INTEGRATION OF CUSTOMARY LAW IN THE PRINCIPLE OF LEGALITY TOWARDS A JUST INDONESIAN CRIMINAL LAW SYSTEM

Tonnes Gultom [*1] **Henry Aspan** [*2] **Muhammad Arif Sahlepi** [*3]
Universitas Pembangunan Panca Budi
Email : kantorhukum306@gmail.com henryaspan@dosen.pancabudi.ac.id
arifsahlepi@dosen.pancabudi.ac.id

Article Info
Article History
Received: 2024-12-03
Revised: 2024-12-10
Published: 2025-02-15

Keywords:
Principle of Legality, Living Law, Indonesian Criminal Law, Customary Law, Legal Reconstruction

Abstract
The principle of legality is the main pillar in criminal law which functions to guarantee legal certainty and protect human rights from arbitrary actions. In the Indonesian criminal law system, this principle is reflected in Article 1 paragraph (1) of the Criminal Code which states that no act can be punished except based on previously existing written legal provisions. However, the application of the principle of legality which is too positivistic and narrow is considered less relevant in a pluralistic Indonesian society which still upholds customary law as part of living social norms. This thesis aims to reconstruct the principle of legality in the Criminal Code so that it can accommodate living legal values in society (living law) without ignoring the principles of the rule of law and protection of human rights. The method used is a juridical-normative research with a historical, conceptual, and comparative legal approach. The results of the study show that the recognition of customary law in the criminal system has obtained constitutional legitimacy through Article 18B paragraph (2) of the 1945 Constitution and legal support in the 2022 Criminal Code Bill. The proposed reconstruction of the legality principle emphasizes the importance of a balance between written law and local values, through strict verification mechanisms, limitations on sanctions, and strengthening the capacity of law enforcement officers to understand legal pluralism. Thus, this reconstruction is expected to be able to create a national criminal law system that is more contextual, fair, and in accordance with the identity of the Indonesian nation.

I. INTRODUCTION

The principle of legality in criminal law is a fundamental principle. This principle was first stated in the American Constitution in 1776 and after that it was in Article 8 of the Declration de Droit de I'homme et du citoyen in 1789 in France. Then this principle of legality was stated in the Criminal Code of various countries in the world. In France, this principle was first stated in Article 4 of the Code Penal compiled by Napoleon Bonaparte (there is no violation, no offense, no crime that can be punished based on existing legal rules, before the legal rules are made first).(Prawiraharjo 2023)In the Netherlands, the principle of legality is regulated in article 1 paragraph (1) of the Criminal Code which has the task of determining "Geen Feit is Strafbaar and uit kracht van eene daaran voorafgegane wettelijke strafbepalingen". The principle of legality was formed based on the peak of the implications of the antithesis (conflict) of the arbitrariness of the rulers with the people who were oppressed in basic human rights and legal injustice, which occurred before and during the Second World War in 1939-1945.(Wisdom 2023)

In the Roman legal system, it is known as Civil Law, in ancient times it was known as "Crimina Extra Ordinaria", meaning criminal acts that are not written in the law. Part of the elements of Crimina Extra Ordinaria is Crime Hellionatus, the literal meaning is as evil and wicked acts.(Angrayni 2016)

When Roman law was accommodated in Western Europe during the Renaissance around the Middle Ages, the Kings who reigned in Europe tended to use Crimenia Extra Ordinaria as a tool of criminal law arbitrarily according to the King's own wishes, while the people did not know the limits of prohibited acts because the law was

unwritten and the legal process was not in accordance with good rules.

A major event occurred in Europe that had quite an influence on legal reform, starting from the case of Jean Calos Te Toulouse in France in 1762 who was accused of murdering his own biological daughter named Mariae anotoine Calos who did not know about the act but Calos was still found guilty and sentenced to death, then executed by Guillotine (beheading with a large knife). The reaction of the French people at that time was dissatisfied with the verdict that Calos was suspected of being innocent, so that a ruler "Voltaine" whose real name was Francois Marie Ainet, criticized the decision by filing a Revision (re-examination) of the case. The Revision request was granted by the court, so that in 1975 with the Revision case stating that Mariae died by suicide, so that Calos was found not guilty and canceled the first verdict, but Calos' life had already died in the execution.(Ulil 2019)

Furthermore, the effects of the heartbreaking event made the majority of the French people ask for legal certainty (Rechtjzekenheid) for the king's arbitrary treatment. As a result, the reaction of legal experts and figures agreed to voice fundamental legal changes. This era is known as De Eennis Van de Verlichting or the Age of Aufklaurung (enlightenment).(Fate 2024)

The legal experts Montesquieu in his writings L'esprit des Lois (the soul of the law) in 1748, JJ. Rousseou with his book Du Contrac Social Du Principes Du proit Politique (principles of political law or social contract) in 1762 demanded that the King limit his power in writing or written law (statute). This request became the basic idea for forming the Principle of Legality, although some other legal experts had such a concept long before, such as the English philosopher, Francis Bacon (1561-1626) with his concept of the Principle of Legality through the adage "Moneat Lex Prisquam Feriat" (the law must provide a warning first before realizing the threat contained therein). It was Johan Anselum Van Vourerbach from Germany in 1801 with his Vom Prycologischen Zwang theory for the first time to formulate the principle of legality with the Postulate, namely "Nullum Delictum Nulla Poena Sine Praevia Lege Poenali" (there is no criminal act or no punishment without previous criminal law) with his book on the topic "Lehrbucch Des Gemeinen, in "Dutchland Giltige Peinlichen Richts". The writing of this book coincided with the peak of revolutionary turmoil in mainland Europe, inspired by the politics of the French revolution which overthrew the absolute monarchy.

In Indonesia, the Dutch National Criminal Law was established in 1881 and enforced in 1886 under the name "Weetboek Van Strafrechts (WvS) by including the Principle of Legality in Article 1 of the Dutch Criminal Code which reads "Geen Feit is Strafbaar and Vit Een Doaran Voorafgeyone Wetteljke Strafbepaling". Then the principle of Legality in Indonesian criminal law is a derivative of the Dutch colonial period which is called the Concordance Principle, namely in 1918 under the name Weetboek Van Strafrecht Voor Nederlandsch Indie (WVSNI) derived from the Dutch WvS.

Furthermore, the Principle of Legality began to apply in Indonesia in 1945 with Law Number 1 of 1946 concerning Indonesian criminal law regulations. In Article VI, the name "Weetboek Van Strafrecht Voor Nederlandsch Indie" was changed to "Weetboek Van Strafrecht" and translated into the Criminal Code (KUHP). The provisions of the principle of Legality are regulated in Article 1 paragraph (1) of the Indonesian Criminal Code which reads: "No event can be punished other than by the force of the provisions of the criminal law that preceded it."(Muslih 2017)

According to Machteld Boot, the principle of legality contains several conditions; First, - Nullum crimen, noela poena sine lege praevia, which means there is no criminal act, no punishment without previous law. The consequence of this meaning is to determine that criminal law may not be retroactive. Second, Nullum Crimen, Noela Poena sine lege scrita, meaning there is no criminal act, no punishment without written law. The consequence of this meaning is that all criminal acts must be written. Third, nullum crimen, noela poena sine lege certa, meaning there is no criminal act, no punishment without clear statutory regulations. The consequence of this meaning is that the formulation of the criminal act must be clear so that it is not multi-interpretable which can endanger legal certainty. Fourth, nullum crimen, noela poena sine lege stricta, meaning there is no criminal act, no punishment without strict law. The implicit consequence of this meaning is that analogy is not allowed. Criminal provisions must be interpreted strictly, so as not to give rise to new criminal acts.(Iwan Rasiwan and SH 2025)

The principle of legality has been adopted into the criminal law system of various countries

that limit what actions may be done and what actions may not be done by both rulers, kings and citizens or people so that a legal society and orderly governance are created. However, in its application, the principle of legality tends to protect criminals, while protection for victims and justice for the wider community give rise to a sense of injustice due to the weakness of the principle of legality itself.(Angrayni 2016)

The advantages and limitations of the principle of legality in its application are an interesting topic to analyze in this scientific paper for the understanding of all parties, both scientists, legal practitioners, and especially legal decision makers in order to achieve justice for all parties.

II. RESEARCH METHODS

This research uses a juridical-normative method with a conceptual, historical, and legislative approach.(Indra Utama Tanjung 2024)The juridical-normative approach is carried out to analyze the applicable positive legal norms, especially Article 1 paragraph (1) of the Criminal Code and Article 2 of the Draft Criminal Code, studied within the framework of the reconstruction of the principle of legality. The conceptual approach is used to examine legal theories related to the principle of legality, living law, and legal pluralism in the criminal system. Meanwhile, the historical approach is used to trace the development of the principle of legality from the Roman era to its formulation in Indonesian national law. The data sources used are primary legal materials such as laws and court decisions, as well as secondary legal materials such as academic literature, law journals, and official documents of the Draft Criminal Code. The analysis is carried out qualitatively with an emphasis on systematic interpretation of legal norms and values that live in society.

III. RESULTS AND DISCUSSION

A. Principle of Legality in Indonesian Criminal Law

In the development of the criminal law system, the principle of legality occupies a very important position as a basic principle in ensuring justice and legal certainty. This principle is not only a technical procedural norm, but also the result of a long struggle of humanity in rejecting arbitrary power and strengthening protection of individual rights. History records that the concept of the principle of legality was born from the dark experiences of the past where the law was implemented in an unwritten and subjective manner, especially during the absolute power of kings in Europe, including in the context of classical Roman law known as Crimina Extra Ordinaria. In this context, crimes or criminal acts are often not formulated explicitly in the law, but are determined by the will of the ruler at that time.(Lesmana 2020)

This condition causes acute legal uncertainty, where someone can be sentenced even though their actions are not clearly classified as a crime according to applicable law. One of the events that became a milestone for change was the case of Jean Calas in Toulouse, France, in 1762, where Calas was accused of murdering his biological child. Although he did not admit his actions, he was still sentenced to death. After his death, it was discovered that his child had committed suicide, not been murdered. The revision of the decision by the court acknowledged that Calas was innocent. This tragedy raised public awareness and encouraged the emergence of modern legal thinking that emphasized the importance of the principle of legality.

The principle of legality then received philosophical and normative formulations in modern legal texts. One of them is reflected in the Declaration des Droits de l'Homme et du Citoyen in 1789 in France, which states that "No one can be punished except on the basis of criminal provisions according to laws that have existed prior to the act itself." This is a fundamental declaration that emphasizes that criminal law must not be applied retroactively (nullum crimen, nulla poena sine lege praevia), and that there must be no analogy in determining an act as a crime.(Gunawan et al. 2024)

In the Indonesian context, the principle of legality has become a main pillar in the national criminal law system as stated in Article 1 paragraph (1) of the Criminal Code (KUHP):

"No act can be punished except by virtue of criminal provisions in legislation that existed before the act was committed." This article emphasizes that every act can only be punished if it has been explicitly regulated in legislation before the act was committed. Thus, the principle of non-retroactivity and the prohibition of analogy are integral parts of this principle.

Philosophically, the principle of legality contains the values of justice, freedom, and legal rationality. Ontologically, the principle of legality affirms the existence of criminal law as an objective norm that must exist before it can be enforced. This means that law should not be created reactively after an event occurs. Law must exist as a normative pre-existence—something that "already exists" and is "known" by society as a binding rule of the game before an individual commits an act that carries a criminal risk.

Epistemologically,(Yudhanegara et al. 2024)the principle of legality requires a system of codification and announcement of laws to the public. This means that a criminal law rule must be formulated clearly, unambiguously, and can be rationally understood by the general public. This provides clarity and accessibility of legal knowledge as a condition for the legal application of a criminal norm.

Axiologically, the principle of legality aims to protect citizens from arbitrary criminalization. By prohibiting the use of analogy and prohibiting retroactive application, this principle encourages a fair legal system and upholds the principle of due process of law. In practice, this limits the power of the judiciary and executive to not arbitrarily determine certain actions as criminal acts without a written legal basis beforehand.(Yudianto 2016)

However, in its implementation, the principle of legality also faces challenges. On the one hand, this principle provides legal protection for individuals, but on the other hand, it can be an obstacle in responding to new crimes that have not yet been regulated by law. Examples include cybercrime, digital technology-based crimes, and other forms of non-conventional crimes that often emerge faster than the legislative process. In cases like this, the legal system's reluctance to use analogy or extensive interpretation can make the law unresponsive and fail to answer social needs.

In Indonesian law, criticism of the principle of legality as reflected in the old Criminal Code has also been raised. Several legal experts such as Utrecht and Sudarto have provided critical notes on the provisions of Article 1 paragraph (1) of the Criminal Code. One of the main criticisms is that this provision is too rigid and does not accommodate the development of unwritten legal values that live in society (living law). In practice, many customary law communities still apply criminal sanctions on the basis of unwritten norms that are recognized by society as legitimate and binding.(Rambe, Sari, and Sembiring 2024)

In response to this criticism, the idea emerged to reconstruct the principle of legality to be more contextual and adaptive to local values. This idea is reflected in the draft of the Criminal Code Bill which accommodates the validity of living laws in society as the basis for criminal punishment, as regulated in Article 2 paragraph (1) of the Criminal Code Bill. This provision states that a person can be punished based on local customary law as long as the law is still alive and developing in society. Although it still upholds the principle of legality and prohibits analogy, this approach shows a paradigm shift from normative legality to sociological legality.(Ali 2023)

This reconstruction of the legality principle certainly has major implications for the national legal system. On the one hand, it acknowledges legal pluralism and the reality of Indonesian multiculturalism. However, on the other hand, it also opens up new space for debate regarding the legitimate limits of unwritten law and the validation mechanism for customary values so that they do not conflict with the principles of

human rights and universal national law. This requires a balance between written norms and local wisdom, between legal certainty and substantive justice.

Thus, the discussion of the principle of legality in Chapter II of this thesis does not only describe the historical and dogmatic aspects, but also invites us to reflect deeply on how this principle should be developed in the context of Indonesia's diverse social context. Reconstructing the principle of legality that accommodates living law does not mean ignoring legal certainty, but rather an effort to create a criminal law system that is fairer, contextual, and answers the real needs of society.

B. Chronology of Changes in the Principles of Legality in Indonesian Criminal Law

The principle of legality is the heart of criminal law, which guarantees that a person can only be punished for an act that has previously been determined as a crime by valid laws and regulations. In the context of Indonesian criminal law, this principle has long been the mainstay since the enactment of the Criminal Code (KUHP) inherited from the Dutch colonial era. However, along with the social, political, and cultural dynamics of Indonesian society that continue to develop, the need to make changes to the principle of legality is inevitable. This chapter specifically examines the historical journey and chronology of proposed changes to the principle of legality in Indonesian criminal law in response to these dynamics.(Setiawan 2021)

Changes to the principle of legality did not suddenly appear without basis. It is the result of the dynamics of legal thought that developed in Indonesia and also as a reflection of the needs of society for a law that is more alive, contextual, and just. One of the important starting points for this change is the recognition of living law in society as a legitimate source of law. This recognition is certainly a challenge for the principle of legality which from the beginning was positivistic and written. History records that the development of proposals for changes to the principle of legality has emerged since the early days of independence, but has only received serious attention in the national legislative agenda in the last two decades.

The chronology of the proposed changes can be traced more concretely since the process of drafting the Draft Criminal Code (RKUHP) which was officially discussed by the government and the House of Representatives (DPR) since the early 2000s. In the academic paper and the draft RKUHP formulated in 2015, one of the fundamental things that was reviewed was the meaning of the principle of legality in Indonesian criminal law. At this stage, there was a shift in views that led to the expansion of the meaning of the principle of legality, namely that criminal provisions do not only come from written laws and regulations, but can also come from laws that live in society.(Faith 2023)

The new formulation of the principle of legality began to appear in Article 2 of the 2015 Criminal Code Bill, which states that "the law that lives in society can be used as a basis for criminalizing someone, as long as the act is recognized as a prohibited act and is threatened with sanctions by the local community." This provision is a form of compromise between the principle of strict legality and the reality of legal pluralism in Indonesia. Here, the state begins to recognize that law does not only live in the state gazette, but also grows in the social practices of indigenous peoples and local communities.

Furthermore, in the 2019 RKUHP, the formulation of Article 2 is clarified and expanded. This provision not only regulates that living law can be used as a basis for criminalization, but also mentions its normative limitations, namely that the law must be in line with Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by civilized societies. In other words, there is an effort to organize the Indonesian criminal law system so that it remains inclusive of customary law without abandoning universal principles of justice and protection of human rights.

This step is certainly not free from long debate among academics and legal practitioners. Many welcomed the government's courage to recognize customary law as a source of criminal law. However, many also expressed concerns, especially regarding legal certainty and the potential for discrimination due to the application of local and unwritten customary law. Some experts say that including customary law in the formal criminal system risks blurring the boundaries between positive law and social norms. This concern is justified, especially if there are no objective parameters in assessing the

existence and validity of the law called "living in society".

In response to these concerns, the drafting team of the RKUHP added an explanatory provision stating that the law that lives in society must be proven to exist through research, documents, or previous court decisions. This means that even though it is unwritten, customary law must still be objectively verified before it can be used as a basis for criminalization. This effort is made to maintain a balance between substantive justice and legal certainty which is the essence of the principle of legality itself.

Another important chronology in the process of changing the principle of legality is in 2022, when the RKUHP was officially passed into law and will come into effect in 2026. In the final provisions, Article 2 of the Criminal Code states that "the law that lives in society can still be used as a basis for determining criminal acts, as long as it meets nationally recognized legal values." This indicates that Indonesia has officially abandoned the pure legality principle model as in Dutch criminal law, and switched to the contextual legality principle that recognizes legal pluralism.

This change reflects a major advancement in the Indonesian criminal law system. It is evidence that law is no longer seen as a mere elite product, but as a reflection of the legal awareness of society. In this context, customary law and local values are not positioned as "disruptors" of the national legal system, but rather as important elements in creating substantive justice in a multicultural society.

However, this paradigm shift also brings serious implications. The application of living law in society must be truly selective and measured. The government and law enforcement officers need to formulate clear guidelines regarding the mechanism for recognizing customary law, its objectivity parameters, and how to monitor potential abuse. Without all of this, good intentions in recognizing customary law can turn into a tool of local repression that is contrary to the principles of human rights.

In the constitutional framework, recognition of customary law is actually nothing new. Article 18B paragraph (2) of the 1945 Constitution expressly states that the state recognizes and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of the times and the principles of the unitary state of the Republic of Indonesia. Therefore, the renewal of the principle of legality as contained in the RKUHP can be said to be a form of operationalization of the constitutional order.

In the author's opinion, this change in the principle of legality is an important turning point in the history of Indonesian criminal law. It is not just a technical adjustment, but a paradigm transformation from a rigid legal system to a more open, adaptive, and social justice-oriented system. This change also reflects the state's courage in positioning itself as a facilitator between written law and the values that grow and live in society.

Thus, the chronology of changes in the principle of legality in Indonesian criminal law is not only a matter of legislative history, but also the history of the search for national legal identity. It is a conscious effort to form Indonesian criminal law that does not merely imitate the Western model, but also reflects the personality of the nation, cultural pluralism, and the spirit of Pancasila. This change is a reflection of Indonesia's spirit to formulate laws that are rooted in reality, but still uphold the universal principles of rights and justice.(Pratiwi 2020)

C. Chronology of Changes in the Principles of Legality in Indonesian Criminal Law

The principle of legality is one of the fundamental principles in modern criminal law. In the Indonesian context, this principle is regulated in Article 1 paragraph (1) of the Criminal Code which states that "no act can be punished except based on the force of criminal rules in legislation that existed before the act was committed." This formulation reflects the values of legal certainty and protection of human rights, but at the same time contains fundamental problems in a society that lives in a diversity of local values, customary legal systems, and traditional wisdom that are not always contained in written law. Therefore, the need arises to reconstruct the principle of legality so that it can accommodate the values that live in society (living law) without eliminating the basic principles of the rule of law.(Meliala and Sahlepi 2024)

The reconstruction of the legality principle is not intended to eliminate the legality principle itself, but rather as an effort to align the national criminal law system with the social and cultural realities of Indonesian society. This adjustment is important because the construction of the legality principle that is too positivistic and textual tends to ignore the existence of customary norms and legal values that live in society, even though Indonesia is a country built on the foundation of legal and cultural diversity.

In this chapter, the author begins by explaining that the formulation of the principle of legality in the current Criminal Code is still very much tied to the principles of lex scripta, lex certa, and non-retroactivity. This means that an act can only be punished if it has been regulated in statutory regulations, the formulation must be clear, and it is not retroactive. This formulation is rooted in the continental European legal tradition and was inherited by the Dutch colonial government through the Wetboek van Strafrecht voor Nederlandsch-Indie. As a result, the Criminal Code that is in effect until now tends to close the door to criminal law enforcement based on unwritten norms.

However, the social reality of Indonesian society shows that law does not only exist in the form of written laws. Many indigenous communities have their own legal systems and regulate their social lives through local norms that are recognized and obeyed together. In some cases, communities even consider customary norms to be more "authoritative" than state law because the values they contain are born from mutual agreement, passed down across generations, and are considered more contextual to local needs.

Based on this reality, the reconstruction of the principle of legality becomes very important to be carried out. The reconstruction in question is an effort to change, expand, or perfect the meaning and application of the principle of legality so that it does not only refer to written law, but also recognizes the validity of living law in society as a source of criminal law. This is in line with the principle stated in Article 18B paragraph (2) of the 1945 Constitution which recognizes and respects the unity of customary law communities along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia.(Country 2001)

In the reconstruction offered, the author maps out several important steps that need to be taken. First, in the formulation of criminal norms, it is necessary to accommodate provisions stating that an act can be considered a crime if it is contrary to the law that is alive in society. This has begun to appear in Article 2 paragraph (1) of the 2019 Criminal Code Bill which states that the law that is alive in society can be used as a basis for criminalization, provided that it meets certain criteria and does not conflict with the values of Pancasila and human rights.

Second, this reconstruction also requires a verification mechanism for the laws that exist in society. Not all customary norms can be used as a basis for criminalization, because their existence, acceptance by the community, and conformity with national legal principles must be ensured. This mechanism can be carried out through evidence in court, recognition by the indigenous community itself, or through valid academic and anthropological documentation.(Handayani and Syafliwar 2017)

Third, there needs to be a limit on sanctions so that the application of customary law remains within the framework of human rights protection. In many customary law practices, sanctions are not always repressive, but rather towards restoration and reconciliation. Therefore, in the reconstruction of the principle of legality, it is necessary to distinguish between customary sanctions that are non-penal and customary sanctions that can be recognized as criminal by the state.

Fourth, this reconstruction must also touch on institutional aspects. Law enforcers (judges, prosecutors, investigators) need to be equipped with an understanding of legal pluralism and the capacity to assess the validity of customary law. Without this understanding, the existence of customary law can be misused or ignored because it is considered to have no formal legitimacy. Therefore, legal training and education must be changed to be able to produce officers who are not only proficient in reading laws, but also understand and appreciate the dynamics of local values.

Fifth, the author emphasizes the importance of the value approach in criminal law. This means that the reconstruction of the principle of legality must not stop at expanding the sources of law, but must also consider the values of justice that live in society. In this case, the living law approach as put forward by Eugen Ehrlich becomes important. Ehrlich stated that the law that truly lives is not the one written in the statute book, but the one that lives in the legal consciousness of society.

Furthermore, the author also shows that the recognition of customary law in the criminal system is not new. Since Law No. 1/Drt/1951 concerning Minor Criminal Offenses, there have been provisions that recognize customary sanctions as a form of criminal resolution. Likewise, in Law No. 14 of 1970 concerning the Principles of Judicial Power, Article 27 states that judges are required to explore, follow, and understand the legal values that live in society.

This means that systematically, the recognition of customary law has a strong legal basis.

From the entire description, it can be concluded that the reconstruction of the principle of legality in the Criminal Code based on the values that live in society is a necessity in order to create a criminal law system that is more just, adaptive, and reflects the identity of the Indonesian nation. With the recognition of customary law, the legal system does not only belong to the legal elite in the center, but also becomes part of the lives of grassroots communities who have so far made customary norms a guideline for their lives.

This reconstruction directly answers the main problem of this thesis, namely how to redesign the principle of legality so that it is not only based on written law alone, but also on legal values that are truly alive and applicable in society. This approach is in line with the spirit of national legal renewal based on the values of Pancasila, social justice, and cultural diversity. In the long term, this more inclusive reformulation of the principle of legality will be an important foundation in the development of a national criminal law that is just and rooted in the reality of the nation.

IV. CONCLUSIONS AND RECOMMENDATIONS

The principle of legality is a basic principle in criminal law that guarantees that a person can only be punished on the basis of written legal rules that existed before the act was committed. Historically, this principle emerged as a reaction to arbitrary and unpredictable legal practices. In the Indonesian context, the principle of legality was adopted in its entirety from the colonial Dutch legal system and is embodied in Article 1 paragraph (1) of the Criminal Code. However, the application of this principle in Indonesia faces major challenges because it does not take into account the sociological reality that law in Indonesia does not only live in statutory texts, but also in social norms and customary laws that are widely recognized and adhered to by society.

This study found that the formulation of the legality principle that is too rigid has the potential to hinder the realization of substantive justice, especially in a society that still uses customary law as the main reference in resolving conflicts and determining shared moral standards. The old version of the legality principle often fails to respond to contemporary crimes that are not yet regulated in written law, and ignores local legal values that live in society. Therefore, the legality principle requires reconstruction to be more inclusive of plural legal systems and local justice values, without losing the basic principles of the rule of law and the protection of human rights.

Through a historical review and normative analysis of the journey of Indonesian criminal law, including the dynamics of the drafting and ratification of the new Criminal Code in 2022, this study confirms that there has been a significant shift in the perspective on the principle of legality. The state has begun to recognize that laws that live in society—in the form of customary law, social norms, and local wisdom—can be used as a source of criminal law, as long as they meet constitutional principles and universal values.

The reconstruction offered in this thesis includes a paradigm shift from the principle of legality that is purely lex scripta to the principle of legality that is open to living law. This means that written law remains the main basis, but space is opened for recognition of legal norms that exist and are recognized by the community. For this reason, it is necessary to strengthen regulations that regulate the conditions for the validity of customary law as a basis for criminalization, including proof of its existence, the principle of non-discrimination, and integration with the values of Pancasila and human rights.

With this reconstruction, the principle of legality is no longer just a formal protection fence, but also a tool to realize substantive and contextual justice. This is a progressive step towards the establishment of a national criminal law system with Indonesian characteristics, not just an imitation of a foreign legal system. Thus, the reconstruction of the principle of legality based on values that live in society not only answers the need for local justice, but also strengthens the character of Indonesian constitutionalism which is plural, humanist, and based on the noble values of the nation.

REFERENCE LISTAN

Ali, H Zainuddin. 2023. Sociology of Law. Sinar Grafika.

Angrayni, Lysa. 2016. “Penal Mediation Policy in Settling Minor Criminal Cases from a Restorative Justice Perspective.” Jurnal Hukum Respublica 16 (1): 88–102.

Fata, Bayu Ihsanul. 2024. “Criminal Law Policy On The Expansion Of The Principle Of Legality In The Perspective Of National Criminal Law.” Sultan Agung Islamic University Semarang.

Gunawan, Abraham, Roudoh Rohmatilah, Aissha Nurrahma Hartanty, Rr Novaryana Laras Dewi Prasasti, and Aisyah Rahman. 2024. "Integration of Customary Law and State Law in Indonesia: Perspective of the School of Legal History in the Social Legal Context of the Development of the Indonesian Capital City IKN." UNES Law Review 6 (4): 11268–77.

Handayani, Febri, and Syafliwar Syafliwar. 2017. "Implementation of Mediation in Settlement of Divorce Cases in Religious Courts." Al Himayah Journal 1 (2): 227–50.

Hikmah, Faidatul. 2023. "A Comparative Study of the Use of Analogy in Indonesian Criminal Law with the Common Law and Sharia Legal Systems." Journal of Legal Interpretation 4 (2): 392–404.

Imani, Sely Cahya. 2023. "Criminal Law Policy In An Efforts To Combat The Criminal Act Of Aggravated Theft (Curat) In The New Kuhp." Sultan Agung Islamic University Semarang.

Indra Utama Tanjung. 2024. BASICS OF LEGAL RESEARCH METHODS. Karanganyar: CV Pustaka Dikara). https://scholar.google.com/citations?view_op=view_citation&hl=id&user=rToGqjUAAAAJ&cstart=20&pagesize=80&citation_for_view=rToGqjUAAAAJ:Wp0gIr-vW9MC.

Lesmana, CSA Teddy. 2020. Integration of Penal Mediation in the Reform of the Indonesian Criminal Justice System. Pena Persada.

lwan Rasiwan, H, and MH SH. 2025. The Principle of Balance of the New Criminal Code Reflects Pancasila Values in Law Enforcement. Takaza Innovatix Labs.

Meliala, Nugraha Manuella, and Muhammad Arif Sahlepi. 2024. "Implementation of Restorative Justice by the Medan District Court to Realize Legal Certainty in Resolving Criminal Acts." Journal of Law, Humanities and Politics 4 (3): 459–70.

Muslih, Mohammad. 2017. "Indonesian Legal State in the Perspective of Gustav Radbruch's Legal Theory (Three Basic Legal Values)." Legalitas: Jurnal Hukum 4 (1): 130–52.

State, Third Amendment to the Constitution. 2001. "Republic of Indonesia in 1945." In accordance with the order of chapters, articles and verses, (Jakarta: Secretariat General of the MPR RI, 2006).

Pratiwi, Rufia Wahyuning. 2020. "Legal Protection Against Negligence in Fulfilling Child Support Payments Post-Divorce Based on the Decision of the Blitar Religious Court." State and Justice 9 (1): 50–61.

Prawiraharjo, Bagus Satrio Utomo. 2023. "Implementation of the Idea of Monodualistic Balance in Law Number 1 of 2023 concerning the Criminal Code." Progressive Law Journal 11 (2): 159–71.

Rambe, Muhammad Juang, Wahyu Indah Sari, and Danioko S Sembiring. 2024. "The Position of State-Owned Enterprises: Towards a Health Sector Super Holding Company Paradigm." In Proceedings of International Conference on Healthy Living (INCOHELIV), 1:315–22.

Setiawan, M Nanda. 2021. "Criticizing the ITE Law Article 27 Paragraph (3) Viewed from the Socio-Politics of Indonesian Criminal Law." DATIN Law Journal 2 (1): 1–21.

Ulil, Ahmadulil Ulil. 2019. "Resolving Minor Criminal Offenses Through Local Wisdom in the Development of the National Legal System." Jurnal Rechts Vinding: Media for National Legal Development 8 (1): 113–26.

Yudhanegara, Firman, Qadriani Arifuddin, Mohammad Hidayat Muhtar, Mas Ahmad Yani, Mia Amalia, Loso Judijanto, and Muhammad Adam HR. 2024. Introduction to Legal Philosophy: An Ontology, Epistemology, and Axiology of Legal Science. PT. Sonpedia Publishing Indonesia.

Yudianto, Otto. 2016. "The Character of Pancasila Law in the Reform of Indonesian Criminal Law." DIH: Journal of Legal Studies, 35–44.