

## LIVING LAW IN MODERN LEGAL SYSTEMS: CHALLENGES TO THE PRINCIPLE OF LEGALITY

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**Abstract:** The transformation of the principle of legality in Article 1 paragraph (1) of the new Criminal Code and the incorporation of living law in Article 2 highlights a pivotal shift in Indonesia's legal framework. Indonesia, adhering to a civil law system, emphasizes that crimes and punishments are governed solely by statutory provisions. The principle of legality ensures that no act can be deemed criminal without a written law. However, the inclusion of living law, an unwritten customary law rooted in societal traditions, challenges this principle. This transformation, motivated by the decolonization of the Dutch-inherited Criminal Code, raises critical questions about legal certainty and the adaptability of customary law within a modern legal system. This study aims to analyse the juxtaposition of Article 1 and Article 2 in the new criminal code. Using a normative-conceptual approach and library research, the study examines statutory frameworks and the socio-legal dynamics surrounding these provisions. Findings reveal that while the previous Criminal Code lacked recognition of living law, the new criminal code incorporates it as an extension of the legality principle. However, this integration has sparked significant debate due to the inherent uncertainty of customary law, which contrasts with the clear and definitive requirements of *lex certa*. Customary law prioritizes community justice by adapting to time, place, and circumstances, yet its application risks undermining the predictability demanded by the principle of legality. In conclusion, the coexistence of statutory legality and living law in the new criminal code underscores a complex legal reform balancing modern legal certainty with Indonesia's pluralistic traditions.

*Transformasi asas legalitas dalam Pasal 1 ayat (1) Kitab Undang-Undang Hukum Pidana dan masuknya hukum yang hidup (living law) dalam Pasal 2 menyoroti adanya perubahan penting dalam kerangka hukum pidana. Indonesia yang menganut sistem hukum Eropa menekankan bahwa kejahatan dan hukuman hanya diatur oleh*

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ketentuan undang-undang. Asas legalitas menjamin bahwa suatu perbuatan tidak dapat dianggap pidana tanpa adanya hukum tertulis. Namun, dimasukkannya hukum yang hidup, yaitu hukum adat tidak tertulis yang berakar pada tradisi masyarakat, menantang prinsip ini. Transformasi yang dilatarbelakangi oleh dekolonisasi KUHP warisan Belanda ini menimbulkan pertanyaan kritis mengenai kepastian hukum dan kesesuaian hukum adat dalam sistem hukum modern. Penelitian ini bertujuan untuk menganalisis penjabaran Pasal 1 dan Pasal 2 dalam KUHP baru. Dengan menggunakan pendekatan normatif-konseptual dan studi kepustakaan, studi ini mengkaji kerangka perundang-undangan dan dinamika sosial-hukum yang melingkupi ketentuan tersebut. Temuan menunjukkan bahwa meskipun KUHP sebelumnya kurang mengakui hukum yang hidup, KUHP yang baru memasukkannya sebagai perpanjangan dari asas legalitas. Namun, integrasi ini telah memicu perdebatan yang signifikan karena ketidakpastian hukum adat, yang kontras dengan persyaratan *lex certa* yang jelas dan definitif. Hukum adat mengutamakan keadilan masyarakat dengan menyesuaikan diri dengan waktu, tempat, dan keadaan, namun penerapannya berisiko melemahkan prediktabilitas yang dituntut oleh asas legalitas. Kesimpulannya, keberadaan legalitas undang-undang dan hukum yang hidup dalam KUHP yang baru menggarisbawahi adanya reformasi hukum yang kompleks yang menyeimbangkan kepastian hukum modern dengan tradisi pluralistik di Indonesia.

**Keywords:** living law; criminal code; legality.

## INTRODUCTION

Criminal law is a fundamental pillar in a nation's legal system. As a foundational aspect of law, criminal law serves to establish basic principles and regulations defining prohibited acts accompanied by sanctions and governs the enforcement of these sanctions against offenders (Moeljatno 1983:1). According to Mertokusumo, criminal law is often referred to as *ultimum remedium* or the last resort, emphasizing its role as a final measure to address social issues and maintain public order (Mertokusumo 2006:128). This dual function underscores the importance of criminal law as a means to achieve justice by balancing societal interests with individual rights within a legal framework.

Indonesia's criminal law codification has historically been rooted in colonial legacies but is now undergoing significant reforms. For decades, Indonesia relied on the *Wetboek van Strafrecht* (WvS), a Dutch colonial criminal code. While it served its purpose in the past, the colonial legal framework no longer aligns with the contemporary social, cultural, and philosophical values of Indonesian society. In response to these discrepancies, Indonesia has embraced a comprehensive transformation to replace outdated colonial laws with a legal framework tailored to the nation's identity and present-day needs (Arief, 2010:30). The enactment of Law Number 1 of 2023 marks a new chapter in Indonesia's legal history. Ratified by President Joko Widodo on January 2, 2023, this law replaces the WvS with a new

Indonesian Criminal Code that aligns with the socio-political and cultural values of the nation. This legal reform signifies a crucial step in decolonizing the legal system, ensuring that criminal law reflects the noble values and ideology of the Indonesian people while effectively addressing modern legal challenges.

The civil law system enforces criminal offenses and penalties according to written laws and statutes. This system relies on codified legal principles and detailed legal codes to define crimes and prescribe corresponding punishments. This law determines what actions are considered criminal acts. If an action is not regulated by law, then the action is not categorized as a criminal act (Remmelink 2003:358). The principle of legality as a core tenet of criminal law must experience development along with changes in the dynamics of society. Consequently, there are differences between the principle of legality outlined in the old Criminal Code and that in the New Criminal Code. The principle of legality is a fundamental aspect of Indonesian criminal law, often regarded as the essence and the oldest principle in criminal law. (Shidarta 2016:22). The principle of legality asserts that no act can be deemed illegal or punishable by criminal penalties unless it has been explicitly defined as such in statutory regulations in advance (*nullum delictum nulla poena sine praevia lege*) (Moeljatno 1983:26). This legality principle is regulated in Article 1 paragraph (1) of the Criminal Code (KUHP), which is currently transforming Article 1 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code. This legality principle has undergone an expansion of the concept from the old Criminal Code to the new Criminal Code.

The expansion of the principle of legality is evident in Article 1, paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code, which prohibits the use of analogy in defining criminal acts (Presiden Republik Indonesia 2023: Pasal 1). The prohibition of using analogy stems from the principle of legality. Analogy involves interpreting and applying the law to events or situations not explicitly covered by statutes or regional regulations by equating them with similar, regulated events or situations. This approach is barred under the principle of legality to ensure that criminal acts and penalties are clearly defined and not subject to interpretation beyond the written law. (Presiden Republik Indonesia 2023). The legal framework of Article 1 seems to conflict with Article 2 of Law Number 1 of 2023 concerning the Criminal Code. Article 2, paragraph (1) clarifies that the principle of legality provisioned in Article 1 does not negate the applicability of living law in society, which might prescribe punishment even if an act is not explicitly covered by this Law. Additionally, Article 2, paragraph (2) specifies that living law is applicable in areas where it exists, provided it aligns with the values of Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the international community, as long as it is not regulated by this Law.

The existence of laws that apply in society or customary laws that were originally not regulated in state regulations, in the New Criminal Code, customary laws are recognized as unwritten laws. While the principle of legality itself requires written laws. With the

development and changes in these regulations, a person can be sentenced to criminal penalties if they violate customary criminal law.

The legal provisions that live in society are the ones that are the pros and cons because they are considered to open to multiple interpretations and are considered as rubber articles. The provisions of living law provide greater freedom for indigenous peoples to apply their customary laws. However, on the other hand, living law is very much against the principle of legality and it is feared that it will affect the existence and sanctity of customary law itself because of government intervention. Groups that agree with the implementation of living law assume that most Indonesian people still apply unwritten law and can provide a sense of justice rather than criminal sanctions by customary law. Conversely, critics of Article 2 of the Criminal Code argue that incorporating living law into the National Criminal Code undermines the principle of legality and harms legal certainty. Studies discussing the transformation of the principle of legality and living law have previously been widely conducted by academics. Although they have the same theme, these studies differ in the scope of their discussions. In the research written by Ari Nurhaqi, which examines how justice views the application of the principle of legality, the conclusion drawn is that in cases of conflict between legal certainty and justice, justice should take precedence or be given priority (Nurhaqi 2022:9).

Then the research written by Ahmad Rifan and Ilham Yuli Isdiyanto stated that legal certainty and living law have one line of convergence and cannot be separated. The validity of living law is grounded in legal certainty, as it grants legitimacy and safeguards the existence of living law, which reflects the identity of Indigenous communities (Rifan and Isdiyanto 2021:20-35). The pros and cons that were debated by the community then attracted the author to compile this study with a focus on the problem of how to transform Article 1 and Article 2 of the New Criminal Code. So this study will discuss the changes in the formulation of Article 1 and Article 2 of Law Number 1 of 2023 concerning the Criminal Code.

This study employs a qualitative approach with normative juridical methods, utilizing library research. It gathers primary data from laws and regulations, and secondary data from literature such as books, journals, articles, and other relevant writings.

## RESULT AND DISCUSSION

### The Concept of the Principle of Legality and Living Law

The principle of legality is a principle that provides limits on actions that can be carried out and actions that are prohibited based on a person's freedom. (Suharsono 2010:6). This principle protects a person from abuse of authority that may be carried out by law enforcers and guarantees a person's safety for the actions they take. So based on this legality principle, no action is considered a criminal act if it has not been clearly stated by statutory regulations. In general, the legality principle has 3 (three) meanings, namely: *Nulla poena sine lege* (There is no punishment if there is no provision in the Law); *Nulla poena sine crimine*

(There is no punishment if there is no criminal act); and *Nullum crimen sine poena legali* (There is no criminal act if there is no punishment based on the Law) (Situngkir 2018). The principle of legality realizes the existence of legal certainty. Legal certainty is the principle that mandates the enforcement of laws that are formally enacted or established through legal statutes and must be in line with the provisions regulated. This is the essence of legal certainty. As the positivism of thought, legal certainty can only be achieved if the law has been stipulated in statutory regulations or written regulations (Mertokusumo 2010:10). On the other hand, the rules or laws that serve as guidelines for the behavior of this society are born naturally as a result the interaction of the social life of society. This naturally born law has lived and developed across generation, is known as living law. Living law aims to regulate the social life of a society that has different characteristics, cultures, and religions. So that if in the future other laws serve as guidelines, society has an attitude of tolerance and respect for differences between people. Therefore, living law naturally becomes a rule that is implemented in society so that the interests and differences between people can be maintained and there is no division in society (Rifan and Isdiyanto 2021).

Living law, also known as customary law, is the law that exists within a community and reflects its real-life experiences. According to Soepomo, customary law represents living law because it embodies the genuine sentiments and practices of the people and evolves alongside societal changes. According to Soerjono Soekanto, in essence, customary law is customary law that has legal consequences. Repeated actions lead to "*rechtsvordigeordeningsamenlebing*". Living law can be described as a law that originates from the customs and traditions of the community itself, is unwritten, and is carried out repeatedly by the community. In fact, the recognition of customary law or living law is constitutionally regulated in Article 18b paragraph (2) of the 1945 Republic of Indonesia Constitution, Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, Article 103 letters d and e of Law Number 6 of 2014 concerning Villages, and Article 6 of Law Number 39 of 1999 concerning Human Rights. These laws and regulations regulate the recognition of local wisdom, customs, and rights of an original nature. (Hadi 2017). According to Soepomo as quoted by Soerjono Soekanto, in customary law there is no separation between criminal law and civil law. (Soekanto 2021:117). However, according to Himan Hadikusuma, customary criminal law or "*adat delictenrecht*" refers to the body of law dealing with actions and events that must be punished with customary sanctions because they disrupt societal balance. These matters are addressed by customary administrators (Effendi 2018:15).

### **Transformation of the Principles of Legality and Living Law in Criminal Code**

The Academic Manuscript is a scientific accountability manuscript regarding the concept containing the background, purpose of the preparation, targets to be achieved, and the scope, reach, object, or direction of the regulation of the draft law. (Presiden Republik Indonesia 2023). In the Academic Manuscript of Law Number 1 of 2023 concerning the Criminal Code, legal provisions that live in society are an exception to the application of the

principle of legality in the Indonesian criminal law system (Kemenkumham 2023). The implementation of living law within society represents an evolution in criminal law norms aimed at ensuring future legal certainty. This approach incorporates the principles of formal legality and material legality to enhance both the development of criminal law and its enforcement practices.

#### 1. Transformation of Article 1 of Law Number 1 of 2023

The principle of legality is a fundamental concept in criminal law. Von Feuerbach articulated this principle with the adage *nullum delictum nulla poena sine praevia lege poenali*, meaning "There is no crime and no punishment without prior legal regulation." (Widayati 2011). This principle asserts that no act can be subject to punishment unless it has been explicitly defined and regulated by law in advance (Suharsono 2010:6). The principle of legality can be described to be a guarantor of a person's basic freedom by providing limitations on acts that can be carried out and acts that are clearly prohibited (Suharsono 2010:6). This principle states that the law cannot be applied retroactively, meaning actions cannot be criminalized unless they were defined as such by law at the time they were carried out. In Indonesian criminal law system, this principle is codified in Article 1, paragraph (1) of the Criminal Code, which states: "An act cannot be punished except based on the force of existing criminal law provisions."

The principle of legality as the fundamental concept in national criminal law has undergone a change in formulation which is regulated again in Article 1 paragraph (1) and Article 1 paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code, which reads: Article 1 (1) No act may be subject to criminal sanctions and/or actions, except by the criminal regulations in the laws and regulations that existed before the act was committed. (2) determining the existence of a Criminal Act, it is prohibited to use analogy. (Presiden Republik Indonesia 2023: Pasal 1).

In the explanation of Article 1 paragraph (1) of Law Number 1 of 2023, it is explained that an act is considered a criminal offense only if it is explicitly regulated by statutory regulations. This paragraph embodies the principle of legality, specifying that statutory regulations include both laws and regional regulations. According to this principle, regulations prescribing criminal sanctions must be in place before the commission of the crime, ensuring that criminal provisions are not applied retroactively. This approach is designed to prevent arbitrariness by law enforcers. Furthermore, Article 1 paragraph (2) of Law No. 1 of 2023 explains that it is prohibited to use analogies to determine criminal acts. The prohibition of using this analogy is a consequence of the principle of legality. "Analogy" in this context means interpreting an act that, at the time it was committed, was not considered a crime but was later given a punishment similar to another crime that was considered similar, because the two were supposed to have similarities. (Widayati 2011:312). By emphasizing the prohibition of using analogies, the aim is to resolve the differing opinions that have emerged in practice, thereby ensuring clearer and more consistent application of the law.

Basically, the principle of legality according to Article 1 of the Criminal Code contains several meanings, namely: An act cannot be prohibited or punished criminally unless it is first defined in a statutory regulation. The principle of legality serves to protect individuals from punishment unless explicitly provided by law. In addition, the principle of legality has an instrumental function where there is no criminal act that is not prosecuted. This instrumental function is related to Von Feuerbach's theory, namely the *psychologische dwang* theory (psychological pressure theory). This theory explains that the justification for imposing a criminal sentence on the grounds that before the act a warning must be given to everyone about prohibited actions and their associated punishments. If a warning is not issued before the act, the deterrent effect of the threat is undermined and loses its effectiveness (Remmeling 2003:605). It is forbidden to use analogy to determine a criminal act. As explained above, what is meant by analogy is interpreting an act where at the time the act was committed it was not included as a criminal act, but the act was applied to criminal provisions that have the same nature or form that apply to other criminal acts because the two acts are considered similar to each other. According to Moeljatno, although extensive interpretation and analogy are essentially the same when viewed from a psychological perspective there are differences between the two. The difference is that extensive interpretation is still based on the wording of the rules, only there are sentences of interpretation that are not given meaning. Because of this, extensive interpretation is called interpretation. While analogy, in its application, is no longer based on existing rules but rather on the core, the ratio of it. Therefore, the analogy is prohibited from being used in determining criminal acts because it is contrary to the principle of legality (Moeljatno 1983:32).

The rules in criminal law are not retroactive. According to Ishaq, criminal law is not retroactive, meaning that laws and regulations are only binding for the present and future and do not apply backward. A person's actions for a crime must be sanctioned according to the rules that were in force at the time the act was committed (*lex temporis delicti*). According to Simons, with this non-retroactive principle, criminal law regulations apply only to acts committed after criminal regulations began to be applied for the present and things that happen in the future (Omar 2020:77). Thus, the regulation of criminal acts must not be retroactive. This is to ensure the legal certainty of a person, where criminal provisions for a new act must be determined first, then sanctions for violating the criminal provisions can be imposed consequently the legal subject committing the crime.

## **2. Transformation of Article 2 of Law Number 1 of 2023**

Different from the old Criminal Code, Law No. 1 of 2023 concerning the Criminal Code regulates the law that lives in society. This is because there are still several regions in Indonesia that enforce unwritten laws and apply living laws in the community in that area. In this case, the life that lives in this community is called customary criminal law or customary law. The recognition of customary criminal law is explicitly regulated in Article 2 of Law No. 1 of 2023. This new legal framework updates the previous formulation in Article 2 of the old Criminal Code, which dealt with the Territorial Principle. The changes to Article 2 of Law

No. 1 of 2023: Article 2 (1) the provisions as referred to in Article 1 paragraph (1) do not reduce the validity of the law that is alive in society which determines that a person should be punished even though the act is not regulated in this Law; (2) the law that is alive in society as referred to in paragraph (1) applies in the place where the law is alive and as long as it is not regulated in this Law and by the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the community of nations; (3) provisions regarding the procedures and criteria for determining the law that is alive in society are regulated by Government Regulation (Presiden Republik Indonesia 2023: Pasal 2).

Article 2 provides an exception to the principle of legality, which requires that criminal acts be written in statutory regulations. It acknowledges that customary criminal acts aim to address the sense of justice within specific communities. By incorporating customary law into the Criminal Code, the principle of legality can be set aside and may not apply in these cases. According to the article's explanations, "law that lives in society" refers to customary law that prescribes punishment for certain acts. This concept relates to unwritten laws that are still valid and evolving within Indonesian society. Regional Regulations address customary criminal law to reinforce the legitimacy and application of these living laws. (Presiden Republik Indonesia 2023). Furthermore, "applicable in the place where the law lives" refers to a rule or law that is established to apply to all individuals who commit a customary crime within that specific area. In determining customary criminal law, Government Regulations become guidelines for the makers of Regional Regulations where the validity of this regional law has been recognized by the Criminal Code Law.

### **Analysis of Legal Certainty and Living Law**

In theory, regulations are the foundation for ensuring the enforcement of legal certainty. (Maskur et al. 2024). The changes to Articles 1 and 2 of the New Criminal Code indicate that Indonesian criminal law continues to adhere to the principle of legality, prohibiting the use of analogy in defining criminal acts. However, the principle of legality can be set aside in practice when applying customary criminal law. With the condition that the customary criminal law must be by the values of Pancasila, the 1945 Constitution of the Republic of Indonesia, Human Rights, and general legal principles recognized by the community of nations. From here, this creates a clear contradiction regarding the nature and regulation of the principle of legality and customary law within the new Criminal Code. According to Prof. Barda, the formal formulation of the law should be regarded as an objective criterion or measure to determine whether an act can be said to be against the law, in this case, referred to as the principle of formal legality. In addition, objective factors must be materially tested to ensure that the act aligns with the legal awareness of society or the living law, which is referred to as the principle of material legality (Nawawi 2016:104). With the principle of material legality, the traditional view of the principle of legality, which focuses



solely on written law (*nullum delictum sine lege*), is expanded to include the law that lives in society (*nullum delictum sine ius*) (Nawawi 2013:8).

Thus, the New Indonesian Criminal Code has recognized two principles of legality, namely the principle of formal legality (Article 1) and the principle of material legality (Article 2). According to the principle of formal legality, a criminal act is appropriate to be punished if the act is committed after the law is enacted (written law). According to the principle of material legality, a criminal act is subject to punishment if it conflicts with the law that exists and is recognized within society. (unwritten law) (Nawawi 2008:75). Talking about the principle of legality, criminal law requires that the regulations must be written clearly and accurately (*lex certa*) and there is no possibility of law outside the Law. The principle of legality was influenced by the positivist school. H.L.A. Hart provides the characteristics of legal positivism, namely that law comes from the lawmakers (law is a command of the lawgivers); There is no absolute or essential connection between law and morals; while laws and morals can influence each other, they operate independently. The law only regulates things that happen on reality (*das sein*). In addition, the legal system must be logical, permanent, and self-contained, without necessarily considering social, political, and moral aspects. This shows that the law must run according to what has been determined in writing without having to accept interference or influence from outside. Legal certainty is very necessary for society so laws and regulations must clearly state the limits of actions so that they can be implemented effectively (Rismana 2024). According to the positivist view, laws that have been established in such a way are considered to have provided a sense of justice (Nurhaqi 2022). Meanwhile, most of the laws that live and develop in society are unwritten laws. A legal concept has emerged suggesting that the inclusion of laws that live in society within the New Criminal Code aims to recognize and establish laws beyond those that are formally written and enacted by the state. It can be said that the changes in the formulation of Articles 1 and 2 of the New Criminal Code open up opportunities for legal pluralism officially recognized by the state. However, by the function of the principle of legality itself, it assumes that a person's actions can be punished if the punishment for the action is explicitly regulated in statutory laws and if the laws are not applied retroactively. In other words, unwritten law cannot be applied to criminalize someone for their actions. This means that according to the author, Article 1 which was amended as stated in Law Number 1 of 2023 prohibits the application of customary criminal law in Article 2.

The inclusion of the law that lives in society is based on a mono-dualistic balance, which includes the balance between individual interests or protection and societal interests or protection and the balance between legal certainty and justice. The provisions of the formal legality principle in Article 1 paragraph (1) emphasize legal certainty while the material legality principle in Article 2 emphasizes justice. The formal legality principle prioritizes legal certainty over justice and the material legality principle prioritizes justice over legal certainty (Widayati 2011). The principle of formal legality requires the existence of regulations before a criminal act, this shows the certainty of law and ignores justice because the criminal justice

process focuses on imposing criminal penalties on the perpetrators according to the positivism school. The principle of material legality, which acknowledges customary law as unwritten law, prioritizes justice for the community in the region over strict legal certainty. As mentioned above, the concept of living law is a rule that lives in society and will continue to change according to the socio-cultural conditions of the local community. Therefore, according to the author, the inclusion of regulations regarding living laws in writing national laws results in a mismatch in policies in people's lives. The mechanism of living law which is deliberative, and its social sanctions will lose direction. Criminal law with its penal nature as a last resort in law enforcement will also not work if it is faced with the living law article in the New Criminal Code. Of course, in its implementation, what kind of customary law is by Article 2 of the New Criminal Code. This will also change the role of customary courts where this change has not been determined because Law Number 1 of 2023 has not yet come into effect. It is estimated that the impact that will occur is the criminalization of an act that according to indigenous peoples is not by their traditions (Wibowo, Sadam, and Ramadavin 2023:126).

According to the author, the New Criminal Code lacks a detailed explanation of the criteria for customary criminal law, similar to the provisions outlined in Article 2, because on reality the enforcement of positive (written) law has tended to ignore social conditions and the existence of living law within the community. The legality granted by laws and regulations to living law must be studied on depth and more detail so that the existence of this living law does not conflict with the principle of legality and is binding on all people without exception, like the nature of the law itself. This aims to prevent arbitrary actions from law enforcers in handling cases that occur due to violations of living law. Living law should not be regulated in writing in national scale regulations or legislation, but rather this living law is given the best place or position according nature as unwritten law. This aligns with Hilman Hadikusuma's view, as cited by Erdianto Effendi, that customary law or customary criminal law cannot be overridden by statutory regulations. If enacted, Indonesian law will lose its source of law (Effendi 2018:15). It would be even better if customary law as a living law in this society was used as a source of criminal law according to its inherent nature, thereby showing respect for customary law. Because, if customary law is used as national law, its rules would then become part of the National Criminal Code, transforming them from customary rules into formal legal provisions and no longer as customary criminal law rules. Furthermore, in the study of customary law, the theory of "*Existential Moment*" is known, which means the birth of a law (Sudiyat 2010:16). A new rule can be said to be a law if this rule has been established. This does not mean that before the stipulation, a rule is not yet a rule, but only at the time of stipulation does the customary behavioral rule become a positive law. At the time of stipulation, this is called the "*Existential Moment*" (Muhammad 1961:26). So before the enactment of Law Number 1 of 2023, customary law did not yet have the character of a positive legal rule. In fact, without the stipulation of Article 2, customary law had been born, lived, respected, and applied in the local community. The integration of customary law into

the dimension of the principle of legality causes a misalignment with the essence of customary law, as it shifts from being an unwritten tradition to a formalized part of the legal system.

Customary criminal law, being open to new events and actions, inherently lacks the certainty found in the principle of legality, which demands fixed and closed rules. Customary law emphasizes community justice based on evolving circumstances, time, and place (Hadikusuma 1989:12). This discrepancy highlights a conflict with the principle of legality. Consequently, incorporating customary criminal law into the New Criminal Code may be seen as inconsistent with the principle of legality's requirements. Until now, a solution has not been found to create a balance between certainty and justice considering that the nature of justice itself is abstract so that it is difficult to measure. Until now the measure of justice is subjective. Subjective means that fair for one person is not necessarily fair for another. Justice should be impartial, honest, fair, equal treatment, and appropriateness of the values that develop and are accepted in society. So that legal justice and legal certainty cannot coexist. The regulation and implementation of Article 1 and Article 2 of Law Number 1 of 2023 need to be reviewed by the legislators considering the impacts that arise not only in the legal field but also in all sectors of community life.

## CONCLUSION

The principle of legality in Article 1 paragraph (1) of the New Criminal Code requires that regulations regarding criminal acts be regulated through written legislation. This aims to provide legal clarity for the public, making sure that individuals who commit crimes can be held responsible for their actions. Meanwhile, Article 2 of the New Criminal Code includes new legal regulations, namely living law in society or customary criminal law (unwritten law). In other words, this regulation is contrary to the principle of legality with its legal certainty (*lex certa*). The introduction of customary law regulations (living law) in Article 2 of Law Number 1 of 2023 suggests that customary law may no longer align with its fundamental nature. Customary criminal law, being inherently uncertain and open to various events or actions, contrasts sharply with the principle of legality, which demands clearly defined, closed rules. Customary law emphasizes the community's sense of justice, adapting to changes in circumstances, time, and location where the customary law originated. [W]

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