

The Sociological Perspective on The Study of The Living Law: Is It a Part of Legal Discipline or Social Discipline?

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Abstract

The legalistic positivist Civil Law tradition still dominates legal thinking in Indonesia. Therefore, law is often only defined as legislation. Law that is realized in norms is postulated in the form of laws. Whereas outside state law there is also a law that grows and develops in society which has a very effective force. The law is known in the concept of The Living Law which is translated by academics in Indonesia as Customary Law, where the law is realized in the attitude of legal action. Its existence as an embodiment of the original Indonesian Legal system is different from the Civil Law legal system. The problem is when each claims the truth of the law. Meanwhile, if we look at the legislation, the existence of Customary Law as The Living Law is highly dependent on state recognition. Therefore, to understand and explain it brings methodological consequences that use an external perspective. The question that arises is whether the law embodied in the attitude of legal action can be interpreted sociologically? If it can, is this sociological study part of the study in the discipline of law or is it a study of social disciplines? This paper will argue about the importance of an interdisciplinary perspective in the study of legal disciplines, such as the Sociology of Law in the study of The Living Law.

Keywords: *Civil Law, The Living Law, Interdisciplinary, Law.*

1. INTRODUCTION

In general, the association of life in society will create different legal traditions in accordance with the development of legal thinking influenced by the socio-political and economic conditions at the time the law was formed. Indonesia itself, has a Civil Law legal tradition which is a concordance from the Dutch East Indies colonial government to the Dutch government. This tradition then continued after the independence of the Republic of Indonesia by adopting the Dutch East Indies Regulation through Article II of the 1945 Constitution on Transitional Rules.

In the Civil Law tradition, we have written rules that are managed rationally. The national legal framework is then focused on the creation of legal codification and unification. As a result, legal norms become a system of rules that are general and either abstract or concrete, applying to all layers of Indonesian society. The structure of legal formation is perceived as a form of written law, namely legislation.

Law is the legislation created by a body with the authority to carry out its legislative function, namely the Legislative Body. In this legal concept, a norm is legally defined as law if it originates from the state, or an institution authorized by the state to enact laws. Beyond that, there may be other forms of law, but

not in the true legal sense. This tradition is heavily influenced by legal thinking known in the philosophy of law as positivism. This perspective limits the concept of law, where a norm becomes law if it meets the following elements: (i) it is established by a sovereign authority, (ii) the norm contains commands that must be obeyed, and (iii) it is accompanied by sanctions for those who violate it. Based on this concept, law is essentially only embodied in legislation, as its content represents the command of a sovereign authority. This makes the source of authority for the creation of law originate from the ruler.¹

Historically, the concept as mentioned above has been adopted in Article 15 of the *Algemene Bepalingen van Wetgeving* (AB), which states that “with the exception of provisions established for Indonesian nationals and those equated with them, customary practices are not considered law unless otherwise stated by law.” During the colonial period, the enforcement of legal codification and unification, such as the Civil Code, Criminal Code, and Commercial Code along with their procedural laws, marked the application of the Civil Law tradition. This tradition continued into the era of independence. We can see from the transitional provisions of the 1945 Constitution, which state that “All existing laws and regulations shall remain in force until new ones are enacted pursuant to this Constitution.” This means that this provision aimed to legitimize the continued application of colonial law with the purpose of avoiding legal vacuums during the transition period at the beginning of independence, while also solidifying the positivistic Western legal paradigm.

In the context of Indonesian society, diversity in social and cultural structures has given rise to diverse legal values that may vary significantly. These legal values may not only differ among local communities but also from the national legal system. On one hand, communities create law within their informal or locally distinctive cultural contexts, which are often concrete in nature. On the other hand, state law is bound by its idealism, characterized not only as a logical system but also as specific, abstract, and formal norms that must maintain their authority. The diversity in Indonesia’s social and cultural structures, along with claims of legal truth, becomes a distinct issue when these truths differ from the claims of state law.

From the perspective mentioned above, state law with its supreme character indeed possesses the strongest binding force, supported by sanctions, and serves as a means of social control for those who violate it. Unfortunately, state law is rarely encountered in everyday life, especially in traditional local communities that are distant and isolated. Although, in some matters related to public law such as administrative and constitutional law, as well as criminal law, state law applies. However, once again, claims of legal truth by the community, however simple they may be, are difficult to ignore. This is because they represent actual, living law that operates within social reality. They regulate social relationships that occur in everyday life within the community and are effective in the interactions among community members. In other words, the law that is most closely associated with and has sociological validity in everyday life is actually a different kind of law outside of state law.

Essentially, the law formed by such communities is a living law that operates within every association (group of people) in society. This means that every community will form groups to fulfill their basic needs, and they will create customs that become norms

¹ Hari Chand, *Modern Jurisprudence* (International Law Book Services, 2001).

guiding how each person within that group should behave in achieving those goals, which is the fulfillment of their basic needs. This concept was introduced by E. Ehrlich as “The Living Law”: “at the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, but in society itself.” According to him, the concept of The Living Law is the focal point of the formation and development of law within society itself. It is a norm that arises from the activities of members of a community group in the social space that dominates society’s life, even though it is not always formulated in a formal manner but always reflects the values within the society.

From the description above, Ehrlich believed that law originates from social facts and does not depend on state authority but rather on social compulsion. This means that the source of law is not legislation or cases (in court) reported but rather the activities of the community itself. The concept of The Living Law in Indonesia is interpreted as Customary Law – the native Indonesian law with a nature and essence different from the understanding of Civil Law. It is embodied in the attitudes and actions of the community, thus having real legal elements. The meaning of customary law itself encompasses all regulations that manifest in decisions made by traditional leaders and are spontaneously followed within the community (Terhaar). These decisions represent actions to determine whether a certain custom has become customary law, which depends on the community leaders’ response to violations of customary rules. If the leaders impose penalties on the violator, then the customary practice becomes customary law.

If the concept of The Living Law as customary law, what is it really: the decision of judges (traditional leaders) or authority within the community? One thing to emphasize is that customary law forms the basis of the legal order within indigenous communities. Regardless of whether they have found expression in court decisions or in laws or whether they will find it in the decisions of traditional authorities. In Indonesia, it is not an easy matter to understand the existence of customary law because the identity of indigenous communities and their laws should ideally not be singular and uniform. The development and changes in customary law and indigenous communities cannot be restrained.

In the context of claims of legal truth, can such law be interpreted sociologically? This becomes a necessary question because every understanding of law, viewed from various perspectives such as Civil Law - which has abstract and legislative characteristics, and customary law, which is concrete and real - has different methodological consequences. This article aims to explain how we can scientifically examine the existence of customary law within the framework of the legal discipline. There are at least two reasons why this article needs to be conveyed: First, customary law in Indonesian society, which is The Living Law, has not been extensively studied scientifically. Second, there are not many academics who understand the various forms of legal existence and the methodological consequences of studying each of these legal existences from an interdisciplinary perspective such as sociology of law. Therefore, this article is titled “The Sociological Perspective in the Study of The Living Law: Is it a Part of Legal Discipline or Social Discipline?”.

2. ANALYSIS AND DISCUSSION

2.1. Ehrlich's Thought: The Concept of Law and Critique of Positivism

The fundamental concept of law as Living Law becomes the central theme of Ehrlich's legal philosophy. Law is derived from real issues within society and is not dependent on the authority of the state. Therefore, the real source of law is not legislation or court case reports but rather originates from the society itself; that is the living law. Furthermore, he emphasizes that living law is actually more commonly used by the community, and even when prioritized, it is more effective in its enforcement. This situation can occur because laws stemming from the realities within society are always acceptable to the people, as they continually evolve beyond the rigid and stagnant state law.²

From the description above, Ehrlich is actually critiquing the mainstream legal positivism, which, in providing a concept of law, focuses solely on the examination of statutory regulations. His criticism can be found in the first paragraph of Chapter XII in his book, where he states that the reason why the dominant legal school of thought prioritizes legal regulations over other legal phenomena as the subject of its investigation is because this school of thought quietly assumes that all law can be found in the regulations created by the state. A norm can be considered law if it originates from the authority/state.³

This school of thought strengthens legal thinking by providing legal justification through the process of selecting existing norms, and only norms that have been formulated positively are referred to as law. Once a norm, according to the agreed-upon process, becomes positive, it immediately becomes legally valid. Therefore, the creation of legislation becomes the absolute source of legal validity, and only through this process is a law declared to be legally valid.

One of the pioneers of the positivist school of thought was John Austin, who provided a definition of law as the command of a sovereign (law as a command of sovereign) - "*Laws proper or properly so called are commands; laws which are not commands are laws improper or improperly so called.*" From this statement, Austin aimed to emphasize that a norm is considered law if it is a command (this command forms the basis of law). In other words, a command is understood as something imperative that originates from a sovereign authority and is directed to others to act in accordance with that command.⁴ Once a norm is formulated positively, it becomes legally valid. Therefore, the creation of legislation also becomes the absolute source of legal validity, and it is only through this process that it is determined which laws are legally valid. For Austin, the supremacy and unlimited power of the law are the sources of every legal rule in an independent political society. This means that the rules in question are those that contain commands from sovereign authority.⁵ In other words, Austin's view of law shows that law is a command from a sovereign authority, and thus, there is an authority that forms regulations. It can also be said that any norm is considered a legal norm when it is created by an institution (parliament) that possesses sovereignty and authority to do so.⁶ The concept of commands, which was later elaborated by Herbert Hart in his concept related to the

² Purnadi Purbacaraka and Chidir Ali, "Disiplin Hukum," Bandung: PT. Citra Aditya Bakti Edisi 5 (1980): 50-51.

³ Eugene Ehrlich and Klaus A Ziegert, *Fundamental Principles of the Sociology of Law* (Routledge, 2017).

⁴ Michael D A Freeman, "Lloyd's Introduction to Jurisprudence," London: Sweet & Maxwell, 1994, 214-19.

⁵ William Twining, *Globalisation and Legal Theory* (Cambridge University Press, 2000). *Cornell Law Review* 66 (June 1981):986-1031.

⁶ George Mousourakis, "Legal Empiricism, Normativism, and the Institutional Theory of Law," 2009. , *International Journal of Philosophy* 37, no. 2 (2008):138-148 (141).

Rule of Recognition, states that a law can be considered a legal norm if it possesses the characteristic of being obligatory or mandatory, which in Austin's concept is referred to as a command or order. Furthermore, a command can only be considered a command if it can be accepted by the person who is commanded.⁷ This opinion represents Hart's critique of Austin's viewpoint, which represents the positivist school of thought, similar to Kelsen's belief that the most important aspect of legal validity is that it must be based on the constitution. As long as it is based on the constitution and the rules within it within a legal system. This view is challenged by Joseph Raz, who demonstrated that Austin's opinion cannot be applied to Commonwealth countries with their own legislative powers. Additionally, this serves as a counterexample to Kelsen's claims.⁸

From the description above, the dominant legal thought of the 19th century has shaped law into legalism in the development of the legal world and has also been accepted in legislative systems. Meanwhile, Ehrlich found that within society, there are various types of legal rules that, in reality, interact with each other. This is his criticism of legal positivism, which only recognizes one type of state law: legislative regulations that can serve as sources for deciding cases, but it overlooks other types of law that are also important within society. In other words, he wants to argue that within society, there are many systems of rules as behavioral guidelines that are equally important and should be enforced alongside the legal regulations. According to him, these systems of rules might actually be more effectively accepted by the community.

The source of law is not only in state law but also within the society itself, where they create law through the social institutions they establish, which may also change and evolve in the process. He describes this situation by stating at the beginning of his writing: "at the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, but in society itself."⁹ This is The Living Law, a type of law distinct from state law, which stems from the phenomena of life within groups in society as they engage in social institutions. Just like economic institutions, there are markets within markets, so we can observe how society conducts its business transactions and how, in these transactions, every member of the group adheres to agreed-upon norms if they wish to be accepted within their group.

In the sociological context of these groups, they are referred to as associations - groups of people embodying a social institution. Within these groups, each individual will carry out their activities according to the roles expected by the group. To ensure that individuals can carry out group activities in an orderly manner, Ehrlich introduced the concept of the inner order. It's a concept that involves a set of normative networks that regulate the expected roles of individuals when they engage in social relationships within their group activities. In this context, expectations of behavior are known, followed, and upheld by the group members as binding rules. Every individual in fulfilling their role is always guided by the prevailing norms within the social institution in the community of which they are a member.

The norms, as mentioned above, shape the patterns of behavior among members of society in their social relationships with each other, and this is what constitutes The

⁷ Victoria L Ridler, "The Exercise of Jurisdiction and the Absent Author of Law's Speech," *Law & Literature* 31, no. 1 (2019): 71-93. (78) < <https://doi.org/10.1080/1535685X.2018.1506409> >

⁸ Brian H Bix, "John Austin and Constructing Theories of Law," in *The Legacy of John Austin's Jurisprudence* (Springer, 2012), 1-13. (July 2011):432 < <http://dx.doi.org/10.2139/ssrn.1535386> >

⁹ Ehrlich and Ziegert, *Fundamental Principles of the Sociology of Law*.

Living Law or the law that is alive. For example, in the process of transactions in the market, contracts are formed that give each individual their position and role in the relationships within the group/association. If each person fulfills their obligations, they fulfill the expected roles in the contract. When they fulfill their obligations, it's not out of fear of sanctions, but because they want to meet the behavioral expectations established within those relationships. Therefore, according to Ehrlich, The Living Law is relied upon precisely because it is based on the beliefs of individuals within the context of their group and dominates life itself, even though this law is not specified in state regulations.

Based on the description above, we can see that Ehrlich distinguishes the concept of law from what he first refers to as a legal proposition - law created by the state, which he articulates as precise rules and formulas that universally bind as legislation, or he refers to it as being "in a law book." Second, there is the law that originates from social facts and grows from the social relationships present in the activities of social institutions of which one is a member; this law is referred to as legal norms.¹⁰ In his concept, Ehrlich's notion of the two types of norms mentioned above demonstrates that pluralism also always occurs within society. This concept was later introduced by Benda-Beckmann as a condition where there are two or more legal systems existing simultaneously in a society, interacting with each other, and their applicability can either adopt or overlap with each other.¹¹

Although the law is differentiated as described above, Ehrlich did not intend to separate the two types of law; rather, he wanted to correct the thinking of legal scholars (positivists) who only focused their analysis on state law. Therefore, it is important to differentiate them because both types of law apply within society, and in fact, they interact with each other. Furthermore, he added that the neglect of non-state law types by legal experts results in ineffective decisions.

How is the law referred to as Living Law found? He answers by stating that our sources of knowledge about the law are, first, through legal documents. Second, by observing life, trade, customs, and practices that are not only recognized by the law but also those that it ignores. For example, to discover living law within a company, one can observe how people manage their business to reach agreements on a daily basis. Thus, state-made legal norms only play a subsidiary role in practice. What actually applies are other norms such as customs, morality, and practices within the community. Purnadi Purbacaraka explains the statement above by stating that for Ehrlich, the state is always a social organization. The state is just one form among many legal institutions, similar to social institutions like families or economic institutions like corporate bodies, whether they have legal status or not. Therefore, alongside the law originating from social facts that are relied upon, there is also law generated by the state. In reality, the law that arises from social realities is constantly evolving and often surpasses the rigid and often stagnant state law.

Regarding the applicability of law beyond state law, Wignjosoebroto and also Moore argue that state law (positive law) is not always able to fulfill its function as a regulator

¹⁰ In his concept, E. Ehrlich's idea of the existence of two kinds of norms demonstrates that pluralism also always occurs within society.

¹¹ Keebet von Benda-Beckmann and Bertram Turner, "Legal Pluralism, Social Theory, and the State," *The Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (September 2018): 255–74, <https://doi.org/10.1080/07329113.2018.1532674>. < <https://doi.org/10.1080/07329113.2018.1532674> >

of societal life. Instead, what is commonly found within society is the self-regulating mechanism, which operates informally but autonomously. This is what makes living law not only serve as a guide for behavior but also as a mechanism for resolving disputes that arise in social relationships among community members.

In its development, we can see that diverse legal objectives have underpinned various reasons for the subjects in various legal interactions. The ideas about how to achieve justice, utility, and legal certainty would be very contrasting if based on different reasons. A norm will receive different responses if the legal culture lived by the subjects is based on different specific characteristics.¹² This view is in line with Banakar's opinion that normativity is used to trace the reasons why, in certain circumstances, we feel obligated to act in a certain way. According to Banakar, in non-traditional contexts where there are several alternative ways of doing something, the idea of an obligation to act in a certain way requires a conscious commitment to the norm and is thus related to the non-empirical internal aspect of the norm.¹³ Furthermore, Banakar argues that the normative effectiveness of a particular norm depends on the authority of the source of that norm, which prescribes acting in a certain way, as well as its social function.

2.2. The Application of The Living Law Concept in Indonesia

In the context of applying the concept of The Living Law in Indonesia, at least three authors categorize it as Customary Law. First, there are Franz and Keebet who found that the concept of The Living Law is not as conceptualized by Ehrlich, but rather a concept used and labeled by Cornelis van Vollenhoven as "levend recht" in 1907. Second, the authors find similarities in the concept of The Living Law, especially in the understanding of law and living law. Additionally, there are similarities in the legal conditions under study, where the law is considered to be truly relevant to people, and this type of law not only becomes the subject of social and legal studies, but its use should lead to the achievement of an interest. Levende Recht is customary law that, according to Van Vollenhoven, is a law that, in its use, is based on its own rights, regardless of the existence of the state or the use of coercive force by the state. Customary law is a custom that has legal consequences, with a dynamic process and the ability to change.¹⁴ It is maintained through the voluntary compliance of its members within the indigenous community. This compliance, which Van Vollenhoven refers to as an act of preventive law maintenance, ensures that all social transactions are validated and confirms that these transactions do not violate the rights of others and adhere to the principles of customary law.

Second, Satjipto Rahardjo, who at the beginning of the article emphasizes that the concept of the living law proposed by Ehrlich is a reaction to the reality of social gaps in legal life where regulations lag behind social realities. In explaining this concept, Satjipto refers to Vinogradoff's thoughts, which he believes truly demonstrate how these structures arise immediately from practices that directly grow from conventions, both for society and individuals themselves. For example, issues related to inheritance, ownership, contracts, and so on do not emerge due to legislative initiatives but rather from daily practices guided by considerations of giving and taking within a framework

¹² Andreas Ratuanak, Sulistyowati Irianto, and Ratih Lestari, "Customary Law or State Law: The Settlement of Marine Resource Disputes in The Kei Islands Community," *The Indonesian Journal of Socio-Legal Studies* 2, no. 1 (2022): 2. < <https://scholarhub.ui.ac.id/ijsls> >

¹³ Reza Banakar, *Normativity in Legal Sociology* (Springer, 2014).

¹⁴ Benda-Beckmann and Turner, "Legal Pluralism, Social Theory, and the State."

of reasoning and cooperation. Based on this, Satjipto concludes that Vinogradoff's definition clearly points to a formulation of law as a living legal reality.¹⁵

How is the formation process of this living law? Satjipto explains by referring to Fuller's concept of living law as implicit law. Implicit law does not recognize an authoritative verbal declaration about its content. In other words, this law does not define itself in words but through a series of actions. Therefore, it does not have a moment of enactment, so the role of time in shaping the law becomes significant. Thus, living law grows and evolves over a period of time. The nature and process as described are similar to what happens in customary law. In customary law, it also arises spontaneously from the communal relationships in society. It means that it is not intentionally created but grows as a living reality within the community. Therefore, for customary law, the birth of a legal provision that is needed takes time and growth.

The opinions of the three authors mentioned above, stating that The Living Law is customary law, appear to differ from the concept presented by Ehrlich. If we read his book, the concept of The Living Law refers to rules that arise from the practices of life within various associations of a social institution in society. In sociological terms, this refers to a group of people engaged in activities within a social institution where each member fulfills their obligations. When they fulfill these obligations, they perform their roles. These roles are regulated and agreed upon by the members and adhered to in their behavior, which Ehrlich calls "the inner order." People behave and fulfill their duties because their inner awareness dictates that it is what they should do (in line with the expected role of their community). Therefore, Ehrlich is essentially saying that everyone will perform their roles, and it becomes a habit – a customary behavior within the community of each individual. Regarding customs, Sudikno Mertokusumo mentions that customs are fixed behavioral patterns with normative power and binding force. Because they are repeated by many people, they bind others to do the same, ultimately creating an awareness and belief that these actions are indeed appropriate, and that's what constitutes custom.¹⁶ Regarding *ajeg* or established behavior to be considered a habit, the opinion is also presented by Purnadi Purbacaraka and Soerjono Soekanto. For *ajeg* behavior to become a habit, two conditions are required: first, a material condition in the form of a firmly established habit, and second, a psychological (social) condition, which involves an awareness of an obligation according to the law (that one adheres to).¹⁷ From these four authors, all agree that the existence of *ajeg* behavior is always based on an awareness that the obligation is carried out because according to the existing law, that is the inner order.

Looking at the social process of forming rules as norms, as stated by Sudikno, they have similarities with Ehrlich and the three authors mentioned earlier. Their similarity lies in the main source of these legal rules, which is the community of the society itself and its environment where the law arises and is maintained. Therefore, such laws are not dependent on the state for their formation, socialization, or enforcement. However, they differ in determining where The Living Law is found. While the three authors

¹⁵ Satjipto Rahardjo, "Pengertian Hukum Adat, Hukum Yang Hidup Dalam Masyarakat (Living Law), Dan Hukum Nasional," in *Seminar Hukum Adat Dan Pembinaan Hukum Nasional, Terselenggara Atas Kerjasama BPHN-UGM, Jogjakarta*, 1976, 15–17.

¹⁶ Sudikno Mertokusumo, *Mengenai Hukum: Suatu Pengantar* (-, 1919).

¹⁷ Purnadi Purbacaraka and Soerjono Soekanto, *Sendi-Sendi Ilmu Hukum Dan Tata Hukum*, (Bandung: PT. Citra Aditya Bakti, 1979).

mentioned unwritten laws, Ehrlich mentions it in addition to written legal sources such as contracts and wills, also in everyday practices in economic law through observation.

Referring to the opinions of these three authors, who claim that The Living Law is customary law, it raises the question of whether customary law also includes customary law? This question is answered by Soepomo and Soerjono Soekanto. Soepomo states that customary law is non-statutory law, most of which is customary law and a small part is Islamic law. This law, rooted in culture, also encompasses judicial decisions that contain legal principles in the environment where they decide cases.¹⁸ Meanwhile, Soerjono Soekanto mentions that customary law is essentially customary law, meaning customs that have legal consequences. However, such customs differ from habits performed because others do them without a belief that they should be done. Thus, we can say that The Living Law in the context of understanding in Indonesia is Customary Law.

2.3. Sociological Study of The Living Law

2.3.1. Diverse Existence of Law and Interdisciplinary Perspectives in Its Academic Study

Customary law, as a manifestation of The Living Law, continues to serve as a guide for organizing communal life and as a means of resolving disputes that arise within society. Unfortunately, the existence of customary law still heavily relies on state recognition. This recognition can be seen in the 1945 Constitution of Indonesia (UUD'45), specifically in Article 18B, which states that the state recognizes customary law as long as it is still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law. The mechanism for recognizing customary law by the community is governed by Regulation of the Minister of Home Affairs Number 52 of 2014 concerning Guidelines for the Recognition and Protection of Customary Law Communities. Therefore, the existence of customary law does not stand alone but requires recognition. Yet, in the daily lives of traditional communities, it continues to function effectively in various regions and is used to resolve disputes that arise. In fact, by using this legal system, they often believe that it can generate solutions acceptable to all parties involved in the dispute.

The requirement for this recognition may also be due to the strong influence of positivist legal thinking in our legal system, where law is often perceived in the form of legislation, a characteristic of countries following the Civil Law system. Historically, we can see how the Dutch East Indies government marginalized customary law, as evident in Article 15 of the *Ab or Algemene bepalingen van wetgeving voor Indonesische* which stated that “with the exception of provisions laid down for Indonesian nationals and persons assimilated to them, customs and habits do not constitute law unless the law declares otherwise.” This article emphasized the need for recognition by the government during the colonial era under Dutch rule, and this requirement continued after independence. This provision implies that the Dutch East Indies government at the time recognized the existence of legal systems other than legislation (Western law) in society, thus necessitating its acknowledgment in legal provisions. This was reflected in Article 163 and Article 131 of the *Indische Staatsregeling* (IS), both of which emphasized the diversity of nations within the Dutch East Indies and the legal implications for each of these national groups. In this context, recognition was

¹⁸ Raden Soepomo, “Bab-Bab Tentang Hukum Adat,” (Jakarta: Pradnya Paramita), (1977).

given to three national groups: first, the European national group, where Western law applied; second, the foreign Eastern national group (Chinese, Arab, and Indian), subject to their own laws; and third, the indigenous (Pribumi) national group, where customary law applied.¹⁹

The recognition of ethnic diversity and legal pluralism continues to exist until today, while the legal paradigm of statutory law remains in force. For instance, the provisions in Article 5 of the Basic Agrarian Law (UU Pokok Agraria) clearly demonstrate how the existence of ulayat rights, which is the highest right concerning the use of customary land for members of customary law communities, is highly dependent on state recognition. However, if we look at Article 24 of the 1945 Constitution (UUD'45), which is in line with the provisions of Article 5(1) of Law No. 48 of 2009 on Judicial Authority, judges are actually instructed to not only rely on statutory law but also consider the sense of justice within the community, as reflected in the values of customary law, when resolving disputes. This provision implies that judges, in delivering justice, must also taking into account the concept of justice beyond state law. In other words, here the state acknowledges the existence of law within the community, where the sense of justice it produces may be different from that of state law.

The situation described above cannot be denied, given the strong influence of positivism in the application of law in Indonesia, and this, of course, has consequences in the field of legal studies. In our legal system, which follows the positivist approach, the application of law is done through a method often referred to as juridical-dogmatic. This method upholds the existing legal rules and studies them rationally. The term 'upholds' here means that the law is accepted as the existing and obligatory rules. Meanwhile, the term 'rules' refers to commands originating from the state (sovereign authority), leading to the emergence of a paradigm of Rules and Compliance. Consequently, in legal studies, there is a very close relationship between the researcher and the object of study. The researcher must maintain a fundamental attitude of acceptance, implementation, and advocacy. In other words, the law being studied is used as a means of resolving issues or disputes. In this context, the articles are used as starting points for judging people's behavior and social relationships.

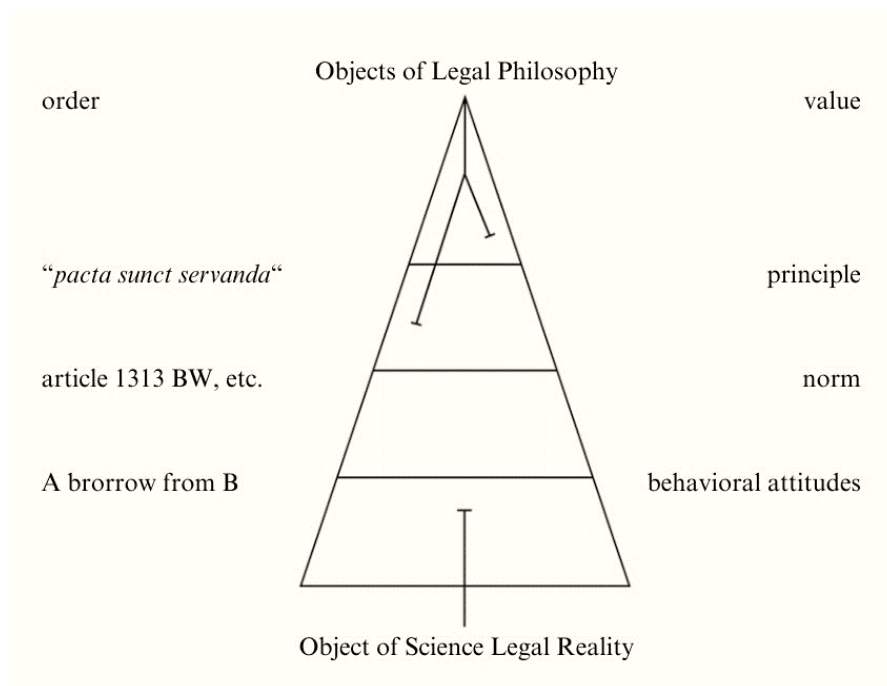
With the fundamental bias of researchers in favor of the law, research is directed towards the rational structure of the legal system. Consequently, legal studies and the methods used are tasked with understanding the intricacies of the legal system as a rational structure. In this context, research is conducted by examining the principles and doctrines used as guidelines for examining or analyzing a legal event. This research approach, borrowing the terminology of Satjipto Rahardjo, can be described as prescriptive. According to Agus Brotosusilo, prescriptive studies represent a prescriptive discipline – a teaching system that provides guidelines for what should be done when dealing with specific phenomena and realities.²⁰

Picture of Pyramid.²¹

¹⁹ Arman, p. 31-32.

²⁰ Agus Brotosusilo, "Penulisan Hukum: Buku Pegangan Dosen," Jakarta: Konsorsium Ilmu Hukum Departemen PDK, 1994.

²¹ Brotosusilo, p. 7.



Looking at the pyramid above, where the peak of the pyramid is Justice, which is the goal of law. As a structure of values, the most abstract element is Justice. If we talk about Justice, the values that will always coexist but be in tension are Certainty and Proportionality. In the legal perspective, Certainty refers to the binding nature of the law on the parties because the law is a command from the authority. On the other hand, Proportionality refers to the correspondence between a legal act and its consequences for individuals. These values must be translated into the level of legal principles, which are still at an abstract level. For example, in Western Civil Law regarding contract law, the most fundamental principle is *pacta sunt servanda*, which stands for the principle of freedom to contract. It means that individuals are free to enter into contracts (as long as they do not violate the law, public order, and morality), and once a contract is made, it is binding on the parties like a law (Article 1358 of the Civil Code). Because this principle exists at an abstract level, it needs to be formulated into legal rules first to become positive law.

When someone is conducting legal research or studies, there are specific procedures to follow. First, they will examine the content, which means the text of the contract they are studying, and match it with the elements in the Civil Code (KUHPerdata) to determine whether these elements have been fulfilled in the legal act as stated in the contract they are examining. During this phase, researchers will test the elements in the articles of the law to see if they are met in the contract they are studying. At this stage, researchers may also examine the elements in one article against another or compare articles from outside the law to determine the synchronization between regulations and their research. Secondly, to establish their argument, they will test these elements against legal principles/doctrines, ensuring that their argument demonstrates that the legal act they are studying has been tested against or complies with the existing principles. In other words, by examining not only legal regulations but also principles or doctrines, the study/research of the law can be justified, making its results rational, scientific, and prescriptive in nature.

If we want to study customary law as a manifestation of The Living Law, our focus will primarily be on the concrete form of law, not the abstract form as seen in the pyramid above (at the level of values, principles, and norms). In the context of legal discipline, only something concrete can be observed. Law of this nature is found in the life of law that arises spontaneously from collective relationships in society. Law is not seen as an abstract legal system but rather manifests itself in the observable behaviors of individuals within society's activities. Law is not intended to be viewed as conceived in the sense of "law as what ought to be," nor is it just "what it is in the books." Instead, it is viewed as "law as it is in society" – empirically observed in individual experiences within the processes of social relationships in society. In empirical legal studies, law will be revealed from the perspective of reality. This is different from the prescriptive method mentioned earlier, where the researcher and the research subject have a close and non-distant relationship. In the context of law as "law as it is in society," the law will be studied as it exists in reality, allowing it to speak for itself.

2.3.2. Research on Living Law, use a legal sociology perspective: Is It Part of the Legal Discipline or Part of the Social Discipline?

Looking back at the pyramid above, at the most basic level where there is also law outside of state law, namely customary law, which is Indonesia's original legal system that differs from the Civil Law system. If we examine it carefully, it falls under the category of ideal law (not observable through the senses because it is more of an abstract rule). Meanwhile, in the customary law system, its existence is manifested in legal actions, making it visible and observable, and therefore it has real legal elements. The goal in researching customary law is to gain a more contextual and in-depth understanding of the presence of law within its social system. As a result, it cannot be explained using the methods used in normative research as explained above, which only use an internal perspective. Based on the explanation above, such research must use an external perspective (legal interdisciplinary) with a theoretical and methodological basis borrowed from social sciences such as sociology or anthropology.

Law and social science indeed have very different natures. If law is normative and prescriptive, explaining how people should behave, then Social Science is descriptive, explaining how the law manifests in people's behavior, and it must be value-free in its explanations. Does using an external perspective mean that legal research will be tainted by impurity in its legal purity, as suggested by Hans Kelsen in his teachings on the Pure Theory of Law, which states that when studying the law, it should not be contaminated by elements outside the law? He only wants to see the law as a method, and that method is what he makes the object of legal science. Meanwhile, law is also interpreted as *ajeg* behavior, as suggested by Van Apeldoorn. According to Kelsen, *ajeg* behavior is not the object of legal science but the object of social science, such as sociology of law. This is why Kelsen's theory is called "Reine Rechtslehre or The Pure Theory of Law" because his teaching emphasizes that the law should be cleansed of political, sociological, philosophical, and other elements that influence it.²²

In Indonesia, the teachings of Kelsen were further emphasized by Peter Mahmud, who described the entry of social sciences into the field of law as a "disaster".²³

²² Purnadi Purbacaraka and Soerjono Soekanto, "Perihal Kaedah Hukum," (Bandung: PT. Citra Aditya Bakti, 1993), (1978).

²³ Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Prenada Media, 2017).

His opinion indicates that in legal research, one cannot borrow or use the intervention of social sciences. If there is intervention, it is not legal research but social research. The separation of objects of study between legal and social sciences will indeed always be a long-standing debate. In practice, sometimes cases or problems are encountered where judges cannot find a solution to the issues they face if legislation and jurisprudence cannot provide it. Therefore, it is only fair for social sciences to contribute to the formation of judicial decisions.

Regarding the above dichotomy, Arief Sidharta offers a different opinion. He believes that legal science and social science should collaborate, or in other words, legal science as a normative practical science should study how to find solutions to concrete problems faced, and in its activities, it needs to converge all relevant products of other sciences to establish the right formation of decisions. Additionally, Arief also argues that as a practical science aimed at providing fair solutions, legal science requires continuous evaluation of social realities. Social reality is rich in values, and to uphold the value of justice in legal products, even though its object of study is positive law, it should involve sociology of law. Thus, through sociology of law, explanations about social realities in which positive legal rules function can be obtained. Consequently, legal decisions can always be contextual and at least approach justice.²⁴

Similar views are expressed by Satjipto Rahardjo. Once again, if we revisit the explanation of the research procedure in the doctrinal study above, the researcher's fundamental stance is to accept positive law as something that must be followed. In legal research, the researcher participates as a party, thus taking a supportive stance towards positive law. Articles are used as the starting point for their work, which involves judging people's behavior and relationships within society using logic as their tool. The method used is to understand the intricacies of the legal system as a rational structure, examining principles and doctrines, and studying the rational arrangement of the legal system.²⁵ Based on the explanations above, Satjipto asserts that such legal science falls into the category of practical legal science. The methods used strongly support the professional world's need for scientific legitimacy in carrying out roles such as judges, prosecutors, and lawyers. Meanwhile, in reality, society also shapes and enforces its own laws, and these laws are often more effectively perceived by the community. Such laws are customary laws manifested in the actions and behaviors of individuals. As laws formed from everyday practices within social relationships in the community, these laws will naturally evolve with the development of their social foundation. Consequently, when conducting legal research on these matters, it can only be explained using an external perspective like sociology of law. Furthermore, in reality, positive law is not always capable of fulfilling its function in providing solutions to the problems faced by society. Hence, people tend to rely on their own

²⁴ B Arief Sidharta, *Refleksi Tentang Struktur Ilmu Hukum: Sebuah Penelitian Tentang Fundasi Kefilsafatan Dan Sifat Keilmuan Ilmu* (Mandar Maju, 2009).

²⁵ Satjipto Rahardjo and Khudzaifah Dimiyati, *Sosiologi Hukum: Perkembangan, Metode, Dan Pilihan Masalah* (Muhammadiyah University Press, 2002).

laws, often referred to by Soetandyo as informal rules, which, despite being informal, are autonomous and sometimes considered more effective.²⁶

Returning to the question posed in this text, whether using an external perspective like sociology of law does not constitute legal science. To answer this question, let's first look at the concept of the legal discipline. We know that the legal discipline is a system of teachings about law as an ideal and real phenomenon. To explain this, we will present the views of two experts, namely Soerjono Soekanto and Arief Sidharta.

Soerjono Soekanto, speaking about the legal discipline, begins by looking at the nature of humans and the antinomian pairs, and humans in society as a sphere of functional and normative integration. In general, humans in their social life always desire harmony in their personal lives and in their interactions with others. Personal harmony is achieved by maintaining a connection with the Creator through faith. As for the individual, harmony is achieved through one's conscience and is nurtured through moral values. In the context of social life, harmony translates to propriety, which results in pleasant interpersonal relationships and peace through the realm of law. This means that harmony among values, for example, in the field of law between the values of certainty and proportionality, order and peace, constitutes pairs of values in the process of life, much like a pendulum swinging left and right but ultimately remaining constant because fundamentally, humans also have a desire to live harmoniously. In other words, human life is a result of the interaction of these legal values, which can be seen from a legal philosophy perspective.

Meanwhile, social interaction is a system of orderly and organized relationships, within which there are a set of positions and roles that each person will carry out, manifested in a lawful and upright conduct in specific relationships. When these various roles are interconnected, Purnadi concludes that society itself can be examined as a sphere of normative integration. In other words, every individual in society, with their respective roles, forms supportive working relationships. Simultaneously, in fulfilling their roles, they must always and consistently align with the expectations of others. Failure to do so may be considered a deviation that disrupts social relationships. Thus, viewing communal life can be understood from a particular perspective as outlined above. This perspective is based on the connection between legal subjects (who have rights and obligations) engaging in lawful behavior, leading to legal relationships concerning legal objects. Furthermore, Soerjono Soekanto suggests that in this context, law can be the subject of sociological studies on law. Therefore, law falls within the realm of the sciences dealing with the reality of law.²⁷

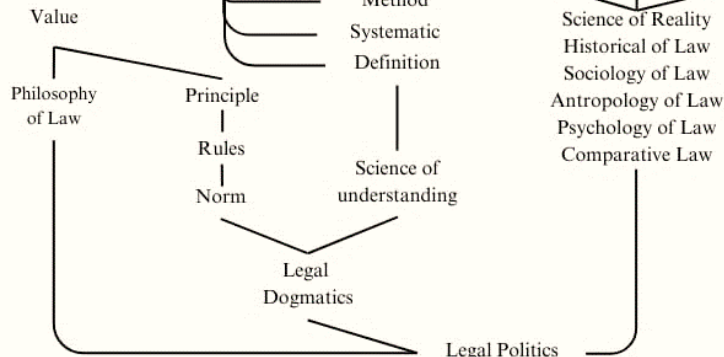
From the explanation above, Soekanto intends to conclude that law is indeed a reflection of human life. This can be seen from two perspectives: philosophy of law (the purpose of life: living harmoniously) and the empirical science of law (living together). In essence, both forms of legal disciplines represent systems of values and the foundations of integrative systems. Soekanto adds that there are other legal disciplines that fall under what is known as legal dogmatics. Disciplines encompassed by legal dogmatic include: (i) the science of legal methods as an elaboration of the philosophy

²⁶ Soetandyo Wignjosoebroto, "Dari Hukum Kolonial Ke Hukum Nasional: Dinamika Sosial-Politik Dalam Perkembangan Hukum Di Indonesia," (Jakarta: Huma) (2014).

²⁷ Soerjono Soekanto, "Disiplin Hukum Dan Disiplin Sosial: (Bahan Bacaan Awal)" (Jakarta: PT. Raja Grafindo Persada 1988).

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Philosophy of Law, Legal Dogmatics, and Empirical Legal Science result in Legal Politics.

Arief Sidharta describes the discipline of law as a normative practical science. As a normative science, it seeks to link responsibilities and obligations based on the principle of imputation to legal subjects in specific situations or circumstances. Based on imputation, it applies “if A (occurs or exists), then (it should occur).”²⁹ The discipline of law, as defined by Arief, is a part of intellectual activities aimed at rationally acquiring knowledge in a specific field. As a legal discipline, it studies how to find and offer solutions to concrete problems in society. He continues that in order to gain intellectual mastery over the law, he divides the discipline of law into three groups: (i) philosophy of law, (ii) legal theory, and (iii) legal sciences. In the third point, it refers to normative legal disciplines, namely, positive law and western law, which he calls legal dogmatic (he uses the term employed by Mochtar Kusumaatmadja) and comparative law. On the other hand, the second group, Legal Theory, is an empirical legal discipline, consisting of Sociology of Law, Anthropology of Law, and Psychology of Law.³⁰ Arief defines Legal Science Theory as a legal discipline from an interdisciplinary and external perspective that critically analyzes various aspects of legal phenomena, both individually and as a whole, in both its theoretical concepts and practical manifestations. Its goal is to gain a better understanding and provide clear explanations of the presented legal materials and juridical activities in societal reality.³¹

Based on the opinions of both authors, Soerjono Soekanto and B. Arief Sidharta, we can draw a conclusion to address the issue related to the use of a social science perspective. Both authors place sociology of law as part of the discipline of law. Additionally, they view law as a behavioral act, making it observable. However, they position the external perspective differently. Soerjono Soekanto places sociology of law within the real elements of the legal discipline. On the other hand, Arief places the external perspective of sociology of law within the group of legal theory. In this context, sociology of law represents a science that translates concepts into legal practice. In other words, both authors see sociology of law as a real component in the legal discipline that examines law as a reality manifested in legal acts, such as in customary law. Its use is aimed at obtaining accurate and in-depth explanations of its existence within the societal system referred to as the community. When studying customary law, the sociology of law approach is used as a research method for customary law.

There is no doubt that the paradigm of legal science is no longer realized in a rational-mechanical order, as taught by Kelsen. Instead, the functioning of the law also occurs within a situation and conditions filled with various variables. Law is also viewed as

²⁸ Soekanto and Salman, p. 2-20.

²⁹ Widodo Dwi Putro and Erwin Natosmal Oemar, *Kritik Terhadap Paradigma Positivisme Hukum* (Genta Publishing, 2011).

³⁰ Sidharta, p. 136.

³¹ Sidharta, p. 122.

an empirical reality that exists. Figures like Durkheim and Max Weber worked within the positivist thought process, employing explanatory methods to describe how law evolves and becomes what it is today. Durkheim observed the development of legal forms, which initially were repressive and later became restitutive in line with societal progress. This transformation occurred as society evolved from simple, mechanically solidaristic communities to modern/industrial societies with organic solidarity. Changes in the form of solidarity necessitated adjustments in the form and function of the law. Max Weber noted the transition of law from an irrational state to a rational one when society changed due to the rise of capitalism in Germany. In this context, the law had to be reliable and the consequences of legal actions had to be calculated rationally (if action A is B, then the consequence is C). In other words, the law had to provide legal certainty, a principle aligned with the efficiency ideals of capitalism.³²

Building on the explanation above, legal studies are no longer esoteric; they require an explanation of how humans participate in the legal system through critical descriptions of their realistic manifestations rather than solely relying on legal methods within legislation. In other words, law is understood (borrowing from the words of Soetandyo) as “law is not (always) society. Law is in society,” and it predominantly exists within a plural and complex society.³³

3. CONCLUSION

The external perspective in legal research applies empirical legal theory, utilizing the methods of sociology of law to examine the characteristics of existing legal systems, including their existence and development, functions, and legal practices with the aim of gaining a deeper understanding of the presence and role of law in the social system, as found in customary law systems used by communities in Indonesia. In the study of customary law, sociology of law is used as a research method for customary law. Its primary focus is not on abstract legal regulations but rather on what is observed (the lawful behavior) in reality – within society or within the concept of social structures as described in sociology. Therefore, sociology of law is placed within the discipline of law as part of the real aspect of law, specifically in the field of the science of reality.

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³² Dragan Milovanovic, *A Primer in the Sociology of Law* (Harrow and Heston Albany, New York, 1994).

³³ Soetandyo Wignjosoebroto, *Pergeseran Paradigma Dalam Kajian-Kajian Sosial Dan Hukum* (Setara Press, 2013).

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