




# Indonesian Criminal Code, *Living Law* and Social Control in Law Enforcement in Indonesia

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## Abstract

**Introduction:** The inclusion of the *Living Law* concept in the latest Criminal Code as a law that lives in society.

**Purposes of the Research:** This paper analyzes the dialectic of legal certainty according to the principle of legality with living law as the principle of substantive justice in criminal law reform, from the perspective of law as a mechanism of social control and its influence on the dynamics of criminal law enforcement in Indonesia.

**Methods of the Research:** This research uses a normative legal research model. Data collection is done through secondary data searches in the form of primary legal materials and secondary legal materials that are relevant to the object of the problem being studied. The approach used in the analysis is juridical-normative and then elaborated with a sociological approach through social science theories.

**Results of the Research:** The results of the research on the accommodation of living law as a basic principle of criminal law have led to a dialectic between the principle of legal certainty and the principle of substantive justice. Living law is a form of law that is not codified like state law, but rather leads to awareness and cooperation among individuals in a community, so that the function applied is to control over community behavior, so that law enforcement mechanisms run naturally in order to maintain order and public morality.

## 1. INTRODUCTION

At the beginning of 2023, the Draft Criminal Code (RKUHP), as a concept for the national criminal law reform rooted in the colonial legal system, has officially been enacted as Law Number 1 of 2023 concerning the Criminal Code. Despite being marked by pro and contra stances during its formulation, due to differing views on certain articles that are seen as potentially become catchall articles.<sup>1</sup> However, there is one of particular section specific and interesting aspect in the latest Criminal Code is the inclusion of the concept of Living Law or law that lives within society.

Historically, this change in the Criminal Code has had a significant impact on the national criminal law system, as living law becomes one of the fundamental foundations that determine the structure and characteristics of criminal law in Indonesia, which

<sup>1</sup> Kompas, "Pro Kontra RKUHP," diakses 13 Februari 2023, <https://nasional.kompas.com/read/2022/07/05/00400071/pro-kontra-rkuhp>.

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previously was heavily influenced by the legacy of the colonial government's legal system. The adoption of living law in the Criminal Code is not without controversy, with arguments supporting it viewing it as a progressive step in shaping the character and aspirations of national law, representing the interests of the Indonesian people themselves. Undeniably, the inclusion of living law in the national legal system is seen as a recognition of the realities in society regarding the values that form the basis of everyday life, as reflected in the Pancasila ideology.

On the other hand, there is a contrasting viewpoint that considers living law as potentially creating uncertainty in law enforcement. This is because the definition of living law in Article 2 of the latest Criminal Code has a very broad classification, including customs, religious laws, traditions, and other related matters.<sup>2</sup> There is a contradiction between the principle of legal certainty based on the principle of legality, where laws are formulated through formal legal procedures in countries with a civil law system, and the rules based on social control mechanisms that are typically associated with common law system countries.<sup>3</sup> Ultimately, the concept of living law in the Criminal Code is specifically filtered down to customary criminal law.<sup>4</sup>

Some research results related to living law in the dynamics of Indonesian criminal law show information including, living law or law that lives in the community towards the renewal of national criminal law has a theoretical basis and recognition from international legal instruments.<sup>5</sup> In addition, research on the relationship between living law and state law in the Criminal Code is able to raise the issue of state domination over the interpretation of living law where the concept will focus on determining whether or not a person should be convicted based on the mechanism of customary criminal law.<sup>6</sup> Such a concept in terms of the principle of legality has the potential to cause legal uncertainty and obstacles in law enforcement by the authorities, where the concept of customary crime basically has a complex nature and form.<sup>7</sup>

However, the results of other studies show a paradigm that between the principle of legal certainty and living law cannot be sharply negated, but there is a convergence or meeting point, namely law enforcement while still paying attention to the principle of

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<sup>2</sup> Ady Thea DA, "Kategori Pidana dalam PP Tentang Living Law Harus Diatur Ketat," diakses 13 Februari 2023, <https://www.hukumonline.com/berita/a/kategori-pidana-dalam-pp-tentang-living-law-harus-diatur-ketat-lt639824d7a9a9f>.

<sup>3</sup> Kompas, "Mempersoalkan Living Law Dalam KUHP Yang Baru," diakses 13 Februari 2023, <https://nasional.kompas.com/read/2022/12/19/09243351/mempersoalkan-living-law-dalam-kuhp-yang-baru>.

<sup>4</sup> Hukumonline, "Koalisi: Pasal Living Law RUU KUHP Berpotensi Menyingkirkan Masyarakat Hukum Adat," diakses 13 Februari 2023, <https://www.hukumonline.com/berita/a/koalisi--pasal-living-law-ruu-kuhp-berpotensi-menyingkirkan-masyarakat-hukum-adat-lt637b6ee23411e>.

<sup>5</sup> Tongat Tongat dkk., "Hukum yang Hidup dalam Masyarakat dalam Pembaharuan Hukum Pidana Nasional," *Jurnal Konstitusi* 17, no. 1 (6 Mei 2020): 157, <https://doi.org/10.31078/jk1717>.

<sup>6</sup> Tody Sasmita Jiwa Utama, "'Hukum Yang Hidup' Dalam Rancangan Kitab Undang-Undang Hukum Pidana (KUHP): Antara Akomodasi Dan Negasi," *Masalah-Masalah Hukum* 49, no. 1 (31 Januari 2020): 14, <https://doi.org/10.14710/mmh.49.1.2020.14-25>.

<sup>7</sup> Nella Sumika Putri, "Memikirkan Kembali Unsur Hukum Yang Hidup Dalam Masyarakat Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas," *Indonesia Criminal Law Review Indonesia Criminal Law Review* 01, no. 1 (2021), <https://scholarhub.ui.ac.id/iclr/vol1/iss1/5>.

legality but in a more flexible nature.<sup>8</sup> From various research studies that discuss the concept of living law in law enforcement in Indonesia, the author takes significance in this paper with the formulation of the problem of how the influence of the construction of living law or law that lives in society after the enactment of Law Number 1 of 2023 concerning the Criminal Code on the dynamics of criminal law enforcement in the future.

This paper will analyze the dialectic of legal certainty according to the principle of legality with living law as a principle of substantive justice by elaborating a juridical-normative approach, which will be further combined with a sociological approach, namely seeing law as a means of social control, where social control can generally be divided into two, namely formal and informal control. Therefore, this paper will explain the concept of living law in the Criminal Code in terms of the concept of social control and the relationship between formal and informal social control towards law enforcement in Indonesia today.

## 2. METHOD

This research adopts a normative legal research method. The data collection, which serves as references, is primarily obtained from legal primary sources such as legislation, as well as secondary legal materials including journal articles, research findings, and other relevant sources that support the analytical framework according to the studied subject matter. The analysis employs the legislative approach (statute approach), historical approach, and conceptual approach. Additionally, the socio-legal approach or legal science perspective from the viewpoint of social sciences supports the analysis in this research.<sup>9</sup>

## 3. RESULTS AND DISCUSSION

### 3.1 Construction of Living Law in Criminal Law Reform in Indonesia

The conceptual construction of law is often understood in the form of legislation, commonly known as positive law, rooted in the doctrine of legalism or the idea that law is synonymous with statutes,<sup>10</sup> This understanding is closely associated with the legal systems of continental European countries, known as Civil Law Systems. Such legal systems emphasize the principle of legality as the foundation for law enforcement, particularly in the context of criminal law, including in Indonesia, As stated in Article 1(1) of Law No. 1 of 2023 concerning the Criminal Code, it is mentioned that no act can be subject to criminal sanctions or actions unless based on criminal provisions established in pre-existing legislation before the act was committed.<sup>11</sup>

The principle of legality, as stated in the aforementioned article, may differ when juxtaposed with the construction of living law as law that lives within society. This is evident in the subsequent provision in Article 2(1), which emphasizes that: "The provision as mentioned in Article 1(1) does not diminish the applicability of living law within society, which determines that a person may be subject to criminal punishment even if the act is not regulated in this Law." Furthermore, in paragraph (2), it is explained that: "The living law

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<sup>8</sup> Ahmad Rif'an dan Ilham Yuli Isdiyanto, "Dediametralisasi Living Law Dan Kepastian Hukum Dalam Pasal 2 RKUHP," *Ahmad Dahlan Legal Perspective* 1, no. 1 (24 Februari 2021): 20–35, <https://doi.org/10.12928/adlp.v1i1.3555>.

<sup>9</sup> Joaneadi Efendi dan Jhonny Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris* (Jakarta: Kencana, 2016).131.

<sup>10</sup> E. Fernando M. Manullang, *Legisme, Legalitas dan Kepastian Hukum* (Jakarta: Kencana, 2016).

<sup>11</sup> Pasal 1 ayat (1), Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

within society, as referred to in paragraph (1), applies within the legal framework where it exists and is applicable as long as it is not regulated in the Law and in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and the general principles of law recognized by the international community."

The description between Article 1 and Article 2 of Law Number 1 of 2023 concerning the Criminal Code shows how the dualism of formal and material legality principles coexist. The strong principle of formal legality in the Indonesian criminal law cannot be separated from the historical roots of Western colonization, particularly the dominant characteristics of the civil law system inherited from the Netherlands. However, in essence, the applicable law in Indonesia is adjusted to Pancasila as the ideological foundation, giving rise to the concept of Pancasila as a constitutional state. In this concept, the values that develop in society are recognized as a source of material law in the formation of legislation or positive law. Therefore, it would not be appropriate for the legal system in Indonesia to adopt civil law entirely.<sup>12</sup> However, at the same time, including "living law" as a general principle in the Criminal Code can be analyzed as a reinforcement of the material legality principle, where the main significance is given to the law that considers living values, not just formal procedural law enforcement.<sup>13</sup>

From the perspective of legal pluralism, state-enacted rules do not constitute the sole dominant law shaping the patterns of societal life. Instead, in a practical sense, there are values encompassing customary law, religious law, and norms or a mixture of all these factors that hold obedience and effectiveness within society.<sup>14</sup> According to Soerjono Soekanto, that law cannot be separated from the various social and cultural value constructions and the values existing in a society. He emphasized that law is a reflection and concretization of those values<sup>15</sup>. Indeed, Eugen Ehrlich, a legal sociologist, provided a specific definition of "living law" from a sociological perspective. He viewed law as a living or tangible certainty rather than an abstract concept.<sup>16</sup> Precisely, in the context of criminal law, the concept of legal certainty cannot be limited solely to what is prescribed in legislation. It should also consider how living values or laws within society serve as a means of controlling individual behavior within a community.

When analyzed from the perspective of criminal law's political aspect, as conveyed by Mahfud MD, living law becomes a policy implemented by the government that includes the formation, repeal, or modification of laws according to the context or dynamic issues faced, based on the political configuration in parliament as the authority to enact laws.<sup>17</sup> The function of legislation in enacting laws and regulations should be understood based on the principle of representing the broad needs of the nation and state. This means that the

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<sup>12</sup> Syofyan Hadi, "Hukum Positif dan The Living Law (Eksistensi dan Keberlakuannya dalam Masyarakat)," *DiH: Jurnal Ilmu Hukum* 13, no. 26 (3 September 2018), <https://doi.org/10.30996/dih.v0i0.1588>.

<sup>13</sup> Warih Anjari, "Kedudukan Asas Legalitas Pasca Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006 dan 025/PUU-XIV/2016," *Jurnal Konstitusi* 16, no. 1 (1 April 2019): 1, <https://doi.org/10.31078/jk1611>.

<sup>14</sup> Humas FH UI, "Living Law dalam Rancangan Hukum Pidana oleh Prof. Sulistyowati Irianto," diakses 14 Februari 2023, <https://law.ui.ac.id/living-law-dalam-rancangan-hukum-pidana-oleh-prof-sulistyowati-irianto/>.

<sup>15</sup> Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum* (Jakarta: Rajawali Pers, 2020). 16.

<sup>16</sup> Eugen Ehrlich, *Fundamental Principles of The Sociology of Law* (New Brunswick: Transaction Publishers, 2002). 501.

<sup>17</sup> Moh. Mahfud MD, *Politik Hukum di Indonesia* (Jakarta: Rajawali Pers, 2017). 9.

formation of a law should not be solely oriented towards political interests.<sup>18</sup> If the law is seen as a system, then the ongoing efforts to reform the Criminal Code (KUHP) for decades become a necessity for the future development of the national legal system, as a country based on Pancasila. These changes will affect both the substantive content of legislation and the existing law enforcement mechanisms.

It is evident how the dialectic between the principles of formal and material legality influences the orientation of criminal law reform in Indonesia, driven by the need to establish a legal system that aligns with the characteristics of the Indonesian nation. This can be seen from the aspect of *ratio legis*, or the reasons behind the enactment of a law, which encompasses three aspects: philosophical, sociological, and juridical. Philosophical perspective, the Criminal Code (KUHP) emphasizes the nation's goals and principles as stated in the preamble of the 1945 Constitution. Sociological perspective, the need for a new Criminal Code becomes evident as it is seen as a real necessity for the broader society. The last is juridical perspective, the reform of the Criminal Code is necessary to ensure legal certainty, justice, and the beneficial effects of the law.<sup>19</sup>

From the various descriptions above, when juxtaposed, the conception of living law in Indonesia can be seen as a law outside the framework of legal positivism, which bases its validity on the recognition and acceptance of values that have become consensus within a community. It has a strong binding power, high compliance, and effectively influences the legal consciousness of each individual. Therefore, law cannot be reduced to various text articles within the laws established by the state. Instead, there exists a law whose validity is based on the awareness and sense of justice within the internalized society, in accordance with the principles or philosophy of the nation, namely Pancasila.

It is important to emphasize that the inclusion of living law as a principle in the articles of the Criminal Code (KUHP) needs to be re-evaluated. The conception of living law in Article 2 of the Criminal Code, which is interpreted as the basis for criminal punishment based on the appropriateness determined by the living law in society, specifically refers to customary criminal law. Moreover, the determination and enforcement of this living law will be established through Regional Regulations (PERDA).<sup>20</sup> The inclusion of customary law in the Criminal Code can indeed lead to debates regarding law enforcement from various perspectives. One example is the principle of restorative justice rooted in Western law, which provides an alternative approach to resolving cases that focuses on restoration rather than solely punishment. However, conceptually, in customary criminal law, the concept of forgiveness is recognized. Furthermore, that not all aspects of the law that exists within society are derived from the recognition of human rights.<sup>21</sup>

The issue, as mentioned in the above paragraph, is inseparable from the fundamental principle of criminal law, which is the principle of legality. According to this principle, any

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<sup>18</sup> Andi Mattalatta, "Politik Hukum Perundang-Undangan," *Jurnal Legislasi Indonesia* 6, no. 4 (2009), <https://doi.org/10.54629/jli.v6i4>.

<sup>19</sup> "Draft Naskah Akademik Rancangan Undang-Undang tentang Kitab Undang-Undang Hukum Pidana" (Badan Pembinaan Hukum Nasional), diakses 13 Juni 2023, [https://bphn.go.id/data/documents/naskah\\_akademik\\_tentang\\_kuhp\\_dengan\\_lampiran.pdf](https://bphn.go.id/data/documents/naskah_akademik_tentang_kuhp_dengan_lampiran.pdf). 161-166.

<sup>20</sup> Lihat Penjelasan Pasal 2, Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

<sup>21</sup> Rofiq Hidayat, "Polemik Living Law, Muncul Gagasan Kompilasi Hukum Pidana Adat," *Hukumonline* (blog), diakses 14 Juni 2023, <https://www.hukumonline.com/berita/a/polemik-living-law--muncul-gagasan-kompilasi-hukum-pidana-adat-lt5d2f02fe6737e/?page=2>.

act that falls within the realm of criminal law must be determined through legislation enacted by the state. The principle of legality is based on the consideration that criminal provisions must be written (*lex scripta*), clear and unambiguous (*lex certa*), and not subject to analogical interpretation (*lex stricta*).<sup>22</sup> Therefore, formulating living law within the context of customary criminal law as the basis for criminal punishment would complicate the law enforcement process due to the difficulties in mapping out the concepts of customary law and determining where and how these rules apply. This is particularly challenging in Indonesia, given its heterogeneous and diverse customary practices. Considering this, since criminal punishment is closely related to the principles of human rights, its application requires a method with strict limitations.

### 3.2 Reforming Criminal Law as a Social Control Based on Pancasila

The long-standing efforts to reform national criminal law are a progressive step in criminal law policy to achieve legal goals in accordance with the characteristics of nationhood and statehood based on Pancasila as the fundamental norms in the hierarchy of Indonesian law. This dynamic represents a significant stride towards abandoning the colonial-era legal system, which is deemed irrelevant and inadequate in representing the interests of the Indonesian nation.

One point in the reform of national criminal law in the latest Criminal Code (KUHP), as discussed in the previous sub-discussion, is the inclusion of the element of living law as a general principle for the application of criminal provisions, taking into account the realities of society. This directly impacts the direction of law enforcement, where law enforcement efforts are often closely associated with formal legal aspects through the judicial system. The enforcement of the law based on the principle of legality, with the main objective of ensuring legal certainty, often leads to a crisis where the laws established by the state may not align with the public's sense of justice. Conversely, justice according to society cannot be reduced to justice according to the law.<sup>23</sup> It can be understood that the latest Criminal Code (KUHP) adheres to a division between the principles of formal legality and material legality<sup>24</sup>. As an implication, Article 1 paragraph (1) and Article 2 paragraph (1) of the latest Criminal Code strive to integrate both the enforcement of the law that ensures certainty and justice.

Indeed, the dialectic between legal certainty and justice highlights the inherent tension between these two principles. In this regard, the Pancasila-based rule of law in the Republic of Indonesia conceptually reconciles the dualism of legal systems such as civil law and common law, which have different foundations for law formation. In countries with a civil law tradition, legislation is considered the primary source of law, and anything outside of it is not considered law because the highest orientation is legal certainty.<sup>25</sup> In contrast to civil

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<sup>22</sup> Widiati Wulandari dkk., "Laporan Penelitian Kewenangan Mahkamah Konstitusi Dalam Melakukan Judicial Review Terhadap Undang-Undang Pidana Yang Mengakibatkan Perubahan Norma Dalam Hukum Pidana Materiil Ditinjau Dari Asas Legalitas" (Pusat Penelitian dan Pengkajian Perkara, dan Pengelolaan Perpustakaan Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi, 2019).

<sup>23</sup> Sunarto Sunarto, "Asas Legalitas Dalam Penegakan Hukum Menuju Terwujudnya Keadilan Substantif," *Masalah-Masalah Hukum* 45, no. 4 (22 Oktober 2016): 252, <https://doi.org/10.14710/mmh.45.4.2016.252-258>.

<sup>24</sup> Fadly Andrianto, "Kepastian Hukum dalam Politik Hukum di Indonesia," *Administrative Law and Governance Journal* 3, no. 1 (6 April 2020): 114-23, <https://doi.org/10.14710/alj.v3i1.114-123>.

<sup>25</sup> Anjari, "Kedudukan Asas Legalitas Pasca Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006 dan 025/PUU-XIV/2016."

law systems, countries with a common law system recognize judicial precedent, or jurisprudence, as the highest source of law.<sup>26</sup> The integrative approach in law enforcement in Indonesia, combining the elements of certainty and justice, can be seen in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power. The article states that "judges or constitutional judges are required to explore, follow, and understand the legal values and sense of justice that exist in society."<sup>27</sup> Indeed, even before the draft of the Criminal Code (RKUHP) was enacted into law, the concept of living law was already accommodated within the mechanisms of the judiciary through the role of judges in examining and adjudicating cases in society.

Indeed, contextualizing the meaning of living law within the formulation of the latest Criminal Code (KUHP) poses a significant dilemma, particularly when it refers to customary law, specifically customary criminal law. The inclusion of customary law elements in the state's legal norms is considered potentially criminalizing for the community if the legal interpretation is left to law enforcement authorities. On the other hand, the diverse nature of living law within Indonesian society makes it challenging to establish a solid foundation for criminal application. This difficulty arises because the construction of customary law is inherently a dynamic and flexible legal system.<sup>28</sup>

Indeed, it can be challenging to contextualize how customary criminal law is applied in the midst of diverse social and cultural pluralism. This complexity gives rise to ambiguity, considering that the main principle in criminal law is that it must be written and clear, avoiding multiple interpretations. This situation can create a conflict, particularly regarding the principle of legal certainty. If the application of law is not carefully done through limitations set in the law, it may risk violating human rights.<sup>29</sup>

In the social sciences perspective, Soerjono Soekanto distinguishes between two forms of social control: formal control and informal social control.<sup>30</sup> The first form of control, formal control, emphasizes official institutions such as the judiciary and law enforcement agencies appointed by the state to enforce the law, including legislation.

The second form of control emphasizes social functions as a mechanism for law enforcement based on the awareness of values regarding what should be obeyed and the consequences that will be faced if violated, determined by the consensus of a community. In this pattern, the primary responsibility for law enforcement does not solely lie with the authorities but also involves the participation of the community through social institutions. These institutions may include influential figures or individuals who have a significant role in social control within the community. This bears resemblance to the principles and functions of restorative justice, where the pattern of law enforcement prioritizes alternative solutions that specifically address the needs of the affected victims and focus on holding

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<sup>26</sup> Neni Sri Imaniyati dan Panji Adam, *Pengantar Hukum Indonesia Sejarah dan Pokok-Pokok Hukum Indonesia* (Jakarta: Sinar Grafika, 2018). 52-55.

<sup>27</sup> Pasal 5 ayat (1) Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman.

<sup>28</sup> Sasmito, "Masyarakat Sipil Tolak Living Law dalam RKUHP," diakses 15 Februari 2023, <https://www.voaindonesia.com/a/masyarakat-sipil-tolak-living-law-dalam-rkuhp/5058288.html>.

<sup>29</sup> M Nabil Fadlillah, Siti Sa'adah Fauziah, dan Andian Achya D.K, "Tinjauan Yuridis Mengenai Pertentangan Hukum Yang Hidup dalam Masyarakat dalam Pasal 2 pada Rancangan Kitab Undang-Undang Hukum Pidana dengan Asas Legalitas," *AL-MANHAJ: Jurnal Hukum dan Pranata Sosial Islam* 4, no. 2 (26 November 2022): 505-14, <https://doi.org/10.37680/almanhaj.v4i2.1790>.

<sup>30</sup> Soerjono Soekanto, *Sosiologi Suatu Pengantar* (Jakarta: Rajawali Pers, 2019). 180.

offenders fully accountable for their actions.<sup>31</sup> Among the models of dispute resolution that incorporate a restorative justice approach is penal mediation, which involves various parties, including the offender, the victim, the community, and the state, with the latter serving as a supervisor.<sup>32</sup>

Indeed, when viewed from the perspective of criminal law, social control as described above directs efforts towards restoration rather than mere retaliation. It can also be directed towards preventive measures to prevent further violations of the law. Criminal law defines what actions are prohibited, prohibited, and punishable, and it includes threats or sanctions for those who commit such violations.<sup>33</sup> Furthermore, the function of criminal law encompasses two main aspects: regulating social life and maintaining order within society. However, it is important to note that not all aspects of societal conduct and morality are explicitly addressed in formal criminal law. This includes the internal states of individuals, such as their moral conscience or spiritual well-being, which may not be governed by statutory laws.<sup>34</sup>

Criminal law can be categorized into written and unwritten criminal law, although unwritten criminal rules are rarely found due to the nature and character of criminal law, which requires written laws, as embodied in the principle of *lex scripta*.<sup>35</sup> However, when discussing living law or customary law as part of customary criminal law, its application can be challenging and may reduce the meaning of customary law itself as a form of law that is not codified. This is due to the existence of diverse customs and local wisdom, where each region, with its various ethnic and linguistic backgrounds, has its own characteristics and social values that are adhered to.

The dimension of living law should be viewed broadly, considering the diversity of rules arising from various customary sources that develop within society itself.<sup>36</sup> Furthermore, the context of enforcing customary criminal law is carried out dynamically or flexibly, not rigidly as stipulated in the law, due to the methods used, such as providing advice, making agreements to comply and not repeat reprehensible acts. Therefore, the mechanisms for resolving issues do not immediately involve imprisonment or incarceration, and of course, these efforts can help alleviate the role of law enforcement officials, such as the police.<sup>37</sup>

On the other hand, the concept above focuses on individual improvement to remain within society through a dynamic form of sanction. This means that living law here interprets criminal law not only as a form of punishment or imprisonment for crimes or offenses, but as a means to instill a deterrent effect that restores the offender to their rightful

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<sup>31</sup> Hariman Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana," *Jurnal Media Hukum* 25, no. 1 (2018), <https://doi.org/10.18196/jmh.2018.0107.111-123>.

<sup>32</sup> Muhaimin Muhaimin, "Restoratif Justice dalam Penyelesaian Tindak Pidana Ringan," *Jurnal Penelitian Hukum De Jure* 19, no. 2 (26 Juni 2019): 185, <https://doi.org/10.30641/dejure.2019.V19.185-206>.

<sup>33</sup> Teguh Prasetyo, *Hukum Pidana* (Depok: Rajawali Pers, 2017). 23.

<sup>34</sup> Teguh Prasetyo, *Hukum Pidana*. 29-30.

<sup>35</sup> Sriwidodo Joko, *Kajian Hukum Pidana di Indonesia* (Yogyakarta: Kepel Press, 2019). 38.

<sup>36</sup> Nabilah Apriani dan Nur Shofa Hanafiah, "Telaah Eksistensi Hukum Adat pada Hukum Positif Indonesia dalam Perspektif Aliran Sociological Jurisprudence," *Jurnal Hukum Lex Generalis* 3, no. 3 (17 Maret 2022): 231-46, <https://doi.org/10.56370/jhlg.v3i3.226>.

<sup>37</sup> Ridwan Ridwan, Khudzaifah Dimiyati, dan Aidul Fitriaciada Azhari, "Perkembangan Dan Eksistensi Hukum Adat: Dari Sintesis, Transplantasi, integrasi Hingga Konservasi," *Jurnal Jurisprudence* 6, no. 2 (7 Januari 2017): 106, <https://doi.org/10.23917/jurisprudence.v6i2.3008>.



place according to the principles of life adhered to by the community. The main difference from formal criminal law enforcement lies in the approach to resolution, which heavily emphasizes a sense of kinship and consensus as guiding principles.

The significance of the various explanations can be understood that the integration of positive law with living law as the law that exists within society cannot and should not be excessively negated as two completely opposing entities. With a sociological approach, it becomes clear that the function of living law can actually strengthen the position of positive law and functionally serve as a control mechanism for the attitudes and behaviors of the community to prevent the occurrence of harmful violations to security, order, and public interests.

The integration of law enforcement roles will lead to a progressive legal culture, as stated by Satjipto Raharjo, where law is not a sterile institution isolated from external factors, but it is constantly tested by its presence and works as a result and consequence that arise in the life of society.<sup>38</sup> It should be understood that the orientation of criminal law reform is not only limited to the aspect of retribution for crimes but also disregards the aspects of utility and justice that exist within society. This has a conceptual alignment with the concept discussed earlier regarding the presence of concepts such as Restorative Justice known in Western law. Therefore, in its development, there is a need to build a new paradigm in criminal law regarding social control, considering values such as utility, not merely confined to the meaning of certainty and justice through formal processes alone.

So, how to create an effective law in order to achieve the goals of law, including certainty, justice, and utility, is a challenge for law enforcers as well as subjects governed by the law. In line with the principle of Pancasila as a rule of law state that promotes certainty and justice, and views law as a means of change, although in practice, law, according to Arief Hidayat, still functions as a tool for self-justification or seeking victory, and is oriented towards truth using formal interpretation.<sup>39</sup> Positive law often creates a polemic regarding the meaning of justice that can contradict the expectations of society, due to being framed within the framework of legal positivism that tends to be rigid. However, the need to clarify the formulation in the Criminal Code regarding living law as a general principle must be emphasized to avoid creating problematic aspects concerning the protection of individuals from arbitrary law.

#### 4. CONCLUSION

Criminal law reform with the enactment of the Criminal Code passed into Law Number 1 Year 2023 is the spirit of renewal of the national criminal law system which is still rooted in the colonial legal system. The incorporation of the concept of living law as one of the principles of criminal law enforcement raises two different perspectives where the principle of living law should be seen as a progressive step in the development and enforcement of law by taking into account the values that exist in society rooted in various norms such as religion, social, and local culture. On the other hand, the inclusion of living law as part of positive law has created the potential for uncertainty in law enforcement and

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<sup>38</sup> Satjipto Raharjo, *Sosiologi Hukum Perkembangan Metode dan Pilihan Masalah* (Yogyakarta: Genta Publishing, 2010). 92-93.

<sup>39</sup> Arief Hidayat, "Revitalisasi Ideologi Pancasila dalam Aras Global Perspektif Negara Hukum: Sebuah Pandangan Indonesia Terkini," *Seminar Nasional Hukum Universitas Negeri Semarang 2*, no. 1 (2016), <https://doi.org/10.15294/snhunnes.v2i1.488>.

reduced the meaning of law which is limited to the definition of customary criminal law, where there is a diversity of customs in each region. From the perspective of law as a means of social control, living law is a form of law that is not codified like state laws and regulations, but in practice is more focused on awareness and cooperation among individuals in a community, so that the function applied is to control the behavior of the community in accordance with the norms that have been rooted in individuals. The living law is a more flexible law enforcement mechanism, so that the community has an independent and natural space to enforce rules to maintain public order and public morality.

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