

The Significance Of The Living Law Concept In The New Criminal Code: A Perspective Of Progressive Law

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Abstract

Discussions on the Indonesian Criminal Code (New Criminal Code) continue to develop and become the spotlight for various parties involved in the legal world. One aspect that has drawn criticism is the concept of law that lives in society, which in legal literature is often referred to as "living law". The regulation of law that lives in society is an idea that involves the interaction between written legal norms and developments and changes in society. This research will deeply analyze the importance of living law regulation in Indonesia's New Criminal Code from a progressive legal perspective. This research is designed using the normative juridical method, which refers to legal analysis based on existing regulations. The research results validate the necessity of incorporating provisions on living law regulation in the New Criminal Code, as it plays a crucial role in safeguarding legal certainty and upholding the continuity of customary law in Indonesia. The regulation of living law is aligned with the principles of the progressive law enforcement method'.

Keywords: Criminal Code, Law Concept, Living Law, Perspective Progressive Law.

Introduction

In every community, norms govern the relationships between individuals. Cicero put forward the principle of "ubi societas ibi ius," which suggests

that laws have always existed in societies to regulate their actions. In fact, law is a cultural element that develops in line with society. Therefore, it is not surprising to say that law is the result of culture (law as a cultural product). Martin Kryger's opinion (Kryger, 2019), describes law as a tradition. Thus, cultural growth and legal development are interrelated; law develops with the development and growth of society's culture. This fact indicates that law cannot be separated from its society. Society is the main source of law. It is no wonder that Ronald Dworkin describes society as a "fabric of rules" (Dworkin, 2013).

In general, law is a set of norms and principles that act as a tool or means to promote development by directing human activity towards the desired goals of development or change. (Radbruch, 2003). From a contemporary standpoint, there has been a shift in the perception of law, wherein it is no longer regarded as a self-contained entity, but rather as a dynamic system that necessitates interaction with other circumstances. The main goal is to obtain and accommodate the interests that exist in a society that is always moving and developing. One of the causes of this change is the impact of the phenomenon of globalization.

Law encompasses more than just a collection of regulations or standards that govern human conduct, it also embodies the underlying concepts and values that guide individuals towards desired progress or transformation. Law is seen as a tool or means to shape the direction of human activities in accordance with the goals of development or change in society.

In the emerging paradigm, the concept of law is no longer perceived in isolation, but rather as an interconnected entity. This means that the law does not operate in isolation, but must interact with other factors in society. This reflects the view that law must be responsive to social dynamics and accommodate the various interests that exist in society.

The phenomenon of globalization serves as a catalyst for expeditious societal transformation. The modernization process can give rise to instability and conflict within society due to the quick pace of societal change. According to Muladi (1997), the dynamic evolution of community values necessitates the formation of novel standards within community life. In such a situation, it is imperative to establish legal frameworks that possess the ability to accommodate the

evolving nature and intricacies of society within the globalized period. The processes of modernization and globalization are not discretionary choices, but rather inescapable phenomena that need acknowledgement and engagement. The emergence of these two features can be attributed to the inherent complexity and variability in social relations resulting from advancements in contemporary technology (Muladi, 1997).

Globalization is a phenomenon in which geographic and political boundaries are eroding, and interactions between countries, cultures and economies are intensifying. The impact of globalization has affected many aspects of life, including law. Law must be able to accommodate these global dynamics, such as cross-border trade, information flows, and social changes induced by global factors.

In this context, law is expected not only to be a static tool to maintain order, but also a responsive and adaptive instrument in the face of change. This includes the development of international law governing interstate relations, international trade law, and universal human rights law.

It is important to remember that views on law can vary depending on cultural, political and social contexts. However, the understanding that law must adapt to changes in society, including the impact of globalization, is a view that is fairly consistent with contemporary legal developments.

The concept of globalization has emerged as a result of the transnational nature of modernisation, which has been facilitated by advancements in sophisticated communication and information technology tools. The impact of this phenomenon demands a transformation in the structure of legal relationships, the formation of new legal substance, and even the emergence of a legal culture that is often entirely new. Without adaptation in the legal system, there is a potential risk to stability in various aspects of community life, resulting in uncertainty, disorder, and a feeling of insecurity (Muladi, 1997).

With the acceleration of globalization increasingly permeating aspects of social, national and political life, Anthony Giddens formulated the concept of the “middle way” as an alternative between two contrasting options, namely socialism and capitalism, as well as a mixture of state intervention and free markets. At the end of the 20th century,

the world was characterized by a state of “manufactured uncertainty” (Giddens, 2013). This is a period filled with uncertainty. These conditions are not caused by nature, but rather are the result of human activity thanks to the technological developments they produce. Additionally, it encompasses its impact on societal interactions and promotes the assimilation of cultural norms. The phenomenon of cultural acculturation has a significant influence on the perception and understanding of the law, as well as its overall existence (Christianto, 2020).

The swift progression of technology has significantly influenced the alteration of individuals' behavior. Consequently, there has been an emergence of novel criminal activities or modifications to preexisting criminal acts. The aforementioned influence is evident in the present state of affairs, characterized by an increasing number of criminal statutes that designate certain behaviors as criminal offenses. These actions encompass a range of transgressions, including sexual assault, pornography, and different forms of crimes associated with electronic information and transactions.

In fact, it has become essential that criminal law must continually adapt to these dynamic developments. Numerous scholarly investigations are anticipated to bridge the disparity between the existing state of affairs (*das sein*) and the desired state of affairs (*das sollen*) within the legal domain. According to Raharjo et al. (2018), this will facilitate the process of reconciling the disparities that arise from the dynamic nature of criminal activities and the corresponding legal measures required to address them.

Criminal law constitutes an essential component of the whole legal framework operative within a given jurisdiction. The document encompasses the fundamental ideas and regulations employed in the identification of banned actions that warrant criminal consequences. Furthermore, criminal law delineates the specific conditions under which persons implicated in illegal activities may be susceptible to the prescribed sanctions. According to Moeljatno (2002), criminal law encompasses guidelines pertaining to the implementation of criminal sanctions in cases when an individual is suspected of engaging in unlawful activities.

The aforementioned legislation possesses a persuasive and obligatory character, hence giving rise to repercussions stemming from its execution. The ramifications manifest as

punishments, encompassing both criminal penalties and additional measures (maatregel) (Ramadhani et al., 2013).

Therefore, Mertokusumo's view illustrates that criminal law is known as the "ultimumremedium", which means it is the last resort in dealing with a situation. This notion underscores the need of employing criminal law as a measure of last resort subsequent to careful consideration of a range of other approaches. This is emphasized to recognize the serious impact that may arise from the application of criminal punishment (Mertokusumo, 2007).

The historical development of criminal law in Indonesia may be traced back to the legal framework established by the Dutch colonial administration over the 350-year colonial era. Consequently, the criminal law framework in Indonesia continues to be based on the concepts of Dutch criminal law, primarily manifested in the *Wetboek van Strafrecht* (WvS) or KUHP. Therefore, there is a significant need to update the criminal law in order to build a more modern and relevant national criminal law system (Siregar, 2013).

Efforts are presently underway to undertake the redevelopment of criminal law, a comprehensive framework that incorporates several ideas. This statement demonstrates a deliberate attempt to critically analyze and reassess the field of criminal law within the context of socio-political, socio-philosophical, and socio-cultural frameworks that underpin social policy, criminal law, and law enforcement in Indonesia (Arief, 2010).

The process of reforming the criminal law in Indonesia holds significant significance, primarily in establishing a domestic criminal law system to supplant the inherited Dutch colonial-era criminal law system. The legal system referred to as the *Wetboek van Strafrecht Voor Nederlands Indie* 1915 may be traced back to its predecessor, the Dutch *Wetboek van Strafrecht* 1886 (Muladi, 1997). As previously elucidated, the Indonesian populace exhibits a resolute commitment towards effectuating a comprehensive reform of criminal legislation, imbued with profound significance.

Criminal law reform encompasses a more comprehensive scope, involving endeavors to realign and rejuvenate the criminal justice system in accordance with the fundamental socio-political, socio-philosophical, and socio-cultural principles that serve as the foundation and normative principles, as well as the desired essence, of criminal law

(Muladi, 1997). The New Criminal Code maintains the application of the principle of material legality, which encompasses the notion that an act is deemed unlawful not only based on formal legal requirements but also on its violation of substantive legal provisions (Suartha, 2015). Furthermore, the New Criminal Code has vulnerabilities in addressing newly emerging forms of crimes that have yet to be addressed.

In fact, the old Criminal Code tends to be outdated and less responsive to new trends and types of crimes emerging today. This often leads to legal loopholes for modern types of crimes. Of course, this condition has the potential to jeopardize the effectiveness of the criminal law enforcement process.

Legal reform, particularly within the domain of criminal law, is an imperative requirement that cannot be disregarded, owing to the ongoing evolution of societal expectations for justice that necessitate adaptation. Nevertheless, during the deliberation of the Draft Criminal Code (RKUHP) in the DPR, many clauses have garnered significant scrutiny from civil society. There are concerns that these articles could result in an excessive increase in criminalization. A number of legal institutions have conducted in-depth reviews of key articles in the New Criminal Code and provided their views and defenses on this issue (Irianto, 2022).

On December 6, 2022, a significant event occurred when the Draft Criminal Code (New Criminal Code) was formally enacted into law at a plenary session of the House of Representatives of the Republic of Indonesia. According to the Ministry of Law and Human Rights (2022), This particular move signifies the commencement of a novel epoch in the realm of criminal law reform within the context of Indonesia. For around 104 years, from 1918 to 2022, Indonesia has used the Dutch Criminal Code known as *Wetboek van Strafrecht* (WvS) (Setiadi, 2017).

Even when Indonesia became independent on August 17, 1945, the principle of concordance of the *Wetboek van Strafrecht* (WvS) was still maintained as the basis of criminal law in this country (Hakim, 2022).

One of the aspects considered in this renewal effort is the inclusion of "laws prevailing in the community" or what is often referred to as living law. This arrangement is embodied in Article 2 of the New Criminal Code as follows (State

Secretariat of the Republic of Indonesia, 2022):

Article 2

- (1) "The provisions referred to in Article 1 paragraph (1) shall not prejudice the applicability of living law which determines that a person should be punished even though the act is not regulated in this Law."
- (2) "The living law as referred to in paragraph (1) applies where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and legal principles recognized by civilized society."

This article elicits divergent perspectives from several stakeholders. According to the viewpoint expressed by Prof. Komariah E Sapardjaja, a former Supreme Court Justice, there exists an inconsistency between Article 2, paragraph (1) and Article 1, paragraph (1) of the New Criminal Code. The central focus of her argument pertains to the justification for Article 1, paragraph (1) of the New Criminal Code, which is derived on legal principles. Conversely, Article 2, paragraph (1) of the New Criminal Code pertains to the concept of unwritten law, sometimes known as living law.

On the other hand, a different view is presented by Sulistyowati in her writing. According to him, if living law is considered the same as customary law directly, then this can actually create problems. She argues that customary law is not a stationary entity, but rather experiences interaction with other laws, and through this transformation produces a "hybrid" type of law that is constantly changing and new (Irianto, 2022).

Customary law has become widespread as indigenous peoples have migrated to new areas without boundaries that have formed new communities. In these places, they have established a "biculturalist" identity. In addition to upholding traditional values and customary laws pertaining to life cycle events such as birth, marriage, death, inheritance, and ownership rights over natural resources in their respective regions of origin, individuals also assimilate new values, laws, and lifestyles that align with their new living environment.

Finding and mapping customary law across the vast archipelago is no easy task, especially when it is done with a

romanticized perspective of old adat. In a previous endeavor, Van Vollenhoven undertook the task of delineating the indigenous populations inside the Dutch East Indies by partitioning the region into 19 distinct customary regions. Nonetheless, this methodology faced scrutiny due to its heavy reliance on anecdotes from Indonesian students enrolled at Leiden University during that period, leading to its classification as a work of speculative fiction.

Customary law has a much deeper complexity than can be codified. Especially in the current era, attempts to re-codify it can reduce the essence and richness of customary law itself (Lintang et al., 2021).

Disputes and differences of opinion regarding dynamic legal approaches are inevitable. However, in the context of science and especially when discussing criminal law, there is the concept of progressive law that has a significant role in Indonesia. The idea of progressive law was introduced by Prof. Satjipto Rahardjo and proposed that in legal development, the important aspect is that the law should serve human needs, and not the other way around, namely that humans should be subject to the law.

In the progressive view of law, there is an emphasis on the importance of understanding and responding to changes in society as well as evolving social values. Law is seen as a tool to achieve social goals and justice, rather than just a norm that must be followed without considering the social context and human values.

But, of course, there are also different viewpoints. Some individuals may argue that too much flexibility in the law can lead to vagueness in legal boundaries, compromise legal certainty, and result in multiple interpretations.

However, progressive legal ideas have made valuable contributions in questioning the role of law in society and how law can better serve the goals of justice and human dignity in an ever-changing context. The underlying basis of this argument is founded on the recognition that the field of law has attained a state of "deep ecology," a concept that encompasses the notion of anthropocentrism.

Anthropocentrism is a view that focuses on the central role of humans, with the belief that humans have the capacity to create, feel, speak, create, and think to the extent permitted by God. In this view, the law does not simply make decisions

without considering their

impact on the environment. (KBBI, 2023). The concept that humans are "khalifah fil ardh" or rulers of the earth is the basis of the understanding that God gives dignity and respect to His creation. Therefore, man-made laws should not reduce the degree of dignity and respect given by God, and laws should not contradict these values recognized in religious teachings.

In this context, laws must reflect the values and ethics adopted by humans as caliphs or rulers of the earth, and must not contradict the respect and dignity given by the Creator. Thus, laws made by humans must always be in harmony with religious principles and human values.

This page provides a comprehensive description of the "living law" system inside the New Criminal Code. However, in this context, it is important to understand the urgency and impact of such arrangements, especially when viewed from a progressive legal perspective.

The necessity to regulate the concept of "living law" under the New Criminal Code is driven by the imperative to adapt to societal developments, including shifting values, norms, and social developments that change over time. By adopting this approach, the law has the potential to remain relevant and effective in addressing new challenges that arise, such as modern crimes or previously unregulated behavior.

From a progressive legal perspective, the "living law" arrangement has many merits. The concept of progressive law emphasizes the importance of laws that are responsive to social and environmental changes, as well as prioritizing justice and human dignity. By incorporating the concept of "living law" in the New Criminal Code, the law will be better able to adjust to the evolving values of society.

However, as with any legal change, there are also potential challenges and risks. "Living law" arrangements need to be implemented carefully so as not to blur legal boundaries and legal certainty. Diverse interpretations and possible abuse by law enforcement officials are issues of concern. In addition, there may be disagreement in defining a clear boundary between formal law and values that change over time.

Maintaining legal clarity is a crucial consideration that must be carefully balanced with the imperative for prompt action. If the regulation of "living law" in the Criminal Code is applied judiciously and in alignment with the tenets of progressive jurisprudence, it has the promise of yielding

favorable outcomes in addressing the needs of a changing society.

Research Methods:

Every study in the field of law is basically normative in nature (Marzuki, 2009). However, there are various methodological approaches. One type of study is the normative-conceptual approach, where this approach not only focuses on analyzing the laws and regulations (lex) that govern society, but also explores the norms that apply in people's lives as well as experts' views on the norms and values lived by society in achieving harmony. In this context, The objective of this study is to investigate the consequences that arise from the implementation of Article 2 of the Criminal Code in relation to the notion of "living law" and its impact on legal certainty throughout the society. This study also seeks to understand the legal implications academically and theoretically in order to develop a deeper understanding of the law.

Problem Formulation

Based on the description and explanation, the author formulates the problem, how is the concept of "living law" regulated in the Criminal Code (KUHP) in the perspective of progressive law?

Results and Discussion

1. Construction of Living Law in the New Criminal Code

The ratification of the RKUHP holds significant importance within the broader context of the ongoing criminal law reform process. Criminal law reform encompasses the initiatives undertaken by a nation to refine or restructure the fundamental principles and regulations governing criminal law within its jurisdiction. In the present environment, criminal law reform primarily encompasses the realm of criminal law politics. Criminal law politics refers to the governmental endeavor within a nation to shape the trajectory of criminal law policy. This endeavor is grounded in the legal requirements of society and serves as a means to establish equitable regulation of criminal law, aligning with the State's ambitions (Nasution, 2021) (Nasution, 2021).

In the Indonesian context, criminal law reform and criminal law politics have an orientation to be in accordance with the substance of the state's legal ideals, namely Pancasila.

Pancasila in this case has an important role not only as a basic principle of the state (*staatsfundamentálnorm*), but also as a legal guideline that guides the substance of criminal law in society.

Law has a central role in maintaining order, security and peace within the framework of a social system that involves relationships between individuals or groups of individuals. The presence of rules provides guidelines for assessing an action, whether the action is in accordance with the prevailing norms in the social system, or on the contrary, may cause disturbances. The primary objective of these regulations is to maximize societal peace and security. The objective is to mitigate potential harm to the parties concerned, mitigate instances of unfairness amongst persons, and maintain the harmonious functioning of social relationships (Amin & Huda, 2021); (Baek et al., 2020); (Ibrahim, 2020).

The Republic of Indonesia exhibits a multitude of viewpoints about legal matters, owing to the vast geographical diversity of its archipelago. This diversity has engendered a rich tapestry of cultures, each with its own unique outlook on many aspects, including the domain of law. Communities in Indonesia exhibit unique understandings and applications of legal principles. For instance, the Balinese community employs the village, *kala*, *patra* system, which is characterized by its adaptable nature. In contrast, the Bedouin community adheres to sacred principles that dictate the prohibition of connecting short objects and cutting long objects. Every community group have distinct traits and legal attributes.

In every society, law always exists and undergoes growth and development, which then becomes a guide in behavior. This law is known as "the living law," which takes the form of customs, traditions, beliefs, and so on. The living law has a role that is no less important than positive law in regulating human interaction. In fact, Steven Winduo ³ states that without customary law, humans would not have survived for more than 50,000 years.

This variety of community forms reflects the characteristics and characteristics in accordance with the cultural views that have been inherited for a long time and maintained by community groups for generations (Yudho & Tjandrasari, 2017). In the present situation, it is imperative to grasp the entire understanding of the legal position, as it pertains to the *volkgeist* or the collective spirit of the country.

This entails considering the ontological, historical, and genetic dimensions of law (Isdiyanto, 2018).

The field of law is intrinsically intertwined with the fabric of community existence, since it is the community itself that serves as the fundamental impetus for the establishment and development of legal systems. The law primarily arises as a means of addressing societal ties and upholding order within the community's social interactions (Syamsudin, 2018). This principle is reflected in the well-known expression of Marcus Tullius Cicero, namely “ubi societas ibi ius” which translates as “Where there is society, there is law” in the Indonesian context. The inseparable relationship between law and society is an eternal one, as society is the “subject of law”. Therefore, it is not surprising that society is referred to as a “fabric of rules”, which refers to the fabric of rules in which law emerges as norms that regulate social life in society (Mebri, 2017).

The term “the living law” was originally introduced by (Eugen, 1963) For Eugen Ehrlich, the development of law is centered on society itself, not on the process of law formation by the state, judge decisions, or the development of legal science. Ehrlich wanted to convey that the main source of law is society, and law cannot be separated from the reality of its society. Based on this principle, Eugen Ehrlich, explained that “the living law” is the law that affects people's lives, even though it has not been stated in the form of formal law.

In Indonesia, there is an attempt to accommodate the concept of “living law” by including it in Article 2 of the Criminal Code. This article states “that the law that lives in the community can be the basis for punishing someone, even if the act is not regulated in the law. Article 2 Paragraph (2) then explains that the law that lives in the community as described in Article 2 Paragraph (1) applies in the place where the law exists, as long as it is not contrary to the law and in line with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and legal principles recognized by civilized society.” The formulation in the Criminal Code is as follows (State Secretariat of the Republic of Indonesia, 2022):

1. “The provisions referred to in Article 1 paragraph (1) shall not prejudice the applicability of the law living in the community which determines that a person should be punished even though the act is not regulated in this Law.”

2. "The law that lives in the community as referred to in paragraph (1) applies where the law lives and as long as it is not regulated in this Law and in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia Human Rights, and legal principles recognized by civilized society."

The statement "the law that lives in the community that determines that a person should be punished" can be understood as referring to customary criminal law. The term "living law" as used in this article pertains to the ongoing applicability and evolution of legal norms within the context of Indonesian society. In several parts of Indonesia, there exist uncodified legal rules that are effectively enforced and serve as regional laws, governing the circumstances under which individuals may be subjected to criminal penalties. In order to provide a legal framework for the implementation of customary criminal law, it is essential for the government to undertake the process of gazettment and compilation. This process entails the incorporation of regional rules specific to each jurisdiction where customary criminal law is enforced. This compilation will encompass legal provisions that pertain to living law and are regarded as customary criminal crimes. It is crucial to highlight that this particular measure will not disregard the legal concept of legality and the prohibition of analogy, as established in the relevant legal literature (Bello, 2012; Bui, 2020; H. W. Lee & Kim, 2020; M. Y. K. Lee & Lo, 2020).

On the other hand, in the elucidation of Paragraph (2), it is explained that the phrase "applies where the law lives" refers to "a situation where the provisions of customary criminal law are applied to any individual who commits a customary criminal offense in the area." This subsection offers assistance on the establishment and identification of the relevance of customary criminal law as acknowledged by the present legislation. This paragraph delineates the legal framework for the regulation and formal recognition of customary criminal law within the purview of the Act.

According to Sulistyowati Irianto, the notion of "living law" is not only a broad word, but a significant idea that has been historically examined in several fields of legal scholarship, including legal anthropology. The term "living law" essentially denotes the legal framework that is inherently embedded into a certain community or holds predominant influence within it.

The field of legal pluralism posits that the legal system prevailing within a nation is not the exclusive mechanism governing the conduct of its populace. In the realm of daily life, customary norms, religious laws, habits, or a combination thereof, also govern interpersonal interactions among individuals. While state law possesses the utmost sovereignty and exerts the most compelling binding authority, the presence of these other legal frameworks cannot be disregarded.

State law with its ultimate authority does have significant power. In the event that an individual is found to have violated legal statutes, law enforcement agencies, acting as agents of the government, has the jurisdiction to apprehend this individual. Nevertheless, it is uncommon for individuals to come with state law in their daily lives, unless it pertains to matters of population management, civil transactions, or criminal proceedings. The laws that have the greatest direct relevance to everyday life encompass legal provisions that extend beyond the purview of state law (Carozza, 2008).

The acknowledgment of "living law" as a fundamental component of Indonesian law has been officially established via the enactment of several constitutional legislation. As an illustration, the provisions outlined in Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, Article 5 Paragraph (1) of Law No. 48/2009 concerning Judicial Power, Article 103 letters d and e of Law No. 6/2014 pertaining to Villages, and Article 6 of Law No. 39/1999 about Human Rights serve as pertinent examples. These clauses expressly govern the acknowledgment of indigenous knowledge, cultural practices, and rights of indigenous communities.

In situations where the living law is ignored or disrespected, this can result in conflict over the true meaning of the rule of law. Currently, the Republic of Indonesia's New Criminal Code gives more legitimacy to "living law" by including community laws as part

of the criminal law. This formulation process can be detailed by regulating customary criminal law through regulations in each region where the law applies.

The assertion posits that the notion of "living law" should not be confined solely to customary law, as delineated in the Criminal Code. Nevertheless, in the absence of explicit regulation within established legal frameworks, there exists the potential for authorities or law enforcement agencies to exploit

such gaps and implement unjust law enforcement methodologies. In this context, it is important to formulate and recognize "living law" explicitly in the law to avoid abuse and ensure that law enforcement is carried out fairly and in accordance with prevailing values of justice.

The aforementioned explanation establishes that the New Criminal Code acknowledges the idea of living law by explicitly acknowledging the inclusion of customary law within its framework. The accommodation of regional regulations is contingent upon the involvement of regions in the drafting process, wherein the regulations are formulated in accordance with the principles and content of local customary law. The objective of the endeavor to restrict the application of customary law, sometimes referred to as living law, is to uphold the idea of substantive legality. However, in the process, the construction of Regional Regulations to cover Article 2 of the Criminal Code with a focus on customary law, creates potential problems in the form of legal vagueness. The main concern is that Regional Regulations at the Provincial or Regency / City level that have the authority to regulate this matter should be directed to avoid non-uniformity in the regulation of customary law, so that there is no disharmony in the formulation of Regional Regulations as the implementation of Article 2 of the Criminal Code.

2. The Existence of Living Law in the Perspective of Progressive Law

When analyzed from a sociological and anthropological perspective, Indonesian society is classified as a diverse society, with a diversity of cultures, religions and customs. Hence, Indonesian culture encompasses several legal systems, including customary law and Islamic law. The notion of "The living law" has been present in Indonesian society from pre-independence era, giving rise to the phenomena of legal pluralism when distinct community groups possess their own laws with unique traits and attributes.

The Dutch colonial footprint in Indonesia has had a considerable impact on the country's legal system. As is commonly known, the Netherlands adhered to the civil law tradition, which influenced Indonesia's legal structure. One of the main characteristics of the civil law tradition is that legislation is considered the primary source of law. The view expressed by (Joseph, n.d.) that codified legislation is the primary source of law in the civil law tradition.

This is similar to the perspective of Vincy Fon and Fransico Parisi, who point out that laws have a central role as the main source of law in the civil law system, while court decisions are in a secondary position (Parisi & Farisi, 2016).

The notion of progressive legislation aligns with the concept of responsive law as proposed by Nonet and Selznick (2003). According to their perspective, the principal purpose of legislation is to safeguard human interests. According to this perspective, the objective of the legal system encompasses three fundamental components that serve as the foundation of law: fairness (*gerechtigkeit*), certainty (*rechtsicherheit*), and expediency (*zweckmäßigkeit*). The aforementioned notion underscores the imperative for the legal system to provide safeguarding of both individual and societal interests, while also ensuring the provision of justice, predictability, and advantages in its implementation (Otje, 2009).

In a general sense, law refers to a set of norms and principles that aim to be an instrument or tool for development. Its function is to direct human activities towards the desired direction in the context of development or change. In the new paradigm, the view of law has changed; it is no longer considered as a stand-alone entity, but must have the ability to interact with other elements. The main objective is to integrate and adopt the various interests that exist in society.

Within a context of a responsive legal framework, there exists considerable space for the facilitation of debate and discourse, therefore accommodating a diverse range of ideas and pluralistic perspectives that are inherent to the prevailing circumstances. This view is in line with the legal concept referred to as "responsive law". This view also reflects a transformation in the understanding of the role of law in society, which is increasingly open to diverse perspectives and interaction with the dynamics of the surrounding environment (Radbruch, 2003).

In this context, responsive law has undergone a shift from being solely based on juridical considerations to being broader and holistic, with the main goal of achieving what is known as "substantive justice". Throughout history, the concept of responsive law theory has been a central topic of discussion within the realms of legal realism and social jurisprudence. Nonet and Selznick (2003) argue that this theory advocates for a greater level of responsiveness within the legal system to address societal demands. They propose that this

may be achieved by acknowledging and broadening the scope of legal issues to encompass a wider range of concerns. With this approach, it is hoped that the law can address social challenges in a more holistic way and more in line with the values of substantial justice.

The concepts of responsive law provide promising prospects for the advancement of legal development in Indonesia. The historical emphasis on the positivist method within the law enforcement tradition has been found to result in legal outcomes that exhibit reduced efficacy when implemented inside society. The advent of responsive legal theory offers a promising avenue for redirecting law enforcement towards greater responsiveness to the prevailing societal ideals.

The concept of responsive law provides an opportunity for the law to be more open to social dynamics and change. By considering various perspectives and community values, the law can be directed to better accommodate social needs and demands. This means that the law is not just a set of norms that must be followed, but also a tool that can provide solutions that are more in line with the realities and aspirations of society.

Therefore, responsive legal theory brings hope for law enforcement that is more adaptive, inclusive, and sides with the values of substantial justice recognized by society. With the adoption of these principles, it is expected that the resulting legal products will have a more positive and effective impact in solving various existing social problems.

In their work, Nonet and Selznick (2003) identify three fundamental categories of law within a given community:

1. **Repressive Law:** In this classification, law functions as a tool of power used to enforce obedience and control people's behavior. Law is used as an instrument to enforce norms and rules by using sanctions and repression. Its main purpose is to maintain social order by suppressing actions that are considered unlawful.
2. **Autonomous Law:** This classification refers to law as an institution that has autonomy or
3. **Independence Law:** is seen as a system that has the capacity to maintain its own integrity and protect society from chaos or excessive interference from other parties, such as government or political power. Law in this view emphasizes the values of justice and the protection of

individual rights.

4. **Responsive Law:** In this classification, law is seen as a facilitator or tool to respond to social needs and aspirations. Law focuses not only on enforcing norms, but also on creating solutions and responses that are appropriate to developments and changes in society. The aim is to make a positive contribution towards solving social problems and achieving substantial justice.

This responsive law approach brings a more inclusive view of the role of law in society. By emphasizing responses to social needs and aspirations, this approach seeks to create law that are more adaptive and effective in the face of evolving social dynamics (Nonet & Selznick, 2003).

Responsive law is characterized by an attitude that prioritizes the attainment of outcomes or objectives outside the confines of the legal system. This approach posits that the legal system should not be regarded as a construct necessitating control or subjugation, but rather as a construct open to negotiation. One notable characteristic of responsive law is its focus on discerning the implicit values inherent in legislation and policies.

In the responsive law model, there is disagreement with the doctrinal approach which is considered too standardized and inflexible in legal interpretation. Responsive legal products are made through a participatory process, which involves various elements of society, both individuals and groups. This process is also aspirational, where the source is the desire and will of the community itself. In this case, the legal product does not only reflect the ruler's desire to legitimize his power, but focuses more on the welfare of society as a whole. The main purpose of responsive law is to achieve greater interests, namely the welfare of society, not just for the benefit of the ruler or the elite.

The concept of progressive law, as put out by Satjipto Rahardjo, is grounded on the notion that law serves as an institutional framework designed to steer individuals towards a state of equitable, successful, and contented existence. This perspective is grounded in the fundamental premise that the concept of law is not to be regarded as an immutable and inflexible entity, but rather should possess the capacity to fulfill the requirements of humanity (Rahardjo, 2006a).

In a progressive legal perspective, the law does not only function as a binding rule, but also as a tool to create better

social conditions. The adaptability of law to evolving societal requirements, together with its capacity to contribute positively to the overall welfare of society, is vital. Progressive legal perspectives believe that the primary objective of law is to safeguard human pleasure and well-being, extending beyond the mere preservation of formal standards.

The motivation to promote the evolution of national law stems from apprehensions over the predominant emphasis of practical legal research on the regulation, order, and legal certainty paradigm, which therefore results in a lesser consideration for the paradigm of human welfare. In this particular context, Satjipto Rahardjo has emphasized the essential distinction that exists between practical legal science, which prioritizes the regulatory paradigm (rule), and progressive legal science, which aligns with the human paradigm (people). The incorporation of the human paradigm within progressive legal research leads to an increased emphasis on behavioral aspects and the human experience. This means that progressive legal science does not only focus on the preparation of rules and regulations, but also pays attention to how the law can

influence human behavior and provide a better experience for them. In this context, progressive legal science encourages prioritizing human welfare and positive impacts on society, not just the formal and technical aspects of the law itself (Rahardjo, 2006a).

Progressive legal science places significant emphasis on the notion that law serves the interests and well-being of human beings. Conversely, practical legal science often observes that individuals may at times prioritize adherence to legal principles and reasoning over their own needs and desires. The advancing legal science method presents a notable advantage in this regard. The prioritization of persons in progressive legal science renders this method active and critical rather than passive or totally compatible with current regulations.

In progressive legal science, a critical attitude towards the law is emphasized because its main goal is to ensure that the law does not only comply with formal and technical aspects, but also has a positive impact on society. Therefore, this approach encourages questioning and assessing existing laws from the perspective of humanity, justice, and human welfare. This critical attitude allows progressive legal science to update and

develop laws that are more relevant to social change and the needs of society (Rahardjo, 2006b).

The legal system should possess the capacity to adjust to evolving circumstances, effectively address these transformations by relying on well-established principles, and prioritize the welfare of society by considering the ethical dimensions and capabilities of legal practitioners. According to Rahardjo (2009), the perspective of Satjipto Rahardjo emphasizes the significance of law in revealing and examining the deficiencies inherent in contemporary legal methodologies that are grounded in positivism, legalism, and a linear framework when dealing with diverse legal issues.

Progressive law embodies the essence of liberation, namely independence from adherence to conventional legal traditions characterized by legalism and linearity. From the standpoint of progressive legal theory, the process of legal transformation no longer centers solely on regulatory measures, but rather emphasizes the ingenuity of legal agents in effectively implementing the law within the specific temporal and spatial circumstances. Legal actors that use a progressive strategy have the ability to effectuate modifications by employing innovative interpretations of current legislation, so circumventing the need to await official rule revisions.

Progressive law, akin to the notion of *interessenjurisprudenz*, does not seek to eliminate established regulations, in contrast to the *frei rechtslehre* school. However, in contrast to legism, which views rules as unchangeable principles, or analytical jurisprudence, which focuses solely on formal logical processes, progressive law adopts a more comprehensive perspective. According to Tanya et al. (2013), it is acknowledged that each legal judgment must include both regulations and social reality or requirements as two crucial components.

Progressive jurisprudence, interest jurisprudence, and legal realism have a same objective, namely prioritizing human interests and needs within the framework of the legal system. According to Satjipto Rahardjo, the scope of law enforcement extends beyond the basic implementation of laws and processes, commonly referred to as black letter law, due to the potential variability in its quality and intensity. Therefore, law enforcement based on morality is needed, which involves utilizing the spiritual potential that exists in humans. This aims

to encourage law enforcement that is carried out with moral awareness, leading to the understanding that the implementation of the law can also be an active role in carrying out spiritual values (Raharjo et al., 2018).

The formulation of Article 2 of the Criminal Code aims to include the principles of law enforcement and justice, which are fundamental to the core of the legal system. This method ensures the preservation of the principle of legality, while placing a greater focus on the notion of material legality. This entails not only adhering to the explicit provisions of legislation, but also acknowledging and safeguarding the underlying legal principles of the dynamic legal system. There has been a significant movement in the approach to law enforcement, moving away from the former emphasis on legal certainty as the primary goal. This shift involves a transition from a framework based on formal legality within the Criminal Code to one that prioritizes a more substantive understanding of the law.

In this case, the shift means that the understanding of law does not only focus on the formal form of legal regulations, but also on the substance and values contained therein. Existence the living law cannot be ignored because this will result in injustice. Hence, it is imperative for criminal law enforcement to duly acknowledge and uphold the esteemed societal norms prevalent in Indonesia. Hence, the primary aim of law enforcement is not alone to establish legal certainty, but also to uphold justice within society. This paradigm is in line with the spiritto accommodate the noble values that live in society, so that law enforcement does not onlyfocus on formal aspects, but also on fulfilling the values of justice (Demir, 2021).

The relationship between the notion of progressive law and the concept of living law within the realm of law enforcement has a distinct correlation. Both entities have a same ethos in which the primary objective of law is to prioritize the interests and needs of human beings. Living law, which emerged from the Volgeist concept, emphasizes the importance of understanding and accommodating the lawsthat live and develop in local communities. This creates space for a more holistic understanding of the law, which better reflects the values and aspirations of the community.

In this context, living law arrangements can serve as a basis for law enforcers, especially judges, to apply the law

progressively. By delving into a deep understanding of the “living law”, judges can understand and acknowledge the values that underlie practices and norms in society. This allows them to interpret and apply the law more flexibly, taking into account the prevailing social context and values. In this sense, progressive law and the concept of living law can work together to create law enforcement that is more responsive, fair, and in line with the needs of society.

Thus, the living law provision in the Criminal Code is not only a foundation for more progressive law enforcement, but also provides guidance to law enforcers, especially judges, to carry out their duties by considering the values and aspirations of the people living in the legal context.

Conclusions

The living law, also known as customary criminal law, is governed by Article 2 of the New Criminal Code. The aforementioned legislation remains in effect and continues to exert a significant influence on the daily lives of individuals residing in Indonesia. This idea pertains to circumstances whereby acts are governed by the legal framework of the respective community.

The principle of living law serves as the foundation for law enforcement officers, particularly judges, to employ a more progressive approach in the application of legal principles. It allows them to go beyond the strict limits of the formulation of existing articles, by exploring a deep understanding of the living law. Thus, the living law approach provides flexibility for law enforcers to apply the law in a way that is more sensitive to the social context and needs of society, and overcomes the limitations of conventional legal approaches.

Author Contribution

Khoirunnisa: Conceptualization, Methodology, Validation, Data curation, Resources, Formal analysis, Supervision, Writing – review and editing. **Didi Jubaidi:** Conceptualization, Methodology, Investigation, Validation, Data curation, Resources, Formal analysis, Writing – original draft and editing

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