FORGING A MIDDLE PATH: PROBLEMS ON THE INTEGRATION OF LIVING LAW IN INDONESIAN PENAL REFORM

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Abstract *- The implementation format of living law within the New Indonesian Penal Code has ignited a pressing debate on whether to regulate it through legislation or leave it unregulated, a crucial determinant for its success in Indonesia. This qualitative study, employing legislative and conceptual analysis, aims to find a middle ground that accommodates living law while upholding legal certainty and the principle of legality. Critiques of positivism underpin the inclination to shape living law without codification, fearing it could reduce it to positive law, diminishing its essence. However, without codification, the enforcement of living law becomes challenging, resulting in legal uncertainty and potential injustice. Hence, the targeted deconstruction of the positivist paradigm in the New Penal Code doesn't call for outright elimination but advocates adopting a revisionist form of neo-positivism. The integration of living law into the legality principles framework ensures legal certainty and alignment with national criminal law, avoiding standing outside legality bounds. Consequently, the government's legal policy in the New Penal Code is considered fitting, requiring further development to address societal gaps. This research contributes to the discourse on legal theory and the evolving nature of criminal law paradigms in contemporary Indonesia.*
Keywords*: Legal Certainity, Living Law, Neo-Positivism, Paradigm Shift, Penal Reform*

INTRODUCTION

The evolution of Indonesia's criminal law, marked by the pursuit of decolonization and the recodification of norms, enters a transformative phase with the enactment of Law No. 1 of 2023 concerning the Penal Code (*Kitab Undang-Undang Hukum Pidana* /KUHP).[1] This legislative measure signifies a comprehensive update to the applicability of the Old Penal Code. Anticipated to be operationalized in 2025, the implementation of the New Penal Code replaces the longstanding *Wetboek van Strafrecht voor Nederlands Indie* (WvS-NI), which has been in force since January 1, 1918.[2] Following independence, Indonesia's criminal legal framework had adopted Dutch criminal law provisions, both in substance and form, with a focus on preventing legal vacuums (*rechtvacuum*).[3] Article II of the Transitional Provisions of the 1945 Constitution, enacted on August 18, 1945, mandates the enforcement of existing legislation before the establishment of new legal frameworks.[4] Consequently, the government instituted Law No. 1 of 1846 concerning Criminal Law Regulations, delineating the applicability of WvS-NI in Java and Madura, and achieving national significance since 1973.[5]

Historically, the enforcement of WvS-NI in Indonesia was guided by the principle of concordance, as stipulated by Article 131 of the *Indische Staatsregeling* (IS).[6] Concordance represented a facet of the legal politics of European Continental colonialism in the early modern era, aiming to establish legal dominance to reconstruct the socio-political dimensions of native communities within the colony by implementing a monopolistic legal system.[7] Furthermore, concordance aimed to facilitate economic relations and legitimize the colonial government's governance and law enforcement.[8]

Beyond WvS-NI in the realm of criminal law, the concordance principle extended to the enactment of the *Burgerlijke Wetboek (*Civil Code) and *Wetboek van Koophandel* (Commercial Code) as substantive legal sources in the field of civil law.[9] As legal products framed by the interests and pillars of the paradigmatic system of Continental Europe, WvS-NI, BW, and WvK exhibited disparities with the social and cultural conditions of Indonesian society.[10] Consequently, the imperative of updating WvS-NI, by reintegrating the socio-cultural values of the Indonesian nation, represents an indispensable step in the development of contemporary criminal law.[11]

The initiation of reforms in the conceptualization of the Draft Penal Code has been underway since the National Criminal Law Seminar I in Semarang in 1963 The principles of decolonization and recodification serve as two essential foundations, alongside the legal necessity to ensure the relevance of norms that have historically been in existence for almost a century since their formulation.[12] The New Penal Code has traversed a lengthy journey through legislative discussions and intellectual dialectics within Indonesian law. The draft, subsequently enacted as the Penal Code in Law No. 1 of 2023, represents the 14th version of the Penal Code with a substantial number of fundamental and substantive normative updates.[13] Although Law No. 1 of 2023, establishing the New Penal Code, still raises critical notes regarding the formulation of certain articles, it has accommodated crucial thoughts that are integral to revitalizing the criminal law enforcement space in Indonesia.

The New Penal Code, enacted through Law No. 1 of 2023, incorporates several fundamental concepts that emerged as antitheses to the classical positivism-formal paradigm. Despite some criticisms, the New Penal Code embraces important novelties, particularly the unification of living law within the national criminal legal system.[14] In Law No. 1 of 2023 concerning the New Penal Code, the regulations pertaining to living law are outlined in Article 2, comprising three clauses:

1) The provisions as stipulated in Article 1, paragraph (1), do not diminish the applicability of living law in society, determining that an individual may be subject to criminal punishment even if the act is not regulated by this law.
2) Living law in society, as referred to in paragraph (1), applies in the legal domain where it exists and as long as it is not regulated by this law, provided it aligns with the values inherent in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and recognized principles of international law.
3) The procedures and criteria for determining living law in society are regulated by Government Regulations.

Meanwhile, Article 1 mentioned in Article 2, paragraph (1), constitutes the substance of the legality principle, consisting of two clauses:

1) No act shall incur criminal sanctions or actions unless mandated by criminal regulations in pre-existing legislation before the act is committed.
2) Analogical reasoning is prohibited in establishing the existence of a criminal act.

The formulation of living law within the Indonesian Penal Code emerges as the outcome of a protracted process marked by compromise and extensive debate, yet it remains far from achieving a definitive resolution. The officially ratified Penal Code, slated for implementation in 2025, has sparked a contentious debate surrounding the format of living law.[15] Notably, proposals advocating for the normatization of living law through government regulations face strong opposition. Critics argue that such propositions exhibit a positivistic and reductionist stance toward living law, undermining its core essence and the mission embedded in Indoensian penal reform.

This debate underscores the tension between those advocating for the codification of living law within governmental regulations and those opposing such efforts. The latter group contends that codifying living law in legislative documents contradicts the essence of Article 2, paragraph (3) of the Penal Code. This provision emphasizes the integration of living law, aligning with the ongoing mission of Penal Code reform. As the discourse unfolds, the complexities surrounding the implementation of living law persist, necessitating a nuanced and thoughtful approach. The forthcoming activation of the revised Penal Code in 2025 will undoubtedly mark a critical juncture, shaping the trajectory of living law within the Indonesian legal landscape. This ongoing debate serves as a testament to the dynamic nature of legal theory and the intricacies inherent in reconciling tradition with contemporary legal paradigms.

The unresolved theoretical debates pose a significant obstacle to the substantial success of incorporating living law into the New Penal Code. The optimal enforcement and effective application of the revised Penal Code may be compromised if the regulations governing living law are not meticulously formulated. Hence, there is an urgent need for concerted efforts to rectify the criminal legal paradigm's perspective on living law as a source of penalization, aimed at achieving substantive

justice. It is crucial to navigate this discourse without compromising the fundamental principles of criminal law rooted in legal certainty. As the legal community grapples with these intricacies, a careful and considered approach is paramount to ensuring the smooth implementation and effectiveness of living law within the context of the new Penal Code.

This study is directed towards providing an antithesis to legal arguments constructed around the concept of unwritten living law. The utilization of living law as a source of penalization should not be seen as an isolated entity divorced from the principle of legality; rather, it constitutes a novel legal source no different from national criminal law. The positivistic paradigm, often criticized for causing issues in contemporary criminal legal theory and practice, can be addressed by aligning the interests of reform while upholding the foundational principles of criminal law, with legal certainty as an indispensable and unalterable cornerstone.

This research adopts a qualitative dual-method approach, integrating legal analysis and conceptual analysis, with a focus on paradigm shifts, to explore a middle path for reconciling the dichotomy of punishment through the normatization of living law within the context of Indonesian penal reform.[16] The methodology involves a rigorous examination of legal frameworks, including the recent Law No. 1 of 2023, and a conceptual analysis centered on paradigm shifts within legal thought. The legal analysis component entails an in-depth study of existing legal structures, such as the Indonesian Penal Code and related statutes, to assess their compatibility with integrating living law principles. This aims to identify legal challenges and opportunities within these frameworks, particularly in response to the legal developments introduced by Law No. 1 of 2023.

Conceptual analysis, focusing on paradigm shifts within legal philosophy literature, involves an extensive review of existing theoretical frameworks related to living law. The objective is to unravel underlying conceptual shifts and explore their influence on the evolving landscape of Indonesian penal law. Stakeholder consultations with legal experts, policymakers, scholars, and community leaders are essential for obtaining diverse perspectives, validating conceptual analyses, addressing concerns, and refining the proposed normative framework within the context of paradigmatic changes.

The insights from legal and conceptual analyses contribute to the development of a normative framework, suggesting amendments or new legislation aligned with legal principles and paradigmatic shifts. This framework provides a theoretical foundation for future developments in the Indonesian penal system. The validation and refinement of the normative framework occur through peer review and feedback from legal experts, ensuring coherence and applicability. The study concludes by offering clear recommendations for policymakers, legal practitioners, and scholars, emphasizing the potential implications of adopting the proposed normative framework on the legal system and societal dynamics. This methodology, combining legal and conceptual analyses, offers a nuanced perspective on forging a middle path in the normatization of living law within the Indonesian penal reform landscape, particularly in response to the legal changes introduced by Law No. 1 of 2023.

1. The Foundational Thought in the Reform of the Indonesian Penal Code: Progressive Critique of Positivism

Legal positivism, a philosophical perspective interpreting law as positive norms within the legislative system, is underpinned by three crucial tenets. Firstly, law is considered a rational command detached from moral considerations.[17] Secondly, legal research and discovery are pursued purely by isolating elements outside the legal realm, such as history, politics, or socio-cultural factors. Thirdly, the legal system is construed as logical, certain, and characterized by grounded interpretations. A top-to-down pattern of reasoning is advocated by legal positivism, wherein human life adheres to established legislation. The development of positivist thought in Europe's classical era was marked by influential figures like Auguste Comte, H.L.A. Hart, John Austin, and Hans Kelsen. Legal positivism, terminologically rooted in the phrase ponere-posui-positus, denotes the act of placing something in a given position. Consequently, law is perceived as concrete, written, and clear.[18]

The positivistic legal paradigm assumed a pivotal role as the primary perspective and foundation in the former Indonesian Penal Code.[19] WvS-NI, implemented since January 1, 1918, was derived from the WvS of the Dutch Kingdom, which, in turn, had its origins in the French Code Penal compiled during the Classical era. The imperative need to establish legal certainty and counteract rulers' arbitrariness from the 17th to the early 20th century was instrumental in establishing positivism as the dominant paradigm.[20] Post-independence, the incorporation of WvS-NI in Law No. 1 of 1946 pertaining to Criminal Law Regulations seamlessly introduced the positivist paradigm into the Indonesian criminal law system.[21] The positivistic elements were further substantiated by the foundational principle of formal legality outlined in Article 1, paragraph (1) of the former Penal Code. The inherent colonialism encapsulated within the principle of formal legality systematically dismisses the rich tapestry of indigenous wisdom, living law, and socio-cultural realities that predated the colonial era in Indonesia.[22] The Dutch scholar Snouck Hurgronje's classification of 19 living law regions in Indonesia, each with its distinct wisdom, traditions, culture, and punishment concepts, underscored the incompatibility of these diverse realities with prevailing government penal policies. This incongruence led to the wholesale adoption of the *Strafrecht Code* employed in the Netherlands.[23] The inability to integrate these values stems from the rigidity embedded in the four characteristics of the legality principle within the civil law tradition. These include the law's written nature (*lex scripta*), its clarity and detail (*lex certa*), the prohibition of analogies in punishment, and the non-retroactive application of criminal law.[24]

Aligned with the four key characteristics of legal principles, the principles of legality embedded in both the *Wetboek van Strafrecht voor Nederlands Indie* (WvS-NI) and the previous Indonesian Penal Code exhibit three analogous interpretations grounded in written law, the prohibition of analogy, and the non-retroactive principle. This circumstance signifies that the enforcement of the former Penal Code in Indonesia since 1946 still adheres to the legal paradigm of Continental European society, prevalent over two centuries ago. According to Barda Nawawi Arief, the reformulation of legality principles stands as one of the pivotal objectives in shaping the Draft Penal Code.[25] The recalibration of legality principles aims to shift the 'rigid' character inherent in criminal law enforcement toward a more adaptable and inclusive framework.

Progressive legal thought scrutinizes positivism within the previous Penal Code due to its inclination towards legal certainty. The relentless pursuit of the legal certainty principle undermines the law's capacity to realize justice and utility as its fundamental objectives. As articulated by Prof. Tjip, the ultimate aspiration of progressive law is to attain social justice for the entire populace. Justice remains elusive when solely relying on the formal legality principle and restricting the law within the confines of legislation.

Prof. Tjip's critique of the monopolistic logic within legal positivism draws inspiration from Edward Wilson's "*Consilience: Unity of Knowledge*." Wilson underscores the significance of unified knowledge principles in unraveling social phenomena. Segregative legal frameworks, such as those rooted in Hans Kelsen's Pure Theory of Law, prove inadequate in serving as instruments for producing substantive justice, instead fostering procedural justice exclusively [26]. Consequently, progressive legal thought advocates for the deconstruction of positive law, urging its supplementation with living law to serve as a counterbalance in law enforcement. Barda Nawawi Arief underscores that the ethos underpinning the New Penal Code should be forged on the foundational concept of balancing Pancasila values.[27]

The equilibrium forged on the foundation of Pancasila values is articulated through the transformation from a positivistic paradigm to a holistic paradigm.[28] The formal principle of legality no longer stands as the exclusive foundation restricting the jurisdiction of criminal law within legislation; instead, it is reformulated into both formal and material legality principles.

The expansion of the legality principle to encompass both formal and material dimensions acknowledges the legitimacy of living law as a recognized and valid source of criminalization by the state.[29] An individual can be subject to criminal sanctions based on actions deemed violations or crimes against societal norms, even when not explicitly regulated by statutory law. In this context, living law is applied to accommodate the interests of living law communities in practicing traditions

and living law within their territorial jurisdiction, thereby achieving principles of respect and inclusivity.

Despite taking an anti-thesis stance against positivism, progressive law rejects fundamental premises advocating for the regulation of law within statutory law.[30] While law remains in its written position as the primary instrument, it is not the sole instrument. Progressive law advocates for law enforcement not to be executed purely through legal logic but also by considering dynamic social realities. In this regard, Prof. Tjip adopts Charles Sampford's concept of social melee, demonstrating that order can be achieved through social processes without emphasizing rigid legal approaches.[31] This approach can be implemented by 'legislating with the heart,' with law enforcement officials at the forefront of implementing progressive law. The following outlines the five crucial missions of the New Penal Code in the further formulation of living law regulation in Indonesia.

Table 1. Indonesia's Penal Reform mission

Penal Reform Mission	Explanation
Decolonialization	Strategically eliminates colonial-era elements from the Penal Code, transforming its positivistic paradigm towards more balanced justice, emphasizing rehabilitation and incorporating the material legality principle.
Democatization of Criminal Law	Aims to align criminal law with democratic principles, enhancing transparency, accountability, and public participation in legislative and policy processes, ensuring fair and equitable legal protection for all citizens.
Consolidation and Recodification	Gathers normative aspects into the New Penal Code, evident in restructuring laws like Section 35 in Book II, governing Special Criminal Offenses.
Harmonization of Criminal Law	Synchronizes legal principles between national criminal law and societal dynamics, unifying diverse norms into a singular legal framework to prevent conflicts and ensure consistent application.
Modernization	Replaces traditional paradigms and content in criminal law with contemporary elements, adapting to societal changes, regulating new offenses, and revising existing ones for the New Penal Code's relevance.

2. Growing Debates: Between the Essence and Implementation of Living Law

The protracted discourse surrounding the integration of living law principles into the formulation of the Indonesian Penal Code has evolved into a protracted and intricate dialogue, persisting through the meticulous creation of 14 successive drafts. At the epicenter of this extensive deliberation lies the pivotal inquiry of how the forthcoming Penal Code will assimilate the dynamic concept of living law [32]. Advocates of a progressive legal framework assert that the fluidity inherent in living law should not be confined within the boundaries of positive legal regulations, as such a restrictive approach jeopardizes the fundamental essence of a dynamic legal system. Barda Nawawi Arief posits that living law should be granted the autonomy to evolve organically, without undue positivization.[33] He contends that the efficacy of living law should be measured by its fidelity to core values and moral principles, surpassing the necessity for rigid adherence to positive norms. The prevailing concern is that the excessive formalization of norms might relegate living law to a mere reflection of positive law, eroding its distinctiveness in comparison to conventional national legal frameworks.[34]

Moreover, the deliberate abstention from the positivization of living law is motivated by the imperative to evade the imposition of the formal principle of legality as articulated in Article 1, paragraph (2) of the Indonesian Penal Code. This strategic choice arises from the tripartite ramifications of the legality principle, wherein an act becomes subject to punishment only if

explicitly addressed in pre-existing legislation, laws lack retrospective applicability, and the application of analogy is strictly prohibited. Intriguingly, the very essence of living law embodies an analogical nature, emanating from abstract, expansive, and non-concrete values and morals. In its practical implementation, living law places precedence on policy considerations over rigid normative frameworks. This intentional departure from the positivization route underscores a nuanced approach that acknowledges the inherent dynamism and contextual responsiveness of living law within the legal landscape.

Nonetheless, the progressive perspective advocating the integration of living law without formal legislative regulation has ignited a sharp and contentious debate.[7] The critique against legal-formalist positivism has gone to the extent of attempting to construct a distinct and markedly different penal system, vehemently rejecting the fundamental tenets of legality. On the contrary, the legality principle stands as a rational instrument, providing a guarantee of legal certainty for all individuals. It serves as the gateway for idealistic, abstract principles and thoughts within the domain of values to concretely materialize through the formulation of norms. This principle not only encapsulates the essence of legal order but also acts as a conduit for translating abstract principles into tangible legal frameworks. Devoid of norms, these values and principles would render law enforcement inconsistent, adrift, and plagued by uncertainty, ultimately culminating in potential injustices resulting from enforcement lacking a robust foundational basis.

Despite facing criticism from scholars within the realm of critical legal studies for being perceived as a central figure in rigid positive law, the thoughts articulated by Hans Kelsen concerning the genesis of norms continue to furnish an essential conceptual groundwork.[35] Kelsen posits that norms are not merely products of political expediency but emerge from the meticulous formulation of values, principles, concepts, and idealized considerations. In order to govern a society characterized by diverse backgrounds through a singular norm, these values, principles, and concepts must undergo a crucible of sorts through legal regulations—a process akin to a 'melting pot.' Stated differently, for these values to attain efficacy, they must undergo the process of normativization. Once norms take shape, the implementation of legal enforcement can proceed in a pure and unadulterated fashion. Kelsen's pure legal theory underscores the imperative of segregating juridical and meta-juridical facets within the sphere of enforcement, grounded in the premise that debates involving meta-juridical factors reach their resolution upon the establishment of norms. The latter segment of Kelsen's theory is presently deemed obsolete, as legal enforcement necessitates considerations beyond, aiming for broader certitude, justice, and utility. However, discarding the fundamental principle of normatizing values for rational application is inherently flawed reasoning.

The proposition to refrain from codifying living law entirely is fraught with three compelling reasons that render it untenable.[28] *Firstly*, the formidable challenge stemming from Indonesia's profound ethnolinguistic diversity becomes evident. According to Snouck Hurgronje's meticulous 1907 research, 19 distinct living law regions were delineated across the archipelago, spanning Sumatra, Java, Kalimantan, Sulawesi, Timor, Maluku, Papua, and the surrounding islands. In this contemporary era marked by heightened mobility propelled by technological advancements, individuals can expeditiously traverse geographical boundaries. The absence of codified norms presents a significant risk wherein individuals not indigenous to a region where living law prevails may inadvertently face penal consequences due to their lack of awareness. This starkly contradicts a foundational tenet in criminal jurisprudence, which mandates that punishment is contingent upon violations explicitly stipulated in lucid regulations. Furthermore, the legal fiction principle entrenched in Indonesia posits that every individual is presumed to possess knowledge of the law. However, how can one be expected to comprehend the 'law' if it lacks regulatory codification within normative frameworks? An individual's capacity to grasp the intricacies of all living laws in regions they may visit without the presence of explicit and clear norms is inherently unreliable and poses significant challenges for practical implementation.

Secondly, the absence of concrete regulatory frameworks for living law precipitates a departure from the foundational principle of legality. This departure arises due to the dependence of the legality principle on legislative norms preceding any given action. Should living law find expression solely

within codifications such as books or other non-legislative documents, both in theory and practice, the binding nature of the legality principle is compromised. The dearth of a legal foundation enables unchecked analogies, drawing parallels between a particular action and a violation, even in situations where the act's contentious nature is apparent. Enforcers of living law may mete out penalties grounded in non-legal considerations, amplifying the potential for injustices. Furthermore, the absence of legality principles renders the non-retroactive principle inapplicable. Individuals could face prosecution for actions considered violations long before the formal acknowledgment of living law, thereby exacerbating the potential for injustices to proliferate.

Thirdly, the legal ambiguity stemming from the dualism of criminal legal systems presents a substantial challenge [7]. If living law is articulated within a distinct regime, divorced from legislative regulations, it engenders a dualism of punitive sources. This duality establishes two criminal legal systems that wield equal authority, posing a considerable challenge for acceptance, particularly when the norms of living law lack codification in specific regulations [36]. Legal certainty stands as the bedrock of modern law enforcement; without it, criminal law cannot deliver justice and utility for the entirety of a densely populated state. While the idea of leaving living law entirely uncodified may be proposed, the intricate nature of Indonesia's diverse cultural landscape, coupled with the principles of legal fiction and the challenges posed by modern mobility, renders it an impractical and potentially unjust proposition. The codification of living law becomes imperative not only for legal clarity but also to uphold fundamental principles of fairness and justice in the legal system.

3. Deconstruction of the Principle of Legality in the Evolution of Indonesian Criminal Law

The protracted historical narrative of modern criminal law in Indonesia is inextricably intertwined with the positivistic thinking paradigm bequeathed by European explorers. The foundational tenets of Indonesian criminal law find their genesis in the codification of Dutch East Indies law, representing a comprehensive embodiment of positivism.[37] Despite undergoing numerous evolutions, the complete abandonment of positivism proves impractical, as the guarantee of legal certainty remains an indispensable and irreplaceable facet. Within the positivistic framework, certainty is underwritten by the principle of legality, a stringent mandate dictating that criminal laws must be meticulously, unequivocally, and precisely formulated, with no allowance for analogy.

While criticisms may be leveled against the inflexible nature of the principle of legality, eschewing its application in delineating the parameters of a punitive source remains untenable. The assurance of legal certainty, deeply rooted in the positivistic tradition, persistently assumes a pivotal role in shaping and governing the trajectory of modern criminal law in Indonesia.[38]

The genesis of the principle of legality can be traced back to a pivotal period marked by the reactions to the absolutist authority wielded by European monarchies during the twilight of the Renaissance and the Enlightenment. This principle serves as a diametrically opposed stance to the legal doctrines of ancient Roman law, particularly the concept of crimina extra ordinaria, which encompassed offenses not explicitly enumerated in legal statutes.[39] *Crimina extra ordinaria,* with its broad ambit, was typically applied to actions perceived as morally reprehensible or wicked but were not expressly stipulated in legal codes. Concurrently, amidst the era of absolute monarchy where sovereigns held unrestrained power, the principle of legality granted legitimacy to arbitrary punitive measures, resulting in widespread suffering and a profound crisis of justice.

The articulation of the principle of legality is attributed to von Feurbach in the early 19th century, notably expounded in his seminal work "Lehrbuch des Peinlichen Rechts" (1801). Feurbach's formulation encapsulates the adage "*nullum delictum nulla poena sine praevia lege poenali*," underscoring that an action cannot be subject to punishment unless there exists a pre-established penal law within legislation before the commission of the act.[40] This formulation by Feurbach not only encapsulates a comprehensive legal philosophy but also complements earlier critiques of absolutism in judicial authority, as advanced by Montesquieu in "L'esprit des Lois" (1748) and J.J Rousseau in "Die Contract Social." Antedating Feurbach's articulation, the principle of legality found partial expression in Article 8 of the Declaration des droits de L'homme et du citoyen (1789), unequivocally asserting that nothing should be punishable except as prescribed by a valid law. Both the principle elucidated in the French declaration and Feurbach's formulation incontrovertibly

advocate for the imperative of proscribing an act within a valid legal framework before it can serve as the basis for prosecution.[41]

The formulation of the principle of legality within Indonesia's pre-revised Penal criminal legal system exclusively acknowledged statutory law as the singular foundation for prosecution. According to Sudarto, the corollary of the legality principle as articulated in Article 1 of the former Penal Code was that any action not expressly designated as a criminal offense in statutory law could not be subject to prosecution. However, the effective implementation of legal certainty through this principle encountered inherent challenges within the Indonesian legal framework [42]. Since the period of Dutch colonialism, a dual legal system has prevailed in Indonesia concerning criminal law, encompassing both national law and living law. National law constitutes a formally recognized legal source endorsed by the state, enforced through state institutions based on normatively established principles, doctrines, and regulations. In contrast, living law embodies a distinct legal reality, existing as an unprecisely regulated form of law that evolves and is applied in tandem with the social dynamics inherent in the community.[10]

The deconstruction of the principle of legality, accompanied by the recognition of the actuality of living law, has been acknowledged since the enactment of Law No. 1 Drt in 1951, addressing Temporary Measures for Organizing the Unity of the Power Structure and Civil Court Proceedings. Article 1, paragraph (3) sub b, articulates the principle of accommodating the enforcement of customary criminal acts, whether they exist or are incomparable to the provisions in the Penal Code [42]. However, the principle of recognition delineated in Law No. 1 Drt of 1951 is not construed as a form of accommodation for the pluralism of Indonesian law; rather, it represents a 'practical effort' by the government to fill legal voids and prosecute actions violating the law yet not regulated in the old. The implementation of this provision resulted in the gradual elimination of Swapraja Courts in diverse regions, expediting the process of legal unification. From a legal-political perspective, the security, economic, and political conditions of Indonesia in the early years of independence can be construed as a strategic endeavor to maintain national stability and ensure legal order in society.

Post-reform, the transformation of the judicial system in Indonesia to realize substantive law and justice, as mandated in Article 24, paragraph (1) of the amended 1945 Constitution, opened up space for the integration of living law as an alternative to legal enforcement beyond legislation. This provision is stipulated in Article 5, paragraph (1) of Law No. 48 of 2009, emphasizing that: "Judges and constitutional judges must explore, follow, and understand the legal values and sense of justice existing in society." This provision explicitly 'revises' the principle of legality by obligating judges to consider the existence of living law in their decision-making. Therefore, the principle of legality in Indonesia's criminal legal system in the reform era is no longer absolute, although it has not explicitly guaranteed the certainty of the pluralism of criminal law sources.

In analyzing the transformations witnessed throughout the history of Indonesian criminal law, it is discernible that the deconstruction of the principle of legality does not intend to eradicate it as a foundational source of punitive measures. Rather, its objective is to 'soften' the principle, affording judges greater leeway to consider meta-legal aspects, employing the terminology of Kelsenian thought. This strategic approach is notably pertinent as it empowers judges to enrich the facets of justice and utility without compromising the imperative of legal certainty. Furthermore, the emphasis on justice and utility should not be exaggerated, remaining circumscribed by the bounds of legal certainty. Judges are bestowed with the capacity for judicious discretion, contemplating meta-legal aspects, while concurrently upholding the law as an unwavering reference and cognitive bedrock.

Moreover, the cognizance that the law serves as a tangible source of concrete norms, distinct from mere considerations of meta-legal aspects, substantiates the sagacious decision to deconstruct the principle of legality. This deliberate choice is not only apt but also rational, ensuring a harmonious integration of legal certainty, justice, and utility within the dynamic framework of Indonesian criminal law.

4. Neo-Positivism as an Intersecting Paradigm between Living Law and Legal Certainty

The evolution of legal thought paradigms is an ongoing process, responsive to societal conditions, national imperatives, and the objectives pursued by a country's legal policies. Positivism, originally introduced by Auguste Compte in the social sciences and later becoming a dominant paradigm in various fields, including law, is undeniably experiencing a diminishing relevance.[43] Dialectical critiques of positivism surface from diverse perspectives, such as post-modernism, critical legal studies, and other schools of thought. Varied deconstruction approaches advocate for positivism to undergo changes, be it partial or total, as a paradigm within criminal law.

It is crucial to emphasize that transformative processes are neither immediate nor instigated by a singular piece of legislation. The scope of change extends beyond regulatory adjustments, necessitating the adaptation of the entire legal infrastructure, which includes substance, structure, and the cultural fabric of society.

Therefore, instead of advocating for the abolition of legality principles—the foundational tenets of positivism that contribute to confusion and legal uncertainty—the current accommodation of living law should ideally adopt a neo-positivist paradigm. This transition aligns with the evolving landscape of Indonesian criminal law, striving to strike a balance between legal certainty, adaptability, and societal values.

The neo-positivist movement has emerged as a corrective response to the extensively criticized positivist philosophy. Neo-positivism is grounded in the principle of justification, serving as an objective criterion for assessing statements or behaviors. This philosophy alienates abstract elements from real-life scenarios, which, aside from being uncertain, also presents challenges in its universal application for a diverse populace [44].

The fragments of the neo-positivist paradigm play a pivotal role in evaluating the shortcomings of implementing unwritten living law and, conversely, contribute to understanding the crucial importance of regulating living law within the framework of legal regulations. By incorporating living law into legal regulations, the objective is to integrate the interests seeking to apply 'authentic' law built on local wisdom in Indonesia. This integration fosters an inclusive approach, contrasting with a segregative and dichotomous stance. The transformation of the Penal Code should be viewed as an open-ended change but within the consistent framework of legality principles. The values of living law are invited to coexist and integrate with national law within the framework of legality principles, rather than opposing their existence and introducing uncertainty through dualism.

In the post-reform era, it is imperative to recognize that specific regions have consistently embraced the concept of living law, with Nanggroe Aceh Darussalam standing out prominently. Granted special autonomy under Law Number 18 of 2001, Aceh, a region predominantly inhabited by Muslims known for its commitment to Sharia law, established a distinct legal framework for living law through the instrument of "Qanun." This legislation delineates criminal offenses based on local customs and provides explicit details regarding sanctions and enforcement methods.[45]

Contrary to the perception of an unwritten legal system, Qanun is meticulously codified within clear, precise legal regulations. Functioning as a legislative document, Qanun aligns itself with the principles of positivism and legal certainty, operating under the guiding *lex specialis derogate legi generali* principle. The implementation and enforcement of Qanun fall under the purview of the Lembaga Pengadilan Syariat Aceh, adhering to established legal regulations. Significantly, Qanun stands as a pioneering example of successfully enforced living law in Indonesia, gaining official recognition from the state.

In the pursuit of revising positivism, the prudent choice emerges as the implementation of living law while steadfastly upholding the framework of legal principles, exemplified by the application of Qanun in Aceh. This nuanced approach strikes a delicate balance, allowing for the integration of dynamic living law while preserving the integrity of established legal principles. The proposed New Penal Code, propelled by the ambition to comprehensively embrace living law, can glean invaluable insights from the Qanun implementation [46]. This involves the meticulous process of codifying and formulating living law within legislative frameworks, a paradigm that resonates with the principles of positivism and legal certainty.

Returning to the foundational articles laying the groundwork for the incorporation of living law into the New Penal Code, the judicious inclusion of Article 2, paragraph (3) signifies a sagacious political choice. This entails establishing the validity of living law through Government Regulations, subsequently articulated within Regional Regulations.

Opting for the incorporation of living law within Regional Regulations delineates an ideal middle ground, ensuring that its implementation aligns seamlessly with the fundamental principles of legal positivism and legal certainty in Indonesia. This method mitigates the risk of conflicting legal principles and guarantees a harmonious integration of living law. Furthermore, adopting this method eliminates the potential dualism between conflicting legal systems, as both are characterized by being codified within legislative frameworks and applied in accordance with the principles of legal positivism. This pragmatic approach contributes substantively to the ongoing discourse on legal theory, providing a nuanced pathway to integrate living law while steadfastly upholding the foundational principles of the Indonesian legal system.

CONCLUSION

The discourse surrounding the incorporation of living law into the New Indonesian Penal Code embodies a delicate equilibrium between preserving its intrinsic nature and ensuring legal certainty. This tension emerges from the inclination to avoid codification, influenced by critiques of positivism, juxtaposed against the practical need for a regulatory framework to facilitate effective enforcement. The deliberate deconstruction of the positivist paradigm advocates for a nuanced approach by embracing a revisionist form of neo-positivism. This approach allows for the seamless integration of living law into the legality principles framework, emphasizing that living law should be perceived as an integrative source of criminalization rather than a dichotomous one. To ensure practical applicability, legal certainty, and justice, living law must be incorporated into a positive legal framework, bounded by legality principles.

The government's legal policy embedded in the New Penal Code is acknowledged as a positive step forward, underlining the necessity for further refinement to address societal gaps and augment legal certainty. This research significantly contributes to the ongoing discourse on legal theory and the dynamic evolution of criminal law paradigms in contemporary Indonesia. Striking a harmonious balance between preserving the essence of living law and navigating the practical intricacies of legal implementation is imperative for maintaining an adaptive, just, and culturally reflective legal framework in Indonesia.

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