

Original Article

Bridging Formal Legality and Living Law Public Prosecutorial Policies to Achieve Justice

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Abstract

Recognition of living law: Article 2 of Law Number 1 of 2023 concerning the Criminal Code marks a paradigm shift in Indonesian criminal law from the principle of formal legality to material legality. However, this change has not been accompanied by an update to criminal procedural law. In fact, Criminal Procedure Code (KUHAP) remains oriented towards legal positivism and does not provide a procedural mechanism to integrate existing social norms into criminal justice practices. This situation creates tension between legal pluralism, legal certainty, and demands for substantive justice in the criminal justice system. This study aims to analyse: (1) the position of the Criminal Procedure Code in accommodating living law in the criminal justice process; (2) the role of the Prosecutor's Office as dominus litis in integrating living law through prosecution policy; and (3) the reconstruction model of prosecution policy in the perspective of ius constituendum in order to realize the integration between formal legality and material legality. The study uses a normative legal research method with a statutory, conceptual, and comparative approach, and is analysed using the theory of justice, the Pancasila theory of justice, and Gustav Radbruch's theory of legal values. The results of the study indicate that: (1) the Criminal Procedure Code functions as a procedural law based on formal legality so that it has not been able to operationalize the recognition of living law procedurally; (2) the Prosecutor's Office has in fact accommodated living law through prosecutorial discretion and restorative justice, but does not yet have systemic procedural legitimacy; and (3) reconstruction of prosecution policy is needed through a facilitation model by prosecutors, judicial verification, court decisions, and state execution in order to balance legal certainty, substantive justice, and social benefits in the Indonesian criminal justice system.

Keywords: Dominus Litis; Living Law; Prosecutorial Discretion; Restorative Justice;

Introduction

Customary criminal law is part of customary law that has long existed in society.¹ Long before the formation of a national legal system, customary criminal law was an important component of Indonesia's native legal tradition.² Customary law communities have adhered to this law for generations because it is unwritten. Since its recognition by Law No. 1/Drt/1951, customary criminal law has become an interesting subject. This recognition demonstrates that the principle of legality in Indonesian criminal law encompasses material meaning derived from unwritten legal norms as well as formal regulations. Therefore, as a crucial part of the law enforcement process, Law enforcement officials must possess a

¹ Ahmad Rivai Ardiansyah Harahap, Sayyid Al Farros and Asmak Ul Hosnah, 'Implementation of Pancasila Values in the Formation of Law No. 1 of 2023 (New Criminal Code)', *Formosa Journal of Science and Technology*, 4.1 SE-Articles (2025), 27–38 <<https://doi.org/https://doi.org/10.55927/fjst.v4i1.13001>>.

² Ian D Marder, 'Mapping Restorative Justice and Restorative Practices in Criminal Justice in the Republic of Ireland', *International Journal of Law, Crime and Justice*, 70 (2022), 100544 <<https://doi.org/https://doi.org/10.1016/j.ijlcj.2022.100544>>.



comprehensive understanding of both the statutory legal framework and the normative rules that develop and operate within society.³

Along with the enactment of the provisions of Article 2 paragraph (1) and paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the National Criminal Code), which explicitly broadens the understanding of the principle of legality.⁴ The principle of legality, which has so far been understood narrowly as a principle that only refers to written norms in statutory regulations, in the future also includes legal sources that exist in society as an implementation of the issuance of the provisions of Article 2, paragraph (1) and paragraph (2) of the National Criminal Code. With this change, in the future, not only acts formulated in the National Criminal Code can be used as a basis for criminalization, but also acts that violate unwritten legal norms, namely laws that exist in society, which, in the explanation of Article 2 paragraph (2) are identified as customary crimes will also become a source of law in the future.⁵

Law Number 1 of 2023 concerning the National Criminal Code not only expands the meaning of the principle of legality through Article 2 paragraph (1), but also systematically integrates the validity of living law in society into the national criminal law system.⁶ This regulation is emphasised in Article 597, which recognises that acts deemed prohibited by living law in society can form the basis for criminal punishment, with sanctions consisting of the meant of customary obligations, as regulated in Article 66, paragraph (1), letter f.⁷ This normative construction demonstrates a paradigm shift from a legality principle oriented solely toward written law to a material legality that accommodates living and evolving social norms. Thus, the National Criminal Code is no longer entirely based on a positivist approach but has begun to integrate a plurality of legal sources, reflecting the diverse character of Indonesian society.⁸

Conceptually, the recognition of living law marks an effort to harmonise state law with local normative realities, while simultaneously opening space for the creation of more context-specific justice.⁹ However, this transformation also raises a normative dilemma; without clear parameters for boundaries, implementation mechanisms, and oversight, the recognition of customary law can create legal uncertainty, inconsistent law enforcement, and the risk of violating human rights principles and universal legal standards.¹⁰ In this regard, an analysis is needed to see how the formal legal framework in the Indonesian criminal justice system responds to this expanded meaning of legality, particularly through the Criminal

³ Putri Eunike Siregar dan Debora, 'Perlindungan Hak Tersangka Dan Terdakwa Dalam Proses Hukum Acara Pidana Di Indonesia (Studi Pada Pengadilan Negeri Tarutung)', *Jurnal Pendidikan Tambusai*, 8.3 (2024), 50787–92 <<https://doi.org/https://jptam.org/index.php/jptam/article/view/23912>>.

⁴ Dedi Iskandar and others, 'Perkembangan Teori Dan Penerapan Asas Legalitas Dalam Hukum Pidana Indonesia', *Jimmi: Jurnal Ilmiah Mahasiswa Multidisiplin*, 1 (2024), 293–305 <<https://doi.org/10.71153/jimmi.v1i3.147>>.

⁵ Putri Eunike Siregar dan Debora.

⁶ Samera Esmeir, 'On the Lives of Modern State Law', *Modern Intellectual History*, 19.4 (2022), 1316–1327 <<https://doi.org/10.1017/S147924432100069X>>.

⁷ Yesi Arfianto, 'Penerapan Asas Keadilan, Kemanfaatan, Dan Kepastian Hukum Dalam Kebijakan Pengampunan Pajak (Tax Amnesty) Di Indonesia', *Wijayakusuma Law Review*, 3.1 (2020), 55–66 <<https://doi.org/DOI:10.51921/jehs6x39>>.

⁸ Dan Ahmad Hajar Zunaidi and Mokhammad Najih, 'Analisis Perbandingan Kebijakan Penyelesaian Perkara Pidana Di Luar Persidangan Di Belanda, Inggris, Dan Indonesia', *Audito Comparative Law Journal (ACLJ)*, 1.1 (2020), 1–15 <<https://doi.org/10.22219/audito.v1i1.12781>>.

⁹ Panca Sarjana Putra and others, 'Legal Politics of Investigation Authority in Criminal Offences Under the Draft Criminal Procedure Code (RKUHAP)', *JUSTISI*, 11.3 SE-Articles (2025), 686–701 <<https://doi.org/10.33506/js.v11i3.4273>>.

¹⁰ Wirdi Hisroh Komeni and Ermania Widjajanti, "The Inaccuracy of the Application of Customary Criminal Law in Article 2 of the New Criminal Code: A Legal Certainty Theory Perspective." *Innovative: Journal of Social Science Research*, Vol. 4, no. 3, (2024), p. 1051–1059, doi.org/10.31004/innovative.v4i3.10586.



Procedure Code (KUHAP), as the primary instrument that has so far represented the principle of formal legality.¹¹

The KUHAP embodies the principle of formal legality in the Indonesian criminal justice system by establishing law enforcement procedures within a strict written framework grounded in a normative division of authority.¹² The KUHAP regulates the mechanism for resolving criminal cases through the principle of functional differentiation, in which each law enforcement officer performs their role separately within the limits of authority determined by law. This structure reflects a positivistic approach that emphasises legal certainty and adherence to formal procedures as the primary foundation of law enforcement.¹³ However, the rigidity of this system also demonstrates its limitations in accommodating social dynamics and prevailing legal values, particularly when law enforcement requires flexibility and consideration of substantive justice.¹⁴ Therefore, the KUHAP serves not only as an instrument of procedural justice but also illustrates the dominance of the formal legality paradigm, which serves as a starting point for debates over the integration of living law into the national criminal law system.¹⁵ This dynamic is also reflected in the performance data on case handling by the Indonesian Attorney General's Office for 2020–2024, which shows a significant increase in settlements through a restorative justice approach, as seen in Table 1 below.

Table 1. Case Handling and Restorative Justice Performance of the Indonesian Attorney General's Office 2021–2025

Year	RJ Proposed	RJ Approved	Pre-prosecution (Completed/ Total)	Prosecution (Completed /Total)	Case Execution (Completed/ Total)	BB Execution (Completed/ Total)
2021	236	192	121,401 / 137,317	108,091 / 114,128	77,377 / 83,088	187,141 / 241,055
2022	422	388	122,126 / 127,236	111,948 / 118,716	105,415 / 114,954	160,822 / 205,092
2023	1,519	1,454	130,275 / 138,068	114,973 / 117,226	118,392 / 120,172	178,210 / 181,127
2024	2,497	2,459	118,151 / 127,253	108,863 / 118,061	80,314 / 87,529	306,713 / 427,681
2025	2,053	2,019	126,888 / 132,944	103,349 / 106,342	90,699 / 91,200	58,039 / 77,791

Source: Attachment to Regulation of the Attorney General of the Republic of Indonesia Number 4 of 2025 concerning the Strategic Plan of the Attorney General of the Republic of Indonesia for 2025–2029

¹¹ Aditya Rizka Utami, Suyadi and Setya Wahyudi, 'Perbandingan Asas Legalitas Di Indonesia Dan Korea Selatan (Tinjauan Yuridis Terhadap Kitab Undang- Undang Hukum Pidana Indonesia Dan Criminal Code Of Republic Of South Korea) Comparison of Legality Principle in Indonesia and South Korea (Juridicial Revie', *Journal of Chemical Information and Modeling*, 2.1 (2019), 212–24 <<https://doi.org/DOI:https://doi.org/10.20884/1.slr.2020.2.1.11>>.

¹² Jason Beckett, 'The Divisible College: A Day in the Lives of Public International Law', *German Law Journal*, 23.9 (2022), 1159–1192 <<https://doi.org/10.1017/glj.2022.79>>.

¹³ Gani Hamaminata, 'The Development of the Criminal Justice System in Indonesia', *Journal of Law, Politics and Social Sciences (Jlpis)*, Vol. 2, No. 4 (December 2023), pp. 52 to 64, <<https://doi.org/10.55606/jlpis.v2i4.2334>>.

¹⁴ Muhammad Ansori Lubis, 'Discretion of Law Enforcement Officials in Handling Children Who Commit Crimes: A Study of Compliance With the Principles of Restorative Justice', *Jurnal Ilmiah METADATA*, 7.3 (2025), 280–95 <<https://doi.org/10.47652/metadata.v7i3.927>>.

¹⁵ Rosdiana Rosdiana and Ulum Janah, 'Penerapan Restorative Justice Dalam Tindak Pidana Perzinaan Pada Masyarakat Kutai Adat Lawas', *Jurnal Bina Mulia Hukum*, 5.1 (2020), 53–73 <<https://doi.org/10.23920/jbmh.v5i1.14>>.



Based on evaluation data from the 2021–2025 Strategic Plan of the Indonesian Attorney General’s Office, there has been an increase in case resolution through a restorative justice approach.¹⁶ The number of cases approved for resolution through restorative justice increased from 192 in 2020 to 2,019 in 2024. This increase indicates a shift in case handling, moving beyond formal litigation to more substantive and justice-oriented resolution.¹⁷ On the other hand, the performance of general criminal case handling at the pre-prosecution, prosecution, and execution stages shows a consistent resolution rate of above 90% of the total number of cases handled each year.¹⁸ This data reflects the Attorney General’s Office’s institutional capacity to fulfil its prosecutorial function and confirms its strategic position as *dominus litis* within the criminal justice system. However, fluctuations in the number of cases and the high handling load also highlight structural challenges that need to be anticipated when formulating future law enforcement policies.¹⁹

In law enforcement practice in Indonesia, the application of the KUHAP reveals several structural problems that reflect limited coordination among law enforcement officials.²⁰ The pre-prosecution mechanism, which shows the back-and-forth of case files between investigators and public prosecutors, the withdrawal of trial examination minutes, and the failure to follow up on a number of Notices of Commencement of Investigation (SPDP), reveals the fragmentation of a system built on the principle of functional differentiation. The difference in approach between the police’s *restorative justice-based termination of investigations* and the limiting provisions of Article 109, paragraph (2), of the Criminal Procedure Code also shows the tension between the need for social flexibility and a rigid, formal procedural framework.²¹

These conditions demonstrate that, although the KUHAP was designed to guarantee legal certainty through structured procedures and a clear division of authority, in practice this approach has led to systemic rigidity. Law enforcement tends to be oriented towards procedural compliance rather than achieving contextual justice. When faced with social dynamics and the recognition of living law, existing mechanisms do not fully provide space for substantive justice. Therefore, the recognition of living law in the National Criminal Code requires greater systemic integration into law enforcement mechanisms, so that the expansion of the principle of legality does not end at the normative level but can be operationalised consistently and accountably in criminal justice practice. There has been an expansion of the principle of legality (living law is recognised in the Criminal Code), but the KUHAP law enforcement system remains formalistic and rigid. What is the role of the prosecutor’s office in bridging the gap between the two?²²

¹⁶ Denny Saputra and others, ‘Peran Jaksa Dalam Sistem Peradilan Di Indonesia’, *Halu Oleo Law Review*, 6 (2022), 218–37 <<https://doi.org/10.33561/holrev.v6i2.7>>.

¹⁷ James Boyle, ‘Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance’, *SSRN Electronic Journal*, 78.3 (2017), 371 <<https://doi.org/10.2139/ssrn.3084837>>.

¹⁸ Tobias Bernet and others, ‘Stadt von Rechts?’, 7 (2019), 7–22 <<https://doi.org/http://dx.doi.org/10.17169/refubium-2370>>.

¹⁹ Nur Agus Susanto, ‘Dimensi Aksiologis Dari Putusan Kasus “SI” Kajian Putusan Peninjauan Kembali Nomor 97 PK/Pid.Sus/2012’, *Komisi Yudisial Republik Indonesia*, 7.3 (2014), 213–35 <<https://doi.org/https://doi.org/10.29123/jy.v7i3.73>>.

²⁰ Merijn Oudenampsen, ‘The Conservative Embrace of Progressive Values : On the Intellectual Origins of the Swing to the Right in Dutch Politics’, 2018 <<https://api.semanticscholar.org/CorpusID:165549570>>.

²¹ Alfin Aslichatul Ummah, ‘Actualization Of Customary Law (Living Law) As A Form Of Legal Reform In Indonesia’, *The Jurnal Of Sosio-Legal And Islamic Law*, 2.1 (2023), 9–15 <<https://doi.org/doi.org/10.30651/jssl.v2i1.22171>>.

²² Damir Banović, ‘About John Austin’s Analytical Jurisprudence: The Empirical-Rationalist Legal Positivism’, *International and Comparative Law Review*, 2021 <<https://doi.org/Available at SSRN: https://ssrn.com/abstract=3858338 or http://dx.doi.org/10.2139/ssrn.3858338>>.



Several previous studies have examined aspects of criminal procedure law and the existence of living law in the Indonesian legal system. Rozi²³ discusses the authority of investigators and the protection of the rights of suspects and defendants under the KUHAP, particularly regarding legal aid and human rights guarantees during the investigation process. This study focuses on the procedural dimension of rights protection in the criminal justice system but has not yet examined how the recognition of living law affects law enforcement mechanisms or the strategic role of the prosecutor's office in this regard.

Furthermore, Hadi²⁴ examines the relationship between positive law and living law from the perspectives of their existence and applicability in society, while Tongat et al.²⁵ discuss the position of living law in society within national criminal law reform from a legal-theoretical perspective. Although both studies enrich the conceptual understanding of legal plurality, they remain limited to the normative and theoretical dimensions, without directly linking them to the institutional design of law enforcement, particularly the role of the prosecutor's office as *dominus litis* in the criminal justice system. In contrast to these studies, this article offers new perspective by integrating an analysis of the expansion of the principle of legality in the National Criminal Code with a structural and prospective study of the prosecutor's office's role in upholding a living law that is just and certain. The novelty of this research lies in its focus on the integrative function of the prosecutor's office as a case controller (*dominus litis*) in bridging positive law and living law in society, as well as in shaping the future direction of the *ius constituendum* role of the prosecutor's office.

The main issue that arises is no longer the normative recognition of living law. Instead, it concerns how the law enforcement mechanism, particularly through the role of the prosecutor's office as *dominus litis*, can systematically integrate the expansion of the principle of legality within the framework of legal certainty and justice. This study analyses the role of the prosecutor's office in enforcing living law through three interrelated main focuses. The first issue regarding the effectiveness of law enforcement mechanisms in the Indonesian criminal justice system is examined using Gustav Radbruch's theory of legal objectives, which places justice, legal certainty, and utility as fundamental legal values, and is reinforced by the theory of justice and the Pancasila theory of justice as grand theories. This framework is used to assess whether the system regulated in the Criminal Procedure Code currently emphasises formal legal certainty over substantive justice in society, thus not fully optimal for accommodating living law.²⁶

The second problem concerns the existing condition of the prosecutor's office, as *dominus litis* is analysed using the theory of justice and the Pancasila theory of justice as normative foundations, as well as role theory as an applied theory to assess the function and position of the prosecutor's office in the criminal justice system.²⁷ This analysis examines the extent to which prosecutorial authority can serve as an instrument of integration between

²³ Achmad Fahrur Rozi, 'Penindakan Oleh Penyidik Hak-Hak Tersangka Dan Terdakwa Dalam KUHAP Bantuan Hukum', *Lex Mercatoria*, 02.01 (2025), 31–41 <[https://doi.org/10.31851/lexmercatoria.v2i1.17647](https://doi.org/DOI:https://doi.org/10.31851/lexmercatoria.v2i1.17647)>.

²⁴ Sofyan Hadi, 'Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)', *Jurnal Ilmu Hukum*, Volume 13, Nomor 26, (2018), hal. 259 <<https://doi.org/https://doi.org/10.30996/dih.v0i0.1588>>.

²⁵ Yaris Adhial Fajrin Tongat, Said Noor Prasetyo, Nu'man Aunuh, 'Hukum Yang Hidup Dalam Masyarakat Dalam Pembaharuan Hukum Pidana Nasional (The Living Law In The Nasional Criminal Law Reform)', *Jurnal Konstitusi*, 17.1 (2020) <<https://doi.org/https://doi.org/10.31078/jk1717>>.

²⁶ Ahmad Fadlil Sumadi, 'Hukum Dan Keadilan Sosial Dalam Perspektif Hukum Ketatanegaraan Law and Social Justice in Constitutional Law Perspective', *Jurnal Konstitusi*, 12.4 (2016), 853–54 <[https://doi.org/10.31078/jk1249](https://doi.org/DOI:https://doi.org/10.31078/jk1249)>.

²⁷ Tojiboev Akbar Zafar Oglu Pujiyono Suwadi, Hasbullah, Anurat Anantanatorn, 'Judges' Role in Suspect Determination and Evolving Legal Concepts', *Jurnal Justice Dialectical*, 3.2 (2025), 176–97 <<https://doi.org/https://doi.org/10.70720/jjd.v3i2.98>>.



positive law and existing law in society, through both penal mechanisms and out-of-court settlements.²⁸

Furthermore, in formulating the *ius constituendum* for the prosecutor's future role, this study draws on the theories of legal objectives, justice, criminal law formulation policy, and legal formation to design a just and certain law enforcement model in accordance with the National Criminal Code.²⁹ All of these discussions are strengthened by comparisons with the legal systems of the Netherlands, Germany, the United States, and South Korea to provide an overview of prosecutorial practices and legal policies relevant to the development of Indonesia's law enforcement system.³⁰

Method

This research is a doctrinal legal research, which aims to systematically examine the expansion of the principle of legality through the recognition of living law in Law Number 1 of 2023 concerning the National Criminal Code and its implications for the law enforcement mechanism in the Criminal Procedure Code and the role of the prosecutor's office as dominus litis in bridging the tension between formal legality and substantive justice.³¹ The approaches used include a statute approach by examining the 1945 Constitution, the Criminal Procedure Code, the National Criminal Code, the Law on the Prosecutor's Office, and other related regulations; a conceptual approach by analysing the concept of the principle of legality, living law, prosecution policy, justice, and legal certainty based on Gustav Radbruch's theory of legal objectives which places justice, legal certainty, and utility as fundamental values of law, as well as the theory of justice and Pancasila justice as a normative basis; and a comparative approach by examining the prosecution policies and law enforcement systems in the Netherlands, Germany, the United States, and South Korea to gain perspective on how the prosecution institutions in these countries maintain a balance between legality and justice.³² This study uses secondary data in the form of primary legal materials (statutory regulations and official documents), secondary legal materials (literature, scientific articles, and expert opinions), and tertiary legal materials that support the interpretation of legal concepts, all of which are collected through library studies and analysed qualitatively with deductive methods to produce normative and prescriptive arguments regarding the prosecution policy model that is able to integrate living law into the criminal justice system in an accountable, just, and legally certain manner.³³

Results and Discussions

Living Law Accommodation within the Framework of the Criminal Procedure Code

The concept of living law was popularised by Eugen Ehrlich within the framework of legal sociology.³⁴ Ehrlich stated that the law that truly governs people's lives is not merely the law stipulated in statutes or court decisions, but rather the social norms that are truly

²⁸ Achmad Fahrur Rozi.

²⁹ Ade Sathya Sanathana Ishwara, 'Evaluating the Construction and Limitations of Opportunism Principle in Indonesian Judiciary', *Indonesian Journal of Law and Economics Review*, 11.2 (2023), 6–14 <[https://doi.org/10.21070/jjhr.v12i2.982](https://doi.org/DOI:https://doi.org/10.21070/jjhr.v12i2.982)>.

³⁰ Yuni Priskila Ginting, Chika Takeisha and Claressa Samantha, 'Penyelesaian Tindak Pidana Dengan Melibatkan Tokoh Adat/Pemangku Kepentingan: Sebuah Pendekatan Restoratif', *Jurnal Locus Penelitian Dan Pengabdian*, 3.3 (2024), 266–74 <<https://doi.org/10.58344/locus.v3i3.2531>>.

³¹ Bintang Sekar Ayu and Kayus Kayowuan Lewoleba, 'Reframing Prosecutorial Legitimacy: Embracing Restorative Justice in Criminal Case Discontinuation', *DiH: Jurnal Ilmu Hukum*, 20 (2024), 91–103 <<https://doi.org/10.30996/dih.v20i2.10803>>.

³² THALIA GONZÁLEZ, 'RESTORATIVE JUSTICE DIVERSION AS A STRUCTURAL HEALTH INTERVENTION IN THE CRIMINAL LEGAL SYSTEM', *The Journal of Criminal Law and Criminology* (1973-), 113.3 (2023), 541–591 <<https://www.jstor.org/stable/48743665>> [accessed 27 February 2026].

³³ Nicholas A. Caputo, 'Rules, Cases, and Reasoning: Positivist Legal Theory as a Framework for Pluralistic AI Alignment', *ArXiv*, 1.NeurIPS (2024), 1–9 <<https://doi.org/https://doi.org/10.48550/arXiv.2410.17271>>.

³⁴ Eugen Ehrlich, *Fundamental Principles of The Sociology of Law* (Austria: Walter L. Moll trans, 1936).



obeyed and implemented in daily practice, ‘the law that dominates life itself’. Thus, living law stands outside the construction of state legal positivism and derives its legitimacy from social acceptance rather than formal legislation.³⁵ This view aligns with Friedrich Carl von Savigny’s historical school, which holds that *volksgeist* (the soul of the nation) is the source of law, with law growing organically with society rather than being imposed by the state. In Indonesia, Soepomo affirmed that customary law is the living law because it embodies the people’s real sense of law.³⁶

Epistemologically, Ehrlich’s concept of living law rests on a socio-legal paradigm that views law as a dynamic, plastic, and contextual social phenomenon. In contrast, the KUHAP is built on a legal positivism paradigm that emphasises formal legality (*lex scripta, lex certa, lex stricta*), limited evidence, and rigid proceduralism. When Article 2 of the National Criminal Code recognised living law within society as the basis for sentencing, the state was attempting to integrate the principle of material legality into the national criminal law system. However, this integration was not accompanied by a reconstruction of procedural law. As a result, a paradigm clash occurred between the communal, unwritten, and restorative nature of living law and the individualistic, written, and retributive-procedural nature of the KUHAP. This clash was not merely a technical issue of evidence, but rather an epistemological conflict between the sociology of law and legal positivism.³⁷

This epistemological tension becomes relevant within the framework of the Indonesian state of law, as stated in Article 1, paragraph (3), of the 1945 Constitution, which states that “Indonesia is a state of law.” The meaning of this provision is that Indonesia places law as the highest foundation for the administration of the state, upholds the supremacy of law for the sake of realising truth and justice, and ensures that every form of power is accountable.³⁸ The KUHAP is the primary foundation for the application of criminal procedure law in Indonesia. This regulation was established by Law Number 8 of 1981 as part of the reform of the colonial criminal justice system, the *Herziene Inlandsch Reglement* (HIR), which was deemed no longer in accordance with the spirit of independence and the principles of a modern rule of law. The KUHAP comprehensively regulates the procedures for investigation, prosecution, court hearings, and the implementation of decisions in criminal cases.³⁹

One of the important principles contained in the KUHAP is respect for the rights of suspects and defendants. The KUHAP expressly guarantees basic rights, including the right to legal aid, the right not to be tortured, and the right to be accompanied by legal counsel from the beginning of the investigation process. This marks a paradigm shift from a repressive approach to one more oriented towards protecting human rights in the judicial process.⁴⁰ This statement reinforces that the KUHAP is part of Indonesia’s efforts to align

³⁵ Amal Abuanezh, ‘The Rationale for Detention in the Jordanian Code of Criminal Procedure: A Comparative Study with French Law’, *Heliyon*, 8.10 (2022), e11164 <<https://doi.org/https://doi.org/10.1016/j.heliyon.2022.e11164>>.

³⁶ La Ode Dedihasriadi and Edy Nurcahyo, ‘Pancasila Sebagai Volkgeist: Pedoman Penegak Hukum Dalam Mewujudkan Integritas Diri Dan Keadilan’, *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 9.1 (2020), 142 <<https://doi.org/10.24843/jmhu.2020.v09.i01.p10>>.

³⁷ Pan Mohamad Faiz, ‘Teori Keadilan John Rawls (John Rawls’ Theory of Justice)’, *SSRN Electronic Journal*, 6.1 (2017), 135 <<https://doi.org/10.2139/ssrn.2847573>>.

³⁸ People’s Consultative Assembly of the Republic of Indonesia, *Guidelines for the Socialization of the 1945 Constitution of the Republic of Indonesia (According to the Order of Chapters, Articles and Verses)*, (Jakarta: Secretary General of the MPR RI, 2010), p. 46.

³⁹ Dinar Kripsiaji dan Nur Basuki Minarno, ‘Perluasan Kewenangan Dan Penegakan Hukum Praperadilan Di Indonesia Dan Belanda’, *Al-Mazaahib: Jurnal Perbandingan Hukum*, 10.1 (2022), 29–56 <<https://doi.org/DOI:10.14421/al-mazaahib.v10i1.2573>>.

⁴⁰ Achmad Fahrur Rozi, ‘Action by Investigators on the Rights of Suspects and Defendants in the Criminal Procedure Code Legal Aid’, *Lex Mercatoria*, vol. 02, no. 01, (2025), pp. 31–41, doi: <https://doi.org/10.31851/lexmercatoria.v2i1.17647>.



its legal system with international standards. While the protection of human rights in the KUHAP reflects procedural progress, this progress remains within a formal, written, structured, and limited legal framework. This formal legal framework needs to be systematically analysed to assess its compatibility with the recognition of living law, as mapped in Table 2 below.

Table 2. Criminal Procedure Code as a Manifestation of Formal Legality

Analysis Aspects	Normative Basis (Article)	Formal Legal Character	Implications for Living Law	The Gap That Emerges
Procedural Legality	Article 1 numbers 1–7 of the Criminal Procedure Code; Article 6 of the Criminal Procedure Code	All law enforcement actions must be based on written authority.	Unwritten living law is difficult to operationalize	The Criminal Procedure Code is not designed for non-written norms
Functional Differentiation	Article 6 (investigators); Articles 13–14 (public prosecutors); Articles 182–197 (judges)	Strict separation of investigative, prosecution and judicial functions	Customary mechanisms are not included in this structure.	There is no formal coordination space with traditional institutions
Limitative Proof System	Articles 183–184 of the Criminal Procedure Code	Minimum 2 valid pieces of evidence; only 5 types of evidence	Unwritten customary norms are difficult to prove	There is no mechanism to prove the existence of living law
Legal Certainty Orientation	The overall structure of the Criminal Procedure Code	Lex scripta, lex certa, lex stricta	Procedural certainty is more dominant than social justice	Formal certainty displaces substantive justice

Source: Compiled by the author based on Law No. 8/1981 (Criminal Procedure Code), Law No. 1/2023 (Criminal Code), the 1945 Constitution, and relevant legal theory literature.

Normatively, the KUHAP provides detailed regulations regarding the stages of the criminal justice process, from investigation and prosecution to the verdict and execution of sentences. One of the main principles regulated is the presumption of innocence, which emphasises that a person may not be treated as a perpetrator of a crime until their guilt is legally and convincingly proven in court. The Criminal Procedure Code presents a more progressive approach by strengthening procedural protections, shifting the orientation from an inquisitorial system to a more adversarial model, and placing the legal process within the framework of modern criminal justice.⁴¹

The accommodation of living law within the KUHAP framework cannot be separated from the KUHAP's basic character as a manifestation of the principle of formal legality in the Indonesian criminal justice system. The KUHAP, established by Law Number 8 of 1981, is based on the principle of procedural legality, namely that all law enforcement actions must have a clear written normative basis and be carried out in accordance with the stages determined by law. This is evident from the limited regulations regarding the authority of investigators in Article 6 of the KUHAP, the mechanism for terminating investigations in Article 109 of the KUHAP, the authority of prosecution in Article 140 of the KUHAP, and the evidentiary system, which is expressly limited to five pieces of evidence in Article 184 paragraph (1) of the KUHAP. This structure shows that the KUHAP places great emphasis on legal certainty (*rechtszekerheit*), in line with Gustav Radbruch's Theory of Legal Objectives,

⁴¹ Hery Mahardika, M Galang Asmara and Muh Risnain, 'Pelaksanaan Penyelesaian Sengketa Adat Melalui Lembaga Adat Di Kabupaten Lombok Utara', *Justitia*, 9.4 (2022), 2107–21 <<https://doi.org/DOI: http://dx.doi.org/10.31604/justitia.v9i4.%25p>>.



which holds that law must guarantee order through clear, measurable, and predictable procedures. The principle of functional differentiation between investigators, public prosecutors, and judges further emphasises this orientation, because each institution is strictly limited by its normative authority.⁴²

However, following the enactment of Law Number 1 of 2023 concerning the National Criminal Code, which, through Article 2 paragraphs (1) and (2), recognises existing laws within society as the basis for criminal punishment, there has been an expansion from formal legality to material legality. Normatively, the National Criminal Code provides for criminal punishment based on customary criminal law, provided it meets the requirements of conformity with Pancasila, the 1945 Constitution, human rights, and general legal principles. However, this substantial expansion is not accompanied by procedural reconstruction in the Criminal Procedure Code. The Criminal Procedure Code does not provide a mechanism for proving unwritten customary norms, does not regulate procedures for verifying the validity of customary law, and does not provide formal coordination procedures between law enforcement officers and customary institutions. The evidentiary system in Articles 183 and 184 of the Criminal Procedure Code, which requires at least two valid pieces of evidence to convince a judge, becomes problematic when the norms to be proven are unwritten and reside in society’s collective consciousness. In practice, testimony from traditional figures often lacks a clear position as to whether they qualify as witnesses or experts, creating uncertainty in proving cases based on living law. Therefore, the Criminal Procedure Code not only does not yet regulate living law, but, epistemologically, it is not designed to accommodate the plurality of legal sources.⁴³

These limitations are also reflected in the pre-prosecution stage. The provisions of Articles 109, 110, 138, and 139 of the KUHAP demonstrate that the relationship between investigators and public prosecutors is built on the principle of rigid functional differentiation. Data on the handling of general criminal cases in 2022 and 2023 show that the number of SPDPs that do not progress to case files remains high, and that thousands of files go back and forth at the P-19 stage before being declared complete (P-21). This situation indicates that a procedural orientation often dominates over the achievement of substantive justice. On the other hand, the practice of resolving cases through a restorative justice approach, which has increased significantly in recent years, demonstrates a social need for more flexible, context-specific resolution mechanisms. However, this restorative justice stems from internal prosecutorial policies rather than an explicit reconstruction in the Criminal Procedure Code, making it more discretionary than structural.⁴⁴

Table 3. Normative Space in the Criminal Procedure Code (Is There Accommodation?)

Normative Space	Basic Article	Setting Properties	Limitations of Living Law	Gap
Termination of Investigation	Article 109 paragraph (2) of the Criminal Procedure Code	SP3 due to insufficient evidence, not a criminal act, or by law	Does not open explicit space for customary resolution	Does not accommodate living law as a reason

⁴² A Rahmatyar and M Rosikhu, ‘Implementasi Nilai Pancasila Dalam Pelaksanaan Sistem Peradilan Pidana Indonesia’, *Innovative: Journal Of Social Science Research*, 4.3 (2024), 18080–89 <<https://doi.org/10.31004/innovative.v4i3.12695>>.

⁴³ Dewa Made Rasta, ‘Tindak Pidana Adat Di Bali Dan Sanksi Adatnya’, *Yustitia*, 13.2 (2019), 1–11 <<https://doi.org/10.62279/yustitia.v13i2.398>>.

⁴⁴ Nursyamsudin Nursyamsudin and Samud Samud, ‘Sistem Peradilan Pidana Terpadu (Integreted Criminal Justice System) Menurut Kuhap’, *Mahkamah: Jurnal Kajian Hukum Islam*, 7.1 (2022), 149 <<https://doi.org/10.24235/mahkamah.v7i1.10413>>.



Termination of Prosecution	Article 140 paragraph (2) of the Criminal Procedure Code	Prosecutors can stop prosecution	Does not explicitly include customary-based substantive justice reasons	Discretion is very limited
Prosecutorial Discretion	The principle of <i>dominus litis</i> (Article 14 of the Criminal Procedure Code)	The prosecutor is the case controller	Policy-based discretion, not structural norms	Not systemic
Restorative Justice (RJ)	Regulation No. 15 of 2020	Internal policies of the prosecutor's office	Not part of the Criminal Procedure Code	Weak normative position
Absence of Customary Procedural Law	Not in the Criminal Procedure Code	—	There is no procedure for verifying customary norms	Procedural <i>rechtsvacuum</i>

Source: Author's elaboration based on the Indonesian Criminal Procedure Code (Law No. 8/1981), Prosecutor Regulation No. 15/2020, and relevant legal pluralism scholarship

Normatively, the Criminal Procedure Code does provide several spaces that theoretically is used as entry points for flexible case handling, such as the termination of investigations in Article 109 paragraph (2) of the Criminal Procedure Code and the termination of prosecution in Article 140 paragraph (2) of the Criminal Procedure Code, as well as the prosecutor's authority as *dominus litis* based on Article 14 of the Criminal Procedure Code. However, all these mechanisms are built within a formal legal framework that does not explicitly accommodate living law-based settlements or considerations of substantive justice for indigenous communities. The practice of restorative justice under Prosecutor's Regulation Number 15 of 2020 is more of an internal policy, discretionary, and not structurally integrated into the Criminal Procedure Code. Furthermore, the absence of specific procedural law to verify and prove customary norms creates a procedural legal vacuum (*rechtsvacuum*), and it can be concluded that the normative space in the Criminal Procedure Code remains limited and has not been systematically designed to integrate living law into formal criminal justice mechanisms. Therefore, the law enforcement mechanism in the Criminal Procedure Code has not been effective in operationalising the recognition of living law.⁴⁵

From the perspective of Gustav Radbruch's theory of legal purposes, the imbalance among legal certainty, justice, and expediency in criminal law enforcement mechanisms is clear. The KUHAP remains dominated by an orientation toward formal legal certainty, while the recognition of living law in Article 2 of the National Criminal Code reflects demands for substantive justice and social expediency. This lack of synchronisation between substantive criminal law and procedural law indicates that law enforcement mechanisms have not fully operationalised the recognition of living law. Without the reconstruction of criminal procedural law, the recognition of living law risks stopping at the declarative level. In line with this, from the perspective of justice theory, particularly substantive justice oriented toward a balance between individual and social interests, the legal system should not stop at procedural compliance but rather ensure the achievement of a sense of justice that permeates society. Furthermore, within the Pancasila justice framework, which emphasises harmony, deliberation, and a balance between certainty and humanity, the recognition of living law reflects the nation's social values. However, without the support of adaptive procedural mechanisms, these values do not find room for actualisation in criminal justice practice. The

⁴⁵ Mohd Din, Asmadi Syam and Ihdi Karim Makinara, 'Termination of Prosecution Based on Restorative Justice from the Perspective of the *Dominus Litis* Principle', *International Journal of Multicultural and Multireligious Understanding*, 10.2 (2023), 24–34 <<https://doi.org/DOI: http://dx.doi.org/10.18415/ijmmu.v10i2.4364>>.



dominance of formal legal certainty in the KUHAP demonstrates the suboptimal realisation of Pancasila justice in the criminal law enforcement system. The emerging problems are not merely technical issues of proof or a lack of norms, but rather a systemic inconsistency between reforms to substantive criminal law and the stagnation of criminal procedural law. Without structural reconstruction, Article 2 of the Criminal Code risks becoming a progressive norm that loses its operational power in criminal justice practice. Thus, the law enforcement mechanism in the Indonesian criminal justice system has not fully integrated living law into its operational framework, which remains oriented towards formal legality.⁴⁶

Prosecution Policy and the Role of the Prosecutor's Office as Dominus Litis

The concept of dominus litis in the Indonesian criminal justice system positions the Prosecutor's Office as both the owner and controller of criminal cases. In modern criminal law, dominus litis is the authority to determine whether a case is worthy of being brought to court, which rests exclusively with the Public Prosecutor. Consequently, judges are passive and unable to examine or try cases without the prosecutor's authorisation. Thus, prosecutors are not merely technical executors of prosecution, but rather central actors controlling the direction of cases from the pre-prosecution stage, through the drafting of indictments, to the implementation of court decisions. Normatively, this position is affirmed in Law Number 11 of 2021 concerning the Prosecutor's Office, which states that the Prosecutor's Office exercises state power in the field of prosecution, reinforced by the Attorney General's position as the highest Public Prosecutor and the authority to waive cases in the public interest (the principle of opportunity).⁴⁷

The strengthening of this position is also reflected in the Criminal Procedure Code, which details the authority of the Public Prosecutor, starting from receiving and examining case files, conducting pre-prosecution, preparing indictments, transferring cases to the court, and implementing judges' decisions. Even the authority to stop prosecution, as provided in Article 140, paragraph (2), of the Criminal Procedure Code, emphasises that the continuation of a case is entirely within the prosecutor's control. Functionally, the central position of the Prosecutor's Office can be understood through three main dimensions, namely as a gatekeeper who filters cases before entering the court, as the owner of prosecutorial discretion who can continue or stop cases, including through alternative mechanisms such as restorative justice, and as the controller of national prosecution policy through a single prosecution system under the Attorney General.⁴⁸

However, there is debate over the extent to which the principle of dominus litis is fully implemented, particularly because the Criminal Procedure Code's functional differentiation separates investigative authority from the police and prosecution from the prosecutor's office, thereby ensuring a coordinative, rather than subordinate, relationship between the two. Constitutionally, however, the Constitutional Court still recognises the prosecutor's office as controlling prosecution. Based on this normative construction and institutional practice, it can be affirmed that the prosecutor's office is the main axis of the criminal law enforcement architecture. Through prosecutorial discretion, the prosecutor's office not only processes individual cases but also determines the direction and face of criminal law

⁴⁶ Vivi Ariyanti, 'Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana Indonesia', *Jurnal Yuridis*, 6.2 (2019), 33–54 <<https://doi.org/10.35586/jyur.v6i2.789>>.

⁴⁷ Titin Herawati Utara, Supanto and Yudho Taruno Muryanto, 'Synergy of Prosecutors, Police and Corruption Eradication Commission to Handle Corruption in the Frame of Integrated Criminal Justice System', *Proceedings of the International Conference on Environmental and Energy Policy (ICEEP 2021)*, 583.Iceep (2021), 202–4 <<https://doi.org/10.2991/assehr.k.211014.043>>.

⁴⁸ Anindita Tresa Valerina dan Daud Rismana, 'Living Law In Modern Legal Systems : Challenges To The Principle Of Legality', *Walisono Law Review (Walrev)*, 6.1 (2024), 29–41 <<https://doi.org/10.21580/walrev.2024.6.1.22062>>.



enforcement policy as a whole. However, in the Indonesian system, dominus litis remains procedural in nature and has not yet fully developed into a systemically standardised policy.⁴⁹

Table 4. Normative Basis for the Role of Prosecutors from the Perspective of Pancasila Role and Justice Theory

Dimensions of Analysis	Legal Basis (Article)	Regulatory Substance	Theoretical Relevance
Formal Role of Prosecutors (Legal-Procedural)	Article 1 number 6 letter a of the Criminal Procedure Code	Public Prosecutor is a prosecutor who is authorized to carry out prosecution.	Affirming the formal position of the prosecutor as the executor of state power in the field of prosecution.
	Article 13 of the Criminal Procedure Code	A public prosecutor is a prosecutor who is authorized by law to carry out prosecutions.	Strengthening the normative legitimacy of the prosecution function
	Article 14 of the Criminal Procedure Code	The authority of the public prosecutor (receiving files, pre-prosecution, indictment, case transfer, etc.)	Describes the formal role as dominus litis in the prosecution stage
	Article 2 paragraph (1) of Law No. 11 of 2021 concerning the Prosecutor's Office	The Prosecutor's Office is an institution that exercises state power in the field of prosecution.	Placing the prosecutor's office as a single prosecution institution (single prosecution system)
Substantive Role (Discretion and Policy)	Article 140 paragraph (2) of the Criminal Procedure Code	Authority to terminate prosecution	Discretionary space to consider substantive benefits and justice
	Article 35 letter c of the Prosecutor's Office Law	The Attorney General has the authority to set aside cases in the public interest (principle of opportunity)	Prosecutors as guardians of public interests; not merely implementers of procedures
	Regulation No. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice	Settlement of cases through a restorative approach	Concrete manifestation of substantive role and orientation towards social benefit
Prosecutors as Guardians of Public Interests	Explanation of Article 35 letter c of the Prosecutor's Office Law	Public interest is defined as the interests of the nation and state and/or the wider community.	Affirming prosecutors as representatives of the public interest in prosecution policy
	Article 30 of the Prosecutor's Office Law	Duties and authorities of the prosecutor's office in the criminal, civil and state administrative fields	Demonstrates the dimensions of protecting the interests of the state and society
Dimension of Social Justice (Pancasila)	Article 1 paragraph (3) of the 1945 Constitution	Indonesia is a country of law	The constitutional basis is that the law must guarantee justice, not just certainty.

⁴⁹ Samuel Dharma Putra Nainggolan and others, 'Harmonisasi Hukum Pidana Adat Batak Toba Dengan Sistem Hukum Pidana Nasional', *Ilmu Hukum Prima (IHP)*, 6.1 (2023), 46–59 <<https://doi.org/10.34012/jihp.v6i1.3431>>.



Preamble to the 1945 Constitution, paragraph IV	The goal of the state: to protect the entire nation and realize social justice	The philosophical basis of social justice as an orientation of law enforcement policy
The Fifth Principle of Pancasila	Social Justice for All Indonesian People	The normative basis is that criminal law must reflect social balance and benefit.

Source: Author's elaboration based on the Indonesian Criminal Procedure Code (Law No. 8/1981), Prosecutor's Office Law (Law No. 11/2021), Prosecutor Regulation No. 15/2020, and the 1945 Constitution of the Republic of Indonesia

From a role theory perspective, every public office is not only understood as a normative position regulated by legislation, but also as a set of social expectations inherent to that position. Roles reflect the actualisation of rights, obligations, and responsibilities carried out by the office holder within the context of social structures and the legal system. In the Indonesian criminal justice system, prosecutors, as Public Prosecutors, bear two interrelated roles: formal and substantive. The formal role is explicitly formulated in positive legal norms, particularly in the Criminal Procedure Code and the Prosecutor's Office Law, which positions prosecutors as executors of state power in the field of prosecution, drafting indictments, referring cases to court, and executing decisions that have permanent legal force. In this dimension, prosecutors function as state instruments that ensure the principles of legality and legal certainty are upheld through structured, limited procedures.⁵⁰

However, limiting the prosecutor's role solely to formal procedural aspects may diminish the social and moral functions inherent in the prosecution institution. Beyond the formal legal framework, prosecutors also play a substantive role, namely the responsibility to ensure that law enforcement is not only procedurally valid, but also just and socially beneficial. This substantive role is reflected in the use of prosecutorial discretion, whether through termination of prosecution, the application of the opportunity principle, or restorative justice policies, which allow prosecutors to consider factors of expediency, proportionality, and the prevailing sense of justice within society. In this context, prosecutors are no longer merely "mouthpieces of the law" but rather normative actors weighing the balance between legal certainty and substantive justice.⁵¹

This position is closely related to the concept of prosecutors as guardians of the public interest. The public interest in the criminal justice system cannot be understood narrowly as the state's interest in punishing lawbreakers, but rather as society's collective interest in achieving proportional and civilised justice. As dominus litis, prosecutors have the authority to determine whether a case is worthy of being brought to court or whether it should be dropped for the sake of maintaining social stability and the greater good. The authority to waive cases in the public interest demonstrates that the Indonesian legal system does not adhere to the principle of absolute and rigid legality, but rather allows for policy considerations oriented toward social welfare.⁵² In restorative justice practices, for example, prosecutors act as mediators between the interests of victims, perpetrators, and the

⁵⁰ Yasmirah Mandasari Saragih, 'Peran Kejaksaan Dalam Pemberantasan Tindak Pidana Korupsi Di Indonesia Pasca Undang-Undang Nomor 20 Tahun 2001 Tentang Pemberantasan Tindak Pidana Korupsi', *Ai, Adl*, 9.1 (2017), 49–66 <<https://doi.org/DOI: 10.31602/al-adl.v9i1.802>>.

⁵¹ Rahma Eka Fitriani, M. Muhibin Asshofa and Nisbati Sandiah Humaeroh, 'Analisis Penetapan Surat Dakwaan Terhadap Suatu Tindak Pidana', *Al-Jinayah Jurnal Hukum Pidana Islam*, 8.1 (2022), 38–57 <<https://doi.org/10.15642/aj.2022.8.1.38-57>>.

⁵² Budi Mulya and others, 'Asas Dominus Litis Bagi Kejaksaan Dalam Penuntutan Tindak Pidana Berdasarkan Undang-Undang', *Wajah Hukum*, 6.2 (2022), 367 <<https://doi.org/https://doi.org/10.33087/wjh.v6i2.950>>.



community, so that the law enforcement process is not solely oriented toward retribution but also toward restoring social relations and community harmony.⁵³

Within a broader framework, the prosecutor's function must be understood within the perspective of the Pancasila theory of justice. As the philosophical foundation of the state, Pancasila places social justice as a fundamental goal of law enforcement.⁵⁴ The fifth principle, "social justice for all Indonesians", emphasises that the law must not stop at guaranteeing formal certainty; it must also balance individual and societal interests. Pancasila justice is integrative, harmonising legal certainty, humanity, and social benefit within a single set of values. Therefore, in carrying out their prosecutorial function, prosecutors are required not only to adhere to written norms but also to be sensitive to social realities, economic conditions, and the cultural context of society. Prosecutorial discretion, within this framework, can be understood as an instrument to prevent structural injustice, avoid over-criminalisation, and ensure that criminal law does not have a disproportionate social impact, particularly on vulnerable groups.⁵⁵

Thus, role theory and Pancasila justice theory provide a conceptual foundation that broadens understanding of the function of prosecutors in the criminal justice system. Prosecutors not only fulfil their formal role as executors of state prosecutorial power but also assume a substantive role as guardians of the public interest and implementers of social justice. The effectiveness of the criminal justice system, therefore, is not solely measured by adherence to procedures, but by the extent to which prosecutors are able to actualise the values of Pancasila social justice in concrete, proportional, and civilised law enforcement practices.⁵⁶ Prosecutorial discretion in the Indonesian criminal justice system is a strategic instrument that demonstrates how the principle of *dominus litis* extends beyond procedural functions to encompass policy dimensions and value integration. As the person in control of a case, the prosecutor has the authority to determine whether a case will proceed to trial or be dismissed based on specific considerations. This authority is not merely administrative but also an evaluative space that integrates legal certainty, the public interest, and the public's sense of justice. Within this framework, prosecutorial discretion serves as a bridge between rigid formal legality and the need for substantive justice in law enforcement practices.⁵⁷

One concrete manifestation of this discretion is the application of restorative justice.⁵⁸ Through this mechanism, prosecution can be closed off if restoration has been achieved among the perpetrator, the victim, and the community, and if certain conditions stipulated in the Prosecutor's Office's internal policies are met.⁵⁹ The restorative approach demonstrates that not every criminal case must be resolved through formal punishment in court, but can instead be directed toward restoring social relations and community balance.

⁵³ Tjetjep Rosmana, 'Mitos Dan Nilai Dalam Cerita Rakyat Masyarakat Lampung', *Patanjala : Jurnal Penelitian Sejarah Dan Budaya*, 2.2 (2010), 191 <<https://doi.org/10.30959/patanjala.v2i2.215>>.

⁵⁴ Randikha Prabu Raharja Sasmita, Sigid Suseno and Patris Yusrian Jaya, 'The Concept of Reasons for Eliminating Corporate Crime in Criminal Law in Indonesia', *Helikon*, 9.11 (2023), e21602 <<https://doi.org/https://doi.org/10.1016/j.helikon.2023.e21602>>.

⁵⁵ Geofani Milthree Saragih Mohd. Yusuf DM, Armen, Fuad Aprima, Rikardo Marpaung, 'Penegak Hukum Dalam Sistem Peradilan Pidana Di Indonesia (Studi Terhadap Advokat, Kepolisian, Kejaksaan Dan Hakim)', *Jurnal Pendidikan Dan Konseling*, 5.2 (2023), 8 <<https://doi.org/10.31004/jpdik.v5i2.13662>>.

⁵⁶ Raju Moh Hazmi, Asep Saepudin Jahar and Nurul Adhha, 'Construction of Justice, Certainty, and Legal Use in the Decision of the Supreme Court Number 46 P/HUM/2018.', *Jurnal Cita Hukum*, 9.1 (2021), 159–78 <<https://doi.org/10.15408/jch.v9i1.11583>>.

⁵⁷ Fitriati, 'Analisis Perkembangan Sistem Peradilan Pidana Ditinjau Dari Perspektif Pengadilan Tindak Pidana Korupsi', *Jurnal Yustisia*, 90.31 (2014), 73–82 <<https://doi.org/10.20961/yustisia.v3i3.29550>>.

⁵⁸ Reski Anwar, 'Eksistensi Asas Legalitas Formil Dan Materil Pada KUHP Nasional', *Jurnal Fakta Hukum (JFH)*, 2.2 (2023), 145–59 <[https://doi.org/10.58819/jurnalfaktahukum\(jfh\).v2i2.106](https://doi.org/10.58819/jurnalfaktahukum(jfh).v2i2.106)>.

⁵⁹ Alison Cronin, 'The Important Role of Civil Class Actions in the Enforcement of Corporate Criminal Law', *Journal of Economic Criminology*, 6 (2024), 100106 <<https://doi.org/https://doi.org/10.1016/j.jeconc.2024.100106>>.



Thus, restorative justice represents a shift in orientation from a retributive paradigm to one that is more responsive to social benefits and the values inherent in society.⁶⁰

Furthermore, the authority to waive cases in the public interest, grounded in the principle of opportunity, reinforces the policy dimension of prosecutorial discretion. In this context, the Attorney General can discontinue a case if the prosecution is deemed inconsistent with the interests of the nation, state, or wider society.⁶¹ The opportunity policy demonstrates that the Indonesian legal system does not adhere to the principle of absolute legality but rather allows for considerations of expediency and social stability. Thus, prosecutorial discretion serves as an integrative instrument that enables the Prosecutor’s Office to balance legal certainty, substantive justice, and the public interest, while simultaneously affirming the prosecutor’s central role in determining the direction and orientation of criminal law enforcement.⁶²

Table 5. Comparative Analysis of Prosecutorial Discretion and Interaction with Living Law

Aspect	Dutch	German	United States of America	South Korea
Legal System	Civil Law (inquisitorial)	Civil Law (strong codification)	Common Law (dominant precedent + statute)	Mixed system (Civil Law + Common Law + local traditions)
Principles of Prosecution	Legality + Opportuniteitsbeginsel	Legality (Gesetzlichkeitsprinzip) with exceptions	Prosecutorial Discretion is very broad	Legality (죄형법정주의) + significant discretion
Prosecutor’s Discretion Room	Seponer (not demanding), transaction, consideration of public interest	Termination of minor cases (§153 StPO), conditional termination (§153a StPO)	No obligation to sue; charging decision; plea bargaining; community prosecution	기소유예 (gisoyuye), bulgisocheobun; termination for expediency
Control & Accountability Model	Prosecution policy by the College van procureurs-generaal	Subject to StPO; hierarchical supervision	Influenced by political control (elected prosecutors) and judicial oversight	Strong and centralized prosecutorial system; internal oversight
Balance of Legality & Benefit	Formal legality combined with opportunities for public interest	Legality is dominant, utility is present through procedural exceptions	Benefit is very dominant through broad discretion	Formal legality is maintained, benefits are accommodated through gisoyuye
Living Law Status for Prosecutors	Not as a source of crime, but influencing	Not a source of criminal law, only a factor in	Does not create new crimes, but greatly influences	Does not form the basis for a formal criminal charge, but influences

⁶⁰ Cornelia Körthl and Imad Chbib, ‘Illicit Enrichment in Germany: An Evaluation of the Reformed Asset Recovery Regime’s Ability to Confiscate Proceeds of Crime’, *International Review of Law and Economics*, 80 (2024), 106230 <<https://doi.org/https://doi.org/10.1016/j.irle.2024.106230>>.

⁶¹ Jonathan Hobson and Brian Payne, ‘Building Restorative Justice Services: Considerations on Top-down and Bottom-up Approaches’, *International Journal of Law, Crime and Justice*, 71 (2022), 100555 <<https://doi.org/https://doi.org/10.1016/j.ijlcj.2022.100555>>.

⁶² Palmawati Taher, ‘Pancasila as The Basis of The State Unity of The Republic of Indonesia’, *Pancasila and Law Review*, 2.2 (2021), 133–40 <<https://doi.org/10.25041/plr.v2i2.2449>>.



opportunity decisions	considering interest	public	the application of the law	prosecution decisions.
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Source: Author's compilation based on the *Dutch Wetboek van Strafvordering*, German *Strafprozessordnung* (StPO §§153–153a), U.S. Department of Justice Principles of Federal Prosecution, and the South Korean Criminal Procedure Act.

A comparative analysis of the Netherlands, Germany, the United States, and South Korea shows that prosecutors' discretion is a key instrument in bridging the tension between formal legality and social reality (living law).⁶³ In the Netherlands, although the criminal justice system is firmly rooted in the principle of legality, prosecutors (Openbaar Ministerie) may discontinue prosecution under the *opportuiniteitsbeginsel* if they deem it contrary to the public interest. This discretion allows for consideration of expediency, the effectiveness of conflict resolution, and the social realities of society without making living law a stand-alone source of criminal offences. In Germany, the *Gesetzlichkeitsprinzip* principle remains dominant and requires prosecution if there is sufficient evidence, but the Criminal Procedure Code (StPO) provides exceptions through the mechanisms of dismissal of minor cases (§153 StPO) and conditional dismissal (§153a StPO). In this context, discretion is limited, particularly in assessing the public interest and the proportionality of law enforcement.⁶⁴

The United States exhibits a significantly different model.⁶⁵ The common law system grants prosecutor's extensive discretion, including decisions on whether to prosecute, the type of charge (charging decision), plea bargaining, and setting priorities for community-based law enforcement (community prosecution).⁶⁶ This discretion makes prosecutors strategic actors at the intersection of written law and prevailing social norms. While the principle of *nullum crimen sine lege* remains constitutionally protected, in practice, the application of the law is heavily influenced by considerations of public interest, resources, and community perceptions of justice.⁶⁷ South Korea, as a hybrid system influenced by both civil and common law, upholds the principle of legality, but grants prosecutors significant authority to terminate prosecutions on the basis of expediency. In exercising this discretion, prosecutors consider the relationship between the perpetrator and the victim, the circumstances surrounding the crime, the perpetrator's attitude, and community sentiment, thereby influencing prosecution decisions.⁶⁸

From a control and accountability perspective, the Netherlands and Germany maintain a hierarchical structure and strong internal oversight within their prosecutorial institutions, allowing discretion to remain within a coordinated prosecutorial policy framework.⁶⁹ The United States relies on more political and institutional control mechanisms, including judicial oversight and electoral legitimacy, for some regional prosecutors. South Korea maintains a

⁶³ Utami, Suyadi and Setya Wahyudi.

⁶⁴ Darwin Pandjaitan, Herman Herman and Oheo K. Haris, 'Analisis Hukum Penetapan Tersangka Dalam Kasus Pungutan Liar (Pungli) Sebagai Tindak Pidana Korupsi', *Halu Oleo Legal Research*, 1.3 (2019), 429 <<https://doi.org/10.33772/holresch.v1i3.10361>>.

⁶⁵ Tiar Adi Riyanto, 'Fungsionalisasi Prinsip Dominus Litis Dalam Penegakan Hukum Pidana Di Indonesia', 481–92 <<https://doi.org/https://doi.org/10.20885/jlr.vol6.iss3.art4>>.

⁶⁶ Jiwon Suh, 'Human Rights and Corruption in Settling the Accounts of the Past', *Bijdragen Tot de Taal-, Land- En Volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia*, 179.1 (2023), 61–89 <<https://doi.org/https://doi.org/10.1163/22134379-bja10049>>.

⁶⁷ Dini Mardhatillah, Muhammad Ramdan and Al Musthafa, 'Perbandingan Hukum Mengenai Kewenangan Penyidikan Perkara Pidana Antara Kejaksaan Indonesia Dengan Korea Selatan (Berdasarkan Kitab Undang-Undang Hukum Acara Pidana Dan Criminal Prosedure Act of South Korea)', *Jurnal Ilmu Hukum Dan Politik*, 2.1 (2024), 430–42 <<https://doi.org/DOI:https://doi.org/10.51903/perkara.v2i1.1820>>.

⁶⁸ Alfian Biroli, 'Problematika Penegakkan Hukum Di Indonesia (Kajian Dengan Perspektif Sosiologi Hukum)', *Jurnal Pemikiran Sosiologi*, 8.2 (2015), 1–9 <<https://doi.org/DOI:https://doi.org/10.21107/djs.v8i2.3728>>.

⁶⁹ Camilo A Cepeda-Francesc and Aurora A Ramirez-Álvarez, 'Reforming Justice under a Security Crisis: The Case of the Criminal Justice Reform in Mexico', *World Development*, 163 (2023), 106148 <<https://doi.org/https://doi.org/10.1016/j.worlddev.2022.106148>>.



centralised and strong prosecutorial system, with internal oversight mechanisms that maintain consistency in the use of discretion.⁷⁰ Overall, the four countries exhibit different balances between legality and expediency: Germany tends to prioritise legality with limited exceptions; the Netherlands combines legality with opportunity; the United States prioritises expediency and public policy as the primary determinants of practice; and South Korea integrates formal legality with significant discretion for expediency.⁷¹ Thus, living law in these four systems does not function as an autonomous source of criminal offences, but rather influences the application of the law through the scope of prosecutorial discretion institutionalised within the framework of positive law. Compared to the Dutch and German models, which have systemic institutionalised prosecution policy standards, the construction of prosecutorial discretion in Indonesia still relies on internal policies that have not been fully integrated into the design of criminal procedural law.⁷²

Granting broad discretion to public prosecutors, as seen in various comparative legal systems, on the one hand allows for flexibility and responsiveness to social realities, but on the other hand carries serious risks of abuse of discretion.⁷³ Discretion without clear normative parameters can lead to inconsistent law enforcement, disparities in the treatment of similar cases, and even political intervention and conflicts of interest.⁷⁴ In highly discretionary systems like the United States, debates over prosecutorial accountability are central, as the decision to prosecute or not can effectively determine a person's fate without a full adjudication. Similarly, in systems that recognise opportunity, such as the Netherlands, or in conditional dismissal mechanisms like Germany and South Korea, the open-ended nature of "public interest" considerations can lead to ambiguity if not constrained by measurable, transparent guidelines.⁷⁵

Another risk is an imbalance between the principles of legality and utility.⁷⁶ If discretion is used excessively under the pretext of efficiency or public interest, legal certainty (*rechtssicherheit*) can be reduced, and create room for normative uncertainty.⁷⁷ Conversely, if legality is applied rigidly with no room for discretion, the justice system may fail to prioritise substantive justice and social utility. Therefore, prosecutorial discretion must be understood not as absolute power, but as authority bound by the principles of proportionality, rationality, and accountability. In this context, the balance of values, as formulated by Gustav Radbruch, is crucial. Between legal certainty, justice, and utility the latter becomes an important theoretical criterion for assessing the legitimacy of discretion.⁷⁸

⁷⁰ Hans Julius Wolff, 'Criminal Justice in Germany', *Michigan Law Review*, 42.6 (1944), 1067–88 <<https://doi.org/10.2307/1283584>>.

⁷¹ Treena Wilkie and others, 'Criminal Responsibility', in *Encyclopedia of Forensic and Legal Medicine (Third Edition)*, ed. by Jason Payne-James and Roger W Byard, Third Edit (Oxford: Elsevier, 2025), pp. 858–65 <<https://doi.org/https://doi.org/10.1016/B978-0-443-21441-7.00093-5>>.

⁷² Ni Kadek Dripta Yanti and I Ketut Mertha, 'Eksistensi Saksi Mahkota Dalam Proses Peradilan Pidana Di Indonesia Berdasarkan Asas Non Self Incrimination', *Kertha Semaya: Journal Ilmu Hukum*, 8.12 (2020), 1928 <<https://doi.org/10.24843/ks.2020.v08.i12.p10>>.

⁷³ Tomoya Mukai and others, 'Criminal Justice Participation among Japanese Adults: A Preliminary Study', *International Journal of Law, Crime and Justice*, 74 (2023), 100616 <<https://doi.org/https://doi.org/10.1016/j.ijlcj.2023.100616>>.

⁷⁴ Edgar Bodenheimer, *Jurisprudence The Philosophy and Method of the Law* (USA: Harvard University Press, 1978).

⁷⁵ Lambok Immanuel Sihaloho dan Padmono Wibowo, 'Sistem Peradilan Pidana Terhadap Tujuan Pidana Pemasarakatan Indonesia', *INNOVATIVE: Journal Of Social Science Research*, 3.5 (2023), 2440–49 <<https://doi.org/https://j-innovative.org/index.php/Innovative/article/view/5031>>.

⁷⁶ Saputra and others.

⁷⁷ Tomoya Mukai, Yuma Matsuki and Eiichiro Watamura, 'Who Participates in Criminal Justice? An Exploratory Study in Japan', *International Journal of Law, Crime and Justice*, 77 (2024), 100670 <<https://doi.org/https://doi.org/10.1016/j.ijlcj.2024.100670>>.

⁷⁸ Atip Latipulhayat, 'Friedrich Karl von Savigny', *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)*, 2.1 (2015), 197–208 <<https://doi.org/10.22304/pjih.v2n1.a12>>.



Thus, the need for clear operational standards and effective oversight mechanisms is a key prerequisite for institutionalising prosecutorial discretion. These standards could include published prosecution policy guidelines, mandatory written arguments for case termination decisions, internal hierarchical control mechanisms, and the possibility of judicial review or other external mechanisms. Without adequate oversight instruments, discretion risks degenerating into uncontrolled power and undermining the legitimacy of the criminal justice system.⁷⁹ Therefore, integrating discretionary flexibility with a transparent accountability system is essential to ensuring that the use of prosecutorial authority remains within the rule-of-law framework and does not deviate from the goals of substantive justice. Although normatively, the Prosecutor's Office has been placed as *dominus litis*, the construction of prosecutorial discretion in Indonesia remains fragmentary and has not been fully institutionalised within a systemic, measurable standard framework, thus opening up room for ambiguity in the integration between legal certainty and substantive justice.⁸⁰ This condition shows that although conceptually Indonesia has adopted the *dominus litis* model, institutionally and normatively, the design of prosecutorial discretion has not been fully transformed into a standardised public policy instrument within the framework of an integrative rule of law.⁸¹

Reconstruction of Prosecution Policy in the Integration of Living Law

The future reconstruction of Indonesia's criminal justice system demands a harmonisation of substantive and procedural criminal law. Recognition of living law in society, as enshrined in Article 2 of the National Criminal Code, has expanded the principle of legality from the formal to the material dimension.⁸² However, this expansion has not been accompanied by structural adjustments within the KUHAP, resulting in a lack of synchronisation between criminal norms and their procedural mechanisms.⁸³ Therefore, the reformulation of the relationship between the Criminal Code and the Criminal Procedure Code must be directed toward conceptual integration between material and formal legality within a coherent system design. The following is a draft reconstruction of Article 1: proposal to add chapters to the Criminal Procedure Code Bill.⁸⁴

Chapter X regulates the integration of living law within the prosecution process through the principle of dual legality, which combines formal legality in statutory criminal law with material legality that recognizes societal norms. The Public Prosecutor may consider dispute resolution based on customary law when the settlement is recognized by the relevant community, accepted by the victim and perpetrator, free from discrimination, and consistent with statutory law and human rights. Prosecution may be terminated if the dispute has been resolved through a voluntary customary agreement that protects victims and respects human dignity, subject to judicial confirmation. The court must examine constitutional conformity, procedural fairness, distributive justice, and proportionality before granting approval.

⁷⁹ Michael M Welner, 'Assessment of Criminal Maturity in Juvenile Homicide Offenders', in *Encyclopedia of Forensic and Legal Medicine (Third Edition)*, ed. by Jason Payne-James and Roger W Byard, Third Edit (Oxford: Elsevier, 2025), pp. 360–70 <<https://doi.org/https://doi.org/10.1016/B978-0-443-21441-7.00325-3>>.

⁸⁰ Masahiko Saeki, 'Victim Participation in Criminal Trials in Japan', *International Journal of Law, Crime and Justice*, 38.4 (2010), 149–65 <<https://doi.org/https://doi.org/10.1016/j.ijlcj.2011.01.002>>.

⁸¹ Afreiza Octaguna A and others, 'Moralitas Hakim Di Indonesia Dalam Mewujudkan Keadilan Menurut Perspektif Aristoteles', *Jurnal Pendidikan, Seni, Sains Dan Sosial Humanioral*, 1.1 (2023), 1–25 <<https://doi.org/10.11111/nusantara.xxxxxx>>.

⁸² Sholahuddin Al-Fatih and Sayed Khalid Shahzad, 'Rethinking How Laws Are Made: Indonesia's Legal Method Dilemma', *Journal of Sustainable Development and Regulatory Issues*, 3.2 (2025), 170 – 190 <<https://doi.org/10.53955/jsderi.v3i2.32>>.

⁸³ Allison R Gilbert and others, 'Law Enforcement Assisted Diversion (LEAD) in North Carolina: A Longitudinal Analysis of Criminal-Legal Outcomes', *Journal of Criminal Justice*, 96 (2025), 102323 <<https://doi.org/https://doi.org/10.1016/j.jcrimjus.2024.102323>>.

⁸⁴ Kusnu Goesniadhie S., 'Perspektif Moral Penegakan Hukum Yang Baik', *Jurnal Hukum Ius Quia Iustum*, 17.2 (2010), 195–216 <<https://doi.org/10.20885/iustum.vol17.iss2.art2>>.



The formulation of the articles above represents a normative reconstruction aimed at harmonising the recognition of material legality in the Criminal Code with the mechanisms of criminal procedure.⁸⁵ Through this chapter, living law is no longer merely a symbolic norm but has acquired a structured, controlled operational channel. In this design, the Prosecutor's Office transforms from a procedural dominus litis to a value-integrated dominus, an institution that bridges state law and community law while remaining within the constitutional and human rights framework. Judicial verification mechanisms ensure that legal pluralism does not develop into legal relativism, which threatens legal certainty and equality.⁸⁶

The proposed model establishes a structured mechanism for integrating living law within the criminal prosecution process through four sequential stages: facilitation by the Public Prosecutor, verification by the judge, judicial determination by the court, and execution by the state. In this framework, the Public Prosecutor initially facilitates the settlement process based on societal norms that remain consistent with constitutional principles and human rights standards. The judge subsequently verifies the legality, fairness, and procedural integrity of the settlement. Following this verification, the court issues a formal judicial determination that grants legal validity and enforceability to the agreement, after which the state implements the decision through its legal institutions. This institutional design aims to ensure that the principles of legal certainty, substantive justice, and social utility are balanced and operationalized within the structure of Indonesian criminal procedural law.⁸⁷

The Indonesian legal system is characterised by legal pluralism, where codified state law coexists with societal law (living law), particularly customary law. The explicit recognition of living law in Article 2 of the National Criminal Code marks a paradigm shift from formal legality to material legality.⁸⁸ However, this recognition is not unlimited, as it must remain in harmony with Pancasila, the 1945 Constitution, human rights, and general legal principles recognised by the community of nations.⁸⁹ Based on penal policy, this recognition has the consequence that living law is not merely positioned as an alternative source of offenses, but rather as a consideration of the public interest in prosecution policy.⁹⁰ The public interest in the criminal justice system should not be narrowly interpreted as the state's interest in punishing, but rather understood as the collective interest of society in achieving substantive justice, social recovery, and communal balance. Thus, living law functions as a corrective instrument against the rigidity of positive law, without negating the principle of legal certainty.⁹¹

The restorative justice approach, as stipulated in Prosecutor's Regulation Number 15 of 2020, represents the embryonic integration of social values into national penal policy. Restorative justice aligns with dispute resolution mechanisms in many customary legal systems, which emphasise deliberation, restoration, and social reintegration.⁹² From the perspective of *ius constituendum*, this approach should be developed not as a limited

⁸⁵ Xian Liu, Wen Wang and Shoujun Huang, 'Criminal Enforcement and Environmental Performance: Evidence from China', *Ecological Economics*, 224 (2024), 108267 <<https://doi.org/https://doi.org/10.1016/j.ecolecon.2024.108267>>.

⁸⁶ Gani Hamaminata, 'Perkembangan Sistem Peradilan Pidana Di Indonesia', *Jurnal Hukum, Politik Dan Ilmu Sosial*, 2.4 (2023), 52–64 <<https://doi.org/10.55606/jhps.v2i4.2334>>.

⁸⁷ Alexa Cinque and others, 'Program Outcomes in a Light-Touch Prosecutor-Led Misdemeanor Diversion Program', *Journal of Criminal Justice*, 101 (2025), 102498 <<https://doi.org/https://doi.org/10.1016/j.jcrimjus.2025.102498>>.

⁸⁸ Bernet and others.

⁸⁹ Mulya and others.

⁹⁰ Zhen Ye and others, 'Controlling Insider Dealing through Criminal Enforcement in China', *Journal of Financial Crime*, 27.4 (2020), 1061–73 <<https://doi.org/https://doi.org/10.1108/JFC-05-2020-0089>>.

⁹¹ Rosalia Dika Agustanti and Bambang Waluyo, 'Konsep Sistem Peradilan Pidana Khusus Perempuan Korban Kekerasan', *Masalah-Masalah Hukum*, 52.1 (2023), 42–51 <<https://doi.org/10.14710/mmh.52.1.2023.42-51>>.

⁹² Al-Fatih and Shahzad.



administrative policy but as a national penal paradigm that connects state law with community law through a standardised, accountable procedural framework.⁹³ However, the integration of these social values can only be justified if accompanied by a rigorous verification mechanism. Customary decisions intended to be institutionalised within a state's legal system must first undergo procedural, distributive, and human rights compliance tests by formal courts. Without these mechanisms, the state risks legitimising discriminatory practices or unfair procedures in the name of customary recognition. Therefore, integrating living law into penal policy must be carried out through a facilitation-verification-determination-execution model, thereby maintaining the balance between substantive justice and legal certainty.⁹⁴

The design of a progressive prosecution policy within the framework of *ius constituendum* must be based on a balance among three legal values formulated by Gustav Radbruch: legal certainty, justice, and utility. In practice, the Indonesian criminal procedure system tends to prioritise formal legal certainty.⁹⁵ The recognition of living law through the National Criminal Code opens space to rebalance this dominance by presenting substantive justice and social utility more concretely. From the perspective of the Pancasila theory of justice, law must not stop at procedural formalism. The fifth principle, "social justice for all Indonesian people", demands that criminal law function as an instrument of social harmony, not merely a repressive tool of the state. Therefore, a progressive prosecution policy must position the Prosecutor's Office not merely as a procedural dominus litis, but as a gatekeeper of substantive justice capable of balancing formal legality with the values of humanity that live in society, as mandated by Article 8, paragraph (4), of the Prosecutor's Office Law.⁹⁶

This progressive model must be adaptive to legal plurality. Adaptability does not mean legal relativism, but rather the prosecutor's ability to engage with customary norms, provided they do not conflict with human rights and the principle of non-discrimination. In the proposed design, the prosecutor acts as a facilitator for customary dispute resolution, drafting the agreement, and liaising with the court to obtain a ruling.⁹⁷ The court then conducts substantive and procedural verification before granting executive power.⁹⁸ The prosecutor then carries out the execution function in accordance with the National Criminal Code (including Articles 81 and 82, which concern fines and their substitutes). With this model, progressive prosecution policy is grounded not only in Radbruch's balance but also in Pancasila's integrative justice. State law and customary law are not dichotomously opposed, but rather institutionalised within a controlled and constitutional relationship.⁹⁹

The Prosecutor's Office transforms from mere prosecutors to mediators of legal pluralism and guardians of integrated values.¹⁰⁰ Ultimately, the design of a progressive prosecution policy that adapts to legal plurality aims to ensure that the recognition of living law does not cease to be a declarative norm in the National Criminal Code, but is truly

⁹³ Saputra and others.

⁹⁴ Henny Saida Flora, 'Perbandingan Pendekatan Restorative Justice Dan Sistem Peradilan Konvensional Dalam Penanganan Kasus Pidana', *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam*, 5.2 (2023), 1933–48 <<https://doi.org/10.37680/almanhaj.v5i2.3812>>.

⁹⁵ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)*, 3rd edn (Kencana, 2011) <<https://jdih.maritim.go.id/bunga-rampai-kebijakan-hukum-pidana>>.

⁹⁶ Zoltán Oszkár Szántó, 'Max Weber'S Way From Social Economics To Sociology', *Studia Universitatis Babeş-Bolyai Sociologia*, 66.1 (2021), 75–92 <<https://doi.org/10.2478/subbs-2021-0004>>.

⁹⁷ WooJung Jon and Wonsuk Yang, 'Mapping South Korea's Digital Asset Regulatory Landscape: From Criminal Code to the Recently Implemented Virtual Asset User Protection Act', *Computer Law & Security Review*, 57 (2025), 106140 <<https://doi.org/https://doi.org/10.1016/j.clsr.2025.106140>>.

⁹⁸ Panca Sarjana Putra and others.

⁹⁹ Iskandar and others.

¹⁰⁰ M I S Korompot, S Al-Fatih and D Pradhan, 'The Principle of Equality Before the Law in Indonesian Corruption Case: Is It Relevant?', *Journal of Human Rights, Culture and Legal System*, 1.3 (2021), 135–46 <<https://doi.org/10.53955/jhcls.v1i3.13>>.



operational in practice through a procedural framework that guarantees procedural justice, distributive justice, human rights protection, and legal certainty. Thus, the ideal of *ius constituendum*, the enforcement of living law with justice and legal certainty, takes concrete institutional form and is constitutionally accountable. Without this reconstruction, Article 2 of the Criminal Code could become a declaratory norm, losing procedural effectiveness and creating legal uncertainty. Therefore, the reconstruction of procedural law is not merely a technical necessity but a constitutional imperative to maintain the coherence of the national criminal law system.¹⁰¹

Conclusion

Code KUHAP remains oriented toward formal legality and, therefore, is unable to operationalise the recognition of living law in criminal justice practice. As a criminal procedure law grounded in legal positivism, the KUHAP bases law enforcement on written criminal law, limited evidence, functional differentiation, and authority grounded in written norms. Although the national legal system recognises customary law as living law, especially after the recognition of material legality in the National Criminal Code, the KUHAP does not provide procedural mechanisms to verify, assess, or integrate living norms into the formal criminal justice process. This condition creates tension between the plurality of social laws and the demand for legal certainty under the principle of legality, leaving criminal law enforcement mechanisms unable to fully deliver substantive justice. The Prosecutor's Office, as *dominus litis*, has in fact acted as a bridge between state law and the law that lives in society. However, this role remains discretionary and lacks adequate procedural legitimacy. In prosecutorial practice, the Prosecutor's Office, through the exercise of discretion, the application of humanitarian values, consideration of customary norms, and restorative justice policies, has demonstrated its substantive function as a guardian of the public interest and a mediator in resolving social conflicts. However, because the KUHAP does not explicitly regulate the mechanism for integrating living law, this practice still relies on internal policies and lacks a systemic procedural basis. Consequently, the exercise of prosecutorial discretion can create inconsistent practices and legal uncertainty. These findings indicate that *dominus litis* in the Indonesian system remains at a procedural stage, having not yet developed into a normatively institutionalised instrument for value integration. From the perspective of *ius constituendum*, integrating living law into the criminal justice system requires a reconstruction of prosecutorial policy that positions the Prosecutor's Office as a facilitator of constitutionally controlled legal pluralism. This reconstruction can be realised through procedural law regulations that allow criminal cases to be resolved based on customary agreements, with facilitation by prosecutors, verification by the courts, and formal legitimacy through judicial determination. This model allows for harmonisation between formal and material legality, while institutionalising a restorative justice approach within the framework of a state based on the rule of law. Implementation of this design requires establishing clear procedural rules, standardising prosecution policies, increasing law enforcement officers' knowledge of living law, and coordinating structures between the Prosecutor's Office, the courts, and indigenous communities. Thus, the recognition of living law does not cease to be a declarative norm in substantive criminal law but acquires an operational form that ensures a balance between legal certainty, substantive justice, and social benefit.

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¹⁰¹ Hwian Christianto, 'Pembaharuan Makna Legalitas Dalam Pidana Indonesia', *Jurnal Hukum Dan Pembangunan*, 39.3 (2017), 347–75 <<https://doi.org/DOI:10.21143/jhp.vol39.no3.1512>>.



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