

Dissecting the Position of *Living Law* in the Criminal Code 2023

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Abstract

This study analyzes the position of living law in the 2023 Criminal Code. Through normative research methods using a legislative approach and a conceptual approach, this article finds: First, the position of living law in the 2023 Criminal Code is narrowed down to only referring to customary law as regulated in the explanation of Article 2. Second, the regulation of customary law is a recognition of sanctions for fulfilling customary obligations that will be used by judges as guidelines for sentencing. Third, the living law sanction in the 2023 Criminal Code is a type of additional criminal sanction in the form of fulfilling local customary obligations. Violations of the provisions of living law are subject to principal criminal sanctions and additional criminal sanctions if the act has been regulated by the 2023 Criminal Code. The regulation of additional criminal sanctions in the form of customary obligations aims to accommodate the types of customary law sanctions. In addition, there is a substitution mechanism for perpetrators who cannot fulfill customary obligations, in the form of substitution of compensation whose value is equivalent to a category II fine to a supervision sentence or social work sentence.

Keywords: *Customs; The Law of Life; punishment; Penalty.*

Introduction

The development of national criminal law (*penal reform*) through Law Number 1 of 2023 concerning the Criminal Code (from now on referred to as the Criminal Code 2023) will soon be enforced on January 2, 2026.¹ The development of national criminal law has marked a pattern of change in the principle of legality which will no longer be absolute due to provisions that implicitly recognize unwritten law in society or *living law*.² Previously, the regulation of *the living law* in the 2023 Criminal Code had reaped various controversies.³ Because it was feared that it would become an entry point to

¹ Noveria Devy Irmawanti and Barda Nawawi Arief, "The Urgency of Criminal Objectives and Guidelines in the Context of Reform of the Criminal Law Criminal System," *Indonesian Journal of Legal Development* 3, No. 2 (2021): 217–27, <https://doi.org/10.14710/jphi.v3i2.217-227>.

² Article 2 of the 2023 Criminal Code

³ Yoserwan, "Implications of the Entry of Customary Criminal Law into the New Indonesian Criminal Code: Strengthening or Weakening?" *Strong Social Sciences* 10, no. 1 (2023), <https://doi.org/10.1080/23311886.2023.2289599>.

criminalize vulnerable people, both women, gender diversity⁴, groups with disabilities, and indigenous peoples. This concern arises because what is meant by *living law* in practice is so broad that it has the potential to be used to legalize identity politicization and is misogynistic.

The existence and enforceability of positive law and the *living law* is a dialogical debate between the sociology school of law and the school of positivism of law. The debate between the two schools lies like *law* in people's lives.⁵, therefore, the policy⁶ Incorporating ethical, moral, or religious elements into state laws must be carried out with great caution. Incorporating non-state law into the legal system as the basis for prosecution by the state can also lead to the co-optation of customary law by law enforcement officials and customary elites. In practice, this situation can make it difficult for justice seekers due to the weak legal certainty and consistent attitude of the Indonesian criminal justice system.⁷ On the other hand, customary law arrangements that are made in writing are feared to give birth to various policies in the name of living laws to provide space for abuse, persecution at the local level, and other discriminatory practices. As is common in Indigenous communities where the law is not written when and what elements appear as a customary delicate are difficult to find because it depends on the *representation collectives*, that is, the state of mind in society is a combination of values that exist in society, always participating and *analyser end*.⁸ Nevertheless, the *living law* arrangement in the 2023 Criminal Code is still maintained by lawmakers.

As a study material in this research, the scope of *living law* presented includes issues related to criminalization and types of sanctions. Punishment is the process of giving or imposing a criminal sentence by a judge, so it can be said that the criminal system includes all legal provisions that regulate how the criminal law is enforced or

⁴ Xiaozhi Zhang et al., "Descriptive Analysis of Depression Among Adolescents in Huangshi, China," *BMC Psychiatry* 23, no. 1 (2023), <https://doi.org/10.1186/s12888-023-04682-3>.

⁵ Syofyan Hadi, "POSITIVE LAW AND LIFE LAW (Existence and Applicability in Society)," *DiH Journal of Law* 13, No. 26 (2017): 259–66, <https://doi.org/10.5281/zenodo.1239838>.

⁶ Vivi Ariyanti, "Law Enforcement Policy in the Indonesian Criminal Justice System," *Juridical Journal* 6, no. 2 (2019): 33–46, <https://doi.org/https://doi.org/10.35586/jjur.v6i2.789>.

⁷ Sulistyowati Irianto, "Living Law in the Criminal Law Draft" (Jakarta, 2023), https://bphn.go.id/data/documents/materi_cle_8_yg_ke-2prof_dr_sulistyowati_irianto.pdf.

⁸ Muhammad Bushar, *Principles of Customary Law* (Jakarta: Balai Pustaka, 2013).

operationalized concretely so that a person is sentenced to criminal sanctions.⁹, while the type of sanction is a classification related to the type of criminal sanction that has been known in the principal and additional crimes. The perspective of criminals and types of sanctions is an important element in projecting the implementation of the 2023 Criminal Code sanctions as a form of national law reform.

After the ratification of the legal basis for the reform of Indonesia's national criminal law, research on *living law* in the 2023 Criminal Code is a fairly new research topic and has begun to be widely researched. Research conducted by Rikardo Simarmata (2021) on the Position and Role of Customary Justice after the Unification of the Formal Justice System, discusses the fate of the customary law system after the modernization of national law through the unification.¹⁰ Then Yusuf Saefudin (2021) who wrote with the title *Living Law in The Perspective of Progressive Law: The Urgency of Its Regulation in the Draft Criminal Code discusses*¹¹ the regulation of *living law* which is associated with the spirit of progressive law enforcement which requires judges to explore, follow, and understand the values of law and the sense of justice that live in society, and the latest research in 2023 conducted by Khofifah Karalita Arifin entitled *Reviewing the Implications of the Living law as an Expansion of The Legality Principle in the Criminal Code* discusses the regulation of *living law* that will have an impact on legal uncertainty and dualism of customary law, including its law enforcement officials (¹²)Anugrah Satria Magal writes about Legal Accommodation in Society in the New Criminal Code of Indonesia According to the Perspective of Progressive Law which discusses *living law* with progressive legal

⁹ Martha Sarah, Valentina Hura, and Edi Yunara, "A Study of Criminal Law Against Children as Perpetrators of Gambling Crimes in a Criminological Perspective," *Unes Legal Review* 6, no. 4 (2024): 11582–600, <https://www.review-unes.com/index.php/law/article/view/2116/1729>.

¹⁰ Rikardo Simarmata, "The Position and Role of the Customary Court after the Unification of the Formal Justice System," *Law: Law Journal* 4, no. 2 (2021): 281–308, <https://doi.org/10.22437/ujh.4.2.281-308>.

¹¹ Yusuf Saefudin, "Living Law in the Perspective of Progressive Law: The Urgency of Regulation in the Draft Criminal Code," *Journal of Legal Dynamics* 21, no. 2 (2021): 358, <https://doi.org/10.20884/1.jdh.2021.21.2.3526>.

¹² H. Arifin, K. K., & Primadianti, "Examining the Implications of Living Law as an Expansion of the Principle of Legality in the Criminal Code," *Sriwijaya Crimen And Legal Studies* 1, no. 1 (2023): 44–55, <https://doi.org/10.28946/scls.v1i1.2732>.

analysis.¹³ Of the several studies that have existed, there has not been a single study that focuses on discussing the position of *living law* in the 2023 Criminal Code that has been passed, including using a criminal perspective and types of sanctions in its discussion.

This research limits the scope of its discussion to three problem formulations. *First*, what is the position of *living law* in the 2023 Criminal Code?; *Second*, how is *the living law* regulated in the 2023 Criminal Code from a criminal perspective?; *Third*, how is the living law regulated in the 2023 Criminal Code from the perspective of the type of sanctions? The purpose of this study is in line with the research question that has been formulated, namely to analyze the position of *living law* in the 2023 Criminal Code more specifically. The use of a criminal perspective aims to analyze its regulatory function in criminalization, while the purpose of the research is to use the perspective of the type of sanction to analyze and describe the application of living law sanctions in the 2023 Criminal Code. The analysis of the position, criminal perspective, and perspective of the type of sanction makes this research comprehensive and important with the hope of providing projections on the application of *living law* in the 2023 Criminal Code, as well as enriching scientific treasures in anticipation of its enactment in 2026.

The discussion in this writing will begin by examining the position of *living law* in the 2023 Criminal Code by using the living law clause from Eugen Ehrlich to provide a basic understanding for readers of the concept of living *law* and compare it with the regulation of *living law* in the 2023 Criminal Code. After the reader has a uniform understanding of *living law*, the next discussion is directed to analyze the living *law arrangements* in the 2023 Criminal Code from a criminal perspective. The penal perspective makes the discussion of *living law* in this study unique and relevant because it describes its regulatory function in penal action based on the 2023 Criminal Code. In the last discussion, this article presents a discussion of *living law* using the perspective of the type of sanction. The perspective of the type of sanctions is discussed by describing several types of sanctions in the 2023 Criminal Code to be able to describe

¹³ Anugrah Sahtia Magala, "Living Legal Accommodation in Indonesia's New Criminal Code According to the Perspective of Progressive Law," *Legal Spectrum* 20, No. 2 (2023): 115–27, <https://doi.org/10.56444/sh.v20i2.4345>.

the purpose of regulating living *law sanctions* in the 2023 Criminal Code, including describing the mechanism for its implementation after it is enforced in 2026.

Research Methods

This article uses normative legal research methods,¹⁴ Which is a process to find the right legal rules, legal principles, theories or legal concepts to solve the legal problems faced.¹⁵ In this study¹⁶, a *statutory approach* related to the research topic and a conceptual approach are used to understand and provide a critical analysis of the position of *living law* from the perspective of criminalization and the regulation of the type of sanctions in the 2023 Criminal Code.

Results and Discussion

The use of criminal law must pay attention to the goal of national development, namely realizing a just and prosperous society based on Pancasila. The use of criminal law aims to overcome crime and make adjustments for the welfare and protection of society. The Constitution as the basis of the Indonesian state has long recognized the existence of *living law* through the statement that the law on indigenous peoples in Indonesia is recognized as a law as long as it is still valid.¹⁷ This meaning provides the basis that the existence of Indigenous peoples is recognized by the state.¹⁸, as well as all regulations that are still alive and obeyed by the indigenous peoples themselves. The reform of the national criminal law aims to adapt actual developments to societal conditions and eliminate values that are no longer suitable for application in Indonesia.¹⁹

¹⁴ Irwansyah, *Legal Research: Choice of Article Writing Methods & Practices*, ed. Ahsan Yunus, 1st edition, vol. 1 (Yogyakarta: Mitra Buana Media, 2020).

¹⁵ Peter Mahmud Marzuki, *Legal Research (Second Edition)* (Jakarta: Kencana Prenadamedia Group, 2006).

¹⁶ Muhaimin, *Legal Research Methods* (Mataram: Mataram University Press, 2020).

¹⁷ Habibul Umam Taquiuddin, "The Idea of the 1945 Constitution as a Political Constitution, Economic Constitution, and Social Constitution," *Ecology* Vol. 3 No., no. November (2021): 38–54.

¹⁸ Including the Basic Agrarian Law, Article 5 which states that the agrarian law that applies to the earth, water and space is customary law, as long as it does not conflict with the national and state interests, which is based on the unity of the nation, with Indonesian socialism and with the regulations contained in this Law and with other laws and regulations, everything by heeding the elements that rely on religious law

¹⁹ Itok Dwi Kurniawan et al., "Analysis of the Existence of Living Law in Updating the Principles of Criminal Law Legality" 2, no. 1 (2024): 100–104.

As is known, *the van Strafrecht Wetboek*, which was later used as Law Number 1 of 1946 concerning the Criminal Code (hereinafter written as the 1946 Criminal Code), is a Dutch colonial legacy. Therefore, with the enactment of the 2023 Criminal Code which carries out the mission of decolonization, democratization, consolidation and codification, harmonization, and modernization, it is hoped that it will be able to become a milestone of change and characterize national characteristics and values with more modern legal goals. The following chart explains each of the objectives of the 2023 Criminal Code renewal principles.

Graph 1. National Criminal Law Reform Mission

Dekolonisasi	Demokratisasi	Konsolidasi	Harmonisasi
<ul style="list-style-type: none"> • Meniadakan unsur-unsur kolonial dari KUHP untuk mengubah paradigma positivistik menjadi paradigma keseimbangan terhadap keadilan melalui rehabilitasi dan asas legalitas materil. 	<ul style="list-style-type: none"> • Menyelaraskan hukum pidana dengan prinsip demokrasi dan memastikan perlindungan hukum yang adil dan merata bagi seluruh warga negara 	<ul style="list-style-type: none"> • Restrukturisasi melalui penghapusan keseluruhan aturan tindak pidana khusus ke dalam KUHP 2023 	<ul style="list-style-type: none"> • Menyelaraskan prinsip hukum pidana nasional dan dinamika masyarakat, dengan menyatukan berbagai norma ke dalam kerangka hukum tunggal untuk mencegah konflik dan memastikan penerapan yang konsisten

Source: Author's Analysis, 2024²⁰The reform of the national criminal law²⁰

Carries out four reform missions, namely decolonization, democratization, consolidation, and harmonization. The four reform missions are framed with a modernization framework that aims to replace the traditional paradigm and content in criminal law with contemporary elements so that it can adapt to societal changes, accommodate new violations, and adjust existing violations to be relevant to the times. In the spirit of decolonization to eliminate colonial elements from the 1946 Criminal Code, change the positivistic paradigm towards more balanced justice, emphasizing rehabilitation and incorporating the principle of material legality. The mission of democratizing criminal law is also aimed at harmonizing criminal law with democratic

²⁰ Ayu Denis Christinawati, "Living Law in the Indonesian Criminal Code: A Perspective of Customary Law and Its Impact on Law Enforcement," *Civic: Journal of Law and Civic Education* 3, No. 1 (2024): 87–97.

principles, increasing transparency, accountability, and public participation in the legislative and policy process, and ensuring fair and equitable legal protection for all members of the state. Consolidation and codification aim to collect normative aspects that have been spread in various laws outside the 1946 Criminal Code into the 2023 Criminal Code through regulations on special criminal acts. The mission of harmonization of criminal law is also aimed at harmonizing national criminal law principles and societal dynamics, uniting diverse norms into a single legal framework to prevent conflicts and ensure consistent application.²¹

The four missions of the 2023 Criminal Code then gave birth to regulations on *living law* as Article 12 paragraph (2) of the 2023 Criminal Code stipulates that to be declared a Criminal Act, an act that is threatened with criminal sanctions and/or actions by laws and regulations must be unlawful or contrary to the law that lives in society. This means that a person can be convicted if he commits an act that is unlawful or contrary to the law that lives in society. The use of the phrase "or" results in the possibility of a person being convicted if he commits an act that is unlawful or contrary to the law that lives in society even though the act committed has not been regulated in the law as a criminal act. This consequence raises concerns about arbitrary law enforcement better known to the public as overcriminalization.²² So that it will have an impact on society, especially vulnerable people consisting of women, children, and people with disabilities because the enforcement of recognition of the law that lives in society has an impact on various forms of unlawful acts that are not included in the 2023 Criminal Code.

The law that lives in society is a concept that was first put forward by Eugen Ehrlich with the term *living law*. For Ehrlich, a good law is a law that is by the law that lives in society.²³ The basis of *living law* thought put forward by Ehrlich began from his view

²¹ Itok Dwi Kurniawan and Vincentius Patria Setyawan, "ANALYSIS OF THE INTEGRATION OF LIVING LAW IN INDONESIAN," *Journal of Testimonials* 22, No. 1 (2022): 409–14.

²² Nazaruddin Latif et al., "Policy Reform for Handling Sexual Violence Crimes According to the Tpk's Law to Achieve a Madani Indonesian Society," *PALAR (Pakuan Law Review)* 8, No. 4 (2022): 91–105, <https://doi.org/https://doi.org/10.33751/palar.v8i4>.

²³ Muh Ridha Hakim, "Implementation of Rechtsvinding with Progressive Law Characteristics," *Journal of Law and Justice* 5, No. 2 (2016): 227, <https://doi.org/10.25216/jhp.5.2.2016.227-248>.

that opposed the traditional view of positive law or state law which he considered to have reversed the established idea of law. Ehrlich then divided the law juridically and legislatively in the form of law and *living law* as living law. *Living law*, according to Ehrlich's view, is the same as the legal standard in behaviour that is obeyed by individuals as part of a society or group. According to Ehrlich, many interactions are governed by moral standards that are embedded in everyday interactions and accepted as legitimate by members of social groups even if they are not statutory or written.²⁴

Graph 2. *Living Law* According to Ehrlich

²⁴ Amanda Perry-Kessaris, "Living Methods for the Law of Life: Eugen Ehrlich Meets Bruno Latour through the Design of the Hostile Exhibition," no. September (2022): 1–16.



Source: Author's Analysis, 2024

Living law is different from laws and regulations. *Living law* is a law that is practised in daily interactions between humans as part of society. This idea encompasses more than just written laws because it is possible that living laws are never embodied in books or existing laws, but are contrary to those laws.²⁵ From Ehrlich's view, it can be understood that *living law* covers a very wide range of rules as long as it fulfils several things, namely, that *the living law* has been used as a guideline that is obeyed by groups, communities, and society even if it is not written. *Living law* is a broad domain. The existence of *living law* is not only found through customary law if the customary law is still valid because various unwritten rules that are obeyed by a group of people who are members of a certain community or professional association can also be qualified as living law. As long as a rule is recognized and obeyed by members of a community group or association, then such a rule can be said to be part of living law.²⁶

Understanding the position of *living law* in the 2023 Criminal Code can start by looking at how systematic the regulation is. The regulation of *Living law* in the 2023 Criminal Code begins with the body of the 2023 Criminal Code, namely Article 2 paragraph (1) which stipulates that the provisions as referred to in Article 1 paragraph

²⁵ David Tan, "Revisiting the Pound's Law in Ehrlich's Actions and Laws of Life to Find 'Gaps': A Compilation of Lecture Notes," *Review Journal* 24, No. 2 (2022): 225, <https://doi.org/10.37253/jjr.v24i2.7220>.

²⁶ Eugen Ehrlich, *Basic Principles of Legal Sociology* (Walter L. Moll trans: Walter L. Moll trans, 1936).

(1) do not reduce the applicability of "living law in society" which determines that a person should be punished even if the act is not regulated in this law. Furthermore, paragraph (2) stipulates that to be qualified as a law that lives in society, it must meet several conditions, namely, it applies in the place where the law lives and as long as it is not regulated in this Law and by the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the community of nations. Although lawmakers have formulated conditions to be able to qualify *living law*, the regulation of living law on the body of the 2023 Criminal Code, precisely Article 2, is very broad considering the many values that live in society, including religious values, customs, customary law, and various other values that are adhered to by communities and society.

The position of *living law* on the body of the 2023 Criminal Code seems to be as broad as *living law* in Ehrlich's conception. The breadth of the meaning of living law is then sought to be limited to what is meant as *living law* through its regulation in the explanatory section of the 2023 Criminal Code. If we examine the draft of the draft history of the birth of the Criminal Code until 2019, then we will not find any affirmation that what is meant as a law that lives in society is customary law.²⁷ In the explanatory part of the 2023 Criminal Code, precisely Article 2 paragraph (1) states that what is meant by law that lives in society is customary law which determines that a person who commits a certain act should be punished. The affirmation of what is meant as *living law* is customary law is detailed in the explanation of the 2023 Criminal Code, not in the body part. From such an arrangement, it appears that the framers of the 2023 Criminal Code are trying to narrow what is meant as *living law*. Therefore, it can be understood that the position of *living law* in the 2023 Criminal Code is not the same and not as broad as *living law* as Ehrlich's conception of *living law*, but in the 2023 Criminal Code, the lawmakers give a narrower position to *living law*, which is only interpreted as limited to customary law.

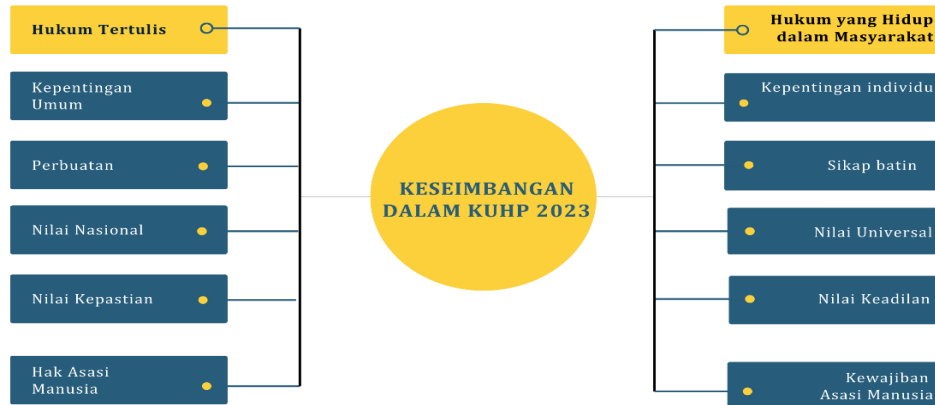
²⁷ In the draft RKUHP version of August 28, 2019, laws that live in society are used alternately with other terms, such as moral norms of legal values and justice, customary obligations, local customary obligations, etc.

Living Law Arrangements in the 2023 Criminal Code Reviewed from a Criminal Perspective

Criminalization is the process of giving or imposing a criminal sentence by a judge. The penal system includes all legal provisions that regulate how the criminal law is enforced or operationalized concretely so that a person is sentenced to criminal sanctions. Several articles related to *living law* include Article 2, which *expressively verbically* recognizes the principle of material legality as the basis for a person's conviction even if the act has not been regulated in the 2023 KUHAP. Furthermore, the distribution of articles on *living law* that leads to customary law as regulated in the explanatory section of Article 2 of the 2023 Criminal Code, followed by the distribution of several other articles, including Article 66, Article 96, and Article 567 of the 2023 Criminal Code related to criminalization and types of sanctions. The regulation of *living law* (customary law) as a criminal guideline by the mandate of Article 12 paragraph (2) of the 2023 Criminal Code is aimed at maintaining a balance between the legal objectives to be achieved. The form of balance includes the balance between the public interest and the interests of individuals, the interests of the perpetrator and the interests of the victim, between the actions and the inner attitude, between the balance and certainty and justice, the balance of national and universal values, the balance of human rights and human obligations, including the balance between written law and law that lives in society.²⁸ The purpose of emphasizing balance in the values described is the implementation of the four missions of the 2023 Criminal Code, which also gave birth to criminal guidelines.

Figure 3. Objectives of Criminal Balance, Criminal Code 2023

²⁸ Considerations considering letter c of the 2023 Criminal Code



Source: Author's Analysis, 2024

This balance of interests will bind the judge in imposing a penalty²⁹ where the judge must consider the value of law and justice that lives in society. The purpose of balancing interests is further described as a criminal guideline that is an expressive *verb* as stated in the provisions of Article 54 paragraph (1) letter k of the 2023 Criminal Code.

Graph 4. Criminal Guidelines, Criminal Code 2023



Source: Author's Analysis, 2024

The regulation of Article 54 paragraph (1) of the 2023 Criminal Code as the basis for criminal guidelines or *Guidance of Sentencing* is a guideline for judges to impose or apply criminal punishment. With the regulation of *living law* as a criminal guideline, living law can function as a guideline for judges in imposing criminal penalties, as well

²⁹ Article 54 (1) letter k of the 2023 Criminal Code

as affirming that customary law functions as a consideration in criminal liability, either as a reason for mitigating or burdening a criminal penalty for a person. What Ehrlich described through *living law* in Bukowina, where parents take the salaries of employed children as an illustration of the law that lives in the Bukowina community.³⁰ The act, although contrary to the Austrian Civil Code, cannot be punished because it is a *living law* in Bukowina. Ehrlich claimed that this is an illustration of the existence of *living law* in Bukowina. This condition illustrates the use of *living law* in its positive function.³¹

In the context of Indonesia, several regions³², including South Sulawesi, are relevant to be used as examples of how customary law affects judges in deciding cases. The value of the spirit in the Bugis Makassar Indigenous people affects the judge's consideration in imposing a penalty for a criminal act committed based on maintaining *the Siri'*.³³ A series of situations will arise when a person is embarrassed because of his social position in society or his sense of self-esteem and honour is openly tarnished by other parties. If this happens, then the person who is *ri parasitic* is required by the custom to take action to redeem or restore his dignity in his own eyes and the eyes of the community, namely by getting rid of the cause of shame. People who *are made* to shame, but are unable to recover their polluted self-esteem will be looked down upon and ostracized by society.

The value of *Siri' na Pacce* in the Bugis Indigenous people of Makassar teaches about moral morality in the form of encouragement, prohibitions, rights and obligations that dominate human actions to maintain and maintain their honour. The existence of *Siri' na Pacce* as an abstract value that lives amid the Bugis-Makassar community is

³⁰ T MULAHELA, A YANTO, and F HIKMAH, "Forging the Middle Way: The Problem of Living Law Integration in Indonesian Criminal Reform," *Russian Law Journal* XII, no. 1 (2024): 138–50, <https://russianlawjournal.org/index.php/journal/article/view/3632>.

³¹ Simarmata, "The Position and Role of the Customary Court after the Unification of the Formal Justice System."

³² Maria Maria, Burhan Sidabaria, and Ellicsa Sari, "The Impact of Living Law on Judges' Decisions in Civil Disputes in North Sumatra," *Russian Law Journal* XI, no. 4 (2023): 536–44, <https://doi.org/10.1017/Soo22216X09990575>.

³³ Siri's conception leads to self-esteem. This is included in an expression among the Bugis that says "*utetong ri ade'é najagainnami siri'ku*" which means, I obey the custom for the sake of maintaining my self-esteem. Siri' in the Bugis sense concerns everything that is most sensitive in them, such as dignity or self-esteem, reputation, and honour, all of which must be preserved and upheld in real life.

applied in the enforcement of customary norms in the form of *Siri* in several cases of murder based on *Siri*' is also considered by the judge to realize legal goals in the form of justice, certainty, and usefulness as a form of legal awareness and values upheld by the Bugis-Makassar community.³⁴ This reinforces the reality that *living law* in the criminal justice system in Indonesia has been widely applied in the final results of the criminal justice system, precisely the judge's decision, even though it was not previously regulated in written criminal law. Judges with the authority to examine, adjudicate, and decide a case have been mandated by Law Number 48 of the Year concerning Judicial Power (hereinafter referred to as the Judicial Power Law) so that each decision can provide the greatest justice for the community. Judges are required to explore, follow, and understand the legal values and sense of justice that live in society so that each decision can accommodate the legal feelings of the community.³⁵ Making customary law a criminal guideline will negate the existence of cultural values and laws in the community that has been prioritizing the principle of formal legality and legitimizing judges in using the consideration of the doctrine of material law in its negative function as a mitigating reason in the context of criminal liability.

Arrangement of the *Living Law* in the 2023 Criminal Code from the Perspective of Types of Sanctions

The update of the criminal law after the 2023 Criminal Code is essentially to carry out a *policy-oriented approach and a value-oriented approach* (³⁶) through criminal sanctions. Criminal punishment is a punishment given by the state to a person who violates the applicable law. The penalty³⁷ Is imposed deliberately so that a person feels

³⁴ Andika Wahyudi Gani, "The Existence of *Siri*' Na Pacce Cultural Values Against the Crime of Murder Based on the Origin of Legality in the Bugis-Makassar Community," *Dissertation* (Gadjah Mada University, 2019).

³⁵ Article 5 paragraph 1 of Law Number 48 of 2009 concerning Judicial Power

³⁶ Saharan Hadziq, "Regulation of the Crime of Adultery in the Criminal Code Studied from the Perspective of Living Law," *Lex Renaissance Journal* 4, no. 1 (2019): 25–45, <https://doi.org/10.20885/jlr.vol4.iss1.art2>.

³⁷ Larissa Silva Costa, Maria José Veloso da Costa Santos, and Vania Lisboa da Silveira Guedes, "Estudo da terminologia da Área Disciplinar de Direito e a proposição de um Sistema de Organização do Conhecimento em Direito Penal," *Encontros Bibli: Revista Eletrônica de Biblioteconomia e Ciência Da Informação* 27, No. 1 (2022): 1–21, <https://doi.org/10.5007/1518-2924.2022.e89652>.

a sense of sadness. The provision of punishment or suffering that is deliberately imposed on a person who violates the law is nothing but intended to deter that person as a form of maintaining norms recognized by the law. With adherence to the principle of material legality, the 2023 Criminal Code mandates the establishment of government regulations to serve as a guideline for local governments in making regional regulations.³⁸ to criminalize customary offences³⁹ and their allegations⁴⁰. Criminalization⁴¹ Every person who commits an act that, according to the law that lives in society, is declared a prohibited act, will receive a criminal penalty in the form of fulfilling customary obligations.⁴² This indicates that regional regulations on *living law* will later contain criminal sanctions in the form of fulfilling customary obligations.

This section will present a critical analysis of the *living law arrangements* spread across several articles in the 2023 Criminal Code. Unlike the 1946 Criminal Code which regulates the qualifications of criminal acts into crimes (*midriff*) and violations (*overtrading*), the 2023 Criminal Code does not distinguish between the types of criminal acts in the form of crimes and violations which also results in differences in the qualifications of the type of sanction. Judging from the pattern of grouping (classification) of types of sanctions, the 2023 Criminal Code no longer regulates the penalty of imprisonment, which according to the 1946 Criminal Code pattern is usually threatened for acts in the form of violations. The 2023 Criminal Code explicitly formulates an additional type of crime in the form of fulfilling customary obligations.

Table 1. Types of Crimes in the 1946 Criminal Code and 2023 Criminal Code

Criminal Code 1946	Criminal Code 2023
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³⁸ Explanatory part of Article 2 paragraph (3) of the 2023 Criminal Code

³⁹ The term customary offence is used to make it easier for readers to understand acts that are considered prohibited and given customary sanctions. Indigenous peoples should not know the distinction between the types of cases as in positive law.

⁴⁰ Penalization is a process of threatening acts that are prohibited by criminal sanctions. Criminalization and criminalization are related because they are to determine a criminal policy. Rationalization policy related to the imposition of sanctions for unlawful acts

⁴¹ Camilla de Camargo, "We Are Test Rabbits: The Uncertainty of Police Enforcing Coronavirus Regulations in the UK," *International Journal of Law, Crime and Justice* 72, no. November 2022 (2023): 100566, <https://doi.org/10.1016/j.ijlcj.2022.100566>.

⁴² Article 567 of the 2023 Criminal Code

Principal Crimes:	Principal Crimes:
- Die	- Prison
- Prison	- Cover
- Confinement	- Supervision
- Fine	- Fine
- Cover	- Social Work
Additional Penalties:	Additional Penalties:
- Revocation of certain rights	- Confiscation of Certain Items
- Confiscation of Certain Items	- Announcement of the Judge's Decision
- Announcement of the judge's decision	- Compensation
- Closure of all or part of the Company for a specified period	- Fulfillment of Local Customary Obligations
	Special:
	- The death penalty is always threatened as an alternative

Source: Author's Analysis, 2024

If further examined in Article 66 of the 2023 Criminal Code⁴³ Which regulates the type of sanctions, then the sanction for fulfilling customary obligations is regulated as an additional type of sanction. The regulation of sanctions for the fulfilment of customary obligations as a form of additional sanctions shows that the imposition of criminal penalties on customary crimes can only be imposed on acts that have also been regulated in the 2023 Criminal Code so the imposition of sanctions depends on the imposition of principal crimes that are facultative. In simple terms, it can be understood that criminal acts according to the 2023 Criminal Code can still be subject to sanctions

⁴³ Article 66 paragraph (1) of the 2023 Criminal Code stipulates that additional crimes consist of revocation of certain rights, confiscation of certain goods and/or bills, the announcement of judges' decisions, payment of compensation, revocation of certain permits, and fulfilment of local customary obligations.

in the form of fulfilling customary obligations, but as an additional penalty as stipulated in Article 66 paragraph (2) of the 2023 Criminal Code that additional crimes as referred to in paragraph (1) can be imposed if the imposition of the principal penalty alone is not enough to achieve the purpose of the penalty. Thus, the authority to impose sanctions for the fulfilment of customary obligations is declared or declared by the judge in his decision on cases that violate the provisions of customary law and have been regulated in the 2023 Criminal Code, while for acts that are violations of customary law and have not been regulated by written law, the 2023 Criminal Code delegates the authority to criminalize customary law to local governments through regional regulations. According to the author, with the number of articles in the 2023 Criminal Code reaching 624 articles, are there still acts left behind that have not been regulated in the 2023 Criminal Code? This is because the process of forming laws always departs from moral values, religion, customs, and customs that come from the life of the people of the nation. Therefore, delegating regulatory authority over acts that have not been regulated in the 2023 Criminal Code to regional regulations can be seen as *a second-line inspection* or at least as a preventive effort to guard against if there are still acts that are violations in customary law communities that have not been regulated in the 2023 Criminal Code. This is in line with the uncertainty of the number of customary law communities in Indonesia in line with public pressure to ratify the Customary Law Community Bill.⁴⁴ On the certainty of its number and distribution to date.⁴⁵

Viewed from a criminal perspective, the fulfilment of additional criminal sanctions in the form of customary obligations itself aims to accommodate the type of customary law sanctions or legal sanctions according to unwritten law. Viewed from this angle, it can be said that the pattern of sanctions according to the 2023 Criminal Code consists of formal sanctions (sanctions that have been explicitly mentioned according to written law) and informal sanctions (sanctions according to law that live in society whose type

⁴⁴ Jawahir Thontowi, "Protection and Recognition of Indigenous Peoples and Their Challenges in Indonesian Law," *Ius Quia Iustum Law Journal* 20, No. 1 (2013): 21–36, <https://doi.org/10.20885/iustum.vol20.iss1.art2>.

⁴⁵ National Development Planning Agency, *Indigenous Peoples in Indonesia: Towards Inclusive Social Protection*, Ministry of National Development Planning/Bappenas, 2013, https://perpustakaan.bappenas.go.id/e-library/file_upload/koleksi/migrasi-data-publikasi/file/Policy_Paper/Masyarakat_Adat_di_Indonesia-Menuju_Perlindungan_Sosial_yang_Inklusif.pdf.

is not expressly mentioned in written law or law). The provision of this type of informal sanction is because the 2023 Criminal Code recognizes the existence of criminal acts according to customary law which have no parallel in the 2023 Criminal Code as written law. For offences (including customary offences) that have been formally regulated expressly in the Criminal Code, formal sanctions are available and may be subject to additional sanctions in the form of fulfilment of customary obligations; As for the offense according to customary law (informal delicacy), there are informal sanctions in the form of fulfilment of customary obligation sanctions that are by each existing sanction and apply to the Indigenous peoples themselves.⁴⁶

Indonesia as a country that recognizes the existence of customary law in its constitution, including in several distributions of *existing laws*, often uses customary methods to solve a problem, even against actions that are classified as actions. On the other hand, the settlement of criminal acts through customary sanctions has the potential to be abused by certain individuals, especially if you look at the dominance of criminal acts that occur in Indigenous peoples, which is usually a form of sexual violence.⁴⁷ Utilizing the form of resolving sexual violence cases through customary sanctions to negate criminal law by the state is certainly not a justified form of case settlement, especially if the victim of sexual violence sincerely wants a settlement through criminal law.⁴⁸ This situation is exacerbated by the assumption of law enforcement officials that customary settlement of criminal acts is viewed with the principle of *ne bis in idem*.⁴⁹ So that they feel no need to enforce criminal law because the perpetrator has been given customary sanctions. With the regulation of the recognition of customary sanctions in the form of additional sanctions expressly and in writing, the potential practice of

⁴⁶ Barda Nawawi Arief, *Potpourri Criminal Law Policy: Development of the Drafting of the New Criminal Code Concept*, Print to (Jakarta: Kencana Prenadamedia Group, 2015).

⁴⁷ Ninik Rahayu, *Legal Politics of the Elimination of Sexual Violence in Indonesia*, ed. triantono Triantono, 3rd edition (Jakarta: Bhuana Ilmu Populer, 2021).

⁴⁸ Ibnu Sina Chandranegara, Gusta Orin Andini, and Nani Mulyati, "Women in the Vortex of Law & Customs: Reflections on the Emergency of Sexual Violence in Indonesia," in *Indonesian Law in the Future*, ed. Ibnu Sina Chandranegara, 1st edition (Jakarta: Rajagrafindo Persada, 2022), 356, <https://ebooks.gramedia.com/id/buku/hukum-indonesia-di-masa-depan>.

⁴⁹ Carles Gorrís Lopez, "INTERPRETATION OF NE BIS IN IDEM IN CASE LAW AND THE EFFECTIVENESS OF EUROPEAN COMPETITION LAW," *Revista Catalana De Dret Public* 68, No. 2 (2024): 31, <https://doi.org/https://doi.org/10.58992/rcdp.i68.2024.4165>.

abusing customary law to avoid criminal law against crime is expected to no longer occur.

Another part regarding substitution for customary law sanctions is an inseparable discussion in the discussion of this research. The existence of a substitution mechanism, that is, the replacement of the type of sanction if the perpetrator cannot fulfil the sanction of fulfilling customary obligations is intended to provide a guarantee of the fulfilment of sanctions for the fulfilment of customary obligations even though it is an additional sanction. Article 96 paragraph (2) of the 2023 Criminal Code stipulates that the fulfilment of local customary obligations as referred to in paragraph (1) is considered comparable to a category II fine.

Graph 5. Flow of Customary Sanctions Substitution



Source: Author's Analysis, 2024

Article *a quo* regulates the existence of a sanctions substitution mechanism. If the perpetrator is unable to fulfil the sanction in the form of fulfilling local customary obligations, he must pay compensation in an amount proportional to the Category II fine.⁵⁰, which is a minimum of ten million rupiah and not greater than the amount of the category II fine, which is fifty million rupiah. The receipt of this compensation, although declared to be comparable to a category II fine, will of course be obtained by the local Indigenous peoples considering the purpose of providing customary criminal sanctions that are

⁵⁰ Fines I and II according to the 2023 Criminal Code are light fine categories.

qualified as additional sanctions by not negating the essence of the provision of customary sanctions which aims to restore balance in the community.⁵¹ At the same time, it is part of the benefits of law as part of criminalization. This is in line with Jeremy Bentham's teaching, that there are three benefits of criminalization, namely, first, criminalization will be very useful if it can improve the self-improvement of criminals; second, criminalization must eliminate the ability to commit crimes; Third, the penalty must provide compensation to the aggrieved parties, including the community.⁵² If the first substitution option, which is in the form of compensation equivalent to a category II fine of the 2023 Criminal Code, cannot be fulfilled by the perpetrator, then the next substitution can be carried out with a substitute sanction in the form of a supervision or social work penalty. In the transition of the form of customary sanctions (the fulfilment of customary obligations that can be substituted with compensation equivalent to category II fines), the state must also immediately provide adequate means of regulation regarding the period and mechanism of its implementation, including related to the coordination of the transition from the form of sanctions for the fulfilment of customary obligations if the perpetrator is given a substitution of sanctions in the form of supervision or social work crimes.

Supervision and social work crimes are forms of sanctions managed by the state, there is a possibility of substitution of sanctions in the form of supervision crimes so that social work crimes can be seen as an effort by the state to protect the community by designing sanctions substitution into several forms so that perpetrators who violate customary law still get sanctions for their actions. The policy of recognizing and regulating living *law* sanctions expressly in written law is also seen as in line with the principle of *lex scripta* in the formation of legal regulations. The *lex scripta* principle, which requires the law in written form, aims to enable the public to know what acts can and cannot be done and the threat of sanctions. The characteristics of customary law that have been unwritten and uncodified, but still obeyed in society have a certain sanction if

⁵¹ Annisa Rahmadiana, Putri Nabilah, and Tiara Rahmawati, "A Criminological Study on the Customary Sanction of 'Washing the Village' Against Adulterers," *Review Journal* 24, No. 1 (2022): 19, <https://doi.org/10.37253/jjr.v24i1.5817>.

⁵² Eddy OS Hiariej, *Principles of Criminal Law Adjustment Edition of the National Criminal Code*, i (Jakarta: Rajawali Pers, 2024).

it is not obeyed and applies to everyone in their territory.⁵³ Knowledge of the law is important so that a person can have the knowledge and can determine the will before committing an act because a person cannot avoid punishment on the grounds of not knowing the law as the postulate of the law that ignorance of the law is not a reason for forgiveness (*ignorant leges excusat mine*).⁵⁴ This is in line with the crime prevention policy as described by G. Peter Hoefnagels about *criminal policy*, one of which is taken by influencing the public's views on criminal crime.⁵⁵ In various forms, including making written laws.

Conclusion

The position of *living law* in the 2023 Criminal Code refers to customary law. The position of *living law* as customary law in the 2023 Criminal Code shows the difference in the concept of the position of *living law* as put forward by Eugen Ehrlich. The framers of the 2023 Criminal Code seek to narrow the position of *living law* in the 2023 Criminal Code through its regulation in the explanatory section of Article 2 of the 2023 Criminal Code by emphasizing that *the living law* in question is customary law. From a criminal perspective, the regulation of *living law* in the 2023 Criminal Code is a form of recognition of the form of sanctions for fulfilling customary obligations which will be affirmed in writing and serves as a criminal guideline for judges in imposing criminal sentences. From the perspective of the type of sanction, the living law in the 2023 Criminal Code is regulated as an additional sanction in the form of fulfilling customary obligations. Violations of the provisions of *living law* or customary law will be subject to basic criminal sanctions and additional criminal sanctions if the act that violates customary law has been regulated as a criminal offense in the 2023 Criminal Code. The

⁵³ Today Shasmita Jiwa Utama, "Between Customary Law and Living Law: The Illusion of Incorporating Customary Law into the Indonesian Criminal System," *Journal of Legal Pluralism and Unofficial Law* 53, no. 269–289 (2021), <https://doi.org/doi.org/10.1080/07329113.2021.1945222>.

⁵⁴ M Ricca, "Ignorantia Facti Excusat: Legal Responsibility and Intercultural Significance of the 'Contrat de Véridition' Greimas," *International Journal for Legal Semiotics - Revue Internationale de Sémiotique Juridique* 31, No. 1 (2018): 101–26, <https://doi.org/https://doi.org/10.1007/s11196-017-9529-6>.

⁵⁵ Arief, *Potpourri Criminal Law Policy: Development of the Drafting of the New Criminal Code Concept*.

regulation of additional criminal sanctions in the form of customary obligations aims to accommodate the type of customary law sanctions or legal sanctions according to unwritten law. In addition, there is a substitution mechanism for perpetrators who cannot fulfil customary obligations, namely by substitution of compensation for several category II fines to supervision or social work crimes.

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