



The Essence of the Principles of Legality and Law Living in a Post-Criminal Law Reform Society

Albri Labaka

Fakultas Hukum Universitas Muhammadiyah Yogyakarta, Indonesia

Address: Jl. Lingkar Selatan,, Kasihan, Bantul, Geblagan, Tamantirto, Bantul, Kabupaten Bantul,
Daerah Istimewa Yogyakarta 55183

Email: albri.labaka.psc23@mail.umy.ac.id

Abstract. *This research aims to analyze the essence of the principle of legality and the recognition of living law in society after the reform of the Indonesian National Criminal Code (KUHP). The study employs normative or doctrinal juridical research, which relies on a legislative and conceptual approach. The principle of legality is a fundamental doctrine in criminal law, emphasizing that no individual may be punished without pre-existing legal provisions. This principle is crucial not only as an instrument to guarantee legal certainty but also as a safeguard of human rights against arbitrary and repressive actions of the state. Traditionally, the principle of legality contains several core elements, namely *lex scripta* (law must be written), *lex certa* (law must be clear), *lex stricta* (prohibition of analogy), and *lex praevia* (non-retroactivity of law). These elements ensure that criminal provisions are accessible, predictable, and prevent abuse of power. However, with the enactment of the new Criminal Code in 2023, the meaning and application of this principle have shifted. The reform introduces a transition from a strictly formal legality principle toward a material legality principle. This development is particularly reflected in Article 2, paragraph (1) of the new Criminal Code, which explicitly recognizes living law (*hukum yang hidup dalam masyarakat*) as a legitimate source of criminal law. The recognition of living law expands the scope of legality beyond statutory law to include unwritten norms that are deeply rooted in local communities and cultural traditions. On the one hand, this reform represents an effort to align national criminal law with Indonesia's socio-cultural realities. On the other hand, it also raises critical debates regarding legal certainty, uniformity, and potential conflicts with universal human rights standards.*

Keywords: *Customary Law, Principles of Legality, Reform of the Criminal Code.*

1. INTRODUCTION

Indonesia's criminal law originates from the Dutch legal system, which is based on the civil law tradition. As a result, its implementation is strongly linked to the principle of legality, which serves as a fundamental basis for both the development and enforcement of criminal law. (Maskur, 2018) Simons, van Hamel, and van Hattum highlighted the principle of legality as a guarantee of legal certainty, while Vos emphasized its role in deterring crime and upholding legal certainty. (Widowati et al., 2021) The concept of legality was initially defined in the American Constitution of 1776 and later in Article 8 of the Charter of the Rights of Man and of the Citizen of 1789: no one can be punished except by virtue of a law created and published prior to the offense and lawfully applied. This notion was later integrated into Article 4 of the French Penal Code established by Napoleon Bonaparte. The concept taken from the French Penal Code later made its way into Article 1, paragraph (1) of the *Wetboek van Strafrecht* in the Netherlands, which clearly reads, "Geen feit is strafbaar dan uit kraft van eenedaaraan voorafgegane wetelijke strafbepaling." (Cahyadi & Utami, 2021)

Anselm Von Feuerbach (in his book entitled "Lehrbuch des peinlichen recht", 1801) is "nulum delictum nulla poena sine praevia lege" which means that there is no criminal act, and there is no criminal offense without a legal provision that first determines it. (Fuad et al., 2021) Article 1 (1) in the Criminal Code establishes the foundation in legality, stating that no act is considered criminal unless specified by prevailing rule. Eddy O.S. Hiariej notes that this principle serves both protective and instrumental functions, while Andi Hamzah emphasizes its role in preventing state arbitrariness beyond legal boundaries. (Suherman, 2020) In line with this, Osman Abdel Malek al-Saleh stated the principle of legality in Islam, that "no person can be accused of a crime or suffer punishment except as specified by law". (Jamaa, 2014)

In its development, several countries, such as Russia, Germany, and the Netherlands, have deviated from the principle of legality. This principle requires that a person can only be punished if his or her actions are expressly regulated in the Criminal Law, and the provision must not apply retroactively. Therefore, actions not defined as illegal cannot lead to monetary penalties, so the employing of parallels to create novel crimes is prohibited. This provision directly impacts legal certainty and the protection of individual rights. (Marpaung & Moeliono, 2021)

Barda Nawawi Arief argues that Article 1(1) of the Criminal Code appears to suppress living unwritten criminal law. While this was understandable under Dutch colonial legal policy, its continuation post-independence seems questionable. (Hermawan & Herman, 2021) The idea that formality renders written and living law mostly unexamined, especially within the context of legal practice. Thus, in national legal reform, especially in revising the Criminal Code, balancing legal certainty with justice has become a key policy direction. (Putra Rozi, 2019)

Sudarto asserts that criminal law should reflect the cultural values of its society, serving as a system that penalizes behaviors rejected by the community. (F. M. Nugroho & Eskanugraha, 2023) That pertains to one's viewpoint on life, morality in religion, or the goals in the relevant country. The overhaul of national criminal law, intended for achieving a regulatory structure with an Eastern orientation, is seen to have integrated social norms as well as endeavors to improve the existing legal system in Indonesia, specifically in harmonizing modern law, characterized by constitutional formalism, and the prevailing societal principles in the foundation for legitimacy. (Sunantara, 2020)

By comprehending the concepts, attitudes, and substantive rules contained in the Penal Code, they are founded on the basis of legal legality, it is dogmatically impossible in

its application that there is a clash (conflict) with the values and interests of the interests or legal needs in society. (Candra, 2013) Gaps and differences in values or interests can factor in dissatisfaction with law enforcement practices. This is in line with Utrecht's explanation of the meaning of Law, which is an arrangement of instructions or guidelines for life, both commandments and prohibitions, that regulate the order of society and that should be obeyed and, if violated, can cause action by the government. (Pertwi & Saimima, 2022)

The Criminal Code (KUHP) ideally reflects the cultural values of the society where the Law is enforced. This is because the Concept of reprehensible and unjustifiable acts is rooted in the values and social perceptions of the local community. According to Mahfud MD, the ideal Law should not be separated from the community as the subject that is its goal, so the adjustment of laws and regulations to the characteristics and dynamics of society is necessary. (Bahri, 2021) A legal system misaligned with societal realities or based on non-contextual foreign concepts will face challenges in acceptance and effective implementation. (Ansori, 2018)

Criminal justice reform encompasses not just alterations or enhancements of the stipulations of the penal code, the primary source of criminal law, but additionally involves a deeper understanding of the context and necessity of this change. This can be examined through partisan, philosophically or social lenses, as well as various policy dimensions, particularly social regulations. Criminal justice and law enforcing policies. Criminal law reformation seeks to adjust or modify legislation in accordance with the nation's fundamental socio-political, intellectual, and culture principles. (Wibowo, 2017)

The inclusion of living law in the National Criminal Code ensures legal certainty regarding the enforcement of customary law as a basis for punishment. This acknowledges Indonesia's pluralistic legal system, which respects diverse local customs and cultures, leading to valid and followed forms of customary law. Consequently, recognizing living law expands the principle of legality from a formal, written approach to one that includes unwritten legal norms. To understand the role and significance regarding the concept of law and the recognition of living law after criminal law reform through the National Criminal Code, the author aims to critically address two main questions: (1) What is the core essence of the principle of legality in the criminal justice system? and (2) How is the concept of living law articulated in the reformed Indonesian National Criminal Law paradigm?

This research aims to explore how the principle of legality relates to the application of living law, particularly after the reformulation of the National Criminal Code (KUHP).

The study focuses on understanding the conceptual shift in The concept of legitimacy in the nation's legal system. The expected outcome is to enrich legal thought and broaden academic perspectives, especially regarding the integration of the principles of legality and unwritten law.

2. RESEARCH METHODS

The investigation utilizes normative or doctrinal legal research, concentrating on literary evaluation or the analysis of both main and secondary legal information. The research employs both a legislative and conceptual framework to analyze the standards inside the laws and rules pertinent to its legal difficulties, specifically focusing on the premise of legitimacy or the acknowledgment of living act as delineated in Law No. 1 the 2023 concerning the penal code. The notion of legitimacy frequently poses difficulties in the implementation of legislation in Indonesia, which is or a theoretical framework uses to examine pertinent judicial ideas and hypotheses.

3. RESULTS AND DISCUSSION

History Principle of legality

Belefried asserts as the concept of Law constitutes an essential standard originating through substantive Law, rather than through superior hierarchy regulations. From the perspective of legal science, this legal principle results from the crystallization of positive legal values that develop in society. This means that it reflects the prevailing normative structure and the collective legal awareness in a legal community.(Putera Astomo, 2018) According to Paul Scholten, principles are fundamental ideas inherent and hidden behind the legal system, manifesting in the form of norms of laws and regulations as well as in court decisions. Meanwhile, legal principles are understood as normative tendencies that reflect society's ethical view of the Law, and contain general characteristics that are fundamental, although limited in scope, but their existence is a necessity.(Rokilah & Sulasno, 2021) Legal principles can either be high-level norms within the legal system that underpin other legal provisions or exist as standalone principles.

The notion of validity was initially articulated by Paul Johann Anselm von Feuerbach (1775–1833). a prominent German criminal jurist, in his classic *Lehrbuch des Peinlichen Rechts*, published in 1801.(Eddy O.S.Hiariej, 2018) Feuerbach's idea was born in response to the socio-political conditions of pre-modern times, where criminal Law was often arbitrarily enforced by absolute rulers without written and predictable legal certainty.

In this historical context, the principle of legality is intended as a protection of individual rights from the arbitrariness of power and as a concrete form of the basic principle of the system of justice.

According to Bambang Poernomo, Feuerbach's formulation contains a fundamental meaning that is reflected in three main principles known in Latin, namely *nulla poena sine lege* (there is no crime without criminal provisions in the Law), *nulla poena sine crimine* (there is no crime without criminal acts), and *nullum crimen sine poena legali* (There are no criminal acts without a criminal offense as determined by Law). Feuerbach condensed these three principles into the maxim "nullum dictum, nulla poena sine praevia lege penal," emphasizing that no act should be punished unless it was previously defined in the applicable criminal law.(Fartini, 2017)

Meanwhile, if you look at its history, long before this principle appeared, an English philosopher, Francis Bacon (1561-1626)(Fadli, 2021) He introduced the adage 'moneat lex, priusquam feriat,' meaning laws must issue warnings before enforcing their threats. Therefore, the principle of legality demands that prohibitions be written in advance.(Hartono et al., 2023) In the civil law tradition, the principle of legality is strictly enforced through four aspects: laws and regulations, retroactivity, *lex certa*, and analogy. Regarding these four aspects, according to Roelof H Haveman contends that while each facet may not be robust alone, its amalgamation provides an additional authentic interpretation of the notion of legitimacy.(Heveman, 2002)

Hazewinkel Suringa argues that the principle of legality reflects Montesquieu's doctrine of separation of powers, where lawmakers create laws, not judges. Laws must be established and publicly announced before any actions can be punished. This concept initially emerged in the United States Constitution to 1783 or subsequently in Article 8 of the 1789 Declaration on the Fundamental Rights of Man and Citizen.(Christianto, 2012)

History shows that before Indonesia's independence, it was known as the Dutch East Indies, where the *Wetboek van Strafrecht (WvS)*, or Dutch Criminal Code, was applied after its introduction in the Netherlands in 1866 and 1872. The Dutch Criminal Code came into effect in Indonesia in 1886, replacing the earlier *WvS*. Similar to France, the principle of legality has been in use in Indonesia since 1866.(Jefri & Harefa, 2021) Based on the principle of conformity with Article 75 of the *Regerings Reglement (RR)* and Article 131 of the *Indische Staatsregeling (IS)*, the Dutch Criminal Code must also be enforced in colonial areas such as the Dutch East Indies with adjustments to the local situation and conditions. Then, on January 1, 1918, the *Wetboek van Strafrecht voor Nederlands Indie*

(WvS-NI) or the Dutch East Indies Criminal Code, was enacted. The principle of legality stated in WvS 1886 is also outlined in WvS-NI. Thus, it officially came into force on January 1, 1918. This principle of legality remains valid in Indonesia.

Even during the Japanese colonial period, the principle of legality was still applied in Indonesia because WvS-NI was still enforced based on (*Osamu Serei*), Law Number 1 of 1942. (Andi Hamzah, 2012) According to Article 2 of the 1945 Transitional Regulation, WvS-NI continued to be under force upon the declaration of Indonesia's independence on the seventeenth of August, 1945. On the 18th of August 1946, Law Number 1 of 1946 concerning the Criminal Procedure Regulation was adopted, and subsequent to their publication, the WvS-NI designation was altered to WvS, which was then translated into Indonesian as the Criminal Code (KUHP). The Dutch edition of the penal code states the following. "*Geen feit is strafbaar*" and "*uit kracht van eene daaraan voorafgegane wettelijke strafbepaling*". Translation: "No act can be punished unless it is defined by existing criminal law, rather than the act itself. (Lamintang, 2014)

This stage is intended to examine and explore the meaning of freedom from the perspective of positive criminal Law. This approach is used to analyze relevant subjects in criminal Law, especially those related to applicable principles and norms, as well as the relationship between the two in the criminal law system. (Astari, 2015) In this case, legal construction is understood as a normative building consisting of certain subsystems or elements that are systematically arranged so that its normative content can be understood in a complete, clear, and structured manner. Consequently, Indonesia has established herself as an international rule-of-law nation. This tenet is highlighted in the Basic Interpretation of the 1945 Constitution, that asserts that Indonesia is a state founded upon laws (*rechtsstaat*), rather than only on force (*machtsstaat*). (Sufriadi, 2010) In this context, the term *rechtsstaat* in the General Explanation of the 1945 Constitution refers to the principle of the rule of law broadly, rather than specifically to the concept within the continental civil law system.

Following the amendment of the 1945 Constitution, Article 1(3) explicitly affirms Indonesia as a state of law, conceptually linked to the idea of *rechtsstaat*. Within this framework, Pancasila's core values serve as the foundation for the nation's governance, forming what is known as the Concept of the Pancasila State of Law. (Pratama, 2018) I Dewa Gede Atmadja stated that the Pancasila State of Law is defined by family values, consensus-based deliberation, and human rights protection. From the Pancasila perspective,

the rule of law emphasizes a balance between citizens' rights and duties, using the law as a tool to protect all societal levels within the framework of social justice.(Marbun, 2019)

Indonesia employs a pluralism or diverse system of law, where various legal systems coexist and complement each other. This system includes enforcing laws and regulations (positive), customary Law, and Islamic Law. In this context, the plurality of Indonesia's legal system reflects the Indonesian nation's social, cultural, and historical complexity. Barda Nawawi Arief argued that the sources of legal material in shaping national criminal law are not limited to a single legal system. According to him, the source can come from various legal systems that have developed in Indonesia, including customary Law, religious Law, laws that have existed and are sourced from Western legal traditions, even from the legal provisions of other countries and principles that have become part of international legal trends and agreements.(Ali, 2020)

From a legal theory perspective, this legal pluralism aligns with Gustav Radbruch, who asserted that law is closely tied to the values of justice, utility, and certainty. He believed that good law should not solely depend on formal legality but also reflect society's moral and social values.(Mochtar, 2015) In the Indonesian context, recognizing customary and religious law within the national legal system embodies the principle of substantive justice advocated by Radbruch.(Ratnaningsih & Sudjatmiko, 2021) Furthermore, Lon L. Fuller emphasized the importance of the inner morality of Law, namely that the legal system must contain elements that guarantee order, clarity, and openness. If managed proportionately, the plurality of legal sources in the Indonesian legal system can strengthen the legitimacy and effectiveness of the national criminal Law because it reflects the social realities and aspirations of diverse communities.(W. Nugroho, 2019)

The principle of legality has a fundamental function as a mechanism to limit state power in determining and implementing criminal sanctions, thereby preventing the potential for arbitrary criminalization of individuals. This principle contains important principles reflected in three derivative principles:

- a. *lex scripta* means that only written laws, namely laws and regulations, are recognized as the only valid sources of criminal Law.
- b. *lex stricta* demands that criminal law norms be interpreted strictly, not broadened analogously, especially if such expansion can harm an individual's legal position or expand the scope of criminalization beyond the statute's bounds.
- c. *lex certa*, which in legal doctrine is also known as *bestimmtheitsgebot*, requires that criminal norms be formulated in clear, firm, and unambiguous language. Ambiguity

in the formulation of norms can lead to legal uncertainty, which ultimately weakens the protection of individual rights and has the potential to cause injustice in law enforcement practices.

Van Hammel stated that the principle of legality in criminal law encompasses both material and formal criminal law.(Satjipto Raharjo, 2006) In material criminal law, the principle of legality means that punishment can only be imposed based on criminal rules existing in the laws before the act was committed. Criminal Law is the Law about an act. The distinction of types of criminal acts in criminal Law has juridical legal consequences when proving the case. According to Eddy OS Hiariej, formal delicacy is a delicacy that focuses on deeds, while material delicacies are delicacies that focus on consequences. Causality relationship theory or *reading about causation*.(Ali & Setiawan, 2021)

Moelyatno outlined three meanings of the principle of legality: 1) No act can be punished unless it is defined in law beforehand. 2) Analogy (kiyas) should not be used to define criminal acts. 3) Criminal law does not apply retroactively.(Satria, 2018) In the context of development policy, legal development in a multicultural society must be interpreted as a set of government policies designed so that all people can pay attention to the culture of all ethnic groups or ethnic groups.(Rokilah & Sulasno, 2021)

This is reasonable because, after all, all ethnic groups or tribes and nations have contributed to the formation and development of a nation. Even our constitution, Article 18B paragraph (2) stipulates that "The State recognizes and respects the units of customary law communities and their traditional rights as long as they are alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law." Similarly, when viewed in terms of improving the substantive aspect of the Law.(Suratno, 2017) In terms of legal substance, the law-making process, along with the implementation and enforcement of state law, must address and incorporate living law, reflecting the values, norms, institutions, and legal traditions of a multicultural society.(Shafira et al., 2021) By virtue, everyone who studies criminal Law must learn one of its main principles, namely the principle *of legality (or the principle of the origin of legality)*.(Kadri Husin, 2016)

The Principle of Material Legality in the Renewal of Indonesia's Criminal Law System

The national legal system's strong focus on legal certainty has overshadowed justice and utility. Satjipto Rahardjo emphasized that law should not be viewed merely as rigid

norms, but as a tool to achieve substantive justice aligned with societal needs.(Moeljatno, 2016) The modernization and recodification of criminal law have long been part of Indonesia's criminal law reform agenda.(Azizah, 2021) The principle of substantive legality is clearly and specifically outlined in Article 2 of the New Criminal Code. Article 2 (1) states:"The provisions as referred to in Article 1 paragraph (1) do not reduce the validity of the law that lives in a society that determines that a person deserves to be punished even though the act is not regulated in laws and regulations". This article allows for the application of "living law," meaning a person may be punished based on societal norms, even if the act is not explicitly defined as a crime in written law.

Article 2(2) of the New Criminal Code states that the application of living law, as mentioned in paragraph (1), must align with Pancasila values, human rights, and universally recognized legal principles. While this sets boundaries, the term "living law" remains broad, encompassing customary, traditional, local, and religious laws.

The principle of legality, as outlined in Article 1(1) of Criminal Code Law Number 1 of 2023, provides that: *"No act can be subject to criminal sanctions and/or actions, except based on the laws and regulations that existed before the act was committed."* This provision affirms the basic principle in modern criminal Law, namely the prohibition of retroactive application of criminal Law and the requirement that every crime and criminal sanction must be determined in advance by the applicable laws and regulations. However, in the context of a pluralistic and multicultural Indonesian society, the reform of the national criminal Law cannot be based solely on legal formalism. This is considering that *living Law*, especially customary Law, is still an important part of the social reality of Law that is lived and obeyed by many communities in Indonesia.(Saravistha et al., 2022) Barda Nawawi Arief emphasized that national criminal law should be based on societal values customary, religious and consider developments in relevant international law.(Rosnawati et al., 2018) This approach shows that Law is not only a product of normative logic but also a reflection of the sociocultural values that live in society.

Similarly, Satjipto Rahardjo, with his concept of law as a tool for social engineering, stressed that law must adapt to social dynamics and serve as a means of social transformation.(Ansori, 2018) Thus, living law should have a balanced role in the national legal system to prevent a gap between positive law and the normative reality in practice.(Gunarto, 2013) In the reform of the National Criminal Code, the principle of formal legality is upheld, while the concept expands materially by incorporating unwritten

law as a basis for punishment. This expansion aligns with the global understanding of the principle of legality, particularly in civil law countries.

The Concept of the Criminal Code includes the provisions of Article 2, which determine:

- 1) The provision in paragraph (1) does not diminish the validity of living or customary law, which may impose punishment based on local customs, even if the act is not specified in this legislation
- 2) The Law that lives in society in paragraph (1) applies where the Law is alive, and as long as it is not regulated in this Law and by the values contained in Pancasila, the Constitution of the Republic of Indonesia in 1945, human rights, and general law principles recognized by the people of nations.
- 3) Provisions on the procedures and criteria for identifying living law in society are governed by Government Regulations.

Article 96 of the New Criminal Code

- 1) Additional penalties in the form of fulfilling local customary obligations take priority if the crime meets the criteria set out in Article 2 paragraph (2).
- 2) Fulfilling local customary obligations, as referred to in paragraph (1), is deemed equivalent to a category II fine.
- 3) If such customary obligations are not fulfilled, they shall be substituted with compensation equal in value to a category II fine.
- 4) If the compensation is not paid, it shall be replaced with a supervision or community service penalty

In the explanation of Article 2

- 1) Law that lives in society refers to customary law that dictates certain acts warrant punishment. This pertains to unwritten laws that remain relevant and continue to evolve within Indonesian communities. Regional Regulations support the enforcement of such customary offenses to reinforce these living laws.
- 2) Applicable where the law lives” means the provision applies to anyone committing customary offenses in that specific region. This paragraph serves as a guideline for formulating customary criminal law acknowledged by this legislation.
- 3) The Government Regulation acts as a framework for regions to incorporate living laws into their Regional Regulations.

From the essence of the reading of Article 1 and Article 2 of the New Criminal Code, conclusions can be drawn.

- 1) The principle of legality is acknowledged as a fundamental concept in Indonesian criminal law.
- 2) The use of analogical interpretation is prohibited.
- 3) Exceptions to the legality principle apply to the enforcement of “laws that live in society.”
- 4) Recognition of such laws is limited to those that align with Pancasila, human rights, and universally accepted legal principles.

Compared to Hans Kelsen's normative approach that emphasizes the formal legality and consistency of the application of legal norms, John Rawls offers a more substantive perspective on justice in *A Theory of Justice*. Rawls views justice not merely as conformity to the prevailing legal norms but as a moral and political principle that ensures the equitable distribution of rights and obligations within the basic structure of society. (Fahmi, 2016) In his theory of "justice as fairness," Rawls emphasized two main principles: (1) the principle of equal freedom for all and (2) the difference principle, which holds that social inequality can only be justified if it provides the greatest benefit to the most disadvantaged groups. (Hasanuddin, 2018) In this framework, justice is not just enough to apply the Law consistently but also requires that the content of the Law itself be ethically accountable and socially just. This implies that the principle of legality should also consider the substance of legal norms to avoid falling into legal positivism, which may legitimize structural injustice. (Sunaryo, 2022)

Meanwhile, Max Weber, through his sociological approach, sees Law as part of the rationalized structure of modern society. Weber distinguishes between three types of traditional, charismatic, and rational-legal authority and places modern Law in the rational-legal realm, where the legitimacy of Law rests on regulations formally drafted and enforced by legitimate authorities. Weber emphasized predictability in the legal system as a key feature of formal rationality, aligning with the principle of legality in criminal law. However, he cautioned that legal formalism may diverge from society's substantive values. (Rato, 2021) In other words, a legal system that relies too much on formalism and procedure can lose sensitivity to the substantive justice that lives in society. Therefore, the Law needs to consider the material dimension of rationality, i.e., the extent to which the Law reflects the ethical, moral, or social justice values in society. (Syapriillah et al., 2015)

Comparing the views of Kelsen, Rawls, and Weber shows that the principle of legality should go beyond formal certainty in criminal law, aligning as well with substantive justice and social realities. This presents a challenge for Indonesia's legal reform, particularly in bridging written law with living law grounded in cultural diversity and local values.

Measuring the Essence of Law Living in Indonesian Society

Indonesia's criminal law system recognizes two complementary forms of law written (positive) criminal law and unwritten (customary) criminal law. Written law is codified in the Criminal Code (KUHP) and various sectoral regulations, while unwritten law stems from cultural and social norms upheld by communities and enforced through collective sanctions. Customary criminal law is explicitly acknowledged in Article 18B paragraph (2) of the 1945 Constitution, which affirms the state's recognition and respect for customary law communities and their traditional rights, as long as they remain alive, evolving, and consistent with the principles of the Unitary State of Indonesia. This reflects a legal pluralism approach, allowing local norms to coexist within the national legal framework. (Marpaung & Moeliono, 2021)

The recognition of unwritten laws is not unique to Indonesia; it also exists in other countries like South Africa and Canada. In South Africa, the post-apartheid constitution acknowledges customary law within traditional societies, provided it does not conflict with constitutional principles, especially human rights and gender equality. Likewise, Canada's pluralistic legal system recognizes the customary laws of First Nations Indigenous peoples, particularly in areas like natural resource management, dispute resolution, and community-based adjudication, while still operating within the national legal framework.

From the perspective of jurisprudence, H.L.A. Hart classifies customary Law as the primary rules of obligation, namely rules that are born from social practices and are obeyed because they are considered moral obligations. Customary Law is formed through repetitive habits and is believed to be normatively binding. (Setyowati, 2020) Soepomo referred to it as non-statutory law that exists in society and mirrors local culture. As a dynamic entity, customary law evolves with social and cultural changes, thus it is aptly termed living law. (Fartini, 2017)

The reformulation of the principle of legality in the New Criminal Code is a significant step in accommodating the existence of customary Law. In the old Criminal Code, the principle of legality was closed and referred strictly to written Law (*nullum*

crimen sine lege, nulla poena sine lege). However, Article 2 paragraph (1) of the New Criminal Code opens up the possibility of applying laws that are alive in society, including customary criminal Law, as long as they meet certain conditions: still alive, recognized by the community, and by the principles of justice within the framework of the Republic of Indonesia.

The recognition of customary law within a positive legal system presents both methodological and practical challenges. One such challenge is codifying customary law into Regional Regulations. While codification ensures legal certainty and applies the principle of legality, overly rigid codification may hinder the flexibility and contextual nature of customary law. Thus, it is essential to create a compilation of customary laws that allows for the continued evolution of local values. In the context of customary law, crimes typically arise from actions that disrupt the social harmony upheld by indigenous communities. Such acts provoke a collective response as they are seen as violations of sacred values and the social order. Customary offenses are not fixed or codified; instead, they depend on the normative awareness and social reactions of the community. If an action no longer sparks condemnation or social reaction, it may lose its status as a crime. This illustrates the dynamic and evolving nature of customary law, closely tied to the collective legal consciousness or *volksgeist* of the community.

A concrete example of customary offenses can be seen in the Baduy Indigenous community in Banten, where actions that harm the environment, such as cutting trees in restricted forest areas (*leuweung kolot*) without customary permission, are strictly prohibited. These acts are considered both ecological and spiritual offenses, as they disrupt the balance between humans, nature, and ancestors. Violating this rule results in customary sanctions, such as social exclusion, expulsion, or performing a ritual apology. However, if an action no longer triggers a reaction from the community, due to factors like modernization or changing collective views, it gradually loses its status as a customary offense. This illustrates that the enforcement of customary law depends on the living law, shaped by the community's awareness and response.

In this context, judges play a crucial role as creators of the law (*rechtsvinding*), particularly when addressing gaps in written legal norms. (Tumpa, 2015) Article 10, paragraph (1) of the Law on Judicial Power (Law No. 48 of 2009) stipulates that judges cannot dismiss cases due to the absence or ambiguity of the law. (Suhariyanto, 2015) Judges can explore the legal values that live in society, including customary Law, as a source of juridical considerations in deciding cases. Muladi reminded us that the principle

of legality aims to protect against the abuse of state authority through Criminal Law.(Ansori, 2018) Therefore, the integration of customary Law into the national criminal law system must still pay attention to the basic principles of criminal Law, including legal certainty, clarity of norms, and substantive justice. This is where the important role of compiling Customary Law is in a participatory and contextual manner so as not to conflict with the principle of the rule of Law.

As part of the development of national Law, customary criminal Law must be developed in line with the ideology of Pancasila and the values of social justice. B. Arief Sidharta emphasized that the national legal system ideally integrates universal, customary, and sectoral principles in one epistemic framework based on Pancasila.(Ali & Setiawan, 2021) Law is not only a means of social control but also an agent of change (social engineering), as stated by Mochtar Kusumaatmadja.(Sebastian, 2018)

In the future, the state needs to take concrete steps to ensure the sustainability of customary Law, for example, by documenting and recording customary Law in the State Gazette. For example, Awig-Awig in Bali, or Nagari customary law in West Sumatra. This will give formal legal force to customary norms and accelerate the recognition of Indigenous peoples as subjects of collective Law (*legal entities*). Thus, the recognition of customary Law is symbolic and operational within the framework of a democratic and just national legal system.

The author believes it is essential to establish standard operating procedures (SOPs) for law enforcement officers, including the police, prosecutors, and judiciary, when dealing with cases involving customary law communities. These guidelines are crucial for determining whether a case can be resolved through restorative justice or by incorporating local values. For instance, if reconciliation occurs between the offender, victim, and their families, the case may be halted at the investigation stage. However, if the case reaches trial, the peace agreement can serve as a basis for judges to impose lighter sentences, particularly for offenders from Indigenous communities.

In customary criminal Law, sanctions or punishment function as retribution for unlawful acts and have a deeper spiritual and social meaning. Punishment, in the perspective of customary, aims to restore the cosmic balance, that is, the harmony between the real and the supernatural, as well as create collective peace among the members of society. Thus, justice according to customary Law is holistic according to the convict, the victim, and society. The ultimate goal is eliminating disturbances or conflicts threatening society's social and spiritual order.

4. CONCLUSION

The principle of legality in the New Criminal Code evolves from formal legibility to material legality by acknowledging the living law in society, as outlined in Article 2, paragraph (1) of the National Criminal Code. This expanded principle allows for the prosecution of customary offenses or acts that violate the values of living law, even if they lack direct equivalence in the legal framework. Such offenses can be tried in court, providing a clear legal foundation for enforcement. Living law, particularly customary law practiced by local communities, should be reflected in improving the welfare and happiness of indigenous peoples. The approach to customary law must go beyond a purely normative perspective, incorporating philosophical, sociological, and juridical dimensions. In this way, the law serves not only as a coercive system but also as a reflection of the noble values rooted in the nation's culture, grounded in the fundamental principles of Pancasila and the 1945 Constitution

REFERENSI

- Ali, M. (2020). Hukum Pidana Sebagai Last Resort Dalam Undang-Undang Perlindungan Dan Pengelolaan Lingkungan Hidup. *Jurnal Hukum Ius Quia Iustum*, 27(1), 68–86. <https://doi.org/10.20885/iustum.vol27.iss1.art4>
- Ali, M., & Setiawan, M. A. (2021). Teori Hukum Pidana Minimalis dari Douglas Husak: Urgensi dan Relevansi. *Undang: Jurnal Hukum*, 4(1), 245–279. <https://doi.org/10.22437/ujh.4.1.245-279>
- Andi Hamzah. (2012). *Asas-Asas Hukum Pidana Di Indonesia & Perkembangannya*. Sofmedia.
- Ansori, L. (2018). Reformasi Penegakan Hukum Perspektif Hukum Progresif. *Jurnal Yuridis*, 4(2), 148. <https://doi.org/10.35586/v4i2.244>
- Astari, P. (2015). Landasan Filosofis Tindakan Diskresi Kepolisian Terhadap Anak Yang Berhadapan Dengan Hukum. *Arena Hukum*, 8(1), 1–18. <https://doi.org/10.21776/ub.arenahukum.2015.00801.1>
- Azizah, M. (2021). Peran Negara dalam Perlindungan Konsumen Muslim di Indonesia. *Volkgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 4(2), 153–165. <https://doi.org/10.24090/volkgeist.v4i2.5738>
- Bahri, S. (2021). Problema dan Solusi Peradilan Pidana yang Berkeadilan dalam Perkara Pembelaan Terpaksa. *Jurnal Wawasan Yuridika*, 5(1), 131. <https://doi.org/10.25072/jwy.v5i1.415>
- Cahyadi, F., & Utami, H. R. (2021). Legalitas Pemeriksaan Sidang Perkara Pidana Melalui Media Teleconference Di Masa Pandemi Covid-19. *Veritas et Justitia*, 7(2), 481–505. <https://doi.org/10.25123/vej.v7i2.4243>

- Candra, S. (2013). Pembaharuan Hukum Pidana; Konsep Pertanggungjawaban Pidana Dalam Hukum Pidana Nasional Yang Akan Datang. *JURNAL CITA HUKUM*, 1(1), 19. <https://doi.org/10.15408/jch.v1i1.2979>
- Christianto, H. (2012). Penafsian Hukum Progresif Dalam Perkara Pidana. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, 23(3), 479. <https://doi.org/10.22146/jmh.16170>
- Eddy O.S.Hiariej. (2018). *Prinsip-Prinsip Hukum Pidana*. Cahaya Atma Pustaka.
- Fadli, M. R. (2021). Hubungan Filsafat dengan Ilmu Pengetahuan dan Relevansinya Di Era Revolusi Industri 4.0 (Society 5.0). *Jurnal Filsafat*, 31(1), 130. <https://doi.org/10.22146/jf.42521>
- Fahmi, K. (2016). Menelusuri Konsep Keadilan Pemilihan Umum Menurut UUD 1945. *Jurnal Cita Hukum*, 4(2), 167–186. <https://doi.org/10.15408/jch.v4i2.4098>
- Fartini, A. (2017). Ade Fartini Fenomena Common Law Pertarungan Hukum Nasional dan Hukum Adat dalam Sanksi Pidana. *Al-Ahkam*, 13(2), 48. <https://doi.org/10.37035/ajh.v13i2.1757>
- Fuad, F., Thalib, H., & Zainuddin, &. (2021). Penerapan Asas Legalitas Materil Terhadap Hukum Pidana Adat: Studi Tana Toa Kajang. *Journal of Lex Theory (JLT)*, 2(1), 1–18. <http://pasca-umi.ac.id/index.php/jlt/article/view/396>
- Gunarto, M. P. (2013). Faktor Historis, Sosiologis, Politis, Dan Yuridis Dalam Penyusunan Ruu Hap. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, 25(1), 13. <https://doi.org/10.22146/jmh.16099>
- Hartono, T., Hanami, V., & Prameswari, F. D. (2023). Drug abuse rehabilitation policies in Indonesia: a comparison with Vietnam, Australia and Portugal. *Wacana Hukum*, 29(2), 163–180. <https://doi.org/10.33061/wh.v29i2.9576>
- Hasanuddin, I. (2018). Keadilan Sosial: Telaah atas Filsafat Politik John Rawls. *Refleksi*, 17(2), 193–204. <https://doi.org/10.15408/ref.v17i2.10205>
- Hermawan, S., & Herman, H. (2021). Analisis Kebijakan Penanganan Covid-19 Dari Perspektif Sociological Jurisprudence. *Arena Hukum*, 14(2), 328–348. <https://doi.org/10.21776/ub.arenahukum.2021.01402.7>
- Heveman, R. H. (2002). *The Legality of Adat Criminal Law in Modern Indonesia*. Tata Nusa.
- Jamaa, L. (2014). Perlindungan Korban Kekerasan Dalam Rumah Tangga Dalam Hukum Pidana Indonesia. *JURNAL CITA HUKUM*, 2(2), h. 255. <https://doi.org/10.15408/jch.v1i2.1467>
- Jefri, A., & Harefa, B. (2021). Pemenuhan Hak Anak Korban Tindak Pidana Perdagangan Orang. 174–196.
- Kadri Husin, dan B. R. H. (2016). *Sistem Peradilan Pidana di Indonesia*. Sinar Grafika.
- Lamintang, P. A. . (2014). *Dasar- Dasar Hukum Pidana di Indonesia*. Sinar Grafika.
- Marbun, R. (2019). Mereposisi Korban dalam Sistem Peradilan Pidana di Indonesia: Suatu Keterlemparan (gowerfen-sein) dalam Mitos Modernitas. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 8(4), 525. <https://doi.org/10.24843/JMHU.2019.v08.i04.p07>
- Marpaung, R., & Moeliono, T. P. (2021). Perbandingan Hukum antara Prinsip Habeas Corpus dalam Sistem Hukum Pidana Inggris dengan Praperadilan dalam Sistem Peradilan

- Pidana Indonesia. *Jurnal Wawasan Yuridika*, 5(2), 224. <https://doi.org/10.25072/jwy.v5i2.494>
- Maskur, M. A. (2018). Internalisasi Nilai-Nilai Masyarakat Adat Dalam Pembaharuan Hukum Pidana Nasional. *Masalah-Masalah Hukum*, 47(1), 22. <https://doi.org/10.14710/mmh.47.1.2018.22-31>
- Mochtar, Z. A. (2015). Antinomi dalam Peraturan Perundang-undangan di Indonesia. *Hasanuddin Law Review*, 1(3), 316. <https://doi.org/10.20956/halrev.v1n3.112>
- Moeljatno. (2016). *Asas-asas Hukum Pidana*. Bina Aksara.
- Nugroho, F. M., & Eskanugraha, A. P. (2023). Refleksi Asas Kemanfaatan: Mengilhami Asas Tiada Pidana Tanpa Kesalahan Tiada Kesalahan Tanpa Kemanfaatan. *PUSKAPSI Law Review*, 3(1), 121. <https://doi.org/10.19184/puskapsi.v3i1.40295>
- Nugroho, W. (2019). Konsep Integrasi Kebijakan Pengelolaan Pertambangan Perspektif Pluralisme Hukum Di Indonesia. *Masalah-Masalah Hukum*, 48(4), 402. <https://doi.org/10.14710/mmh.48.4.2019.402-410>
- Pertiwi, Y. W., & Saimima, I. D. S. (2022). Peranan Kontrol Sosial Dan Optimalisasi Kebijakan Keadilan Restoratif Pada Anak Pelaku Tindak Pidana. *Jurnal Hukum Dan Peradilan*, 11(1), 109. <https://doi.org/10.25216/jhp.11.1.2022.109-133>
- Pratama, A. R. (2018). Sistem Ekonomi Indonesia Dalam Perspektif Pancasila Dan Uud 1945. *Veritas et Justitia*, 4(2), 304–332. <https://doi.org/10.25123/vej.3067>
- Putera Astomo. (2018). *Ilmu Perundang-undangan: Teori dan Praktik di Indonesia*. Rajawali Pers.
- Putra Rozi, Z. B. (2019). Perkembangan Delik Zina Dalam Yurisprudensi Hukum Pidana. *Veritas et Justitia*, 5(2), 286–301. <https://doi.org/10.25123/vej.3612>
- Ratnaningsih, & Sudjatmiko. (2021). Menakar Nilai Keadilan, Kemanfaatan, dan Kepastian Hukum Pencegahan Perkawinan Anak. *Jurnal Of Economic and Business Law Review*, 1(1), 50–66.
- Rato, D. (2021). Realisme Hukum: Peradilan Adat dalam Perspektif Keadilan Sosial. *Jurnal Kajian Pembaruan Hukum*, 1(2), 285. <https://doi.org/10.19184/jkph.v1i2.24998>
- Rokilah, R., & Sulasno, S. (2021). Penerapan Asas Hukum Dalam Pembentukan Peraturan Perundang-Undangan. *Ajudikasi: Jurnal Ilmu Hukum*, 5(2), 179–190. <https://doi.org/10.30656/ajudikasi.v5i2.3942>
- Rosnawati, E., Multazam, M. T., Khotimah, S. D., & Pahlevy, R. R. (2018). Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Kekerasan Dalam Rumah Tangga. *De Jure: Jurnal Hukum Dan Syar'iah*, 10(2), 61–71. <https://doi.org/10.18860/j-fsh.v10i2.4888>
- Saravistha, D. B., Sukadana, I. K., & Suryana, K. D. (2022). Optimalisasi Penerapan Sanksi Adat dalam Upaya Pengejawantahan Asas Restoratif Justice di Desa Adat (Studi Kasus di Desa Adat Penyaringan, Kabupaten Jembrana). *Jurnal Impresi Indonesia*, 1(3), 201–210. <https://doi.org/10.58344/jii.v1i3.32>
- Satjipto Raharjo. (2006). *Hukum Dalam Jagat Ketertiban*. Uki Press.
- Satria, H. (2018). Restorative Justice: Paradigma Baru Peradilan Pidana. *Jurnal Media Hukum*, 25(1), 111–123. <https://doi.org/10.18196/jmh.2018.0107.111-123>
- Sebastian, T. (2018). Masalah Metodologis Ilmu Hukum Indonesia. *Veritas et Justitia*, 4(1), 59–87. <https://doi.org/10.25123/vej.2913>

- Setyowati, D. (2020). Memahami Konsep Restorative Justice sebagai Upaya Sistem Peradilan Pidana Menggapai Keadilan. *Pandecta Research Law Journal*, 15(1), 121–141. <https://doi.org/10.15294/pandecta.v15i1.24689>
- Shafira, M., Firganefi, F., Gustiniati, D., & Anwar, M. (2021). Illegal Fishing: Optimalisasi Kebijakan Penegakan Hukum Pidana sebagai Primum Remedium. *Jurnal Wawasan Yuridika*, 5(1), 40. <https://doi.org/10.25072/jwy.v5i1.391>
- Sufriadi, Y. (2010). PENERAPAN HUKUM PROGRESIF DALAM PENEGAKAN HUKUM DI TENGAH KRISIS DEMOKRASI. *JURNAL HUKUM IUS QUIA IUSTUM*, 17(2), 233–248. <https://doi.org/10.20885/iustum.vol17.iss2.art3>
- Suhariyanto, B. (2015). Eksistensi Pembentukan Hukum Oleh Hakim Dalam Dinamika Politik Legislasi Di Indonesia. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 4(3), 413. <https://doi.org/10.33331/rechtsvinding.v4i3.14>
- Suherman, A. (2020). Esensi Asas Legalitas Dalam Penegakan Hukum Pidana Lingkungan. *Bina Hukum Lingkungan*, 5(1), 133. <https://doi.org/10.24970/bhl.v5i1.133>
- Sunantara, I. G. H. (2020). Arah Pembaharuan Hukum Pidana Indonesia Dan Kontribusi Hukum Pidana Adat Di Tengah Pluralisme Hukum Indonesia. *Kertha Semaya : Journal Ilmu Hukum*, 8(12), 1972. <https://doi.org/10.24843/ks.2020.v08.i12.p14>
- Sunaryo, S. (2022). Konsep Fairness John Rawls, Kritik dan Relevansinya. *Jurnal Konstitusi*, 19(1), 001. <https://doi.org/10.31078/jk1911>
- Suratno, S. B. (2017). Pembentukan Peraturan Kebijakan Berdasarkan Asas-Asas Umum Pemerintahan yang Baik. *E-Journal Lentera Hukum*, 4(3), 164. <https://doi.org/10.19184/ejlh.v4i3.5499>
- Syapriallah, A., Hukum, F., & Borneo, U. (2015). Kesadaran Hukum Sebagai Aspek Dasar Politik Hukum Legislasi: Suatu Tinjauan Filsafat. *Rechtsvinding*, 4(233), 295–310.
- Tumpa, H. A. (2015). Penerapan Konsep Rechtsvinding dan Rechtschepping oleh Hakim dalam Memutus Suatu Perkara. *Hasanuddin Law Review*, 1(2), 126. <https://doi.org/10.20956/halrev.v1n2.90>
- Wibowo, A. (2017). Sumbangan Pemikiran Hak Asasi Manusia Terhadap Pembaharuan Kitab Undang-Undang Hukum Acara Pidana(Kuhap). *Jurnal Media Hukum*, 23(2), 128–136. <https://doi.org/10.18196/jmh.2016.0074.128-136>
- Widowati, W., Ohoiwutun, Y. A. T., Nugroho, F. M., Samsudi, S., & Suyudi, G. A. (2021). Peranan Autopsi Forensik Dan Korelasinya Dengan Kasus Kematian Tidak Wajar. Refleksi Hukum: *Jurnal Ilmu Hukum*, 6(1), 1–18. <https://doi.org/10.24246/jrh.2021.v6.i1.p1-18>