PERANTARA
Peradaban Hukum Nusantara
https://perantara.traksdigi.or.id/index.php/plr/index
E-ISSN: 3089-588X (online)
Volume 1, No. 2, December 2024.

The Urgency of Reformulating the Material Legality Principle in the Criminal Code Based on Godly Justice

Urgensi Mereformulasi Asas Legalitas Materiil dalam KUHP Berbasis Keadilan Berketuhanan

Aldi Yudistira[1]

Received:	*Reviewed:*	*Accepted:*	*Published:*
12-01-2025	*16-01-2025*	*21-01-2025*	*22-01-2025*

How to cite (in Chicago Manual of Style 17th Ed.):
Aldi Yudistira "The Urgency of Reformulating the Material Legality Principle in the Criminal Code Based on Godly Justice." *Peradaban Hukum Nusantara* Volume 1, No 2 (03, December, 2024): 16-29, https://doi.org/10.62193/fdorqm06

Abstract

Kemerdekaan Indonesia pada tahun 1945 memberikan peluang untuk mereformasi hukum, termasuk pembaruan hukum pidana. Hingga saat ini, KUHP masih mengadopsi asas legalitas formil warisan kolonial yang cenderung positivistik dan kurang mencerminkan keadilan substantif serta nilai-nilai yang hidup dalam masyarakat. Penelitian ini bertujuan untuk menganalisis relevansi dan urgensi reformulasi asas legalitas materiil dalam menciptakan keadilan berketuhanan yang sejalan dengan nilai-nilai Pancasila. Penelitian menggunakan metode yuridis normatif dengan pendekatan deskriptif analitis, mengandalkan studi kepustakaan, dan dianalisis secara kualitatif. Hasil penelitian menunjukkan bahwa asas legalitas materiil dalam KUHP nasional saat ini belum mencerminkan keadilan berketuhanan, karena hukum yang hidup hanya dimaknai sebagai hukum adat, tanpa mengakomodasi hukum agama. Reformulasi asas legalitas materiil diperlukan berdasarkan tiga urgensi: filosofis, sosiologis, dan yuridis. Secara filosofis, hukum yang hidup harus mencakup hukum agama dan kebiasaan yang tetap eksis di masyarakat. Secara sosiologis, hukum agama di banyak daerah menjadi pedoman utama, namun belum terakomodasi dalam KUHP. Secara yuridis, pembatasan hukum hidup hanya pada hukum adat menciptakan kekosongan hukum yang dapat diatasi dengan memasukkan hukum agama. Reformulasi ini menjadi langkah strategis untuk membangun sistem hukum pidana yang berbasis keadilan berketuhanan, sesuai dengan nilai Pancasila dan UUD 1945, serta memenuhi kebutuhan masyarakat Indonesia yang beragam.

Keywords: *Reformulasi Hukum; KUHP Nasional; Keadilan Berketuhanan*

Abstract

[1] Faculty of Law, Universitas Diponegoro Semarang, Indonesia, Email: aldiyudistira444@gmail.com

Indonesia's independence in 1945 provided an opportunity to reform the law, including criminal law reform. Until now, the Criminal Code still adopts the colonial legacy formal legality principle which tends to be positivistic and does not reflect substantive justice and values that live in society. This study aims to analyze the relevance and urgency of reformulating the principle of material legality in creating divine justice in line with the values of Pancasila. The research uses normative juridical method with analytical descriptive approach, relying on literature study, and analyzed qualitatively. The results show that the principle of material legality in the current national Criminal Code does not reflect divine justice, because the living law is only interpreted as customary law, without accommodating religious law. Reformulation of the principle of material legality is needed based on three urgencies: philosophical, sociological, and juridical. Philosophically, living law must include religious law and customs that still exist in society. Sociologically, religious law in many regions is the main guideline, but has not been accommodated in the Criminal Code. Juridically, limiting living law to customary law creates a legal vacuum that can be addressed by including religious law. This reformulation is a strategic step to build a criminal law system that is based on divine justice, in accordance with the values of Pancasila and the 1945 Constitution, and meets the needs of diverse Indonesian communities.

Keywords: Legal Reformulation; National Criminal Code; Godly Justice

Introduction

The independence of the Indonesian nation proclaimed on August 17, 1945 cannot be separated from the ideals of legal reform. The declaration of independence contained the spirit to break away from the shackles of Dutch colonial law that was irrelevant to local values of justice. The Preamble of the 1945 Constitution emphasizes that the independence of the Indonesian nation, apart from being a blessing from the Almighty God, was also driven by the desire of Indonesian ancestors to live in a free and just order. However, until now, the Indonesian criminal law system still reflects the formal juridical paradigm inherited from colonialism.[2] This paradigm tends to prioritize the principle of formal legality, as seen in the case of Mbok Minah who was punished for stealing three cocoa pods, even though there was no intention to possess them. This shows the need to reformulate the criminal law system to be more responsive to the value of substantive justice.[3]

Barda Nawawi Arief, has identified the weakness of the principle of formal legality, which only focuses on fulfilling the elements of the offense without considering local values and divine justice. Several studies have also highlighted the importance of the

[2] Syofyan Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," *DiH: Jurnal Ilmu Hukum* 13, no. 26 (3 September 2018): 266, https://doi.org/10.30996/dih.v0i0.1588.

[3] Imam Sukadi, "Matinya Hukum Dalam Proses Penegakan Hukum Di Indonesia," *Risalah Hukum*, 2011, 40, https://e-journal.fh.unmul.ac.id/index.php/risalah/article/view/171.

application of living laws in society, such as customary and religious laws. However, this research has not yet deeply explored how these values can be comprehensively integrated into the Indonesian criminal law system. This gap is the basis for justifying the contribution of this research, which is to provide a conceptual foundation for the reformulation of the principle of material legality that includes customary and religious laws based on Godhead.[4]

The urgency of this research lies in the urgent need to create a criminal law system that is inclusive and in accordance with the principles of Pancasila.[5] In reality, the current Indonesian criminal law is still fragmentary, which has the potential to cause injustice and conflict in its implementation. Reformulation of the principle of material legality can be a strategic step to overcome this fragmentation, especially by accommodating the existence of laws that live in society.[6] Furthermore, this urgency is also rooted in the massive impact of the injustice of criminal law that does not pay attention to the social context and local values.

The main legal issue that is the focus of this research involves analyzing the concept of the principle of material legality in the National Criminal Code to ensure that the principle is able to reflect local values, including customary law and religion, which live and develop in the community.[7] In addition, this research also examines the obstacles faced in the implementation of a more inclusive principle of material legality in Indonesia, such as the juridical, sociological and philosophical obstacles that often arise in the process of recognizing and applying living law. This approach is important to answer the challenge of building a criminal law system that not only accommodates the diversity of cultures and beliefs, but also creates harmony between positive legal rules and local norms that play an important role in maintaining social order in various regions.[8]

This research aims to identify and analyze the weaknesses of the formal legality principle in the current Indonesian criminal law system and provide recommendations

---

[4] Muhammad Rustamaji, "Biomijuridika: Pemikiran Ilmu Hukum Pidana Berketuhanan Dari Barda Nawawi Arief," *Undang: Jurnal Hukum* 2, no. 1 (28 Oktober 2019): 196, https://doi.org/10.22437/ujh.2.1.193-223.

[5] Ratno Lukito, *Tradisi Hukum Indonesia: disertai postcript baru oleh Pranoto Iskandar* (Cianjur: Institute for Migrant Rights Press, 2013), 40.

[6] Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," 262.

[7] Abdul Rachmad Budiono, *Peradilan Agama dan Hukum Islam di Indonesia* (Malang: Bayu Media Publishing, 2003), 3.

[8] Ahmad Bahiej, "Studi Komparatif Terhadap Qanun Aceh Tentang Hukum Jinayat Dan Enakmen Jenayah Syariah Selangor Malaysia," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 48, no. 2 (2 Desember 2014): 337, https://doi.org/10.14421/ajish.v48i2.120.

for the reformulation of the material legality principle. Specifically, this research aims to integrate local values, such as customary law and religion, in the national criminal law system in order to create substantive justice based on Pancasila.

Based on this background, the reformulation of the principle of material legality is an urgent need in an effort to build a criminal law system that is not only adaptive to the dynamics of a pluralistic society in Indonesia, but also based on the values of Pancasila which upholds substantive justice.[9] This reformulation is expected to be able to integrate living laws in society, such as customary and religious laws, into the national criminal law system, so as to be able to answer various problems arising from legal fragmentation. With an inclusive approach and based on local values, the national criminal law system can be an effective instrument to create justice that is not only procedural, but also substantive, in order to realize sustainable social harmony. This research, therefore, provides a solid conceptual foundation to ensure that the national criminal law is able to fulfill the needs and aspirations of Indonesian society holistically.

Method

This research uses a normative juridical approach, which focuses on the study of legal norms and legal doctrine to analyze the principle of material legality in the National Criminal Code. This approach is relevant because the research aims to evaluate the relationship between the principle of material legality and divine justice, in accordance with the values of Pancasila. According to Marzuki (2005), the normative approach aims to examine the consistency between legal norms and the underlying philosophical values. In this context, the research will explore how the principle of material legality can reflect substantive justice that is in line with the laws that live in society.[10]

The specification of this research is descriptive analytical, as explained by Soekanto (2007), descriptive analytical research aims to provide a systematic description of the object of research and analyze it in depth based on the relevant normative framework. This research uses this specification to identify the urgency of reformulating the

[9] Kristiyadi Kristiyadi, "Pergeseran Asas Legalitas Dalam Pembaruan Hukum Pidana Indonesia," *Jurnal Dunia Ilmu Hukum (JURDIKUM)* 1, no. 1 (13 Juni 2023): 26, https://doi.org/10.59435/jurdikum.v1i1.100.

[10] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2005), 11.

principle of material legality and its contribution to a criminal law system based on divine justice.[11]

Data collection techniques were conducted through literature and document studies. The data collected includes laws and regulations, such as Article 2 of the National Criminal Code, relevant legal doctrines, court decisions, and scientific articles related to the principle of legality in criminal law. This approach is in line with the view of Salim and Nurbani (2013), which states that literature study allows researchers to obtain primary and secondary data in depth to analyze the dynamics of law in practice.[12]

The data analysis technique uses a qualitative juridical method. The analysis is conducted through legal interpretation, including systematic, teleological, and historical interpretations, to assess the consistency and relevance of the principle of material legality in the National Criminal Code with the values of Pancasila. Suteki and Galang (2018) emphasize that qualitative juridical analysis serves to evaluate legal norms in relation to the social and philosophical needs of society.[13]

Result and Discussion

A. Urgency of Policy Reformulation of the Material Legality Principle in the National Criminal Code

The reformulation of the principle of material legality in the National Criminal Code is an important step to integrate the laws that live in the community as a source of law. The principle of material legality, as a manifestation of the rule of law, provides space for customary law and other laws that live in the community to be recognized as the basis for legalization and criminalization. Without the principle of legality, criminal law risks becoming an arbitrary tool.[14]

However, the material legality principle in Article 2 of the National Criminal Code has been criticized. According to Andi Hamzah, Article 2 of the Criminal Code contradicts the principle of legality in Article 1 paragraph (2) of the Criminal Code which prohibits the use of analogies. This creates a risk of legal uncertainty.[15] Eddy

---

[11] Soerjono Soekanto, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2007), 22.

[12] Salim Hs dan Erlis Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis Dan Disertasi* (Jakarta: Raja Grafindo Persada, 2023), 18, https://rune.une.edu.au/web/handle/1959.11/63466.

[13] Suteki Suteki dan Galang Taufani, *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik)* (Depok: Rajawali Pers, 2018), 2.

[14] J.E. Sahetapy, *Analekta JES* (Jakarta: Penerbit Buku Kompas, 2020), 32.

[15] Prianter Jaya Hairi, "Kontradiksi Pengaturan 'Hukum Yang Hidup Di Masyarakat' Sebagai Bagian Dari Asas Legalitas Hukum Pidana Indonesia (The Contradiction Of 'Living Law' Regulation As Part Of The Principle Of

O.S. Hiariej added that living law does not have a clear standard of proof, making it difficult for prosecutors to prove criminal elements.[16] Komariah E. Sapardjaja also stated that Article 2 contradicts the principle of written law in Article 1 paragraph (1) of the Criminal Code. [17]

Historically, the idea of material legality emerged in the 1963 National Law Seminar in Semarang and was recommended again in 1964. Barda Nawawi Arief explained that this step was needed because customary law was isolated by state law, making it difficult to enforce.[18] Recognition of laws that live in society, such as customary law, is reasonable considering that the Indonesian nation has various tribes that still practice customary law as the main social rule.

For example, in Bali there is a customary sanction system such as pamidanda which includes religious, physical or fines. This system aims to maintain the balance and harmony of society.[19] In Lombok, customary law regulates sanctions in the form of expulsion or fines in the case of merari.[20] In Minangkabau, there are customary sanctions such as kabek arek to maintain traditional values[21]

Laws that live in the community are not new. The 1945 Constitution, Article 18B paragraph (1), recognizes customary law communities as long as they are in accordance with the times and the principles of the Unitary State of the Republic of

---

Legality In The Indonesian Criminal Law)," *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 7, no. 1 (27 Desember 2017): 90, https://doi.org/10.22212/jnh.v7i1.924.

16 Ady Thea DA, "2 Profesor Hukum Ini Semula Menolak Living Law Masuk KUHP Nasional," hukumonline.com, 2023, https://www.hukumonline.com/berita/a/2-profesor-hukum-ini-semula-menolak-living-law-masuk-kuhp-nasional-lt64c1dca56989c/.

17 NNP, "Pasal Living Law di RKUHP Berpotensi Disalahgunakan Aparat Penegak Hukum," hukumonline.com, 2016, https://www.hukumonline.com/berita/a/pasal-iliving-law-i-di-rkuhp-berpotensi-disalahgunakan-aparat-penegak-hukum-lt56d8059ec6ae0/.

18 K. Wantjik Saleh, *Seminar Hukum Nasional 1963-1979* (Jakarta: Ghalia Indonesia, 1980), 24.

19 I. Putu Sarjana, "Penerapan Sangaskara Danda di Desa Pakraman Darmasaba, Kecamatan Abiansemal, Kabupaten Badung," *Dharmasmrti* 1, no. 18 (2018): 113, https://www.neliti.com/publications/266369/.

20 Novi Komalasari, "Perkawinan Adat Merari' Suku Sasak Dalam Perspektif Hukum Adat (Srudi Kasus Di Desa Kateng Kecamatan Praya Barat Lombok Tengah)," *Dinamika* 26, no. 10 (10 Agustus 2020): 1304, https://jim.unisma.ac.id/index.php/jdh/article/view/7155.

21 Hendra Eka Sapura, "Upaya penyelesaian sengketa yang berkaitan dengan tindak pidana dan aturan-aturan yang diterapkan oleh masyarakat hukum adat (Studi Kasus pada Nagari Lubuak Batingkok Provinsi Sumatera sekalat" (depok, Fakultas Hukum Universitas Indonesia, 2012), 78, https://www.lib.ui.ac.id/detail?id=20307259&lokasi=lokal.

Indonesia.[22] Eddy O.S. Hiariej notes that the principle of legality in Indonesia is not absolute, as Article 2 recognizes unwritten laws such as customary law.[23]

However, the formulation of Article 2 of the Criminal Code needs to be reformulated to reflect customary law, religion, and local customs holistically. This integration is important to create a criminal law system that is responsive to the reality of Indonesia's pluralistic society, while maintaining the values of justice based on Pancasila and divine values.[24]

B. Philosophical Urgency of Material Legality Policy in the National Criminal Code

The reformulation of the principle of material legality in the National Criminal Code is an important agenda to create an inclusive criminal law system. Laws that live in the community, such as customary law, should be recognized not only as a complement, but also as a relevant source of law in the context of Indonesia's pluralistic society. Unfortunately, the formulation of Article 2 of the 2023 Criminal Code limits the recognition of living laws to customary laws regulated through Regional Regulations, which reduces the original nature of customary law as unwritten law.

According to Soerjono Soekanto, the law that lives in the community is a customary law that has legal consequences, and is an act that is repeated in the same form towards "rechtsvardigeordening der samenlebing".[25] Based on the results of the Seminar on Customary Law and the development of National Law, the law that lives in the community is defined as the original Indonesian Law that is not written in the form of legislation of the Republic of Indonesia, which here and there contains religious elements.

Philosophically, customary law reflects the volksgeist or soul of society, where law grows, develops and is accepted as an integral part of social life. This idea is supported by Von Savigny who sees law as a reflection of the collective

---

[22] Republik Indonesia, *Undang-Undang Darurat Republik Indonesia Nomor 1 Tahun 1951 Tentang Tindakan-Tindakan Sementara Untuk Menyelenggarakan Kesatuan Susunan Kekuasaan Dan Acara Pengadilan-Pengadilan Sipil, Lembaran Negara Republik Indonesia Tahun 1951 Nomor 9*, 1951.

[23] O. S. Hiariej, *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional* (Depok: Rajawali Pers, 2024), 86, //all.fh.unair.ac.id%2Findex.php%3Fp%3Dshow_detail%26id%3D23880.

[24] Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara* (Yogyakarta: Genta publishing, 2010), 2.

[25] Sekhar Chandra Pawana, "Polemik Atas Konsep 'Hukum Yang Hidup' Dalam Pembaharuan KUHP Di Indonesia," *JUDICATUM: Jurnal Dimensi Catra Hukum* 1, no. 1 (28 Juni 2023): 54, https://doi.org/10.35326/judicatum.v1i1.4045.

consciousness of society. However, the regulation of Article 2 of the 2023 Criminal Code tends to make customary law part of the state's written law, which eliminates the dynamic and flexible nature of customary law. This reduces its ability to adapt to social change.

In addition, the recognition of living law is limited to customary law to the exclusion of religious law and other customs that are also part of Indonesian society.[26] For example, the implementation of Qanun in Aceh shows how religious law can be an integral part of the local legal order.[27] Thus, the limitation to customary law alone is insufficient to reflect the plurality of laws that exist in Indonesia.

Criticism of this formulation also emerged from legal experts. Eddy O.S. Hiariej highlighted the potential conflict between customary law and the principle of legality adopted by Article 1 of the Criminal Code. Komariah Sapardjaja added that the regulation of Article 2 of the KUHP contradicts the principle of written law in Article 1 paragraph (1). This criticism shows the need for a more holistic approach in accommodating living laws without compromising the basic principles of criminal law.

By understanding this philosophical urgency, the reformulation of the principle of material legality should consider the existence of customary law, religious law, and local customs as a living legal entity.[28] This reformulation not only supports substantive justice but also ensures that the national criminal law remains relevant to the needs of society. Therefore, a more inclusive policy framework is needed to accommodate the diversity of existing laws in Indonesia without reducing the divine values and justice that are the foundation of the national legal system.

C. Sociological Urgency of Material Legality Policy in the National Criminal Code

Sociological urgency means considerations or reasons that illustrate that regulations are formed to meet the needs of society in various aspects, as well as

---

[26] Retno Kus Setyowati, "Pengakuan Negara Terhadap Masyarakat Hukum Adat," *Binamulia Hukum* 12, no. 1 (27 Agustus 2023): 137, https://doi.org/10.37893/jbh.v12i1.601.

[27] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2012), 110.

[28] Theresia Ngutra, "Hukum Dan Sumber-Sumber Hukum," *SUPREMASI: Jurnal Pemikiran, Penelitian Ilmu-Ilmu Sosial, Hukum Dan Pengajarannya* 11, no. 2 (14 Februari 2017): 182, https://doi.org/10.26858/supremasi.v11i2.2813.

concerning empirical facts regarding the development of problems and needs of society and the state.

In the reality of religious law communities in various regions in the country that religious law is part of the law that lives in society, it is not uncommon for local governments to formalize it in the form of Regional Regulations. In addition, there is an expression from the National Law Development Agency of the Ministry of Law and Human Rights that the existence of Islamic law has long been understood as an inseparable part of the Indonesian people's awareness of law and justice which is indeed clear in its existence or existence within the framework of the national legal system.[29]

There are several examples that religious law is in harmony with Indonesian society, including the Aceh region, where there is a regional regulation called qonun, which in essence is a regional regulation based on Islamic religion, if violated, criminal liability can be held according to Islamic law.

Regional Regulation of South Lampung District No. 3/2004 on the Supervision and Control of the Sale of Alcoholic Beverages within South Lampung District explains the prohibition of alcoholic beverages and the restriction of their circulation to create a prosperous society free from mental illness and despicable acts.

Likewise, Gorontalo Province Regional Regulation No. 10/2003 on the Prevention of Maksiat explains the policy and legal regulations on the prohibition of liquor and drugs.

Manokwari Regency Regional Regulation No. 5/2006 on the Prohibition of the Import, Storage, Distribution and Sale and Production of Alcoholic Beverages explains that Manokwari as the area where the gospel first entered Papua needs to prohibit all activities of importing, storing, distributing and selling and producing alcoholic beverages in Manokwari Regency.

Regional Regulation of Bali Province No. 9/2002 on the Supervision and Control of Alcoholic Beverage Distribution explains that alcoholic beverages (keras) have high economic potential and endanger health and can cause disturbances to public order. However, this Hindu regulation does not prohibit it absolutely, but

[29] Andrie Irawan, "Posisi Hukum Agama (Hukum Islam) Dalam Ranah Politik Indonesia," *Academy of Education Journal* 6, no. 1 (1 Januari 2015): 66, https://doi.org/10.47200/aoej.v6i1.126.

only regulates the circulation and control of alcoholic beverages as stipulated in article 4. Therefore, every business entity that distributes at least A, B and C alcoholic beverages must attach a distribution label as stipulated in the provisions of article 6.

Thus we can conclude that there is a role of religious law in the daily life of Indonesian society which ultimately contributes to the formation of law in their respective regions,

However, in the formulation of the National Criminal Code that a person should be punished only for violating customary criminal law, indirectly when a person violates religious law, he should not be punished because the law that lives in society is only recognized customary criminal law.

From the reality that occurs in the community, there is a gap in this case state law (KUHP) with community customs in various regions in the country. Therefore, in order to provide justice, it is necessary to reformulate the principle of material legality in the National Criminal Code so that the value of divine justice in society can be accommodated in the formation of the principle of legality.

D. The Juridical Urgency of the Policy of the Material Legality Principle in the National Criminal Code

Juridical urgency means reasons or considerations that illustrate that the regulations formed aim to overcome existing legal problems or fill legal gaps that have not been accommodated in the legislative system. This also includes efforts to improve existing legal provisions to ensure legal certainty and a sense of justice for the community at large.[30] In this context, the principle of material legality stipulated in Article 2 of the National Criminal Code is an important issue that requires reassessment in order to reflect the values of legal pluralism in Indonesia.

In the national legal system, the recognition of customary law as a living law in the community has been explicitly regulated in Article 2 paragraph (1) of the National Criminal Code. However, the neglect of religious law as part of the law that lives in the community is one of the fundamental weaknesses in this formulation. In fact, the main principles in Pancasila, especially the first principle, emphasize the importance of the state to respect and accommodate religious norms in the

[30] Philipus M. Hadjon, *Perlindungan hukum bagi rakyat di Indonesia: sebuah studi tentang prinsip-prinsipnya, penanganannya oleh pengadilan dalam lingkungan peradilan umum dan pembentukan peradilan administrasi negara* (Surabaya: Bina Ilmu, 1987), 4.

formation of law. Religious law has a significant role in resolving social conflicts with a more humanist approach and in accordance with local values.

Furthermore, laws and regulations such as Law Number 12/2011 on the Formation of Laws and Regulations also underline the importance of incorporating norms that live in society into national legal policies. This is intended to ensure that regulations made can be accepted by all levels of society and have strong social legitimacy. Therefore, the revision of Article 2 of the National Criminal Code which only accommodates customary law is a strategic step to create a more inclusive and fair legal system for all Indonesian people.

The formulation of Article 2 of the National Criminal Code only accommodates customary law as a living law in the community. Thus, the rules regarding the laws below (in this case Government Regulations and Regional Regulations) only accommodate the interests of customary law. Religious law is not categorized as a living law in the community.

In fact, the absorption of religious norms in the Formation of Legislation is a mandate from Pancasila which is then regulated in the 1945 Constitution and applicable laws and regulations. Based on the principle of the Fourth Principle of Thought that "The State is based on God Almighty, on the basis of a just and civilized humanity, then life in the state must be based on religious values and norms to then be practiced both culturally and legally formal through the process of forming legislation or local regulations as mentioned above.

With this formulation, it does not provide justice for religious communities in Indonesia because religious law is not accommodated in the laws that live in society. To provide justice, religious law or customary law should be formulated into the Criminal Code regarding laws that live in the community.

This study asserts that the reformulation of the principle of material legality in the National Criminal Code is an urgent need to create an inclusive, responsive, and just criminal law system. In the previous discussion, it was revealed that the recognition of customary law as a living law in the community has been explicitly accommodated in Article 2 of the Criminal Code. However, the neglect of religious law and other customary laws indicates a significant shortcoming in representing legal pluralism in Indonesia.

The philosophical, sociological, and juridical urgency of this reformulation aims not only to overcome the fragmentation of existing laws but also to create harmonization between local values and the national legal framework. As a nation with a diversity of cultures, traditions, and beliefs, Indonesia requires a criminal law system that is not only repressive but also able to reflect substantive justice in accordance with the values of Pancasila. This adjustment is important so that the national criminal law can function as a tool for legal development based on the principles of divine justice, respect for human rights, and respect for social norms that live in society.

As a recommendation, the revision of Article 2 of the Criminal Code should consider expanding the definition of law that lives in the community to include religious law and local customs. Thus, this reformulation is not only a strategic step to increase the social legitimacy of criminal law but also a symbol of national legal transformation that is more progressive and oriented towards the interests of all Indonesian people. This is in line with the constitutional objective to realize social justice for all Indonesians within the framework of the rule of law.

Conclusion

Policy Formulation of the principle of material legality in the National Criminal Code currently needs to be reformulated because it does not reflect the value of divine justice, there are several urgencies to reformulate the principle of material legality in the National Criminal Code, the urgency of the researchers divide it into three first urgency philosophically, second urgency sociologically and the third urgency juridically. First, the philosophical urgency, the law that lives in the community in the National Criminal Code is only interpreted with customary law if it is reviewed philosophically, it has essentially reduced the essence of the law that lives in the community even though there are other laws that still exist in this case customary law, customary law (customary law here is religious law) which is still used by people in various regions in Indonesia as a guide to solving everyday problems. Second, sociological urgency, in various regions in Indonesia religious law is a living law in society but the formulation in the National Criminal Code does not categorize religious law as a living law in society, thus not providing justice for religious communities. Third, juridical urgency, there is a legal vacuum when the law that lives in society is only interpreted by customary law, the legal vacuum is because customary law does not categorize the offense as an act that is

considered reprehensible but in religious law the act is considered a reprehensible act so there are sanctions. To fill the legal vacuum, customary law or religious law should be formulated in the National Criminal Code as part of the law that lives in the community.

Bibliograph

Arief, Barda Nawawi. *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*. Yogyakarta: Genta publishing, 2010.

Bahiej, Ahmad. "Studi Komparatif Terhadap Qanun Aceh Tentang Hukum Jinayat Dan Enakmen Jenayah Syariah Selangor Malaysia." *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 48, no. 2 (2 Desember 2014): 333–61. https://doi.org/10.14421/ajish.v48i2.120.

Budiono, Abdul Rachmad. *Peradilan Agama dan Hukum Islam di Indonesia*. Malang: Bayu Media Publishing, 2003.

DA, Ady Thea. "2 Profesor Hukum Ini Semula Menolak Living Law Masuk KUHP Nasional." hukumonline.com, 2023. https://www.hukumonline.com/berita/a/2-profesor-hukum-ini-semula-menolak-living-law-masuk-kuhp-nasional-lt64c1dca56989c/.

Hadi, Syofyan. "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)." *DiH: Jurnal Ilmu Hukum* 13, no. 26 (3 September 2018). https://doi.org/10.30996/dih.v0i0.1588.

Hadjon, Philipus M. *Perlindungan hukum bagi rakyat di Indonesia: sebuah studi tentang prinsip-prinsipnya, penanganannya oleh pengadilan dalam lingkungan peradilan umum dan pembentukan peradilan administrasi negara*. Surabaya: Bina Ilmu, 1987.

Hairi, Prianter Jaya. "Kontradiksi Pengaturan 'Hukum Yang Hidup Di Masyarakat' Sebagai Bagian Dari Asas Legalitas Hukum Pidana Indonesia (The Contradiction Of 'Living Law' Regulation As Part Of The Principle Of Legality In The Indonesian Criminal Law)." *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 7, no. 1 (27 Desember 2017): 89–110. https://doi.org/10.22212/jnh.v7i1.924.

Hiariej, O. S. *Prinsip-Prinsip Hukum Pidana Edisi Penyesuaian KUHP Nasional*. Depok: Rajawali Pers, 2024. //all.fh.unair.ac.id%2Findex.php%3Fp%3Dshow_detail%26id%3D23880.

Hs, Salim, dan Erlis Nurbani. *Penerapan Teori Hukum Pada Penelitian Tesis Dan Disertasi*. Jakarta: Raja Grafindo Persada, 2023. https://rune.une.edu.au/web/handle/1959.11/63466.

Irawan, Andrie. "Posisi Hukum Agama (Hukum Islam) Dalam Ranah Politik Indonesia." *Academy of Education Journal* 6, no. 1 (1 Januari 2015): 65–73. https://doi.org/10.47200/aoej.v6i1.126.

Komalasari, Novi. "Perkawinan Adat Merari' Suku Sasak Dalam Perspektif Hukum Adat (Srudi Kasus Di Desa Kateng Kecamatan Praya Barat Lombok Tengah)."

Dinamika 26, no. 10 (10 Agustus 2020): 12971306. https://jim.unisma.ac.id/index.php/jdh/article/view/7155.

Kristiyadi, Kristiyadi. "Pergeseran Asas Legalitas Dalam Pembaruan Hukum Pidana Indonesia." *Jurnal Dunia Ilmu Hukum (JURDIKUM)* 1, no. 1 (13 Juni 2023): 25–27. https://doi.org/10.59435/jurdikum.v1i1.100.

Lukito, Ratno. *Tradisi Hukum Indonesia: disertai postcript baru oleh Pranoto Iskandar*. Cianjur: Institute for Migrant Rights Press, 2013.

Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Kencana, 2005.

Ngutra, Theresia. "Hukum Dan Sumber-Sumber Hukum." *SUPREMASI: Jurnal Pemikiran, Penelitian Ilmu-Ilmu Sosial, Hukum Dan Pengajarannya* 11, no. 2 (14 Februari 2017): 193–211. https://doi.org/10.26858/supremasi.v11i2.2813.

NNP. "Pasal Living Law di RKUHP Berpotensi Disalahgunakan Aparat Penegak Hukum." hukumonline.com, 2016. https://www.hukumonline.com/berita/a/pasal-iliving-law-i-di-rkuhp-berpotensi-disalahgunakan-aparat-penegak-hukum-lt56d8059ec6ae0/.

Pawana, Sekhar Chandra. "Polemik Atas Konsep 'Hukum Yang Hidup' Dalam Pembaharuan KUHP Di Indonesia." *JUDICATUM: Jurnal Dimensi Catra Hukum* 1, no. 1 (28 Juni 2023): 51–62. https://doi.org/10.35326/judicatum.v1i1.4045.

Rahardjo, Satjipto. *Ilmu Hukum*. Bandung: Citra Aditya Bakti, 2012.

Republik Indonesia. *Undang-Undang Darurat Republik Indonesia Nomor 1 Tahun 1951 Tentang Tindakan-Tindakan Sementara Untuk Menyelenggarakan Kesatuan Susunan Kekuasaan Dan Acara Pengadilan-Pengadilan Sipil, Lembaran Negara Republik Indonesia Tahun 1951 Nomor 9*, 1951.

Retno Kus Setyowati. "Pengakuan Negara Terhadap Masyarakat Hukum Adat." *Binamulia Hukum* 12, no. 1 (27 Agustus 2023): 131–42. https://doi.org/10.37893/jbh.v12i1.601.

Rustamaji, Muhammad. "Biomijuridika: Pemikiran Ilmu Hukum Pidana Berketuhanan Dari Barda Nawawi Arief." *Undang: Jurnal Hukum* 2, no. 1 (28 Oktober 2019): 193–223. https://doi.org/10.22437/ujh.2.1.193-223.

Sahetapy, J.E. *Analekta JES*. Jakarta: Penerbit Buku Kompas, 2020.

Saleh, K. Wantjik. *Seminar Hukum Nasional 1963-1979*. Jakarta: Ghalia Indonesia, 1980.

Sapura, Hendra Eka. "Upaya penyelesaian sengketa yang berkaitan dengan tindak pidana dan aturan-aturan yang diterapkan oleh masyarakat hukum adat (Studi Kasus pada Nagari Lubuak Batingkok Provinsi Sumatera sekalat." Fakultas Hukum Universitas Indonesia, 2012. https://www.lib.ui.ac.id/detail?id=20307259&lokasi=lokal.

Sarjana, I. Putu. "Penerapan Sangaskara Danda di Desa Pakraman Darmasaba, Kecamatan Abiansemal, Kabupaten Badung." *Dharmasmrti* 1, no. 18 (2018): 102–15. https://www.neliti.com/publications/266369/.

Soekanto, Soerjono. *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Raja Grafindo Persada, 2007.

Sukadi, Imam. "Matinya Hukum Dalam Proses Penegakan Hukum Di Indonesia." *Risalah Hukum*, 2011, 39–53. https://e-journal.fh.unmul.ac.id/index.php/risalah/article/view/171.

Suteki, Suteki, dan Galang Taufani. *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik)*. Depok: Rajawali Pers, 2018.