed for local political purposes.

This framework differs from primarily administrative solutions that focus on the efficiency of local regulation, including proposals for umbrella regional regulations (Universitas Muhammadiyah Yogyakarta, 2025). The contribution is philosophical rather than merely procedural. The central issue is how the state may redefine the sources from which criminal-law validity can be derived without sacrificing either the certainty promised by written law or the substantive legitimacy claimed by norms that genuinely organize community life. Restricted material legality therefore offers two levels of contribution. Theoretically, it clarifies the point at which positivism and pluralism can meet: social validity supplies the material origin of the norm, while formal recognition, constitutional review, and rights-based limitations govern its criminal enforceability. Practically, it provides an evaluative structure for regional lawmakers and judges when determining whether a claimed customary offence may legitimately enter the state criminal-law system.

CONCLUSION

Article 2 of Indonesia's National Criminal Code does not normatively abolish the principle of legality in Article 1(1). It expands legality from an exclusively formal model toward a material dimension while preserving a written element through the mechanism of regional regulation. The philosophical consistency between customary legal pluralism and legal certainty is therefore partial. Article 2 creates a dialectical synthesis in which socially derived norms may receive criminal recognition, but that recognition remains dependent on formal state validation and higher normative constraints. The arrangement can be characterized as formalized material legality: it acknowledges the social source of customary law while retaining the institutional structure of legal positivism.

The synthesis remains vulnerable to ambiguous evaluative criteria, unequal regional implementation, the positivization and possible freezing of dynamic customary law, evidentiary difficulties, and tension with the prohibition of analogy. To address these limitations, the study proposes restricted material legality based on graduated formalization, proportional sanction ceilings, and participatory verification. The study is limited by its doctrinal design and by the fact that it analyzes Article 2 during an evolving period of implementation and constitutional review rather than through empirical observation of multiple regional applications. Future research should therefore examine the implementation of Government Regulation Number 55 of 2025 across different regions after the Constitutional Court resolves case Number 295/PUU-XXIV/2026, including whether regional formalization processes actually reflect living community norms and whether the proposed framework can operate effectively in the drafting and application of regional regulations concerning customary offences.

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