

The imperative is to restrict customary criminal offenses after implementing Indonesia's new criminal code



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Abstract

Criminal law's legality principle limits offences to those specifically established by law. The Indonesian Criminal Code (KUHP) enlarged the definition of criminal offences beyond those in legislation. It now includes usual criminal offences. However, customary criminal offences are not explicitly regulated by law. This paper discusses the need to regulate customary criminal offences in criminal law enforcement. This project also develops conceptual frameworks for transforming customary criminal offences into codified laws. Normative legal research, or doctrinal legal research, examines legal norms and regulations. A literature evaluation of relevant legislative rules is used to collect and analyze data for this research. This analysis indicates that written legislation should provide thorough regulations on customary criminal offence structure. These rules aim to reduce customary criminal law's arbitrary and inconsistent use in criminal justice. The study's findings also show that written legal rules, such as Regional Regulations, can be used to formulate customary criminal offence regulations that comply with legality.



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1. Introduction

The principle of legality holds significant importance within the realm of Criminal Law as it serves as a fundamental basis for its implementation. This principle acts as a guiding framework, ensuring that Criminal Law is not implemented in an arbitrary or deviant manner. The principle of legality in Criminal Law establishes a criminal justice system that is devoid of arbitrariness. It is a guiding principle in ascertaining the presence or absence of banned actions. Additionally, Roeslan Saleh underscored the significance of the legality concept within the realm of Criminal Law, as it serves to regularize the oversight role of Criminal Law, preventing its potential exploitation by the governing authority.¹ This assertion aligns with one of the duties attributed to the concept of

¹ Syamsul Fatoni, 'Penghapusan Kriminalisasi Terhadap Hakim Dan Jaksa Dalam Rangka Mewujudkan Sinkronisasi Sistem Peradilan Pidana Anak', *Jurnal Konstitusi*, 17.1 (2020), 224 <<https://doi.org/10.31078/jk17110>>.

legality, specifically the function of safeguarding. The principle of legality safeguards individuals' interests and rights from arbitrary actions carried out by governing bodies.²

The current application of the principle of legality in Indonesia is enshrined in the provisions of the Criminal Law as stipulated in Article 1, paragraph (1) of the Criminal Code (KUHP). This provision establishes that no action can be subject to punishment unless it is based on criminal regulations that were in force prior to the commission of the act.³ Based on the stipulations outlined in Article 1, Paragraph (1) of the Criminal Code, it can be inferred that for an action to be subject to punishment or classified as a criminal offence, it must be explicitly defined as such in the legislation in effect at the time the offence is committed.

An issue arises when examining the provisions of Article 1 Paragraph (1) of the Criminal Code, which stipulates that a criminal offence exists only if it has been previously regulated by law when the act is committed. The problem is when society considers an act morally reprehensible or a criminal offence. However, it still needs to be regulated or regulated by law at the time of its commission. Consequently, such acts cannot be punished due to the principle outlined in Article 1 Paragraph 1 of the Criminal Code, which only recognizes an act as a criminal offence if it has been previously regulated by law. This aligns with a specific element of the principle of legality, which stipulates that individuals cannot be condemned unless under the criminal provisions outlined by the law.⁴ Hence, the issue of criminalizing an act deemed morally reprehensible by the community yet lacking legal regulation remains a matter that necessitates resolution. This is crucial to prevent societal harm and uphold a collective sense of justice. In order to fulfil this sense of justice and maintain societal order, it is appropriate to impose penalties on acts deemed unnatural, reprehensible, or inconsistent with prevailing societal values, even in the absence of explicit legal prohibition.⁵

This discussion pertains to the issue of the inability to impose penalties for acts deemed morally reprehensible or criminal offences by the community. This predicament arises due to the absence of regulations that govern such acts under the principle of legality outlined in Article 1, Paragraph (1) of the Criminal Code, which remains in effect in contemporary Indonesia. It is important to note that Indonesia is recognized as a legal state, as stated in Article 1, Paragraph 3 of the 1945 Constitution of the Republic of Indonesia, which declares, "The State of Indonesia is a state of law".⁶

² Zico Junius Fernando and others, 'Preventing Bribery in the Private Sector through Legal Reform Based on Pancasila', *Cogent Social Sciences*, 8.1 (2022) <<https://doi.org/10.1080/23311886.2022.2138906>>.

³ Alif Kharismadohan, 'Typosquatting Crime in the Electronic Transactions', *Law Research Review Quarterly*, 7.1 (2021), 111-24 <<https://doi.org/10.15294/lrrq.v7i1.43188>>.

⁴ Gilang Prama Jasa and Ratna Herawati, 'Dinamika Relasi Antara Badan Pemeriksa Keuangan Dan Dewan Perwakilan Rakyat Dalam Sistem Audit Keuangan Negara', *Law Reform*, 13.2 (2017), 189 <<https://doi.org/10.14710/lr.v13i2.16155>>.

⁵ Warih Anjari, 'Kedudukan Asas Legalitas Pasca Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006 Dan 025/PUU-XIV/2016', *Jurnal Konstitusi*, 16.1 (2019), 1 <<https://doi.org/10.31078/jk1611>>.

⁶ Surya Darma Kardeli, 'Analisis Tentang Parliamentary Threshold Dan Calon Perseorangan Berdasarkan Undang-Undang Nomor 10 Tahun 2016 Dalam Perspektif Demokrasi Dan Prinsip Check and Ballances', *Jurnal Ilmiah Hukum LEGALITY*, 26.1 (2018), 118 <<https://doi.org/10.22219/jihl.v26i1.6618>>.

The Constitution of the Republic of Indonesia of 1945 incorporated provisions for criminalising acts not explicitly addressed by legislation, specifically by resorting to unwritten or customary law. Concerning the concept of unwritten law or customary law within the framework of the 1945 Constitution of the Republic of Indonesia, Article 18B Paragraph (2) stipulates that "The State acknowledges and upholds the cohesion of customary law communities and their traditional rights, provided that they remain in existence and align with societal progress and the principles of the Unitary State of the Republic of Indonesia as prescribed by legislation".⁷ Hence, under the provisions outlined in Article 18B Paragraph (2) of the 1945 Constitution, the state acknowledges the legal standing of customary law communities, thereby also acknowledging the legitimacy of unwritten laws practised and evolving within these communities.

The provisions stipulated in Article 18B Paragraph (2) of the 1945 Constitution have effectively established the legal basis for implementing customary law, which serves as the foundation for penalizing behaviours deemed criminal by society yet are not explicitly addressed in written statutory provisions. Moreover, within the annals of Indonesian governance, Indonesia previously implemented UUDS 50, which likewise acknowledged the legitimacy of customary law as a means of retribution.⁸ According to Article 14, Paragraph (2) of the 1950 Constitution of the Republic of Indonesia (UUDS 50), individuals cannot be subjected to prosecution or sentencing unless an existing and applicable legal provision justifies such actions.⁹ The article employs the concept of the rule of law, which encompasses a wider scope than mere legislation, as it encompasses both written and unwritten legal norms.¹⁰ Therefore, according to this understanding, it is possible to consider unwritten law as a legal instrument for punishment.

In addition, concerning the acknowledgment of unwritten law or customary law as a means of imposing penalties, legislation has established the legal basis for using unwritten law or customary law as a punitive instrument. This legislation is referred to as Law No. 1 of 2023 on the Criminal Code (after this, referred to as the most recent Indonesian Criminal Code), scheduled to take effect in 2026. Law No. 1 of 2023, commonly known as the latest Indonesian Criminal Code, is scheduled to be implemented in 2026. Upon its enforcement, Law No. 1 of 2023 will effectively supersede Law No. 1 of 1946, also known as the old Indonesian Criminal Code, which remains in effect presently. Implementing Law No. 1 Year 2023 on the Criminal Code represents a significant advancement in criminal law. This legislation explicitly acknowledges the presence of

⁷ Diana Yusyanti, 'Aspek Perizinan Di Bidang Hukum Pertambangan Mineral Dan Batubara Pada Era Otonomi Daerah', *Jurnal Penelitian Hukum De Jure*, 16.3 (2016), 309–21.

⁸ Rian Saputra, M Zaid, and Silaas Oghenemaro, 'The Court Online Content Moderation : A Constitutional Framework', *Journal of Human Rights, Culture and Legal System*, 2.3 (2022), 139–48 <<https://doi.org/10.53955/jhcls.v2i3.54>>.

⁹ Rasdi Rasdi and others, 'Reformulation of the Criminal Justice System for Children in Conflict Based on Pancasila Justice', *Lex Scientia Law Review*, 6.2 (2022), 479–518 <<https://doi.org/10.15294/lesrev.v6i2.58320>>.

¹⁰ Ira Alia Maerani, 'Implementasi Ide Keseimbangan Dalam Pembangunan Hukum Pidana Indonesia Berbasis Nilai-Nilai Pancasila', *Jurnal Pembaharuan Hukum*, 11.2 (2015), 329–38 <<http://jurnal.unissula.ac.id/index.php/PH/article/view/1364>>.

unwritten or customary law as a means of punishment, thereby reinforcing its position as a punitive instrument. This recognition is particularly noteworthy as the previous iteration of the Indonesian Criminal Code did not explicitly acknowledge the role of unwritten or customary law in punishment.

The affirmation of acknowledging the existence of unwritten or customary law as a means of punishment is evident in Law No. 1 of 2023, specifically in Article 2 Paragraph (1). This provision states that the regulations mentioned in Article 1 Paragraph (1) do not diminish the legitimacy of the law practised within the community, which mandates imposing penalties on individuals even in cases where the act is not explicitly addressed in this particular legislation. Upon examination of the stipulations outlined in Article 2, Paragraph (1) of Law No. 1, the Year 2023 on the Criminal Code, it becomes evident that criminal offences are not solely confined to acts explicitly delineated in the legislation. Rather, they extend to acts that are deemed criminal by society. Consequently, this provision also grants legitimacy to the utilization of unwritten or customary law to impose penalties.

Article 2, Paragraph (1) of Law No. 1 Year 2023 on the Criminal Code has unequivocally affirmed and reinforced the status of unwritten or customary law as a means of criminal punishment. Simultaneously, it has provided legal recognition for using unwritten or customary law as a tool for criminal punishment. However, despite these advancements, the acknowledgment of the position of unwritten or customary law and the legality of its application as a mechanism for criminal punishment still presents inherent challenges. These issues pertain to the scope of limitations associated with an act that can be classified as a criminal offence under societal norms or unwritten and customary laws. Additionally, it examines the extent to which criminal limitations can be enforced or imposed upon an individual who, as determined by the community or under unwritten and customary laws, has committed a criminal offence. Consequently, this still needs to be solved, requiring further investigation to identify potential solutions.

This article elucidates the pressing need to codify customary criminal offences into written regulations. The author endeavours to present ideas and concepts about regulating customary criminal offences, thereby highlighting the following issues in this article: What is the need to establish regulations on customary criminal offences about transgressions of unwritten criminal law or customary law? How does regulating criminal prohibitions against violations of unwritten criminal law or customary law function?

2. Research Method

This study constitutes normative legal research, also known as doctrinal legal research. This research employs both statutory and conceptual approaches as its methodological framework.¹¹ The statutory technique involves researching by examining and analyzing

¹¹ Rian Saputra, Josef Purwadi Setiodjati, and Jaco Barkhuizen, 'Under-Legislation in Electronic Trials and Renewing Criminal Law Enforcement in Indonesia (Comparison with United States)', *JOURNAL of INDONESIAN LEGAL STUDIES*, 8.1 (2023), 243-88 <<https://doi.org/10.15294/jils.v8i1.67632>>.

different legal regulations relevant to the studied issue.¹² The present study employs a conceptual method to elucidate and analyze issues to identify and resolve the difficulties under investigation.¹³ The research utilizes secondary data sources, including main legal materials such as legal rules on the specific topic being investigated and secondary legal resources such as books, journals, and articles relevant to the problem at hand.

3. Results and Discussion

The urgency of criminal limitations on customary criminal offences: a proposal to Indonesia

The existing Criminal Code (KUHP) does not explicitly acknowledge the utilization of unwritten law or customary law to impose penalties.¹⁴ This omission is due to the principle of legality within the current Criminal Code, which only recognizes an act as a criminal offence if it has been specifically addressed in statutory regulations.¹⁵ Therefore, by referring to the principle of legality outlined in Article 1 Paragraph (1) of the current Criminal Code, it becomes evident that the scope of criminal offences is confined solely to acts that have been formally established or regulated as such in statutory provisions.¹⁶

As Article 1 Paragraph (1) outlines, the current criminal code strictly adheres to the principle of legality by only recognizing criminal offences explicitly defined and regulated by laws and regulations. This approach does not allow for considering unwritten or customary laws as a basis for imposing punishment. Consequently, applying punishment for criminal offences primarily relies on existing laws and regulations, thereby emphasizing the formal aspect of the principle of legality as stated in Article 1 Paragraph (1) of the Criminal Code. Moreover, when it comes to the imposition of punishment, it is necessary to consider the presence of regulations outlined in the laws and regulations about the transgressed act as a prerequisite for punishment and the unlawful nature of the act itself.¹⁷ This is because the mere existence of an act specified in the laws and regulations does not automatically warrant punishment if the act lacks an element of unlawfulness.

In the realm of Criminal Law theory, two doctrines guide in determining the unlawful

¹² M Zaid and others, 'The Sanctions on Environmental Performances: An Assessment of Indonesia and Brazil Practice', *Journal of Human Rights, Culture and Legal System*, 3.2 (2023), 236–64 <<https://doi.org/10.53955/jhcls.v3i2.70>>.

¹³ Rian Saputra, Muhammad Khalif Ardi, and others, 'Reform Regulation of Novum in Criminal Judges in an Effort to Provide Legal Certainty', *JILS (Journal of Indonesian Legal Studies)*, 6.2 (2021), 437–82 <<https://doi.org/10.15294/jils.v6i2.51371>>.

¹⁴ Leandro Mancano and Deborah Russo, 'Punishment of Criminals', in *Encyclopedia of Violence, Peace, & Conflict (Third Edition)*, ed. by Lester R Kurtz, Third Edition (Oxford: Academic Press, 2022), pp. 539–51 <<https://doi.org/https://doi.org/10.1016/B978-0-12-820195-4.00160-6>>.

¹⁵ Linda Gröning and others, 'Remodelling Criminal Insanity: Exploring Philosophical, Legal, and Medical Premises of the Medical Model Used in Norwegian Law', *International Journal of Law and Psychiatry*, 81 (2022), 101776 <<https://doi.org/https://doi.org/10.1016/j.ijlp.2022.101776>>.

¹⁶ Insan Pribadi, 'Legalitas Alat Bukti Elektronik Dalam Sistem Peradilan Pidana', *Jurnal Lex Renaissance*, 3.1 (2018), 109–24 <<https://doi.org/10.20885/jlr.vol3.iss1.art4>>.

¹⁷ Agnes Pembriarni Nuryuaningdiah, 'Urgensi Pembentukan National Asset Management Credit Dalam Penyelesaian Kredit Macet Bank Bumh', *Masalah-Masalah Hukum*, 49.4 (2020), 443–53 <<https://doi.org/10.14710/mmh.49.4.2020.443-453>>.

nature of an act: the theory of formal unlawfulness and the theory of material unlawfulness.¹⁸ These doctrines serve as reference points for assessing whether an act might be deemed unlawful. The concept of formal unlawfulness refers to an act that is deemed unlawful under the relevant laws and regulations.¹⁹ On the other hand, material unlawfulness encompasses the idea that an act may be considered unlawful not solely due to its explicit prohibition by law but also due to provisions that exist beyond the scope of written legislation.²⁰

Moreover, concerning the opposition between nature and material law, there are two distinct functions inside it: negative and positive. The significance of relying on unwritten law as a framework for defining criminal offences not explicitly addressed in legislation is supported by the theory of natural law in its constructive role.²¹ This is because the theory of natural law, in its constructive role, acknowledges the existence of norms beyond statutory law (such as customary law) as a foundation for classifying an action as a criminal offence, even in the absence of specific legal provisions. Consequently, unwritten law is pivotal in determining acts that fall under criminal offences.²²

Given the significant role of unwritten law or customary law, which is not explicitly acknowledged in the existing Criminal Code, in the imposition of penalties as a consequence of the legality principle outlined in Article 1 Paragraph (1) of the current Criminal Code, it is fitting to revise or broaden the interpretation of the legality principle stated in the current Criminal Code. This revision aims to strengthen the status of unwritten or customary law as one of the mechanisms for implementing penalties. Regarding the renewal or expansion of the principle of legality as stipulated in Article 1 Paragraph (1) of the existing Criminal Code, Law No. 1 of 2023 on the Criminal Code (KUHP), which will officially come into effect in 2026 and simultaneously repeal the current Criminal Code, there has indeed been a renewal or expansion of the meaning of the principle of legality within it.

The Law No. 1 Year 2023 on the Criminal Code (KUHP) demonstrates a renewal or broadening of the interpretation of the principle of legality. This can be observed in Article 2 Paragraph (1), which states that "The provisions mentioned in Article 1 Paragraph (1) do not diminish the validity of the customary law that is practiced within the society, which mandates the imposition of punishment even in cases where the act is not explicitly regulated by this law." Based on the provisions mentioned above, it becomes evident that the principle of legality, as stipulated in Article 1 Paragraph (1) of Law No. 1 of 2023 on the Criminal Code (KUHP), asserts that no action can be subjected to criminal penalties or measures unless it is supported by criminal regulations outlined in pre-existing laws and regulations prior to the commission of said action. The meaning of the principle of legality has been broadened

¹⁸ E Lea Johnston and others, 'Diminished Criminal Responsibility: A Multinational Comparative Review', *International Journal of Law and Psychiatry*, 91 (2023), 101919 <<https://doi.org/https://doi.org/10.1016/j.ijlp.2023.101919>>.

¹⁹ Krzysztof Szczucki, 'Ethical Legitimacy of Criminal Law', *International Journal of Law, Crime and Justice*, 53 (2018), 67-76 <<https://doi.org/https://doi.org/10.1016/j.ijlcj.2018.03.002>>.

²⁰ Vani Wirawan and others, 'Rekonstruksi Politik Hukum Sistem Pendaftaran Tanah Sebagai Upaya Pencegahan Mafia Tanah', *Jurnal Negara Hukum*, Volume 13.2 (2022), 185-207.

²¹ Rian Saputra, M Zaid, and others, 'Reconstruction of Chemical Castration Sanctions Implementation Based on the Medical Ethics Code (Comparison with Russia and South Korea)', *Lex Scientia Law Review*, 7.1 (2023), 61-118 <<https://doi.org/10.15294/lesrev.v7i1.64143>>.

²² Muhammad Bagus Adi Wicaksono and Rian Saputra, 'Building The Eradication Of Corruption In Indonesia Using Administrative Law', *Journal of Legal, Ethical and Regulatory Issues*, 24.Special Issue 1 (2021), 1-17.

through the provisions outlined in Article 2, Paragraph (1) of the law. Consequently, the principle of legality now encompasses its formal nature and its material nature.

The amendment or broadening of the interpretation of the principle of legality in Law No. IX. 1 Year 2023 on the Criminal Code (KUHP) reinforces and confirms the significance of unwritten or customary law in criminal law as a means of enforcing penalties. Additionally, the amendment or broadening of the interpretation of the principle of legality in the law has directly extended the scope of criminal offences, which were previously restricted to actions explicitly specified in legislation. Consequently, as the principle of legality undergoes renewal or expansion, criminal offences are no longer confined solely to acts explicitly stipulated in statutory regulations. They now encompass acts that, based on societal perspectives, unwritten or customary law, deserve punishment.²³ Moreover, it should be noted that Law No. 1, the Year 2023 on the Criminal Code (KUHP), has effectively broadened the interpretation of the principle of legality, expanding the scope of criminal offences.

This expansion is no longer confined to acts explicitly specified in statutory regulations but also encompasses acts deemed punishable according to community standards, unwritten law, or customary law.²⁴ Nevertheless, upon closer examination of the legal framework, it becomes apparent that there is a lack of explicit regulation governing actions classified as customary criminal offences. This situation poses a significant risk to the efficacy of criminal law enforcement in the long run, as it opens the door for potential misuse and the establishment of an arbitrary criminal law enforcement system. From a theoretical standpoint, the principle of legality serves both an instrumental and protective role, safeguarding individuals from arbitrary actions perpetrated by authorities or judges during the judicial process.²⁵

The principle of legality serves two distinct functions within the context of enforcing criminal law. Firstly, it functions instrumentally by aiming to ensure legal certainty throughout the process. This entails providing a clear and predictable framework for criminal law enforcement. Secondly, it serves a protective function by aiming to safeguard human rights. Specifically, it seeks to protect individuals from unjust, arbitrary, or unreasonable treatment by authorities and judges during criminal law enforcement or the criminal justice process. Furthermore, to maintain the function of the principle of legality in the process of enforcing criminal law or in the criminal justice process, related to the provisions of Article 2 Paragraph (1) of Law No. IX. 1 of 2023 on the Criminal Code (KUHP), which has expanded the meaning of the principle of legality so that the boundaries of criminal offences become broader, not only limited to actions that have been regulated in the provisions of laws and regulations but also including actions that according to the views of the community or according to unwritten law or customary law are considered as actions that should be punished, where in the law no regulation expressly regulates the actions included in the criminal offence, then to avoid the emergence of abuse in the application of these provisions and to avoid the emergence of arbitrary criminal law enforcement processes or criminal justice processes, it is appropriate for the provisions to be carried out. The criminal law

²³ Tommy Leonard, 'Pembaharuan Sanksi Pidana Berdasarkan Falsafah Pancasila Dalam Sistem Hukum Pidana Di Indonesia', *Yustisia Jurnal Hukum*, 5.2 (2016), 468–83.

²⁴ Elwi Danil, 'Konstitusionalitas Penerapan Hukum Adat Dalam Penyelesaian Perkara Pidana', *Jurnal Konstitusi*, 9.3 (2016), 583 <<https://doi.org/10.31078/jk938>>.

²⁵ M Murdian, 'Criminal Responsibility in the Execution of the Contract for the Procurement of the Government', *Jurnal IUS Kajian Hukum Dan Keadilan*, IV.1 (2016), 2–26.

enforcement process regulation should address the constraints associated with using arbitrary measures concerning criminal offences. These constraints serve the dual purpose of preserving the integrity of the norm of legality and mitigating the risk of arbitrary implementation of criminal law enforcement or criminal justice procedures.

The concept of limiting criminal offences for customary criminal law offences: a contribution to the field of Indonesian criminal law

The principle of legality in the criminal law system establishes clear guidelines and boundaries for the application of criminal law.²⁶ This ensures that the enforcement of criminal law and the criminal justice process are no longer characterized by random or arbitrary practices, as observed during the Roman Empire era. During the era of the Roman Empire, the absence of explicit guidelines in the application of criminal law within criminal law enforcement and criminal justice processes can be attributed to the unwritten nature of the legal system prevalent during that period.²⁷ Consequently, this led to arbitrariness in the criminal justice process, as judges relied primarily on their legal sensibilities to determine the applicable laws.²⁸ Hence, incorporating the principle of legality into the criminal justice system establishes guidelines or boundaries in implementing criminal legislation, intending to mitigate the occurrence of arbitrary law enforcement or criminal justice proceedings.

As Paul Johan Anselm Von Feurbach articulated in Latin, the concept of legality is "Nullum delictum nulla poena sine praevia lege poenali".²⁹ This phrase conveys the notion that the existence of a criminal act and the imposition of punishment are contingent upon a preexisting criminal law.³⁰ When further expounded, the articulation of the principle of legality can be summarized as follows: a. Nulla poena sine lege, denoting that punishment cannot be imposed without legal provisions; b. Nulla poena sine crimine, signifying that punishment cannot be inflicted without committing a criminal offence; and c. Nullum crimen sine poena legali, indicating that no criminal act can go unpunished without adherence to legal procedures.³¹

This formulation elucidates that the principle of legality encompasses two distinct roles, specifically a protective function and an instrumental one.³² The protective function of

²⁶ Kevin S Douglas, 'Risk Assessment for Criminal and Violent Behavior amongst Adults', in *Encyclopedia of Mental Health (Third Edition)*, ed. by Howard S Friedman and Charlotte H Markey, Third Edition (Oxford: Academic Press, 2023), pp. 65–73 <<https://doi.org/10.1016/B978-0-323-91497-0.00208-3>>.

²⁷ Ian D Marder, 'Mapping Restorative Justice and Restorative Practices in Criminal Justice in the Republic of Ireland', *International Journal of Law, Crime and Justice*, 70 (2022), 100544 <<https://doi.org/10.1016/j.ijlcrj.2022.100544>>.

²⁸ Seno Wibowo and Ratna Nurhaya, 'Perbedaan Pandangan Ajaran Sifat Melawan Hukum Materil Tindak Pidana Korupsi', *Padjadjaran Jurnal Ilmu Hukum*, 2.2 (2015), 351–69.

²⁹ Fernando Morganda Manullang, 'The Purpose of Law, Pancasila and Legality According To Ernst Utrecht: A Critical Reflection', *Indonesia Law Review*, 5.2 (2015) <<https://doi.org/10.15742/ilrev.v5n2.141>>.

³⁰ Muh Endriyo Susila, 'Criminal Prosecution Of Doctors In Indonesia: Issues And Problems', *IIUM Law Journal*, 23.3 (2015), 439–58.

³¹ Dewa Gede Giri Santosa and Karell Mawla Ibnu Kamali, 'Acquisition and Presentation of Digital Evidence in Criminal Trial in Indonesia', *Jurnal Hukum Dan Peradilan*, 11.2 (2022), 195 <<https://doi.org/10.25216/jhp.11.2.2022.195-218>>.

³² Alissa Greer and others, 'The Details of Decriminalization: Designing a Non-Criminal Response to the Possession of Drugs for Personal Use', *International Journal of Drug Policy*, 102 (2022), 103605 <<https://doi.org/10.1016/j.drugpo.2022.103605>>.

criminal law can be understood as safeguarding individuals from arbitrary exercise of state authority.³³ On the other hand, the instrumental function can be understood as the state's authorized exercise of power within the boundaries established by law.³⁴ The protective function primarily pertains to substantive criminal law, encompassing the principles of *nulla poena sine lege* (no punishment without law) and *nulla poena sine crimine* (no punishment without crime).³⁵ On the other hand, the instrumental function primarily pertains to procedural criminal law, which encompasses the principle of *nullum crimen sine poena legali* (no crime without legal punishment).³⁶

In the context of the principle of legality, the recently ratified Indonesian Criminal Code, as stipulated in Law No. 1 of 2023 on the Criminal Code (KUHP), incorporates provisions on the principle of legality. Article 1, Paragraph (1) of the law, as mentioned above, explicitly states that no action can be subjected to criminal penalties or measures unless it is under the criminal regulations established by pre-existing laws and regulations before the commission of said action. Furthermore, it is important to note that the requirements of Article 1 Paragraph (2) explicitly prohibit the utilization of parallels when establishing the presence of a criminal offence. The specific language states that "the use of analogies is prohibited" in determining a criminal offence. The principle of legality, as stipulated in Law No. 1 of 2023 concerning the Criminal Code (KUHP), can be theoretically understood to align with the general concept of legality. This concept encompasses four key meanings: a) the nonretroactive application of criminal provisions, b) the requirement for criminal provisions to be in written form, c) the necessity for the clear formulation of criminal provisions, and d) the strict interpretation of criminal provisions, with the prohibition of analogical reasoning.³⁷

In considering the concept of the principle of legality, as previously discussed, it is necessary to establish that an act can be classified as a criminal offence under this principle.³⁸ This requires the act in question to be specifically addressed and regulated within written legal provisions or legislation. Consequently, the written legal regulations or legislation on criminal law serve as a tangible expression of the principle of legality.³⁹ This limitation arises from the fact that activities or actions classified as criminal offences are only confined to those

³³ Katherine LeMasters and others, 'Inequities in Life Course Criminal Legal System Sanctions: Measuring Cumulative Involvement', *Annals of Epidemiology*, 76 (2022), 83–90 <<https://doi.org/https://doi.org/10.1016/j.annepidem.2022.10.007>>.

³⁴ Yagie Sagita Putra, 'Penerapan Prinsip Ultra Petita Dalam Hukum Acara Pidana Dipandang Dari Aspek Pertimbangan Hukum Putusan Perkara Pidana', *University Of Bengkulu Law Journal*, 2.1 (2017), 14–28 <<https://doi.org/10.33369/ubelaj.v2i1.8009>>.

³⁵ James M Ogilvie and Steve Kisely, 'Examining the Health and Criminal Justice Characteristics for Young People on Compulsory Community Treatment Orders: An Australian Birth Cohort and Data Linkage Study', *International Journal of Law and Psychiatry*, 83 (2022), 101813 <<https://doi.org/https://doi.org/10.1016/j.ijlp.2022.101813>>.

³⁶ Retno Widiastuti and Ahmad Ilham Wibowo, 'Pola Pembuktian Dalam Putusan Pengujian Formil Undang-Undang Di Mahkamah Konstitusi', *Jurnal Konstitusi*, 18.4 (2022), 803 <<https://doi.org/10.31078/jk1844>>.

³⁷ Made Sugi Hartono and Ni Putu Rai Yuiartini, 'Penggunaan Bukti Elektronik Dalam Peradilan Pidana', *Jurnal Komunikasi Hukum*, 6.1 (2020), 281–302.

³⁸ Abenaa A Jones and others, 'Impacts of Intergenerational Substance Use and Trauma among Black Women Involved in the Criminal Justice System: A Longitudinal Analysis', *Journal of Substance Use and Addiction Treatment*, 153 (2023), 208952 <<https://doi.org/https://doi.org/10.1016/j.josat.2023.208952>>.

³⁹ Pribadi.

that have been legally defined.⁴⁰

Moreover, the principle of legality restricts the classification of a criminal offence solely based on established laws and regulations, Law No. IX. 1 Year 2023 on the Criminal Code (KUHP) has broadened the scope of criminal offenses. This expansion entails that criminal offences are no longer confined to those explicitly stipulated in statutory regulations. Instead, they now encompass offences based on societal, unwritten, or customary laws, as stated in Article 2, Paragraph (1) of the law as mentioned above. This provision explicitly states that "The regulations mentioned in Article 1, Paragraph (1) do not diminish the validity of societal laws that prescribe punishment for certain acts, even if these acts are not regulated by this law". Based on the clauses mentioned above, it can be inferred that the scope of criminal offences is no longer confined solely to conduct explicitly regulated by legislation but includes offences defined by the customary rules prevalent within the community.

The expansion of criminal offences or the principle of legality in Law No. 1 of 2023, which pertains to the Criminal Code, presents a dilemma within criminal law. This is because, when viewed from one perspective, the principle of legality, encompassing its various connotations, necessitates that prohibited acts outlined in statutory regulations not only specify the nature of the action but also the corresponding punitive measures.⁴¹ On the contrary, the nature of customary law within a community is predominantly oral and continues to persist in contemporary times. Additionally, it is impractical to encompass all aspects of customary law within written legal regulations or legislation due to the variations in customs among different tribes or regions. These variations give rise to divergent perspectives on what constitutes a criminal offence and the appropriate forms of criminal sanctions.⁴²

Moreover, the principle of legality encompasses various aspects, necessitating the explicit regulation of criminal offences and corresponding penalties in written legal statutes or legislation. This ensures that the legislator, as outlined in Article 2, Paragraph (1) of Law No. 1 of 2023 on the Criminal Code, has established provisions concerning criminal offences and the potential sanctions that may be imposed for contravening societal or customary laws, as referenced in the article as mentioned above. The legislation governing criminal offences on breaches of community laws or customary law, as outlined in Law No. 1 of 2023 on the Criminal Code, is encompassed within the stipulations of Article 597, Paragraph (1), which states that "Any individual who engages in conduct that is deemed prohibited according to the prevailing community laws shall be subject to punishment". The regulations on how punishment is administered can be found in Article 597, Paragraph (2), which states that "The prescribed punishment, as mentioned in Paragraph (1), takes the form of fulfilling customary obligations as outlined in Article 66, Paragraph (1), letter f".

The current formulation of Article 597 Paragraph (1) of Law No. 1 of the Year 2023 on the

⁴⁰ Patrick Michaud, Eric Beauregard, and Jean Proulx, 'Criminal Nomadism: A Neglected Dimension of Spatial Mobility in Sex Offending', *Journal of Criminal Justice*, 81 (2022), 101928 <<https://doi.org/https://doi.org/10.1016/j.jcrimjus.2022.101928>>.

⁴¹ Otwin Marenin, 'The Tragic Core of Criminal Justice: Coercive Social Control and the Loss of Innocence', *International Journal of Law, Crime and Justice*, 58.April (2019), 91-99 <<https://doi.org/10.1016/j.ijlcj.2019.04.003>>.

⁴² Muhammad Natsir and Andi Rachmad, 'Penetapan Asas Kearifan Lokal Sebagai Kebijakan Pidana Dalam Pengelolaan Lingkungan Hidup Di Aceh', *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 7.4 (2018), 468 <<https://doi.org/10.24843/jmhu.2018.v07.i04.p05>>.

Criminal Code (KUHP) lacks clarity in addressing criminal offences on violations of community laws or customary practices. The principle of legality, which underscores the need for explicit descriptions of criminal actions, is not fully reflected in the formulation of this provision. Consequently, the norms outlined in Article 597 Paragraph (1) can be deemed ambiguous.

Moreover, concerning the stipulations outlined in Article 597, Paragraph (2), it is evident that the prescribed penalty for transgressions of community, unwritten, or customary laws is limited solely to supplementary punishment in the form of fulfilling local customary obligations. Determining the appropriate form of punishment for violations of laws within a community, specifically in the context of additional punishment, can be seen as deviating from the principles of criminal justice.⁴³ Theoretically, additional punishment is a supplementary measure that complements the primary punishment. Therefore, the application of additional punishment should not occur independently of the main punishment. In his work titled "Indonesian Criminal Code (KUHP)" and accompanying commentary, R. Soesilo elucidates the concept of additional punishment as a supplementary measure to the primary penalty. It is important to note that additional punishment cannot be inflicted independently; nevertheless, certain exceptions to this principle exist in specific circumstances.⁴⁴

According to S.R. Sianturi's work titled "Principles of Criminal Law in Indonesia," it is generally acknowledged that the imposition of additional punishment is not recognized as an independent measure separate from the primary punishment. However, in the practical application of criminal law, there has been a shift away from solely focusing on the act's punishability. Instead, the emphasis has been placed on the defendant's punishment, which serves as the basis for exceptions.⁴⁵ The provided explanation offers a theoretical rationale for imposing additional punishment as the primary penalty for infractions of laws within the community, as stipulated in Article 597 Paragraph (2) of Law No. 1 Year 2023 on the Criminal Code (KUHP). Furthermore, the law also includes a provision stating that fulfilling customary obligations in customary criminal offences is equivalent to category II fines.

Upon reviewing the stipulations outlined in Article 597, Paragraph (1) of Law No. 1 of 2023 Concerning the Criminal Code (KUHP), it becomes apparent that this particular provision lacks explicit regulations on the nature of actions that are deemed criminal offences based on prevailing laws within the community or customary law. However, a closer examination of Article 2, Paragraph (3) of the law, as mentioned above, reveals that "Provisions concerning the procedures and criteria for determining laws that are in force within the community are governed by government regulations".⁴⁶ The statement suggests that the government intends to guide regions in establishing community living laws through government regulations. This,

⁴³ Rusli Muhammad, 'Pengaturan Dan Urgensi Whistle Blower Dan Justice Collaborator Dalam Sistem Peradilan Pidana', *Jurnal Hukum IUS QUIA IUSTUM*, 22.2 (2015), 203–22 <<https://doi.org/10.20885/iustum.vol22.iss2.art2>>.

⁴⁴ Abdul Kadir Jaelani and Resti Dian Luthviati, 'The Crime Of Damage After the Constitutional Court's Decision Number 76/PUU-XV/2017', *Journal of Human Rights, Culture and Legal System*, 1.1 (2021), 31–42 <<https://doi.org/10.53955/jhcls.v1i1.5>>.

⁴⁵ Hikmawati Puteri, 'Pidana Pengawasan Sebagai Pengganti Pidana Bersyarat Menuju Keadilan Restoratif', *Negara Hukum*, 7.1 (2016), 71–88.

⁴⁶ Herning Setyowati and Nurul Muchiningtias, 'Peran Advokat Dalam Memberikan Bantuan Hukum Kepada Masyarakat Dalam Perspektif Hak Asasi Manusia', *Lex Scientia Law Review*, 2.2 (2018), 155–68 <<https://doi.org/10.15294/lesrev.v2i2.27582>>.

in turn, would lead to more specific and definitive regulations regarding criminal offences within these laws, as outlined in the provisions of Regional Regulations.

The author aims to provide conceptual input to Regional Regulation makers regulating customary criminal offences.⁴⁷ This input is intended to assist in formulating articles on regulating customary criminal offences that will be incorporated into future Regional Regulations. The concept of the regulation of customary criminal offences, which will be incorporated into regional regulations, has explicitly outlined the nature of such offences and the corresponding penalties that may be imposed for their violation. Consequently, the inclusion of regulations within regional legislation concerning the nature of customary criminal offences and the associated penalties serves as a tangible manifestation of the provisions stipulated in Article 2 of Law No. 1 of 2023 on the Criminal Code (KUHP). Moreover, this also serves as evidence that including Article 2 in Law No. 1 of 2023 on the Criminal Code does not diminish the enforceability of the principle of legality, as stipulated in Article 1 Paragraph (1) of the law mentioned above.

4. Conclusion

Law no. 1 of the Year 2003 on the Criminal Code has established the legal framework for penalizing actions deemed criminal offences under a community's statutory and customary law. However, the law lacks explicit provisions regarding the specific nature of actions classified as customary criminal offences. This absence of clear regulation on actions categorized as criminal offences according to community laws contradicts the principle of legality enshrined in the law. In order to uphold the principle of legality in the enforcement of criminal law, it is imperative that acts deemed punishable under the laws of a given community are clearly and explicitly defined in written legal regulations, thereby avoiding any contradictions. The conversion of customary criminal offences into written legal regulations is a means of regulating actions considered punishable according to the community's law. This can be achieved by establishing regional regulations tailored to the specific jurisdiction where the community's law applies. By implementing written regulations in the form of regional laws that explicitly govern the types of actions deemed punishable under the community's law, there is a harmonization with the principle of legality, which is a constraint in enforcing criminal law.

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⁴⁷ MARK FINNANE, "Payback", Customary Law and Criminal Law in Colonised Australia', *International Journal of the Sociology of Law*, 29.4 (2001), 293–310 <<https://doi.org/https://doi.org/10.1006/ijsl.2001.0153>>.

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