



Reconciling the Principle of Legality and Living Law in Criminal Law: A Model of Limited Legality Based on Judicial Verification

Nisa Fadhilah¹, Adinda Akhsanal Viqria²

^{1,2} Faculty of Law, Universitas Muhammadiyah Kotabumi, Lampung, Indonesia.

ABSTRACT: This study aims to analyze the problem of legal certainty in the application of living law in criminal law, particularly following its recognition in Government Regulation No. 55 of 2025. The integration of living law without clear normative boundaries has the potential to create legal uncertainty, disparity in rulings, and uncontrolled expansion of judicial discretion. This situation highlights a tension between the need for legal certainty, as guaranteed by the principle of legality, and the demand for substantive justice that exists within society. This study employs a normative legal method with a conceptual and statutory approach. Qualitative analysis is conducted to examine the relationship between the principle of legality and living law, as well as to formulate a normative model capable of reconciling the two. The research findings indicate that the primary issue does not lie in the recognition of living law as a concept, but rather in the absence of clear criteria and structured verification mechanisms in its application. To address this issue, this study proposes a model of limited legality based on judicial verification, which positions the principle of legality as the primary rule, while treating living law as a secondary consideration that can only be applied through the fulfillment of cumulative requirements and strict verification mechanisms. This model implies a limitation on judicial discretion within a normative framework that is testable and accountable, thereby maintaining a balance between legal certainty and substantive justice within the criminal law system. Thus, the proposed model functions not only as a mechanism for reconciliation but also as a normative control instrument over the application of living law.

Corresponding Author:

Nisa Fadhilah

Published Online:

April 24, 2026

License:

This is an open access article under the CC BY 4.0 license:

<https://creativecommons.org/licenses/by/4.0/>

KEYWORDS:

Principle of Legality; Living Law; Legal Certainty; Judicial Discretion; Judicial Verification; Limited Legality

Cite the Article: Fadhilah, N., Viqria, A.A. (2026). *Reconciling the Principle of Legality and Living Law in Criminal Law: A Model of Limited Legality Based on Judicial Verification*. *International Journal of Human Research and Social Science Studies*, 3(4), 286-295. <https://doi.org/10.55677/ijhrsss/10-2026-Vol03I04>

1. INTRODUCTION

The development of modern criminal law indicates a shift in orientation from a purely formal approach toward one that is more responsive to social dynamics (Rahardjo, 2009) (Nonet & Selznick, 1978). In this context, the recognition of living law as a living norm within society has become increasingly relevant, particularly in pluralistic legal systems (Ehrlich, 1936). Living law is viewed as capable of representing the values of justice that are actually developing within society, which in many ways are not fully accommodated in written law.

In criminal justice practice, a tendency to consider living law has begun to emerge, whether in the form of recognition of customary law or of social values developing within society (Lindsey & Butt, 2018). This phenomenon reflects the need to make the law more adaptive and contextual. However, the use of living law in practice is not always accompanied by a clear normative framework, raising questions regarding the limits and legitimacy of its application within a criminal legal system grounded in the principle of legality.

The principle of legality, as a fundamental principle in criminal law, requires that every criminal act be based on clear, pre-existing written legal provisions (Moeljatno, 2008). This principle serves to ensure legal certainty and protect individuals from arbitrary

actions (Raz, 1979). On the other hand, living law possesses a dynamic character and is not always formally documented, thereby potentially creating tension when integrated into a criminal law framework that emphasizes certainty and formality.

This tension becomes increasingly problematic when the application of living law is carried out without clear normative boundaries. Under such conditions, the scope of judicial discretion risks becoming overly broad, which could ultimately lead to disparities in rulings and legal uncertainty. On one hand, disregarding living law may result in the marginalization of the sense of justice that exists within society. On the other hand, the unrestricted application of living law without structured mechanisms can obscure the fundamental principle of legality. Therefore, an approach is needed that can balance these two interests proportionally (Tamanaha, 2011).

A number of previous studies have discussed the existence and status of living law in criminal law, including its relevance in judicial practice. However, most of these studies remain descriptive and have not yet formulated a normative model capable of systematically and operationally reconciling the tension between the principle of legality and living law. Consequently, there remains a conceptual gap in defining the boundaries and mechanisms for applying living law in harmony with the principle of legality (Griffiths, John, 1986).

The urgency of formulating a reconciliation model has become increasingly important in the context of the development of criminal law, which is required not only to guarantee legal certainty but also to reflect substantive justice (Fuller, 1969). Without a clear normative framework, the integration of living law risks causing inconsistencies in the enforcement of criminal law. Therefore, a model is needed that not only explains the relationship between the principle of legality and living law but also provides operational guidelines for its application in judicial practice.

Based on these issues, this study aims to formulate a model for reconciling the principle of legality and living law in criminal law through a normative approach. This study proposes a model of limited legality based on judicial verification, which positions the principle of legality as the primary rule, while living law is positioned as a secondary consideration that can only be applied through the fulfillment of cumulative requirements and strict verification mechanisms. This model is expected to limit judicial discretion within a normative framework that is testable and accountable, while still providing room for the realization of substantive justice.

This study employs a normative legal methodology with conceptual and statutory approaches. Through this approach, this study not only analyzes existing norms but also formulates new normative constructs that can strengthen the legitimacy of applying living law within the criminal law system. Thus, this study is expected to provide theoretical and practical contributions to the development of a more adaptive criminal law system without sacrificing the principle of legal certainty.

II. METHOD

This study employs a normative legal method, focusing on the analysis of legal norms and the principles evolving within the doctrine of criminal law. This approach was chosen because the study aims to formulate a normative framework regarding the reconciliation between the principle of legality and living law within the criminal legal system (Marzuki, 2016).

The approaches used in this study include the conceptual approach and the statutory approach. The conceptual approach is used to analyze the fundamental concepts related to the principle of legality, living law, and judicial discretion in criminal law. Meanwhile, the statutory approach is used to examine relevant legal provisions and the normative framework governing the application of the principle of legality within the criminal law system.

The legal materials used consist of primary and secondary legal sources. Primary legal sources include legislation related to criminal law, while secondary legal sources include legal literature, academic journals, and previous research relevant to the study's topic. Additionally, tertiary legal sources are used as supplementary materials to provide a more comprehensive conceptual understanding.

The legal materials were collected through library research, by tracing and examining various relevant legal sources. Subsequently, the legal materials were analyzed qualitatively using deductive reasoning, that is, by drawing conclusions from general principles to formulate more specific normative constructs.

Through this method, this study aims not only to describe existing norms but also to formulate a normative model of limited legality based on judicial verification as a form of reconciliation between the principle of legality and living law. Thus, the approach used enables this study to produce conceptual contributions applicable to criminal judicial practice.

III. RESULTS AND DISCUSSION

3.1 The Principle of Legality in Criminal Law

The principle of legality is a fundamental principle in criminal law that asserts that no act can be punished without a prior legal provision regulating it (*nullum crimen, nulla poena sine lege*). This principle serves as the primary instrument in ensuring legal certainty and protecting individuals from arbitrary actions in the enforcement of criminal law (Fletcher, 1998). Thus, the principle

of legality not only has a normative dimension but also functions as a mechanism to limit state power.

In its development, the principle of legality is no longer understood in a purely formalistic manner but is also linked to the need to deliver justice within a dynamic social context. An overly rigid approach to the principle of legality risks ignoring the evolving social realities within society, particularly in the context of a pluralistic society. This indicates that the absolute application of the principle of legality does not always address demands for substantive justice (Ashworth & Horder, 2013).

However, flexibility in interpreting the principle of legality also carries its own risks. Weakening the principle of legality, particularly through the expansion of legal sources beyond written norms, risks blurring the boundaries of what is criminally punishable. This situation could ultimately lead to legal uncertainty and create room for inconsistent interpretations in judicial practice. From this perspective, the principle of legality must be upheld as a clear normative boundary to prevent uncontrolled criminalization (Duff, 2010).

Thus, it can be understood that the principle of legality is in a dilemma between the demands of legal certainty and the need for substantive justice. This tension indicates that an approach is needed that not only preserves the function of the principle of legality as a guarantee of legal certainty but is also capable of proportionally accommodating social dynamics. Therefore, a normative framework is required that can maintain a balance between these two interests without sacrificing the fundamental principles of criminal law (Bedner, 2010).

3.2 The Role of Living Law in Criminal Law

Living law, as a living norm within society, represents social values that develop in an actual and dynamic manner (Cotterrell, 2006). In the context of criminal law, the existence of living law is often viewed as an instrument for delivering more contextual justice, particularly when written law fails to address the complexities of social reality. Thus, living law plays a crucial role in bridging the gap between legal norms and social practices.

In judicial practice, the tendency to accommodate living law indicates a shift in approach from a purely positivistic one toward a more contextual approach (Benda-Beckmann & Benda-Beckmann, 2006). However, the application of living law is not always accompanied by clear boundaries, raising issues regarding its legitimacy and consistency within the criminal justice system. This indicates that without a firm normative framework, living law risks being applied inconsistently.

The unwritten and dynamic nature of living law also poses challenges regarding proof and validation. Unlike written law, which has certainty in form and content, living law often depends on the interpretation of evolving social practices within society. This situation creates room for subjectivity in determining the applicability of a norm, which ultimately may affect the consistency of court rulings (Merry, 1988).

Furthermore, without clear control mechanisms, the application of living law has the potential to expand judicial discretion in an unmeasurable manner. In such a situation, judges not only act as discoverers of law (*rechtsvinding*) but also have the potential to become creators of law (*rechtsschepping*), which may conflict with the fundamental principle of the rule of law. This indicates that while living law holds significant value in achieving substantive justice, its application still requires clear boundaries.

Thus, the role of living law in criminal law cannot be separated from the need to maintain a balance between flexibility and legal certainty. Therefore, a normative model is required that can establish boundaries and mechanisms for the application of living law to ensure it remains consistent with the principle of legality (Gregorio et al., 2024).

3.3 The Problem of Legal Certainty in the Application of Government Regulation No. 55 of 2025

Conceptually, the problem of legal certainty in the application of living law is not merely technical but reflects structural issues within the criminal justice system. When unwritten norms serve as the basis for law enforcement, there is a shift from a rule-based system toward a system increasingly reliant on interpretation. This shift directly implies a decline in the level of legal predictability, which is an essential element of the principle of legality (Ario et al., 2025).

The recognition of “living law” in the national criminal legal system through Government Regulation No. 55 of 2025 is fundamentally intended as an effort to accommodate the social values that are alive in society. However, this regulation actually leaves a number of fundamental issues related to legal certainty. These issues are not merely technical but also touch upon fundamental aspects of criminal law, particularly regarding the principle of legality as a limiting principle.

3.3.1 The Ambiguity of the Definition of Living Law

One of the main problems with Government Regulation No. 55 of 2025 is the lack of a clear operational definition of “living law.” Although the regulation acknowledges the existence of living law within society, there are no clear criteria for identifying the existence and scope of such norms (Hidayat et al., 2025).

The absence of this definition raises serious implications in the context of criminal law, which demands clarity of norms (*lex certa*). Without clear boundaries, it is difficult to determine whether an act can be classified as a criminal offense. This indicates that

recognizing living law without conceptual clarity actually risks undermining the function of the principle of legality as a guarantee of legal certainty (Febrianty et al., 2023).

Furthermore, this lack of clarity opens the door to uncontrolled expansion of interpretation. Social norms can easily be drawn into the realm of criminal law without undergoing an adequate legislative process. This situation has the potential to blur the boundaries between social norms and legal norms, which ultimately reduces legal certainty in the enforcement of criminal law.

3.3.2 Absence of a Normative Verification Mechanism

Beyond the issue of definition, another fundamental problem is the absence of a clear verification mechanism regarding the existence of living law (Lubis et al., 2025). Government Regulation No. 55 of 2025 does not provide detailed provisions regarding the procedures or evidentiary standards that must be met to ensure that a norm is truly alive and recognized within society.

In judicial practice, this situation leads to a high degree of reliance on judicial discretion. Without standardized guidelines, judges may rely on a variety of inconsistent sources, ranging from expert testimony to perceptions of social practices. Consequently, evidentiary standards become inconsistent and difficult to objectively assess.

The absence of this verification mechanism not only leads to inconsistent rulings but also undermines accountability in law enforcement. Decisions based on norms that are not objectively verified have the potential to erode trust in the judicial system. In the long term, this situation can erode the legitimacy of criminal law itself.

3.3.3 Potential for Disparity in Rulings

The lack of clarity in definitions and the absence of verification mechanisms directly contribute to the emergence of disparity in rulings. In a system that accommodates “living law” without clear parameters, judges in various regions may apply different standards in assessing an act (Andra, 2020).

This disparity occurs not only in the classification of acts but also in the level of severity of the offense and the type of sanctions imposed. An act considered serious in one region may be viewed differently in another (Laia, 2025). This situation indicates that without uniform standards, criminal law loses its fundamental character as a predictable system.

From the perspective of the principle of legality, disparity in rulings is a serious issue because it directly relates to the protection of individual rights. When standards for the application of the law are inconsistent, individuals cannot predict the legal consequences of their actions. This contradicts the primary function of the principle of legality as a guarantee of legal certainty (Nurdin, 2016).

Furthermore, this condition reflects a shift from “law as a system of rules” toward “law as a system of discretion,” which opens the door to criminalization based on interpretations that are not fully measurable (Moeliono & Wulandari, 2015).

3.3.4 Unchecked Expansion of Judicial Discretion

The recognition of “living law” in Government Regulation No. 55 of 2025 implicitly expands the scope of judicial discretion (Yanto & Hikmah, 2023). This discretion is not only related to the interpretation of written norms but also encompasses the determination of the applicability of unwritten norms.

Although discretion is an integral part of judicial practice, an expansion not balanced by normative limits has the potential to lead to unchecked authority. In such circumstances, judges not only act as discoverers of law (*rechtsvinding*) but also have the potential to become creators of law (*rechtsschepping*), which contradicts the fundamental principle of the rule of law.

This situation indicates a risk of subjectivity in the enforcement of the law. Non-legal factors, such as a judge’s social background and personal perspective, can influence the assessment of living law. In certain situations, this can even open the door to the abuse of authority.

3.3.5 Threats to Legal Certainty

The accumulation of these various issues ultimately leads to a threat to legal certainty (Toatubun & Djamaludin, 2024). In the criminal justice system, legal certainty is a cornerstone that ensures the law is applied consistently and predictably.

In the context of Government Regulation No. 55 of 2025, the recognition of “living law” without clear parameters actually has the potential to weaken legal certainty (Ramadhani, 2024). Unwritten norms that are not clearly defined and not objectively verified are difficult to use as a stable foundation for the enforcement of criminal law.

Furthermore, this situation indicates that the primary issue does not lie in the recognition of living law as a concept, but rather in the absence of an adequate normative framework to regulate its application (Wanggai et al., 2026). Without such a framework, the integration of living law risks conflicting with the principle of legality.

Overall, these various problems indicate a shift from a criminal law system based on certainty toward one based on discretion. This shift risks transforming criminal law from an instrument of certainty into an instrument of excessive flexibility, which ultimately

contradicts its fundamental character as the *ultima ratio*.

Therefore, a normative model is needed that not only acknowledges the existence of living law but also establishes clear boundaries and structured judicial verification mechanisms. Such a model is essential as a control mechanism to maintain the balance between legal certainty and substantive justice. A discussion of this model will be elaborated upon in the following section.

3.4 The Problem of Legal Certainty in the Application of Government Regulation No. 55 of 2025

The recognition of “living law” within the framework of Government Regulation No. 55 of 2025 not only raises normative issues but also has significant implications for criminal justice practice, particularly regarding the expansion of judicial discretion. In the criminal justice system, judicial discretion is essentially an inevitability, particularly in interpreting legal norms and adapting the law to the concrete context of a case. However, such discretion must, in principle, remain within the boundaries defined by the principle of legality (Raz, 1979).

In situations where legal norms are clearly formulated and written, the scope of judicial discretion is relatively controlled because it is bound by strict normative limits. Conversely, when the legal system accommodates unwritten norms such as “living law,” this scope of discretion becomes broader. Judges no longer merely interpret existing norms but also play a role in determining the existence and applicability of social norms as the basis for legal considerations.

Conceptually, this expansion of the role shifts the judge’s position from merely being “the mouthpiece of the law” to becoming a more active actor in legal construction. On one hand, this shift can be viewed as a form of adaptation to the needs of substantive justice. However, on the other hand, without clear normative boundaries, this situation has the potential to raise serious issues regarding the consistency and accountability of judicial decisions.

From a critical perspective, this expansion of discretion also reflects a shift in the locus of power within the criminal justice system from the legislature to the judiciary. If left unchecked, this shift risks fostering judicial overreach, where judges not only interpret the law but substantively help shape new norms with criminal implications. In the context of a repressive criminal justice system, this poses a serious risk to the protection of individual rights.

One of the primary implications of this expansion of judicial discretion is the increased potential for subjectivity in decision-making. Assessments of the existence and relevance of “living law” are heavily influenced by the judge’s perspective, including their social and cultural background and understanding of local values. Without standardized criteria, these differing perspectives can result in divergent rulings on similar cases (Epstein, 1998).

Furthermore, the expansion of judicial discretion also disrupts the balance between legal certainty and substantive justice. On one hand, flexibility allows judges to consider relevant social values. On the other hand, the lack of clear boundaries reduces legal predictability, making it difficult for the public to understand and anticipate the legal consequences of an action.

Another equally important implication is the potential blurring of the line between *rechtsvinding* and *rechtsschepping*. In a situation where judges actively interpret social norms as the basis for criminal punishment, there is a risk that the resulting rulings no longer merely discover the law but also create new norms outside the legislative process. This indicates the potential for uncontrolled expansion of criminal law.

From a human rights protection perspective, this situation raises serious concerns. Given that criminal law is the most repressive instrument, any expansion of authority in its application must be balanced by strict control mechanisms. Without such controls, the risk of violations against individual rights—particularly regarding legal certainty and protection from arbitrary action—grows significantly.

In judicial practice, these implications are reflected in differing standards of proof regarding living law, variations in the assessment of the severity of violations, and inconsistencies in the imposition of sanctions. This situation not only complicates matters for those seeking justice but also undermines the consistency of the judicial system as a whole.

Thus, the recognition of living law in Government Regulation No. 55 of 2025 has significantly expanded judicial discretion, yet this has not been balanced by adequate control mechanisms. Without clear boundaries, such discretion risks evolving into unchecked authority that disrupts the balance between legal certainty and justice.

Therefore, a normative framework is needed that can limit and guide the exercise of judicial discretion in a proportionate manner. This framework must ensure that the application of living law remains within the bounds of the principle of legality, while simultaneously providing limited room for substantive considerations of justice. It is within this context that the formulation of a reconciliation model becomes crucial as a control mechanism against the expansion of such discretion, which will be discussed in the following section.

3.5 Reconciliation Model: Limited Legality Based on Judicial Verification

The reconciliation model proposed in this study constitutes a normative response to the risk of the erosion of legality arising from the integration of living law without clear boundaries. This model is not intended as an alternative to the principle of legality, but rather as a reinforcement of it through structured limiting mechanisms. Thus, this model becomes a systemic necessity to maintain a balance between legal flexibility and legal certainty within the criminal justice system.

To clarify the model's structure, the following visual representation is provided:

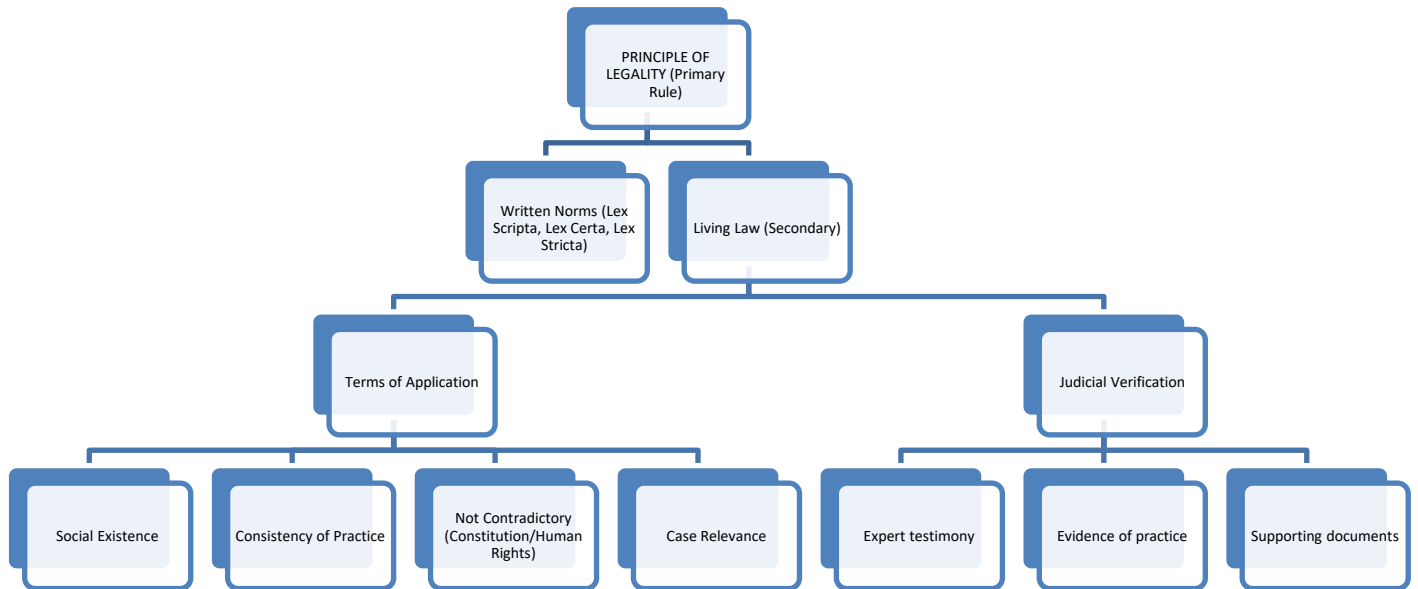


Figure 1. Structure of the Judicial Verification-Based Limited Legality Model

Source: Adapted by the author (2026)

This model is built on the principle that the principle of legality remains the primary rule in criminal law, so that written norms remain the main basis for determining criminal acts. Within this framework, living law is positioned as a secondary consideration that can only be used in a limited manner through the fulfillment of cumulative requirements and strict verification mechanisms.

To ensure that the application of living law does not create legal uncertainty, this model establishes four cumulative requirements, namely:

1. the existence of a provable social reality;
2. consistency of practice within society;
3. it does not conflict with higher legal principles, including the principle of legality and human rights; and
4. relevance to the case under review. These criteria serve to ensure that the living law applied possesses both social legitimacy and legal relevance.

Furthermore, this model emphasizes the importance of judicial verification mechanisms as instruments of normative control. Judges cannot directly assume the existence of living law but must go through an accountable evidentiary process, such as expert testimony, evidence of social practice, and documents demonstrating the applicability of the norm. Through this mechanism, the application of living law no longer depends on the judge's subjectivity but on a structured and testable evidentiary process.

Within this framework, judicial discretion remains recognized as part of criminal judicial practice, but is placed within clear boundaries. Judges are not granted the authority to create new norms, but only to identify and verify norms that are truly alive in society. Thus, the judge's role remains within the function of "rechtsvinding" (legal discovery), not "rechtsschepping" (legal creation), thereby remaining consistent with the principle of legality.

Furthermore, this model has direct implications for the limitation of judicial discretion. Through strict criteria and structured verification mechanisms, the scope of discretion is no longer unrestricted but operates within a normative framework that is testable and accountable. In this context, the judge acts as a normative verifier, not as a norm-maker.

These implications contribute to the maintenance of legal certainty, as the application of living law is not carried out arbitrarily but through measurable and consistent procedures. At the same time, this model still leaves room for the realization of substantive

justice by allowing judges to consider relevant social values when adjudicating cases.

Overall, the model of limited legality based on judicial verification demonstrates that the tension between the principle of legality and living law need not be resolved dichotomously. Both can be reconciled through a structured and controlled approach. In this regard, the model functions not only as a tool for reconciliation but also as a normative control mechanism to prevent the expansion of criminalization based on unmeasurable interpretations.

Thus, this model reinforces the integrity of the principle of legality while allowing limited room for adaptation to social dynamics. It is hoped that this model will serve as a conceptual contribution to the development of national criminal law, as well as a foundation for the formulation of more measured and accountable legal policies in the future.

3.5.1 Basic Principles of the Reconciliation Model

This model is built upon two main principles. First, the principle of legality remains positioned as the primary rule in criminal law, so that written norms remain the main basis for determining criminal acts. Second, living law is positioned as a supplementary source (secondary consideration) that can only be used under certain conditions.

Thus, the relationship between the Principle of Legality and Living Law is not one of substitution but of complementarity. Living law does not replace written law but serves to strengthen or supplement existing norms, particularly in the context of assessing substantive justice.

3.5.2 Conditions for the Application of Living Law

To ensure that the application of living law does not create legal uncertainty, clear and measurable criteria are required. In this model, living law can only be applied if it meets the following cumulative conditions:

1. Proven Social Existence : The norm must be truly alive and widely recognized within a specific society, not merely an assumption or subjective perception.
2. Consistency of Practice : The norm must be consistently applied in social practice, thereby demonstrating that it possesses social binding force.
3. Not in Conflict with Higher Legal Principles : Living law must not conflict with the constitution, human rights, or fundamental principles of criminal law, including the Principle of Legality.
4. Relevance to the Case at Hand : The norm must have a direct connection to the context of the case under review, so that its application is not speculative.

These criteria are intended to ensure that the living law used truly possesses social legitimacy and legal relevance.

3.5.3 Judicial Verification Mechanism

One of the key elements in this model is the existence of a clear judicial verification mechanism. In this regard, judges cannot directly assume the existence of living law but must go through an accountable process of verification.

Such verification can be conducted through:

1. expert testimony in the field of customary or social law;
2. testable evidence of social practice;
3. documents or records demonstrating the applicability of the norm.

With this mechanism in place, the application of living law no longer depends on the judge's subjectivity but on a structured evidentiary process. This simultaneously strengthens the accountability of rulings and reduces the potential for disparity.

3.5.4 Limits on Judicial Discretion

This model also emphasizes the importance of limiting judicial discretion in applying living law. Discretion remains necessary, but it must be within clear boundaries. Judges are not granted the authority to "create" new norms, but only to identify and verify norms that are truly alive in society.

Thus, the judge's role remains within the function of legal discovery (*rechtsvinding*), not lawmaking (*rechtsschepping*). This limitation is crucial to maintaining consistency with the Principle of Legality.

3.5.5 Implications of the Model for Legal Certainty

The application of the "limited legality based on judicial verification" model is expected to strike a balance between legal certainty and substantive justice. With clear criteria and a structured verification mechanism, the application of living law can be carried out in a more measured and consistent manner.

This model also has the potential to reduce disparities in rulings by providing more uniform guidelines for judges in assessing the existence and relevance of living law. Furthermore, by placing the principle of legality as the primary principle, this model maintains the function of criminal law as an instrument for the protection of individual rights.

Overall, the proposed reconciliation model demonstrates that the conflict between the Principle of Legality and Living Law need

not be resolved through a dichotomous approach. Instead, both can be integrated through a structured and controlled approach.

Within this framework, the limited legality model based on judicial verification functions as a normative control mechanism aimed at preventing the expansion of criminalization based on unmeasurable interpretations. In this regard, the model serves not only as a tool for reconciliation but also as an instrument to safeguard the integrity of the principle of legality in the face of the dynamics of legal pluralism.

Thus, reconciliation does not mean sacrificing one of the principles, but rather establishing a balance that allows criminal law to maintain certainty while remaining responsive to social dynamics. This model is expected to contribute conceptually to the development of national criminal law, as well as serve as a foundation for the formulation of more comprehensive legal policies in the future.

IV. CONCLUSION

Based on the discussion, it can be concluded that the recognition of living law in Government Regulation No. 55 of 2025 raises structural issues of legal certainty within the criminal law system. These issues are primarily caused by the lack of clarity in the definition of living law, the absence of standardized verification mechanisms, and the unchecked expansion of judicial discretion. This situation indicates that the integration of living law without a clear normative framework has the potential to weaken the principle of legality as a fundamental principle in criminal law.

To address these issues, this study formulates a model of limited legality based on judicial verification, which positions the principle of legality as the primary rule, while living law is positioned as a secondary consideration that can only be applied through the fulfillment of cumulative requirements and strict verification mechanisms. This model functions as a normative control instrument that limits the application of living law to ensure it remains within the framework of the principle of legality.

The application of this model implies a restriction on judicial discretion in criminal proceedings, so that it is no longer unrestricted but operates within a measurable, testable, and accountable framework. Thus, this model is capable of maintaining legal certainty while simultaneously providing space for the realization of substantive justice through consideration of relevant social values.

Overall, this study demonstrates that the tension between the principle of legality and living law need not be resolved through a dichotomous approach but can be reconciled through a structured and controlled normative model. The proposed limited “ ” legality model, grounded in judicial verification, not only strengthens the integrity of the principle of legality but also offers a conceptual contribution to the development of a more adaptive and accountable criminal law.

V. RECOMMENDATIONS

Based on the research findings, concrete steps are needed to ensure that the limited legality model based on judicial verification can be effectively implemented within the criminal law system.

First, it is recommended that lawmakers formulate clearer regulations regarding the status of living law in criminal law, including the establishment of normative boundaries and verification mechanisms that must be met in its application. These regulations are essential to prevent overly broad interpretations and maintain consistency in the application of the principle of legality.

Second, for judges as the executors of judicial power, caution is required in applying living law while adhering to the principle that the principle of legality is the primary foundation of criminal law. Judges must ensure that the application of living law is based on the fulfillment of clear criteria and through a justifiable judicial verification process, so as not to cause deviations in judicial practice.

Third, for future researchers, it is recommended to conduct an empirical study on the application of living law in criminal judicial practice to test the effectiveness of the limited legality model based on judicial verification offered in this study. Further research is also needed to explore the possibility of developing the model within the context of different legal systems.

REFERENCES

1. Alexy, R. (2000). On the Structure of Legal Principles. *Ratio Juris*, 13(3), 294–304. <https://doi.org/10.1111/1467-9337.00157>
2. Andra, J. (2020). DISPARITAS PUTUSAN HAKIM DALAM PERKARA TINDAK PIDANA NARKOTIKA DI WILAYAH HUKUM PENGADILAN NEGERI BANGKINANG. *Jurnal Panji Keadilan: Jurnal Ilmiah Nasional Mahasiswa Hukum*, 3(2). <https://doi.org/10.36085/jpk.v3i2.1198>
3. Ario, D., Situngkir, S. A., Situngkir, F., & Elviandri. (2025). Living Law, Kepastian Hukum, dan Hak Asasi Manusia: Politik Hukum dalam KUHP 2023 di Indonesia. *Lentera*, 7(1), 31–42. <https://doi.org/10.32505/lentera.v7i1.13426>
4. Ashworth, A., & Horder, J. (2013). *Principles of Criminal Law*. OUP Oxford.

5. Bedner, A. (2010). An Elementary Approach to the Rule of Law. *Hague Journal on the Rule of Law*, 2(1), 48–74. <https://doi.org/10.1017/S1876404510100037>
6. Benda-Beckmann, F. von, & Benda-Beckmann, K. von. (2006). The dynamics of legal pluralism. *Dalam Dynamics of plural legal orders* (hlm. 1–41). <https://research.wur.nl/en/publications/the-dynamics-of-legal-pluralism/>
7. Burbank, S. B. (2008). Judicial Independence, Judicial Accountability & Interbranch Relations on JSTOR. <https://www.jstor.org/stable/40544057?seq=1>
8. Cotterrell, R. (2006). *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*. Ashgate Publishing, Ltd.
9. Deviyanti, D. (2025). Konsep Asas Legalitas Terhadap Pengaturan Living Law dalam Pembaharuan Kitab Undang-Undang Hukum Pidana Terkait Fungsi Penuntutan oleh Kejaksaan Republik Indonesia pada Sistem Peradilan Pidana. *The Prosecutor Law Review*, 3(3). <https://doi.org/10.64843/prolev.v3i3.72>
10. Duff, R. A. (2010). A criminal law for citizens. *Theoretical Criminology*, 14(3), 293–309. <https://doi.org/10.1177/1362480610369784>
11. Ehrlich, E. (1936). *Fundamental Principles of the Sociology of Law*. Transaction Publishers.
12. Epstein, L. (1998). The Choices Justices Make. Lee Epstein. <https://epstein.wustl.edu/choices>
13. Febrianty, Y., Ishwara, A. S. S., Priambada, B. S., & Hulwanullah, H. (2023). The Limitations of Living Law in Indonesian Criminal Law Reform: An Effort to Realize Justice. *Jurnal IUS Kajian Hukum Dan Keadilan*, 11(2), 192–208. <https://doi.org/10.29303/ius.v11i2.1232>
14. Fletcher, G. P. (1998). *Basic concepts of Criminal law*. Oxford University Press. <https://doi.org/10.1093/oso/9780195121704.001.0001>
15. Fuller, L. L. (1969). *The Morality of Law*. Yale University Press.
16. Gregorio, E., Kusumastuti, D. A., & Kesuma, I. G. K. W. (2024). Implikasi Pelunakan Pengaturan Asas Legalitas dalam KUHPN Terhadap Konsep ‘Hukum Yang Hidup Dalam Masyarakat’. *Jurist-Diction*, 7(2), 263–290. <https://doi.org/10.20473/jd.v7i2.56124>
17. Griffiths, John. (1986). What is Legal Pluralism?: Legal Pluralism and Critical Social Analysis: Vol 18 , No 24—Get Access. *The Journal of Legal Pluralism and Unofficial Law*. <https://www.tandfonline.com/doi/abs/10.1080/07329113.1986.10756387>
18. Hart, H. L. A. (1961). *THE CONCEPT OF LAW*. By H. L. A. Hart. Oxford: Oxford University Press, 1961. Pp. Viii, 263. 21s. | *The American Journal of Jurisprudence* | Oxford Academic. Oxford University Press. <https://academic.oup.com/ajj/article-abstract/7/1/169/213851?redirectedFrom=fulltext&login=false&utm>
19. Hidayat, S., Andryani, Y., Rifa’I, I. J., & Muliani, R. Y. (2025). Pergeseran Asas Legalitas Formal ke Material dalam KUHP Baru dan Konsekuensinya terhadap Hukum Adat. *Jurnal Hukum Mimbar Justitia*, 11(1), 151–166. <https://doi.org/10.35194/jhmj.v11i1.5160>
20. Hirschl, R. (2008). The Judicialization of Mega-Politics and the Rise of Political Courts. *Annual Review of Political Science*, 11(Volume 11, 2008), 93–118. <https://doi.org/10.1146/annurev.polisci.11.053006.183906>
21. Laia, Y. A. (2025). DISPARITAS PUTUSAN HAKIM ATAS TINDAK PIDANA KEKERASAN SECARA BERSAMA-SAMA YANG MENGAKIBATKAN KEMATIAN [S1, Universitas Malikussaleh]. <https://doi.org/10/Full-text.pdf>
22. Lindsey, T., & Butt, S. (2018). *Indonesian Law*. Oxford University Press.
23. Lubis, I., Siregar, T., Lubis, D. I. S., Adawiyah, R., & Lubis, A. H. (2025). Integrasi Hukum Adat dalam Sistem Hukum Agraria Nasional: Tantangan dan Solusi dalam Pengakuan Hak Ulayat. *Tunas Agraria*, 8(2), 143–158. <https://doi.org/10.31292/jta.v8i2.401>
24. Marzuki, P. M. (2016). *PENGANTAR METODE PENELITIAN HUKUM: Edisi Revisi / Prof. Dr. Peter Mahmud Marzuki | PERPUSTAKAAN TERINTEGRASI UNIV. HASANUDDIN. Kencana*. <https://opac-library.unhas.ac.id/opac/detail-opac?id=58466&utm>
25. Merry, S. E. (1988). Legal Pluralism. *Law & Society Review*, 22(5), 869–896. <https://doi.org/10.2307/3053638>
26. Moeliono, T. P., & Wulandari, W. (2015). Asas Legalitas dalam Hukum Acara Pidana: Kritik terhadap Putusan MK tentang Praperadilan. *Jurnal Hukum IUS QUIA IUSTUM*, 22(4), 594–616. <https://doi.org/10.20885/iustum.vol22.iss4.art4>
27. Moeljatno. (2008). *Asas-Asas Hukum Pidana*. Rineka Cipta.
28. Nonet, P., & Selznick, P. (1978). *Law and Society in Transition: Toward Responsive Law*. Transaction Publishers.
29. Nurdin, F. S. (2016). REKONSTRUKSI ASAS LEGALITAS DALAM HUKUM PIDANA BERDASARKAN PRINSIP KEADILAN | Refleksi Hukum: *Jurnal Ilmu Hukum*. <https://ejournal.uksw.edu/refleksihukum/article/view/634>
30. Rahardjo, S. (2009). *Hukum progresif: Sebuah sintesa hukum Indonesia*. Genta Pub.
31. Ramadhani, M. (2024). Tantangan Implementasi Pengakuan Hukum Adat dalam Kitab Undang-Undang Hukum Pidana Baru di Indonesia. *Syntax Idea*, 6(8), 2708–3716. <https://doi.org/10.46799/syntax-idea.v6i8.4356>

32. Raz, J. (1979). Oxford Scholarship Online. https://www.philosophyandlaw.org/Syllabi/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue_%20Joseph%20Raz.pdf
33. Raz, J. (1979b). *The authority of law: Essays on law and morality*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198253457.001.0001>
34. Tamanaha, B. Z. (2011). *The Rule of Law and Legal Pluralism in Development*. *Hague Journal on the Rule of Law*, 3(1), 1–17. <https://doi.org/10.1017/S1876404511100019>
35. Toatubun, N., & Djamaludin, D. (2024). *The Dialectics of the Principle of Legality and Living Law in the National Criminal Law System Post-Enactment of Law No. 1 of 2023*. *JiHK*, 6(1), 85–94. <https://doi.org/10.46924/jihk.v6i1.253>
36. Wanggai, F. R. M., Hartono, M. S., & Parwati, N. P. E. (2026). *Penerapan Living Law Dalam Kuhp Baru Dan Pengaruhnya Terhadap Asas Legalitas Serta Kepastian Hukum Di Indonesia*. *Al-Zayn : Jurnal Ilmu Sosial & Hukum*, 4(1), 6993–6999. <https://doi.org/10.61104/alz.v4i1.4517>
37. Yanto, A., & Hikmah, F. (2023). *Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas*. *Recht Studiosum Law Review*, 2(2), 237–247. <https://doi.org/10.32734/rslr.v2i2.14162>
38. *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*.
39. *Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman*.
40. *Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana*.
41. *Peraturan Pemerintah Nomor 55 Tahun 2025 tentang Tata Cara dan Kriteria Penetapan Hukum yang Hidup dalam Masyarakat*.