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Reformulating the principle of legality in the 2023 criminal code: legal certainty versus living law

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ABSTRACT

The enactment of Law Number 1 of 2023 concerning the Criminal Code signifies a paradigm shift in the national criminal law system from a rigid model of legal certainty based on *lex scripta* and *lex stricta* toward a more flexible approach to criminal law enforcement. Nevertheless, the recognition of the “living law in society” (living law) under Article 2 of the 2023 Criminal Code gives rise to constitutional concerns regarding the consistency of the formal principle of legality. This study aims to critically examine the implications of the reformulation of the principle of legality in the 2023 Criminal Code and to analyze the potential erosion of legal certainty resulting from the ambiguity surrounding the operational parameters of living law. The research employs a normative juridical method through statutory and conceptual approaches, supported by qualitative analysis of secondary legal materials to assess the harmonization between Article 1 and Article 2 of the 2023 Criminal Code. The findings indicate that the recognition of living law generates a contradictory dualism within the principle of legality. On the one hand, it is oriented toward achieving substantive justice; on the other hand, it creates opportunities for judicial arbitrariness and disparities in the application of law across regions. This condition reflects a tendency toward the obscuration of the principle of *nullum crimen sine lege praevia*, which consequently creates uncertainty in determining criminal acts and potentially weakens the protection of human rights against arbitrary criminalization. Therefore, the reformulation of the principle of legality in the 2023 Criminal Code may be regarded as an insufficiently mature compromise between legal modernization and the recognition of local values, thereby risking the sacrifice of legal certainty. Accordingly, more restrictive implementing regulations are required to limit the scope of the application of living law in order to ensure its conformity with the principles of the rule of law.



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Introduction

The principle of legality constitutes one of the fundamental pillars of modern criminal law, ensuring that no individual may be subjected to criminal punishment unless the conduct has been expressly prohibited by law prior to its commission (Duff, 2018; Hamzah, 1994; Horder, 2022; Moeljatno, 2002; Rummelink & Moeliono, 2003). This principle functions as a constitutional safeguard against arbitrary state power by requiring criminal liability to be based on previously enacted, clear, and written legal norms. Traditionally, the legality principle has been embodied through the doctrines of *lex scripta*, *lex certa*, *lex stricta*, and *nullum crimen sine lege praevia*, all of which collectively guarantee legal certainty, predictability, and equality before

the law (Radbruch, 2006; von Feuerbach, 1847). Within constitutional democracies, these principles also serve to limit judicial discretion by preventing courts from creating criminal norms beyond those established by the legislature.

The enactment of Law Number 1 of 2023 concerning the Indonesian Criminal Code marks a significant transformation in the national criminal justice system (Kai, 2021). While Article 1 paragraph (1) preserves the classical formulation of the legality principle by requiring criminal punishment to be based upon written law, Article 2 paragraph (1) simultaneously recognizes the applicability of the living law existing within society as a legitimate basis for criminal liability. This reform represents a substantial departure from the traditional positivist conception of criminal law by introducing greater flexibility through the formal recognition of unwritten customary norms. This development also reflects Indonesia's long-standing criminal law reform agenda, which seeks to decolonize the national criminal justice system by integrating living law and indigenous legal values into statutory criminal law (Barda Nawawi Arief, 2016; Muladi, 2002).

The coexistence of Articles 1 and 2 creates an important constitutional question regarding the relationship between legal certainty and substantive justice. On the one hand, Article 1 seeks to preserve predictability through nationally codified criminal legislation. On the other hand, Article 2 recognizes that legal norms may also derive from customary values that continue to operate within particular communities. Although this approach reflects Indonesia's commitment to legal pluralism and the recognition of indigenous legal traditions, it also raises concerns regarding the consistency of criminal liability when legal standards differ across regions and are not uniformly codified.

The recognition of living law therefore introduces a fundamental tension between two competing paradigms of criminal law (B. Tamanaha, 2021; Valerina & Rismansa, 2024). The first is legal positivism, which maintains that criminal liability must derive exclusively from formally enacted legislation to ensure certainty, equality, and constitutional restraint upon governmental power. The second is legal pluralism, which accepts that normative authority may also originate from social practices and customary values that possess legitimacy within particular communities. This perspective is consistent with the view that law should be understood as a social institution developing alongside the dynamics of society rather than merely as a collection of written rules (Rahardjo, 2006a). This understanding also reflects Savigny's conception that law develops organically from the *Volksgeist* or the legal consciousness of society, rather than being created exclusively through legislative enactment (von Savigny & Hayward, 1831). While these paradigms pursue different normative objectives, their simultaneous incorporation into the 2023 Criminal Code creates uncertainty regarding the extent to which unwritten norms may legitimately supplement or even replace written criminal legislation.

This normative tension has significant implications for the protection of human rights because the principle of legality serves not only as a doctrine of criminal law but also as a constitutional safeguard that guarantees legal certainty, equality before the law, and protection against arbitrary state power (Jimly Asshiddiqie, 2021; Manan, 1996). The legality principle is widely recognized as a fundamental guarantee protecting individuals from arbitrary criminalization by ensuring that citizens are able to know in advance which conduct constitutes a criminal offence. When criminal liability depends upon unwritten norms whose content varies across different communities, individuals may no longer possess adequate certainty concerning the legality of their conduct. Consequently, the constitutional values of legal accessibility, predictability, and equal protection before the law become increasingly difficult to maintain.

This study adopts a normative doctrinal legal research design employing statutory, conceptual, and limited comparative approaches to examine the constitutional coherence between Article 1 paragraph (1) and Article 2 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code. Rather than investigating empirical law enforcement practices, the study evaluates the internal consistency of the legality principle through doctrinal analysis of statutory provisions, constitutional principles, and contemporary criminal law theory. Within this analytical framework, the concept of normative antinomy refers to the coexistence of legal norms pursuing different constitutional objectives within a single statutory regime, thereby creating the potential for contradictory legal consequences. Likewise, legal certainty is operationalized through three analytical indicators: (i) the predictability of criminal norms, (ii) the accessibility of legal standards to citizens, and (iii) the limitation of judicial discretion in determining criminal liability. These analytical criteria provide a structured framework for evaluating whether the incorporation of living law remains compatible with the constitutional guarantees embodied in the legality principle.

The theoretical framework of this research is situated within the contemporary debate between legal positivism and legal pluralism. From the perspective of Hartian legal positivism, the validity of criminal law

depends upon its formal enactment through legitimate legal institutions, thereby preserving legal certainty and limiting judicial law-making. Conversely, legal pluralism recognizes that normative authority may also arise from customary practices and social values existing within particular communities. Rather than treating these perspectives as mutually exclusive, this study examines whether the constitutional principle of legality can accommodate living law without undermining the doctrines of *lex scripta*, *lex certa*, and *lex stricta*. In doing so, the study employs Gustav Radbruch's conception of legal certainty, justice, and utility as the principal evaluative framework for balancing constitutional legality with substantive justice. Recent studies likewise demonstrate that Radbruch's theory continues to influence contemporary constitutional debates concerning the relationship between legal certainty and substantive justice (Glahé, 2022).

Although the recognition of living law seeks to ensure that criminal law remains responsive to social realities and local values, excessive flexibility may simultaneously weaken one of the legality principle's primary constitutional functions, namely limiting the discretionary authority of judges. Without sufficiently clear normative parameters governing the application of unwritten law, judicial interpretation risks expanding beyond constitutional limits and transforming judges from interpreters of legislation into creators of criminal norms. Such a development may undermine the predictability of criminal law, generate disparities in judicial decisions, and weaken equality before the law.

Furthermore, because living law differs among local communities, identical conduct may receive different legal treatment depending upon the geographical location in which it occurs. This condition creates the possibility of legal fragmentation and inconsistent standards of criminalization throughout Indonesia. Consequently, the reformulation of the legality principle raises an important constitutional dilemma concerning whether legal pluralism may coexist with the rule of law without sacrificing legal certainty and the constitutional protection afforded to individuals against arbitrary criminal prosecution.

The constitutional dilemma generated by Articles 1 and 2 of the 2023 Criminal Code has attracted increasing scholarly attention. Earlier studies by Barda Nawawi Arief (2016) and Marpaung (2008) primarily examined the recognition of living law as part of the decolonization of Indonesian criminal law, arguing that the accommodation of customary norms represents an effort to establish a criminal justice system reflecting Indonesia's socio-cultural identity. From this perspective, living law is regarded as an instrument for achieving substantive justice through legal pluralism.

Similarly, studies conducted by Cahyadi focus on the institutional mechanisms for integrating living law into formal legal instruments, particularly through regional regulations (*Peraturan Daerah*). These studies contribute significantly to discussions concerning the administrative formalization of customary law. Likewise, analyses of the doctrine of material unlawfulness following Constitutional Court Decision Number 003/PUU-IV/2006 generally support broader judicial recognition of non-textual legal values in criminal adjudication. Collectively, these studies provide important philosophical and institutional justifications for recognizing customary norms within Indonesia's criminal justice system.

However, existing Indonesian scholarship predominantly approaches living law from historical, sociological, and philosophical perspectives while paying comparatively limited attention to its constitutional implications for the legality principle. In particular, previous studies rarely evaluate whether Article 2 of the 2023 Criminal Code satisfies the doctrinal requirements of *lex scripta*, *lex certa*, and *lex stricta*, which constitute the essential safeguards of legal certainty in modern criminal law. Consequently, the constitutional limits governing judicial reliance upon unwritten criminal norms remain insufficiently explored.

Recent comparative scholarship further demonstrates that the relationship between legal pluralism and the legality principle has become an increasingly important issue in contemporary criminal law. Rather than rejecting customary law altogether, recent studies generally argue that the accommodation of unwritten norms must remain subject to constitutional safeguards ensuring predictability, equality before the law, and judicial accountability (Duff, 2020; Hörnle, 2021; Ambos, 2022; Farmer, 2023). Comparative experiences from jurisdictions recognizing indigenous or customary legal systems indicate that unwritten norms rarely operate as independent sources of criminal liability. Instead, they are incorporated through statutory recognition, constitutional authorization, or clearly defined judicial limitations designed to preserve legal certainty while accommodating local values.

Despite these developments, relatively little attention has been devoted to examining whether Indonesia's approach under Article 2 of the 2023 Criminal Code provides comparable constitutional safeguards. Existing studies have not systematically analyzed the extent to which the recognition of living law may expand judicial discretion, create inconsistent standards of criminalization, or weaken the constitutional guarantee of legal certainty. This unresolved issue demonstrates the existence of an important research gap concerning the

constitutional compatibility between legal pluralism and the legality principle within Indonesia's reformed criminal law system.

Accordingly, this study differs from previous research by positioning the reformulation of the legality principle as a constitutional problem of normative coherence rather than merely as an effort to accommodate legal pluralism. Instead of assuming that the recognition of living law necessarily strengthens substantive justice, this research critically evaluates the constitutional conditions under which unwritten norms may legitimately operate within the framework of the legality principle. In doing so, the study develops a doctrinal analytical framework integrating the principles of *lex scripta*, *lex certa*, *lex stricta*, and *nullum crimen sine lege* to assess the constitutional validity of Article 2 of the 2023 Criminal Code.

The originality of this study therefore lies in three principal contributions. First, it provides a doctrinal framework for evaluating the constitutional relationship between Article 1 and Article 2 of the 2023 Criminal Code through the legality principle as the primary analytical benchmark. Second, it critically assesses whether the statutory recognition of living law preserves legal certainty while maintaining substantive justice and judicial restraint. Third, drawing upon comparative developments in contemporary criminal law, the study formulates constitutional limitations governing judicial reliance upon living law in order to reconcile legal pluralism with the rule of law.

Based on these considerations, this study aims to analyze the constitutional relationship between Article 1 and Article 2 of Law Number 1 of 2023 concerning the Criminal Code within the framework of the legality principle. Furthermore, it evaluates whether the recognition of living law satisfies the constitutional requirements of *lex certa*, *lex stricta*, and legal certainty while preserving substantive justice. Finally, the study formulates doctrinal recommendations concerning the constitutional limits for applying living law in criminal adjudication as an effort to maintain a balance between legal pluralism and the rule of law.

To accomplish these objectives, this study addresses the following research questions: (1) Under what constitutional conditions does the recognition of living law remain compatible with the legality principle? (2) To what extent does Article 2 of the 2023 Criminal Code satisfy the constitutional requirements of *lex certa*, *lex stricta*, and legal certainty? (3) What constitutional limitations should govern judicial reliance upon living law in criminal adjudication to prevent arbitrary criminalization while preserving substantive justice?

Theoretically, this research contributes to contemporary debates concerning the evolution of the legality principle within plural legal systems by proposing a constitutional doctrinal framework capable of balancing legal certainty and substantive justice. Practically, the findings are expected to provide guidance for legislators, judges, and policymakers in formulating implementing regulations governing the application of living law under the 2023 Criminal Code, thereby strengthening legal certainty while preserving Indonesia's commitment to legal pluralism. The following section explains the methodological approach employed to examine these issues systematically.

Method

Research Design

This study employs normative doctrinal legal research to examine the constitutional implications of the reformulation of the principle of legality under Law Number 1 of 2023 concerning the Indonesian Criminal Code. This approach is consistent with the Indonesian methodology of normative legal research, which emphasizes the analysis of legal norms and doctrines through statutory and conceptual approaches (Marzuki, 2017; Soekanto & Mamudji, 2013). Unlike empirical legal research, which investigates the implementation of law through field observations or interviews, normative doctrinal research evaluates legal norms as the primary object of analysis by examining their coherence, consistency, and conformity with constitutional principles and established legal doctrines.

The research integrates four complementary approaches: the statutory approach, conceptual approach, historical approach, and limited comparative approach. These approaches are employed in an integrated manner rather than independently in order to provide a comprehensive evaluation of whether the recognition of living law under Article 2 remains compatible with the constitutional requirements of the legality principle.

The statutory approach examines the legal framework governing the principle of legality within the 2023 Criminal Code. The conceptual approach analyzes the fundamental doctrines of *nullum crimen sine lege*, *lex scripta*, *lex certa*, *lex stricta*, and the rule of law as constitutional standards for criminal legislation. The historical approach traces the evolution of the legality principle from the Dutch colonial Criminal Code to

the enactment of the 2023 Criminal Code in order to understand the transition from colonial criminal law toward a nationally reformed criminal justice system that reflects Indonesian legal values and contemporary criminal law policy (Atmasasmita, 2012; Barda Nawawi Arief, 2016). Finally, the limited comparative approach considers developments in selected jurisdictions recognizing customary law in order to identify constitutional safeguards relevant to Indonesia's criminal law reform.

Corpus and Sources of Legal Materials

The corpus of this research consists of legal documents directly relevant to the reformulation of the principle of legality in the Indonesian criminal justice system. Primary legal materials include authoritative legal sources possessing binding legal force and constituting the principal basis for doctrinal analysis. These materials comprise Law Number 1 of 2023 concerning the Criminal Code, with particular emphasis on Articles 1 and 2, the 1945 Constitution of the Republic of Indonesia, especially Article 28D paragraph (1) concerning the constitutional right to legal certainty, relevant Constitutional Court decisions interpreting the legality principle and legal certainty, including Decision Number 003/PUU-IV/2006, as well as the official explanatory memoranda and legislative materials accompanying the enactment of the 2023 Criminal Code (Indonesia, 2023; Konstitusi, 2006).

Secondary legal materials consist of peer-reviewed journal articles, scholarly books, legal commentaries, and previous studies discussing the legality principle, legal pluralism, constitutional criminal law, living law, and criminal law reform. Priority was given to recent international publications issued between 2019 and 2024 while also incorporating classical doctrinal works that continue to serve as foundational references in criminal law scholarship.

Tertiary legal materials include legal dictionaries, encyclopedias, and other authoritative reference sources used to clarify legal terminology and doctrinal concepts. In particular, legal dictionaries were consulted to ensure conceptual consistency in interpreting technical legal terminology relating to legality, criminal liability, and legal certainty (Garner, 2014).

The selection of legal materials followed three inclusion criteria. First, the material had to be directly relevant to the legality principle or living law. Second, it had to possess constitutional significance concerning legal certainty and criminal liability. Third, it had to demonstrate academic credibility, including legislation, Constitutional Court decisions, and publications appearing in reputable scholarly sources. Materials that did not satisfy these criteria were excluded from the analysis.

Collection of Legal Materials

Legal materials were collected through systematic library research using both printed and electronic legal resources. The collection process consisted of four sequential stages: identification, selection, classification, and documentation.

Initially, relevant legal materials were identified through statutory databases, official government publications, Constitutional Court decisions, and academic journal databases. Subsequently, the identified materials were screened according to the predefined inclusion criteria. Materials meeting these criteria were then classified into primary, secondary, and tertiary legal materials based on their normative authority and analytical function. Finally, all selected materials were systematically documented to facilitate the subsequent doctrinal analysis.

This structured procedure was adopted to ensure transparency in the selection of legal materials and to enhance the reproducibility of the research process.

Analytical Framework

The analytical framework consists of five sequential stages designed to evaluate the constitutional coherence of the reformulated legality principle.

The first stage involves identifying the statutory provisions governing the legality principle, with particular emphasis on Articles 1 and 2 of Law Number 1 of 2023. The second stage applies doctrinal interpretation using four established methods of legal interpretation, namely grammatical, systematic, historical, and teleological interpretation. The third stage evaluates the normative consistency between the interpreted provisions to determine whether the relationship between Articles 1 and 2 reflects constitutional coherence or normative disharmony. In this study, normative disharmony is assessed based on four analytical indicators: the existence of contradictions between legal norms, ambiguity in normative formulation, inconsistency with constitutional principles, and the potential expansion of judicial discretion affecting legal certainty.

The fourth stage compares the findings with constitutional approaches adopted in selected jurisdictions recognizing customary law within their criminal justice systems to identify common safeguards preserving the legality principle. Finally, the fifth stage formulates normative recommendations concerning the constitutional limits on the application of living law within Indonesia's criminal justice system to reconcile substantive justice with legal certainty.

Data Analysis

Legal materials were analyzed qualitatively using doctrinal legal reasoning. Rather than measuring empirical outcomes, the analysis focused on evaluating the coherence between statutory provisions and the constitutional principles governing criminal law.

The analytical process employed argumentative legal reasoning by integrating statutory interpretation with constitutional doctrine and comparative legal scholarship. This approach also applies principles of systematic legal reasoning by evaluating coherence between statutory norms, constitutional principles, and legal doctrines (Shidarta, 2006). This approach enabled the identification of constitutional tensions between formal legality and living law, followed by a critical assessment of their implications for legal certainty, judicial discretion, and the protection of human rights.

To enhance analytical transparency, each legal argument was developed through a structured sequence consisting of: (i) identification of the relevant legal norm; (ii) interpretation using established methods of legal reasoning; (iii) evaluation against constitutional standards of legality; and (iv) formulation of prescriptive recommendations. This analytical protocol enables other researchers to replicate the reasoning process using the same corpus of legal materials and evaluative criteria. Such a reasoning process emphasizes logical consistency, justification, and normative argumentation as the essential characteristics of legal reasoning (Shidarta, 2013).

Results and Discussions

Doctrinal Findings: Reformulation of the Principle of Legality under Law Number 1 of 2023

Consistent with the analytical framework presented in the methodology, the first stage of analysis evaluates the doctrinal relationship between Article 1 paragraph (1) and Article 2 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code. Rather than merely describing the statutory provisions, this stage examines whether the reformulation of the legality principle preserves constitutional coherence with the classical doctrines of *lex scripta*, *lex certa*, and *lex stricta*. The analysis further assesses whether the incorporation of living law under Article 2 creates normative compatibility or constitutional tension within the Indonesian criminal justice system.

Table 1. Doctrinal Comparison between Article 1 and Article 2 of Law Number 1 of 2023

Analytical Aspect	Article 1 Paragraph (1)	Article 2 Paragraph (1)
Source of criminal law	Written legislation	Living law (customary norms)
Model of legality	Formal legality	Material legality
Constitutional objective	Legal certainty	Substantive justice
Dominant doctrine	<i>Lex scripta</i> , <i>lex certa</i> , <i>lex stricta</i>	Legal pluralism
Potential implication	Predictability	Expanded judicial discretion

Table 1 demonstrates that the reformulated Criminal Code incorporates two different models of legality within a single statutory framework. Article 1 maintains the classical legality principle by limiting criminal liability to previously enacted statutory law, reflecting the traditional doctrines of *lex scripta*, *lex certa*, and *lex stricta* that have long formed the foundation of Indonesian criminal law (Marpaung, 2008; Moeljatno, 2002). Conversely, Article 2 recognizes living law as an additional normative source capable of supporting criminal punishment. This dual construction represents the principal doctrinal finding of this study. This finding is also consistent with recent Indonesian scholarship identifying the coexistence of Articles 1 and 2 as a dualistic construction of the legality principle that simultaneously pursues legal certainty and substantive justice (Gandi & Nupa, 2026).

The coexistence of these provisions reflects Indonesia's attempt to reconcile legal certainty with substantive justice. Historically, the legality principle has been understood as the principal constitutional mechanism limiting state authority through the doctrines of *nullum crimen sine lege*, *lex scripta*, *lex certa*,

and *lex stricta*. These principles ensure that criminal offences are formulated clearly, publicly accessible, and enacted before criminal liability arises (Ashworth & Zedner, 2014; Hörnle, 2021).

The present findings indicate, however, that Article 2 modifies this classical construction by recognizing living law as an additional source of criminal liability without providing comprehensive statutory criteria governing its application. The provision reflects Indonesia's criminal law reform agenda, which seeks to accommodate indigenous legal values within the national criminal justice system (Atmasasmita, 2012; Barda Nawawi Arief, 2016). Consequently, the legality principle no longer relies exclusively upon written legislation but also depends upon customary norms whose content varies among local communities.

This transformation reflects the influence of legal pluralism within Indonesian criminal law reform, which recognizes that legal authority may derive not only from state-enacted legislation but also from social norms and customary practices that possess normative legitimacy within particular communities (Ehrlich & Ziegert, 2017; Rahardjo, 2005; B. Z. Tamanaha, 2001). From this perspective, criminal law is expected to accommodate social values existing within society rather than relying exclusively upon statutory regulation. Similar developments have been observed in several plural legal systems where indigenous or customary law continues to influence criminal justice policy. Nevertheless, comparative scholarship consistently emphasizes that such recognition remains constitutionally acceptable only when accompanied by clear institutional safeguards preserving legal certainty and judicial accountability (Tamanaha, 2008; Duff, 2020; Ambos, 2022).

Accordingly, the findings do not suggest that the recognition of living law is inherently incompatible with the legality principle. Instead, the constitutional concern arises from the absence of explicit legal parameters regulating when, under what conditions, and to what extent living law may operate as a basis for criminal liability. This absence creates uncertainty regarding the hierarchy between written criminal legislation and unwritten customary norms.

The doctrinal analysis therefore identifies a structural tension between the constitutional objectives pursued by Articles 1 and 2, namely between legal certainty and substantive justice, which reflects the balance of legal values proposed by Gustav Radbruch (Wilk, 1950). Article 1 seeks to ensure predictability by restricting criminal liability to codified legal norms enacted through democratic legislative procedures. Conversely, Article 2 prioritizes substantive justice by recognizing legal norms that derive their legitimacy from social acceptance rather than legislative enactment. Although these objectives are individually legitimate, their simultaneous operation within a single criminal code generates uncertainty concerning the applicable standard of legality.

This finding supports Hart's argument that legal certainty depends upon the institutional recognition of authoritative legal sources (Hart, 2012). At the same time, it also reflects Tamanaha's observation that legal pluralism inevitably challenges the exclusivity of state law by recognizing multiple normative orders operating simultaneously within society (Tamanaha, 2008). The Indonesian Criminal Code therefore represents an important example of the contemporary interaction between legal positivism and legal pluralism within constitutional criminal law.

A further implication concerns the doctrine of *lex certa*. Under the classical legality principle, criminal provisions must be sufficiently precise to enable citizens to foresee the legal consequences of their conduct. However, because living law is not uniformly codified and differs among customary communities, individuals may encounter considerable difficulty in identifying applicable criminal norms before acting. Consequently, predictability—the essential function of *lex certa*—may become significantly weakened.

This doctrinal finding is consistent with contemporary scholarship emphasizing that the legality principle serves not merely as a procedural requirement but also as a constitutional safeguard protecting individual autonomy through legal predictability and fair notice (Hörnle, 2021; Ambos, 2022). Where criminal liability depends upon norms lacking sufficient accessibility or precision, the protective function of legality becomes substantially reduced.

Furthermore, the analysis demonstrates that the recognition of living law potentially expands judicial discretion. Judges are required not only to interpret statutory provisions but also to determine whether a particular customary norm constitutes legally recognized living law capable of supporting criminal liability. Without objective statutory criteria, this process inevitably increases the possibility of inconsistent judicial interpretation.

Rather than concluding that judicial discretion should be eliminated, the findings indicate that discretion must remain constitutionally constrained through clearly defined procedural and substantive standards.

Comparative criminal law demonstrates that jurisdictions recognizing customary law generally establish explicit constitutional or statutory safeguards to prevent judicial subjectivity from undermining legal certainty (Duff, 2020; Farmer, 2023). Such safeguards are not yet comprehensively reflected in Article 2 of the 2023 Criminal Code.

Doctrinal Findings

Based on the foregoing analysis, four principal doctrinal findings may be identified. First, Article 1 preserves the classical legality principle by maintaining the doctrines of *lex scripta*, *lex certa*, and *lex stricta* as the fundamental guarantees of legality in criminal law. Second, Article 2 introduces the concept of material legality by recognizing living law as an additional source of criminal liability, thereby expanding the normative basis of criminal law beyond statutory legislation. Third, the interaction between Articles 1 and 2 creates a normative antinomy because each provision pursues a distinct constitutional objective: Article 1 prioritizes legal certainty through formal legality, whereas Article 2 seeks to achieve substantive justice by accommodating living law. However, the Criminal Code does not provide explicit mechanisms for reconciling these potentially competing objectives. Fourth, the principal constitutional challenge does not arise from the recognition of living law itself, but rather from the absence of clear statutory limitations governing its application. This regulatory gap has the potential to weaken legal certainty by expanding judicial discretion and creating inconsistent interpretations in criminal adjudication. Collectively, these doctrinal findings provide the analytical foundation for the second stage of the analysis, namely assessing whether the relationship between Articles 1 and 2 satisfies the constitutional requirements of normative consistency, legal certainty, and the protection of human rights.

Assessment of Normative Consistency

Following the doctrinal findings presented in the previous section, the second stage of analysis evaluates whether the interaction between Article 1 paragraph (1) and Article 2 paragraph (1) satisfies the constitutional requirements of normative consistency. In accordance with the analytical framework adopted in this study, normative consistency is assessed using four indicators: (i) predictability of criminal norms, (ii) compliance with the doctrine of *lex certa*, (iii) limitation of judicial discretion, and (iv) compatibility with constitutional principles governing legal certainty and equality before the law.

Table 2. Normative Consistency Matrix

Evaluation Indicator	Article 1	Article 2	Assessment
Predictability of criminal norms	High	Limited	Partial inconsistency
Compliance with <i>lex certa</i>	High	Uncertain	Normative tension
Limitation of judicial discretion	Strong	Weak	Expanded judicial discretion
Equality before the law	Uniform	Potential regional variation	Risk of fragmentation
Constitutional legal certainty	Preserved	Conditional	Requires statutory safeguards

The comparative assessment presented in Table 2 indicates that Article 1 consistently satisfies the constitutional requirements of the legality principle by providing clear, accessible, and predictable criminal norms. In contrast, Article 2 demonstrates only conditional compatibility because the application of living law depends upon social norms that are neither nationally standardized nor comprehensively codified. Consequently, the constitutional compatibility of Article 2 depends largely upon the existence of institutional safeguards capable of limiting interpretative discretion.

The first analytical indicator concerns the predictability of criminal law, which constitutes a core requirement of the legality principle. Under this principle, individuals must be able to foresee the legal consequences of their conduct before criminal liability arises, reflecting the doctrine of **lex certa**, which obliges legislators to formulate criminal offences in clear, precise, and accessible language (Ashworth, 2021; Hörnle, 2021). Article 1 paragraph (1) fulfills this requirement because criminal liability derives exclusively from written statutory provisions enacted through formal legislative procedures, thereby enabling citizens to identify prohibited conduct through publicly accessible legislation. This degree of predictability represents one of the fundamental constitutional functions of criminal law in modern democratic legal systems. By contrast, Article 2 introduces a different normative structure by recognizing living law as a source of criminal liability. Since living law originates from customary norms that exist within particular communities, its substantive content may vary across regions and may not always be documented in authoritative legal instruments. Consequently, individuals outside those communities may reasonably encounter difficulties in identifying applicable criminal norms before engaging in particular conduct. This condition demonstrates that the constitutional concern lies not in the legitimacy of customary law itself, but rather in the accessibility

of customary norms as a basis for criminal punishment. Comparative scholarship consistently emphasizes that the legality principle protects not only formal legality but also the individual's ability to obtain adequate notice of criminal prohibitions before punishment is imposed (Duff, 2020; Ambos, 2022). Accordingly, the incorporation of living law tends to weaken the predictability required by **lex certa** unless accompanied by legal mechanisms ensuring that customary norms are publicly identifiable, objectively verifiable, and legally accessible. This conclusion is consistent with Fuller's concept of the internal morality of law, which requires legal rules to be clear, publicly accessible, and sufficiently stable to guide human conduct effectively (Fuller, 1969).

The second analytical indicator concerns the expansion of judicial discretion. One of the primary constitutional objectives of the legality principle is to limit judicial authority by ensuring that criminal liability remains grounded in democratically enacted legislation rather than individual judicial preferences (Hart, 2012). Under Article 1, judicial discretion remains relatively limited because judges primarily determine whether the factual circumstances of a case satisfy the statutory elements established by legislation. Although judicial interpretation is inevitably required, its scope is constrained by the boundaries of written legal texts. Article 2, however, substantially alters this relationship by requiring judges not only to determine the existence of criminal conduct but also to assess whether a particular customary norm qualifies as legally recognized living law. This additional interpretative responsibility inevitably expands judicial discretion because the Criminal Code does not provide comprehensive statutory criteria defining the legal characteristics of living law. The expansion of judicial discretion is not, in itself, incompatible with constitutional criminal law, as many comparative jurisdictions recognize a legitimate interpretative role for judges within constitutionally prescribed limits. Nevertheless, contemporary scholarship consistently emphasizes that broader judicial discretion must be accompanied by transparent and objective legal standards capable of ensuring consistency, predictability, and judicial accountability (Farmer, 2023; Hörnle, 2021). Accordingly, the findings indicate that the principal constitutional concern lies not in the exercise of judicial discretion itself, but in the absence of objective statutory guidance governing judicial reliance upon living law. Without such guidance, judicial decisions may become increasingly dependent on individual interpretation rather than uniform legal standards, thereby undermining consistency and legal certainty in criminal adjudication.

The third analytical indicator evaluates the relationship between living law and the constitutional principle of equality before the law. Criminal law traditionally operates as a nationally uniform legal system in which identical conduct gives rise to identical legal consequences regardless of geographical location. Article 1 generally preserves this constitutional principle because criminal offences are defined through national legislation that applies uniformly throughout Indonesia. By contrast, Article 2 potentially modifies this legal arrangement by permitting criminal liability to depend upon locally applicable customary norms. As a consequence, identical conduct may produce different legal consequences in different regions depending on the existence or absence of particular forms of living law. This possibility does not automatically render Article 2 constitutionally invalid; however, it introduces a significant constitutional challenge because the principle of equality before the law requires that any distinction in legal treatment be supported by objective, reasonable, and proportionate justification. Comparative constitutional jurisprudence has consistently emphasized that legal pluralism remains compatible with constitutional equality only when differences in legal treatment are clearly regulated, objectively justified, and subject to effective judicial review (Gerards, 2020; Tamanaha, 2021). Accordingly, the findings indicate that legal fragmentation constitutes a potential rather than inevitable consequence of Article 2. The extent to which this risk materializes ultimately depends on whether implementing legislation establishes sufficiently clear and uniform criteria governing the recognition and application of living law across different jurisdictions.

The overall assessment demonstrates that the relationship between Articles 1 and 2 cannot accurately be characterized as either complete constitutional harmony or absolute normative contradiction. Rather, the findings indicate a condition of conditional normative compatibility, whereby Article 2 remains consistent with the legality principle only if it is interpreted within a constitutional framework that preserves legal certainty, appropriately limits judicial discretion, and guarantees equality before the law. Under such an interpretation, the recognition of living law may complement rather than undermine the constitutional foundations of criminal law. However, in the absence of clear statutory limitations and effective constitutional safeguards, the incorporation of living law risks transforming the legality principle from an objective constitutional guarantee into a flexible interpretative mechanism that depends upon varying local norms and individual judicial assessment. Such a development would weaken the constitutional function of criminal law as an instrument for limiting the exercise of state power, thereby reducing legal certainty,

increasing the potential for inconsistent judicial decisions, and undermining the protection of fundamental rights guaranteed under the Constitution.

The assessment of normative consistency produces four principal findings. First, the principal constitutional weakness of Article 2 lies in the absence of measurable statutory criteria governing the application of living law, creating uncertainty regarding its legal scope and implementation. Second, the incorporation of living law reduces the predictability required by the doctrine of **lex certa** unless customary norms are formally recognized, publicly accessible, and capable of objective verification. Third, the expansion of judicial discretion resulting from the application of living law necessitates explicit procedural safeguards to prevent inconsistent interpretation, unequal application of the law, and arbitrary criminalization. Fourth, legal pluralism may remain compatible with the legality principle only when it is implemented through constitutionally defined institutional limitations that preserve legal certainty, judicial accountability, and equality before the law. Collectively, these findings provide the analytical foundation for the comparative analysis presented in the following section, which examines whether Indonesia's approach is consistent with contemporary developments in comparative criminal law concerning the integration of customary law into constitutional criminal justice systems.

Comparative Findings: The Legality Principle and the Recognition of Living Law in Comparative Criminal Law

The third stage of analysis compares the findings of this study with contemporary scholarship on the legality principle, legal pluralism, and the recognition of customary law in criminal justice systems. This comparative assessment aims to determine whether the Indonesian approach adopted under Law Number 1 of 2023 reflects broader developments in comparative criminal law or instead represents a distinctive constitutional model requiring additional institutional safeguards.

Unlike the descriptive literature review presented in the Introduction, this section compares previous studies directly with the doctrinal findings obtained from the analysis of Articles 1 and 2. Consequently, the discussion focuses on areas of convergence, divergence, and theoretical contribution.

Table 3. Comparative Assessment of Previous Studies

Author(s)	Main Focus	Principal Finding	Relation to the Present Study
Duff (2020)	Principle of legality	Legality protects citizens through fair notice	Supports the importance of predictability under Article 1
Hörnle (2021)	Criminal law theory	Judicial discretion must remain constitutionally limited	Supports findings on expanded judicial discretion under Article 2
Ambos (2022)	Comparative criminal law	Legal certainty remains indispensable despite legal pluralism	Supports conditional recognition of living law
Farmer (2023)	Rule of law	Criminal law requires transparent institutional safeguards	Supports statutory limitation of living law
Ashworth & Zedner	Criminal law	Lex certa guarantees predictability	Supports doctrinal analysis of Article 1
Tamanaha	Legal pluralism	Multiple legal orders may coexist	Supports recognition of living law but not unlimited application
Fuller	Internal morality of law	Law must be clear and publicly accessible	Supports critique of vague customary norms
Hart	Legal positivism	Valid law derives from recognized legal authority	Supports primacy of statutory criminal law
Radbruch	Legal philosophy	Justice and certainty require proportional balance	Supports evaluative framework
Feuerbach	Classical legality	No punishment without prior law	Supports <i>nullum crimen sine lege</i>

Author(s)	Main Focus	Principal Finding	Relation to the Present Study
Rommelink	Dutch criminal law	Legality limits judicial power	Supports restrictive interpretation
Barda Nawawi Arief	Indonesian criminal law reform	Recognition of customary law strengthens substantive justice	Partially supported but constitutionally qualified
Muladi	Criminal policy	Criminal law should reflect Indonesian values	Supports legal pluralism with safeguards
Cahyadi	Regional regulation	Formalization of customary law through regional regulation	Supports institutional standardization
Constitutional Court Decision No. 003/PUU-IV/2006	Material unlawfulness	Recognition of non-textual values remains constitutionally limited	Supports constitutional review of Article 2

Table 3 indicates that previous scholarship generally agrees that legal pluralism may enrich criminal justice by accommodating local values. From the perspective of progressive law, legal certainty should not prevent law from responding to social justice, provided that constitutional safeguards remain preserved (Rahardjo, 2006b). Nevertheless, most contemporary scholars simultaneously emphasize that the incorporation of customary norms must remain subject to constitutional safeguards preserving legal certainty, predictability, and equality before the law.

The comparative assessment demonstrates substantial agreement regarding the constitutional function of the legality principle. Within the Indonesian context, criminal law policy has likewise been understood as an instrument for balancing legal certainty, social order, and justice while accommodating the socio-cultural values of society (Muladi, 1995). Duff (2020) argues that the legality principle primarily protects individuals through fair notice, ensuring that criminal punishment is imposed only where citizens can reasonably foresee the legal consequences of their conduct. Similarly, Ashworth and Zedner emphasize that *lex certa* serves not merely as a drafting technique but as an essential constitutional guarantee protecting individual autonomy within criminal law. These arguments reinforce the present finding that Article 1 paragraph (1) remains consistent with the classical understanding of legality by preserving predictability through written legislation.

A different perspective emerges from legal pluralism scholarship. Tamanaha argues that multiple normative systems may legitimately coexist within a single legal order because state law does not monopolize normative authority. Likewise, Barda Nawawi Arief and Muladi maintain that Indonesian criminal law reform should recognize customary norms as part of the decolonization of national law. The present study does not reject these perspectives; rather, it argues that constitutional recognition of living law requires clearer institutional boundaries than those currently provided by Article 2.

The comparative findings further demonstrate that contemporary criminal law scholarship generally rejects unrestricted judicial discretion. Hörnle (2021) argues that broader judicial interpretation may remain compatible with the legality principle only when supported by transparent constitutional standards limiting judicial authority. Farmer (2023) similarly emphasizes that criminal justice systems recognizing legal pluralism should establish institutional safeguards ensuring accountability and consistency in judicial decision-making.

These comparative perspectives directly support the findings presented in Section 4.2. The principal constitutional problem identified in the Indonesian Criminal Code is therefore not the existence of living law, but the absence of explicit statutory criteria governing its recognition, application, and evidentiary standards. Without such criteria, judges may apply customary norms inconsistently, thereby weakening legal certainty and increasing the risk of unequal treatment before the law.

Another important finding concerns the relationship between legal certainty and substantive justice. Classical legal positivism, represented by Hart and Feuerbach, emphasizes that criminal liability must remain grounded in formally enacted legislation. Conversely, Radbruch argues that justice may exceptionally prevail over positive law where statutory law becomes intolerably unjust. However, none of these theoretical approaches advocates unrestricted judicial discretion. Even Radbruch's formula presupposes exceptional circumstances rather than ordinary criminal adjudication. Consequently, reliance upon Radbruch cannot by itself justify broad judicial authority to determine criminal liability through unwritten norms.

The Indonesian model therefore differs from many comparative jurisdictions because Article 2 introduces living law without simultaneously establishing comprehensive institutional safeguards. Comparative legal systems recognizing customary law generally regulate its application through constitutional provisions, statutory codification, or binding judicial guidelines that define the legal status, scope, and evidentiary requirements of customary norms. Such regulatory mechanisms remain insufficiently developed within the current formulation of Article 2, thereby creating greater constitutional uncertainty than that observed in comparable legal systems.

The comparative assessment produces five principal findings. First, most contemporary criminal law scholars support the recognition of customary norms only when such recognition is accompanied by constitutional safeguards that preserve legal certainty and prevent arbitrary application of criminal law. Second, comparative jurisdictions generally regulate the role of customary law through explicit statutory or constitutional mechanisms rather than relying solely upon judicial interpretation, thereby providing clearer normative guidance for courts. Third, no major contemporary scholarship endorses unlimited judicial discretion in determining criminal liability based on unwritten norms, emphasizing instead the necessity of objective legal standards and institutional constraints. Fourth, the Indonesian Criminal Code differs from many comparative models because Article 2 recognizes living law without providing sufficiently detailed statutory parameters governing its recognition and application. Finally, the findings of this study extend existing scholarship by proposing that the constitutional legitimacy of living law depends not merely upon its formal recognition, but upon the existence of objective institutional limitations capable of preserving the principles of *lex certa*, legal predictability, and equality before the law. Collectively, these comparative findings provide the analytical foundation for evaluating the broader constitutional implications of the reformulated legality principle, particularly with respect to judicial discretion, legal fragmentation, and the protection of human rights, as discussed in the following section.

Constitutional Implications for Human Rights

The doctrinal and comparative analyses presented in the preceding sections demonstrate that the reformulation of the legality principle under Law Number 1 of 2023 extends beyond a legislative modification of criminal law. More fundamentally, it raises constitutional questions concerning the protection of fundamental rights, particularly the right to legal certainty, equality before the law, and due process of law. These constitutional implications arise because the legality principle functions not merely as a technical rule of criminal legislation but also as a safeguard limiting the exercise of state power over individual liberty (Ashworth & Zedner, 2014; Ambos, 2022).

The first constitutional implication concerns the protection of legal certainty through the principle of fair notice. Under modern criminal law, individuals must be able to identify criminal prohibitions before engaging in particular conduct, a requirement reflected in the doctrines of *nullum crimen sine lege*, *lex scripta*, and *lex certa*, all of which seek to prevent arbitrary punishment by ensuring that criminal norms are sufficiently clear, accessible, and foreseeable (Duff, 2020; Hörnle, 2021). The analysis presented in Sections 4.1 and 4.2 demonstrates that Article 1 paragraph (1) satisfies these constitutional requirements because criminal liability derives exclusively from written legislation enacted through democratic procedures, thereby providing citizens with a reasonable opportunity to determine which conduct constitutes a criminal offence. By contrast, Article 2 introduces constitutional uncertainty because criminal liability may also depend upon living law, the substantive content of which varies among local communities and is frequently undocumented in nationally accessible legal instruments. As a result, the predictability required by *lex certa* becomes conditional rather than absolute, since individuals who are not members of a particular customary community may reasonably be unable to foresee that their conduct constitutes a criminal offence under local customary norms. This condition directly affects the constitutional guarantee of fair notice because criminal punishment imposed without adequate accessibility to applicable legal norms risks undermining one of the legality principle's central objectives, namely protecting citizens against arbitrary criminalization. Comparative scholarship likewise emphasizes that legal certainty requires not merely the formal existence of legal norms but also their practical accessibility to those subject to criminal law (Fuller, 1969). Accordingly, the present findings indicate that the constitutional challenge posed by Article 2 lies not in the legitimacy of customary law itself, but in the absence of statutory mechanisms capable of ensuring that living law satisfies minimum standards of accessibility, publicity, and foreseeability before criminal sanctions may be imposed.

The second constitutional implication concerns the relationship between judicial discretion and due process of law. The legality principle has historically functioned to restrict judicial authority by limiting criminal punishment to conduct explicitly defined through legislation, thereby ensuring that judicial interpretation serves to clarify statutory meaning rather than create new categories of criminal liability (Hart,

2012; Remmelink, 2003). The recognition of living law under Article 2 modifies this constitutional relationship by requiring judges not only to determine whether the statutory elements of an offence have been satisfied but also to assess whether a particular customary norm qualifies as legally recognized living law. This additional responsibility inevitably expands judicial interpretative authority. The findings of this study indicate that such an expansion of judicial discretion is not inherently inconsistent with constitutional criminal law, as numerous legal systems permit judges to exercise interpretative authority in response to evolving social conditions. However, comparative criminal law consistently emphasizes that broader judicial discretion must remain subject to clearly defined procedural and substantive limitations capable of preventing arbitrary decision-making and ensuring judicial accountability (Farmer, 2023; Hörnle, 2021). In the absence of explicit statutory guidance, different judges may reach divergent conclusions regarding the existence, content, and legal effect of the same customary norm, thereby producing unequal treatment of defendants in substantially similar factual circumstances. From the perspective of due process, this condition raises significant constitutional concerns because criminal liability becomes increasingly dependent upon judicial interpretation rather than objective statutory standards. Accordingly, the requirements of procedural fairness demand that judicial reliance upon living law be supported by transparent evidentiary standards, objectively verifiable proof of customary practice, and effective opportunities for judicial review in order to safeguard consistency, fairness, and the protection of individual rights within the criminal justice system.

The third constitutional implication concerns equality before the law. Criminal law has traditionally operated as a nationally uniform legal system in which identical conduct gives rise to identical legal consequences regardless of geographical location, thereby reflecting one of the fundamental characteristics of the rule of law and constitutional equality (Gerards, 2020). Article 1 generally preserves this principle because criminal offences are defined through nationally enacted legislation that applies uniformly throughout Indonesia. By contrast, Article 2 potentially introduces differentiated standards of criminal liability by recognizing locally applicable living law. As demonstrated in the preceding analysis, identical conduct may therefore receive different legal treatment depending upon whether particular customary norms exist within specific communities. Comparative analysis indicates that legal pluralism is not inherently incompatible with the constitutional principle of equality before the law. Several jurisdictions have successfully accommodated customary law while preserving constitutional equality through explicit statutory regulation, constitutional recognition, and centralized judicial review. However, these legal systems generally establish objective legal criteria governing the recognition and application of customary norms, thereby minimizing disparities in criminal adjudication. The Indonesian Criminal Code, by contrast, currently lacks comparable institutional mechanisms. Consequently, legal fragmentation represents a realistic constitutional risk rather than merely a theoretical possibility, as differences in the recognition and application of living law may produce inconsistent judicial outcomes across jurisdictions. Such disparities have implications not only for the consistency of criminal adjudication but also for public confidence in the fairness, legitimacy, and constitutional integrity of the criminal justice system.

The fourth constitutional implication concerns the protection of human rights within the framework of constitutional criminal law. Article 28D paragraph (1) of the 1945 Constitution guarantees every person the right to legal certainty and equal treatment before the law, while Article 15 of the International Covenant on Civil and Political Rights (ICCPR) similarly affirms the legality principle by prohibiting criminal punishment based on conduct that was not criminal at the time of its commission. These constitutional and international guarantees demonstrate that the legality principle functions not merely as a rule of legislative drafting but as a fundamental safeguard for the protection of human rights. Accordingly, the recognition of living law under Article 2 must remain compatible with these constitutional and international commitments. Criminal punishment based on unwritten norms may be constitutionally acceptable only when those norms are sufficiently clear (Ashworth & Zedner, 2014; Duff, 2018; Nations, 1966), publicly recognizable, non-discriminatory, and capable of objective judicial verification. Otherwise, the expansion of criminal liability risks conflicting with both the constitutional guarantee of legality and internationally recognized human rights standards, including those articulated by the UN Human Rights Committee in General Comment No. 29 (Ambos, 2022). The findings of this study therefore support a balanced constitutional approach that reconciles legal certainty with substantive justice. Such an approach is consistent with Radbruch's view that positive law should ordinarily prevail, while departures from strict legality may be justified only where adherence to positive law would fundamentally deny justice (Radbruch, 2006). Likewise, the constitutional legitimacy of Article 2 ultimately depends upon maintaining an appropriate balance among legal certainty, justice, and legal utility as the three fundamental values of law (Radbruch & Kaufmann, 1987). From this perspective, the accommodation of customary law should not be rejected solely because it originates outside formal legislation; however, its constitutional recognition must be accompanied by robust institutional

safeguards that ensure legal flexibility does not undermine legal certainty, judicial accountability, or the effective protection of fundamental human rights.

Based on the foregoing analysis, four principal constitutional findings may be identified. First, the primary human rights concern arising from Article 2 is the potential weakening of legal certainty where living law lacks sufficient accessibility, clarity, and predictability, thereby diminishing the constitutional guarantee of fair notice. Second, the expansion of judicial discretion remains constitutionally acceptable only when it is accompanied by objective statutory standards, transparent evidentiary requirements, and effective mechanisms of judicial review capable of preventing arbitrary decision-making and ensuring procedural fairness. Third, legal pluralism is compatible with the constitutional principle of equality before the law only if customary norms are applied through nationally regulated institutional mechanisms that provide clear criteria for their recognition and implementation, thereby minimizing the risk of legal fragmentation and inconsistent criminal adjudication. Fourth, the constitutional legitimacy of living law ultimately depends upon its compatibility with the fundamental guarantees of legality, due process of law, and the protection of human rights as recognized under both the 1945 Constitution of the Republic of Indonesia and international human rights law. Collectively, these constitutional findings provide the analytical foundation for the final stage of this study, namely the formulation of a normative reconstruction of the legality principle that seeks to reconcile legal pluralism with legal certainty within Indonesia's constitutional criminal justice system.

Proposed Reconstruction of the Principle of Legality

The preceding analyses demonstrate that the principal constitutional challenge posed by Article 2 of Law Number 1 of 2023 does not arise from the recognition of living law itself, but rather from the absence of objective institutional mechanisms governing its application. Consequently, the reformulation of the legality principle should not be understood as a choice between formal legality and legal pluralism. Instead, it requires a constitutional reconstruction capable of preserving legal certainty while accommodating legitimate customary values existing within Indonesian society.

Based on the doctrinal, comparative, and constitutional findings presented in the previous sections, this study proposes a constitutional model of legality founded upon three complementary institutional safeguards. These safeguards are intended to reconcile substantive justice with the constitutional function of the legality principle as a limitation upon state power.

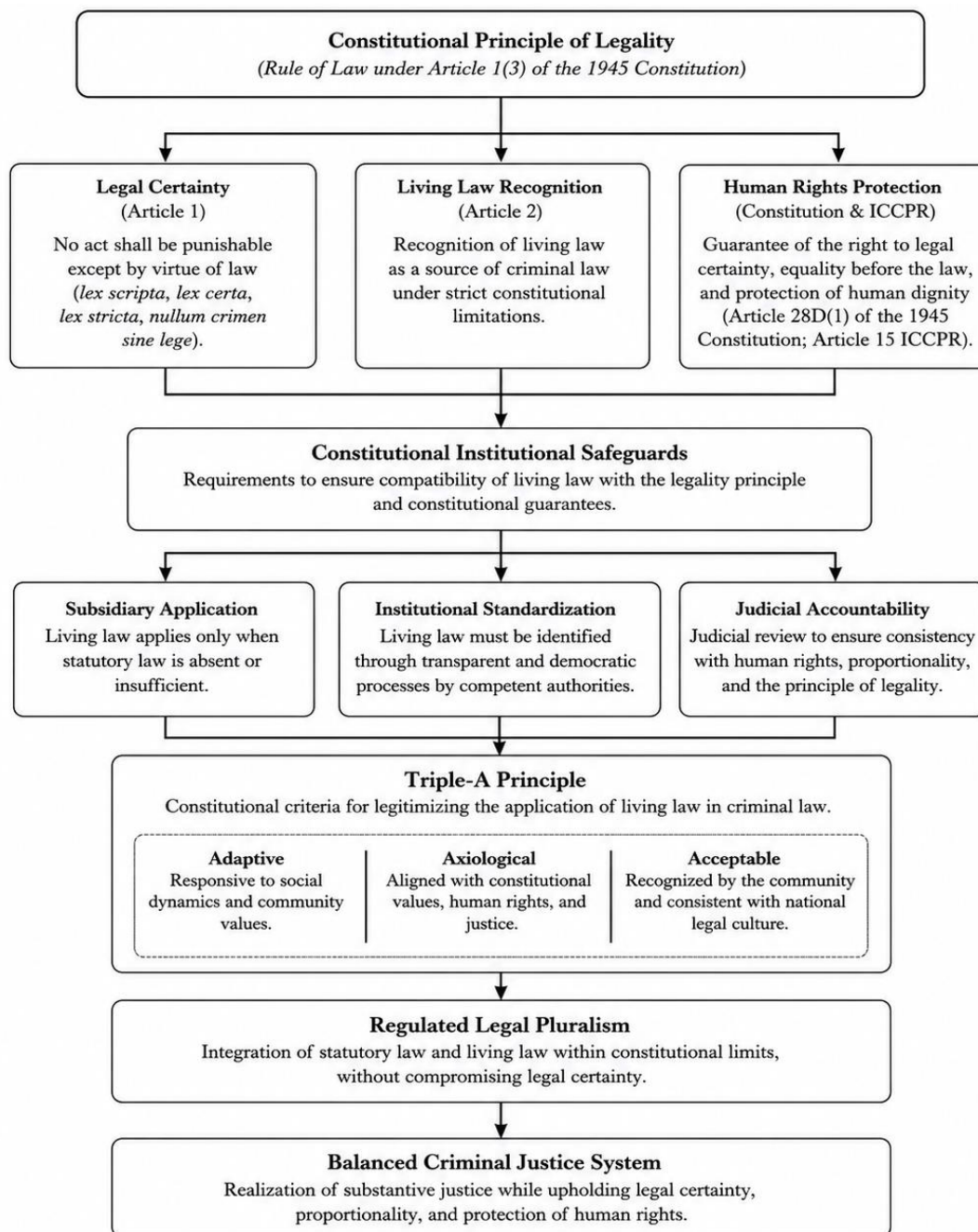


Figure 1. Proposed Constitutional Reconstruction of the Legality Principle

Figure 1 illustrates that living law should not function as an autonomous source of criminal liability. Rather, it should operate within a constitutionally regulated framework in which legal certainty, judicial accountability, and human rights protection remain the primary normative standards.

The first element of the proposed reconstruction concerns the constitutional status of living law. The findings of this study indicate that Article 2 should not be interpreted as establishing living law as an independent basis of criminal punishment equivalent to statutory legislation, as such an interpretation would fundamentally transform the legality principle by permitting criminal liability to arise from norms that lack democratic legislative legitimacy. Instead, living law should function as a subsidiary source of criminal law, applicable only when three cumulative conditions are satisfied: first, no explicit statutory provision adequately regulates the relevant conduct; second, the applicable customary norm has been objectively identified, publicly recognized, and capable of legal verification; and third, its application remains fully consistent with constitutional guarantees of human rights, legal certainty, and due process of law. This

subsidiary model is consistent with developments in comparative criminal law, where customary norms generally complement rather than replace statutory criminal legislation (Ambos, 2022; Farmer, 2023). Accordingly, Article 1 should continue to serve as the primary legal basis for criminal liability, while Article 2 should operate only as a constitutionally limited supplementary mechanism applicable in exceptional circumstances clearly defined by law.

The second element of the proposed reconstruction concerns the institutional standardization of living law. The comparative assessment demonstrates that jurisdictions which successfully recognize customary law generally establish formal institutional mechanisms governing its identification, recognition, and application. By contrast, Indonesia currently lacks comprehensive statutory procedures defining how judges should determine the existence, validity, and scope of living law for the purpose of imposing criminal liability. Accordingly, this study proposes that the implementation of Article 2 be supported through nationally standardized procedural mechanisms designed to enhance legal certainty and judicial consistency. Such mechanisms may include the development of formal inventories of recognized customary norms, the enactment of regional regulations (*Peraturan Daerah*) providing documentary recognition of customary law where constitutionally appropriate, the issuance of Supreme Court Regulations (*Peraturan Mahkamah Agung*—PERMA) establishing uniform evidentiary standards for proving the existence and applicability of living law, and the development of consistent Supreme Court jurisprudence capable of promoting uniform judicial interpretation throughout Indonesia. Collectively, these institutional mechanisms would reduce disparities among courts while preserving the flexibility necessary to accommodate legitimate local customary practices. This recommendation is consistent with the Supreme Court's institutional commitment to strengthening judicial integrity, promoting consistency in legal interpretation, and enhancing accountability in law enforcement, as reflected in its judicial reform agenda (Mahkamah Agung, 2023).

The third element of the proposed reconstruction is the adoption of what this study designates as the Triple-A Principle, which functions as a constitutional test for determining whether a customary norm may legitimately operate as living law in criminal adjudication. Under this framework, a customary norm should satisfy three cumulative requirements. First, it must be Adaptive, meaning that it continues to function effectively within the contemporary social practices of the relevant community and has not become obsolete. Second, it must be Axiological, requiring consistency with Pancasila, the 1945 Constitution, internationally recognized human rights standards, and the fundamental principles of criminal law. Third, it must be Acceptable, signifying that the norm enjoys broad social legitimacy within the relevant community and does not contain discriminatory or exclusionary elements based on gender, ethnicity, religion, or other constitutionally prohibited grounds. Unlike the existing statutory framework, the Triple-A Principle introduces measurable constitutional criteria capable of guiding judicial interpretation while simultaneously limiting arbitrary reliance upon unwritten customary norms. By providing objective standards for judicial assessment, this framework seeks to reconcile legal pluralism with the constitutional demands of legality, legal certainty, and equality before the law. Moreover, the proposed formulation is consistent with the concept of dignified justice, which emphasizes the proportional balancing of legal certainty, justice, and societal values in judicial reasoning (Prasetyo, 2019), thereby strengthening the constitutional legitimacy of living law within Indonesia's criminal justice system.

The fourth element of the proposed reconstruction concerns the establishment of constitutional limits on judicial discretion. The preceding analyses demonstrate that judicial interpretation remains indispensable within any criminal justice system that recognizes living law. However, constitutional legitimacy requires that such discretion be exercised within objective legal standards rather than according to individual judicial preferences. Accordingly, judges should be required to demonstrate, in a transparent and reasoned manner, the factual existence of the relevant customary norm, its continuing acceptance and effective operation within the community, its compatibility with constitutional rights and internationally recognized human rights standards, its consistency with national criminal legislation, and clear legal reasons explaining why reliance upon living law is necessary to achieve substantive justice in the particular case. Requiring courts to satisfy these cumulative conditions would strengthen judicial accountability, promote greater consistency in criminal adjudication, and reduce the risk of arbitrary interpretation while preserving sufficient flexibility to accommodate legitimate customary values within Indonesia's constitutional criminal justice system.

The fifth and final element of the proposed reconstruction is a model of constitutional legality founded on the principle of regulated legal pluralism. Drawing together the findings of this research, the proposed model recognizes legal pluralism as an essential characteristic of Indonesia's criminal justice system while ensuring that its operation remains constitutionally constrained by the legality principle, judicial accountability, and the protection of human rights. Within this framework, the relationship between Articles

1 and 2 should not be understood as one of normative competition or contradiction, but rather as a hierarchically integrated constitutional arrangement. Article 1 continues to serve as the primary constitutional embodiment of the legality principle, preserving the doctrines of *lex scripta*, *lex certa*, and *lex stricta* as the principal safeguards of legal certainty. Article 2, by contrast, functions as a subsidiary corrective mechanism that may be invoked only in exceptional circumstances where statutory law alone is insufficient to achieve substantive justice without undermining legal certainty, equality before the law, or constitutional guarantees of due process. Accordingly, the proposed model seeks to reconcile legal pluralism with constitutional legality by ensuring that the recognition of living law remains firmly embedded within a coherent framework of objective legal standards, institutional safeguards, and effective judicial oversight.

Based on the overall analysis, this study makes five principal contributions to contemporary scholarship on Indonesian criminal law. First, it demonstrates that the primary constitutional issue arising from Article 2 does not lie in the recognition of living law itself, but rather in the absence of measurable statutory safeguards governing its application. Second, it develops an operational analytical framework for assessing normative consistency through the interrelated indicators of predictability, *lex certa*, judicial discretion, constitutional legality, and equality before the law. Third, it integrates contemporary comparative criminal law scholarship into the analysis of Indonesia's legality doctrine, thereby extending previous studies that have predominantly emphasized sociological or historical justifications for legal pluralism. Fourth, it introduces the Triple-A Principle as a constitutional standard for determining the legitimacy of living law in criminal adjudication by providing objective criteria to guide judicial interpretation and limit arbitrary reliance on unwritten customary norms. Finally, it formulates a constitutional model of regulated legal pluralism that seeks to reconcile substantive justice with legal certainty while preserving the legality principle as the primary constitutional safeguard against arbitrary criminalization. Collectively, these contributions advance both the theoretical development of constitutional criminal law and the practical implementation of living law within Indonesia's evolving criminal justice system.

The findings of this study indicate that the reformulation of the legality principle under Law Number 1 of 2023 represents one of the most significant developments in Indonesian criminal law since independence. Rather than replacing the classical legality principle, Article 2 should be interpreted as introducing a constitutionally limited mechanism for accommodating customary law within the national criminal justice system. The constitutional legitimacy of this reform ultimately depends upon the establishment of objective statutory safeguards capable of preserving legal certainty, limiting judicial discretion, and protecting fundamental human rights. Without such safeguards, the recognition of living law risks transforming legal pluralism into a source of constitutional uncertainty. Conversely, when implemented within a regulated constitutional framework, living law may enrich Indonesian criminal law by integrating substantive justice without sacrificing the essential guarantees of the legality principle.

Conclusions

This study examined the reformulation of the principle of legality under Law Number 1 of 2023 concerning the Indonesian Criminal Code by analysing the constitutional relationship between Article 1 paragraph (1), which preserves the classical legality principle, and Article 2 paragraph (1), which recognizes living law as an additional normative basis for criminal liability. Using doctrinal legal research supported by statutory, conceptual, historical, and comparative approaches, the study demonstrates that this reformulation constitutes not merely a legislative amendment but a constitutional reconfiguration of the Indonesian legality principle. Rather than replacing formal legality, the 2023 Criminal Code establishes a dual normative framework in which legal certainty and substantive justice coexist while simultaneously generating constitutional tension. The findings reveal that Article 1 continues to preserve the doctrines of *lex scripta*, *lex certa*, and *lex stricta* as the primary safeguards of legal certainty, whereas Article 2 broadens the normative basis of criminal law through the recognition of living law. Although this development seeks to accommodate Indonesia's legal pluralism and integrate societal values into criminal justice, it also weakens the predictability traditionally guaranteed by the legality principle when objective statutory criteria governing the application of customary norms are absent. Consequently, the principal constitutional challenge lies not in recognizing living law itself but in the lack of measurable institutional safeguards, which may expand judicial discretion, create regional disparities in criminal law enforcement, and undermine the requirements of legal certainty, equality before the law, due process, and judicial accountability.

Accordingly, the constitutional legitimacy of Article 2 depends upon its interpretation within a framework that preserves these fundamental constitutional guarantees.

This study contributes to contemporary scholarship by reframing the relationship between Articles 1 and 2 as an issue of constitutional normative consistency rather than merely a reconciliation between legal positivism and legal pluralism. It develops an analytical framework based on predictability, *lex certa*, judicial discretion, constitutional legality, and equality before the law, proposes a model of regulated legal pluralism in which living law functions as a subsidiary rather than autonomous source of criminal liability, and introduces the Triple-A Principle (Adaptive, Axiological, and Acceptable) as an operational constitutional standard for assessing the legitimacy of customary norms in criminal adjudication. From a practical perspective, the study recommends the establishment of comprehensive institutional safeguards, including implementing regulations governing the identification and recognition of living law and Supreme Court Regulations (*Peraturan Mahkamah Agung*—PERMA) to ensure uniform evidentiary standards and proportionate judicial discretion. While the study is limited by its normative methodology and therefore evaluates constitutional design rather than judicial practice, it provides a foundation for future empirical and comparative research on the implementation of Article 2 within Indonesia's criminal justice system. Ultimately, the reformulation of the legality principle should be understood as a constitutional innovation that seeks to reconcile legal certainty with substantive justice, the success of which depends upon objective institutional safeguards ensuring that legal pluralism strengthens, rather than weakens, the constitutional protection of individual rights, with the legality principle remaining the primary safeguard against arbitrary criminalization.

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